DENNIS K. BURKE
United States Attorney
District of Arizona

PETER SEXTON
Arizona State Bar No. 011089
WALTER PERKEL
Assistant U.S. Attorneys
Two Renaissance Square
40 N. Central Avenue, Suite 1200
Phoenix, Arizona 85004-4408
Telephone (602) 514-7500
peter.sexton@usdoj.gov
walter.perkel@usdoj.gov

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

United States of America,

Plaintiff,

v.

James R. Parker,
Jacqueline L. Parker,

Defendants.

CR-10-757-PHX-ROS

GOVERMENT'S RESPONSE TO DEFENDANTS' JOINT MOTION TO COMPEL OR EXCLUDE DISCOVERY

I. Overview.

The United States respectfully responds to Defendants' Joint Motion To Compel Or Exclude Discovery. (CR 44.) Defendants' Motion should fail; the government has complied with the September 13th Scheduling Order. (CR 39).

First, the Special Agent Reports (SAR) are not discoverable as they are protected by the "deliberative process" and "work product" doctrines, and are specifically exempted by Rule 16(a)(2) of the Federal Rules of Criminal Procedure. However, the government has decided to disclose both SARs despite not being obligated to do so. However, any discovery provided that is not mandated by court order, the Federal Rules of Criminal Procedure, federal statute or federal case law, is provided voluntarily solely to expedite litigation of this case. No inference should be drawn that disclosure in this matter will obligate the government to produce an SAR

in all future cases. *Second*, defendants are not, as a matter of law, entitled to an outright production for review of the entire personnel files and discplinary records of any government's witnesses. *Third,* defendants do not have the right to grand jury testimony, unless that witness is called to testify at trial, or they are able to demonstrate a "particularized need" for such testimony, which they have not. *Fourth*, agent notes taken during the interviews of the witnesses are not deemed "statements" subject to disclosure under the Jencks Act.

II. Factual Background.

A. Indictment.

On June 8, 2010, a federal grand jury returned an indictment against James R. Parker ("Parker") and Jacqueline L. Parker ("Jacqueline Parker"). (CR 1.) Defendant Parker was charged with four counts of Tax Evasion in violation of 26 U.S.C.§ 7201, and four counts of making a False Statement in violation of 26 U.S.C.§ 7206(1). (Id.) Defendant Jacqueline Parker was charged with two counts of making a False Statement in violation of 26 U.S.C.§ 7206(1). (Id.) The Indictment provides the following information in support of these charges.

B. Relevant Facts Contained in the Indictment (CR 1).

Defendants were married and resided in Carefree, Arizona. Parker was the owner of Omega Construction, Inc., a Nevada corporation, and the owner and chief executive officer of Mackinnon Belize Land and Development Limited, a Belize corporation, which developed land for hotels on the Placencia Peninsula in Belize.

In 1997 and 1998, defendants filed joint U.S. Individual Income Tax Returns, which reported minimal income and tax liabilities of $2,089.00 and $7,967.00 respectively. These returns were subsequently the subject of an extensive Internal Revenue Service ("IRS") audit, which revealed that defendants failed to report substantial income for 1997 and 1998.

In May 2003, defendants, who were represented by legal counsel, entered into a stipulated agreement with the government in United States Tax Court as to their correct income tax liability for the years 1997 and 1998. The defendants stipulated to owing, collectively, approximately $1,035,479.00 in additional tax, $207,095.00 in penalties, and $465,860.00 in interest charges.

Defendants never paid any of the agreed upon approximately $1.7 million in additional taxes, penalties, and interest.

For 1999 and 2000, defendants failed to file their tax returns; the IRS again audited defendants and assessed a substantial liability in excess of $1.0 million, which defendants have failed to pay. For the years 2001 and 2002, defendants filed their U.S. Individual Income Tax Returns, with tax liabilities of $13,924.00 and $12,331.00 respectively. Defendants have failed to pay any of the taxes for these years as well.

In anticipation of a substantial tax liability resulting from the audit of defendants' 1997 and 1998 tax returns, defendant Parker, as early as 2002, began to hide assets and income sources. In August 2002, defendant Parker transferred, for no consideration, ownership of the defendants' approximately $1.5 million Carefree, Arizona residence to Sunlight Financial Limited Liability Partnership ("Sunlight"), a nominee entity purportedly managed by the defendants' daughter, Rachael T. Parker Harris. Although ownership of the property was transferred, defendants maintained sole use and control over the residence. Sunlight also has never filed a tax return.

