

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

ATLANTA DIVISION

|                          |   |                       |
|--------------------------|---|-----------------------|
| UNITED STATES OF AMERICA | ) | CRIMINAL ACTION       |
|                          | ) | 1:22-CR-00171-MJB-RDC |
| V.                       | ) |                       |
|                          | ) |                       |
| CARL TORJAGBO            | ) |                       |

**RESPONSE TO THE GOVERNMENT’S MOTION IN LIMINE**

COMES NOW, the Defendant, CARL TORJAGBO, by and through undersigned counsel, and hereby files this response to the government’s consolidated motions in limine filed on January 28, 2025 (Doc. 160):

**I. The government’s request to shield the jury from evidence of the Paycheck Protection Program Lender’s or Small Business Administration’s conduct.**

The government moves to prohibit the defense from introducing any evidence or argument of any claimed negligence, mismanagement or lack of concern on the part of the lender or the United States Small Business Administration (SBA). (Doc. 160 at 2-3). It argues that attempts to shift the blame to the lender or the SBA would be improper and should be prohibited. (*Id.* at 3).

Mr. Torjagbo is aware that an alleged victim’s negligence is not a defense to criminal conduct. *See United States v. Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980). Mr. Torjagbo, however, has the Constitutional right to “a meaningful opportunity to

present a complete defense.” *United States v. Nunez*, 1 F.4th 976, 991 (11th Cir. 2021).

The government has charged Mr. Torjagbo with allegedly submitting to Chase Bank a fraudulent PPP loan application. (Doc. 110 ¶ 7). The bank’s and SBA’s conduct in relation to the PPP loan application submitted is therefore relevant and intrinsic to the government’s bank fraud charge. This evidence is relevant to provide the jury with a complete story of what occurred here, and the exclusion of such evidence may color the jury’s assessment of the material facts of the case. *See United States v. Hurn*, 368 F.3d 1359, 1367 (11th Cir. 2004) (explaining that the government’s selective presentation of truthful evidence can be unfairly prejudicial to a defendant and in these situations, “the defendant has the right to introduce additional evidence to dispel this unjustified taint, even if that evidence does not directly or indirectly bear on a particular element of an offense.”).

While the defense does not intend to argue at trial that Chase Bank or the SBA were allegedly at fault, the jury deserves to be presented with the manner in which the loan was applied for, including the representations in the loan application. The jury is entitled to context. It should therefore be allowed to consider all the circumstances relating to the government’s charges, the PPP loan, and the process through which it was issued and approved by Chase Bank and the SBA. The jury is entitled to draw their own conclusions from this evidence. Should

the government believe that Mr. Torjagbo is shifting fault to Chase Bank or the SBA for issuing the loan, the government must object to specific evidence during trial. A broad pretrial ruling is not warranted.

**II. The government's request to exclude certain evidence related to penalties, character evidence, and alleged "jury nullification."**

**a. Penalty evidence**

The government asks the Court to preclude the defense from introducing evidence relating to the potential penalties and collateral consequences Mr. Torjagbo may face if convicted. (Doc. 160 at 4-5). Mr. Torjagbo is aware of the law disallowing the introduction of penalty evidence and the collateral consequences of a conviction and has no intention to introduce such evidence or argument at trial.

**b. Character evidence**

The government seeks to preclude Mr. Torjagbo from introducing evidence that he possessed "good character." (*Id.* at 9). The defense has not yet determined whether it will introduce any evidence of other conduct by Mr. Torjagbo at trial, but Mr. Torjagbo retains the right to introduce evidence of his pertinent character traits under Federal Rule of Evidence 404(a)(2)(A). *See United States v. Hough*, 803 F.3d 1181, 1191 (11th Cir. 2015) ("Evidence of a criminal defendant's 'pertinent' character trait—such as honesty and truthfulness in a fraud case—is admissible.")(citing FRE 404(a)(2)(A)); *see also United States v. Hewitt*, 634 F.2d 277,

280 (5th Cir. 1981) (“A general trait of character, such as lawfulness, is no less pertinent for being general.”)<sup>1</sup>

The government notes the general proposition under Rule 404(a)(1) that “[e]vidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.” However, subsection 404(a)(2)(A) provides for certain exceptions in a criminal case. Most notably for this case, it states, “A defendant may offer evidence of the defendant’s pertinent [character] trait.” FRE 404(a)(2)(A). Mr. Torjagbo understands that Rule 405(a) provides that evidence may be presented in the form of testimony about his reputation or testimony in the form of an opinion. FRE 405(a). Furthermore, he also understands that Rule 405(b) allows the introduction of a person’s character or trait by specific instances of a person’s conduct when his character or character trait is an essential element of a charge, claim, or defense.

