

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 Response to Defendant's Motion in Limine and
Defendant's Motion for Production of PSRs of Government Witnesses**

The United States of America hereby responds to Defendant Jay's Motion in Limine (Doc. 269) and his Motion for Production of PSRs of Government Witnesses (Doc. 271), showing the Court as follows:

1. Motion to exclude racial epithets uttered by Defendant Jay.

As Defendant Jay notes in his Motion in Limine, the Rule 16 discovery includes emails, texts messages, and digital recordings in which Defendant Jay makes racist and anti-Semitic remarks. (*See* Doc. 269 at 2). Defendant Jay moves to exclude all such evidence on the grounds that it would "unduly prejudice [him] in the eyes of the jury." (*Id.*). Accordingly, Defendant Jay asks the Government to (1) instruct its witnesses not to refer to any such racial epithets, and (2) redact all documents and recordings as needed to prevent the jury from being exposed to any such racial epithets. (*Id.* at 3). The Government believes that is a good suggestion and intends to do exactly that.

2. Motion to exclude allegations about Defendant Jay's involvement in a "giant ruby" investment scheme.

Defendant Jay moves to exclude all evidence concerning his participation in an uncharged scheme to defraud investors who purchased shares in a fictitious giant ruby. (*Id.*). The discovery shows that Defendant Jay was indeed involved in a scam involving a fictitious giant ruby.

Although Rule 404(b) does not permit the government to admit evidence of other bad acts simply to prove a defendant's bad character, it does permit such evidence to show intent, knowledge, plan, or absence of mistake. FED. R. EVID. 404(b). Evidence is admissible under Rule 404(b) if (1) it is "relevant to an issue other than the defendant's character" and (2) "the probative value of the evidence must not be substantially outweighed by its undue prejudice." *United States v. Jackson*, 761 F.2d 1541, 1543 (11th Cir. 1985); *see also United States v. LaSpesa*, 956 F.2d 1027, 1036 (11th Cir. 1992) (holding that evidence of defendant's involvement in other fraudulent schemes was admissible to show his intent to commit fraud when he engaged in the transactions charged in the indictment) "Extrinsic act evidence is especially relevant when the government has, as it [does] here, the burden to prove the defendant's intent to commit the charged offense." *United States v. Hooshmand*, 931 F.2d 725, 736 (11th Cir. 1991).

Even though the Government believes that evidence of Defendant Jay's involvement in the "giant ruby" scam would be admissible under Rule 404(b), the Government does not intend to introduce such evidence at Defendant Jay's trial. If, however, Defendant Jay is convicted of any charges relating to the scheme to defraud investors in Fayne's trucking company (Counts 1 through 4 of

the Second Superseding Indictment), the Government believes that evidence of Defendant Jay's involvement in the "giant ruby" scam would be part of the relevant conduct for sentencing purposes under USSG § 1B1.3.

3. Motion to exclude any emails, text messages or documents to which Defendant Jay was a party, which the government allegedly obtained in violation of the attorney-client privilege.

Defendant Jay moves "to exclude any emails, text messages or documents which were [allegedly] seized in violation of the attorney-client privilege." (Doc. 269 at 5). He offers no details and no explanation as to why he thinks such documents might exist.

The Government did not obtain any emails, text messages or documents in violation of the attorney-client privilege, and it does not intend to offer any such documents into evidence.

4. Motion to exclude single-party recorded conversations made in violation of state laws.

Defendant Jay states in his Motion in Limine that the discovery provided by the Government includes recorded telephone conversations between Defendant Jay and a Ponzi victim, which the victim recorded without Defendant Jay's consent and without being asked to do so by the Government. (*See id.* at 6). Defendant Jay argues that the Government should not be allowed to play any such recordings for the jury because, "[w]hile single-party consent is allowed in many states including Georgia, it is not allowed in several states." (*Id.*).

