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16
17 **UNITED STATES DISTRICT COURT**
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 UNITED STATES

20 Plaintiff,

21 vs.

22 ROBERT HUNTER BIDEN,

23 Defendant.

Case No. 2:23-cr-00599-MCS

Hon. Mark C. Scarsi

**MR. BIDEN’S OPPOSITION TO
THE SPECIAL COUNSEL’S
SEVENTH MOTION *IN LIMINE*
TO PRECLUDE IMPROPER
STATEMENTS & ARGUMENT
REGARDING FACTS NOT IN
EVIDENCE**

Hearing Date: August 21, 2024

Hearing Time: 10:00 a.m.

Courtroom: 7C

1 Defendant Robert Hunter Biden, by and through his counsel of record, hereby
2 opposes in part the Special Counsel’s Motion *in Limine* to preclude improper
3 statements and argument regarding facts not in evidence. (DE 156.) On July 30, 2024,
4 the Special Counsel sent defense counsel an email addressing the government’s
5 amended exhibits list, the proposed statement of the case, the proposed competing
6 verdict forms, the proposed joint voir dire, and the proposed jury instructions (all of
7 which had to be filed the following day); Special Counsel also inquired whether the
8 defense intended to oppose the government’s motions to preclude the defense experts.
9 At the end of that email, the Special Counsel also stated that they “intend to file a
10 motion in limine to preclude statements by defense counsel about facts that are not
11 offered into evidence” and requested the defense position on this motion as well. On
12 July 31, 2024, defense counsel sent a number of responsive emails addressing the
13 various pleadings the parties were required to file and exchanging drafts with the
14 Special Counsel. However, the Special Counsel filed its Seventh Motion *in Limine* to
15 preclude improper statements and argument regarding facts not in evidence before Mr.
16 Biden’s counsel had an opportunity to respond with his position on the Motion. As
17 explained in the attached memorandum of points and authorities, Mr. Biden opposes
18 this Motion in part.

19
20 Dated: August 7, 2024

Respectfully submitted,

21
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 The Special Counsel’s motion *in limine* seeking to preclude improper
4 statements and argument regarding facts not in evidence is based wholly on an
5 improper characterization of events which occurred during Mr. Biden’s trial in
6 Delaware on firearm charges. To begin with, defense counsel is aware of the rules and
7 have no intention to make any “improper” arguments or argue “facts not in evidence.”
8 Moreover, the Court’s preliminary instructions to the jury will clearly identify “what
9 is not evidence.” As the jury will instructed at the outset of the case, the “statements
10 and arguments of the attorneys” are not evidence. Thus, there is no need for the Court
11 to limit the defense to what they can or cannot say during their opening statement so
12 long as counsel reasonably and in good faith expects that the referenced evidence will
13 be admitted at trial. However, the Special Counsel’s rendition of what happened at the
14 Delaware trial is not accurate.

15 As for evidence relating to Mr. Biden’s personal history and the causes of his
16 addiction, such evidence is relevant to his willfulness defense as to all charges in the
17 Indictment to negate the element of specific intent. The Special Counsel has not
18 argued (because he cannot show) that the probative value of such evidence is
19 “substantially outweighed” by the danger of confusing the jury.

20 The admission of Mr. Biden’s personal history and the causes of his addiction
21 are also appropriate under the “rule of completeness” and Federal Rule of Evidence
22 106 because the government intends to offer into evidence excerpts of Mr. Biden’s
23 memoir which discuss in great detail the extent of his drug abuse and addiction.
24 Absent the relevant context of what led to Mr. Biden’s addiction, particularly in 2015
25 and the years that followed, the inflammatory nature of the evidence of drug abuse
26 and addiction may unfairly prejudice the jury against him.

1 of the facts which were not supported by the evidence introduced by documents or
2 witnesses, and took care not to engage in improper vouching. Mr. Biden’s trial
3 counsel is readily familiar with the Federal Rules of Evidence and intends to fully
4 abide thereby; the preclusion of statements the defense has not indicated it will make
5 (or which it may have a good faith basis to make) is not warranted.

