UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, :
:
Plaintiff, :
v. : CASE NO. 2:20-CR-114-JES-MRM
:
CASEY DAVID CROWTHER, :
:
Defendant. :

CASEY CROWTHER'S OPPOSITION TO GOVERNMENT MOTION IN LIMINE TO PREVENT TESTIMONY OF DEFENSE EXPERT

Casey Crowther's disclosure of rebuttal witness (and expert) Jessica Hollobaugh is both timely and sufficient. The Government continues to trickle out late discovery. These late Government disclosures prompted Mr. Crowther to retain an expert witness, and on March 8 the defense provided its Rule 16(b)(1)(C) disclosure. The disclosure was timely. Though the Government cites the Magistrate Judge's Amended Order specifying a date for Rule 16(b)(1) disclosures, it fails to cite the immediately following sentence, "But Defendant need not do so *until the government complies with Rule 16(a)(1)(E)-(G)*." [D.E. 40] at 2-3 (emphasis added). The expert notice is sufficiently detailed, and no grounds exist for the Government's complaints. The fact that the Government does not seek a continuance to prepare but only seeks *exclusion* demonstrates it has no real concern, but rather is attempting to gain a tactical advantage at trial. The Court should reject this Government gamesmanship and deny the motion to exclude.

The Defense Expert Disclosure was Timely

The Government continues to be tardy in its pre-trial disclosures and is still deficient in several areas[1] at the time of this drafting. Across the multiple days the undersigned and the Government conferred about expert issues, the Government never specified a particular provision in any Order supporting its claim of defense disclosure "untimeliness," but following the Government's filing it is apparent that the Government relies on the Magistrate Judge's Amended Order, which states, "On or before December 1, 2020, Defendant must make all disclosures under Rule 16(b)(1). But Defendant need not do so until the Government complies with Rule 16(a)(1)(E-G)." [D.E. 40] at 2-3. The second sentence – not recited by the Government in its motion – limits the defense disclosure requirement. Because the Government failed to comply with its own Rule 16(a)(1)(E-G), the defense obligations had not yet triggered.

Untimely Rule 16(a)(1)(E-G) material disclosed by the Government after the Government's November 24 deadline has included: payroll records, bank documents from multiple banks, IP address records, wire transfer records, and internal notes from Sara Bay Marina's record keeping database (all disclosed on February 3), multiple bank, boat, and mortgage records disclosed on February 9, bank documents disclosed

[1] The government has still not, for example, filed the Notices for each person or non-government entity who has or may have a financial interest in the case. *See* [D.E. 40] at 6.

on December 23, and birth certificate records. Hours after the Government filed its motion accusing the defense of untimeliness, it produced still more apparent Government-case-in-chief documents, namely JP Morgan Chase credit card statements and account documents. All of these materials are within the ambit of Rule 16(a)(1)(E). The Government was also tardy in producing its purported 404(b) material.

Moreover, the Magistrate Judge's Order [D.E. 20] stated, "Within **three days** of providing Defendant all disclosures and discovery required by this Order, the Government must file a notice stating the dates it produced the information and the contents of such discovery." (Emphasis Original). The Government filed a Notice purporting to comply on October 7 [D.E. 24]. The Magistrate Judge's Amended Order [D.E. 40] includes this same language, "Within **three days** of providing Defendant all disclosures and discovery required by this Order, the Government must file a notice stating the dates it produced the information and the contents of such discovery." (Emphasis original). The Government has not done so. Had it done so, a review of the docket would lay bare its unjustified claims of untimeliness by the defense – the Government has continued to produce discovery in late 2020, in February 2021, and even now. It is important to note that the original indictment alleged the PPP charges and the superseding indictment merely added mortgage fraud charges, while the second superseding indictment fixed technical, non-substantive errors. Thus, the Government should have completed its PPP discovery upon their certification to the

Court. Instead, it has continued to produce late discovery related to the PPP charges, including apparent Government case-in-chief evidence.

In short, the Government wishes to treat its deadlines as mere suggestions but asks the Court to penalize the defense for responding to what the Government trickles out. And the Government wishes to ignore the Order's statement that defense Rule 16(b)(1) disclosures do not trigger "until the government complies with Rule 16(a)(1)(E-G)." [D.E. 40] at 2-3.

On Friday, March 5, the Government produced a series of purported summary charts, including one financial analysis. The materials included analysis and conclusions about what was an "Allowable Expense to be Reimbursed by PPP Funds" and is attached as ***Exhibit A***. This suggested the Government would be relying on an expert witness of its own or attempting to introduce pseudo-opinion testimony through its summary witness.

The undersigned had Jessica Hollobaugh, a certified public account and forensic examiner, immediately review the materials, and the undersigned promptly provided expert notice, despite the short turnaround time afforded by Government disclosures. In the process of conferring, we informed the Government that their analysis included what appeared to be an expert opinion regarding what was an allowable expense (even though the Government never provided an expert notice). The Government now states that it will "rework" the exhibit to avoid opinion but has still not produced a "re-worked" version. Troublingly, the Government has filed a motion in limine to preclude testimony regarding loan forgiveness, and yet its analysis as presented relies upon an analysis of allowable expenses.

