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

UNITED STATES OF AMERICA **v.** **DANIEL ERIC JAY,** **Defendant.**	**CRIMINAL ACTION FILE** **NO. 1:20-CR-228-MHC-JKL-2**

ORDER

Defendant Daniel Eric Jay has been charged in the Second Superseding Criminal Indictment with one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349, two counts of wire fraud in violation of 18 U.S.C. § 1343, and one count of bank fraud in violation of 18 U.S.C. § 1344. Second Superseding Criminal Indictment [Doc. 96]. Trial is set to begin on July 19, 2022.

In the Order Resetting Trial [Doc. 264], the parties were directed to file any motions in limine on or before June 23, 2022, and responses to motions in limine on or before July 1, 2022. Both parties timely filed their Motions in Limine. Gov't's Mot. in Limine ("Gov't's Mot.") [Doc. 268]; Def.'s Mots. in Limine ("Def.'s Mot.") [Doc. 269]. Although the Government filed its response to Defendant's Motion in Limine ("Gov't's Resp.") [Doc. 273], Defendant Jay filed no response to the Government's motion.

I. GOVERNMENT'S MOTION IN LIMINE

A. Argument That Other Participants Were Not Indicted

The Government seeks to prohibit Defendant Jay from arguing that he should be acquitted because others who may have participated or profited in the Ponzi scheme were not charged. Gov't's Mot. at 3-6. Defendant Jay does not oppose the request. Whether other individuals have engaged in similar conduct as Defendant Jay is irrelevant to the charges against him and therefore inadmissible. FED. R. EVID. 402. The Government's motion is **GRANTED**.

B. Argument That the Victim Bank Could Have Prevented the Fraud If It Had Been More Careful

The Government seeks to prevent Defendant Jay from arguing that he should be acquitted of bank fraud because United Community Bank, which approved the loan application under the Paycheck Protection Program ("PPP"), could have prevented the fraud had it been more careful. Gov't's Mot. at 6-8. Defendant Jay does not oppose this request. "[T]he negligence of the victim in failing to discover a fraudulent scheme cannot be a defense to wire or bank fraud because '[a] perpetrator of fraud is no less guilty of fraud because his victim is also guilty of negligence.'" United States v. Teers, 591 F. App'x 824, 844 (11th Cir. 2014) (quoting United States v. Svete, 556 F.3d 1157, 1165 (11th Cir. 2009)). The Government's motion is **GRANTED**.

C. Argument That Victims Are to Blame

The Government seeks to prevent Defendant Jay from arguing that the victims of the fraud are culpable because they were gullible or greedy. Gov't's Mot. at 9-10. Defendant Jay does not oppose the request. For the same reasons as stated in the previous section, the Government's Motion is **GRANTED**. See also United States v. Colton, 231 F.3d 890, 903 (4th Cir. 2000) ("If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright.") (citations omitted).

D. Evidence Regarding the Breadth of PPP Fraud Generally

The Government seeks to prohibit Defendant Jay from eliciting evidence concerning the regularity of PPP fraud in general. Gov't's Mot. at 10-11. Defendant Jay does not oppose the request. The Government's Motion is **GRANTED**. See United States v. Powell, 509 F. App'x 958, 967 (11th Cir. 2013) (holding that whether lenders may have created "an environment of lax lending standards is irrelevant" to whether a conspiracy to commit wire or mail fraud occurred).

E. Use of Agent Interview Reports for Impeachment Purposes

The Government objects to Defendant Jay using law enforcement agent's interview reports to impeach interviewees if the latter are called as witnesses. Gov't's Mot. at 11-13. Defendant Jay does not oppose the request.

Rule 613 of the Federal Rules of Evidence permits the use of a witness's prior statement for impeachment purposes under certain circumstances. FED. R. EVID. 613. However, interview summary reports are not witness statements under the Jencks Act. See United States v. Jordan, 316 F.3d 1215, 1252 (11th Cir. 2003) (stating "an interviewer's raw notes, and anything prepared from those notes (such as an FBI 302), 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."); see also Palermo v. United States, 360 U.S. 343, 350 (1959) (stating 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."); United States v. Saget, 991 F.2d 702, 710 (11th Cir. 1993) ("[W]e conclude that 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.").

Consequently, Defendant Jay may not impeach a Government witness by use of a law enforcement agent's interview report unless the witness has ratified or adopt the statement as his or her own. The Government's Motion in Limine is **GRANTED**. This does not prohibit Defendant Jay from asking a witness whether he or she gave a statement to a law enforcement agent and the contents of such a statement. But the agent's summary is not admissible to impeach that witness because it is not a statement of the witness (unless otherwise verified as such).

II. DEFENDANT'S MOTIONS IN LIMINE

A. Racial Epithets

Defendant Jay seeks to prohibit the Government from referencing any racial epithets used by him in any written statements, email or text messages, or digital recordings, and seeks to have any such references in exhibits redacted. Def.'s Mot. at 1-3. The Government agrees and intends to instruct its witnesses not to refer to any such racial epithets and to redact all documents and recordings as needed to prevent the jury from being exposed to such epithets. Gov't Resp. at 1. Defendant Jay's Motion is **GRANTED**.

