

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITES STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

**REPLY BRIEF IN SUPPORT OF DEFENDANT’S
MOTION IN LIMINE TO PRECLUDE THE NOTICED
RULE 404(B) EVIDENCE AND REQUEST FOR AN EVIDENTIARY HEARING**

Pursuant to Local Rule 7.1(c), Defendant Eric Dean Sheppard, by and through his undersigned counsel, submits this Reply Brief in further support of his Motion in Limine to preclude the noticed Rule 404(b) evidence and request for evidentiary hearing (“**Motion**”) [DE 113].¹

The Response does a complete 180° from the Rule 404(b) Notice (“**Notice**”), necessitating a substantive reply brief. The Government’s Notice and the Response both serve up inflammatory and prejudicial allegations based on speculation, wishful thinking, and what-ifs. Something is

¹ As noted in the Motion filed on October 2, 2023 [DE 113 at 1 n. 1]:

On September 28, 2023, the Court granted Defendant additional time to brief his Motion in Limine No. 6 regarding the Rule 404(b) evidence. [D.E. 111 at 9]. Therefore, while this brief is a response to the Government’s 404(b) Notice, it is also styled as a motion in limine, consistent with Defendant’s timely filed motion from September 15, 2023, at [D.E. 84].

Defendant thus properly filed the Motion via ECF as a motion, and ECF properly noted “Responses due by 10/16/2023,” fourteen days later. [DE 113]. However, on October 10, the Government filed its response (“**Response**”) incorrectly as a reply brief [DE 116], presumably to deny Defendant due process in responding to the new information, arguments, and documents raised by the Government for the first time in the Response.

rotten regarding this Rule 404(b) business, as shown by its short, sordid, and frankly bizarre history:

BACKGROUND

1. On September 12, 2023, the Government produced documents obtained from J.G., which included a form that was to be filed by Defendant's company, HMMD (as defined in the Motion) with the U.S. Department of Homeland Security ("**DHS**"), and a letter from HMMD to the U.S. Embassy in Mexico (together, the "**Visa Documents**").

2. On September 13, the Government sent Defense counsel an email ("**Disclosure**"; a redacted copy of which is attached as **Exhibit A**). The Disclosure stated that "[J.G.] . . . indicated that . . . Mr. Sheppard had forged his signature on visa application documents." [Ex. A].

3. On September 14, the Government filed its Notice. [DE 77]. The Notice stated that "J.G. learned that defendant had forged J.G.'s signature" on the Visa Documents. [DE 77 at 2]. The Notice emphasized that the Rule 404(b) evidence was fraud on a federal agency, the DHS. [DE 77 at 4]. The Notice did *not* state how J.G. knew Defendant forged J.G.'s signature on the Visa Documents or whether he could prove it. Unlike the Disclosure, the Notice stated that the Visa Documents contained "false representations" but did *not* identify the alleged false representations or state how J.G. could prove these representations were allegedly false or, more importantly, Defendant's knowledge of same. [*Id.*]. The Notice argued that the proposed Rule 404(b) evidence was admissible on the issue of intent, *not* that the evidence was "inextricably linked" to the charged conduct. [DE 77, *passim*]. The Notice made *no* mention of the reason why J.G. ceased being listed on Sunbiz as a manager or left Defendant's companies, which has no relevance to the charged conduct. The Notice made *no* mention of the engagement letter between HMMD and the law firm and claimed no forgery on it ("**HMMD Engagement Letter**"). As of the date of the Notice, the

Government had not produced the HMMD Engagement Letter. Finally, the Notice stated it was based on information learned during an interview of J.G. on *September 8, 2023*. [DE 77 at 1].

4. Contrary to the Notice, based on information obtained by the Defense, J.G. did *not* claim that Defendant forged his name on the Visa Documents or that the Visa Documents contained false misrepresentations.

5. On September 21, upon demand by the defense, the Government produced the 302 from the *September 8, 2023* interview of J.G. that, per the Government, formed the basis for the Notice (“**302**”; a redacted copy of which is attached as **Exhibit B**, at 2). In the 302, J.G. did *not* claim that Sheppard forged his signature on Visa Documents and did *not* claim that the Visa Documents contained false representations, contrary to the Notice. J.G. also did *not* claim that Defendant forged his name on the HMMD Engagement Letter, and he also did *not* claim that this matter was a reason for any part of J.G.’s work history.

6. Knowing that the Court ordered the Motion be filed by October 2, the Government chose not to update or amend its Notice, even though, based on Defendant’s information, the Government knew the Notice was false.

