United States v. Dawood
8:23-cr-00038-JVS-1

TENTATIVE Order Regarding Motion to Compel Cell Phone Data [118] and Motion in Limine to Exclude or Limit Witness Testimony [119]

Before the Court is Defendant Jamal Nathan Dawood's ("Dawood") motion to compel cell phone data (Cell Phone Mot., Dkt. No. 118) and motion in limine to exclude or limit witness testimony, (Mot. to Exclude, Dkt. No. 119). The Government filed an opposition to each. (Opp'n to Cell Phone Mot., Dkt. No. 122; Opp'n to Mot. to Exclude, Dkt. No. 125.) Dawood replied. (Reply to Cell Phone Mot., Dkt. No. 124.)

For the following reasons, the Court **DENIES** the motion to compel cell phone data. The Court **GRANTS in part and DENIES in part** the motion in limine to exclude or limit witness testimony.

I. BACKGROUND

The parties are familiar with the factual and procedural history of the case. The Court will recite only the background necessary to resolve the instant motions.

In March 2023, Dawood was indicted for knowingly executing a scheme to defraud the victim, Thomas Battaglia ("Mr. Battaglia" or "T.B.") "by means of material false and fraudulent pretenses, representations and promises, and the concealment of material facts." (Dkt. No. 1, ¶ 1.) On September 11, 2024, the Government filed its First Superseding Indictment. (First Superseding Indictment ("FSI"), Dkt. No. 73.)

According to the FSI, Dawood knowingly "executed a scheme to defraud victim T.B. as to material matters." (Id. ¶ 1.) Specifically, Dawood "would offer to assist victim T.B. with the management of real estate properties and retirement savings held in a trust established by victim T.B.'s late brother and administered by victim T.B." (Id. ¶ 2(a).) In assisting, Dawood helped victim T.B. open a retirement savings account referred to as the "Trust Account." (Id. ¶ 2(b).)

The FSI states that Dawood would "obtain from victim T.B. the information necessary to access the Trust Account." (Id. ¶ 2(b).) With this information, Dawood would "initiate wire and online banking transfers from the Trust Account to accounts owned and controlled by [Dawood]" or "to individuals with whom [Dawood] had personal and business relationships." (Id. ¶ 2(c).) In some cases, "Dawood would initiate the wire and online banking transfers without victim T.B.'s knowledge or authorization." (Id. ¶ 2(d).) In other instances, Dawood would "falsely represent to victim T.B. that the wire and online banking transfers were for the benefit of the Trust." (Id.) Through this scheme, the Government contends that Dawood fraudulently obtained money and property belonging to victim T.B. in the amount of at least $2,202,688. (Id. ¶ 2(f).)

On November 18, 2024, the Court resolved a dispute involving some of the issues in the present motions. (See November 18 Order, Dkt. No. 106.) Specifically, in November, Dawood filed a motion to compel the cell phone data on Mr. Battaglia's phone. (Id. at 8.) In its order, the Court denied Dawood's request to compel the Government to turn over a full forensic imaging of the phone. (Id. at 9.) In a separate order, the Court further ordered the Government to produce all information from the cell phone that is material to the defense and "to provide a log identifying with specificity what has been excluded and why." (Dkt. No. 109.) The Court also denied Dawood's motion to exclude deposition testimony of T.B. (November 18 Order at 10.)

II. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 16, "[u]pon a defendant's request, the government must permit the defendant to inspect and copy photographs, books, papers, documents, data, [and] objects . . . if the item is within the government's possession, custody or control . . . [that are] material to preparing [the] defense" or if "the government intends to use the item in its case-in-chief at trial . . . ." Fed. R. Crim. P. 16(a)(1)(E)(i)–(ii). The government must also comply with its obligations to produce any and all material exculpatory, inculpatory, or impeachment evidence under Brady or Giglio.[1]

[1] Brady v. United States, 397 U.S. 742 (1970); Giglio v. United States, 450 U.S. 150 (1972).

