IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA *v.* CARL TORJAGBO	Criminal Indictment No. 1:22-CR-171-MLB-RDC

GOVERNMENT'S CONSOLIDATED MOTIONS IN LIMINE

The United States of America, by its counsel, Richard S. Moultrie, Jr., Acting United States Attorney for the Northern District of Georgia, and Kelly K. Connors and Nicholas L. Evert, Assistant United States Attorneys, hereby files its consolidated motions *in limine*.[1]

I. Motion *in limine* to preclude testimony and argument regarding any negligence or mismanagement on the part of the PPP lender or the SBA.

The Paycheck Protection Program ("PPP") was a COVID-19 pandemic relief program administered by the Small Business Administration ("SBA"). Each PPP loan application was processed by a participating financial institution serving as the lender of funds. If a loan application was approved, the participating lender funded the PPP loan using its own monies, which were fully guaranteed by the SBA.

The superseding indictment charges Torjagbo with submitting a fraudulent PPP loan application to J.P. Morgan Chase Bank, N.A. ("Chase Bank") for his sham company, Kremkov Industries, LLC. (Doc. 110 at 1-4). As a result of Torjagbo's

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[1] As directed by the Court, the parties met and conferred regarding potential motions *in limine*.

material misrepresentations in the PPP loan application, including that Kremkov Industries employed 493 people and had monthly payroll of over $3.8 million, Chase Bank approved Torjagbo's loan application and disbursed $9,554,425 in PPP funds to Kremkov Industries. *Id.* Any attempt to shift blame onto the lender and/or the SBA for approving the loan without discovering or otherwise reacting to Torjagbo's fraudulent conduct would be improper and should be prohibited by the Court.

A defendant may not use or purport to use evidence of a victim's negligence or infirmities to defend against charges that he defrauded the victim. Because a scheme to defraud is defined by the conduct of the perpetrator of the fraud, evidence about a victim's shortcomings is not relevant:

> The focus of the language defining a scheme to defraud is on the violator, not the victim… [A] defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty… A perpetrator of fraud is no less guilty of fraud because his victim is also guilty of negligence.

United States. v. Svete, 556 F.3d 1157, 1165 (11th Cir. 2009) (internal citations and quotation marks omitted).

Courts have carried this principle forward in the lending context to hold that a victim's known idiosyncrasies are not relevant, nor are its practices that might have created lax lending standards. *United States v. Powell*, 509 Fed. App'x 958, 967 (11th Cir. 2013) ("whether the lenders negligently created an environment of lax lending standards is irrelevant. Contributory negligence is not a defense to the crime of fraud."). Thus, the Court should exclude evidence regarding lenders' alleged negligence, the breadth of PPP fraud generally, and the respective roles of the lenders and the government in managing and executing the PPP. *See id.* (finding that excluding evidence of mortgage lenders and the government's alleged role in the mortgage fraud crisis was proper).

Furthermore, even when the victim "knew or should have known the statement was false," that does not change the determination. *United States v. Neder*, 197 F.3d 1122, 1128, 1130 (11th Cir. 1999) (even if lender "did not care" about the defendant's misrepresentations, they can be material); *see also United States v. Johnson*, 530 F.2d 52, 54-55 (5th Cir. 1976) (applying the same principle to government agency).[2]

For the foregoing reasons, the government asks the Court to preclude the introduction of evidence or argument of any claimed negligence, mismanagement, or lack of concern on the part of the lender to whom Torjagbo submitted the PPP loan application, or on the part of the SBA.

II. Motion *in limine* to preclude evidence or argument concerning: (a) the penalties and consequences associated with the charged offenses; (b) general good character, and/or specific instances of good conduct; and (c) any matters that could promote jury nullification.

The Constitution provides criminal defendants with the general right to present evidence and call witnesses in their own favor. *See, e.g.*, *United States v. Hurn*, 368 F.3d 1359, 1362 (11th Cir. 2004). But the right to present a defense is not absolute and without limits. *Id.* at 1365–66. Indeed, it "is axiomatic that a

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[2] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent decision of the Fifth Circuit, including Unit A panel decisions of that circuit, handed down prior to October 1, 1981.

defendant's right to present a full defense does not entitle him to place before the jury irrelevant or otherwise inadmissible evidence." *United States v. Anderson*, 872 F.2d 1508, 1519 (11th Cir. 1989). The Constitution only demands that a defendant be permitted to present evidence that is relevant to an element of the charged offense or to an affirmative defense. *Hurn*, 368 F.3d at 1365–66; *United States v. Masferrer*, 514 F.3d 1158, 1161 (11th Cir. 2008) ("[W]here the proffered evidence does not bear a logical relationship to an element of the offense or an affirmative defense . . . a defendant has no right to introduce that evidence.") (quotation marks omitted).

