

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES

v.

Criminal No. 2:S20-cr-114-FTM-66MRM

CASEY DAVID CROWTHER

Defendant.

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**DEFENDANT’S MOTION IN *LIMINE* TO PRECLUDE REFERENCES
TO ALLEGED FRAUDULENT EMPLOYMENT SCHEME**

Defendant, Casey David Crowther (“**Crowther**”), through undersigned counsel, and pursuant to Fed. R. Evid. 401 and 403, hereby files his Motion in Limine to Preclude References to Alleged Fraudulent Employment Scheme.

I. INTRODUCTION

The Government should be precluded from making references at trial to any alleged fraudulent employment scheme involving either Crowther or Target Roofing and Sheet Metal, Inc. (“**Target**”), Crowther’s company. In particular, the Government should not be permitted to reference any scheme whereby Crowther, through Target, allegedly fabricated individuals on Target’s payroll, books, and records in order to seek forgiveness of the subject Paycheck Protection Program Loan (the “**PPP Loan**”). The Government has absolutely no evidence that Crowther (a) fabricated employee identities, (b) fabricated non-existent persons on Target’s payroll,

books, and records; (c) sought forgiveness of the PPP Loan; or (d) falsified employee identities in connection with seeking loan forgiveness.

The Government's theory is that in order to qualify for forgiveness with respect to the PPP Loan, Crowther falsely created thirty nine (39) employees (the "**Employees**") and improperly included six (6) family members (the "**Family Members**") on Target's payroll when, in reality, these individuals either were non-existent or never performed work for the company. Crowther, however, never applied for forgiveness of the PPP Loan. Thus, it is impermissible for the Government to assume that Crowther intended to apply for loan forgiveness while having zero evidence to support such a false assertion.

Moreover, the Government's theory regarding the alleged fabrication of Target's Employees does not bear on Crowther's alleged intent when Crowther signed the PPP Loan application. Along the same line, the Government cannot attribute crimes to Crowther that have not yet occurred. As such, even if the Government had any evidence that the Employees had been fabricated (it does not), any probative value of such evidence clearly would be outweighed by substantial danger of unfair prejudice, confusing the issues, and misleading the jury because it does not speak to Crowther's intent with respect to the charges in the Government's Second Superseding Indictment.

The Government's theory relies upon allegedly false social security numbers derived from the paperwork submitted by Employees hired by Target during the relevant time period. There is no evidence tying Crowther whatsoever to the alleged

inaccurate information. Importantly, the Government has stated that a State Department witness will testify at trial that accuracy of information provided on a Form I-9 is the legal responsibility of the prospective employee, not the employer. Unfairly shifting this burden to Target and Crowther is inconsistent with the governing law, particularly given that Crowther was not directly involved in the hiring of Target's Employees. In the event that some of Target's former Employees unlawfully misrepresented their eligibility for employment, there is still no evidence that Crowther had any knowledge regarding such facts.

Against the backdrop that the Government has no evidence supporting its fabricated employment theory, it would be highly prejudicial for the Government to be permitted to raise these unsupported assertions at trial. Any such references necessarily will invoke aspersions and insinuations of illegal immigration in the roofing industry that are likely to unfairly prejudice Crowther. Given that the Government has zero evidence supporting a fabricated employment theory, there is absolutely zero probative value that possibly could justify any reference to such unsupported assertions.

Accordingly, Crowther requests that this Court preclude the Government at trial from presenting to the jury any statements or references to the effect that Crowther (a) fabricated Employee identities, (b) fabricated non-existent persons on Target's payroll, books, and records; (c) sought forgiveness of the PPP Loan; or (d) falsified Employee identities in connection with seeking loan forgiveness.

II. MEMORANDUM OF LAW

A. Standard

Fed. R. Evid. 401 states: “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. 403 states: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. “Under the Federal Rules of Evidence, all evidence is subject to the probative-prejudicial balancing test of Rule 403.” *United States v. Rodriguez*, 259 Fed. Appx. 270, 275 (11th Cir. 2007) (citing *United States v. Hewes*, 729 F. 2d 1302, 1314 (11th Cir. 1984)).

