UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**Case No. 21-CR-38 (CRC)**
	:	
RICHARD BARNETT,	:	
	:	
Defendant.	:	

UNITED STATES' REPLY TO DEFENDANT RICHARD BARNETT'S OPPOSITION TO THE GOVERNMENT'S OMNIBUS MOTION *IN LIMINE*

The United States of America moved to exclude the defense from introducing three categories of evidence: (1) evidence or argument related to any potential penalty; (2) evidence or argument intended to elicit jury nullification, and (3) defense evidence not produced in reciprocal discovery and expert witnesses and affirmative defenses not identified pursuant to the Federal Rules of Criminal Procedure. ECF No. 55. The defendant has opposed that motion. ECF. No. 76 ("Def.'s Opp'n"). The government now submits this reply in support of its motion.

A. The Court Should Preclude Evidence and Argument Related to any Potential Penalty.

The defendant asserts, without authority, that he should be permitted to introduce evidence of potential penalties insofar as they relate to the defendant's culpability. Def.'s Opp'n at 3–4. But the defendant fails to explain how potential penalty evidence would be appropriate in this manner. Indeed, the defendant's position directly contradicts the well-settled principle that juries "are not to consider the question of punishment in arriving at [their] verdict[,]" *United States v. Patrick*, 494 F.2d 1150, 1154 (D.C. Cir. 1974)—a principle the defendant acknowledges, Def.'s Opp'n at 3. The government's motion to exclude references to potential penalties should be granted.

B. The Court Should Preclude Argument or Evidence that Encourages Jury Nullification.

To begin, the defendant incorrectly argues that the "jury nullification" evidence the government identifies, ECF No. 55 at 6–7, "is directly relevant to" the factual issues involved in the case. Def.'s Opp'n at 4. According to the defendant, the government has somehow—outside of the actual trial in this case—"opened the door" to otherwise inadmissible character evidence concerning the defendant's political views because of nationally-televised remarks by the President of the United States on September 1, 2022, and publicized statements by members of the U.S. House of Representatives Select Committee to Investigate the January 6th Attack on the United States Capitol. *Id.* But the defendant provides no rules or other authority that support his novel application of the "curative admissibility" doctrine he alludes to in support of his argument. Indeed, that doctrine only applies where "the introduction of inadmissible or irrelevant evidence by one party justifies or 'opens the door to' admission of otherwise inadmissible evidence." *United States v. Brown*, 921 F.2d 1304, 1307 (D.C. Cir. 1990). The statements that the defendant identifies cannot have "opened the door" for the simple reason that they have not been admitted as evidence in this case. Nor does the government intend to present them at trial. And to the extent the defendant contends those statements have affected the jury pool, Def.'s Mot. at 8, the government addressed this argument in its opposition to his motion for a change of venue, *see* ECF No. 84.

Next, the defendant asserts that Rule 404(b) permits him to introduce "propensity evidence" concerning his family, work life, religious beliefs, and hardships.[1] Def.'s Opp'n at 9.

[1] The government's motion on this point is not, as the defendant contends, Def.'s Opp'n at 9, overly broad. Indeed, the overly broad motions mentioned in the defendant's cited cases concern evidentiary matters different than those at issue here. *See United States v. Lowery*, 135 F.3d 957,

But "propensity" character evidence is the precise type of evidence Rule 404(b) bars. *See, e.g.*, *United States v. Williams*, 507 F. Supp. 3d 181, 189 (D.D.C. 2020) (finding evidence admissible pursuant to Rule 404(b) only "for any non-propensity purpose, including to establish motive, intent, plan, knowledge, or absence of mistake."). Moreover, insofar as the defendant seeks to admit this evidence for reasons other than character-propensity, he fails to explain how it relates to his state of mind, motive, or any other permissible issue in this case. To that end, the defendant's arguments also fail under Rules 404(a)(1) and 405(a) because he does not—nor can he—contend that his family, work life, religious beliefs, or hardships involve traits that are "'pertinent' to []or an 'essential element' of his supposed lack of predisposition to engage in the corrupt criminal activity with which he [is] charged." *See United States v. Washington*, 106 F.3d 983, 999 (D.C. Cir. 1997). Instead, any such evidence is intended to either support an improper jury nullification argument or to impermissibly play to the jury's sympathies, and must, therefore, be excluded.

