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

UNITED STATES OF AMERICA *v.* TELDRIN FOSTER, JOHN GAINES A/K/A MARTY GAINES, JERRY BAPTISTE, AND CARLA JACKSON	Criminal Action No. No. 1:20-cr-296-20-JPB

United States' Consolidated Motions *in Limine*

The United States of America, by Ryan K. Buchanan, United States Attorney for the Northern District of Georgia, and Tal C. Chaiken and Samir Kaushal, Assistant United States Attorneys, and by Glenn S. Leon, Chief of the Fraud Section, and Siji Moore, Trial Attorney, respectfully files its Consolidated Motions *in Limine*.

Background

Defendants Teldrin Foster, John Gaines, Jerry Baptiste, and Carla Jackson are charged in a Second Superseding Indictment returned on August 10, 2021. (Doc. 290.) Foster, Gaines, and Baptiste are each charged with conspiracy to commit bank fraud and/or wire fraud (18 U.S.C. § 1349), bank fraud (18 U.S.C. § 1344 and § 2), wire fraud (18 U.S.C. § 1343 and § 2), false statements to a federally insured financial institution (18 U.S.C. § 1014 and § 2), and money laundering (18 U.S.C. § 1956 and § 2). Jackson is charged with money laundering (18 U.S.C. § 1956 and § 2). (Doc. 290.) All charges arose out of a scheme orchestrated by Darrell Thomas to obtain fraudulent Paycheck Protection Program ("PPP") loans.

1. Motion *in Limine* to Preclude Defendants' Admission of their Own Self-Serving Statements.

At trial, the United States will seek to introduce portions of statements made by some of the Defendants – Foster, Gaines, and Jackson[1] – to law enforcement. *See* Fed. R. Evid. 801(d)(2)(A) (statements made by a party and offered against that party are "not hearsay"). These Defendants, however, may not introduce their own statements at trial.

Where a defendant seeks to introduce his or her own prior statements, those statements are not "offered against an opposing party" and therefore do not qualify as non-hearsay under Rule 801(d)(2). Fed. R. Evid. 801(d)(2); *United States v. Willis*, 759 F.2d 1486, 1501 (11th Cir. 1985) (affirming the district court's ruling that the defendant could not elicit, through cross-examination of a government witness, his own exculpatory statements because placing a defendant's remarks before the jury without subjecting the defendant to cross-examination is "precisely what is forbidden by the hearsay rule"); *United States v. Santos*, 947 F.3d 711, 729 (11th Cir. 2020) (affirming district court's admission of inculpatory portions of the defendant's statements and exclusion of exculpatory portions of the defendant's

[1] Baptiste did not make any statements to law enforcement.

statements). The Court should therefore preclude Defendants from introducing their own statements at trial.[2]

2. Motion *in Limine* to Exclude Bern Benoit's Hearsay Statements.

Defendant Baptiste is charged in connection with a fraudulent PPP loan obtained by Transportation Management Services Inc. ("Transportation Management"). On July 28, 2020, in response to a grand jury subpoena directed to Transportation Management, Bern Benoit – Transportation Management's owner – provided the United States with Transportation Management's response. As part of its response, Transportation Management produced text messages between Benoit and Baptiste, with annotations by Benoit regarding the text messages. An example of these annotations is attached as Ex. A.

The Court should preclude Baptiste from introducing Benoit's annotations for the truth of the matter asserted because those annotations are hearsay that does not fall within any exception. Fed. R. Evid. 801(c); Fed. R. Evid. 802.

3. Motion *in Limine* to Exclude Victim-Blaming.

The United States anticipates that Defendants may seek to blame the victims of their fraudulent scheme by arguing that the lenders and/or the Small Business Administration were too gullible or negligent in approving the PPP loans at issue or should have detected the fraud before approving the loan applications. The Court should preclude such evidence or arguments.

[2] When a portion of a recorded statement is admitted, the rule of completeness "'does not automatically make the entire document admissible.'" *Santos*, 947 F.3d at 730 (citation omitted); *see also United States v. Umbach*, 708 F. App'x 533, 548–49 (11th Cir. 2017) (rejecting the defendant's "all-or-nothing proposition" because an entire recording does not automatically become admissible when a portion is admitted).

