UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**4:12-cr-00087-RAS-DDB**
	)	
v.	)	
	)	
XXXX XXXX, JR.,	)	
	)	
Defendant.	)	
	)	

MOTIONS *IN LIMINE* NUMBERS I-VI

Defendant XXXX XXXX, Jr. moves this Court *in limine* to preclude the government from asking questions of any witness at trial, or presenting evidence or argument at trial, with regard to the subjects set forth below.

I. UNDER FED R. EVID. 402, 403 AND 404(b), THE GOVERNMENT SHOULD BE PRECLUDED FROM OFFERING EVIDENCE AS TO OTHER ALLEGED FRAUDULENT LOANS

The government has charged Mr. XXXX in the indictment in this case with involvement in the making of four fraudulent mortgage loans. It is anticipated that the government will move to dismiss Count 1 of the indictment for lack of evidence and, therefore, will proceed to trial on three allegedly fraudulent loans.

Bizarrely, the government has elected to bring this case in the Eastern District of Texas in an already overcrowded division. What makes this bizarre is that three remaining loans charged in the indictment all involve a business from the Northern District of Texas, homes in the Northern District of Texas, borrowers who live in the Northern District of Texas, and mortgage companies with no connection to the Eastern District of Texas. Moreover, the investigating agency is located

in the Northern District of Texas. Mr. XXXX does not anticipate the government will call any witnesses from the Eastern District of Texas. Indeed, the only connection the three remaining loans charged in the indictment have to the Eastern District of Texas is that it is alleged that the closings for those loans took place in the Eastern District.

On top of this, the government has informed counsel that it is intending to offer proof of twelve other loans that are allegedly fraudulent and are allegedly connected to Mr. XXXX. These loans have absolutely no connection to the Eastern District of Texas, but, presumably, the government will seek to offer evidence of these Northern District loans under Fed. R. Evid. 404(b) and will require mini-trials regarding whether the twelve loans were, in fact, fraudulent and whether Mr. XXXX had any connection to the loans. If allowed, this will truly be a case where the tail wags the dog.

Mr. XXXX moves under Fed. R. Evid. 402, 403 and 404(b) to exclude evidence of these other loans or, alternatively, to have the Court perform a *Beechum* balancing test, on the record and outside the presence of the jury, before any evidence of the twelve extraneous loans are presented to the jury.

United States v. Riddle, 103 F.3d 423 (5th Cir. 1997) is instructive. In *Riddle*, the defendant, similar to Mr. XXXX, was charged with bank fraud, misapplication of bank funds, and false entries in the records of a bank. *Id*. at 433. In addition to the loans that were charged in the indictment, the government attempted to introduce four extraneous loans that it alleged was fraudulent under Fed. R. Evid 404(b). The Fifth Circuit first noted that "[t]he government must present enough evidence to permit a reasonable jury to conclude by a preponderance of the evidence that Riddle's intent in connection with the four extraneous loans was criminal." *Id*. It then noted that, even if relevant,

under *United States v. Beechum,* 582 F.2d 898, 911 (5th Cir.1978) (*en banc*), "'the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403.'" *Id*. at 434. The Fifth Circuit ultimately reversed Riddle's convictions because it held that the government failed on both accounts. *Id*.

Here too, Mr. XXXX submits that the government will not be able to establish by a preponderance of the evidence that he had any criminal intent in connection with the other loans much less satisfy the second prong of the *Beechum* test. Moreover, allowing the evidence will require twelve mini-trials on a case that should not have been brought in this district in the first place.

II. WITNESSES SHOULD NOT BE PERMITTED TO TESTIFY AS TO MR. XXXX'S ALLEGED REPUTATION IN THE COMMUNITY WITH REGARD TO OBTAINING FRAUDULENT MORTGAGES

It is anticipated that the government may call witnesses who would testify that Mr. XXXX had a reputation for falsifying mortgage loan applications. Such character testimony regarding Mr. XXXX's alleged reputation in the community is clearly inadmissible under Fed. R. Evid. 404. Indeed, under Fed. R. Evid. 404(a)(2)(A), the prosecution may not introduce evidence regarding a defendant's alleged reputation or character unless it is to rebut character evidence introduced by the defendant.

