

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 4:05-cv-33 (TSL/LRA)
)	
)	
IKE BROWN, individually, and in his)	
official capacities as Chairman of Noxubee)	
County Democratic Executive Committee)	
and Superintendent of Democratic Primary)	
Elections; NOXUBEE COUNTY)	
DEMOCRATIC EXECUTIVE)	
COMMITTEE; CARL MICKENS,)	
individually, and in his official capacities)	
as the Circuit Clerk of Noxubee County,)	
Superintendent of Elections, Administrator)	
of absentee ballots and Registrar of voters;)	
the NOXUBEE COUNTY ELECTION)	
COMMISSION; NOXUBEE COUNTY,)	
MISSISSIPPI; and those acting in concert,)	
)	
Defendants.)	
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**MEMORANDUM OF THE UNITED STATES IN RESPONSE TO DEFENDANT
IKE BROWN’S MOTION IN LIMINE**

PROCEDURAL HISTORY

In compliance with Federal Rule of Evidence 609(b), the United States gave Defendant Ike Brown (“the Defendant”) notice by way of its proposed pretrial order that it intended to use his criminal convictions for impeachment purposes.¹ The Defendant

¹ As agreed upon by the parties, the United States sent an electronic copy of its portion of the proposed pretrial order on November 20, 2006.

subsequently filed a motion in limine, broadly requesting that the Court exclude evidence of the following: (1) the Defendant's indictment for conspiracy to commit absentee ballot fraud; (2) the Defendant's conviction for forgery; (3) the Defendant's conviction for soliciting insurance without a license; (4) the Defendant's conviction for income tax fraud; (5) "all allegations, inferences, references, and or mentioning of any acts that were not made parties by Plaintiff in this matter;" and (6) "all allegations, inferences, references, and/or mentioning of any acts by any individuals that do not have a legal agent/principal relationship" with the Defendant. See (Def.'s Mot. in Limine passim).²

ARGUMENT

A. Defendant's Request for a Pretrial Order Prohibiting all Evidence of the Defendant's Past Criminal Convictions Should be Denied.

1. The Probative Value of the Convictions Outweighs the Prejudicial Effect to the Defendant

The Defendant offers no authority to support his argument that the United States should be barred from making any reference to his criminal convictions at trial. Under the Federal Rules of Evidence, a party may offer "[e]vidence that any witness has been convicted of a crime . . . if it involved dishonesty or false statement, regardless of the punishment." Fed. R. Evid. 609(a)(2). If an adverse party has sufficiently been given advance written notice thereof, the credibility of a witness may be attacked with evidence of a criminal conviction older than ten years if the court determines "that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b).

² Contrary to Local Rule 7.2(D), the Defendant's motion does not provide for the court a memorandum of authorities supporting its position.

The district court has broad discretion when deciding the proper application of Rule 609(b); moreover, “evidentiary rulings constitute reversible error only when they affect substantial rights of a party.” United States v. Hamilton, 48 F.3d 149, 154 (5th Cir. 1995)(internal citations and quotations omitted). Under Rule 609(b), “The general rule is inadmissibility. It is only when the court admits evidence of a conviction over ten years old that the court must engage in a balancing test on the record.” Id. (citing United States v. Estes, 994 F.2d 147, 149 (5th Cir. 1993)).

i. Probative Value and Prejudicial Effect

In light of the fact that the Defendant has, at deposition and in court statements, repeatedly denied many of the allegations against him in this case, it is likely that he may do the same at trial. Therefore, of utmost importance is the credibility which his statements should be afforded. All of the Defendant’s past convictions were for crimes which necessarily involved dishonesty or some false statement (forgery, solicitation of insurance without a license, and income tax fraud). The United States seeks to enter the evidence of the Defendant’s convictions of these deceitful crimes for the sole purpose of calling into question the veracity of his assertions of the facts, his denials, and his equivocations at trial.

