IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA

v.

DANIEL ERIC JAY

CRIMINAL INDICTMENT
1:20-CR-228-MHC-JKL
SECOND SUPERSEDING

Government's Motion in Limine

The United States moves the Court to preclude Defendant Daniel Eric Jay from suggesting to the jury—through argument, examination of witnesses, or in any other manner—that he should be acquitted of conspiracy and wire fraud because others participated in the charged conduct but were not indicted, and that he should be acquitted of bank fraud because the victim bank could have prevented the fraud if it had been more careful. In addition, the Government moves to preclude Defendant Jay from blaming the victims, eliciting evidence regarding PPP fraud generally, and using agent interview reports (302s and MOIs) to impeach witnesses.

This case is currently set for trial on July 19, 2022. The Government makes this motion in order to narrow the issues for trial, to exclude irrelevant, extraneous, or unduly prejudicial arguments and evidence, and to expedite this Court's determination of legal disputes likely to arise during trial.

Statement of Facts

Count 1 of the Second Superseding Indictment charges Defendant Jay and three coconspirators—Maurice Fayne, a/k/a Arkansas Mo, Mike Sargent, and Mark Sargent—with conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349. Counts 2 through 4 charge those same Defendants with wire fraud, in violation of 18 U.S.C. § 1343. And Count 5 charges Defendant Jay and Fayne (but not the Sargent brothers) with bank fraud, in violation of 18 U.S.C. § 1344.

Fayne and Mike Sargent pleaded guilty, were sentenced, and are currently serving their sentences. Mark Sargent is deceased. Thus, Defendant Jay will be the only Defendant to stand trial.

Argument and Citation of Authority

The purpose of a motion in limine is "to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984). Such motions allow "the Court to rule in advance of trial on the relevance of certain forecasted evidence . . . without lengthy argument at, or interruption of, the trial." *Palmieri v. Defaria*, 88 F.3d 136, 141 (2d Cir. 1996). "The prudent use of the in limine motion sharpens the focus of later trial proceedings and permits the parties to focus their preparation on those matters that will be considered by the jury." *Jonasson v. Lutheran Child & Fam. Servs.*, 115 F.3d 436, 440

(7th Cir. 1997). "An in limine ruling, made in a criminal case, serves to ensure that the jury will hear only that evidence which the district judge properly deems admissible." U*nited States v. Talley*, 194 F.3d 758, 763 (6th Cir. 1999). "The district court has wide discretion in determining the relevance of evidence produced at trial." *United States v. Roland*, No. 1:14-CR-291-SCJ, 2016 WL 11628078, at *1 (N.D. Ga. June 3, 2016) (quoting *Boyd v. Ala. Dep't. of Corr.*, 296 F. App'x 907, 908 (11th Cir. 2008)).

A. Defendant Jay should not be permitted to argue that he should be acquitted of conspiracy and wire fraud because others participated in the charged conduct but were not indicted.

Counts 1 through 4 of the Indictment allege that Defendant Jay, Maurice Fayne, and the Sargent brothers violated the conspiracy statute (18 U.S.C. § 1349) and the wire fraud statute (18 U.S.C. § 1343) while running a Ponzi scheme that defrauded individuals who invested in Fayne's trucking company. (Doc. 96 at ¶¶ 1-7). The Government anticipates that Defendant Jay intends to suggest to the jury that others profited from that Ponzi scheme but were not charged, and therefore he should be acquitted.

1. The "other people did it too" defense is not permissible under the Federal Rules of Evidence.

"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. 401. "Irrelevant evidence is not admissible." FED. R. EVID. 402. And relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, [or] wasting time." FED. R. EVID. 403.

Any suggestion by Defendant Jay that he should be acquitted of conspiracy and wire fraud because others participated in the charged conduct but were not indicted should be excluded under Rule 402 or, alternatively, under Rule 403.

2. A defendant does not have a constitutional right to present the "other people did it too" defense.

A defendant has a constitutional right "to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). But that "does not entitle him to place before the jury irrelevant or otherwise inadmissible evidence." *United States v. Anderson*, 872 F.2d 1508, 1519 (11th Cir. 1989). A defendant is constitutionally entitled to present only evidence that is relevant to an element of the charged offense or to an affirmative defense. *See United States v. Hurn*, 368 F.3d 1359, 1365-66 (11th Cir. 2004). "[W]here the proffered evidence does not bear a logical relationship to an element of the offense or an affirmative defense . . . a defendant has no right to introduce that evidence." *United States v. Masferrer*, 514 F.3d 1158, 1161 (11th Cir. 2008) (internal quotations omitted).