United States v. Tran Trong Cuon, 18 F.3d 1132 (4th Cir. 1994) is instructive. In that case a doctor was on trial for the illegal distribution of controlled substances. Over objection, the prosecution was permitted to ask a witness about the doctors reputation in the community for being an easy source of drugs even though the doctor had not introduced any evidence of his good

character.[1] The United States Court of Appeals for the Fourth Circuit held this to be reversible error. *Id*. at 1135-36.

III. WITNESSES SHOULD NOT BE ALLOWED TO TESTIFY TO ANY "LOSSES" SUFFERED BY FINANCIAL INSTITUTIONS OR INDIVIDUALS OR OFFER ANY OTHER "VICTIM IMPACT" TESTIMONY

Mr. XXXX is charged with three counts of violating 18 U.S.C. § 1006 and one count of count of conspiracy to violate 18 U.S.C. § 1344. The gravamen of both offenses as charged in the indictment is that Mr. XXXX allegedly made false statements to financial institutions in order to obtain mortgages for potential home buyers. For example, the § 1006 counts charge Mr. XXXX with "knowingly mak[ing]...false entered in the reports or statements submitted to HUD, by making inflated statements about the Buyers' assets and rent history knowing the statements were false, in connection with an application for a home mortgage." The § 1349 bank fraud count charges a conspiracy to obtain money from First Horizon "by means of materially false and fraudulent pretenses and representations."

The government would be the first to argue that, if Mr. XXXX made false statements to a bank in order to obtain a mortgage loan, it would be completely irrelevant if the buyers made every loan payment, the financial institutions suffered no loss and the buyers went on to live the American dream. The key question the jury must answer is whether Mr. XXXX knowingly made false statements to the financial institutions in order to obtain the mortgages and loss is simply not an element of either of the offenses. Therefore, conversely, whether the financial institutions suffered any loss as a result of the mortgages and whether the buyers suffered any alleged hardships as a result

[1]The questioned asked by the government was: "'Is it fair to say that Dr. Tran had a reputation in the community for being an easy source of drugs.'" *Id*. at 1135.

of Mr. XXXX's alleged conduct is also irrelevant. Indeed, in *Beaudine v. United States*, 358 F.2d 417 (5th Cir. 1996), the Fifth Circuit made clear that, in order to justify conviction under 18 U.S.C. § 1006, it is *not* necessary to show loss to a financial institution or to United States. *See also United States v. Chenaur*, 552 F.2d 294, 299 n. 7 (9th Cir. 1977) (In order to sustain a conviction for 18 U.S.C. § 1006 "it is not necessary for the Government to show that Greenwood Savings and Loan suffered a financial loss.").

Such evidence is also irrelevant because the crimes charged occurred at the time the false statements were submitted to the financial institutions, whereas, any alleged failure on the part of the buyers to pay the mortgages would have occurred long after the alleged crimes were complete.

Instructive is *United States v. Parker*, 805 F.2d 1441 (11th Cir. 1996). There the defendant, like Mr. XXXX, was charged with *inter. alia.* violations of 18 U.S.C. § 1006. At trial the government was allowed to present evidence that, as a result of the false statements to the bank, a company was forced to take "write downs" at the behest of the Federal Home Loan Bank Board. While harmless, the United States Court of Appeals for the Eleventh Circuit held that such evidence was "was irrelevant and prejudicial." *Id*. at 1443 n.2.

In sum, it is expected that the jury in this case will ultimately be instructed that it should reach its verdict "without prejudice or sympathy." *See* Fifth Circuit Pattern Jury Instruction 1.04. The only purpose for allowing the jury to hear about losses to banks or alleged hardships suffered by buyers would be in an attempt to prejudice the jury against Mr. XXXX and divert it from its true task in determining whether Mr. XXXX knowingly made false statements to the financial institutions in order to obtain the mortgages.

IV. THE GOVERNMENT SHOULD NOT BE PERMITTED TO DISCUSS MR. XXXX'S EXERCISE OF HIS SIXTH AMENDMENT RIGHTS.

This motion *in limine* is unopposed.

