UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

______________________________________/

DEFENDANT ERIC DEAN SHEPPARD'S
RESPONSE IN OPPOSITION TO GOVERNMENT MOTION [D.E. 86]

Defendant, Eric Dean Sheppard, respectfully submits this response in opposition to the Government's motion to disclose expert witness information at [D.E. 86].

1. The Government seeks an order compelling all opinions of all experts that the defense may seek to offer in its defense, should the Defendant elect to put on a defense case. [D.E. 86], citing *United States v. Caldwell*, 2023 WL 5274338 (11th Cir. 2023). The Government's bare-bones motion posits a simple rule supposedly set out by the Circuit Court: That the Defendant is Constitutionally limited to the expert disclosures it provides before trial. In other words, no matter what discovery the Government continues to produce or what the Government argues or seeks to prove, defense expert opinions on those are off the table. But *Caldwell* says nothing of the sort.

2. In *Caldwell,* the defense waited, without justification, until days before trial to first disclose that it would seek to offer a supposed expert regarding the "nature and structure of criminal gangs," *Caldwell*, at *8—a dubious expertise that was obviously due to be challenged on *Daubert* grounds. Worse still, the defense sought to prevent the Government from doing the work needed to mount a proper *Daubert* challenge, otherwise prepare to cross the "expert," or search

for, interview, and prepare a rebuttal expert, by refusing to identify the basis for the proposed testimony, referring only to unidentified and undisclosed "field work . . . and statistical analysis" and "research, analysis, and teaching on gangs in general." *Id.* The Circuit Court took pains to note that it was "loathe" to second guess the trial court's direction in striking the expert, given the extreme circumstances present.

3. Here, the "nature and structure of gangs" is a far cry from routine expert testimony both sides may seek to offer, and the Government has no basis to complain given both sides disclosures:

a. On July 6, the Government disclosed that it would seek to offer an unidentified IRS expert. [D.E. 48].

b. On August 28, the defense disclosed that it may seek to offer a financial forensic expert and a tax expert. [D.E. 63].

c. On August 31, the Government disclosed the name of its IRS expert and expected subject matter of his testimony and emailed the defense the expert's CV. [D.E. 65].

d. On September 5, the defense disclosed that the name of its financial forensic expert (Scott Bouchner of Berkowitz Pollack Brant), disclosed the expected subject matter of Mr. Bouchner's testimony based on its preparation to date, and provided Mr. Bouchner's CV to the Government. [D.E. 67].

e. On September 11, the Government amended its expert disclosure and changed some of the subject matters of its IRS expert's testimony. [D.E. 74].

f. In subsequent email correspondence, the defense disclosed that its second expert disclosure amended the first disclosure, that it did not yet have a tax expert, and that it did not know if it is going to retain or seek to offer a tax expert. This remains the case today.

4. First, with respect to the Defendant's financial forensic expert, the Government has no possible cause to complain. Many months ago, defense counsel informed the Government in meetings at the US Attorney's Office and on telephone conferences that Defendant was going to show that the proceeds from the loans at issue were applied properly for workers and other business expenses. During these discussions between the parties on the use of the loan proceeds, the Government argued that personal expenses were being paid at the same time as the loans were received. Defense counsel responded that money is fungible, and Defendant was funding his business accounts with millions of dollars—far more than was needed to cover any personal expenses. As such, the Government has been on notice for months (at least since early summer) that Defendant was likely to call an expert exactly like Mr. Bouchner to testify on these matters.

5. Further distinguishing this case from *Caldwell*, the Government has admitted in meet and confers that it has a financial expert on hand and assisting. This is not the kind of expert testimony, as in *Caldwell*, where the Government is going to be left days before trial without a retained expert on an exotic expert issue. That is likely why the Government has not argued prejudice in its motion. The Defendant has made a proper disclosure and will update the disclosure on a timely basis based on its continuing investigation and based on the Government's case. The expert requires analysis of additional information, including the documents that Government has been producing in the last several weeks and on Friday night.

6. Second, with respect to a tax expert, which the Defendant cannot disclose because he does not currently have a tax expert, there is no possible prejudice to the Defendant calling a tax expert in its case <u>depending on the Government's case</u>, considering that the Government is

planning to call the Defendant's CPA and its own tax expert. Likely, cross examination will be sufficient. But under no circumstances should the Government get an advance ruling barring the defense from offering expert testimony that become necessary in response to the Government's case.

7. For both potential expert witnesses, they are rebuttal expert witnesses. A defense tax expert would rebut either the Government's tax expert or testimony on matters Defendant's former CPA may cover. The forensic financial expert is also a rebuttal expert in that he is rebutting the Government's simplistic assertion that just because personal expenses (as well as legitimate business expenses) were paid from an account in which loan funds were deposited, then Defendant failed to use the money for the intended business purposes. And, as noted, the Government has been working with its own financial expert to assist as needed.

8. Again, unlike *Caldwell*, this is not a situation where the Defendant waited until the last minute to reveal game-changing, dubious expert witness testimony to upend the Government's case (and prevented the Government from responding through late and incomplete disclosures).

9. For the reasons detailed in Defendant's amended motion to continue trial, filed simultaneously with this response, Defendant is still actively preparing for trial, including making determinations regarding testifying experts and what opinions are necessary to defend against the Government's charges. In an abundance of caution, Defendant made disclosures that were appropriate and will continue to update them.

CONCLUSION

WHEREFORE, Defendant Eric Dean Sheppard respectfully requests that this Court deny the Government's motion to set an expert disclosure schedule.

Dated: September 18, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 18, 2023, the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

/s/ *Jayne C. Weintraub*
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