Evidence "is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Fed. R. Evid. 401; *see also* Fed. R. Evid. 402 ("Relevant evidence is admissible," while "[i]rrelevant evidence is not admissible"). And, even when evidence is relevant, courts may exclude that evidence "if its probative value is substantially outweighed by the danger of . . . unfair prejudice, confusion of the issues, or misleading the jury." Fed. R. Evid. 403. Trial courts enjoy "broad discretion to determine the relevance and admissibility of any given piece of evidence." *United States v. Merrill*, 513 F.3d 1293, 1301 (11th Cir. 2008).

a. Penalty Evidence

First, the government requests that Torjagbo be prohibited from attempting to introduce evidence of or arguing about the potential penalties or collateral consequences associated with a conviction for the charged offenses.

It is well-settled that the "question of punishment should never be considered by the jury in any way in deciding the case." *United States v. McDonald*, 935 F.2d 1212, 1222 (11th Cir. 1991); *see also Shannon v. United States*, 512 U.S. 573, 579 (1994) ("a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed'") (citation and footnote omitted); *United States v. Thigpen*, 4 F.3d 1573, 1577 (11th Cir. 1993) (recognizing the "established canon that juries are not to be informed of or concerned with the consequences of their verdicts"). And the Eleventh Circuit's pattern jury instructions reflect this well-settled law. *See* Eleventh Cir. Basic Instr. B10.2 ("You must never consider punishment in any way to decide whether the Defendant is guilty. If you find the Defendant guilty, the punishment is for the Judge alone to decide later.").

This analysis applies equally to the collateral penalties associated with a felony conviction—such as being prohibited from certain types of employment, losing the rights to possess firearms and vote, and removal from the United States. *See, e.g.*, *United States v. Muentes*, 316 F. App'x 921, 926 (11th Cir. 2009) ("A defendant is not entitled to an instruction informing the jury of the consequence of a guilt or innocence finding in terms of punishment"); *Thigpen*, 4 F.3d at 1578 ("We . . . hold that the general rule against informing jurors of the consequences of a verdict governs such cases"); *United States v. Macrina*, No. 1:20-CR-216-SCJ, 2022 WL 4594993, at *1 (N.D. Ga. Sept. 30, 2022) (excluding "all arguments and evidence regarding Defendant's potential penalties and collateral consequences" because those matters are irrelevant to the jury's determination of guilt and innocence).

The rationale for excluding penalty evidence is straightforward—the penalties associated with a conviction are not probative of guilt or innocence. *See, e.g.*, *Shannon*, 512 U.S. at 579. Instead, evidence relating to the punishment and the collateral effects of a conviction serve only to compromise the verdict, confuse the jury, or invoke sympathy for the defendant. *See McDonald*, 935 F.2d at 1222.

The government therefore respectfully requests that the Court preclude Torjagbo from arguing or introducing evidence regarding the potential penalties he faces if convicted, including: (a) the maximum penalties associated with the charged offenses; (b) that he could be sentenced to prison; (c) that he will be prohibited from obtaining certain types of jobs, including in law enforcement and the military; (d) that he will no longer be able to vote or possess a firearm; and (e) that he may lose his pilot license and other credentials or clearances. *See United States v. Rogers*, 422 U.S. 35, 40 (1975); *Thigpen*, 4 F.3d at 1578.

b. Good Character Evidence

Second, the government moves to exclude all evidence of Torjagbo's general good character and evidence of specific instances of good conduct. Under the Federal Rules of Evidence, a defendant may present character evidence via reputation or opinion testimony regarding lawfulness and often regarding truthfulness—and the prosecution is allowed to rebut the same. Fed. R. Evid. 405(a); *United States v. Reed*, 700 F.2d 638, 645 (11th Cir. 1983); *United States v. Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981 (Unit A)) (lawfulness is pertinent trait in all criminal prosecutions).[3] But "[e]vidence of a person's character or character

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent decisions of the Fifth Circuit,

trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." Fed. R. Evid. 404(a)(1). Consequently, when character is not an essential element of the offense, character evidence may only be presented through testimony as to reputation or by testimony in the form of an opinion. Fed. R. Evid. 405(a); *accord United States v. Solomon*, 686 F.2d 863, 874 (11th Cir. 1982).

