

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

TIMOTHY WHITEAGLE and
DEBORAH ATHERTON,

Defendants.

FINAL PRETRIAL
CONFERENCE ORDER

11-cr-65-wmc

On April 4, 2012, the court held the final pretrial conference. Defendant Timothy Whiteagle was present with his attorney Glenn Reynolds. Defendant Deborah Atherton was present with her attorneys Kelly Welsh and Erika Bierma. The government was represented by FAUSA Stephen Sinnott and AUSA Laura Przybylinski-Finn. In order of discussion, we covered these topics:

I. Voir Dire

At the final pretrial conference the court discussed with the parties their proposed additional voir dire questions (dks. 62, 73 and 77), agreed to add some and declined to add others, for reasons stated. Attached to this order is a final set of the amended voir dire questions. The parties are directed to read this new version carefully to ensure that the court accurately implemented the changes it agreed to make, and promptly to report and perceived errors to Magistrate Judge Crocker.

II. Jury Instructions/Verdict Forms

At the final pretrial conference the court discussed with all parties the universe of jury instructions, with the goal of providing Judge Conley a complete packet of accurate instructions with which to work at trial. The post-trial instructions intentionally are overinclusive so that Judge Conley and the parties have access to any instruction they might need during the final

instruction conference at the close of the evidence. As with the voir dire, the parties are directed to read the attached set of jury instructions carefully to ensure that the court properly implemented the changes it agreed to make.

At the final pretrial conference the court directed Atherton, by counsel, to present a “good faith” instruction tailored to the circumstances of this case. Because Atherton is not charged in one of the specific intent crimes (namely § 1512(b)(3) and 26 U.S.C. § 7206(1), charged only against Whiteagle), Atherton also should explain why she is entitled to a good faith instruction on the counts charged against her. Similarly, although the court has included a version of Atherton’s proposed limiting instruction that protects her from the jury using against her evidence entered solely against Whiteagle on the tax and tampering charges, it will be up to Atherton—and perhaps the government—to craft a proposed instruction for the court to use during trial. It’s not as if the court cannot come up with limiting instructions on the fly during trial, but it wouldn’t hurt for the parties to give this some thought between now and July.

Next, the government has agreed to prepare a redacted indictment to be used at trial. It is not clear how the government intends to edit Counts 6 and 7, in which Whiteagle is charged with aiding and abetting Clarence Pettibone’s violation of § 666(a)(1)(B). The court has edited the elements instructions to account for this, but the parties have not had input on these edits and there might be a clearer way to present this to the jury. All parties are invited to provide written input on this as part of their set of omnibus final submissions to the court, which now are due by April 30, 2012.

Related to this, we will be renumbering the counts of the indictment to eliminate the numerical gaps created by the severance of Count 12 and former co-defendant Clarence Pettibone’s guilty plea, which has removed Counts 5 and 11 from the trial. In order to ensure that the jury’s verdicts align properly with the superseding indictment, the court will enter a separate order commemorating these numbering changes, although it will wait until the eve of

trial to do this in case there are additional changes. The correspondence at this time is set forth in the following table:

Actual Count Number	Count Number at Trial
1	1
2	2
3	3
4	4
6	5
7	6
8	7
9	8
10	9
13	10
14	11
15	12

Also, the court has edited the verdict forms to reflect the numbers of the counts at trial. Copies of the edited verdict forms are attached.

III. In Limine Issues

Atherton filed a motion to exclude at trial evidence related exclusively to the loan fraud charged against her in Case No. 12-cr-14, wmc, and has joined Pettibone's motion to exclude speculative evidence. *See* dks. 60 & 63. The government responds that it will not attempt to put in any speculative evidence at any time and it will not offer in its case in chief any evidence related to the separately-charged loan fraud. The government, however, reserves the right to

cross-examine Atherton about the alleged loan fraud if she takes the stand. The parties should be prepared to discuss these issues at that time. As for claims of witness speculation, the court flagged for the parties Judge Posner's recent opinion in *United States v. Curescu*, ___ F.3d ___, 2012 WL 934113 at ** 3-4 (7th Cir. March 21, 2012), in which the court of appeals explains when a witness may testify to what another person is thinking.

The government filed an eleven-part motion in limine (dkt. 71) seeking to exclude almost a dozen types of testimony. Whiteagle wishes to be heard in opposition to all parts of this motion. Now that the court has moved the trial to July and has moved to April 30, 2012 the parties' submissions deadline for issues raised at the final pretrial conference, Whiteagle should submit a terse response to the government's motion in which he at least gives a headline version of the basis for his opposition to each of the government's requests.

Whiteagle also wishes to be heard on the government's request that the court take judicial notice of the Ho-Chunk Nation's Code of Ethics Act, dkt. 72. It would be helpful to the court if Whiteagle could articulate a headline version of his concerns in his April 30 submission.

The government's Notice of Intent To Offer Evidence, dkt. 74, is not opposed by either defendant.

Whiteagle filed a three-part motion in limine, dkt. 78 in which he seeks to exclude evidence of his criminal record, any Rule 404(b) material, and any evidence related solely to severed Count 12. The government does not oppose the motion as framed because it does not intend to offer any of this evidence in its case in chief. The government, however, announced its intent to explore all of these issues during cross-examination of Whiteagle if he takes the stand. The parties will be able to argue their positions with more specificity if the trial gets to that juncture.

The parties had no other in limine matters to bring to the court's attention at the final pretrial conference.

IV. "Housekeeping"

As noted above, after the April 4, 2012 final pretrial conference, the court granted Whiteagle's motion to continue the trial. The government predicts the trial will take two weeks or less; Whiteagle is less sanguine, and predicts that the trial might spill into a third week.

The length of the trial caused the parties to request that the court seat 3 alternate jurors. That's fine in theory, but as a practical matter, none of the jury boxes in this courthouse holds more than 14 jurors. In their April 30 submissions to the court, each party should advise how they wish to proceed: drop one alternate, or seat an alternate outside but next to the box?

The defendants also need to advise the court if they are exercising their peremptory strikes separately or jointly. Atherton already has asked for her own table in Courtroom 250; that will be done.

The parties had no other matters to bring to the court's attention.

Entered this 10th day of April, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge