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

ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	
	)	
v.	)	1:20-CR-228-2 (MHC) (JKL)
	)	
	)	
DANIEL ERIC JAY	)	
	)	

MOTIONS IN LIMINE

COMES NOW the Defendant, DANIEL ERIC JAY, and submits the following motions in limine to be considered by this Honorable Court prior to his jury trial, scheduled to begin on July 19, 2022. In support of this request, the Defendant shows as follows:

I) Motion to exclude racial epithets.

As the Court may recall, Daniel Jay was indicted with a codefendant, MAURICE FAYNE and charged with several counts of bank fraud, wire fraud and wire fraud conspiracy. Mr. Fayne pled guilty to running a trucking company which turned out to be a "ponzi scheme." Mr. Fayne also pled guilty to obtaining a PPP loan through fraudulent pretenses, purportedly to allow his trucking company to continue operating during the COVID-19 pandemic. (Doc. 96, 2nd superseding indictment); (Doc. 186-1, Fayne guilty plea). The evidence at trial will show that Mr. Fayne was the recipient and beneficiary of almost all of the funds from the alleged "Ponzi scheme," and Mr. Fayne used almost all of the PPP loan for his own, non-business related, purposes.

The Rule 16 discovery materials provided by the government in this case contain witness statements, emails, texts messages, (and perhaps even digital recordings) wherein Dan Jay, who is white, is alleged to refer to Mr. Fayne, who is African American, in a disparaging manner using the "N-word."

The Defendant moves in limine to exclude any and all such racial epithets from the upcoming trial as they would unduly prejudice Mr. Jay in the eyes of the jury, and they would unfairly place his moral character into evidence. "There is no place in a criminal prosecution for gratuitous reference to race, especially when a defendant's life hangs in the balance. Elementary concepts of equal protection and due process alike forbid a prosecutor to seek to procure a verdict on the basis of racial animosity." *United States v. Bowman*, 302 F.3d 1228, 1240 (11th Cir. 2002).

Any possible probative value possessed by these racial epithets is far outweighed by the unfair prejudice such evidence would create. Such matters must be weighed in accordance with Rules 401 and 403. For such evidence to be admitted, first, the evidence must be relevant to an issue other than the defendant's character. *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. den. 440 U.S. 920, 99 S.Ct. 1244 (1979), adopted in part by in *Huddleston v. United States*, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). See also *United States v. Miller*, 959 F.2d 1535, 1538 (11th Cir.), cert.den. 113 S.Ct. 382 (1992), (applying Beechum and Huddleston). Second, the court must determine whether the probative value of the evidence is substantially outweighed by undue prejudice under Federal Rule of Evidence 403. *United States v. Miller*, 959 F.2d at 1538; *Beechum*, 582 F.2d at 911.

WHEREBY, Dan Jay requests that the government be directed to instruct its witnesses to omit or redact any such racial epithets, "the N-word," and that the government redact all written documents and recordings to prevent the jury from being exposed to any such racial epithets allegedly uttered by Mr. Jay.

II) **<u>Motion to exclude allegations about a giant ruby investment scheme</u>.**

The Rule 16 discovery materials provided by the government in this case also contain some vague allegations and nefarious suggestions about an investment program to purchase shares in a large ruby gemstone. These matters are not charged in the indictment or related to the charges in the indictment.

Furthermore, there is no evidence that the giant ruby investment plan was criminal in nature or that Mr. Jay was criminally involved. Last, these matters are not sufficiently similar to allow their introduction at trial. Thus, in an abundance of caution, Mr. Jay moves in limine to exclude them.

Admission of the giant gemstone investment plan improperly places Mr. Jay's character into evidence before the jury in violation of Rule 404(a). The thin allegations surrounding the giant ruby and its provenance are not sufficiently relevant. Any probative value possessed by the evidence is outweighed by the unfair prejudice created. Such matters must be weighed in accordance with Rules 401 and 403. Rule of Evidence 404(b) provides in pertinent part:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Fed. R. Evid. 404(b).

This court must determine whether the probative value of the extrinsic act is substantially outweighed by undue prejudice under Federal Rule of Evidence 403. *United States v. Miller*, 959 F.2d at 1538; *Beechum*, 582 F.2d at 911. Where the traits that the charged and prior offenses have in common are traits common to the commission of those type offenses so that none of the traits could be called a "signature" trait, the uncharged offenses are not relevant. *Miller* 959 F.2d at 1540 (Kravitch, J., concurring)(noting the similarities between the prior act constituted "the modus operandi of every drug dealer"). In this case, there are no signature traits which would make the defendant sufficiently, more likely to have committed the bank and wire frauds charged in the indictment.

Introduction of the ruby investment program, through testimony from law enforcement officers, alleged victims, coconspirators or former codefendants, will unduly extend, delay and belabor this trial. Furthermore, these matters are likely to confuse the jury in what is already going to be a very confusing case.

WHEREBY, Dan Jay requests that these matters be excluded from his trial.

III) **Motion to exclude any emails, text messages or documents to which Dan Jay was a party, which the government obtained in violation of the attorney-client privilege.**

In an abundance of caution, Mr. Jay moves in limine to exclude any emails, text messages or documents which were seized in violation of the attorney-client privilege.

IV) **Motion to exclude single-party recorded conversations made in violation of state laws**.

The Rule 16 discovery materials provided by the government in this case contain several recorded phone conversations of Dan Jay made with "single-party" consent, where the consent was given by the person / witness who recorded the call. While single-party consent is allowed in many states including Georgia, it is not allowed in several states. That is, several states require that both (all) parties consent to recording a phone call. Thus, in an abundance of caution, Mr. Jay moves to exclude any single-party recorded calls which were made in violation of the laws of the state in which they were recorded.

V) **Renewed request for Brady material.**

Mr. Jay renews his request for any all *Brad*y material, including but not limited evidence revealing or reflecting that he was unaware that Maurice Fayne and others were running a "Ponzi scheme" or otherwise committing fraud. Mr. Jay requests production of any and all impeachment materials including prior inconsistent statements made by government witnesses, or summaries of witness statements, and evidence of drug, alcohol or gambling abuse or addiction, or evidence mental illness which could cast doubt on the credibility of the government's trial witnesses. This request seeks such impeachment evidence for all lay, expert and law enforcement witnesses.

Dan Jay requests production of all **recorded jail calls** made by government witness which are in the possession of the government or its agents. The Defendant also requests production of information or reports revealing the payment of funds or financial benefits to any government witnesses other than standard employee salaries and witness appearance fees. This request includes any expert witness fees, cash awards or bonuses or charitable assistance given to government witness. Last, the Defendant requests production of all information related to pending (or recently resolved) criminal charges against any government witness, whether or not actual benefit has been or will be provided to said witness by the United States government.

Mr. Jay submits he is entitled to the information requested by this motion pursuant to Rule 16 of the Federal Rules of Criminal Procedure, *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 105 (1972).

> [T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, (citation omitted)) the prosecution's responsibility for failing to disclose known,

> favorable evidence rising to a material level of importance is inescapable.
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> . . .
>
> [T]he prosecutor has the means to discharge the government's Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as final arbiters of the government's obligation to ensure fair trials.

Kyles v. Whitley, 115 S.Ct at 1568.

Furthermore, disclosure of information impeaching witnesses' credibility must be timed to enable effective preparation for trial. *United States v. Polisi*, 416 F.2d 573, 578 (2nd Cir. 1969); *United States v. Baxter*, 492 F.2d 150, 173-174 (9th Cir. 1973), *cert. denied* 417 U.S. 940 (1974). The appropriate time for disclosure is as early as possible to enable defense counsel effectively to use the information in preparing the case for trial. Compare *United States v. Campagnuolo*, 592 F.2d 852 (5th Cir. 1979) with *United States v. Opager*, 589 F.2d 799 (5th Cir. 1979). Indeed, even when the favorable information takes the form of a witness' statement otherwise protected from pretrial discovery by the Jencks Act (18 U.S.C. §3500), the prosecution must nonetheless disclose it as far in advance of trial as Due Process may practically require for the defense to make fair use of it. *United States v. Campagnuolo*, supra.

VI. **Duty not to call witnesses who are likely to commit perjury.**

Mr. Jay anticipates that the government will call several witnesses who are former codefendants or alleged coconspirators of Mr. Jay. Some of these witnesses, such as MAURICE FAYNE, MICHAEL SARGENT and CARRIE CAPPONE have extensive histories of lying to other people, as well as prior convictions for fraud involving the making of numerous false statements. Thus, Mr. Jay moves in limine to exclude from the witness stand any witnesses whom the government could reasonably foresee or suspect of being likely to commit perjury. A *Giglio* error occurs when undisclosed evidence demonstrates that the prosecution used perjured testimony and that the prosecution knew, or should have known, of the perjury. *Ford v. Hall*, 546 F.3d 1326, 1331 (11th Cir. 2008).

The Defendant does not mean to suggest the prosecutors in this case would intentionally present perjured testimony. However, given the cast of characters involved in this case, extra caution should be exercised in this area.

WHEREBY, DANIEL ERIC JAY requests that his motions in limine be granted and the he be proved the requested relief as well as the requested *Brady* materials.

Dated: This 23rd day of June, 2022.

Respectfully submitted,

s/ *L. Burton Finlayson*
L. BURTON FINLAYSON
Attorney For DANIEL JAY
Georgia Bar Number: 261460

LAW OFFICES OF
L. BURTON FINLAYSON, LLC
931 Ponce de Leon Avenue, NE
Atlanta, Georgia 30306
(404) 872-0560
lbfcourts@aol.com

CERTIFICATE OF SERVICE

This is to certify that I have this day electronically filed the foregoing Motions in Limine with the Clerk of Court using the CM/ECF system which will automatically send email notifications of such filing to all counsel of record including the following:

Mr. Russell Phillips .
Assistant United States Attorney
600 U.S. Courthouse
75 Ted Turner Drive, S. W.
Atlanta, Georgia 30303

DATED: This 23rd day of June, 2022.

s/ *L. Burton Finlayson*

L. BURTON FINLAYSON
ATTORNEY FOR DANIEL JAY
State Bar Number: 261460