A defendant therefore may not introduce evidence of possessing a generally good character. *See United States v. Camejo*, 929 F.2d 610, 613 (11th Cir. 1991) (court properly excluded proffered testimony "to portray [defendant as having] a good character"); *cf. Hewitt*, 634 F.2d at 280 (prevailing view is that Rule 404(a) precludes a defendant from offering reputation or opinion testimony regarding his "general good character"); *United States v. Cochran*, 4:14-CR-022-HLM, Doc. 44 at 13 (N.D. Ga. November 17, 2014) (barring the defendant "from presenting evidence of his general good character").

Likewise, a defendant may not offer evidence of specific instances of good conduct or the absence of bad conduct. *United States v. Ellisor*, 522 F.3d 1255, 1270-71 (11th Cir. 2008) ("specific acts of good character were inadmissible under [the] Rules"); *see also United States v. Barry*, 814 F.2d 1400, 1403 (9th Cir. 1987) ("testimony as to the lack of prior bad acts is, in essence, testimony as to multiple instances of good conduct, and its admission would appear to violate a strict reading of Rule 405(a)"); *Government of Virgin Islands v. Grant*, 775 F.2d 508, 512 (3d Cir. 1985) ("testimony that one has never been arrested is especially weak

including Unit A panel decisions of that circuit, handed down prior to October 1, 1981.

character evidence; a clever criminal, after all, may never be caught"); *United States v. Morgan*, 2000 WL 1622748, at *10 (E.D. Pa. Oct. 20, 2000) (excluding evidence of lack of criminal history because: (1) "whether the defendant has broken the law before has virtually no bearing on whether he did so this time," (2) "such evidence may mislead the jury," and (3) the evidence may improperly cause the jury to be "overly sympathetic").

Likewise, "[e]vidence of good conduct is not admissible to negate criminal intent." *Camejo*, 929 F.2d at 613 (holding that defendant's refusal to work in one narcotics business was irrelevant and inadmissible prior "good act" when defendant charged with drug trafficking) (citing *Michelson v. United States*, 335 U.S. 469, 477 (1948)). The Eleventh Circuit has consistently affirmed the exclusion of defendants' prior good conduct evidence when offered to support a defense of lack of criminal intent. *See United States v. Ellisor*, 522 F.3d 1255, 1270 (11th Cir. 2008) (concluding that purported legitimate business activities were inadmissible in a fraud case); *United States v. Russell*, 703 F.2d 1243, 1249 (11th Cir. 1983) ("Evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant.") (citation omitted); *see also United States v. Marley*, 621 F. App'x 936, 941 (11th Cir. 2015) (defendant's attempt to justify his firm's fraudulent invoices by asserting that he had performed unbilled work was inadmissible to negate his fraudulent intent); *United States v. Ly*, 543 F. App'x 944, 946 (11th Cir. 2013) (evidence that doctor properly treated certain patients inadmissible to demonstrate his state of mind in improperly dispensing controlled substances).

Based on these well-settled principles, Torjagbo should not be permitted to introduce evidence that he possesses a generally "good character"—such as his being family-oriented, religious, an active community participant, or an otherwise moral and ethical person. *See United States v. Bernard*, 299 F.3d 467, 476 (5th Cir. 2002) (approving court's sentencing instruction that jurors should not "consider the religious views of the defendants"); *United States v. Santana-Camacho*, 931 F.2d 966, 967-68 (1st Cir. 1991) (excluding evidence that defendant was a good family man and a kind man because it was not a trait relevant to the offense); *United States v. Nazzaro*, 889 F.2d 1158, 1168 (1st Cir. 1989) (concluding that evidence of "bravery, attention to duty, perhaps community spirit were hardly 'pertinent' to the [charged] crimes"); *United States v. Morison*, 622 F. Supp. 1009, 1010–11 (D. Md. 1985) (holding that "patriotism" not relevant trait to charge).

Similarly, Torjagbo should not be permitted to put on evidence of specific acts of good conduct, including (a) caring for or providing financial support to his family members; (b) participating in religious services; (c) any charitable work or community service; (d) specific instances of honesty; (e) of the lack of prior bad acts; or (f) of any other specific instances of "good" conduct. *See, e.g.*, *Ellisor*, 522 F.3d at 1270; s*ee also Camejo*, 929 F.2d at 613 ("[P]roffered testimony was merely an attempt to portray [the defendant] as a good character through the use of prior 'good acts.'"); *United States v. McMahan*, 394 F. App'x 453, 463 (10th Cir. 2010) ("[T]he district court correctly determined that although [defendant] was entitled to present character evidence, he could not do so by offering evidence of specific instances of his conduct"); *United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir.