"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); *see also United States v. Teers*, 591 F. App'x 824, 844 (11th Cir. 2014) ("[T]he negligence of the victim in failing to discover a fraudulent scheme cannot be a defense to wire or bank fraud . . . "). Thus, the Eleventh Circuit has regularly precluded the introduction of evidence or argument by defendants that relate to the victim's fault in not detecting the fraudulent scheme. *See, e.g., United States v. Roopnarine*, 718 F. App'x 797, 808 (11th Cir. 2017) (holding that the district court "properly limited defense counsel's cross-examination when defense counsel attempted to imply that the negligence of the financial institutions [that approved fraudulent loan applications] in some way negated her client's intent or culpability"); *United States v. Powell*, 509 F. App'x 958, 967 (11th Cir. 2013) (affirming district court's order on motion *in limine* precluding the defendant from presenting a defense theory that the victim mortgage lenders were negligent or complicit in the fraud); *United States v. Mendez*, 737 F. App'x 935, 942-43 (11th Cir. 2018) (affirming district court's order precluding the defendants from "advancing only an irrelevant defense" regarding the victims' intentionally risky lending practices and negligence).

This binding precedent is dispositive here. Defendants are on trial, not the victims. Any evidence or argument suggesting that the victims were negligent in approving the PPP loans at issue would be irrelevant because it could not provide any defense to the charged schemes. Thus, the Court should preclude Defendants from eliciting evidence or arguing that the lenders should not have approved the loans or should have detected the fraudulent schemes and any other evidence or argument that blames the victims.

4. Motion *in Limine* to Prohibit Penalty Evidence or Argument.

Because the penalties a criminal defendant faces are not relevant to the jury's determination of guilt, the Court should bar Defendants from offering arguments or evidence regarding potential punishment. *See Shannon v. United States*, 512 U.S. 573, 579 (1994) ("It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.'") (citation 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"). Indeed, the Eleventh Circuit's Pattern Jury Instructions caution the jury that it "must never consider punishment in any way to decide whether a Defendant is guilty." Eleventh Cir. Basic Instr. B10.2 (2022).

As the Supreme Court explained, juries should not consider penalty evidence because the penalties associated with a conviction are not probative of guilt or innocence:

> The principle that juries are not to consider the consequences of their verdicts is a reflection of the basic division of labor in our legal system between judge and jury. The jury's function is to find the facts and to decide whether, on those facts, the defendant is guilty of the crime charged. The judge, by contrast, imposes sentence on the defendant after the jury has arrived at a guilty verdict. *Information regarding the consequences of a verdict is therefore irrelevant to the jury's task*. Moreover, providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion.

Shannon, 512 U.S. at 579 (emphasis supplied); *See also 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).

For that reason, the Court should bar Defendants from introducing evidence or argument regarding the potential penalties they face upon conviction, including: (a) the maximum or mandatory minimum penalties associated with the charged offenses; (b) that, if convicted, Defendants could be sentenced to prison; and (c) that parole has been abolished in the federal criminal justice system.

5. Motion *in Limine* to Preclude Evidence or Argument Regarding Charging Decisions.

The United States anticipates that one or more Defendant may seek to argue that others who were involved in Darrell Thomas's scheme, or others who applied for fraudulent PPP loans, were not charged.

"The Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws." *United States v. Cespedes*, 151 F.3d 1329, 1332 (11th Cir. 1998) (internal quotation marks and citation omitted). As a general matter, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). Claims based on the non-prosecution of other individuals are "not a defense on the merits to the criminal charge itself." *See United States v. Armstrong*, 517 U.S. 456, 463 (1996) (analyzing selective prosecution challenge). Because selective prosecution "has no bearing on the determination of factual guilt," it is "an issue for the court to decide, not an issue for the jury." *United States v. Jones*, 52 F.3d 924, 927 (11th Cir. 1995); *cf. United States v. Hill*, 643 F.3d 807, 862-64 (11th Cir. 2011) (on a challenge to the sufficiency of the evidence, explaining that the government's decision not to charge another alleged participant in a fraudulent scheme "does not matter for purposes" of assessing the defendant's guilt).

At trial, the jury will be required to determine whether the United States has proven beyond a reasonable doubt that Defendants committed each of the offenses charged in the indictment. The question of whether some other individuals could also be charged with offenses related to the same or other conduct has no bearing on Defendants' guilt or the factual determinations the jury will be asked to make.