The fact that others engaged in similar conduct but were not prosecuted is irrelevant to Defendant Jay's defense. No constitutional violation occurs when a defendant is "precluded from advancing only an irrelevant defense." *United States v. Mendez*, 737 F. App'x 935, 943 (11th Cir. 2018). Therefore, Defendant Jay should not be permitted to "argue, expressly or impliedly, that the failure to indict others is a reason to acquit [him]." *See United States v. Lepore*, No. 1:15-CR-367-WSD-JKL, 2016 WL 4473125, at *7 (N.D. Ga. Aug. 25, 2016) (granting the Government's motion *in limine* to exclude argument that defendants should be acquitted because others "engaged in similar conduct but were not prosecuted").

3. The "other people did it too" defense is a thinly disguised jury nullification argument.

A defense based on an argument that the defendant should be acquitted because others allegedly violated the same or similar laws but were not prosecuted is tantamount to a jury nullification argument. "[T]he law is crystal clear that such arguments to the jury are improper and impermissible." *United*

States v. Smith, Criminal No. 08–00389–WS, 2009 WL 692149, at *4 n.3 (S.D. Ala. Mar. 13, 2009); *accord United States v. Archie*, No. 1:15-CR-338-MHC-CMS, 2017 WL 11471580, at *3 (N.D. Ga. Jan. 19, 2017) (granting government's motion in limine as to jury nullification). The Eleventh Circuit "has repeatedly disapproved of jury nullification." *United States v. Joseph*, 567 F. App'x 844, 849 (11th Cir. 2014); *see also United States v. Funches*, 135 F.3d 1405, 1408 (11th Cir. 1998) (holding that a defendant has no "right to present evidence the only relevance of which is to inspire a jury to exercise its power of nullification").

B. Defendant Jay should not be permitted to argue that he should be acquitted of bank fraud because the victim bank could have prevented the fraud if it had been more careful.

Count 5 of the Indictment alleges that Defendant Jay and Maurice Fayne committed bank fraud by submitting to United Community Bank a PPP loan application that falsely stated Fayne's trucking company "had 107 employees and an average monthly payroll of $1,490,200." (Doc. 96 at ¶ 12). The Government anticipates that Defendant Jay will argue that he should be acquitted of bank fraud because United Community Bank either did not properly vet the application before approving the loan, or did not rely on the false statements in the application.

To convict a defendant of bank fraud, in violation of 18 U.S.C. § 1344, the Government must prove the following: (1) the defendant knowingly carried out or attempted to carry out a scheme to defraud a financial institution or to get money from a financial institution by using false or fraudulent pretenses, representations, or promises about a material fact; (2) the false or fraudulent pretenses, representations, or promises were material; (3) the defendant intended to defraud the financial institution or someone; and (4) the financial institution was federally insured. *Eleventh Circuit Pattern Jury Instructions, Criminal Cases,* Offense Instruction No. 52 (2022).

> A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

Id.

"The materiality of any misrepresentation is measured against an objective standard, not the subjective impression of the person or entity to whom the misrepresentation was directed." *United States v. Benchick*, No. 13-CR-20453, 2014 WL 4181970, at *2 (E.D. Mich. Aug. 21, 2014). "So long as a defendant, in order to cause a bank to take some action, makes a misrepresentation that a reasonable bank would consider important in deciding whether to act as the defendant wishes, and intends by this representation to deceive the bank, in the furtherance of fraud, the misrepresentation is material." *United States v. Menichino*, 989 F.2d 438, 440 (11th Cir. 1993) (punctuation marks and citations omitted). "False representations about income and employment on loan applications, for example, are material misrepresentations." *United States v. Leadbeater*, No. CRIM.A. 13-121-1 JBS, 2015 WL 567025, at *9 (D.N.J. Feb. 10, 2015).

"*Reliance* and *materiality* are separate concepts, and reliance is not an element of bank fraud." *United States v. Nicoletti*, No. 15-20382, 2017 WL 1382290, at *3 (E.D. Mich. Apr. 18, 2017). "Indeed, a false statement can be material even if the decision maker actually knew or should have known that the statement was false." *United States v. Neder*, 197 F.3d 1122, 1128 (11th Cir. 1999). Thus, whether United Community Bank used appropriate care in reviewing Fayne's PPP loan application is irrelevant.

Furthermore, a bank's negligence "is not a defense to fraud." *Mendez*, 737 F. App'x at 942; *see also United States v. Benchick*, No. 13-20453, 2015 WL 3464091, at *3 (E.D. Mich. June 1, 2015) (granting motion in limine to preclude defendant's argument that victim bank "invited the fraud by implementing insufficient loan approval practices, or could have prevented it with better practices").

C. Defendant Jay should not be permitted to blame the victims.

"[D]efendants in fraud cases may not adopt the 'blame the victim' theme in attacking the government's case." *United States v. June*, No. 10-CR-30021-MAP, 2012 WL 245243, at *2 (D. Mass. Jan. 25, 2012). Such evidence is irrelevant and should be excluded. *Nicoletti*, 2017 WL 1382290, at *2 (granting government's motion in limine to preclude any evidence and argument by defendant that the victim bank "did not care whether representations in loan applications were accurate so long as the representations qualified the applicants for the loans that they were seeking"); *see also Leadbeater*, 2015 WL 567025, at *9 (holding that "Defendants may not argue in opening statements, or elicit testimony on direct examination, about the lack of diligence on the part of the victim lenders . . . or suggest that the banks or mortgage companies were not sufficiently careful or prudent in protecting themselves from fraud").