The defense continues to reasonably fear that the Government will use its purported summary witness (whom it still has not identified – the defense does not even know if this person is an accountant) to offer expert opinion or expert opinion under the guise of summary testimony. Regardless of the Government's attempts to frame this testimony, it is essential that Mr. Crowther be able to rebut it.

Jessica Hollobaugh has been timely disclosed by the defense under the terms of the Order, and must be allowed to testify, as a rebuttal and summary witness (which the Government has not moved to preclude) and as an expert witness if needed.

<u>The Defense Expert Notice Is Sufficiently Detailed</u>

The expert disclosure of Jessica Hollobaugh satisfies the requirements of Rule 16(b)(1)(C): "This summary must describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications." The Government attaches the disclosure, which provides the requisite information. For ease of reference, the defense provides the pertinent information in table format below:

Qualifications	"The defense has engaged Jessica L. Hollobaugh, CPA/ABV, CFE, Partner, Market Leader, Forensics, Investigations and White-Collar Criminal Defense with Withum. Ms. Hollobaugh's qualifications and *curriculum vitae* are attached." [D.E. 79-1].
Opinions	"She will testify, similar to your summary reports, as to what expenses are eligible expenses 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." *Id.*

	"She will rebut the Government's financial analyses and testify to common accounting practices, the availability of funds, S corporations and flow-through income, and the cash flow activity of Target Roofing over the 24-week covered period." *Id.* Ms. Hollobaugh will "address the SBA and accounting issues." *Id.* "Ms. Hollobaugh is still in the process of reviewing the summary exhibits provided by the government on March 5, 2021 and we will update you if there is any change in the scope of her expert testimony or opinion." *Id.*
Bases and Reasons for Opinions	"Ms. Hollobaugh is reviewing the government's summary exhibits, the books and records of Target Roofing, account receivables, loan documents, stock redemption agreements, and any relevant financial transactions." *Id.* "She has reviewed the Interim Final Rules, loan applications, SBA disclosures, and other relevant materials." *Id.* "Ms. Hollobaugh has reviewed Target Roofing's payroll records and other forgivable expenses." *Id.*

Additionally, while conferring with the Government, the undersigned further explained that: (1) the witness would be observing the Government summary witness and SBA witness testimony at trial and may testify in response, (2) that she would be testifying to Target Roofing's eligibility for forgiveness (including her opinion on an analysis of allowable expenses). Mr. Crowther's Motion to Permit Presence of Rebuttal Expert Witness in the Courtroom elaborates:

> Her expert rebuttal testimony may include, inter alia, subject matter regarding (a) interpretation of Generally Accepted Accounting Principles ("GAAP") in reference to S Corporations; (b) fungibility of co-mingled funds; (c) the

> CARES Act; (d) Small Business Administration ("SBA") interim rules; (e) loan forgiveness eligibility; (f) stock redemption agreements, as may be applicable to GAAP principles and the books and records of Target Roofing and Sheet Metal, Inc. ("Target"); and (g) loan documents in reference to S Corporations.

[D.E. 73] at 5. This is detailed information, not at all similar to the Eleventh Circuit case the Government cites, *United States v. Holland*, 223 Fed. Appx. 891 (11th Cir. 2007). In that readily distinguishable case, the disclosure was a mere handful of sentences: that the expert "will testify as to the origin and interstate nexus of the firearm at issue in this case" and that the expert "will testify that the Remington rifle in question was manufactured in New York state." *Id.* at 894. There is simply no comparison.

To the extent the Government wishes there were even more detail than provided to date, that is an issue of the Government's own creation. Because the Government's disclosures have been late, it has placed the defense in a position of needing to respond and prepare quickly. In particular, the defense provided its expert notice three days after the Government's disclosure of purported summary exhibits and financial analysis, which included apparent opinion testimony on what the Government views is an allowable expense for PPP reimbursement.[2]

[2] As noted *supra*, the government says it will re-work the exhibit, but it has not produced a revised version.