With regard to what is "material," the Ninth Circuit has established for the "benefit of trial prosecutors" the following:

> [T]he 'materiality' standard usually associated with Brady . . . should not be applied to pretrial discovery of exculpatory materials . . . . [Rather,] the proper test for pretrial disclosure of exculpatory evidence should be an evaluation of whether the evidence is favorable to the defense, i.e., whether it is evidence that helps bolster the defense case or impeach the prosecutor's witnesses . . . . [I]f doubt exists, it should be resolved in favor of the defendant and full disclosure made . . . .

United States v. Price, 566 F.3d 900, 913 n.14 (9th Cir. 2009).

III. DISCUSSION

A. Motion to Compel Cell Phone Data

In a prior order, the Court denied Dawood's request to compel the Government to turn over a full forensic imaging of the phone. (November 18 Order, Dkt. No. 106 at 9.) The Court clarified that "the government must turn over material that would be helpful to the defense, including material that is exculpatory, inculpatory, or impeaching." (Id. (citation and internal quotations omitted).) In a separate order, the Court further ordered the Government to produce all information from the cell phone that is material to the defense and "to provide a log identifying with specificity what has been excluded and why." (Dkt. No. 109.)

Dawood states that the Government has only provided him with some of the data from Mr. Battaglia's phone, including "a few notes and approximately 150 photographs." (Cell Phone Mot. at 2.) However, the Government did not provide any text message, emails, contacts, phone history, location data, or wifi networks from the extraction. (Id.) Further, the Goverment did not provide a log of what items were not produced. (Id. at 3.) Thus, Dawood renews his request that the Government send the full forensic image of Mr. Battaglia's cell phones. (Id.)

The Government opposes, arguing that it complied with the Court's order to produce all information material to the defense. (Opp'n to Cell Phone Mot. at 1.)

Specifically, the Government argues that Special Agent Sawyer "personally reviewed all of the photographs and notes from the relevant time period" using specific search terms. (Id.) Because the Goverment did not withhold any material information, it contends that it was not required to produce a log of withheld data. (Id.)

The Court agrees with the Government that the proper legal test is clear: the government must turn over material that would be "helpful to the defense," including material that is exculpatory, inculpatory, or impeaching. See United States v. Hernandez-Meza, 720 F.3d 760, 768 (9th Cir. 2013). This means that the Government is under no obligation to turn over the entire forensic imaging of Mr. Battaglia's phones. If Dawood would like the Government to search for additional terms, the Government has noted its openness to his request. (Opp'n to Cell Phone Mot. at 3.) Moreover, the Court agrees that the Government need not provide a log of withheld information if the Government did not withhold any material information.

Notwithstanding the above, the Court is concerned that the Government fails to mention whether a prosecutor reviewed the cell phone data to determine its materiality.[2] The Government's opposition states only that Special Agent Sawyer personally reviewed the information "looking for information material to the defense." (Id. at 2.) However, "the determination of what may be useful to the defense can properly and effectively be made only by an advocate." Dennis v. United States, 384 U.S. 855, 875 (1966).[3] The Government should come prepared to discuss whether its attorneys reviewed the information provided by Special Agent Sawyer to determine its materiality.

B. Motion in Limine to Exclude Testimony

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[2] This is particularly so where Dawood's motion in limine to exclude witnesses contains several references to texts or emails that may have been on T.B.'s phone.

[3] The Court disagrees with Dawood's contention that "advocate" in this context means defense attorney. The Supreme Court in Dennis was drawing a distinction between whether the *judge* should supervise production or the attorneys in the case. See Dennis, 384 U.S. at 875. Thus, advocate ostensibly includes both prosecutors and defense attorneys, each with respect to material in its client's possession.

1. Confrontation Clause

The Confrontation Clause of the Sixth Amendment "guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him," which includes "the right of effective cross examination." United States v. Larson, 495 F.3d 1094, 1102 (9th Cir. 2007). As the Supreme Court established in Crawford, the Confrontation Clause prohibits "statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53–54 (2004). Further, "the Confrontation Clause protects the right to engage in cross-examination that 'might reasonably' lead a jury to 'question the witness's reliability or credibility." Gibbs v. Covello, 996 F.3d 596, 601 (9th Cir. 2021).

