UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA	:	
-v.-	:	S1 15 Cr. 93 (VEC)
SHELDON SILVER,	:	
Defendant.	:	

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THE GOVERNMENT'S MOTIONS *IN LIMINE*

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The Government respectfully seeks rulings *in limine* on several issues prior to retrial.

First, the Government seeks to preclude evidence, argument, or questioning concerning (a) the defendant's family, health conditions, age, conditions of pretrial release, or any other similar personal factors unconnected to guilt and (b) potential punishment or other consequences that may follow conviction.

Second, the Government seeks to preclude evidence, argument, or questioning concerning the defendant's prior commission of "good acts"—including decisions to sponsor grants to people or organizations unrelated to this case—or any other non-criminal activities to seek to disprove his guilt of the crimes charged.

Third, the Government seeks to preclude evidence, argument, or questioning suggesting that law enforcement approaches of certain witnesses were unlawful, unusual, or inappropriate.

Fourth, the Government seeks to preclude evidence, argument, or questioning concerning a draft non-prosecution agreement transmitted to counsel for Dr. Robert Taub.[1]

[1] The Government assumes, and therefore does not seek to re-litigate, that the Court's prior rulings on *in limine* motions in the first trial apply to the instant proceeding. *See generally United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002).

ARGUMENT

I. EVIDENCE, ARGUMENT, OR QUESTIONING CONCERNING THE DEFENDANT'S FAMILY, HEALTH CONDITIONS, AGE, CONDITIONS OF PRETRIAL RELEASE, OR ANY OTHER PERSONAL FACTOR UNCONNECTED TO GUILT SHOULD BE PRECLUDED, AS SHOULD DISCUSSION OF PUNISHMENT

The Government is unaware of any lawful basis for the defendant to offer evidence or argument concerning his family, health conditions, age, conditions of pretrial release, or any other similar personal factors. He should be precluded from doing so, and from mentioning such subjects in his opening statement, absent a showing, outside the presence of the jury, that such a factor bears on his guilt. *See, e.g.*, *United States v. Paccione*, 949 F.2d 1183, 1201 (2d Cir. 1991) (affirming preclusion of evidence that defendant had son with cerebral palsy); *United States v. Battaglia*, No. S9 05 Cr. 774 (KMW), 2008 WL 144826, at *3 (S.D.N.Y. Jan. 15, 2008) (precluding "evidence of Defendant's family and personal status" as not "relevant to the issue of whether Defendant committed the crimes charged"); *United States v. Harris*, 491 F.3d 440, 447 (D.C. Cir. 2007) (affirming preclusion of evidence designed "mainly to cast [the defendant] in the sympathetic light of a dedicated family man").

The defendant should similarly be precluded from offering evidence or argument concerning the punishment or consequences he faces if convicted. Where the jury has no role at sentencing—such as in this case—it "should be admonished to 'reach its verdict without regard to what sentence might be imposed.'" *Shannon v. United States*, 512 U.S. 573, 579 (1994) (quoting *Rogers v. United States*, 422 U.S. 35, 40 (1975)). This is so for good reason: argument concerning punishment "invites [jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." *Id.*

II. EVIDENCE, ARGUMENT, OR QUESTIONING CONCERNING THE DEFENDANT'S PRIOR COMMISSION OF "GOOD ACTS" OR NON-COMMISSION OF OTHER BAD ACTS SHOULD BE PRECLUDED

To the extent that the defendant may seek to question witnesses or to present evidence or argument concerning his prior commission of "good acts"—including decisions to sponsor grants to people or organizations unrelated to this case—or to offer proof of any other non-criminal activities to seek to disprove his guilt of the crimes charged, he should be precluded from doing so. Specific-act propensity evidence is no more admissible to refute a criminal charge than it is to establish one.