Between 2004 and 2007, defendant Parker invested more than $1.2 million into a startup cattle operation on land both owned and leased in the State of Oklahoma. Defendant Parker owned and operated the cattle operation using a nominee entity, Cimarron River Ranch, LLC ("Cimarron LLC"). To hide the true ownership of Cimarron LLC, defendant Parker made his then 21 year old son, Samuel Parker, the straw owner of Cimarron LLC. Cimarron LLC also has never filed a tax return.

On or about June 7, 2004, defendant Parker, as chief executive officer of Mackinnon Belize Land and Development Limited, agreed to sell 597 prime acres in Belize for approximately $6.0 million. The buyer of the property was I.D., an unrelated Illinois company. At the direction of defendant Parker, I.D. deposited the sales proceeds into an account at Belize Bank, Limited, Belize.

In July 2004, defendant Parker, using Cimarron LLC as the purported owner and his 21 year old son Samuel Parker as the "straw buyer," purchased for his personal use a $306,695 Rolls Royce automobile. The Rolls Royce was delivered by the California car dealership to the defendants' Carefree residence, and the insurance policy listed the primary driver as defendant Parker.

In August 2005, in order to further place his assets beyond the reach of the government, defendant Parker obtained a $1.5 million second mortgage against the Carefree, Arizona residence. Defendant Parker then used approximately $1.0 million of the proceeds to purchase a 7,000 square foot residence in Amarillo, Texas. Defendant Jacqueline Parker inspected the home prior to the purchase, and has on occassion also resided at the residence. The Amarillo, Texas residence was placed into yet another nominee entity, RSJ Investments LLC. Again, defendant Parker attempted to hide his ownership of RSJ Investments LLC by again making his son, Sam Parker, the purported owner/member of this entity. RSJ Investments LLC also has never filed a tax return.

In January, 2005, the Resorts Consulting Quorum LLP ("RCQ") bank account at Chase (formerly Bank One) was established. The only authorized signor on the account was an individual associated with a Phoenix, Arizona law firm, which at the time was representing the defendants with regard to the taxes they owed to the IRS. Approximately $112,000, in monthly installments of $7,000, was paid to defendant Parker's Omega Construction Company from the RCQ account, and approximately $152,000 was paid from the RCQ account to make loan payments on the $1.5 million second mortgage on defendants' Carefree home.

After the sale of the above-described property in Belize, and between June 2004 and January 2008, wire transfers were made from Belize Bank Limited into several accounts in the United States. These transfers included transfers of $1,302,000 and $1,544,375 into two bank accounts associated with Cimarron River Ranch, a $223,500 transfer into a bank account associated with RCQ, a $306,000 transfer to purchase the Rolls Royce, and a $36,029 transfer to acquire a Ford truck.

Other than the nominal monies that flowed through the RCQ bank account to Omega, none of the $3,411,904.00 of repatriated funds from the Belize land sale were reported on the defendants' tax returns. The defendants' tax returns for the years 2004, 2005, and 2006 only reflected the following taxable income: $13,320, $37,391, and $40,810 respectively.

On or about July 30, 2004, defendants attempted to "compromise" with the IRS for their unpaid tax liabilities.[1] They sought to eliminate their collective $1.7 million obligation through a one-time payment of $130,000.00. Defendants also falsely claimed that they were borrowing the proposed sum of money from friends and a bank. This offer was not accepted by the IRS. On or about November 16, 2004, defendants again attempted to seek a second "compromise" with the IRS through a one-time payment of $130,000.00. Defendants also claimed that they were borrowing the proposed sum of money from friends and family. This offer was not accepted by the IRS. On or about April 13, 2005, defendants, for the third time, attempted to seek a "compromise" with the IRS for their unpaid tax liabilities. This time they sought to eliminate their collective $1.7 million obligation through a one-time payment of $450,000.00. Defendants again falsely claimed that they were borrowing the money from their family, and receiving collections from a purported note that Omega Construction supposedly held from Sunlight Financial. This offer was not accepted by the IRS.