The Court has previously found that Dawood had a sufficient opportunity to cross examine T.B. before his sudden death, both with respect to timing and subject matter. (November 18 Order at 11–12.) Since that time, the Government has introduced ten new witnesses that it intends to call at trial. Dawood contends that these witnesses violate the Confrontation Clause because Dawood was not able to sufficiently cross examine T.B. before his death as to all ten of these witnesses. (Mot. to Exclude at 3.)

Both parties agree that all ten witnesses, if presented at trial, would be subject to cross-examination. (See Mot. to Exclude at 4; Opp'n to Mot. to Exclude at 17.) The Court agrees with the Government that the Confrontation Clause does not prohibit the use of a witness (who otherwise comports with the Clause) merely because a second witness cannot be cross examined concerning the first. See United States v. Alahmedalabdaloklah, 94 F.4th 782, 816 (9th Cir. 2024) ("The Clause protects a defendant's 'right [to] physically . . . face those who testify against him[.]'") Dawood provides no authority to suggest otherwise. Accordingly, the Court finds that the Confrontation Clause does not bar the ten witnesses.

2. Exclusion of Ten Potential Witnesses Under Rules 402, 403, and 404(b)(2)

Evidence is relevant if "it has any tendency to make a fact more or less probable . . . [and] the fact is of consequence in determining the action." Fed. R.

Evid. 401. Pursuant to Federal Rule of Evidence 403, the Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence. See Fed. R. Evid. 403.

Rule 404(b)(1) bars "[e]vidence of a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, the same evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2). Notwithstanding this exception, the "other act" must: (1) tend to prove a material point; (2) not be too remote in time; (3) be sufficient to support a finding that the defendant committed the other act; and (4) in some cases, the other act must be similar to the offense charged." United States v. Bibo-Rodriguez, 922 F.2d 1398, 1400 (9th Cir. 1991). Evidence which meets the Rule 404(b) standard is nevertheless subject to exclusion under Federal Rule of Evidence 403. United States v. Cherer, 513 F.3d 1150, 1157 (9th Cir. 2008).

Dawood argues for the exclusion or limitation of potential testimony for ten witnesses that the Government intends to produce at trial. The Court will take each witness in turn.

i. Fares Abbasi

According to Dawood, Fares Abbasi and Mr. Dawood are long time business partners. (Mot. to Exclude at 6.) The two men, however, are currently in civil litigation against one another. (Id.) Dawood concedes that Abbasi told the Government that he went to T.B.'s house with Dawood to pick up furniture and observed Dawood access T.B.'s safe by himself. (Id.) Further, Abbasi is expected to testify that Dawood told him that Dawood helps T.B. with his taxes and that Dawood's wife told Abbasi that the Dawoods acquired three homes from T.B.[4] (Id.) Finally, Abbasi claims that he observed Dawood forge signatures on documents. (Id.)

[4] Query whether the statements of Dawood's wife would constitute inadmissible hearsay.

The Court finds that the evidence relating to T.B. is relevant to the claim and that the probative value outweighs any prejudice. Moreover, the Court finds that the foundation of the relationship of these individuals is likewise relevant and admissible.

However, the Court finds that the present civil litigation and personal disputes between Dawood and Abbasi are neither relevant nor so "inextricably intertwined" with the charged offense that it bypasses Rule 404(b), see United States v. Anderson, 741 F.3d 938, 949 (9th Cir. 2013).[5] To be "inextricably intertwined," the other acts must be "part of the transaction that serves as the basis for the criminal charge," or "necessary . . . to permit the prosecutor to offer a coherent and comprehensible story *regarding the commission of the crime*." United States v. Vizcarra-Martinez, 66 F.3d 1006, 1012–13 (9th Cir. 1995) (emphasis added). Abbasi's personal disputes with Dawood, current civil litigation against Dawood, and business dealings (unrelated to T.B.) are neither part of the transaction underlying the criminal charge nor necessary for the Government to offer a coherent story of Dawood's allegedly fraudulent scheme. See id. (finding that the government "would encounter little difficulty in presenting the evidence relevant to its case . . . without offering [the disputed evidence]").

