UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 2:20-cr-114-JES-MRM

CASEY DAVID CROWTHER

UNITED STATES OF AMERICA'S MOTION IN LIMINE TO PREVENT TESTIMONY OF INADEQUATELY DISCLOSED EXPERT

The United State of America moves for an order which prohibits Defendant Casey Crowther from presenting any expert opinion testimony via Jessica Hollobaugh at the upcoming trial. The United States further asks the Court to deem this motion timely filed, owing to the circumstances described below, which provide good cause to permit the filing after the March 8, 2021 motion in limine deadline.

Introduction

Twenty-eight minutes before motions in limine were due and less than two weeks before trial, Crowther provided the United States a letter which disclosed his intent to use an expert witness at the upcoming trial. The expert disclosure was impermissibly late and is insufficiently specific. The United States also suspects the expert testimony will be irrelevant, but so little information has been provided about the opinions the expert intends to offer, it is not possible to brief the issue.

Case History

The defendant is charged in a seven-count second superseding indictment with bank fraud (18 U.S.C. § 1344) (Counts One and Five), false statements to a lending institution (18 U.S.C. § 1014) (Counts Two and Six), and illegal monetary transactions (18 U.S.C. § 1957) (Counts Three, Four, and Seven). Doc. 62. The seven charges can be grouped into two categories: those related to Crowther's procurement of a Paycheck Protection Program (PPP) loan from the Lender and those related to Crowther's procurement of a mortgage loan from the Mortgage Lender.

With respect to the PPP loan, the government intends to prove that Crowther applied for an approximately $2.1 million loan from the Lender on behalf of his company Target Roofing. When he applied for the loan, Crowther represented to the bank that Target Roofing would only use the proceeds of the loan for things like payroll and rent, even though he intended to impermissibly use the proceeds to benefit himself. Upon receipt of the PPP money, Crowther quickly and directly diverted much of it to purchase a nearly $700,000 boat and pay $100,000 in debt to an old business partner.[1] Crowther

[1] Crowther had been negotiating the purchase of the boat prior to obtaining the PPP loan.

took steps to conceal the payments by describing the wire for the boat as "equipment" and the wire to the ex-business partner as "payroll."[2]

The original indictment was filed on September 23, 2020 (Doc. 15), it was superseded on October 28, 2020 to add the mortgage fraud-related counts (Doc. 32), and superseded again on February 10, 2021 to clean up language the Defendant had taken issue with (Doc. 62).

The initial scheduling order setting forth discovery responsibilities was filed on September 23, 2020. Doc. 20. The order required the Defendant to affirmatively opt-out of the process if he did not want to subject himself to reciprocal discovery obligations under Federal Rule of Criminal Procedure 16. Doc. 20 at ¶ A.1.B. An amended scheduling order was issued on November 10, 2020 in response to the first superseding indictment, but it contained the same opt-out requirement. Doc. 40 at ¶ A.1.B.

Crowther never opted out of his reciprocal discovery obligations, and thus was required to provide any expert disclosures required by Rule 16(b)(1)(C) on or before December 1, 2020. Doc. 40 at ¶ A.3.

The government does not intend to use an expert witness in this case and has never disclosed one. On December 11, 2020, Crowther informally told the government that he may call an expert witness at trial (then scheduled

[2] The ex-business partner was not owed any back pay.

for January). Crowther did not provide details about that expert, other than to say any testimony would be "focused on the CARES Act, the Interim Final Rules, and our belief that the Government is misinterpreting those rules." At a status conference three days later, the government told the Court that it had not received any reciprocal discovery from the defendant and that it had learned the defendant may call an expert. Doc. 53. Crowther told the Court that he no longer intended to call an expert because the government was calling a witness from the SBA. Doc. 53.

Crowther made no further mention of calling an expert witness to the government until 4:32 p.m. on March 8, 2021, 28 minutes before the government's motions in limine were due. At that time, Crowther sent a letter (via e-mail) to the government indicating that he may call an expert witness. A copy of the letter is attached as Exhibit A.[3] Almost simultaneously with that disclosure, Crowther filed a ten-page motion in limine seeking permission to have the expert observe the trial, free from sequestration. Doc. 73.

According to the letter, the expert witness was retained to address "SBA and accounting issues." The expert is expected to testify to "common accounting practices, the availability of funds, S corporations and flow-through income, and cash flow activity of Target Roofing over a 24-week

[3] Exhibit A is partially redacted to remove conversation not related to the expert witness issue.

covered period." The expert was also expected to testify to "what expenses are eligible for forgiveness[,] and if the Company chose to file for forgiveness[,] the Company's eligibility for forgiveness and/or the Company's ability to pay back the loan with the lender." The expert's testimony would be based on "the books and records of Target Roofing, account receivables, loan documents, stock redemption agreements, and any relevant financial transactions."

Crowther's motion requesting that the expert be allowed to observe trial appears to add to the scope of the expected testimony. In that regard, the expert may testify about the "interpretation of Generally Accepted Accounting Principles ("GAAP") in reference to S Corporations," and the "fungibility of comingled funds," and the "CARES Act," and "Small Business Administration ("SBA") interim rules, and "loan forgiveness eligibility," and "stock redemption agreements, as may be applicable to GAAP principles and the books and records of Target Roofing," and "loan documents in reference to S Corporations."

Argument

Federal Rule of Criminal Procedure 16(b)(1)(C) requires a defendant to provide the government with a "written summary of any testimony that the defendant intends to introduce under Rules 702, 703, or 705 of the Federal

Rules of Evidence ....” The summary “must describe the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications.” Fed. R. Crim. P. 16(b)(1)(C). The purpose of the rule is to “minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert’s testimony through focused cross-examination.” Fed. R. Crim. P. 16., Advisory Comm. Notes, 1993 Amendment.

