

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

UNITED STATES OF AMERICA )  
 )  
 v. ) Crim. Number  
 ) 07-41-P-S  
DARIO GIAMBRO )

OPPOSITION TO MOTION IN LIMINE

COMES NOW the Defendant, by and through counsel, Peter E. Rodway, Esq.,  
and for his Opposition to the Government’s Motion in Limine, states as follows:

I. INSPECTOR GENERAL AUDIT REPORTS AND CONGRESSIONAL  
RESEARCH REPORT

The Government claims in its motion in limine that the Inspector General audit reports and Congressional Research Reports (hereinafter referred to as “reports”) that were attached as exhibits to Defendant’s First Motion In Limine are not admissible during the trial of this matter because (1) they are or contain hearsay and (2) they are irrelevant. The government does not specify any particular portion or excerpt of the reports as being hearsay and/or irrelevant.

A. HEARSAY OBJECTION

The reports are public reports and, as such, are admissible as an exception to the hearsay rule under 803(8)(C). F.R.E. 803 provides that certain types of hearsay statements are not made excludable by the hearsay rule, whether or not the declarant is available to testify. Rule 803(8) defines the “public records and reports” which are not excludable, as follows:

“Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, ... or (C) in civil actions and proceedings and against the Government in criminal cases, factual

findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.”

In this case, the reports that the government claims are hearsay are United States Treasury Department Inspector General reports and Department of Justice Inspector General reports that were generated as a result of an investigation made pursuant to authority granted by law. Moreover, the reports contain factual findings and are being used against the government in a criminal case. Therefore, the reports fall within the exception to the hearsay rule found at F.R.E. 803(8)(C).

#### B. RELEVANCE

The government makes two specific relevance attacks. First, the government claims that the reports are outdated and therefore not relevant. The government seems to be claiming that the problems with the NFRTR that were exposed in the 1998 reports have been fixed.<sup>1</sup> This is impossible. One of the key findings of fact in the 1998 reports was that records had been destroyed by contract employees of the ATF. If a paper firearm registration has been destroyed, it is gone forever. No amount of computerization or updating of the database can bring back records that were lost or destroyed. The only way that a destroyed record can be restored to the NFRTR is if the gun owner presents the owner’s copy of the registration. In fact, according to the records reviewed by defense expert Eric Larson, this has happened on a multitude of occasions. Thus, the date of the findings contained in the reports that the NFRTR is incomplete and inaccurate due

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<sup>1</sup> Although not clear from its pleading, for purpose of this argument, the defense assumes that the government does not claim that the 2005 Congressional Research Report or the 2007 Inspector General Report are outdated.

to lost or destroyed records and poor record keeping, does not render the reports irrelevant.

Second, the government claims that because Mr. Giambro has not claimed that the NFRTR is inaccurate and incomplete as it pertains to him, he may not attack the NFRTR during his trial. From a factual standpoint, this argument is disingenuous at best. During the trial of this matter, the government intends to introduce evidence of an alleged conversation between Auburn Police Officer Chad Syphers and Mr. Giambro. During the conversation, the officer allegedly advised Mr. Giambro that the subject firearm was required to be registered. Mr. Giambro then allegedly responded that the firearm was registered and that the registration paper was with the firearm when it was seized by the police. Thus, to the extent that a claim that the NFRTR is incomplete and inaccurate as it pertains to him is a prerequisite to Mr. Giambro attacking the completeness and reliability of the NFRTR, a notion that the defense does not concede, in fact, the government claims that he has made such a claim.

From a legal standpoint, the argument counter to the government's claim that, in order to attack the reliability of the NFRTR, Mr. Giambro must present some evidence that the NFRTR is incomplete and inaccurate as it pertains to him, is compelling. The single, most fundamental principle of criminal law is that the defendant has no burden whatsoever in a criminal trial. The government seems to be claiming that it is Mr. Giambro's burden in his upcoming trial to prove that the gun was registered. It goes without saying that Mr. Giambro bears no such burden.