Thus, the Government is cautioned to avoid delving into unrelated business dealings or current civil litigation between the men that are not relevant to the charged offenses or necessary to lay foundation for their relationship.

ii. Roger Bardakjian

As noted by Dawood and the Government, Bardakjian falls into a similar bucket with respect to admissibility. (See Mot. to Exclude at 7; Opp'n to Mot. to Exclude at 5.) For the reasons above, the Court will not exclude Bardakjian's testimony. However, just as with Abbasi, the Government is instructed not to discuss the business dealings that are unrelated to the charged offenses.

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[5] The purpose of Rule 404(b) is to prevent bad act evidence from being used to prove a defendant's propensity to commit a crime. See United States v. Hernandez-Miranda, 601 F.2d 1104, 1108 (9th Cir. 1979).

iii. Alicia Elliot

According to Dawood, Elliott received a $100,000 line of credit from Dawood for her business. (Mot. to Exclude at 8.) As Dawood concedes, Elliott allegedly received a wire transfer from the Trust Account in the amount of $25,000. (Id.) Dawood is concerned, however, that the Government will delve into the personal experience of Elliott as a commercial tenant of Dawood. (Id.) The Government responds that it expects Elliott's testimony to reveal the events that led to her receiving the funds from the Trust Account. (Opp'n to Mot. to Exclude at 6.)

The Court finds that the proffered testimony is relevant and satisfies Rule 403. Accordingly, the motion with respect to Alicia Elliott is denied.

iv. Ashley Hays

Dawood argues that Ashley Hays potential testimony is not relevant. (Mot. to Exclude at 9.) Specifically, Hays is expected to testify that she rented property from the Dawoods during the COVID-19 pandemic despite the property originally being rented to T.B. before T.B. decided not to move into the home. (Id.) The Government contends that Hays's testimony is relevant because the lease agreement for the property ("Costeau Property") was signed by T.B. and T.B. agreed to pay approximately $35,000 to rent the property during the time Hays resided on site. (Opp'n to Mot. to Exclude at 13.)

The Court finds no reason to exclude Hays's testimony. Dawood concedes that the testimony related to the occupancy will be relevant and claims only that he is "unaware of any other testimony" that would be relevant. (Mot. to Exclude at 9.) Yet, the Government offers little other testimony that would be elicited from Hays beyond that which both parties agree is relevant. Accordingly, the motion is denied with respect to Hays.

v. Ezabel Katourjian

According to the Government, Katourjian is a childhood friend of Dawood's wife. (Opp'n to Mot. to Exclude at 8.) The Government expects Katourjian to testify that her husband obtained a loan from Dawood that was

secured by a lien on Katourjian's personal residence. (Id.) When Katourjian was unable to refinance their mortgage to pay off a loan, she was allegedly convinced by Dawood to transfer her property to an LLC belonging to David Shek, who evicted her this year. (Id.) Dawood knows of Ms. Katourjian but argues that he has not found any information about her in discovery. (Mot. to Exclude at 9.)

The Court finds that Katourjian's testimony is substantially more prejudicial than probative. See Fed. R. Evid. 403. Whatever inference may be drawn from Katourjian's relationship with Dawood is not material to the issue of Dawood's allegedly fraudulent scheme against T.B. and will likely lead to jury confusion or unwarranted prejudice. Accordingly, the motion is granted with respect to Ezabel Katourjian.

vi. Dan Kloss

According to Dawood, Kloss was a debtor on at least three of Dawood's properties. (Mot. to Exclude at 9.) Dawood argues that Kloss is not relevant to the case and is currently in ongoing civil litigation with Dawood and another prospective witness, Mr. Shek. (Id.)

The Government believes that Kloss will testify about a property transaction between the two. (Opp'n to Mot. to Exclude at 9.) Specifically, in 2016, Dawood allegedly convinced Kloss to allow him to take over the loan for a property the Government refers to as the Crescent Property. (Id.) Dawood then convinced Kloss to transfer the Crescent Property to an LLC controlled by Dawood. (Id.) Dawood eventually convinced Kloss to allow him to take over management of the property and then never paid rental income from the property to Kloss. (Id.)

