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 TO EXCLUDE EVIDENCE OF MORTGAGE FRAUD AND GUILTY PLEA

Defendant, Casey D. Crowther ("**Crowther**"), through undersigned counsel, and pursuant to M.D. Local Rule 3.01, hereby files his Motion to Exclude Evidence of Mortgage Fraud and Guilty Plea.

I. INTRODUCTION

The Government seeks to introduce irrelevant and highly prejudicial propensity evidence relating to a residential mortgage fraud which occurred two and a half months *after* the Paycheck Protection Program ("**PPP**") counts. These subsequent events, along with Crowther's guilty plea as to Counts V and VI of the Second Superseding Indictment, are not proper Fed. R. Evid. 404(b) evidence and must be excluded.

Crowther has pled guilty to Counts V (Bank Fraud) and VI (False Statement to a Lending Institution) of the Second Superseding Indictment. Counts V and VI allege a mortgage fraud involving residential real property located at 3653 San Carlos Drive, Saint James City, Florida 33956 (the "**Property**"). The face of the Second Superseding Indictment demonstrates Counts V and VI have nothing to do with the PPP application, loan, or proceeds that are the subject of Counts I through IV. The Government's effort to use these events as under the guise of Rule 404(b) fails. The *subsequent* residential mortgage issue has no bearing on the Government's proffered purpose of "intent, knowledge, or lack of mistake" with respect to the *prior* PPP transaction. The Government argues, in essence, Crowther's propensity for lying. Yet, the residential mortgage facts are not relevant, and the risk of undue prejudice and jury confusion is very significant. Under these circumstances, no curative instruction will suffice. Therefore, evidence relating to the mortgage fraud underlying Counts V and VI must be excluded.

Likewise, the Government should be prohibited from making any reference at trial to Crowther's guilty plea as to Counts V and VI of the Superseding Indictment. Undoubtedly, any such reference to Crowther's guilty plea may cause the jury to improperly infer Crowther's guilt as to Counts I through IV. Accordingly, any reference to Crowther's guilty plea should be excluded because it has zero probative value and would severely jeopardize Crowther's right to a fair trial.

II. ARGUMENT

A. The Government Should be Precluded From Introducing Evidence of or Referencing the Alleged Mortgage Fraud Scheme

i. The Alleged Mortgage Fraud is Not Relevant to Any Issue Besides Character and Therefore is Not Admissible Under Rule 404(b)

Rule 404(b) requires that (1) the evidence must be relevant to an issue other than character; (2) there must be sufficient proof that the defendant committed the extrinsic act; and (3) the evidence must still survive Rule 403 balancing. *See e.g. United States v. Mills*, 138 F.3d 928, 935 (11th Cir. 1998). The Government's efforts to introduce subsequent acts under Rule 404(b) fail with respect to the first and third prongs. It should be precluded from introducing evidence of or referencing the alleged mortgage fraud scheme.

Just before the start of trial, the Government emailed the undersigned to the effect that in the event Crowther pleads guilty to Counts V and VI, the Government intends to introduce evidence of false representations made to the mortgage lender; i.e., that Crowther provided the lender with inflated bank account statements in connection with the mortgage application process. *See* **Ex. "A"**. The Government claims that such evidence would be offered to provide "intent, knowledge, and absence of mistake" in reference to Counts I and II of the Second Superseding Indictment. *Id*. The Government, however, fails to explain how anything to do with the mortgage fraud scheme possibly could bear upon Crowther's intent, knowledge, and absence of mistake with respect to the PPP loan, which was a separate and entirely different transaction. Clearly, the alleged mortgage fraud has absolutely nothing to do with Crowther's intent, knowledge, or absence of mistake with respect to the PPP loan because these loans involve entirely different facts.

The Government's sole objective in introducing evidence of mortgage fraud is establishing Crowther's purported propensity to lie. This type of evidence, of course, is inadmissible. *See*, *e.g.*, *Frishberg v. Janac*, 407 B.R. 540, 550-51 (Bankr. S.D. N.Y. 2009) (holding that plaintiff's proposed evidence that defendant lied about being an attorney and knowing music stars could only be offered to show that defendant had a propensity to lie, and therefore must be rejected as inadmissible hearsay and character evidence); *United States v. Petsas*, 592 F. 2d 525, 528 (9th Cir. 1979) (stating that testimony from other purchasers in support of a party's contention that he acted honestly was properly excluded under 404(b)); *United States v. Hatfield*, 685 F. Supp. 2d 320, 324 (E.D.N.Y. 2010) (determining that NASDAQ evidence was prejudicial because it suggested defendants' propensity to lie to investigative authorities and therefore stood a good chance of confusing the jury as to the actual crimes charge, which a curative instruction might not have alleviated).