6 Additionally, the preliminary jury instructions will make clear that the
7 attorneys’ opening statements are not evidence. *See* D.E. 159 at 4 (Joint Proposed
8 Instruction No. 4: What Is Not Evidence); Ninth Circuit Manual of Model Criminal
9 Jury Instructions § 1.4 (2022 ed.) (“The following things are not evidence, and you
10 must not consider them as evidence in deciding the facts of this case: (1) statements
11 and arguments of the attorneys . . .”). Thus, there is no need to preclude any
12 statements by defense counsel at this point in the proceedings.

13 **B. Defense Counsel Should Not Be Precluded from Referencing the**
14 **Defendant’s Personal History or Possible Causes of His Addiction.**

15 **1. Evidence of Mr. Biden’s personal history and causes of his addiction**
16 **are relevant and their probative value is not “substantially**
17 **outweighed” by the danger of confusing the jury.**

18 In reliance on Federal Rules of Evidence 401 and 403, the Special Counsel
19 argues that Mr. Biden’s personal history, including the possible causes of his
20 addiction, are irrelevant and should be excluded because they have the potential to
21 confuse the jury. The Special Counsel ignores the fact that there is a willfulness
22 requirement to the charges against Mr. Biden. In the context of criminal tax cases,
23 “willfulness” is defined as a “voluntary, intentional violation of a known legal duty.”
24 *United States v. Powell*, 955 F.2d 1206, 1210 (9th Cir. 1991) (quoting *Cheek v. United*
25 *States*, 498 U.S. 192, 201 (1991) (internal quotation marks omitted)).

26 Indeed, each of the nine tax charges against Mr. Biden is a specific intent crime.
27 *See* 26 U.S.C. §§ 7201, 7203 & 7206(1); *Hawkins v. Franchise Tax Bd. of California*,

1 769 F.3d 662, 668 (9th Cir. 2014) (describing “[t]he specific intent required for
2 felonious tax evasion” in violation of 26 U.S.C. § 7201); *United States v. Brodie*, 858
3 F.2d 492, 496 n.3 (9th Cir. 1988) (overruled on other grounds by *United States v.*
4 *Morales*, 108 F.3d 1031 (9th Cir. 1997)) (“Specific intent or willfulness is an element
5 of a section 7203 violation.”); *United States v. Brooksby*, 668 F.2d 1102, 1104 (9th
6 Cir. 1982) (“There can be no doubt that the term ‘willful’ in § 7206(1) requires proof
7 of a specific intent to do something which the law forbids; more than a showing of
8 careless disregard for the truth is required.”). “In a prosecution for a specific intent
9 crime, voluntary intoxication that precludes the formation of the requisite intent may
10 be established as a defense. Thus, voluntary intoxication of a high degree may
11 constitute a defense to the element of ‘willfulness.’” *United States v. Jurka*, 818 F.2d
12 1427, 1432 (9th Cir. 1987) (internal citations omitted).

13 The defense intends to prove at trial that for the period from approximately
14 2016 through May 2019, Mr. Biden was severely addicted to alcohol and drugs, as
15 evidenced by the numerous times he sought treatment at a rehabilitation facility and as
16 detailed by Mr. Biden in his memoir entitled *Beautiful Things*—excerpts of which the
17 Government intends to admit into evidence. As an example of the severity of his
18 addiction, in his memoir, Mr. Biden describes 2018 as being dominated by crack
19 cocaine use “twenty-four hours a day, smoking every fifteen minutes, seven days a
20 week.”¹ The defense intends to prove that Mr. Biden’s extensive drug and alcohol
21 abuse during the relevant time-period altered his cognitive activities including his
22 decision-making and judgment, such that Mr. Biden was unable to form the requisite
23 intent to commit the crimes he has been charged with. Mr. Biden’s personal history
24 and his addiction are therefore clearly relevant to his willfulness defense and to negate
25 the element of specific intent.
26

27
28 ¹ Government’s Proposed Exhibit 250 at 7.