### **c. Jury nullification**

Under the guise of preventing Mr. Torjagbo from presenting arguments related to jury nullification, the government argues that Mr. Torjagbo should not be allowed to present evidence of his immigration and naturalization status,

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<sup>1</sup> Decisions of the Fifth Circuit issued prior to the close of business on September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981).

including his reasons for immigrating to the United States. (Doc. 160 at 11). This broad category of evidence does not constitute or encourage jury nullification. Indeed, this evidence—i.e., that Mr. Torjagbo legally came to the United States from Ghana on a student visa, and he continued to work in the United States after college, and he eventually became a citizen—is relevant to present the jury with important context regarding the facts of the case and would dispel any unfair prejudice that Mr. Torjagbo may incur based on assumptions that he is not a United States citizen based on his name, accent, or physical appearance. This evidence is also relevant to showing Mr. Torjagbo’s eligibility to apply for a PPP loan and his obligation to submit tax returns to the IRS. The government’s request to exclude this relevant evidence and related argument should be denied.

The government also argues that Mr. Torjagbo should not be allowed to preclude evidence regarding his financial status. The indictment charges Mr. Torjagbo with financial crimes — bank fraud, wire fraud, and money laundering. Under these circumstances, presentation of evidence regarding Mr. Torjagbo’s financial status does not encourage jury nullification, and the government’s request to preclude such evidence should be denied.

These two categories of evidence are admissible because they are relevant and would not be offered for jury nullification purposes. The heart of the issue raised in the government’s motion is not whether the evidence could cause jury

nullification, but whether the evidence is relevant. A case which the government cites, *United States v. Funches*, 135 F.3d 1405 (11th Cir. 1998), is helpful to demonstrate this point. The defendant in *Funches* argued that “he had a due process right to present evidence the only relevance of which is to inspire a jury to exercise its power of nullification.” *Id.* at 1408. The court held that it is not reversible error “when evidence, *otherwise inadmissible under Rule 402 of the Federal Rule of Evidence*, is excluded, even if the evidence might have encouraged the jury to disregard the law and to acquit the defendant.” *Id.* at 1409 (emphasis added). In other words, relevant evidence is admissible—even if there is a risk of jury nullification—so long as it has other relevant purposes. If evidence only goes to jury nullification, then it becomes inadmissible. Thus, even the other categories the government seeks to preclude, such as familial obligations or medical conditions, would still be admissible so long as they are not solely offered for the purposes of jury nullification.

### **III. The defense is aware of and will oblige by its Rule 16 obligations.**

The government asks the Court to exclude any evidence which the defense does not provide in reciprocal discovery pursuant to Federal Rule of Criminal Procedure 16. (Doc. 160 at 12). Local Criminal Rule 16.1 provides that “[u]nless otherwise ordered by the Court, the defendant shall be required make

discoverable materials requested by government available for inspection and copying no later than twenty-one (21) days prior to trial.” N.D. Ga. L. Cr. R. 16.1.

#### **IV. The defense is aware of the rules of impeachment.**

The government asks the Court to preclude the defense from “(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.” (Doc. 160 at 14). The right to impeach witnesses through cross-examination emanates from the Confrontation Clause. *United States v. Carter*, 776 F.3d 1309, 1328 (11th Cir. 2015). The right to confrontation is satisfied when “the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witness and enables defense counsel to establish a record from which he properly can argue why the witness is less than reliable.” *Id.*

Federal Rule of Evidence 613 allows for cross examining a witness regarding a prior inconsistent statement. Following an amendment effective December 1, 2024, Rule 613(b) states, “Unless the court orders otherwise, extrinsic evidence of a witness’s prior inconsistent statements may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it.” The advisory committee notes explain that “[r]ule 613(b) has been amended to require that a

witness receive an opportunity to explain or deny a prior inconsistent statement *before* the introduction of extrinsic evidence of the statement.” FRE 613, Advisory Committee Notes, 2024 Amendments (emphasis in original). Thus, the foundation for impeaching the witness regarding the prior statement requires that the witness be presented with the statement while testifying. The defense is permitted to cross-examine the witnesses on whether they made certain statements that are noted in an investigative report. Afterward, the defense is permitted to examine case agents who authored those reports about the circumstances of any interviews with the witnesses and any inconsistencies between their reports and any testimony elicited at the trial.

