

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

PLAINTIFF

v.

CASE NO. 3:20-cr-00031-CWR-LGI

TED BRENT ALEXANDER

DEFENDANT

DEFENDANT'S RESPONSE TO GOVERNMENT'S OMNIBUS MOTION IN LIMINE

Comes now Defendant Ted Brent Alexander and files this Response to Government's Omnibus Motion in Limine [Dkt. No. 54]. In support of this Response, Mr. Alexander presents the following:

Introduction

The Government's Omnibus Motion in Limine generally, save a few exceptions, seeks to have the Court enter an order directing the Defense to comply with the Federal Rules of Evidence at trial. As an officer of the Court, the undersigned is in no need of such order. Additionally, to the extent the Government seeks to have the Court predetermine evidentiary issues that are best handled at trial, the Government's request is premature.

1. Presence or Absence of Witnesses

The Government seeks an order from the Court directing the Defense to refrain from making reference to the presence or absence of any witnesses on the Government's witness list. Such an order would be improper.

A witness's availability to a party is not determined by the ability of a party to compel his presence with a subpoena. See *United States v. Chapman*, 435 F.2d 1245, 1247 (5th Cir. 1970). "[A]vailability may well depend ... upon his relationship to one or the other of the parties, and the nature of the testimony that he might be expected to give." *Id.* Unless the government wishes

to provide defense counsel with the names and current contact information for each of its witnesses, and affirmatively informs each witness that they are free to speak to defense counsel or his investigator without any fear of negative repercussion, defense counsel may well be entitled to ask the jury to draw a negative inference against the government for failing to call certain witnesses at trial. "When a witness is controlled by one party, failure to call the witness, if his testimony would elucidate facts in issue, creates an inference which the jury is permitted to draw against that party." *Id.* (citing *Williams v. United States*, 394 F.2d 821, 822 (5th Cir. 1968), cert. denied, 393 U.S. 890 (1968); *Gass v. United States*, 416 F.2d 767, 775 and n. 43 (D.C. Cir. 1969)).

2. *The Use of Interview Reports to Impeach Witnesses*

The Government also seeks an order preventing the Defense from impeaching witnesses with reports of their interviews that were authored by Government agents and not adopted by the witness. Defense counsel understands that it is improper to impeach a witness with a statement that is not a transcribed recorded statement or one they have adopted as their own, and does not deem an order necessary.

3. *Offering Hearsay Statements to Prove the Truth of the Matter Asserted*

The Government is requesting an order that the Defense abide by FRE 801 and FRE 802. The Defense does not object to an order directing all parties to follow the Federal Rules of Evidence.

4. *Raising Discovery Disputes Before the Jury*

The Government is asking the Court for an order prohibiting the Defense from discussing

failures by the Government or its witnesses to disclose information. The Defense is currently unaware of any failure by the Government to disclose information, and finds it odd that the Government would feel the need to anticipate such an issue. Nevertheless, to the extent the conduct of a witness in delaying or otherwise preventing defense counsel from obtaining or receiving discovery is known, that is a matter of bias that is ripe and proper for cross-examination in front of the jury, and the Defense would object to any order prohibiting the same.

5. *Suggestion or Accusation of Prosecutorial Misconduct*

The government cites no caselaw in support of its request. The easiest way to avoid this particular issue is for the prosecutor and his witnesses to refrain from engaging in "misconduct." To the extent the government seeks to have the Court chill or impair the right of defense counsel to fully and vigorously cross-examine government agents or other witnesses on matters such as bias, trustworthiness or honesty, any such order from the Court would be improper, particularly without the benefit of the context in which the cross-examination was occurring in real time. Counsel for the Defense will make the proper objections at the proper times, with the primary goal of sufficiently preserving the ability of the Defendant to litigate appropriate issues on appeal under the least burdensome standard of review. To that end, should it be necessary to use the phrase "prosecutorial misconduct" with regard to perfecting the record on appeal or sufficiently communicating the nature of an objection to the trial court, Defense counsel will endeavor to avoid using said phrase in the presence of the jury.

In the event the Court determine that such an *in limine* order is appropriate, the Court should consider also entering an order directing counsel for the government to avoid inadvertently misstating evidence to the jury which would justifiably warrant an allegation of misconduct. If the Court is inclined to limit the Defense from pointing out the Government's

misconduct to the jury, the Government should be similarly refrained from committing such misconduct.

6. *Comments Touching Upon Who Has or Has Not Been Charged in This or Other Cases*

This request by the Government is so broad that it prevents a meaningful response and fails to serve as a proper basis for a ruling by the Court. This type of evidence may well be relevant or irrelevant, but without any further specification the Defense cannot respond. If the Government has specific examples in mind, perhaps it can state those so that the Defense can respond.

7. *Requests by the Defense that Jurors Not Follow the Law*

Arguments that the jury ignore the law, the Court's instructions, or their oaths are improper. There is no need for such an Order.

8. *Potential Punishment*

The Government is correct as to the law, but the undersigned does not understand the request for an Order. It is unnecessary.

9. *Defense Counsel's Personal Opinions of the Defendant*

The Government is correct as to the law, but the undersigned does not understand the request for an Order. It is unnecessary. However, the Defense would point out that it is entitled to wide latitude in closing argument, and should not be restrained in framing the testimony of witnesses for the jury.

10. Specific Instances of Prior Good Acts

The Government is correct as to the law generally, but the Defense would point out that specific evidence of a pertinent character trait may be admissible. However, the undersigned does not understand the request for an Order. It is unnecessary.

11. The Content of Government Motions and Any Rulings of the Court Regarding the Same

The Government is correct as to the law, but the undersigned does not understand the request for an Order. It is unnecessary.

12. The Existence of an Advice of Counsel Defense

The Government is seeking to have the Court rule on an issue that is not currently before it, and to do so without the benefit of having heard the evidence in this case. The Court should reserve ruling on this matter until such a time as it may hear all of the evidence.

WHEREFORE, premises considered, Defendant Ted Brent Alexander respectfully asks this Court to deny the Government's Motion in Limine Pursuant to Rules 402, 403, 602, 702, and 704 to Preclude Defendant's Designated Expert Witness.

Respectfully submitted, this the 1st day of September, 2022.

/s/ J. Matthew Eichelberger
J. Matthew Eichelberger, MSB No. 101060
Counsel for Ted Brent Alexander

J. Matthew Eichelberger, MSB No. 101060
Jennie A. Eichelberger, MSB No. 102522
Madeline M. Iles, MSB No. 106186
Counsel for Ted Brent Alexander
Eichelberger Law Firm, PLLC
308 E. Pearl St., Suite 201
Jackson, MS. 39201
Telephone: 601-292-7940
Facsimile: 601-510-9103

CERTIFICATE OF SERVICE

I, J. Matthew Eichelberger, do hereby certify that I have this day caused to be filed a true and correct copy of the foregoing document using the Court's CM/ECF system, which sent a true and correct copy of the same to all counsel of record.

SO CERTIFIED, this the 1st day of September, 2022.

/s/ J. Matthew Eichelberger
J. MATTHEW EICHELBERGER