It is undisputed that the mortgage fraud scheme did ***not*** involve the subject PPP application, loan, or proceeds that are the subject of Counts I through IV of the Second Superseding Indictment. In particular, the PPP loan is the subject of Counts I through IV of the Second Superseding Indictment. *See* Doc. 62 at pp. 2-9. By contrast, the alleged mortgage fraud is a separate and distinct unlawful scheme that, according to the Second Superseding Indictment, had nothing to do whatsoever with the facts and circumstances of the subject PPP application, loan, or proceeds. *Id*. at pp. 9-15. Consequently, both evidence and reference to the alleged mortgage fraud should be excluded at trial because the mortgage fraud clearly is not relevant to the charges set forth in Counts V and VI of the Second Superseding Indictment. *See*, *e.g.*, *United States v. Jones*, No. 14-cr-148, 2015 U.S. Dist. LEXIS 25842 at *15-16 (D. Minn. Mar. 4,

2015) (excluding evidence of defendant's past incidents of falling asleep with lit cigarettes where the Government did not even allege that the defendant was smoking on the evening of the alleged fire); *Mata v. City of Farmington*, 798 F. Supp. 2d 1215, 1218 (D.N.M. 2011) (excluding evidence that defendant-officers did not follow standard operating procedures and police training because such evidence was not relevant); *Candonoza v. Royston*, No. 4:16-CV-0048-HLM, 2018 U.S. Dist. LEXIS 238227 at *8-9 (N.D. Ga. Mar. 5, 2018) (holding that evidence was inadmissible under Rule 404(b) where evidence was irrelevant to Fourth Amendment claims); *Pahl v. Robinson*, No. 4:08-CV-112 (CDL), 2009 U.S. Dist. LEXIS 78418 at *4 (M.D. Ga. Sept. 1, 2009) (granting motion to exclude exhibits that were not relevant to any issue in the case and were otherwise inadmissible under Rule 404(b)).

The subsequent residential mortgage acts and the prior PPP issues at trial are starkly different. The issues at trial involve a PPP loan. By contrast, the subsequent acts underlying Counts V and VI involve a residential mortgage from a lender called Angel Oak Mortgage Solutions, LLC ("**Angel Oak**"), not a PPP loan. According to the Government's Notice of Maximum Penalties filed on March 22, 2021, "Crowther created three false bank statements with inflated balances . . . Crowther also created a screenshot of a webpage which falsely showed an inflated balance for" a bank account for "his single-asset real estate company, 3801 Jade Ave, LLC[.]" Doc. 112 at p. 3. There is no allegation in the PPP counts (i.e., Counts I through IV) that Crowther falsified documents. The radically different facts underlying the PPP allegations shed zero light on Crowther's state of mind with respect to the PPP loans.

The Eleventh Circuit's opinion in *Mills*, *supra*, is instructive. In *Mills*, the Eleventh Circuit held that it was error (albeit harmless under the facts of that case) to admit in a Medicare fraud prosecution evidence of the defendant's earlier lies regarding a customs declaration form. The issue in that case involved the defendant's falsification of passenger manifests for a Medicare provider's corporate jet. The Eleventh Circuit explained: "The customs declaration form was different from the passenger manifests, and [the defendant's] interpretation of the customs form accordingly casts no light on her understanding of the passenger manifest." 138 F.3d at 936. Thus the Government's proffered purposes actually boiled down to the claim that because the defendant lied to the Government previously, she was predisposed to lie to the Government again. That is impermissible. Likewise here, falsification of bank statements with respect to a residential loan have no relevance to the subject PPP application, loan, or proceeds. Because there is nothing similar about the alleged facts, the Government invites the same error that occurred in *Mills*.

Separately, *United States v. Qin*, 688 F. 3d 257, 263 (6th Cir. 2012) involved a conspiracy to steal trade secrets case where the Government tried to introduce evidence that the defendant had also misappropriated information from a previous employer. "While it is possible to generalize Qin's alleged conduct in such a way to make it sound substantially similar to the conduct charged in the indictment (e.g., Qin stealing from CPC is substantially similar to Qin and Du stealing from GM) that would be an over-simplification." *Id.* at 263. The oversimplification that the Government is now attempting to advance before the jury is that subsequent mortgage fraud equates to prior PPP loan fraud. It does not. They are separate acts involving zero overlapping facts or circumstances.

ii. The Mortgage Fraud Evidence is Unduly Prejudicial and is Likely to Confuse the Jury

Evidence of the mortgage fraud scheme is unduly prejudicial and highly likely to confuse the jury regarding the actual crimes charged. *See*, *e.g.*, *United States v. Hatfield*, 685 F. Supp. 2d 320 (E.D. NY. 2010) (determining that NASDAQ evidence was prejudicial because it suggested defendants' propensity to lie to investigative authorities and therefore stood a good chance of confusing the jury as to the actual crimes charge, which a curative instruction might not have alleviated). If the jury is presented with evidence relating to the mortgage fraud, the jury is likely to mistakenly believe that mortgage fraud is one of the issues for the jury to decide. This is particularly true because the facts relating to the mortgage fraud are so different in nature from the facts underlying the alleged PPP fraud. Among other things, the alleged mortgage and PPP frauds involve different (a) loan transactions, (b) time periods, (c) loan applications, (d) lenders, (e) loan proceeds, and (f) alleged misrepresentations.