[1] Generally, an individual who owes money to the IRS can seek, under various provisions of law, a reduction to his or her outstanding obligations to the IRS. This is known as a "compromise." Insufficient assets and income to pay the full amount due is an acceptable reason for seeking a compromise. A completed Offer in Compromise (Form 656), signed under the penalty of perjury, is required to be submitted to the IRS in order to seek a compromise of the outstanding liability. This was generally done with the thought that the compromised liability would be made in a single payment thereafter, which would ordinarily be substantially less than the amount originally owed by the taxpayer. Collection Information Statement for Wage Earners and Self-Employed Individuals (Form 433-A) and Collection Information Statement for Businesses (Form 433-B) were schedules used to itemize various financial information, and are often required with an Offer in Compromise (Form 656). Forms 433-A and 433-B also are required to be signed under the penalty of perjury. On occasion, and under limited circumstances, the IRS allowed a taxpayer who owed taxes to enter into an installment agreement and make monthly payments to satisfy a taxpayer's outstanding tax liability.

For all three offers, defendants submitted and signed under penalty of perjury various IRS documentation falsely reflecting that the defendants purportedly had neither the income nor the assets to pay the IRS.

After the IRS turned down the previous offers of compromise, defendants, on or about August 5, 2005, submitted a fourth set of false financial statements, which were signed under penalty of perjury. The defendants were now requesting that because of their purported dire financial condition, they should be allowed to pay a monthly $2,000 installment on their now approximately $2.7 million tax liability. This offer was again rejected by the IRS.

The financial statements submitted by the defendants to the United States in connection with the above-referenced offers of compromise and installment request, falsely failed to disclose the defendants' true ownership of a home worth more than $1 million, a Rolls Royce automobile, a million dollar cattle operation, and approximately $6 million in proceeds received from the sale of Belizian land. The defendants falsely and fraudulently stated to the IRS that they were unable to pay their rent, were impoverished, would be homeless if not for the kindness and support of their two children, and further misrepresented their monthly income and net worth.

During this same time period, from 2000 through February, 2008, defendants frequently traveled to Belize. Defendant Parker made eighteen (18) trips, and defendant Jacqueline Parker made eleven (11) trips.

C. Post-Indictment Relevant Procedural History.

On September 19, 2010, this Court issued its Scheduling Order. (CR 39.) From September 3 until September 21, 2010, the government disclosed 15,746 pages of discovery sent on three separate dates.[2] On October 7, 2010, the government filed its' Notice Of Intent To Introduce Other Acts Evidence Pursuant To 404(b), and the Government's Notice Of Possible Expert Testimony. (CR 40-41.)

[2] The government had disclosed on July 8 and 19, 2010 the first 6663 pages to defendants' previous counsel.

On October 23, 2010, by email, defendant Jacqueline Parker requested additional discovery including "arrest reports, investigator notes, memos from arresting officers, dispatch tapes, sworn statements, and prosecution reports" under Fed. R. Crim. P. 16(a)(1)(A) or 16(a)(1)(B). (See CR 44-3, Exhibit 3.).

On October 27, 2010, the government responded stating that the requested documents were not discoverable under Fed. R. Crim. P. 16(a)(2), but invited defendant Jacqueline Parker to provide any additional legal authority to support her request. Defendant Parker also was asked to provide additional authority to justify the request. (Id.)

On October 29, 2010, defendants requested the IRS SAR and the agent notes, and on October 30, 2010, requested the grand jury testimony. (Id.) On November 1, 2010, the government responded with specific legal authority, explaining that it did not believe the defendants had provided legal or factual authority to support the production of the SAR, any agent notes made during witness interviews, copies of the agent's personnel files, or the grand jury testimony. (Id.) The government again invited defendants to provide specific legal authority to address or distinguish the government's legal citations, as well as articulate their "particularized need" for the production of the grand jury testimony. (Id.) Defendants never responded. Instead, approximately 53 days later, on December 23, 2010,[3] they filed this Motion (CR 44), and Defendants' Joint Motion For Bill Of Particulars. (CR 46.)[4]

[3] The government asserts that defendants' failure to respond to the November 1, 2010 communication, and their decision to file a motion on December 23, 2010, instead violates LRCiv. 7.29(j) and LRCrim 47.1. Defendants should not have filed either motion (CR 44) as defendants did not display a "sincere effort to resolve the matter." LRCiv. 7.29(j).

[4] The government's response to this motion (CR 46) will be filed contemporaneously.

III. Legal Argument.

A. Special Agent Reports (SAR) are Protected by the "Deliberative Process" and "Work Product" Doctrines Under Rule 16(a)(2) Unless Brady/Giglio or Jencks Materials are Involved.