Finally, the defendant's contention that excluding evidence designed to inspire sympathy creates an "unworkable standard[,]" Def.'s Opp'n at 10, is also without merit. It is routinely the role of the trial court to exercise its discretion in excluding material intended to elicit sympathy from the jury. *See, e.g.*, *United States v. Bell*, 506 F.2d 207, 226 (D.C. Cir. 1974). This is true for

---

960 (5th Cir. 1998) (reversing conviction because the district court granted a motion in limine and made "related rulings" regarding evidence necessary for an affirmative defense); *Ocasio v. C.R. Bard, Inc.*, No. 8:13-cv-1962, 2021 U.S. Dist. LEXIS 124823, *14 (M.D. Fla. July 5, 2021) (granting in part a motion *in limine* concerning testimony and evidence showing that the defendant was "a good company or that it does good things[.]"); *Taylor v. Ne. Ill. Reg'l Commuter R.R. Corp.*, No. 04-C-7270, 2008 U.S. Dist. LEXIS 5921, at *13–15 (N.D. Ill. Jan. 28, 2008) (denying an "overly broad" motion *in limine* seeking exclusion of "any argument, suggestion or reference, or eliciting testimony from any witness, or otherwise informing the jury about non-expert opinions, accounts and/or purported knowledge of plaintiff's medical condition[]"); *Edwards v. Mendoza*, No. C-08-371, 2010 U.S. Dist. LEXIS 108487, at *3 (S.D. Tex. Oct. 12, 2010) (denying multiple motions *in limine* "devoid of any specific context"—for example, requesting exclusion of "[a]ny reference to any action of the [d]efendants, other than those relating to the incident that forms the basis of [the p]laintiff's complaint[]").

both defendants *and* victims. *Id.* Moreover, the government has already identified several specific categories of evidence it anticipates from the defense and the defendant has failed to identify a permissible purpose for any of them. At a minimum, the Court may make a determination as to those categories now.

C. The Court Should Preclude Defense Evidence Not Produced in Reciprocal Discovery.

The defendant mischaracterizes the government's request that the Court preclude him from introducing evidence that was not produced in reciprocal discovery. Def.'s Opp'n at 10–11. The government does not seek the disclosure of the defendant's litigation strategy. On the contrary, the government only seeks that to which it is readily entitled under the Federal Rules of Criminal Procedure, including items within the defendant's possession, custody or control that the defendant intends to use in his case-in-chief. *Cf. United States v. Wilkins*, 538 F. Supp. 3d 49, 68 (D.D.C. 2021) (granting a similar request). The defendant still—approaching five months since the government filed its omnibus motion and just two months ahead of trial—has yet to provide any such material. Rule 16(d)(2)(C) expressly authorizes the Court to prohibit a party from introducing undisclosed evidence. The Court should grant the government's motion.

For the reasons stated above, the United States requests that this Court grant in full its Omnibus Motion *in Limine*, ECF No. 55.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney
D.C. Bar Number 481052

/s/ Mary L. Dohrmann
MARY L. DOHRMANN
Assistant United States Attorney
NY Bar No. 5443874
555 Fourth Street N.W.

Washington, DC 20530
Mary.Dohrmann@usdoj.gov
(202) 252-7035

/s/ Alison B. Prout
ALISON B. PROUT
Assistant United States Attorney
Georgia Bar No. 141666
75 Ted Turner Drive, SW
Atlanta, Georgia 30303
alison.prout@usdoj.gov
(404) 581-6000

/s/ Nathaniel K. Whitesel
NATHANIEL K. WHITESEL
Assistant United States Attorney
DC Bar No. 1601102
601 D Street NW
Washington, DC 20530
nathaniel.whitesel@usdoj.gov
(202) 252-7759