One of the elements of the government's proof is that the firearm that Mr. Giambro possessed was not registered in the NFRTR. The government will attempt to meet its

burden on this issue by presenting evidence of negative search results of the NFRTR. In other words, the government will present evidence that a search was done of the NFRTR using Mr. Giambro's name and, in a separate search, using the make and serial number of the firearm, and no record could be located in the NFRTR that showed that the gun was registered to Mr. Giambro in the NFRTR. The absence of the record, the government will argue, means that the gun was not registered to Mr. Giambro. Therefore, the government's proof hinges upon the NFRTR being accurate and complete. The findings set forth in the three Inspector General reports, the first two dated October and December of 1998 respectively and the third dated in June of 2007, as well as the 2005 Congressional Research Service report, are that the NFRTR is not accurate or complete. Thus, the reports refute the notion that the NFRTR is accurate and complete and are therefore probative of a fact in issue even without an affirmative claim by Mr. Giambro that the NFRTR is incomplete and inaccurate as it pertains to him. Evidence that is probative of a fact in issue is relevant.

## II. TESTIMONY OF ERIC M. LARSON

The government argues that the defense expert, Eric M. Larson, should not be allowed to testify consistent with his declaration that was filed with Defendant's First Motion In Limine.<sup>2</sup> The government suggests that the grounds for excluding Mr. Larson's testimony are (1) that his testimony contains "conjecture, speculation and lacks any scientific basis," and (2) because his testimony relates to a general attack on the NFRTR, it is irrelevant.

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<sup>2</sup> Mr. Larson's declaration has been provided to the government. The declaration contains all of the information required by M.R.Crim.P., Rule 16(E).

F.R.E.702 and 703 govern the admissibility of expert testimony. Rule 702 imposes three requirements: (1) the expert must be qualified to testify, by “knowledge, skill, experience, training, or education”; (2) the testimony must concern “scientific, technical or other specialized knowledge”; and (3) the testimony must be such as to “assist the trier of fact to understand the evidence or to determine a fact in issue.”

With respect to his qualification as an expert, the foundation for the introduction of Mr. Larson’s testimony will be that he is qualified to testify by multiple factors. First, his is employed by the Government Accountability Office as a Senior Analyst. His job is the statistical analysis and evaluation of computerized data, including the validity and reliability of administrative data records. Thus, his work experience makes Mr. Larson uniquely qualified to analyze ATF data and form opinions concerning the completeness and reliability of the NFRTR from that data. Second, he is experienced and has specialized knowledge about the completeness and reliability of the NFRTR. He has studied the NFRTR and the administration and maintenance of it by the ATF. He has studied ATF data concerning firearm registration activity since 1990. He has interviewed various witnesses, including firearms owners, firearms dealers, and ATF personnel, concerning problems with the NFRTR. He has received written correspondence with ATF personnel concerning problems with the NFRTR. He has written articles about the NFRTR and has researched the NFRTR. He has testified before Congress six times about his research and opinions concerning the NFRTR. Thus, Mr. Larson’s research gives him the specialized knowledge and experience to qualify as an expert.

Concerning the subject matter of Mr. Larson's proffered testimony, it involves technical or other specialized knowledge. Mr. Larson's testimony will involve the administration of the NFRTR and, as stated above, will draw conclusions about what the statistical data that he has studied indicates about the completeness and reliability of the NFRTR. For instance, Mr. Larson found through his research that between 1992 and 1996, the ATF added 119 or more firearms to the NFRTR that were originally registered between 1934 and 1971. Because of Mr. Larson's knowledge of the technical workings of the NFRTR, he was able to conclude, because he knows that original registrations should not increase over time, that the original registrations were either lost or destroyed and the ATF replaced the registrations when it was proven that the firearms were in fact registered.

Mr. Larson's testimony will also assist the trier of fact in determining a fact in issue, to wit, whether the NFRTR is complete and reliable enough to be used to determine whether the subject firearm was registered. As argued above, an essential element of the government's proof is that the NFRTR was searched and no record of the registration of the firearm could be located. Mr. Larson's testimony will assist the jury in understanding, first, the workings of the NFRTR and, second, determining whether the NFRTR can be relied upon to determine whether a particular firearm is, in fact, registered.

#### CONCLUSION

For the reasons set forth above, Mr. Giambro respectfully requests that the Government's Motion In limine be denied.

Dated at Portland, Maine this 5<sup>th</sup> day of September, 2007.

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UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

I hereby certify that on September 5, 2007, I electronically filed Opposition to Motion in Limine with the Clerk of Court using the CM/ECF system which will send notification of such filing to Assistant United States Attorney Darcie McElwee, and I hereby certify that on September 5, 2007, I mailed by United States Postal Service, the document to the following non-registered participant: Mr. Dario Giambro.

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