Defendants argue that they are entitled to the IRS's SAR as a matter of course. They claim that the SAR will be helpful to the defense in calculating their "tax deficiency," understanding the "factors and deductive processes" used in determining defendants' "assets, liabilities, and expenditures," and cross-examining government witnesses. (Motion at 5.) Factually, it should be noted that the SAR is the case agent's report that summarizes the evidence for the purpose of obtaining approval from both the IRS and the Department of Justice Tax Division before the case can be submitted to the U.S. Attorney's Office for prosecution and possible grand jury indictment.

As a matter of law, these reports are protected by the "deliberative process" and "work product" doctrines. In United States v. Fernandez, 231 F.3d 1240 (9th Cir. 2000), the government did not disclose its prosecution memorandum on the ground the the documents were protected by the "deliberative process" and "work product" privileges. Id. at 1243. The district court disagreed, going so far as to sanction the government for its refusal to provide the memorandum, but the Ninth Circuit reversed and upheld the government's position under "the deliberative process and work product privileges." Id. at 1246 ("By shielding such documents from discovery, the deliberative process privilege encourages forthright and candid discussions of ideas and, therefore, improves the decisionmaking process... It would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny.") (internal quotation marks omitted); see also FTC v. Warner Communications, Inc., 742 F.2d 1156, 1160 (9th Cir. 1984) ("[The] privilege permits the government to withhold documents that reflect advisory opinions, recommendations and deliberations comprising part of a process by which government decisions and policies are formulated."); Wood v. FBI, 432 F.3d 78, 85 n.4 (2nd Cir. 2005) (Sotomayor, J.) (affirming

denial of FOIA request for prosecution memo and holding that "the district court did not commit error . . . in holding that the [prosecution] memo was attorney work-product").

Furthermore, prosecution memoranda are also specifically exempted from the government's discovery obligations under Rule 16. See Fed. R. Crim. P. 16(a)(2) ("Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case."); see also Fernandez, 231 F.3d at 1247 (holding that prosecution memorandum was not subject to disclosure under Rule 16); United States v. Fort, 472 F.3rd 1106 (9th Cir. 2007).[5]

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[5] Several cases from other circuits support the withholding of all or portions of the Special Agent Reports pursuant to Rule 16(a)(2). United States v. Robinson, 439 F.3d 777, 779 (8th Cir. 2006) (withheld computations for gross income and gross receipts in tax evasion prosecution); United States v. Mann, 61 F.3d 326, 331 (5th Cir. 1995) (finding that Rule 16(a)(2) applied to the IRS Special Agent Report); United States v. Koskerides, 877 F.2d 1129, 1133-34 (2nd Cir 1989) (net worth computation in SAR); United States v. O'Keefe, 825 F.2d 314 (11th Cir. 1987) (confirming under Jencks the district court's determination to exclude most of the Special Agent Report from disclosure even after an agent who adopted it testified at trial). While the Ninth Circuit has not ruled specifically on IRS Special Agent Reports, in United States v. Fort, 472 F.3d 1106, at1115-1119 (9th Cir. 2007), it discussed in detail Rule 16, and concluded that FBI reports do not come within Rule 16(a)(1), and that the scope of Rule 16(a)(2) is even broader than the civil work product rule. Id. at 1115.

A few cases have come out differently, but are factually distinguishable. In United States v. Sternstein, 596 F.2d 528 (2nd Cir. 1979), a false preparation case, the government refused to produce the Special Agent Report, and the Second Circuit required the district court on remand to examine the report in camera to see if it had any relevance to the case. The defense argued that the report would be expected to be exculpatory, in that most of the tax returns prepared by defendant were not fraudulent. On remand, the district court examined the Special Agent Report and found that nearly all of the returns identified in the report were false. United States v. Sternstein, 605 F.2d 672 (2nd Cir. 1979). The conviction was affirmed. Id.; See also United States v. Bordewick, 2008 U.S. Dist. LEXIS 78210 (N.D. Cal. Aug. 27, 2008)(N.D. Cal. 2008) (failure to disclose a Special Agent Report after its author testified, even though the report was not exculpatory, was a serious trial error).

In addition, the 1966 Advisory Committee Notes to Rule 16 state that agent reports and memoranda are "exempt from discovery" except as provided in the Jencks Act. FED. R. CRIM. P. 16, Advisory Committee Notes. The 1974 Advisory Committee Notes memorialize the amended language extending the exemption to documents created by attorneys, in order "to make clear that the work product of the government attorney is protected." Id.

