Honorable John Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

UNITED STATES OF AMERICA,	)	
	)	No. CR20-174 JCC
Plaintiff,	)	
	)	DEFENSE MOTIONS IN LIMINE
v.	)	
	)	
ERIC SHIBLEY,	)	
	)	
Defendant.	)	
	)	

Motion

Defendant Eric Shibley, through undersigned counsel, moves in limine to preclude introduction of certain evidence in the trial.[1]

Relevant Background

Mr. Shibley is a 42-year-old man, a naturalized U.S. citizen originally from Bangladesh, now charged by indictment with wire and bank fraud and money laundering arising from various loan applications he made in the spring of 2020 in connection with the federal Paycheck Protection Program and the Economic Injury Disaster Loan program.

[1] Prior to this filing, on October 26 and again on October 30, 2021, defense counsel conferred with government counsel about matters raised herein that remain unresolved. The defense understands that the government will not seek in any way to use information from Mr. Shibley's prior divorce proceeding, the underlying conduct behind the Anacortes Municipal Court criminal matter described below, evidence of prior arrests or criminal charges, or his current custody status.

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In prior years Mr. Shibley was a Washington-licensed physician who ministered to a diverse patient base, many of whom were battling drug addiction and mental illness and who were often homeless. While still medically licensed he began investing in local real estate and performing renovation work on both properties that he owned and other properties he learned about through word of mouth. He structured his business through the use of Limited Liability Corporations (LLCs) and hired people to assist him in these endeavors. For the most part, he operated on a cash basis, paying expenses and wages in cash and receiving much of his income in cash.

His approach suffered from a lack of business convention and proper documentation, some of it a product of inexperience and lack of business savvy and some an outgrowth of prior contentious dealings with others. Like most small businesses, his was severely impacted by the onset of the Covid-19 pandemic in early 2020. Shortly after the government-ordered shutdown that began around the first week of March that year, he learned of certain relief offered under the CARES Act and ultimately made several loan applications that form the basis of the current charges.

Based on the indictment, the government theorizes that Mr. Shibley acted fraudulently in at least two basic ways: (1) by answering online, between April and June 2020, in the negative to the question, "Is the Applicant . . . subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole?" and (2)

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overstating the number of employees and amount of payroll he or his entities actually had.

In fact, on December 13, 2018, a criminal judgment was entered against Mr. Shibley in *City of Anacortes v. Eric Shibley*, Anacortes Municipal Court #AC175 for Violation of a Protective Order, a protection order issued in his divorce proceeding. The judgment imposed 24 months of probation conditioned upon service of a 30-day sentence (364 days with 334 suspended), payment of a fine and costs, and submission to an evaluation by an accredited violence/aggression agency and completion of any recommended treatment. A copy of this judgment is attached as Exhibit 1.

Although formal probation was not set to expire until December 2020, by the spring of 2020 all the conditions of the original sentence has been substantially met (sentence served, fines paid, DV assessment and counseling done). In May 2020, when asked, Mr. Shibley's probation officer, Jeanne McDermott, informed a government investigator that Mr. Shibley had "recently completed his domestic violence counseling and that she had no reason to be in touch with him." When he answered the pertinent question on the loan applications Mr. Shibley did not realize it might have required a different answer.

Mr. Shibley has been involved in prior civil litigation and in a prior bankruptcy. His Washington State medical license was restricted by an ex parte order that became effective on January 2, 2020, and fully revoked in August 2020.

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Mr. Shibley's prior involvement with the legal and medical system raises concerns about the government's intended use of this information to prove its charges or to impeach his testimony. Without being specific, it has indicated that it may seek to impeach Mr. Shibley with evidence related to his bankruptcy, prior civil litigation, and competency evaluation. Additionally, the parties have been unable to agree on the proper limits to proof of his knowledge of his probation status.

In Limine Matters

Even if evidence is marginally relevant, it may still be excluded if its legitimate probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Rule 403. Evidence is unfairly prejudicial if it appeals to the jury's sympathies, provokes its instinct to punish, or otherwise may cause it to base a decision on something other than the established propositions in the case. See *United States v. Skillman*, 922 F.2d 1370, 1374 (9th Cir. 1990).

With the foregoing in mind, the following evidence by the government should not be allowed during trial:

1. **Any details of the judgment in *City of Anacortes v. Eric Shibley* that identify the underlying crime or any condition referencing "domestic violence", "DV", a "victim's panel", or any "violence/aggression treatment agency".**

The defense does not dispute that Mr. Shibley was, in fact, "on probation" but reserves the right to argue that he did not know he was when he made these loan applications and/or read the question in a way that did not require an affirmative

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response. A substantially redacted judgment might work, as would a stipulation to the fact of his probation with some leave to contest the knowledge aspect without delving into the prejudicial underlying details of the conviction.

2. The formal restriction of Mr. Shibley's medical license or his subsequent purported unauthorized writing of prescriptions for controlled substances.