Were this a jury trial, there might be a potential risk of prejudice to the Defendant. However, this is a bench trial, and one in which the Court is certainly capable of admitting and using this evidence for the limited purpose of assisting it in deciding what weight to afford the Defendant’s trial testimony. Therefore, any trace of prejudice which might possibly arise with the admission of these convictions is heavily outweighed by the probative nature of the Court being aware of the Defendant’s propensity towards deceit.

ii. Defendant's Conviction for Income Tax Fraud

The Defendant's argument that his conviction for income tax fraud should be excluded is moot in light of the fact that the Court has already heard testimony from the Defendant regarding his conviction. In a November 7, 2005 hearing in this case, the Court heard the following exchange between an attorney for the United States and the Defendant:

Q. All right. Now, in 1994, you were convicted in this Court of nine counts of tax fraud. Correct?

A. I don't know if they call it that or not, but he was the judge.

Q. Judge Lee was?

A. Yes, he was.

Q. And you were sentenced to two years in the federal penitentiary?

A. That's correct.

(Hr'g. on Mot. for TRO, Tr. 104-05.)

The Defendant has already testified in a hearing on this matter about the tax fraud conviction without objection from his counsel. It is now too late to argue that the Court should not allow in evidence of the conviction.³

2. The Defendant's Request is Overly Broad

³ Authorities released the Defendant from incarceration for tax fraud on November 29, 1996. Scott Boyd, *Ike's coming home Friday*, The Beacon (Macon), November 17, 1996, at 1 (Exhibit A). Had the trial not been delayed as a result of the Defendant's Motion for Continuance, there would be no need for an analysis under Rule 609(b), since his release would have been less than ten years prior to the trial date. The Defendant should not be allowed to benefit from his actions which postponed this Court's trial schedule and consequently brought his latest conviction outside of Rule 609(b)'s ten-year time period.

Even where evidence of a criminal conviction is not admissible under Rule 609, it may, “if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness’[s] character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.” Fed. R. Evid. 608(b). Rule 803(21) recognizes a hearsay exception for “reputation of a person’s character among associates or in the community.” Fed. R. Evid. 803(21).

The Defendant’s motion asks for a sweeping prohibition on the United States’ ability to “mention, allude, or refer in any manner to any of Defendant Ike Brown’s prior convictions, alleged violations of the law, or extraneous acts . . .” (Def.’s Mot. in Limine 1.) The Defendant’s request would not only prohibit impeaching the Defendant’s credibility with his convictions under Rule 609, it would also effectively shield the Defendant from some of the most probative cross-examination regarding his character for truthfulness or untruthfulness under Rule 608. Moreover, the United States would be unable to introduce, under Rule 803(21), testimony by witnesses from the Defendant’s character as it was influenced by his reputation for absentee vote fraud.

The Defendant’s convictions of three crimes involving dishonesty or some false statement (forgery, solicitation of insurance without a license, and income tax fraud) are, in accordance with the rule, certainly the types of conduct which are “probative of truthfulness or untruthfulness.” Furthermore, the Plaintiff anticipates at least one witness will testify that the Defendant’s reputation in the community for absentee vote fraud (as demonstrated by his knowledge of the Defendant’s indictment for absentee vote fraud), influenced his determination as to whether the Defendant made credible absentee ballot-

related threats to the witness's political future. Defendant Brown's motion is therefore overly broad, going far beyond a request to exclude evidence that would simply be used to call the Defendant's credibility into question.

3. *This is an Inappropriate Stage to Make this Determination.*

The broadly requested relief is inappropriate for a pretrial order. A trial setting, where the Court will be able to observe the degree to which the Defendant's case rests on his credibility, is a more appropriate place to determine the probative value of Defendant Brown's history of criminally deceitful acts or make other specific admissibility rulings. This Court is well-suited to examine, on a proffer-by-proffer basis, any evidence which it may find probative for the purposes of cross-examination under Rule 608, admissibility of convictions under Rule 609, and admission of the Defendant's indictment or convictions for the purposes of demonstrating his reputation in the community under 803(21). A blanket determination of the value of this evidence is therefore inappropriate at this stage of litigation.

B. Defendant's Request for a Pretrial Order Only Allowing Evidence of the Actions of Defendant Brown or his Agents Should be Denied.