Contrary to defendants' accusation regarding Special Agent Lisa Giovanelli's alleged "improprieties" or "motivations," the SAR only becomes relevant if it contains exculpatory or impeachment evidence, or if it contains a statement that is covered by the Jencks Act. Defendants' claim that the government is attempting to conceal "improper acts," by not calling SA Giovanelli to testify, is without merit as the government will comply with Brady and Giglio, regardless of whether SA Giovanelli testifies at trial.

Furthermore, since the government has not determined whether it needs to call SA Giovanelli as a witness, the Jencks Act disclosure requirements have not been triggered.[6] Thus, because the SAR is not subject to disclosure, the government is not violating this Court's Scheduling Order. (CR 39.)[7]

However, as stated above, the government has ultimately decided to disclose copies of both SARs. These resports are being provided to defendants contemporaneously with this response. However, the parties to this matter should not draw any inference, whatsover, that disclosure in this matter will obligate the government to produce the SAR in all future matters.

B. Defendant is Only Entitled to a Henthorn Review – Not Outright Production of Entire Confidential Personnel Files.

Defendants' demand for outright production of confidential personnel files, which they "suspect" might possibly contain disciplinary records of the case agent, is not the law in the Ninth Circuit. See United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991). In Henthorn, the defendants sought production of files in a similar manner. On review, the Court of Appeals did not require the outright production of records, but rather ordered the government to conduct a

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[6] The Jencks Act reads: "After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement ... of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500.

[7] Even if the government does disclose the SAR pursuant to the Jencks Act, it reserves the right to redact certain portions of the memorandum.

review of the files in order to determine whether or not it had an obligation to share the information or portions of information contained therein. Cases decided subsequent to Henthorn have approved the process of "delegated review," where the employing agency reviews the personnel files upon the request of the prosecution, and thereafter provides any potential impeachment material to the prosecutor. E.g. United States v. Jennings, 960 F.2d 1488, 1491-92 (9th Cir. 1992). The prosecutor is expected to evaluate any information received and, if the prosecutor determines it might fall within the ambit of Brady/Giglio, the prosecutor can either produce the information or submit it to the Court for an in camera review. Id. at 1492; see also Henthorn, 931 F.2d at 30-31. That is the process the government will use in this case.

In this matter, defendants' make some wild and reckless accusations that the government agents, including SA Giovanelli, are "suspected" by the defendants of having a history of committing "bad acts," "bullying," and "violating IRS policies." (Motion at 14). As is its standard practice prior to trial, the government in this case will request the review of personnel files for any anticipated government witnesses, and will evaluate any information received consistent with its obligations under Henthorn. If there are portions of confidential files that need to be disclosed, the government will either produce them directly or submit them in camera for the Court to review and consider.

C. Defendants Have Not Established a "Particularized Need" for the Grand Jury Transcript.

Defendants have moved to disclose the Grand Jury transcript. Although they could not have known it at the time they filed their motion, only one witness testified before the Grand Jury in this matter. Defendants' request is factually and legally deficient, and clearly does not meet the legal standard for disclosure.

Under Rule 6(e)(3)(E)(i), this Court may permit disclosure only when the requesting party has demonstrated a "particularized need" for the material. Douglas Oil Co. of Calif. v. Petrol Stops Northwest, 441 U.S. 211 (1979). Under this standard, the requesting party must demonstrate that the material sought is: "[N]eeded to avoid a possible injustice in another

judicial proceeding, that the need for disclosure is greater than the need for continued secrecy, and that [the] request is structured to cover only material so needed . . . . [Moreover], in considering the effects of disclosure of grand jury proceedings, the courts must consider not only the immediate effects upon a particular grand jury, but also the possible effect upon the functioning of future grand juries." Id. at 222; see also United States v. Walczak, 783 F.2d 852, 857 (9th Cir. 1986) (emphasizing that the "trial judge should order disclosure of grand jury transcripts only when the party seeking them has demonstrated that a 'particularized need exists ... which outweighs the policy of secrecy.") If the court concludes that disclosure is warranted, it must be limited to only that material for which particularized need has been shown. Douglas Oil, 441 U.S. at 222; see also United States v. Fischback and Moore, Inc., 776 F.2d 839, 845-46 (9th Cir. 1985)