The Court finds that Kloss's testimony falls within the permitted uses of other wrongs in Rule 404(b)(2). Accordingly, the motion is denied with respect to Dan Kloss.

vii. Walter Lima

Similar to Kloss, Dawood argues that Lima borrowed money from Dawood and eventually turned title of his property over to Dawood after facing foreclosure. (Mot. to Exclude at 10.) Like Kloss, Dawood contends that Lima has no

knowledge of T.B., the Trust Account, or any other relevant information related to the charged offense. (Id.) The Government responds that Lima is relevant because he received money from the Trust Account and can testify that these payments were not "investments" as purported by Dawood. (Opp'n to Mot. to Exclude at 12.)

The Court finds that the testimony of Lima is relevant and not substantially more prejudicial than it is probative. While Lima may not specifically know of the Trust Account or T.B., such evidence supports the Government's position that Dawood was misrepresenting what he was doing with T.B.'s assets. Accordingly, the motion is denied with respect to Walter Lima.

viii. Noelle Marini

According to Dawood, Marini was a close friend of T.B. and allegedly had conversations with Dawood and T.B. about the events underlying the case. (Mot. to Exclude at 10.) Marini also supplied the Government with T.B.'s phone and handwritten notes. (Id.) The Government simply notes that Marini has intimate knowledge about statements made by T.B. regarding the Trust Account and Dawood. (Opp'n to Mot. to Exclude at 4–5.)

The Court is unsure what relief Dawood is requesting. Dawood simply concedes that Marini's testimony is relevant and notes that any irrelevant "other acts" for which she might be called to testify should be excluded. The Court will address such objections—should they arise—at trial. Accordingly, the motion is denied with respect to Noelle Marini.

ix. Michael Miller

Dawood argues that Miller is relevant in this case only so far as testifying that on one occasion he ran into Dawood looking at homes and discussed Dawood's real estate practices. (Mot. to Exclude at 11.) According to Miller, Dawood's practices were unusual. (Id.) The Government mentions Miller once in its opposition and provides no specific details on his relevancy.[6] The Court finds

[6] Rather, the Government lumps Miller with other witnesses who had observed Dawood and T.B. and have recollections of interactions between the two. Despite this singular broad

that Miller's testimony is both relevant and falls within the permitted uses of Rule 404(b)(2). Accordingly, the motion is denied with respect to Michael Miller.

x. David Shek

According to Dawood, Shek invested a large amount of money with Dawood. (Mot. to Exclude at 11.) Dawood concedes that Shek could provide relevant testimony regarding deposits into the Shek Funding bank account that were allegedly taken from the Trust Account. (Id.) However, Dawood argues that the Court should prevent Shek from testifying about other investments and loans made through Dawood's LLC that are unrelated to T.B. or the Trust Account. (Id.)

The Government expects Shek to testify that he thought that his financial relationship with Dawood comprised various investements into businesses and properties. (Opp'n to Mot. to Exclude at 7.) Specifically, Shek will testify that he was unaware of T.B. or that he was in a financial relationship with T.B. by virtue of the Trust Account. (Id.)

The Court finds that Shek's testimony regarding the transaction described in count ten of the indictment should not to be limited or excluded. Moreover, Shek may testify as to any portions of funds received from the Trust Account or to his knowledge of T.B., or lack thereof. However, the Court finds that Shek's potential testimony with regard to dealings involving Kloss and Katourjian are not relevant and that the danger of unfair prejudice far outweighs any potential probative value. These financial dealings between Shek and Dawood are also evidence of bad acts that do not share a substantial connection or nexus to the charged offense. Therefore, the Government shall not delve into the business dealings between Shek and Dawood as they relate to Katourjian and Kloss.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** the motion to compel cell phone data. The Court **GRANTS in part and DENIES in part** the motion in limine to exclude or limit witness testimony.

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assertion, the Government fails to provide any showing that Miller is relevant.

IT IS SO ORDERED.