B. Allegations About a Giant Ruby Investment Scheme

Defendant Jay seeks to prevent the Government from introducing evidence of a scheme to defraud involving a "giant ruby investment plan" that was not charged in the indictment and that would be prejudicial. Def.'s Mot. in Limine at 3-5. The Government responds by stating that, even though it believes the evidence would be admissible under Rule 404(b), it does not intend to introduce such evidence at trial. Gov't's Resp. at 2. Defendant Jay's Motion is therefore **DENIED AS MOOT**.

C. Emails, Text Messages, or Documents Obtained in Violation of the Attorney-Client Privilege

"Out of an abundance of caution," Defendant Jay seeks to exclude any emails, text messages, or documents purportedly seized in violation of the attorney-client privilege. Def.'s Mot. at 5. The Government responds that it did not obtain any such written communications and does not intend to offer such documents into evidence. Gov't's Resp. at 3. Defendant Jay's Motion is **DENIED AS MOOT**.

D. Single-Party Recorded Conversations Made in Violation of State Laws

Although acknowledging that in many states such as Georgia the consent of the person who recorded a telephone conversation is sufficient for the call to be admitted, Defendant Jay "in an abundance of caution" moves to exclude any single-party consent recorded calls that were made in violation of the state in which they were recorded. Def.'s Mot. at 6. In response, the Government points out that, regardless of the law of the state in which the call was recorded, the calls are still admissible in a federal criminal trial as long as they were lawfully obtained under federal law. Gov't's Resp. at 3-4. The Court agrees with the Government.

Under 18 U.S.C. § 2511(2)(d),

> [i]t shall not be unlawful . . . 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 or whether one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution of laws of the United States or of any State.

According to the Government, the calls in question were recorded when Defendant Jay lived in Pennsylvania, and the district court in that state has followed federal court precedent which provides that it is not unlawful under federal law for a person not acting under color of law to record a telephone call where such person is a party to the conversation. See United States v. Felton, 592 F. Supp. 172, 193 (W.D. Pa. 1984), rev'd on other grounds, 753 F.2d 256 (3d Cir. 1985) (interpreting 18 U.S.C. § 2511(2)(d) to mean that if the taping by a person not acting under color of law was in violation of state law, that fact would not render the recordings inadmissible in a federal criminal trial, for as long as federal law is satisfied and federal standards of reasonableness are met, the evidence is admissible, despite the fact that the interception was a violation of state law); see also United States v.

Morrison, 153 F.3d 34, 57 (2d Cir. 1998) (same); United States v. Horton, 601 F.2d 319, 323 (7th Cir. 1979) (same)

Accordingly, Defendant's motion is **DENIED**.

E. Brady Material

In his Motion in Limine, Defendant Jay "renews" his request for exculpatory material under Brady v. Maryland, 373 U.D. 83 (1963), and impeachment evidence under Giglio v. United States, 405 U.S. 105 (1972). Def.'s Mot. at 6-8. In his scheduling order issued on August 14, 2020, Magistrate Judge Larkins directed the Government

> to provide all materials and information that are arguably favorable to the defendant in compliance with its obligations under Brady . . . ; Giglio . . .; and their progeny. Exculpatory material as defined in Brady . . . shall be provide sufficiently in advance of trial to allow a defendant to use it effectively. Impeachment material must be provided no later than production of the Jencks Act statements."

Pretrial Scheduling Order [Doc. 64] at 7. In its response, the Government states that it understands and has met its obligations under both Brady and Giglio. Gov't's Resp. at 5-6. Defendant Jay's motion is therefore **DENIED AS MOOT** but the Government is directed to continue to comply with its obligations under Brady and Giglio.

F. Perjured Testimony

Finally, Defendant Jay anticipates that the Government will call witnesses who are either co-Defendants or alleged co-conspirators who have histories of lying to other people as well as prior convictions related to fraud. Def.'s Mot. at 9. Defendant Jay moves to exclude testimony that the Government "could reasonably foresee or suspect" to be perjurious. Id. Defendant Jay cites no authority for such a request and the Government is certainly aware of its ethical obligations which, at a minimum, bars an attorney from offering evidence he or she knows to be false. Rule 3.3(c) of the Ga. Rules of Professional Conduct.

The Government indicates that it intends to call co-Defendant Fayne as a witness and perhaps other unindicted co-conspirators. Gov't's Resp. at 9. Defendant Jay will have ample opportunity to cross-examine and impeach these witnesses. Defendant Jay's motion is **DENIED**.

III. CONCLUSION

For the above reasons, it is hereby **ORDERED** that the Government's Motion in Limine [Doc. 268] is **GRANTED** and Defendant Jay's Motions in

Limine [Doc. 269] are **GRANTED IN PART and DENIED IN PART** as discussed in this Order.

IT IS SO ORDERED this 5th day of July, 2022.

Mark H. Cohen

MARK H. COHEN
United States District Judge