1990) ("[D]efendant may not seek to establish his innocence, however, through proof of the absence of criminal acts on specific occasions."); *United States v. Washington*, 106 F.3d 983, 999-1000 (D.C. Cir. 1997) (affirming exclusion of defendant police officer's commendations because they were neither "pertinent" nor probative of an essential element).

c. Jury Nullification

Third, the government moves to preclude Torjagbo from attempting to introduce evidence or make arguments designed to induce jury nullification.[4]

Federal courts have uniformly excluded evidence and arguments that encourage jury nullification. *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) (defendant's "jury nullification argument would have encouraged the jurors to ignore the court's instruction and apply the law at their caprice. While we recognize that a jury may render a verdict at odds with the evidence or the law, neither the court nor counsel should encourage jurors to violate their oath."); *see also United States v. Muentes*, 316 F. App'x 921, 926 (11th Cir. 2009) ("defense counsel may not raise arguments that would encourage jury nullification"); *United States v. Hall*, 188 F. App'x 922, 925 (11th Cir. 2006) ("[A] criminal defendant is not entitled to either an instruction or an argument for jury nullification").

[4] Jury nullification is defined as a "jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." BLACK'S LAW DICTIONARY, 2508 (10th ed. 2014).

The Eleventh Circuit has explained:

> A jury has not more 'right' to find a 'guilty' defendant 'not guilty' than it has to find a 'not guilty' defendant 'guilty,' and the fact that the former cannot be corrected by a court, while the latter can be, does not create a right out of the power to misapply the law. Such verdicts are lawless, a denial of due process and constitute an exercise of erroneously seized power.

United States v. Funches, 135 F.3d 1405, 1409 (11th Cir. 1998) (quoting *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983)); *see* Eleventh Cir. Pattern Jury Instr. (Criminal), Basic Instruction No. B2.1 ("You must follow the law as I explain it – even if you do not agree with the law").

A defendant "may [also] not argue jury nullification during closing argument." *Trujillo*, 714 F.2d at 106; *Muentes*, 316 F. App'x at 926; *Hall*, 188 F. App'x at 925.

Accordingly, the Court should preclude Torjagbo from attempting to introduce evidence or making arguments designed to encourage jury nullification. By way of example, the government moves to preclude evidence or arguments related to: (1) Torjagbo's financial status or to any financial hardship; (2) his mental health or medical conditions; (3) his familial obligations, such as care for an ailing parent; (4) his immigration and naturalization status, including his reasons for immigrating to the United States; (5) allegations that the statutes at issue have been unfairly or unjustly applied in this case; and (6) suggestions that charges were brought based on improper factors, such as race or ethnicity. *See Funches*, 135 F.3d at 1409 (no error when court denies admission of evidence that would support nullification, "even if the evidence might have encouraged the jury to disregard the law and to acquit the defendant"); *United States v. Moss*, 297 Fed. App'x. 839, 841, (11th Cir. 2008) (defendant's testimony about motive properly excluded where it was intended to promote jury nullification). Such evidence is not relevant to the issues at trial, could promote jury nullification, and should be excluded.

III. Motion *in limine* to preclude Torjagbo from admitting undisclosed evidence subject to reciprocal discovery.

Pursuant to Federal Rule of Criminal Procedure 16(b), the Court may exclude any undisclosed evidence that a defendant has not produced in response to a demand for reciprocal discovery pursuant to Federal Rule of Criminal Procedure 16(b)(1). *See, e.g.*, *United States v. Petrie*, 302 F.3d 1280, 1288-89 (11th Cir. 2002) (affirming district court's exclusion of defense evidence not produced to the government as reciprocal discovery pursuant to Rule 16(b)); *United States v. Prather*, 205 F.3d 1265, 1271-72 (11th Cir. 2000) (same).

Here, the government has requested that Torjagbo provide reciprocal discovery pursuant to Rule 16(b).[5] To the extent that the defendant does not respond to the government's request, the Court should exclude any undisclosed evidence subject to Rule 16(b)(1).

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[5] The government also previously served a subpoena on Kremkov Industries, LLC, but did not receive any records in response. The time has passed for responsive records to be provided to the government, and the government further requests that Torjagbo be precluded from admitting any documents that were responsive to the subpoena but were not provided to the government.