<u>The Government's Request of "Exclusion" Threatens Casey Crowther's Sixth Amendment Right to Present a Defense</u>

The Government's requested remedy is exclusion – not a continuance to prepare further, as one might expect if the Government were genuinely "surprised." But excluding a defense expert on untimeliness grounds can violate a Defendant's Sixth Amendment right to present a defense. *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007). In *Ferensic*, defense counsel was ordered to furnish the expert witness report to the state two months before trial but did not do so until eleven days before trial. The state trial court excluded the evidence. The Sixth Circuit affirmed the district court's granting of a writ of habeas corpus because the exclusion of the expert operated to deny defendant the Sixth Amendment right to present a defense.[3]

In reversing the conviction, the Sixth Circuit explained that less severe sanctions could have remedied the issue and still protected the defendant's rights. The *Ferensic* court noted that "the Supreme Court has given special consideration to the nature of the exclusion-triggering discovery violation at issue, noting that *only egregious violations involving, for example, 'willful misconduct' on the part of the defendant or his counsel will justify the exclusion of material evidence.*'" *Ferensic*, 501 F.3d at 476 (citation omitted) (emphasis added). "Stated differently, the exclusion of a defendant's evidence should be reserved for only those circumstances where a less severe penalty would perpetuate rather than

[3]It is important to note that, unlike *Ferensic,* in the instant case there is no expert report. The expert witness is present to rebut the testimony of Government witnesses.

limit the prejudice to the State and the harm to the adversary process." *Id.* (quotations omitted).

The Government invokes Rule 16(d)(2)(C) as the provision authorizing exclusion. But *exclusion* would not be the appropriate remedy even if the Court were to agree with the Government's complaints. Rule 16(d)(2) provides for other remedies, including a continuance. Courts should impose the *least* severe remedy to ensure prompt and complete compliance with discovery orders, taking into account the reasons for delay, any bad faith, prejudice, and the availability of a continuance or recess. Thus, in *United States v. Euceda-Hernandez*, 768 F.2d 1307 (11th Cir. 1985), the Eleventh Circuit reversed a sanction (exclusion of evidence) imposed on the Government for a Rule 16 violation. The Eleventh Circuit explained that even "a clear violation of a discovery order does not excuse a trial judge from weighing the factors and imposing 'the least severe, but effective, sanction." *Id.* at 1312 (quotation omitted).

There is no violation here, much less one in bad faith. The Government does not ask for a continuance, nor explain why a continuance would be insufficient. Its recitation of prejudice is tautological. And in fact the Government already had an as-yet unidentified summary witness, or pseudo-expert, or undisclosed expert in place.

There simply is no prejudice to the Government. The Government is the party that has prepared the financial analyses that Ms. Hollobaugh will be rebutting. The Government knows what their witnesses will say about these analyses and related topics. The defense has no expert report from the Government and no understanding of who the Government's purported summary witness may be, or what that person's qualifications are. The defense is the party forced to rapidly respond to Government disclosures. Ms. Hollobaugh is reviewing the Government's "summary" witness materials and will be reviewing the Government's SBA and summary witnesses exhibits and testimony at trial. Contrary to the Government's contention, it is Crowther who bears the risk of prejudice. His Sixth Amendment right to present a defense and his trial presentation would be severely prejudiced if his expert, who was disclosed as an anticipated rebuttal witness a week in advance of the witness deadline and two weeks before trial, is excluded.

The Government's arguments that they cannot possibly prepare for cross examination on the CARES Act in a two-week period are baffling. We find it difficult to believe that a federal prosecutor would cite an Act in an indictment charging a defendant with federal charges [D.E. 62, p. 2; ¶¶ 5, 6; pg. 3 ¶¶ 7, 8; pg.4 ¶ 9] and admit in a public filing that he has "no hope of divining a line of cross-examination for the expert having been only been given these broad topics [CARES Act]." D.E. 79, footnote 7, pg. 9. Since the initiation of this case, Crowther has been telling the Government that it believes the Government is fundamentally misunderstanding the CARES Act and its regulations. This was also enumerated in the Motion to Dismiss the Superseding Indictment. The Government cites the CARES Act numerous times in its own Superseding Indictment and press releases. Crowther cannot be held responsible if the Government failed to read or properly apply the CARES Act.

As stated in Crowther's expert notice provided on March 8, 2021 to the Government, "Ms. Hollobaugh is still in the process of reviewing the summary exhibits provided by the government on March 5, 2021 and we will update you if there is any change in the scope of her expert opinion or testimony." Since the expert has had an opportunity to properly review the summaries and relevant documents provided in discovery, she will not need to testify to Generally Accepted Accounting Principles for her rebuttal testimony. The government has been notified of this change in scope and this argument is moot.

Crowther provided the expert notice in a timely manner and out of an abundance of caution in response to a financial analysis that contained what appeared, and the Government agreed, was opinion. The expert has now had a time to review the Government's summary documents and we may call this witness as a rebuttal witness at trial. If the Government's SBA witness and summary witness properly apply the SBA Interim Final Rules and proper S-Corporation tax liabilities, the expert witness may not need to testify. But the Sixth Amendment clearly affords Crowther the option to call Ms. Hollobaugh as an expert at trial if he so wishes.

Conclusion

The disclosure of defense expert Jessica Hollobaugh is timely and sufficient. Mr. Crowther's retention of an expert has in fact been prompted by the Government's own tardy disclosures. She should be permitted to testify, including as an expert. No grounds for exclusion exist, and the Government motion must be denied.

Respectfully submitted,

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.