Exclusion is required where prejudice outweighs probative value. *See, e.g., United States v. Preston*, 608 F. 2d 626, 639 n. 16 (5th Cir. 1979). Even where evidence has some probative worth, evidence should be excluded where its prejudicial impact substantially outweighs any such probative value. *See United States v. Baker*, 432 F. 3d 1189, 1212 (11th Cir. 2005).

Here, the prejudicial impact of non-existent evidence requires exclusion at trial of any references to the Government’s fraudulent employment scheme theory. Insinuations or aspersions regarding unfounded allegations of an alleged fraudulent employment scheme that is supported by no evidence whatsoever clearly has zero probative value. Furthermore, the evidence is entirely irrelevant as to the charges

against Crowther which specifically speak to his intent at the time he signed the PPP loan application. *See* Doc. 62 at pp. 2-8. This red herring would only serve to confuse and mislead the jury. Finally, the Government's theory incorrectly shifts the burden of accurate I-9 paperwork reporting from the Employees to Target and Crowther. Because this burden shift completely contradicts the law, as described in greater detail below, it must be excluded. *See infra, Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 U.S. Dist. LEXIS 162578 at *26-27 (D. Ariz. Nov. 22, 2016) (recognizing that federal law imposes criminal penalties on persons who knowingly forge, counterfeit, or alter any documents prescribed for proof of identity or employment authorization).

B. The Government Has Zero Evidence That Crowther Participated in Any Fraudulent Employment Scheme

The Government's theory that Crowther fabricated Employee identities and the existence of individuals on Target's payroll, books, and records is completely unfounded, speculative, and unsupported by any evidence. In fact, Target gathered legally valid Form I-9s and the required identification demonstrating that they were eligible to be lawfully employed in the United States for all Employees during the relevant time period as required by the law. To the extent that Target may have been presented with forged identification or inaccurate I-9 Forms that appeared to be facially valid, the Government cannot prove any wrongdoing on the part of either Crowther or Target, who themselves would have been the victims of unlawful actions committed by those individuals seeking employment. In any event, there is absolutely

no evidence that Crowther or Target took any actions besides collecting the necessary documentation presented by prospective Employees regarding their eligibility for lawful employment in the United States. There is also no legal requirement for employers to verify identification information of prospective employees; in fact, employers are often advised against such verification on discrimination grounds. *See infra*, *Chamber of Commerce of the United States v. Edmondson*, 594 F. 3d 742, 751 (10th Cir. 2010) (citing 8 U.S.C. §§ 1324a(b)(1)(A)(ii), 1324b(a)(6), which recognize that requiring additional documentation from employees beyond information and documents that appear to be facially valid may encompass a discriminatory purpose).

Similarly, there is absolutely zero evidence that Crowther was directly involved in Target's new employee hiring activities. In fact, this function was performed by Target's human resources personnel, not Crowther personally. There is no evidence that Target's human resources personnel committed any unlawful actions relating to employee hiring or that Crowther had any knowledge of or involvement in any activities that could be considered unlawful. Simply put, there is a complete lack of evidence supporting the Government's unfounded theory.

Notably, the Government's entire theory is that Crowther made up identities of non-existent Employees in order to qualify for forgiveness of the PPP Loan. However, it is undisputed that Crowther never actually applied for forgiveness of the subject PPP Loan. There is no evidence to the contrary. Undoubtedly, there could be nothing more prejudicial than permitting the Government to introduce at trial a theory that literally has zero evidentiary support. *See, e.g., Rodriguez*, 259 Fed. Appx. at 275

(recognizing that all evidence is subject to Rule 403's probative-prejudicial balancing test).

Moreover, there literally is zero evidence and, consequently, nothing to weigh in the Court's probative-prejudicial analysis. Since there is no evidence to be considered, there necessarily is zero probative value. Yet, the prejudicial impact to Crowther of allowing the Government's unfounded assertions and theories regarding Target's Employees to be introduced at trial clearly would be severe, devastating, and fundamentally unfair. *See, e.g., Baker*, 432 F. 3d at 1212 (holding that even where evidence has some probative worth, it should be excluded where probative value is substantially outweighed by its prejudicial impact).