1 As reference to the Delaware trial has been made, the Court should be aware
2 that the entire premise of the firearm prosecution in Delaware was Mr. Biden's severe
3 addiction to drugs at the time he purchased a gun in 2018. The government, through
4 the same Special Counsel, argued and put forward evidence in the Delaware case that
5 Mr. Biden was severely addicted to drugs from 2015 through 2019 (which include the
6 dates for which the charges for the tax violations are based), during which time he
7 purchased a firearm. *See, e.g.*, DE R.T. 6/10/2024 at 1323:14-19 (Mr. Hines: "And
8 again, the evidence and the reason it was introduced from 2015 to '19 shows the
9 defendant habitually used a controlled substance. It isn't something that started the
10 day before he bought and then possessed the gun, or the week before, or the month
11 before, it started years before and it continued for months thereafter."). Based on the
12 government's arguments and evidence on this issue, the jury convicted Mr. Biden of
13 the firearm charges. Mr. Biden would thus be prejudiced if the government is not
14 judicially estopped² from taking a contrary position in this case, where Mr. Biden's
15 drug abuse and addiction bears directly on whether he had the requisite *mens rea* to
16 commit the crimes he has been charged with. While this is ultimately an issue for the
17 jury, the government should not be allowed to gain an advantage in one proceeding by
18 using Mr. Biden's drug abuse and addiction against him, and then gain a second
19 advantage by taking an inconsistent position in this proceeding. *See, e.g., United*
20 *States v. Liquidators of Eur. Fed. Credit Bank*, 630 F.3d 1139, 1149 (9th Cir. 2011)
21 (the government was judicially estopped from taking position inconsistent with that in
22 a prior proceeding).

23
24
25 _____
26 ² "The doctrine of judicial estoppel forbids a party 'from taking a position inconsistent
27 with one successfully and unequivocally asserted by the same party in a prior
28 proceeding.'" *Teledyne Indus., Inc. v. N.L.R.B.*, 911 F.2d 1214, 1217 (6th Cir. 1990)
(citation omitted). It is designed "to protect the integrity of the judicial process" and
"preclude[] parties from taking inconsistent positions in judicial proceedings."
Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 n.3 (9th Cir. 1996) (citations omitted).

1 The United States Supreme Court has held that “forbidding the jury to consider
2 evidence that might negate willfulness [in the context of a criminal tax violation]
3 would raise a serious question under the Sixth Amendment’s jury trial
4 provision.” *Cheek*, 498 U.S. at 203. *See, e.g., Powell*, 955 F.2d at 1214 (the district
5 court “ordinarily cannot exclude evidence relevant to the jury’s determination of what
6 a defendant *thought the law was* in § 7203 cases because willfulness is an element of
7 the offense”).

8 Furthermore, because of the stigma associated with drug abuse and addiction, it
9 is necessary to give the jury some context as to what led Mr. Biden to resort to drug
10 dependence, which include various traumas he experienced. For example, the death of
11 his brother, Beau, in 2015 is directly relevant to why Mr. Biden spiraled into addiction
12 in the years that followed. Mr. Biden’s personal history is therefore necessary to
13 mitigate the damage of the otherwise unsavory evidence of his drug abuse and
14 addiction, which typically would not be admissible in a tax case. If the jury is not
15 given a complete picture of Mr. Biden’s circumstances, the evidence of his drug abuse
16 and addiction may unfairly prejudice the jury against him. The causes of Mr. Biden’s
17 addiction are therefore relevant and generally admissible under Federal Rule of
18 Evidence 402, unless proscribed by another evidentiary rule.

19 Federal Rule of Evidence 403 only permits the Court to “exclude relevant
20 evidence if its probative value is substantially outweighed by” one or more of the
21 articulated dangers. The Ninth Circuit has explained that “[Rule] 403 favors
22 admissibility, while concomitantly providing the means of keeping distracting
23 evidence out of the trial.” *United States v. Hankey*, 203 F.3d 1160, 1172 (9th Cir.
24 2000).

25 In asking the Court to preclude this evidence under Rule 403, the Special
26 Counsel merely states that “[a]ny evidence relating to this topic would [] be
27 inappropriate and would have the potential to confuse the jury.” D.E. 156 at 4-5.
28

1 However, this is insufficient to warrant the preclusion of relevant evidence. Under the
2 appropriate balancing test that Rule 403 requires, the aforementioned evidence is
3 admissible because its probative value is not “substantially outweighed” by the danger
4 of confusing the jury, nor does the Special Counsel claim that it is.