It is settled law that "[a] defendant may not seek to establish his innocence . . . through proof of the absence of criminal acts on [other] specific occasions." *United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir. 1990). Similarly, while a defendant may offer general testimony from a character witness about his reputation for a "pertinent trait of character," or the witness's opinion of the defendant as regards that trait, *see* Fed. R. Evid. 404(a)(2)(A) & 405(a), a defendant can neither testify nor offer other proof to establish specific acts in conformity with that trait that are not an element of the offense. *See, e.g.*, *United States v. Benedetto*, 571 F.2d 1246, 1249-50 (2d Cir. 1978) (defense-proffered character evidence of defendant's specific acts improperly admitted because "character evidence has long been admissible only in the form of reputation and not in the form of a recitation of good or bad acts"); *United States v. Rivera*, No. 13 Cr. 149 (KAM), 2015 WL 1725991, at *2 (E.D.N.Y. Apr. 15, 2015) (precluding evidence of charitable giving).

During his first trial, then-counsel to the defendant repeatedly sought to introduce evidence that appeared to have no purpose other than to seek to demonstrate that the defendant had taken "good acts" as a legislator or cared about good things. Specifically, during the testimony of Victor Franco, a staff member of the Ways and Means Committee, defense counsel

repeatedly elicited not simply that the defendant had sponsored grants unrelated to this case, but also the precise purpose of those grants. (*See, e.g.*, Trial Tr. ("Tr.") 766 (referring to a grant, "And that's to help maintain ongoing summer components including educational enhancement classes and work experience, right?"; *id.* 766-67 (referring to the same grant, "And, in addition, the funds were going to be used to strengthen year-round services to junior high school services, correct?").) The Court recognized then-defense counsel's apparent tactics and called for a side bar, during which defense counsel suggested that this line of questioning was appropriate because the Government allegedly had argued that the defendant "did not fund worthy causes." (*Id.* 768.) The Court agreed that the Government had not done so, but permitted defense counsel to counter the Government's suggestion that because the defendant had directed money to certain projects, by definition, there was less money for other projects. (*See id.*) The Court cautioned defense counsel, however, that "I'm not going to let you use him as a prop and go through ever one of these." (*Id.*)

Notwithstanding the Court's instruction, defense counsel proceeded to question Mr. Franco on a number of other grants, eliciting that the defendant had sponsored ones for, among other things, "workshops and clinics which focused on environmental education for over 1,000 children and adults" (*id.* 770), "catch and release fishing" (*id.*), and "disadvantaged young people" (*id.* 770-71). Defense counsel also asked, "Over the course of the years there were many, many grants that were sponsored by Mr. Silver to support education, right?" (*Id.* 771.) The witness said yes, but defense counsel continued, asking, "And were you would agree that this is just as subset of grants that were sponsored by Mr. Silver to support education, right?" (*Id.*) Again, the witness said yes, and again, defense counsel continued, asking, "Over the course of the years there were many, many grants that were similar to this, correct?" (*Id.*)

After eliciting the foregoing, defense counsel continued to question Mr. Franco about the nature and number of the defendant's grants over the course of his career. (*See id.* ("Mr. Silver, in addition to education, he also supported grants to fund public services, right?"); *id.* 772 (referring to another grant, "And the purpose of this grant was to provide money to be used for emergency legal services for victims of domestic violence, right?"); *id.* 773 (referring to another grant, "And the money was being provided for programs including teen lounge, a basketball league, karate, art, in-state trips, and after school programs, correct?"); *id.* ("Over the course of his tenure, there were many, many more just like this, correct?").)

Defense counsel continued to make same point, asking Mr. Franco about the subject matter of grants ranging from one for "business-to-business marketing" (*id.* 744), to one for "a cleaner and more beautiful Chinatown" (*id.* 775), to one "to fund the redevelopment of Lower Manhattan" (*id.* 776). And again, defense counsel sought to impress upon the jury the number of such grants that the defendant had sponsored, asking, "During the course of his career there were dozens and dozens more just like this one, right?" (*Id.*)

The plain purpose of this lengthy set of questions—which runs for approximately ten pages of the trial transcript—was not to counter the indisputable, mathematical fact that a grant for one person or entity necessarily reduces the funding left for other people or entities, but to seek to portray the defendant as a good or caring legislator. Were the purpose otherwise, there would be no need to explore the precise subject matter of grants, much less multiple subject matters, much less ask whether there were "many, many more" or "dozens and dozens more" such grants, without reference to the time period of this case, much less the grants or other acts at issue in this case. The plain purpose, in short, was improper, and the defendant should be

precluded from taking the same approach again, or otherwise introducing evidence of alleged good acts divorced from the events of this case.