Also, Defendant Jay should be precluded from suggesting to the jury that the Ponzi victims are to blame because they were naive or greedy. *See United States v. Schlyer*, No. 17-CR-00030, 2018 WL 620057, at *7 (N.D. Ill. Jan. 30, 2018) (holding that "a fraud victim's naivety or greed does not lessen the culpability of the person who commits fraud"); *see also United States v. Amico*, 486 F.3d 764, 780 (2d Cir. 2007) (holding that "a victim's lack of sophistication is not relevant to the intent element of mail or wire fraud"); *United States v. Benson*, 548 F.2d 42, 44 (2d Cir. 1977) (holding that a victim's "gullibility or his own criminal background is not relevant"); *United States v. Higgins*, No. 3:18-CR-186, 2022 WL 36511, at *6 (S.D. Ohio Jan. 4, 2022) (holding that the "victim's negligence is not a defense to mail fraud and does not negate any of the elements of the mail fraud statute"). "The laws protecting against fraud are most needed to protect the careless and the naive from lupine predators, and they are designed for that purpose." *United States v. Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980).

D. Defendant Jay should be precluded from eliciting evidence concerning PPP fraud generally.

This Court should preclude Defendant Jay from eliciting evidence regarding the breadth of PPP fraud generally and the respective roles of the lenders and the government in managing and executing the PPP. *See United States v. Powell*, 509 F. App'x 958, 967 (11th Cir. 2013) (holding that "whether the lenders negligently created an environment of lax lending standards is irrelevant"); *United States v. Lindsey*, 850 F.3d 1009, 1016 (9th Cir. 2017) ("We hold that a victim's intentional disregard of relevant information is not a defense to wire fraud and thus evidence of such disregard is not admissible as a defense to mortgage fraud.").

E. The Court should preclude Defendant Jay from improperly using agent interview reports to impeach witnesses.

The government anticipates that Defendant Jay may seek to use interview reports prepared by the FBI and the SBA-OIG to cross-examine and potentially impeach interviewees should they be called by the government as witnesses at trial. As the Federal Rules of Evidence dictate, however, witnesses may only be cross-examined on and, if appropriate, impeached with *their own* prior statements. *See* Fed. R. Evid. 613. Because these interview reports are not a witness's own prior statement, it would not be proper to use them to cross-examine or impeach the witnesses who were the subject of these reports. Accordingly, the government requests that Defendant Jay be precluded from using interview reports to cross-examine and impeach interviewees.

In preparing these interview reports—FBI-302s and SBA-OIG Memoranda of Interviews (MOIs)—agents necessarily exercise some discretion by including their characterization of only those segments of a witness interview to which they assign importance and relevance. As such, 302s and MOIs are not "statements" of the interviewee. *United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003) (agent reports "are not Jencks Act statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness"). A statement within the meaning of the Jencks Act is defined as "a written statement made by said witness and signed or otherwise adopted and approved by him"; a recording or transcription that "is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously"; or a statement made by a witness to the grand jury. 18 U.S.C. § 3500(e). "[S]ummaries of an oral statement which evidence substantial selection of material" or "statements which contain [an] agent's interpretation or impressions" are not statements of the interviewee under the Jencks Act. *Palermo v. United States*, 360 U.S. 343, 352-52 (1959).

Because interview reports are not "statements," the defense should be prohibited from using such summaries of witness interviews to cross-examine or impeach government witnesses (other than the author of such reports), including prohibiting Defendant Jay from introducing such documents into evidence as extrinsic impeachment evidence, without making a sufficient showing that the document is in fact a statement attributable to that particular witness. Indeed, the

Supreme Court has long recognized that it would be "grossly unfair to allow the defense to use statements to impeach a witness which could not fairly be said to be the witness' own rather than the product of the investigator's selections, interpretations, and interpolations." *Id.* at 350; *see also United States v. Carter*, 776 F.3d 1309, 1328-29 (11th Cir. 2015) (observing no error in the district court's decision to "sustain[] the government's objections to defense counsel's questions on the ground that counsel was attempting to impeach the witness with notes from a law enforcement officer that did not constitute a statement of a witness"); *United States v. Saget*, 991 F.2d 702, 710 (11th Cir. 1993) ("a witness may not be impeached with a third party's characterization or interpretation of a prior oral statement unless the witness has subscribed to or otherwise adopted the statement as his own").

More generally, this Court should hold that the defense may not use an interview report in any way that suggests to the jury that the report is a statement of the witness. To allow otherwise would subvert the meaning of the Jencks Act and the Supreme Court's decision in *Palermo*.

Conclusion

For all of these reasons, the Government's Motion in Limine should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 21, 2022, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system.

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