A. The Government's Theory is Entirely Irrelevant to the Issue of Crowther's Intent

Separately, the Government's theory regarding alleged Employee fabrication should be precluded because it has absolutely no bearing whatsoever on the element of intent relative to the charges in the Second Superseding Indictment. In particular, the charges against Crowther regarding the PPP Loan are Bank Fraud (Count I), False Statement to a Lending Institution (Count II), and Illegal Monetary Transaction (Counts III and IV). All of these charges are predicated on Crowther's alleged application for and actual procurement of the subject PPP Loan.¹ *See* Doc. 62, pp. 2-

¹ Notably, the Government's Response in Opposition to Defendant's Motion to Dismiss Indictment clearly argued that the subject matter of this criminal case is not Crowther's utilization of the PPP Loan funds. Instead, the heart of the matter is Crowther's alleged misstatements on the PPP Loan application to the Lender. *See* Doc. 30 at pp. 5-6.

9. As alleged in the Second Superseding Indictment, the loan application was made in April 2020. *Id.* at pp. 4, 6-7.

By contrast, any alleged wrongdoing by Crowther regarding Employee fabrication necessarily could not have occurred during the time period relevant to the Second Superseding Indictment. If the Government's theory is to be believed, these events could not have occurred any earlier than the months and weeks after the PPP Loan funds were disbursed. Consequently, the Government's entire theory regarding purported Employee fabrication for the purpose of qualifying for loan forgiveness necessarily is not relevant to Crowther's intent to commit the crimes charged in the Second Superseding Indictment. Under these circumstances, the Government's theory – even if supported by evidence – should be excluded at trial because it is not probative to the issue of Crowther's intent.² By contrast, the prejudicial impact of allowing the Government's irrelevant theory to be put before the jury would be substantial, to say the least. *See, e.g., Baker*, 432 F. 3d at 1212 (holding that even where evidence has some probative worth, it should be excluded where probative value is substantially outweighed by its prejudicial impact).

B. Holding Crowther Criminally Responsible for Wrongdoing By Former Target Employees is Improper

² The Government cannot be allowed to proceed on its fabricated employment theory because it effectively constitutes charging Crowther for alleged crimes that have not yet occurred. Crowther should not (and cannot) be held criminally liable for the Government's premature arrest.

Moreover, the Government's fraudulent employment scheme theory should be precluded at trial because it impermissibly seeks to hold Crowther criminally responsible for wrongdoing that – if it occurred at all – was committed solely by third parties. In particular, neither Crowther nor Target are responsible for any misrepresentations or falsities made by applicants or new Employees regarding their eligibility for lawful employment in the United States.

Under the federal Immigration Reform and Control Act (“IRCA”), new employees must present employers with proof that they are legally authorized to work in the United States. Specifically, employees are required to complete the employee section of USCIS Form I-9 by the end of their first day on the job. *See* USCIS Handbook for Employers M-274, Section 2.0, available at <https://www.uscis.gov/book/export/html/59502>. Employees then have three (3) business days to present employers with appropriate documentation proving their identity and qualification for lawful employment in the United States. *Id.* Employees who violate these requirements by presenting forged, counterfeit, or altered documents may be fined and imprisoned. *See, e.g., Puente Arizona v. Arpaio*, No. CV-14-01356-PHX-DGC, 2016 U.S. Dist. LEXIS 162578 at *26-27 (D. Ariz. Nov. 22, 2016) (recognizing that IRCA imposes criminal penalties on persons who knowingly forge, counterfeit, or alter any documents prescribed for proof of identity or employment authorization).

By contrast, employers are not subject to penalties unless they are repeat offenders. In *Chamber of Commerce of the United States v. Edmondson*, 594 F. 3d 742 (10th Cir. 2010), the Tenth Circuit stated:

Congress opted to create a substantial safe harbor for employers that comply with the I-9 system. 8 U.S.C. § 1324a(b)(6)(A). Unless an employer persists in violating IRCA after being put on notice of its noncompliance or engages in a pattern or practice of violations, § 1324a(b)(6)(B), (C), employers who attempt to comply in good faith are protected from civil and criminal penalties under federal law, § 1324a(b)(6)(A).