III. EVIDENCE, ARGUMENT, OR QUESTIONING SUGGESTING THAT CERTAIN LAW ENFORCEMENT TECHNIQUES WERE IMPROPER SHOULD BE PRECLUDED

The Government similarly moves to preclude questioning by defense counsel suggesting that law enforcement approaches of certain witnesses were somehow unlawful, unusual, or inappropriate. In particular, at the first trial, then-counsel to the defendant asked a series of questions of both Dr. Robert Taub and Steve August regarding the circumstances of their initial interviews with law enforcement agents and/or lawyers for the Government. Such questions had no apparent purpose other than to leave the misimpression with the jury that the Government improperly strong-armed or intimidated witnesses during its investigation. For example, with respect to Mr. August, defense counsel asked a series of questions about the timing, location and circumstances of his initial meeting with prosecutors and federal agents outside his home in Maine that were untethered from anything related to the case. (*See, e.g.*, Tr. 919-20 (Q: "When was the very first time you met with the prosecutors? Tell us how that came about." A: "I don't know the date. It was January of this year. They came up to Maine, and requested that I speak with them." Q: "And they called you first before doing that?" A: "They did not, no." Q: "They didn't make an appointment to see you?" A: No. Q: "They just showed up? A: They did."); Tr. 920 (Q: "And you mentioned you've retired." A: "Correct." Q: "Were you home? Did they knock on the door?" A: "My wife and I were out for a walk. I recall it was mid-afternoon. They were in the driveway when we returned home….." Q: "Had you ever had that happen before? Where criminal investigators came to your house?" A: No. Q: "Were you surprised to see them there?" A: "I was.").)

With respect to Dr. Taub, defense counsel similarly asked questions about the circumstances of his initial interview with law enforcement that do not bear on issues in the case, and appeared designed to encourage jurors to question impermissibly the Government's law enforcement techniques or to be distracted from the evidence by focusing on the impact of the investigation on Dr. Taub's wife, who was not a witness. (*See, e.g.*, Tr. 564: (Q: "Do you recall that morning?" A: "I believe so." Q: "It would be pretty hard to forget, right?"); Tr. 565 (Q: "Did they make an appointment to come see you?" A: "No." Q: "Did they call you first and say "'We're coming over?'" A: "No." Q: "They just showed up?" A: "Yes." Q: "And they woke you up?" A: "Yes." Q: "Were you startled that you were w[o]ken up by two criminal investigators coming from the prosecutors?" A: "I was terrified."); Tr. 567:2-5 (Q: "And I take it your wife was in her pajamas as well?" A: Yes. Q: "Were you wearing slippers or shoes?" A: "I don't remember.").)

The foregoing lines of questioning were not probative of any issue in the case, and plainly were intended to seek to inflame or confuse the jury about the manner in which the Government conducted its investigation or the impact of the investigation on third-parties. Consistent with standard jury instructions given in this Circuit, the Court should preclude attempts by the defense ask these types of questions at the upcoming trial. *See* Sand, *Modern Federal Jury Instructions*, Instr. 4-4 (use of law enforcement techniques); *United States v. Cheung Kin Ping*, 555 F.2d 1069, 1073-74 (2d Cir. 1977) (jury properly instructed that law enforcement techniques were lawful and permissible). *See also United States v. Bautista*, 252 F.3d 141, 145 (2d Cir. 2001) (finding that "the summation arguments at issue amounted to an (improper) invitation for the jury to consider the government's choice of investigative techniques").

Notably, at the first trial, after it became clear that defense counsel was continuing to question the propriety of the initial interviews conducted by federal agents, the Government wrote a letter to the Court seeking a curative instruction. (*See* Dkt. No. 118.) Although the Court did not issue a curative instruction at that time, it made clear that it considered such a line of questioning to be inappropriate. Regarding the Government's request, the Court stated:

> I have to say I don't see the relevance of that line of questioning. On the other hand, the government didn't object. If it would have objected at the time, I would have sustained the objection. I'm not going to give a limiting instruction at this point. But I will warn you that if you go down that road again, assuming that the government went on a worldwide tour, I'll sustain it. In the final jury charge we will have a charge that says government tactics are not at issue.