The Eleventh Circuit has explained:

The law is clear that if a witness has denied making a statement *or has failed to remember it*, the making of the statement may be proved by another witness. *Williamson v. United States*, 310 F.2d 192, 199 (9th Cir. 1962) (“The answer of a witness that he does not remember having made a prior statement is as adequate for impeachment as a flat denial.”)

*United States v. Billue*, 994 F.2d 1562, 1565-66 (11th Cir. 1993) (emphasis in original) (citations omitted). In *Billue*, the defendant was charged with possessing a firearm as a convicted felon. *Id.* at 1563. The gun at issue was one that had been sold to a pawn shop in Billue’s name. *Id.* at 1563-64. At trial, the government called the pawn shop owner as a witness. *Id.* at 1565. The pawn shop owner testified that he could not recall whether a third person was involved in the sale. *Id.* The

government sought to impeach his statement by asking him if he previously told an ATF agent that Billue was alone when Billue sold the firearm to the pawn shop. *Id.* The pawn shop owner testified that he could not remember what he told the agent. *Id.* The trial court allowed the government to call the agent to testify that the pawn shop owner had told him Billue was the person who had sold the firearm to the pawn shop, that Billue was alone when he did so, and that the pawn shop owner did not say anything about a third person. *Id.* The Eleventh Circuit held that the trial court properly admitted impeachment evidence from the agent to contradict the pawn shop owner's testimony that he could not recall what he had said to the agent. *Id.* at 1566.

Less than two months before *Billue*, the Eleventh Circuit held in *United States v. Saget*, 991 F.2d 702, 710 (11th Cir. 1993), that "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."<sup>2</sup> *Id.* at 710. During the trial, defense counsel attempted to impeach a witness with prior inconsistent statements he had made to FBI agents. In doing so, defense counsel read directly from an agent's summary and asked if

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<sup>2</sup> Not all federal circuits require that the witness adopt the investigative report or summary before it may be used for impeachment. *See United States v. Diaz-Colon*, 640 F.Supp.3d 219, 222 (D. Puerto Rico 2022) (noting that the First Circuit has rejected the requirement of adoption by a witness-declarant and citing *United States v. Catalan-Roman*, 585 F.3d 453, 463 (1st Cir. 2009)).

the statement reflected what the witness told the agent. *Id.* The Eleventh Circuit said that, in effect, the attorney was introducing extrinsic evidence to the jury of the witness' prior inconsistent statement via the FBI agent's summary. *Id.* The district court sustained an objection to the use of the summary prepared by the agent without the witness having adopted the statements as his own. *Id.*

While holding that the district court had properly sustained the objection, the Eleventh Circuit noted that the "the district court merely disapproved of the method [of impeachment] employed by defense counsel and held him to the procedural requirements of establishing the proper foundation." *Id.* The Eleventh Court observed that defense counsel was not prevented from impeaching the witness, as later in the trial he "was able to effectively impeach [the witness's] testimony by questioning the FBI agent about inconsistencies between [the witness's] testimony at trial and prior oral statements he made to the agent, which were contained in the summary." *Id.* Moreover, the defendant was given an opportunity to recall the witness to cross-examine him about the inconsistencies between his testimony and prior statements, although he declined to do so. *Id.* at 710-711.

Mr. Torjagbo asks that he be allowed to inquire of the trial witnesses whether they have been interviewed by law enforcement and to ask the witnesses about the substance of any statements given. *See, e.g., United States v. Cochran*, No.

4:14-CR-22-01-HLM, 2014 WL 12695800, \*5 (N.D. Ga. Nov. 17, 2014). If the witness's statement is inconsistent with the investigative report, Mr. Torjagbo asks that he be allowed to call the agent who conducted the interview as a witness and inquire about the statement, including the manner in which it was taken and any inconsistencies with the witness's prior statement. *See id.* Mr. Torjagbo also submits that he should be allowed to introduce the content of the investigative report or FBI-302 if, during the testimony of the witness-declarant, a foundation is established that the witness-declarant adopted the substance of the report or 302.<sup>3</sup>

### CONCLUSION

WHEREFORE, Mr. Torjagbo asks the Court to rule on the government's motion in limine consistent with the objections noted above.

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<sup>3</sup> The government asserts in footnote 6 of its motion in limine that investigative reports are not discoverable under the *Jencks* Act. However, an investigative report or FBI-302 may constitute *Jencks* material for a testifying law enforcement officer who authored the report. *United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003).

Dated: This 11th day of February, 2025.

Respectfully Submitted,

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