7. On October 2, Defendant filed the Motion and argued, among other things, that the allegations in the Notice cannot be proven by a preponderance of the evidence because J.G. never claimed what is in the Notice. [DE 113 *generally*]. Given the unusual circumstance of the Government being unable to prove the evidence in its Notice, the Motion requested an evidentiary hearing to ensure the Government can sustain its burden of proof before the Government presents these false and inflammatory allegations to the jury. [DE 113 at 10].

REPLY ARGUMENT

The Government's Response makes different and completely new allegations from those set forth in the Notice. This new information and these new allegations were known to the Government before the Motion was filed (and likely much earlier), and they are inadmissible.

I. The Response Falsely Suggests It Is Based On New Information

Save for the first sentence, the Response ignores the Notice. The Response states the Government "learned additional facts from J.G . . . during a recent meeting with J.G. to prepare his trial testimony." [DE 116 at 1 (second and fifth sentences of Response)]. However, based on Defendant's information, the Government did not meet with J.G. or his counsel at any point between Defendant filing his Motion and the Government filing its Response. Thus, the allegedly new information in the Response was known to the Government before the Motion was filed.

II. The Response Proposes New J.G. Testimony That Is Inadmissible, Is Denied by J.G., And Cannot Be Proven By A Preponderance Of The Evidence

A. Speculation That Defendant Directed Someone Else to Forge J.G.'s signature On The Visa Documents Is Not Admissible

Interestingly, and doing a complete 180° from its Notice, the Government no longer claims that J.G. will testify Defendant forged his name on the Visa Documents. In the Response, the Government claims, for the first time, that J.G. will testify that whoever forged J.G.'s name on the Visa Documents "would have done so" only at Defendant's direction. [DE 116 at 3]. This is based on J.G.'s purported belief that no one at Defendant's companies has ever done anything without Defendant's knowing approval. [D.E. 116 at 3, 8]. By that logic, why not cut out the 404(b) and just have J.G. testify that Defendant must have been a knowing participant in all the charged

crimes, relying on the same over-the-top speculation?² None of this speculation is admissible. Fed. R. Evid. 602 (a witness' testimony must be based on personal knowledge); *Pineda v. Pescatlantic Group, LLC*, 16-25291-CIV, 2018 WL 11346674, at *4 (S.D. Fla. Aug. 16, 2018) (noting the court would "not permit a lay witness to testify on matters of which he or she has no personal knowledge, unless that lack of knowledge is somehow relevant to the facts of this case."). Moreover, and more importantly, that is not what J.G. says. Defendant's information is that J.G. recognizes and agrees that he cannot swear under oath who was involved in forging his name.

The Government needs a witness who can provide admissible testimony, and J.G. is not that witness. The Government offers arguments built on complete distortions of what JG actually says. For example:

The distinction that the defendant relies upon – that Defendant was not the one who held the pen over the paper to sign J.G.'s name [on the Visa Documents] – is a distinction without a difference. The decision to use J.G.'s name on the documents submitted by HM[MD] – was the Defendant's decision, not the decision of his staff. [DE 116 at 6].

None of this is connected to reality. *First*, Defendant never "relie[d] on" a distinction between signing J.G.'s name versus directing another to do it. The Motion correctly pointed out that the key assertion in the Notice—that J.G. would testify that Defendant is the person who signed his name on the Visa Documents—is unproven and indisputably false. The Motion did not address whether Defendant directed another to forge J.G.'s name *only because* the Government never made this allegation until *after* the Defendant filed the Motion. *Second*, as noted, the Government has no evidence Defendant directed whoever signed J.G.'s name to do so or that any number of workers (the Government offers no support for saying there were only four) did not do so on their own.

² Similarly, all CEOs would be subject to speculative testimony that they must have directed their underlings' crimes because CEOs are generally in charge. This is not how the criminal justice system works in the United States

Again, J.G. never said he knows who did it. *Finally*, who says the person behind this alleged forgery could be only the Defendant or the four individuals referred to by the Government? While the Defendant does not bear the burden here, the emails produced by the Government (last week) show the visa applicant herself—a person who obviously had a motive—was communicating directly with the law firm about the Visa Documents. She was intimately involved in preparing the actual documentation. Yet, the Government insists it has the right to lead the jury into speculation that Defendant had to have been in the weeds of the process and had to have directed the forger to sign J.G.’s name to the Visa Documents. The Government’s desperate arguments are just words on a brief, not evidence.³

B. Speculation That The Visa Documents Misrepresent Applicant’s Intended Position

The “false statement” evidence, finally identified in the Response, is more weak sauce:

J.G. knows the visa applicant as someone who worked in a marketing type capacity . . . and was not someone who was expected to fulfill a “full time” graphic designer position. . .