On or about October 5, 2011, Mr. XXXX was interviewed by a government agent regarding the allegations surrounding the instant case. Mr. XXXX initially answered the agent's questions, but, at some point, requested counsel before answering additional questions. The government should not be permitted to introduce evidence regarding Mr. XXXX's invocation of his Sixth Amendment rights.

As noted in *United States v. Liddy*, 509 F.2d 428, 444 (D.C. Cir. 1974):

> The trial judge erred, however, in limiting the application of the principle of Griffin with a ruling that apparently considered that it is generally proper to take into account the time and circumstances of retaining an attorney, and to draw whatever inferences as seem appropriate. Such a distinction generally raises problems that hobble the right to seek counsel. To the extent that an inference of criminality is operative, it invites probing of the very process of selection of counsel—who, why, when and where—and pressing the defendant to come forward with evidence concerning this process. The mischief of the approach is underlined by it semantic subtleties, which opens the door to maneuver and misunderstanding. It would be a rare case indeed where the prosecutor could not point out that the incriminating feature of the employment of counsel—in the absence of explanation—rests not in the employment as such but in the time and circumstances surrounding that event, and inferences therefrom that reflect adversely on the defendant.

See also United States v. McDonald, 620 F.2d 559, 564 (5th Cir. 1980) ("Comments that penalize a defendant for the exercise of his right to counsel and that also strike at the core of his defense cannot be considered harmless error. The right to counsel is so basic to all other rights that it must be accorded very careful treatment. Obvious and insidious attacks on the exercise of this constitutional right are antithetical to the concept of a fair trial and are reversible error.").

V. THE GOVERNMENT SHOULD BE PRECLUDED FROM CALLING YLLONDA GRAY AS A WITNESSES WITHOUT A SUFFICIENT PROFFER THAT SHE CAN PROVIDE ADMISSIBLE TESTIMONY

The government has subpoenaed Yllonda Gray, a former contractor of Mr. XXXX's, to testify at trial. Ms. Gray will testify that Mr. XXXX is of fine character and she has no personal knowledge of him engaging in any criminal or fraudulent behavior. She informed the government that, on two occasions, she received complaints about Mr. XXXX. One was from a real estate agent, however, Ms. Gray is unaware of whether Mr. XXXX was even the loan broker related to the real estate agent's account and, if so, whether Mr. XXXX had done anything at all wrong. The other alleged complaint was from a young borrower and, again, other than the borrower's complaint, Ms. Gray had no personal knowledge that Mr. XXXX did anything wrong. Ms. Gray does not remember the names of either the real estate agent or the young borrower.

It appears that the sole purpose for the government calling Ms. Gray as a witness is to repeat the two complaints she received about Mr. XXXX. Nevertheless, as set forth above, Ms. Gray has absolutely no personal knowledge that Mr. XXXX engaged in any fraudulent activity with regard to those two complaints and she personally believes Mr. XXXX to be of upstanding character.

Of course, these two alleged complaints, by unknown persons, are clearly hearsay and inadmissible. *See, e.g., Rowland v. American General Finance, Inc.*, 340 F.3d 187, 204 (4th Cir. 2003) (Letter from a customer complaining of his treatment by employee was hearsay evidence.). Moreover, allowing the jury to hear a second-hand rendition of these complaints would also violate Mr. XXXX's constitutional right of confrontation. The government should not be allowed to call Ms. Gray as a witness without some proffer that she has admissible testimony. Otherwise, it is likely

that the jury might hear prejudicial questions from the government that would be hard to correct with a limiting instruction.[2]

VI. THE GOVERNMENT SHOULD BE PRECLUDED FROM OFFERING ANY STATISTICS REGARDING THE DEFAULT RATES OF DEFENDANT'S LOANS AND/OR THE DEFAULT RATE OF LOANS FROM COMPARISON BUSINESSES

While Mr. XXXX is not certain, he fears that the government will attempt to introduce statistics regarding the default rates of mortgage loans undertaken by his company and/or compare his default rates to the default rates of other mortgage companies and then ask the jury to make the leap that high default rates indicate a high degree of fraudulent loan applications. There would be a host of problems allowing the government to introduce such evidence.