Therefore, a defendant must identify not only the subject matter about which an expert will testify, but also the testimony the expert will offer on those subjects. *United States v. Duvall*, 272 F.3d 825, 828 (7th Cir. 2001) (“The Rule requires a summary of expected testimony, not a list of topics.”). The disclosure should include “not only written and oral reports, tests, reports, and investigations, but any information that might be recognized as a legitimate basis for an opinion.” *United States v. Holland*, 223 Fed. Appx. 891, 894 (11th Cir. 2007) (quoting Advisory Committee Notes for Rule 16, 1993 amendments). When a party fails to meet the requirements of Rule 16, the Court may, amongst other things, prohibit the party from introducing the undisclosed evidence at trial. Fed. R. Crim. P. 16(d)(2)(C).

Crowther’s eleventh-hour disclosure is untimely and insufficient. As to the timing, the expert was disclosed minutes before the motion in limine deadline expired for the government and less than two weeks before the start of trial. Although not entirely clear, the expert appears poised to offer opinion regarding an argument that Crowther is not guilty because, even though he spent PPP funds directly on a boat, his company paid an equivalent amount of money towards payroll from other sources.

When told the government would be filing this motion, Crowther indicated that the disclosure was not untimely because it was a necessary response to "summary exhibits" recently provided to the defense ahead of trial.[4] That excuse is unavailing for two reasons. First, the summary exhibits are just that—summaries. They compile information from bank account statements that were previously disclosed in the discovery process into a digestible format that will increase the efficiency of trial and ensure the jury understands the evidence.[5] Moreover, the accounts summarized by the

[4] Crowther calls the expert a "rebuttal" expert, perhaps in an effort to avoid the requirement of timely expert disclosure by likening it to a governmental rebuttal witness. *See United States v. Frazier*, 387 F.3d 1244, 1269 (11th Cir. 2004) ("[T]he government's presentation of rebuttal testimony without prior notice does not violate Rule 16, since the Rule's notice requirements apply only to the government's case-in-chief."). However, a defendant presenting evidence that he is innocent is not "rebuttal," it is a garden variety defense.

[5] The summary exhibits are based on information contained in bank statements belonging to Crowther or his company which he has repeatedly claimed are evidence of his innocence. The summaries paint a financial picture of Crowther from the beginning of 2020 through the date of his September 2, 2020 arrest. The government disclosed the bulk of the bank statements underlying the summary exhibits on October 7, 2020. At that time, the records contained information showing Crowther's financial condition through roughly July 31, 2020. The government later brought the account statements current through his September 2, 2020 arrest.

exhibits belong to Crowther and his companies. No one has had more time with the underlying exhibits than the person to whom they belong.

Second, focusing on the timing of the *government's* summary exhibit disclosures misses the point. Crowther has been arguing a fungibility defense since nearly the inception of the case, *before he was indicted and before any discovery was provided*. *See* Exhibit B.[6] He devoted further time to the fungibility issue in both of his motions to dismiss the indictments filed months ago. *See* Docs. 25 at p. 14 and Doc. 41 at p. 12. Fungibility is *his defense*. There is simply no excuse for an eleventh-hour disclosure of an expert on an issue Crowther has claimed exonerated him almost from the beginning and for which he has possessed the documents supporting the defense longer than the government has.

Crowther's expert disclosure is also insufficiently detailed and prejudices the government's ability to prepare for trial. Whether one considers the letter he sent formally disclosing the expert or the motion in limine he filed seeking her permission to attend trial, Crowther has provided nothing more than a list of subjects. That the expert will testify about "the interpretation of

Those supplemental documents were provided on a rolling basis to Crowther after receipt by the government from the banks, and the final batch was provided on February 9, 2021.

[6] Exhibit B is an excerpt from a letter sent to the government by Crowther on September 21, 2020. It discusses Crowther's fungibility defense.

Generally Accepted Accounting Principles in reference to S Corporations" or the "CARES Act" or "loan documents in reference to S Corporations," astonishingly broad categories of information, provides the government no ability to prepare.[7]

Not only are the subjects provided too broad to be of use, Crowther has not provided any opinions he believes the expert to provide or what those opinions are based on within any specificity. There is no summary of her expected testimony. Nor has Crowther provided any information that the expert relied upon to form any opinion she may have. For example, Crowther mentions that the expert has reviewed "the books and records of Target Roofing," but doesn't mention which ones. It is not clear whether the government has those materials through prior subpoenas or not, but, in any event, it did not receive any materials in connection with the recent expert disclosure. In the end, the government is left with little more than a guess about how to prepare.

[7] A Google search revealed that an annually published compendium on GAAP interpretation is more than 1400 pages long. *See* Wiley GAAP 2021: Interpretation and Application of Generally Accepted Accounting Principles *available at* https://www.amazon.com/Wiley-GAAP-2021-Interpretation-Application/dp/111973617X (last accessed March 10, 2021). The CARES Act comes in at 335 pages and covers topics ranging from the PPP program (of which there are many, many facets) to PPE supplies to fight the coronavirus. The government has no hope of divining a line of cross examination for the expert having been given only these broad topics of expected testimony.

Preventing last-minute surprise and the unfairness it creates is precisely why Rule 16 exists. Crowther's last-minute disclosure is not only prejudicial to the government in that it provides no time to prepare, it is prejudicial because it provides no substance to prepare for. Accordingly, Crowther should not be permitted to call the expert at the upcoming trial.

WHEREFORE, the government requests that the Court enter an order deeming this motion timely filed for good cause and precluding Crowther from calling Jessica Hollobaugh as an expert witness and offering expert opinion at the upcoming trial in this case.

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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