The party seeking disclosure has the burden of establishing the particularized need. Douglas Oil, 441 U.S. at 223; United States v. Murray, 751 F.2d 1528, 1533 (9th Cir. 1985). Disclosures will not be allowed upon a mere showing of relevance, nor for general discovery. United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); United States v. Evans & Associates Const. Co., Inc., 839 F.2d 656, 658 (10th Cir. 1988) ("The party seeking disclosure must demonstrate . . . there is a particular, not a general, need for the material. The rule is not to be used as a substitute for general discovery"). In most cases, considerations such as convenience, avoidance of delay, case complexity, the passage of time, and expense also are insufficient to justify disclosure. Smith v. United States, 423 U.S. 1303, 1304 (1975) (holding, where movant sought disclosure of grand jury transcripts to preserve "investigatory . . . resources" and because transcripts would be "generally useful," that "it is doubtful whether either of these reasons . . . meets the 'compelling necessity' standard of Rule 6(e)"); Procter & Gamble, 356 U.S. at 683; In re Sells, 719 F.2d 985, 991 (9th Cir. 1983).

The primary argument advanced by defendants as to their "particularized need" is that without the grand jury transcript, they would be unable "to formulate a defense." (Motion at10,

line 21.) Specifically, defendants assert that the "[g]overnment has made ... broad and ill-defined allegations" and that the "counts in the indictment are so unclear." (Id.)

Federal Criminal Procedure Rule 7(c)(1) requires only that the indictment contain a "plain, concise and definite written statement of the essential facts constituting the offense charged," and a citation to the statute the defendant is alleged to have violated. An indictment is sufficient if it contains the elements of the offense charged, fairly informs the defendant of the charge against which he must defend, and enables him to plead double jeopardy where appropriate. United States v. Resendiz-Ponce, 549 U.S. 102, 108 (2007); Hamling v. United States, 418 U.S. 87, 117 (1974). An indictment does not have to describe the government's evidence, plead evidentiary detail, or identify all the facts supporting the allegations. Wong Tai v. United States, 273 U.S. 77, 82 (1927); Resendiz-Ponce, 549 U.S. at 108; United States v. Chenaur, 552 F.2d 294, 301 (9th Cir. 1977).

In this matter, the Indictment clearly and logically specifies the means and methods used by the defendants to defraud the IRS. Courts have specifically recognized that the type of "speaking indictment" employed in this case provides ample notice to defendants. Cf.United States v. Dionisio, 2008 U.S. Dist. LEXIS 84470 (W.D. Wis. Oct. 15, 2008) (denying motion for bill of particulars in part because "the grand jury returned a speaking indictment that, while not exactly *Atlas Shrugged*, adequately and clearly sets forth the government's theory of prosecution so that Dr. Dionisio understands what he is accused of having done in violation of the anti-kickback statute"); United States v. Black, 2005 WL 4864408, *2 (W.D. Wisc. 2005) (W.D. Wisc. 2005) ("Rule 7(c) does not require the government to do more than allege the 'essential facts' constituting the offense, which customarily are thought of as the elements. But the grand jury often returns 'speaking' indictments and no one would suppose that this runs afoul of Rule 7(c); in fact, defense attorneys usually complain that the grand jury doesn't return enough speaking indictments.").

Defendant also argues that the "particularized need" is satisfied because the Grand Jury transcript is needed for "impeachment, refreshing recollections, and [to] test credibility"and/or

should be produced pursuant to the Jencks Act. (Motion at 9.) This ground lacks merit as well. Defendant's motion presupposes that a parade of "witnesses" testified before the grand jury, but in reality, only one witness provided testimony. Notably, it is not anticipated that the government will even call this witness to testify at trial. Thus, no Jencks obligation is expected to arise. If it becomes necessary to call this person as a witness at trial, the government will comply with its Jencks obligations when that determination is made.

The primary argument advanced by defendants as to "particularized need" is that this solitary grand jury transcript of one witness would alone clarify what this case is all about. The Indictment goes well beyond what Rule 7 requires and provides a very detailed road map of what took place in this case. It contains vast amounts of specificity as to the means and methods used by the defendants to defraud the government in this case. Coupled with the voluminous discovery, the government's production of the SARs, and the government's voluntary production of witness statements months in advance of what the rules provide, defendants' conclusory claim of incomprehensibility falls far short of constituting a "particularized need" under the legal precedents set forth above.