[DE 116 at 3]. Employment in marketing does not preclude employment as a graphic designer, and J.G. cannot and will not say the applicant lacked the requisite skills or there was no position available. In fact, Defendant understands that J.G. claims no personal knowledge on this issue. Separately, assuming *arguendo* the Government can prove the statement was false, the Government does not proffer evidence of Defendant’s knowledge or complicity.

³ The Response similarly argues that “J.G. has always maintained that the defendant is responsible for the [unauthorized] use of J.G.’s name and signature on documents from the Defendant’s company, HM[MD].” [DE 116 at 7]. The 302 shows otherwise, but more importantly the Government has not shown that it can prove this with admissible testimony, and Defendant’s information is that J.G., the Government’s only witness, **denies this**. Faced with the Motion, the Government has not provided a 302 from any allegedly more recent interview that contains any of this testimony. Nor can it. Moreover, Defendant’s information is that J.G. never claimed to the Government he could testify under oath who was responsible for the forgery.

C. Speculation That Defendant Forged J.G.’s Signature On The Engagement Letter Between HMMD And The Law Firm

The Notice did not mention the HMMD Engagement Letter, period. Only in the Response does the Government now accuse Defendant of forging J.G.’s signature on the HMMD Engagement Letter, or as the Response puts it, J.G. would testify that he thinks the signature of J.G.’s name on the HMMD Engagement Letter “reflects” Defendant’s hand, whatever that is supposed to mean. [DE 116 at 2]. Such equivocal guessing and speculation lacks foundation. J.G. does not claim to have the requisite personal knowledge to identify Defendant as the signer of his name on the HMMD Engagement Letter.⁴ Based on Defendant’s information, J.G. has no idea who signed his name on the HMMD Engagement Letter and cannot say the script handwriting of J.G.’s name was done by Defendant. Not surprisingly, in the 302 discussed above, J.G. never claimed that Defendant forged J.G.’s signature on any document at any time. Notably, the same 302 records J.G. speculating, regarding an unrelated document containing Defendant’s purported signature, that it “*feels like*” Defendant signed Defendant’s own name there. [See Ex. B at 1]. Thus, while J.G. may well have the requisite personal knowledge to identify Defendant’s signature of Defendant’s own name when asked to do so by the Government, even his testimony there was equivocal.⁵

Moreover, between the Notice and the Response, the Government has yet to form any argument regarding the admissibility of a potentially forged engagement letter with a law firm, as opposed to fraud on a government agency which is the basis for the Notice. Even assuming

⁴ For example, J.G. does not claim to have seen Defendant sign J.G.’s name on prior occasions such that he can recognize Defendant’s version of J.G.’s signature. J.G. also does not claim he is familiar enough with Defendant’s script handwriting that he can discern that Defendant is the person who signed J.G.’s name on the HMMD Engagement Letter.

⁵ All this equivocation on what the forgery of J.G.’s name would look like if done by Defendant would not meet the Rule 404(b)’s requirement of proof by a preponderance of the evidence.

arguendo the allegation was proven, that would not be fraud on the DHS. Defendant could have just as well used another person at HMMD (including himself) to sign an engagement letter for Defendant's company with Defendant's company law firm, which is even further removed from the charged conduct.

D. The Government's "Inextricably Intertwined" Desperation

The Government has a problem when it starts with a strongly worded 404(b) Notice falsely claiming a witness will testify that Defendant forged the witness's name on a document to be sent to DHS, and ends with a half-baked inextricably intertwined argument that it is possible Defendant may have signed the witness's name to an engagement letter between the Defendant's company and a law firm (not on a form being sent to a governmental agency).

The Government now seeks to shoehorn all the unproven speculative accusations against Defendant into the trial by claiming J.G. must be permitted to explain why he requested to be removed as manager on Sunbiz in 2018 and why he left Defendant's companies for a new employer in 2020:

J.G. is expected to testify about his role within defendant's business operations. The reason for J.G.'s decision to be removed [on Sunbiz] as Manager of several companies, particularly HM[MD], is inextricably intertwined evidence and completes the story of J.G.'s association with and departure from, the Defendant's companies.