Defendant Jay's argument is based entirely on his understanding of *state* law and ignores the controlling *federal* law. Under federal law, it is legal for a person "not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication." 18 U.S.C. § 2511(2)(d); *accord United States v. Turk*, 526 F.2d 654, 657 (5th Cir. 1976) (stating that "§ 2511(2)(d) specifically exempts situations in which one party to the conversation is himself the interceptor"); *United States v. Wright*, 573 F.2d 681, 684 (1st Cir. 1978) ("It is clear that the tapes were not illegal wiretaps since in every instance one party to the conversation consented to the tapes being made."); *see also United States v. White*, 401 U.S. 745, 752 (1971) (stating that "one contemplating illegal activities must realize and risk that his companions may be reporting to the police").

Defendant Jay lived in Pennsylvania when the calls were recorded. "Even if Pennsylvania law was violated, that fact would not render the recordings inadmissible in a federal criminal trial." *United States v. Felton*, 592 F. Supp. 172, 193 (W.D. Pa. 1984), *rev'd on other grounds*, 753 F.2d 256, 276 (3d Cir. 1985). "So long as the information was lawfully obtained under federal law and met federal standards of reasonableness, it is admissible in federal court despite a violation of state law." *United States v. Armocida*, 515 F.2d 49, 51-52 (3rd Cir. 1975).

Furthermore, Defendant Jay does not allege that his telephone conversations were recorded "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State," which would make them inadmissible. *See* 18 U.S.C. § 2511(2)(d).

5. Renewed request for *Brady* material, and Motion for Production of PSRs of Government Witnesses.

In his Motion in Limine, Defendant Jay “renews his request for any all Brady material.” (Doc. 269 at 6). The Government understands its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and the Jencks Act, 18 U.S.C. § 3500.

The Government provided *early* Jencks Act disclosures with its original Rule 16 discovery production, including all available 302s and MOIs. That is beyond what is required by law. *See United States v. Mitrovic*, 286 F.R.D. 683, 686 (N.D. Ga. 2012) (noting “that investigative interview summaries are excluded from Rule 16 production,” and that “the production of witness statements is governed by the Jencks Act, 18 U.S.C. § 3500, and Rule 26.2, Fed. R. Crim. P, which together provide that the Court may order production of a witness’s statement only ‘after [the] witness . . . has testified on direct examination’”); *see also United States v. Jordan*, 316 F.3d 1215, 1252 (11th Cir. 2003) (citing cases and holding that interview notes and any memoranda prepared from those notes “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”).

On June 29, 2022, the Government provided defense counsel with the following transcripts:

- 2020_07_27 - status conference;
- 2020_08_14 - status conference;
- Fayne’s bond revocation hearing;

- hearing on Fayne's motion to reconsider bond;
- Fayne's guilty-plea hearing;
- Fayne's sentencing; and
- Mike Sargent's sentencing.

On June 30, 2022, the Government provided defense counsel with the following additional documents concerning Fayne:

- Fayne's criminal history, updated June 29, 2022; and
- FBI-302 of Fayne's interview on 04-28-2022.

Defendant Jay has also filed a Motion for Production of PSRs of Government Witnesses. (Doc. 271). Maurice Fayne, a/k/a Arkansas Mo, is expected to testify at trial on behalf of the Government. The Government intends to file an *ex parte* motion under seal, seeking permission to disclose to the defense all parts of Fayne's PSR that are arguably covered by *Brady*, *Giglio*, or the Jencks Act. The Government will highlight in its *ex parte* motion which parts of Fayne's PSR it believes should be disclosed. But before actually turning over any PSR material to the defense, the Government will wait on direction from the Court.

Defendant Jay also asks the Government to produce two PSRs of his other convicted Co-Defendant, Mike Sargent—one pertaining to this case and one pertaining to Sargent's 2003 bank fraud conviction in the Northern District of Texas. (Doc. 271 at 2 n.1). The Government does not plan to call Sargent as a witness at Defendant Jay's trial. "[A] defendant may be entitled to a witness's PSR if it is in the hands of the prosecutor as distinguished from the probation officer." *United States v. Ventura*, 132 F.3d 44, *2 (10th Cir. 1997). The prosecution

team in the instant case does not have, and has never had, access to Sargent's PSR from his 2003 case in the Northern District of Texas.