The government has suggested that the restricted nature of Mr. Shibley's medical license, effective on about January 2, 2020, demonstrated that his business was suffering before the Covid pandemic created shutdown conditions a couple of months later and is also admissible under ER 404(b) to show his motive to engage in a scheme to defraud.[2]

The problem with this logic is that it equates impoverishment with criminality (doesn't honesty lie in the heart, not the wallet?). It overlooks the fact that the Paycheck Protection Program under the CARES Act was, by definition, designed to alleviate suffering in the business community. *Every* applicant was required to certify that, "[c]urrent economic uncertainty makes this loan necessary to support the ongoing operations of the Applicant". Mr. Shibley, like ever other applicant for PPP loan money, was struggling under the existing economic emergency, and had a motive to save his businesses. Being in need of PPP loan money, a trait shared by tens of thousands of small

[2] The standard for ER 404(b) admissibility requires the prior bad act 1) prove a material point in issue, 2) not be too remote in time, 3) be proven with sufficient evidence, and 4) if admitted to prove intent, be similar to the offense charged. *United States v. Beckma*n, 298 F.3d 788, 794 (9th Cir. 2002).

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businesses, does not necessarily make one motivated to commit fraud.

Mr. Shibley was engaged in real estate renovation and construction activity for a substantial period prior to his applications for CARES Act funding. He applied almost immediately after the funding became available in April 2020. The fact that his medical practice, one that had been declining anyway, was “restricted” a short time before he made the applications is of little relevance and would primarily serve to prejudice him in the eyes of the jury.

Any effort to discredit Mr. Shibley by evidence purporting to show he prescribed controlled substances during a period when his medical license was restricted should be disallowed as marginally relevant and unfairly prejudicial under Rule 403.

3. Mr. Shibley's prior civil litigation, his prior bankruptcy, and the subject matters of that activities.

The government’s vague threat to seek impeachment of Mr. Shibley with evidence related to his bankruptcy or prior civil litigation, particularly since there is a lot of it, leaves the defense guessing. While an impeaching party might properly elicit testimony that contradicts the witness’s own testimony, a common issue is whether the party may use extrinsic evidence to establish the contradiction. The classic standard for whether a matter is collateral, and thus not susceptible to proof by extrinsic evidence, is whether it could be introduced for any purpose independent of the contradiction. See *United States*

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v. Scott, 243 F.3d 1103 1107 (8th Cir. 2001). Ultimately, the admissibility of extrinsic evidence to contradict a witness's testimony must be judged under the relevance standards of Rules 401 - 403. *United States v. DeCologero*, 530 F.3d 36, t60 (1st Cir. 2008). Among factors the court should consider are the significance of the contradicted fact to the witness's story, the ease with which the contradiction can be proved, and whether the contradicted fact was elicited on direct or cross-examination. *United States v. Kincaid-Chauncey*, 556 F.3d 923, 932-933 (9th Cir. 2009).

As soon as practicable the government should be required to disclose any evidence of this sort that it intends to use in its cross examination of Mr. Shibley. Since this evidence apparently does not meet the relevancy standards that would make it non-collateral, it must be viewed with a skeptical eye to assess whether it is truly contradictory. Even if so, the government should be barred from extrinsic proof of such.

4. Any use of information acquired during Mr. Shibley's court-ordered competency evaluation.

Mr. Shibley is not raising an insanity defense or mental disease or defect or any other mental condition bearing on the issue of guilt. He not presenting any psychological or psychiatric evidence. Accordingly, any use by the government of a mental competency evaluation ordered by the court and conducted outside the presence of counsel is improper for any purpose, including the cross-examination of Mr. Shibley.

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The admission of purportedly incriminating statements given during the course of a court-ordered psychiatric examination violates Fifth Amendment due process unless the defendant is first apprised of his right to remain silent and that his statements can be used against him and thereafter waives that right. *Estelle v. Smith*, 451 U.S. 454, 468-469 (1981). See also *Petrocelli v. Baker*, 869 F.3d 710, 728 (9th Cir. 2017)(due process violation when defendant not given Miranda warning before psychiatric evaluation). Criminal Rule 12.2(c)(4) is in accord:

> **(4)** ***Inadmissibility of a Defendant's Statements***. No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on the statement, and no other fruits of the statement may be admitted into evidence against the defendant in any criminal proceeding except on an issue regarding mental condition on which the defendant:
>
> (A) has introduced evidence of incompetency or evidence requiring notice under Rule 12.2 . . .

Any use of material from Mr. Shibley's court-ordered competency evaluation, for any purpose adverse to him, would create serious due process problems and should not be allowed.

5. [Reserved]

Respectfully submitted this 1st day of November, 2021.

/s/ Michael Nance, WSBA #13933
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Certificate of Service

I hereby certify that on the 1st day of November, 2021, I electronically filed the foregoing with the clerk of the court using the CM/ECF system. Notice of this filing will be sent electronically to counsel of record for other parties.

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