6. Motion in *Limine* to Preclude Evidence or Argument Regarding Fourth Amendment Issues.

The United States anticipates that Baptiste and Foster may seek to introduce evidence or arguments related to their previously filed motions to suppress evidence. The United States moves to preclude such evidence or argument as it is irrelevant to the jury's factual determinations of guilt.

It is a "well-established rule that it is for the court, not the jury, to decide whether evidence has been illegally obtained." *Bretti v. Wainwright*, 439 F.2d 1042, 1047 (5th Cir. 1971).[3] Thus, a district court may properly prohibit cross-examination of witnesses and argument to the jury regarding the legality of a search warrant and evidence obtained as a result of its execution. *Burris v. United*

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[3] Decisions of the Fifth Circuit pre-dating September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

States, 192 F.2d 253, 254 (5th Cir. 1951) ("The issues arising upon a motion to quash and suppress are not properly for determination by the jury, but rest within the province of the trial judge."). The Eleventh Circuit has held, for example, that a district court properly limited a defendant's right to cross-examine law enforcement officers regarding their authority to enter a hotel, which was "an issue of law that the district court had already decided against" the defendant. *United States v. Mastin*, 972 F.3d 1230, 1240 (11th Cir. 2020).

Here, Baptiste previously moved to suppress email evidence obtained pursuant to a search warrant (Doc. 439), and Foster moved to suppress cell site data obtained pursuant to a search warrant (Doc. 493) and statements he gave during a voluntary interview with agents (Doc. 494). The Honorable Catherine M. Salinas recommended that the motions to suppress email evidence and cell site data be denied. (Doc. 557; Doc. 639.) Judge Salinas deferred Foster's motion to suppress statements to the District Court. (Doc. 498.) This Court has not yet issued its Orders as to these motions. However, to the extent the Court denies any of these motions to suppress, it should preclude Baptiste and Foster from eliciting evidence or argument relating to the legality of the searches and of Foster's statements.

7. Motion *in Limine* to Exclude Evidence or Argument Regarding Defendants' Ignorance of the Law.

"The general rule that ignorance of law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek v. United States*, 498 U.S. 192, 199 (1991); *see also McFadden v. United States*, 576 U.S. 186, 192 (2015) ("[I]gnorance of the law is typically no defense to criminal prosecution."); *United States v. Johnson*, 981 F.3d 1171, 1189 (11th Cir. 2020) (recognizing that "a mistake of law . . . is not a defense"). Accordingly, any evidence or argument about Defendants' potential ignorance of the statutes Defendants are charged with violating is irrelevant and inadmissible.

8. Motion *in Limine* to Exclude Evidence of Defendants' Generally Good Character and Specific Instances of Good Conduct.

A defendant may not introduce evidence of possessing a generally good character. *See, e.g., United States v. Camejo*, 929 F.2d 610, 613 (11th Cir. 1991) (court properly excluded testimony that "attempt[ed] to portray [the defendant as having] a good character"); *United States v. Cochran*, 4:14-CR-022-HLM, 2014 WL 12695800, at *3 (N.D. Ga. November 17, 2014) (barring the defendant "from presenting evidence of his general good character"); *see also* Fed. R. Evid 404(a)(2) (in a criminal case, "a defendant may offer evidence of the defendant's *pertinent* trait") (emphasis supplied).[4] Thus, Defendants should not be permitted to introduce evidence that they possess a generally "good" character – *e.g.* that they are family-oriented, religious, active community participants, or otherwise moral and ethical people. *See, e.g., 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).

Likewise, it is well-established that "[e]vidence of good conduct is not admissible to negate criminal intent." *Camejo*, 929 F.2d at 612–13 (citation omitted) (in drug trafficking prosecution, holding that the defendant's refusal to

[4] Under the Federal Rules of Evidence, in some circumstances 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. *See* Fed. R. Evid. 404(a)(2)(A); Fed. R. Evid. 405(a).

work in another narcotics business was irrelevant and inadmissible prior "good act"). Thus, the Eleventh Circuit has consistently found proper the exclusion of defendants' prior good conduct evidence when offered to support a defense of lack of criminal intent. *See, e.g., United States v. Ellisor*, 522 F.3d 1255, 1270–71 (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); *United States v. Ly*, 543 F. App'x 944, 946 (11th Cir. 2013) (evidence that doctor discharged patients who violated his screening protocols was not probative of his intent to dispense controlled substances to patients covered by the indictment); *see also* Fed. R. Evid. 404(b)(1) (evidence of other acts "is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character").