"A presentence report . . . is not a statement made by the witness. Instead, it is a statement that a probation officer makes to aid the court in sentencing a defendant." *United States v. Jackson*, 978 F.2d 903, 908 (5th Cir. 1992). "Every court has supervisory power over its own records and files." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). "Control over these documents is a discretionary matter with the district court." *United States v. Gomez*, 323 F.3d 1305, 1307-08 (11th Cir. 2003).

"[C]ourts have been very reluctant to give *third parties* access to the presentence investigation report prepared for some other individual or individuals." *United States Dep't of Justice v. Julian*, 486 U.S. 1, 12 (1988) (citations omitted). For example, the former Fifth Circuit held that "requiring disclosure of a presentence report is contrary to the public interest as it may adversely affect the sentencing court's ability to obtain data on a confidential basis from the accused, and from sources independent of the accused, for use in the sentencing process." *United States v. Martinello*, 556 F.2d 1215, 1216 (5th Cir. 1977).

The Seventh Circuit has held that "[o]nly where a compelling, particularized need for disclosure is shown should the district court disclose the report; even then, however, the court should limit disclosure to those portions of the report which are directly relevant to the demonstrated need." *United States v. Corbitt*, 879 F.2d 224, 239 (7th Cir. 1989). In the Seventh Circuit's view, a party to "pending or contemplated litigation" who requires access to a presentence report

“to impeach a witness, or to establish an affirmative proposition” would normally meet this requirement. *Id.* at 238-39.

“In camera review by the trial court of a cooperating witness’s PSR to determine whether it contains any discoverable information protects the witness’s interest in confidentiality while preserving the defendant’s trial rights.” *Ventura*, 132 F.3d at *2; *see also United States v. Wallace*, 32 F.3d 921, 930 (5th Cir. 1994) (holding, with respect to the defendants’ *Brady* request, that the district court “fulfilled its duty and afforded the defendants all the rights to which they were entitled” by conducting an *in camera* review of the PSI of a government witness/co-conspirator and determining that it need not be produced because it was not “favorable to the defense”).

In case this Court wishes to conduct an *in camera* review of Sargent’s PSR from this case, the Government will provide it to the Court along with Fayne’s PSR when the Government files its *ex parte* motion. The Government will not disclose any material from Sargent’s PSR unless and until directed to do so by this Court.

6. Duty not to call witnesses who are likely to commit perjury.

Defendant 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.” (Doc. 269 at 9). Defendant Jay cites no authority in support of that sweeping proposition, and it does not appear to be in keeping with applicable law.

This Court's Local Rules require all lawyers practicing before this Court (not just the Government's lawyers, but all lawyers) to comply with the Georgia Rules of Professional Conduct contained in the Rules and Regulations of the State Bar of Georgia, one of which states that "[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false. . . . The maximum penalty for a violation of this Rule is disbarment." *Montgomery v. Georgia Power Co.*, No. 1:15-CV-02980-SCJ, 2017 WL 5244175, at *6 n.14 (N.D. Ga. Feb. 28, 2017) (quoting Rule 3.3 of the Georgia Rules of Professional Conduct); *see also* Comment (8) of Rule 3.3 ("A lawyer's knowledge that evidence is false . . . can be inferred from the circumstances."). The Government has no intention of offering any evidence that it knows to be false.

The Government plans to call Defendant Jay's convicted co-defendant, Maurice Fayne, to testify at Defendant Jay's trial. There is nothing improper or unusual about that. *See, e.g., United States v. Dees*, 131 F. App'x 170, 173 (11th Cir. 2005) (affirming defendant's conviction and noting that "the backbone of the government's case against [defendant] was formed through the testimony of [defendant's] convicted co-conspirators"). Defendant Jay's counsel will have ample opportunity to impeach Fayne's credibility on cross-examination and make appropriate arguments in his closing, based on Fayne's prior criminal history, Fayne's conviction in this case, and the compelled nature of Fayne's testimony. "Nothing more [is] required." *United States v. Hozian*, 622 F.2d 439, 442 (9th Cir. 1980). The same goes for any unindicted coconspirators who may be called to testify.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 30, 2022, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system.

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