First, as explained in *United States v. Seligg*, 622 F.2d 207 (6th Cir. 1980), statistics like these would be inadmissible hearsay. There, the government was allowed to introduce at trial a sales comparison chart comparing the sales of nonexempt schedule V items of the defendant's pharmacy with eight other pharmacies. *Id*. at 214. At least there, however, the comparison were to pharmacies that were allegedly comparable in size, location, and volume. *Id*. The United States Court of Appeals for the Sixth Circuit held this to be reversible error. *Id* at 215-16.

Second, the defense has been provided no statistical analysis to allow it to investigate the reasons for defaults with any of Mr. XXXX's loans (other than the loans noted in Part I above) and

---

[2]One other government witness claims that Ms. Gray told him "that something was not right about XXXX and the operation of his office." Nevertheless, Ms. Gray will deny making this statement and it is well established that the government cannot call a witness simply to impeach that witness. *United States v. Hogan*, 763 F.2d 697, 699 (5th Cir. 1985); *United States v. Miller*, 664 F.2d 94, 97 (5th Cir.1981); *United States v. Ince*, 21 F.3d 576 (4th Cir. 1994) ("When the prosecution attempts to introduce a prior inconsistent statement to impeach its own witness, the statement's likely prejudicial impact often substantially outweighs its probative value for impeachment purposes because the jury may ignore the judge's limiting instructions and consider the 'impeachment' testimony for substantive purposes.").

have been provided no information whatsoever regarding loan default rate from other businesses so research can be done as to whether apples are being compared to apples. Thus, to allow this information would be to deny Mr. XXXX his discovery rights under Fed. R. Crim. P. 16 and would deny him the opportunity to review this information in order to properly challenge it at trial.

Third, there can be a host of reasons for loan defaults and to introduce default rates and simply imply to the jury that such defaults are because of fraud would confuse the jury and the probative value of such evidence, if any, would be sufficiently outweighed by the prejudice to Mr. XXXX and the confusion it would cause the jury. *See* Fed. R. Evid. 403.

For all of these reasons, this evidence should not be allowed to be put before the jury.

WHEREFORE Defendant XXXX XXXX, Jr. respectfully requests this Court grant his motion *in limine* to preclude the government from asking questions of any witness at trial, or presenting evidence or argument at trial, with regard to the subjects set forth in this motion.

Respectfully submitted,

/s/ F. Clinton Broden
F. Clinton Broden
TX Bar No. 24001495
Broden & Mickelsen
2600 State Street
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

Attorney for Defendant
XXXX XXXX

CERTIFICATE OF SERVICE

I, F. Clinton Broden, certify that on January 8, 2014, I caused the foregoing document to be served by electronic means on all counsel of record.

/s/ F. Clinton Broden
F. Clinton Broden

CERTIFICATE OF CONFERENCE

I, F. Clinton Broden, hereby certify that I conferenced with opposing counsel, Camelia Lopez on the above referenced motion and it was determined :

The government OPPOSED I, II, III, V and VI

The government is UNOPPOSED to IV

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA,	)	**CRIMINAL ACTION NO.**
	)	
Plaintiff,	)	**4:12-cr-00087-RAS-DDB**
	)	
v.	)	
	)	
XXXX XXXX, XXXX,	)	
	)	
Defendant.	)	
	)	

ORDER

Upon consideration of Defendant's Motion *in Limine* Numbers I-VI, said motion is this _____ day of January, 2014 GRANTED

ORDERED, the government shall be precluded from presenting evidence or argument at trial before the jury regarding: (1) Any extraneous mortgage loans not charged in the indictment; (2) Defendant's alleged reputation in the community with regard to obtaining fraudulent mortgage loans; (3) Any losses suffered by financial institutions or hardships suffered by individuals as a result of alleged fraudulent mortgage loans; (4) The fact that the Defendant requested counsel prior to continuing with an interview with law enforcement agents; and (5) Any statistics regarding the default rates of mortgage loans undertaken by the Defendant's company and/or the default rate of loans from comparison businesses.

FURTHER ORDERED the government is precluded from calling Yllonda Gray as a witnesses without a sufficient proffer that she can provide admissible testimony

FURTHER ORDERED the government shall make all relevant witnesses aware of this Order.