Under these circumstances, the risk of undue prejudice clearly outweighs the nonexistent probative value of the mortgage fraud evidence. *See*, *e.g.*, *United States v. Preston*, 608 F. 2d 626, 639 n. 16 (5th Cir. 1979) (recognizing that exclusion is required where prejudice outweighs probative value); *United States v. Baker*, 432 F. 3d 1189, 1212 (11th Cir. 2005) (holding that even where evidence has some probative worth, evidence should be excluded where its prejudicial impact substantially outweighs any such probative value). The risk of unfair prejudice is acute given that the Government seeks to present evidence that Crowther allegedly created (a) three (3) false bank statements with inflated balances; and (b) a screenshot of a webpage allegedly falsely showing an inflated balance for an account held in the name of Jade Avenue, LLC (the "**Jade Avenue Account**"). *See* Doc. 112 at p. 3. The Jade Avenue Account, however, had absolutely nothing to do with the facts relating to the PPP loan. In Counts I through IV of the Second Superseding Indictment, there are absolutely no allegations either that Crowther created false documents such as bank statements or that PPP loan proceeds ran through the Jade Avenue Account. Yet, there is a substantial risk that the jury may confuse these issues, thereby resulting in undue prejudice to Crowther. At the same time, the mortgage fraud evidence has zero probative value with respect to Counts I through IV of the Second Superseding Indictment.

Even Judge Badalamenti's Order appears to confuse the charges. The Order states: "To begin with, Mr. Crowther argues that all seven counts of the superseding indictment must be dismissed because using PPP funds for purposes unauthorized by the CARES Act is not a crime—it simply means that the borrower is ineligible for loan forgiveness." D.E. 56, pg.4. The Motion to Dismiss the Superseding Indictment included only Counts One through Four (i.e., counts associated to the PPP). The Order further states: "In a similar vein, the superseding indictment provides that Mr. Crowther used the PPP funds to misrepresent the extent of his assets to a Mortgage

Lender, which relied on his misrepresentations to give him a mortgage loan." *Id*. at 5-6. The Government, however, does ***not*** allege that PPP funds were used to misrepresent assets on his mortgage loan. In fact, the only similarity between the mortgage fraud and the PPP fraud allegations are potential overlapping witnesses from Sanibel Captiva Community Bank. D.E. 53. Here, it is unlikely that any curative instruction to the jury would alleviate confusion to the jury and prejudice to the defendant caused by the Government's introduction of irrelevant evidence concerning the mortgage fraud scheme.

On March 11, 2021, the inaccurate statements within Judge Badalamenti's Order were reported in the news media. *See* **Ex. "B"**, Naples Daily News article at p. 2. The same day, ABC7 Southwest Florida published an online article confusing the pending charges against Crowther. *See* **Ex. "C"**, ABC7 Southwest Florida article at p. 2 (stating that "Crowther used his company's PPP money to buy the boat, as well as falsifying his bank account to make it seem like he had enough money to be approved for a mortgage for the St. James City property, according to federal documents"). On the same date, NBC2 News published a similarly factually inaccurate online article. *See* **Ex. "D"**, NBC2 News article at p. 1 (stating that "[i]nvestigators believe the businessman bought a 40-foot catamaran and home in St. James City using COVID-19 relief money meant to keep his business afloat during the pandemic"). News media reporting improperly confusing the charges against Crowther continued through Sunday, March 21, 2021, the day before the first day of trial. Thus, it is clear that there is already significant confusion in the jury pool regarding what the charges against Crowther actually are. Allowing the Government to confound this existing confusion by introducing evidence of the alleged mortgage fraud scheme will run a significant risk of depriving Crowther of his constitutional right to a fair trial.

The risk of confusion regarding the charges alleged in the Second Superseding Indictment and prejudicial to Crowther not hypothetical. On March 22, 2021 – i.e., the same day that Crowther pleaded guilty to Counts V and VI – NBC2 News Southwest Florida immediately reported the following headline: "Casey Crowther admits to faking bank statements, PPP fraud trial moves forward". *See* **Ex. "E"**. The article states, in relevant part:

> With the guilty plea, Crowther takes responsibility for creating fake bank statements so he could be approved by a lender for a $640,381 mortgage. The mortgage was used to buy a home in St James City. He also takes responsibility for depositing more than $1 million of PPP funding into his own bank account, to make the lender believe he had the money for a down payment on the home when in reality he did not have the cash.