(Tr. 1039.)

The Court should reach the same conclusion here, and preclude defense counsel from eliciting testimony clearly intended for an improper purpose.

IV. EVIDENCE, ARGUMENT, OR QUESTIONING ABOUT A DRAFT NON-PROSECUTION AGREEMENT SHOULD BE PRECLUDED

During the initial trial, then-counsel to the defendant questioned Dr. Taub extensively about an unsigned draft non-prosecution agreement (the "draft agreement") which, among other things, did not include the language "in exchange for" when describing the referrals Dr. Taub sent to the defendant and the benefits that the defendant in turn conferred on Dr. Taub. (*Compare* DX 25 *with* DX 27.) In seeking disclosure of the draft agreement, the defense proffered its view that Dr. Taub likely "pushed back on it and would not agree that he engaged in what effectively is a criminal conspiracy." (Tr. 319.) Defense counsel further surmised that Dr. Taub may have told the Government "I didn't do that or I'm not going to agree to that in an agreement that says that." (*Id.*) Defense counsel, at that point, had no idea what the draft agreement actually said or, more importantly, what Dr. Taub would say about it. But in seeking

disclosure of the draft agreement—and the correspondence between the Government and Dr. Taub's counsel regarding the same—defense counsel suggested the information likely qualified as either *Brady* or *Giglio* material. Left unclear was how defense counsel planned to use the information if it obtained it. When the Court repeatedly queried defense counsel for a coherent theory of how the draft agreement could possibly impeach Dr. Taub's trial testimony, defense counsel's eventual response was that Dr. Taub's "testimony is not over." (Tr. 321.)

Now it is. And it is clear that the initial theories of impeachment were wrong. Defense counsel asked Dr. Taub a series of questions about the draft agreement and whether he refused to sign it because he disagreed with specific language in the draft agreement. Dr. Taub repeatedly denied having a hand in wordsmithing or negotiating the document:

> Q. And the cooperation agreement that you got was something that was actually negotiated over time between your lawyer and the prosecutors; correct?
>
> A. I don't know the details of this.
>
> Q. Do you recall that the prosecutors wanted you to say that you referred patients to Mr. Silver for legal representation from in or about 2003 up through and including in or about 2013 . . . and Dr. Taub did this in exchange for receipt of benefits, and your lawyer told them that you would not agree to say that any referral was in exchange for benefits?
>
> A. I don't recall the prosecutors asking me to say anything. I do not recall that.

(*Id.* 590.)

> Q. You didn't sign that [draft agreement]; correct?
>
> A. I don't think so.
>
> Q. Because your lawyer sent back edits to the prosecutors. And, in her concern that you

> make only truthful statements, she struck the language "In exchange for." Correct? . . .
>
> THE COURT: Do you know what she sent back?
>
> A. I discussed this with her, but I'm not sure at this point what she actually sent back. I'd have to look at it.

(*Id.* 593-94.)

> Q. Your lawyer did not allow the language "at Silver's request" to be included in the agreement either, did she?
>
> A. Right now I don't know. I don't know that. I know that she had modified the language.

(*Id*. 594-95.)

As the foregoing makes crystal clear, Dr. Taub did not recall doing *anything* to the draft agreement, and he certainly did not recall "pushing back" on the draft agreement's factual recitation, as defense counsel originally hypothesized. (*Id*. 319.) Indeed, neither the draft agreement nor the related correspondence about the draft agreement contain any statements from Dr. Taub. That is because, as Dr. Taub testified, "[i]n drafting this agreement, I relied on discussions with my attorney. *I'm not sure exactly what transpired*." (*Id*. 600 (emphasis added).)

On this record, defense counsel no longer has any good faith basis to inquire about the steps Dr. Taub allegedly took to "push back" on the draft agreement because, as Dr. Taub testified, he took none. Unlike in the first trial, when defense counsel did not know what Dr. Taub would say about the draft agreement and therefore had at least an arguable good faith basis to inquire about Dr. Taub's involvement with the specific language in draft agreement, defense counsel now has the benefit of the prior trial record. In other words, defense counsel knows exactly what Dr. Taub has said, under oath, about the draft agreement (which is entirely

consistent with the materials disclosed to the defense). Counsel therefore cannot, in good faith, pose questions about supposed Government pressure and resultant push-back from Dr. Taub when they know that to be fiction.