So too, here. Defendants should not be permitted introduce evidence of specific acts of good conduct, including (a) lack of prior bad acts, including acts involving drugs or contraband; (b) care of family members; (c) acts of honesty; (d) participation in religious, charitable, or community services; and (e) any other specific instances of "good" conduct.

9. Motion *in Limine* to Preclude Evidence and Argument Designed to Elicit Jury Nullification.

The Eleventh Circuit has held that "defense counsel may not argue jury nullification during closing argument." *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983) (explaining that the 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").

Accordingly, the Court should bar Defendants from attempting to introduce evidence or to make arguments designed to encourage jury nullification. By way of example, Defendants should not be permitted to introduce evidence or arguments related to (1) the statutes at issue being unfair or applied unfairly in this case; (2) the consequences a conviction may have upon Defendants and/or their families; or (3) sympathy. *See United States v. Funches*, 135 F.3d 1408, 1409 (11th Cir. 1998) (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"). Such evidence is not relevant to the issues at trial, could promote jury nullification, and should be excluded.

10. Motion *in Limine* to Admit Self-Authenticating Evidence Subject to a Determination of Relevance.

The United States intends to offer at trial exhibits that are certified copies of regularly conducted activities. These documents are self-authenticating under Federal Rule of Evidence 902(11) and should be admitted without the need for trial testimony from a records custodian or other qualified witness. The United States previously provided these exhibits to Defendants, none of whom have identified any basis for challenging the authenticity of the records.[5]

Federal Rule of Evidence 902(11) provides that "a copy of a domestic record that meets the requirements of Rule 803(6)(A)–(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court" is self-authenticating. Fed. R. Evid. 902(11). Rule 803(6), in turn, requires that "(A) the record was made at or near the time by – or from information transmitted by – someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; [and] (c) making the record was a regular practice of that activity." Fed. R. Evid. 803(6)(A)–(C).

As to some of its anticipated trial exhibits, the United States has obtained certifications that comply with Rule 902(11). The certifications establish Rule 803(6)(A)–(C)'s requirements and thus, the records associated with the certification are self-authenticating. *See United States v. Lezcano*, 296 F. App'x 800, 807–08 (11th Cir. 2008) (district court properly admitted business records accompanied by written declaration of records custodian as self-authenticating).

Subject to any objections as to relevance, the United States respectfully requests that business records accompanied by a certification that complies with Rule 902(11) and Rule 803(6)(A)–(C) be admitted as self-authenticating without the need for testimony from a records custodian or other witness.

[5] Defendant Baptiste objected to the use of Rule 902(11) to authenticate documents provided by Transportation Management. The United States does not at this time intend to rely on Rule 902(11) to authenticate these records.

11. Motion *in Limine* to Admit Summary Charts Under Rule 1006.

At trial, the United States intends to introduce through witnesses summary charts[6] that identify information related to the 14 loans that are the subject of the charged conduct and/or that relate to Defendants' communications. Specifically, the summary charts will relate to the following: (i) information in the PPP loan applications and supporting documents for each of the 14 loans; (ii) financial transactions by each business that obtained a PPP loan; and (iii) logs of communications between Defendants and Darrell Thomas and/or other co-conspirators. The United States intends to also introduce the records upon which the summary charts are based: the PPP loan applications and supporting documents, bank records, and phone logs. These underlying documents have already been provided as part of discovery.

Under Rule 1006, a party may use "a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court":

> The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

[6] Drafts of the summary charts will be provided at or before the pretrial conference.

Fed. R. Evid. 1006. "[T]he underlying evidence on which the summary or chart is based must be otherwise admissible." *United States v. Thomas*, 631 F. App'x 847, 849 (11th Cir. 2015).

Here, the summary charts should be admissible as highly probative evidence summarizing voluminous documents related to fraudulent PPP loans. The summary charts will pertain to conduct charged within the indictment and will distill dozens of pages of loan applications, financial records, and phone records into a digestible package that can be conveniently examined by the jury. The government intends to admit the underlying records as well, so if the jury would like to review those records, they will be available. All of this evidence is relevant to the crimes alleged in the Indictment. As such, the United States moves for admission of the summary charts at trial.

Conclusion

For these reasons, the United States respectfully requests that the Court grant the above-requested relief.

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