D. Agent Notes Made During Witness Interviews are not Considered "Statements" Under the Jencks Act.

Defendants also request that this Court order the government to produce notes from the investigative agents during witness interviews. The government has requested that interview notes be preserved.[8]

Agent notes concerning witness interviews are not ordinarily subject to disclosure under the Jencks Act, 18 U.S.C. § 3500, or Fed. R. Crim. P. 26.2. See United States v. Claiborne, 765 F.2d 784, 801 (9th Cir. 1985).[9] The agent's notes of an interview generally are not Jencks

[8] United States will produce such documents if they contain material evidence that is favorable to defendants and therefore subject to disclosure under Brady v. Maryland, 373 U.S. 83, 87 (1963), or Giglio v. United States, 405 U.S. 150, 154 (1972).

[9] A statement means: (1) a written statement made by the witness that is signed or (continued...)

statements because they are not "made by," "otherwise adopted", or "approved" by the witness. Claiborne, 765 F.2d at 801 (FBI reports are not statements by interviewee who did not draft or approve their contents); United States v. Griffin, 659 F.2d 932, 937 (9th Cir. 1981); United States v. Goldberg, 582 F.2d 483, 487 (9th Cir. 1976); Beavers v. United States, 351 F.2d 507, 509 (9th Cir. 1965). If, however, the notes are reviewed by, or read back to, and then approved by the witness, they are subject to disclosure under the Jencks Act. Campbell v. United States, 373 U.S. 487, 492-93 (1963); United States v. Boshell, 952 F.2d 1101, 1105 (9th Cir. 1991).

An agent's notes are also not considered a "substantially verbatim" recital of an oral statement made by the interviewed witness. Summaries of a witness interview contained in notes are not a verbatim summary where they reflect the agent's selection of pertinent information. See United States v. Augenblick, 393 U.S. 348, 355 (1969) (notes by agent not "substantially verbatim" statement where they did not cover entire interview); United States v. Palermo, 360 U.S. 343, 352-3 (1959); United States v. Spencer, 618 F.2d 605, 606; United States v. Friedman, 593 F.2d 109, 120 (9th Cir. 1979). This is true even if the notes or report contain selected verbatim statements of the interviewee. United States v. Miller, 771 F.2d 1219, 1231-32 (9th Cir. 1975) ("fragmentary quotations" in interview notes are not covered by Jencks Act). See also United States v. Sasso, 59 F.3d 341, 351 (2nd Cir. 1995); United States v. Gross, 961 F.2d 1097, 1105 (3d Cir. 1992).

In the instant matter, defendant concedes that it has already received 16 witness interview memorandums that summarize statements made by those witnesses the government may call to testify at trial. (Motion at 11-12.) Defendants' claim that there are, in fact, really 20 witnesses, 34 subpoenas, and a witness list containing 34 witnesses, does not change the fact that the government has only 16 interview memorandums, and all 16 have been produced. Of the 20

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[9] (...continued)
otherwise adopted or approved by the witness; (2) a substantially verbatim recital of an oral statement by the witness that is recorded contemporaneously with the making of the oral statement; or (3) a statement made by the witness to a grand jury. 18 U.S.C. § 3500(e)(1) - (3); see also Fed. R. Crim. P. 26.2(f).

witnesses defendants claim in their list (Motion at 8, fn 8), two are, in fact, the defendants, and another is a "Eugene Galant," who was interviewed in 1999 with regards to the IRS audit. Mr. Galant's 1999 interview, while not summarized in an official "Memorandum of Interview,"was recorded in substance and disclosed to defendants. (Bates numbered 9808-13.) There is also a memorandum summarizing a brief conversation with defendants. (Bates numbered 10782-783.) It is also irrelevant how many subpoenas were used, how many witnesses were listed by the IRS, or how many IRS employees were involved at one point or another in a case that originally was a civil enforcement action dating back to at least 1999.

The bottom line is that all 16 witness interviews prepared in this case have been produced, and the notes of those interviews will be preserved and compared to the interview memorandums to determine whether any material inconsistencies exist between the notes and the summaries. If any material inconsistencies are noted in that comparison, the notes will be produced before trial.

IV. Conclusion.

For the foregoing reasons, the Court should deny the motion.

Respectfully submitted this 7th day of February, 2011.

DENNIS K. BURKE
United States Attorney
District of Arizona

s/ Walter Perkel

WALTER PERKEL
PETER SEXTON
Assistant U.S. Attorneys

Certificate of Service: I hereby certify that on this day , I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: Joy Bertrand, John McBee, and Michael Minns.
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