IV. Motion *in Limine* to preclude impeachment through investigative reports.

The government moves to preclude Torjagbo from cross-examining or seeking to impeach a witness with an investigative report that the witness has not signed or otherwise adopted.

Under the Federal Rules of Evidence, a witness may only be cross-examined and, where appropriate, impeached with his or her own prior statements. *See* Fed. R. Evid. 613. Indeed, the Supreme Court has long recognized that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations." *Palermo v. United States*, 360 U.S. 343, 350 (1959). After all, in preparing investigative summaries, law enforcement officers necessarily exercise discretion in drafting reports. *See United States v. Brika*, 416 F.3d 514, 529 (6th Cir. 2005) (recognizing that FBI 302s "have been deemed inadmissible for impeaching witnesses on cross-examination"), *abrogated on other grounds*, *United States v. Booker*, 543 U.S. 222 (2005); *United States v. Almonte*, 956 F.2d 27, 29 (2d Cir. 1992) ("The problem, in essence, is one of relevancy. If a third party's notes reflect only that note-taker's summary characterization of a witness's prior statement, then the notes are irrelevant as an impeaching prior inconsistent statement, and thus inadmissible.").

Investigative reports are thus not the "statements" of the interviewed individuals.[6] *See Jordan*, 316 F.3d at 1252 ("[FBI 302s] are not Jencks Act

[6] Consequently, investigative reports are also not discoverable under the Jencks Act, although the Government has already and will continue to produce such reports to Torjagbo. *See United States v. Jordan*, 316 F.3d 1215, 1255 (11th Cir.

statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness."). And courts have routinely held that these types of law enforcement reports cannot be used to cross examine or impeach interviewed parties if they are called as witnesses. *See, e.g.*, *United States v. Saget*, 991 F.2d 702, 710 (11th Cir. 1993) ("[A] witness may not be impeached with a third party's characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own."); *Almonte*, 956 F.2d at 29 (same).

Accordingly, the government moves to preclude Torjagbo: (a) from cross-examining or seeking to impeach witnesses with non-verbatim reports that have not been signed or adopted by the witness; and (b) from quoting, publishing, or suggesting to the jury that the contents of an investigative report is a statement of the witness.

2003); *United States v. Price*, 542 F.3d 617, 621 (8th Cir. 2008) (holding that, absent evidence of adoption, FBI 302s "are not discoverable under ... the Jencks Act"); *United States v. Donato*, 99 F.3d 426, 433 (D.C. Cir. 1996) ("[T]he agent's notes and 302 report ... are not covered by the Jencks Act."); *United States v. Roseboro*, 87 F.3d 642, 646 (4th Cir. 1996) (affirming ruling that "FBI 302 Report was not a Jencks Act statement"); *United States v. Williams*, 998 F.2d 258, 269 (5th Cir. 1993) ("We hold that the FBI Forms 302 were not discoverable statements under the Jencks Act."); *United States v. Morris*, 957 F.2d 1391, 1402 (7th Cir. 1992) (holding that FBI reports "are not statements producible under the Jencks Act because they were neither signed nor adopted ... and further because they are not a verbatim recital ... but rather only an agent's summary."); *United States v. Foley*, 871 F.2d 235, 239 (1st Cir. 1989) ("302s are not substantially verbatim recitals ... and recorded contemporaneously.").

V. Motion requesting that discovery related issues be addressed outside the presence of the jury.

To the extent that any discovery-related issues arise at trial, the government requests that those matters be addressed outside the presence of the jury. Discovery-related comments are irrelevant to the jury's function and may create the impression that one party has suppressed information to seek an unfair tactical advantage at trial. *See, e.g., United States v. Dochee*, 08-CR-108–4, 2009 WL 102986, *1 (N.D. Ill. Jan. 15, 2009) (excluding comments on discovery because "commentary on discovery matters by either party in the presence of the jury could create the impression that the opposing party is withholding information"); *United States v. Gray*, 2:07-CR-166, 2010 WL 1258169, *3 (N.D. Ind. Mar. 26, 2010) (granting "motion to preclude requests of discovery from witnesses or opposing counsel, moving the court for such discovery or otherwise commenting on discovery matters in the presence of the jury. Any necessary requests for or comments about discovery can be made outside of the jury's presence"). Moreover, doing so minimizes any potential prejudice to either party.

CONCLUSION

For the foregoing reasons, the government respectfully requests the Court to grant its consolidated motions *in limine*.

Respectfully submitted,

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