Id. at 751.

Moreover, “[a]n employee who submits verification documents that ‘reasonably appear [] on [their] face to be genuine’ may not be required to produce different or additional documents if such requests by employers are made for the purpose or with the intent of discriminating.” *Id.* (citing 8 U.S.C. §§ 1324a(b)(1)(A)(ii), 1324b(a)(6)).

A witness from the State Department will testify at trial that accuracy of relevant information submitted on the Form I-9, along with documents submitted verifying identity, is the burden of the employee, not the employer. The Government’s theory unlawfully attempts to shift this burden to Crowther. Because the Government’s theory is wholly contrary to IRCA, the Government should be precluded from making any reference to its legally and factually unsupportable fraudulent employment scheme theory at trial.

C. Referencing Illegal Immigration at Trial Presents the Risk of Severely Prejudicing Crowther

The Government also should be precluded from referencing its unfounded, unsupported fraudulent employment scheme theory at trial because doing so would present the risk of severely prejudicing Crowther. As the Court is aware, public opinion concerning illegal immigration is a widely and highly polarized political matter. In recent years, this matter has become even more polarized by virtue of vastly differing public opinion regarding the alleged need for a southern border wall, along with numerous incidents raising humanitarian concerns regarding prolonged detention of unaccompanied minor children whose parents unlawfully crossed the border into the United States. These highly volatile political issues are likely to be triggered by the Government's introduction of evidence relating to Target's former Employees who may be lawful immigrants or undocumented immigrants who may have unlawfully presented forged, counterfeit, or altered forms of identification to Target during the hiring process.

Clearly, the risk associated with introducing the politically charged issue of illegal immigration at trial may potentially trigger strong emotional reactions among some jurors; in particular, jurors holding strong political views. Issues regarding illegal immigration present a strong risk of unfair prejudice, confusing the issues, and misleading the jury, while offering no probative value whatsoever. *See, e.g., Gresham v. Petro Shopping Ctrs., LP*, No. 3:09-00034-RCJ-VPC, 2011 U.S. Dist. LEXIS 36568 at *12-13 (D. Nev. Mar. 18, 2011) (declining to permit witness impeachment based on bare immigration status where such impeachment would be substantially more

prejudicial than probative due to emotional nature of illegal immigration issue); *Hocza v. City of New York*, No. 06 Civ. 3340, 2009 U.S. Dist. LEXIS 3574 at *6-7 (S.D. N.Y. Jan. 20, 2009) (holding that any probative value that party's immigration status might provide was outweighed by the obvious prejudice that might flow from its use to speculate as to the party's removal from the country); *Peterson v. Neme*, 281 S.E. 2d 869, 872 (Va. 1981) (holding that immigration status was of questionable probative value and uniquely prejudicial; therefore, the trial judge committed no error in refusing to admit it).

Accordingly, Crowther requests that this Court preclude the Government at trial from presenting to the jury any statements or references to the effect that Crowther (a) fabricated Employee identities, (b) fabricated non-existent persons on Target's payroll, books, and records; (c) sought forgiveness of the PPP Loan; or (d) falsified Employee identities in connection with seeking loan forgiveness.

III. CONCLUSION

Based on the foregoing, Crowther respectfully requests that (a) this Motion be granted in all respects; (b) that this Court preclude the Government at trial from presenting to the jury any statements or references to the effect that Crowther (1) fabricated Employee identities, (2) fabricated non-existent persons on Target's payroll, books, and records; (3) sought forgiveness of the PPP Loan; or (4) falsified Employee identities in connection with seeking loan forgiveness; and (c) this Court enter such other and further relief this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Nicole H. Waid, attorney for Casey David Crowther, do hereby certify that I have, this day, filed the foregoing with the Clerk of Court via the CM/ECF system, which has caused a true and correct copy to be served on all counsel of record.

/s/ Nicole H. Waid
Nicole H. Waid, Esq.