Id.

Separately, as this Court is aware during jury selection on March 22, 2021 juror number 6 confused PPP loan fraud with mortgage fraud. Further, juror number 6 admitted to actually researching the subject mortgage fraud and the property records pertaining to Crowther's residence. Accordingly, there is no question that there is a significant risk of jury confusion given the strong public interest in this case and the inaccurate news media reporting that began with Crowther's arrest and has continued through trial.

The mortgage fraud charges set forth in Counts V and VI (which have nothing to do with the PPP loan) and the PPP loan-related charges alleged in Counts I through IV may be easily confused. If a federal district judge can confuse the issues, it is entirely possible – if not likely – that a jury also may confuse the issues. Consequently, there is a significant risk that Crowther may be unduly prejudiced by the Government's evidence of or reference to mortgage fraud, which considerably outweighs any minimal probative value of such evidence. *See*, *e.g.*, *United States v. Preston*, 608 F. 2d 626, 639 n. 16 (5th Cir. 1979) (recognizing that exclusion is required where prejudice outweighs probative value); *United States v. Baker*, 432 F. 3d 1189, 1212 (11th Cir. 2005) (holding that even where evidence has some probative worth, evidence should be excluded where its prejudicial impact substantially outweighs any such probative value).

Accordingly, the Government should be precluded from either introducing evidence of or making reference to the mortgage fraud scheme set forth in Counts V and VI of the Second Superseding Indictment.

B. The Government Should be Precluded From Introducing Evidence of or Referencing Crowther's Guilty Plea

Similarly, the Government should be precluded from introducing evidence of or otherwise referencing that Crowther pled guilty to Counts V and VI of the Second Superseding Indictment. Both of these counts relate to the alleged mortgage fraud scheme. *See* Doc. 62 at pp. 9-15.

For one thing, the fact that Crowther has pled guilty to Counts V and VI has absolutely no relevance to any fact or legal issue regarding Counts I through IV that will be tried by jury. Specifically, none of the factual or legal issues relating to the alleged fraudulent PPP loan scheme have anything to do with the mortgage fraud related charges. For this reason, evidence of Crowther's guilty plea as to Counts V and VI should be excluded. *See*, *e.g.*, *Jones*, 2015 U.S. Dist. LEXIS 25842 at *15-16; *Mata*, 798 F. Supp. 2d at 1218; *Candonoza*, 2018 U.S. Dist. LEXIS 238227 at *8-9 (N.D. Ga. Mar. 5, 2018).

Additionally, any reference to Crowther's guilty plea as to Counts V and VI likely will mislead the jury by unjustifiably inferring Crowther's guilt as to Counts I through IV. *See United States v. Ramirez*, 426 F. 3d 1344, 1353 (11th Cir. 2005) (holding that district judge correctly sustained defendant's objection to prosecutor's question relating to guilty plea); Clearly, there is no possible reason for the Government to introduce evidence of Crowther's guilty plea or otherwise to reference it before the jury, except to improperly imply that because Crowther pled guilty to one set of charges, he must also be guilty of the other charges. For this reason, the Eleventh

Circuit generally does not permit disclosure of a co-defendant's guilty plea because of its tendency to negatively bias the jury and unduly prejudice the defendant's right to a fair trial. *See*, *e.g.*, *United States v. Llorca-Meneses*, No. 2:17cr38-MHT, 2018 U.S. Dist. LEXIS 193088 at *21-22 (M.D. Ala. Nov. 13, 2018) (citing *United States v. Johnson*, 620 F. Appx. 839, 845 (11th Cir. 2015)). Thus, this particular evidence should be excluded because the unfair prejudice that is likely to result from disclosing Crowther's guilty plea as to Counts V and VI far outweighs any nonexistent probative value of such evidence. *See Preston*, 608 F. 2d at 639 n. 16; *Baker*, 432 F. 3d at 1212.

III. CONCLUSION

Based on the foregoing, it is clear that evidence of the mortgage fraud scheme alleged in the Second Superseding Indictment and Crowther's guilty plea as to Counts V and VI are not relevant and, if allowed to be admitted into evidence, would significantly prejudice Crowther's right to a fair trial. Accordingly, Crowther respectfully requests that this Court (a) grant this Motion in all respects; (b) preclude the Government from either introducing evidence of or making reference to the mortgage fraud scheme set forth in Counts V and VI of the Second Superseding Indictment; (c) preclude the Government from either introducing evidence of or making reference to Crowther's guilty plea as to Counts V and VI of the Second Superseding Indictment; and (d) 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.