5 *United States v. Rodriguez*, 971 F.3d 1005 (9th Cir. 2020), cited by the Special
6 Counsel, is inapposite. There, the Ninth Circuit affirmed the district court’s exclusion
7 of the witness’ testimony because the “proffer was extremely weak to the extent it
8 spoke to any issues beyond duress,” *id.* at 1021, and the defendant did “not dispute
9 that she failed to preserve a duress defense,” *id.* at 1020 n.12. Because the proffered
10 evidence “had little to do with her guilt or innocence of the charges,” the Ninth Circuit
11 held there was no abuse of discretion in excluding the testimony. *Id.* at 1020. In
12 contrast here, evidence of Mr. Biden’s drug abuse and addiction is directly relevant to
13 his guilt or innocence of the charges, since it has the potential of negating a required
14 element of each of the charges against him.

15 **2. The admission of Mr. Biden’s personal history and the causes of his**
16 **addiction are also appropriate under the “rule of completeness” and**
17 **Federal Rule of Evidence 106.**

18 The admission of Mr. Biden’s personal history and the causes of his addiction
19 are also appropriate under the “rule of completeness” and Federal Rule of Evidence
20 106. As noted above, the Special Counsel intends to offer into evidence excerpts from
21 Mr. Biden’s memoir that discuss in great detail the extent of his drug abuse and
22 addiction. The common-law “rule of completeness,” which has been partially codified
23 in Federal Rule of Evidence 106,³ provides that “when a party has introduced part of a
24 writing, an adverse party may require the introduction of any other part which ought
25

26 ³ Rule 106 provides: “If a party introduces all or part of a statement, an adverse party
27 may require the introduction, at that time, of any other part—or any other statement—
28 that in fairness ought to be considered at the same time. The adverse party may do so
over a hearsay objection.” Fed. R. Evid. 106.

1 in fairness to be considered contemporaneously.” *Beech Aircraft Corp. v. Rainey*, 488
2 U.S. 153, 155-56 (1988).

3 In the criminal context, the rule of completeness also implicates a defendant's
4 Fifth Amendment rights because a defendant who elects not to testify may be
5 penalized by the government's introduction of a misleading excerpt of a statement that
6 the defendant will not be able to contextualize or explain. *See, e.g., United States v.*
7 *Quinones-Chavez*, 641 F. App'x 722, 732 n.4 (9th Cir. 2016) (Fisher, J., concurring in
8 part) (“Whatever the limits of the trumping function of the rule of completeness, at
9 minimum it should apply in the particular circumstances where the government has
10 abused the asymmetrical nature of the hearsay rule in a criminal trial and exclusion
11 under the hearsay rule would implicate a criminal defendant's Fifth Amendment right
12 not to testify on his or her own behalf.”); *see also United States v. Walker*, 652 F.2d
13 708, 714 (7th Cir. 1981) (the government’s “selective presentation of [defendant’s]
14 prior testimony” penalized the defendant for declining to testify at his second trial).

15 Because the Special Counsel intends to introduce at trial excerpts from Mr.
16 Biden’s memoir, the rule of completeness and Rule 106 require that it do so in a
17 manner that will not mislead the jury or unfairly prejudice Mr. Biden. Due to the
18 inflammatory nature of the evidence of drug abuse and addiction, Mr. Biden must be
19 able to provide the appropriate context for his conduct and to explain the
20 circumstances surrounding his drug abuse and addiction which includes his personal
21 history and what led to his addiction. Without the appropriate context, one might
22 believe that Mr. Biden became addicted to drugs because he was partying and having
23 a great time when the truth of the matter is the drug abuse was a form of coping for
24 severe grief and trauma.

25 CONCLUSION

26 For the foregoing reasons, Mr. Biden’s counsel should not be precluded from
27 making any statements or argument which they reasonably and in good faith believe
28

1 will be supported by the evidence, including statements regarding Mr. Biden's
2 personal history and the causes of his addiction.
3

4 Date: August 7, 2024

Respectfully submitted,

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