None of this is connected to reality. *First*, Defendant's information is that J.G.'s "role within the business operations" and eventual departure had absolutely nothing to do with this matter. That is, had the alleged prior act not taken place, J.G. would still have continued *the same work* with the *same responsibilities*, whether or not listed as manager on Sunbiz, and *he still would have left for the new job*. This matter had no impact on his decision to leave his job with Defendant—one year later, in March 2020—for a better opportunity especially in light of the challenges to Defendant's companies during Covid. *Second*, and more importantly, the

Government's argument is sleight-of-hand. The test here is *not inextricable intertwinement with a witness* the Government seeks to call (likely for this very reason). To be admitted under the "inextricably intertwined" doctrine, the uncharged bad act has to "ar[i]se out of the same transaction or series of transactions *as the charged offense* . . . or be *necessary* to complete the story *of the crime on trial*."⁶ Here, the Government did not even try meet the Eleventh Circuit standard. Nor could it. J.G.'s *subjective rationale* for changes in his employment are not by any stretch of the imagination "inextricably intertwined" with the charged crimes. More specifically, J.G. causing his name to be removed as manager on Sunbiz in March 2019 has absolutely nothing to do with this case. All the more so, *J.G.'s subjective rationale for wanting his name removed from Sunbiz in March 2019 supposedly because he blames Defendant for his supposed personal involvement in the prior act*, which is what the Government seeks to offer, has zero relevance to whether Defendant committed the charged crimes. *Finally*, even if the Government met the inextricably intertwined standard, the Government still needs a witness who can testify from personal knowledge, and it does not have one.⁷

⁶ *U.S. v. Weeks*, 716 F.2d 830, 832 (11th Cir. 1983) (quoted in the Response [DE 116 at 4]). The rest of the Government's cases are in accord. *See, e.g., United States v. Horner*, 853 F.3d 1201, 1213 (11th Cir. 2017) (evidence of money "structuring" "was inextricably intertwined with evidence of the fraudulent tax returns, because the cash deposits formed the basis of the tax fraud itself."); *United States v. Edouard*, 485 F.3d 1324, 1344 (11th Cir. 2007) (evidence that defendant threatened to kill owner of company and employees if owner did not return deposit defendant made for purchase of rice was inextricably intertwined with evidence of the charged money laundering counts as it involved the same funds).

⁷ The Government's suggestion that "defendant's letter to the attorney may be a preview of his defense in this case" is an invitation to go down a rabbit hole we should all decline. [DE 116 at 9]. There are many holes in the Government's case (although the Government refuses to acknowledge them). On the five aggravated identify theft charges involving alleged forgeries, for example, while they list 23 witnesses, none can say Defendant forged the signatures, directed others to do so, even knew the signatures were allegedly forged. But all these holes in the Government's case do not permit the Government to present unsupported uncharged accusations against Defendant or misrepresent the testimony of J.G. to this Court.

III. The Response Fails To Meet The Motion's Substantial Prejudice Argument

The Government does not address the extreme prejudice to the Defendant by these inflammatory allegations. The Government has not established that the proposed evidence is “highly probative” or even admissible. [DE 116 at 9]. The Government has put a lot of effort and made unusual and problematic moves to get these unsupported allegations to the jury, which will inflame the jury and distract them from the trial of this case. That speaks volumes about the Government’s true prejudicial purpose.⁸

IV. The Response Fails to Meet the Motion's Argument For A Hearing

The Motion argued that due to the unusual circumstance of the Government being unable to prove the Rule 404(b) evidence, the Court should order an evidentiary hearing to ensure the Government can sustain its burden of proof before seeking to offer purported 404(b) evidence at trial. [DE 113]. The Response does not address this or deny that evidentiary hearings are warranted on challenges like this. [DE 116 at 10].⁹

CONCLUSION

For the reasons stated in the Motion and herein, Defendant respectfully requests that the allegations in the Notice and Response be excluded, or, in the alternative, requests a pre-trial evidentiary hearing, and for other relief the Court deems just and proper.

⁸ As shown in the Motion, part of this probative/prejudice prong of the Rule 404(b) analysis includes prosecutorial need, and the Government offering none is a factor favoring exclusion. [DE 113 at 4, 8]. In its Response, the Government argued that it has the burden on intent [DE 116 at 8-9], but it did show that it has a need for the evidence.

⁹ The Government did not respond to the Motion on the privilege issue. [DE 113 at 2 n. 2].

Dated: October 17, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 17, 2023, the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

/s/ Jayne C. Weintraub

Jayne C. Weintraub