Consistent with the longstanding rule that the "scope and extent of cross-examination lies within the discretion of the trial judge," *United States v. Blanco*, 861 F.2d 773, 781 (2d Cir. 1988), this Court "may, in its discretion, preclude questions for which the questioner cannot show a good faith basis," *United States v. Concepcion*, 983 F.2d 369, 391 (2d Cir. 1992). And while "counsel may explore certain areas of inquiry in a criminal trial without full knowledge of the answer to anticipated questions, he must, when confronted with a demand for an offer of proof, provide some good faith basis for questioning that alleges adverse facts." *United States v. Katsougrakis*, 715 F.2d 769, 779 (2d Cir. 1983). Given defense counsel's "full knowledge of the answer to anticipated questions," *id*., defense counsel should be precluded from posing questions that would falsely suggest that Dr. Taub rejected the draft agreement because he found particular statements in the document unacceptable.[2]

Finally, in light of Dr. Taub's testimony, defense counsel should also be precluded from offering the draft agreement into evidence. An unsigned draft agreement is not admissible (as a prior inconsistent statement) to impeach Dr. Taub because it is neither inconsistent with Dr. Taub's testimony nor, more fundamentally, is it a statement by Dr. Taub at all. And because it sheds no light on what the jury will have to decide, the draft agreement also cannot properly be put before the jury as substantive evidence.

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[2] Defense counsel similarly should be precluded from asking Dr. Taub whether his lawyer rejected the draft agreement because of *her* alleged concerns about specific language. (*See* Tr. 593-94 (Q. "And, in her concern that you make only truthful statements, she struck the language 'In exchange for.' Correct?").) Dr. Taub's lawyer is not a witness, and her reasoning for accepting or rejecting certain language is not relevant to this trial. Nor is that an appropriate topic for Dr. Taub's testimony, as it would trench upon his attorney-client privilege.

The Government submits that these limits are all the more necessary in light of the ways defense counsel mischaracterized the draft agreement and Dr. Taub's testimony about the draft agreement in summation. Even though Dr. Taub testified that he did not recall pushing back on the "in exchange for" language in the draft agreement, defense counsel told the jury the exact opposite:

> In exchange for. Quid pro quo. This for that. That's what the prosecutors wanted Dr. Taub to say, in exchange for not having his life ruined. *Dr. Taub knew the prosecutors were asking him to lie and he said no, I'm not going to do that. He stood tall.* See for yourself – I mean the pressure and what it was doing to him.

(Tr. 2977 (emphasis added).) None of that actually happened. Defense counsel nonetheless pressed on:

> *[Dr. Taub] refused to agree that he had committed this crime with Mr. Silver.* The prosecutors knew full well the importance and the significance of that language. You are going to hear in the instructions tomorrow from Judge Caproni "in exchange for" or "exchange for" mentioned at least 11 times. They need that. *Dr. Taub wouldn't do it. He also wouldn't say that the referrals came at Mr. Silver's request. And what happened? Because Dr. Taub would not lie, would not commit another crime by making a false statement, the prosecutors were forced to accept the letter that lacked those terms.* When you go back to the jury room you are going to have both the draft and you are going to have the final letter. Look at them. I ask you to please look at them and consider the significance of these six words: *"In exchange for," and "at Silver's request." Dr. Taub would have none of it.*

(Tr. 2977-78 (emphasis added).)

Defense counsel's statements about how Dr. Taub supposedly "stood tall" and "refused to agree" with the draft agreement because he "would not lie" were grossly misleading and untethered from the record. And they underscore why defense counsel should be precluded from attempting to mislead the jury once again by posing questions that lack a good faith basis and precluded from introducing a draft agreement that impeaches no one and is otherwise irrelevant.

CONCLUSION

For the foregoing reasons, the Government's motions *in limine* should be granted.

Dated: New York, New York
March 9, 2018

Respectfully submitted,

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