Defendant also seeks an order excluding "all allegations, inferences, references, and or mentioning of any acts that were not made parties by Plaintiff in this matter." (Def.'s Mot. in Limine ¶ 8.) Or, the Defendant seeks an order excluding the "mentioning of any acts by individuals that do not have a legal agent/principal relationship with the Defendant Ike Brown."⁴ Id. ¶9. The requested relief ignores the broad evidentiary

⁴ The requested relief ignores the fact that the Noxubee Democratic Executive Committee is also a named Defendant. This body has had had at least twenty members since 2000, not to mention to vast number of potential agents or confederates. Therefore

inquiry permitted in a Voting Rights Act claim. Instead of a pretrial order granting Defendant's relief, questions of admissibility and relevancy should be decided on a case-by-case basis.⁵

1. The Voting Rights Act establishes that the evidence the Defendant seeks to exclude is relevant.

The Defendant overlooks the language of the Voting Rights Act as it pertains to this evidentiary question. Courts may examine "the totality of the circumstances."

A violation of subsection (a) [Section 2] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivisions are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973 (b).

Furthermore, evidence "of the circumstances of the local political landscape" is relevant to a Section 2 inquiry. NAACP v. Fordice, 252 F.3d 361, 365 (5th Cir. 2001). An array of evidence "may tend to demonstrate a violation of the Act." Armstrong v. Allain, 893 F. Supp. 1320, 1327 (S.D. Miss. 1994). Unlike other cases, the prosecution of defendants in Voting Rights Act cases requires evidence which includes: whether elections are

racially polarized. . . . if there is a candidate slating process . . . whether political campaigns have been characterized by overt or subtle racial appeals . . . [or] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

the relief requested by the Defendant Ike Brown is extraordinarily inappropriate to this case.

⁵ The United States has never made any "assertion that Ike Brown acts with, conspires with, or is responsible for the actions of basically every black person in Noxubee County." (Def.'s Mot. in Limine ¶ 7.) This statement grossly misrepresents the position of the United States.

Id. at 1327 (quoting Senate Report at 28-29, reprinted in 1982 U.S.C.C.A.N. at 206-07); see also LULAC v. Clements, 999 F.2d 831, 849 (5th Cir. 1993).

Evidence far beyond specific acts done by a named defendant or their agent is relevant to a claim brought under the Voting Rights Act. The Defendant cites no case or authority whatsoever which states only evidence of actions by the named defendants may be admissible in a Voting Rights Act case. The Defendant's assertion and requested relief is contrary to the language of Section 2 itself and contrary to the case law developed under it pertaining to the scope of the Court's totality of the circumstances inquiry and the evidence admissible in furtherance of that inquiry.

2. Trial provides a more appropriate forum to examine any evidentiary proffer by the United States and the relevance thereof.

The Defendant's Motion in Limine asks this Court to exclude any acts by individuals that "were not made parties by Plaintiff in this matter" or that were not agents of Defendants. Defendants cite no case or authority for the proposition that such a remedy is appropriate.

The requested relief is inappropriate for a pretrial order. Instead, this Court is well-suited to examine on a proffer-by-proffer basis at trial any evidence which may or may not have relevance in this case. A broad pretrial order which dramatically confines the Plaintiff's case to only those acts committed by the Defendant Brown, or in the alternative, his agents, is inappropriate at the pretrial stage for a number of reasons.

First, the Plaintiff has provided notice in nineteen separate paragraphs of the Amended Complaint that the cause of action encompasses acts beyond those of

Defendant Brown.⁶ The style caption of the case also plainly states that “those acting in concert” with the Defendant are also defendants. (Pl.’s First Am. Compl.)

Second, and most importantly, granting Defendant’s Motion in Limine would ignore the Plaintiff’s central theory of the case, that is, that the Defendant operates a political apparatus that relies on the Noxubee County Democratic Executive Committee as well as an informal team of actors and confederates. A formal chain of command is rare. For example, the Defendant Brown admits that he paid the notary fees of a team of notaries. (Def.’s Resp. to Req. for Admiss, No. 61.) One such notary will testify that the Defendant Brown instructed that absentee ballots be gathered in a fashion contrary to Mississippi law. Evidence will show Defendant Brown guided her actions. The Plaintiff will present evidence that these actions were in violation of the Voting Rights Act. Yet the Defendant seeks an order that would limit evidence of the acts of this notary because the notary is a person “not made parties by Plaintiff in this matter.” (Def.’s Mot. in Limine ¶ 8.)

The example of actions by Brown-paid notaries, and the resulting pattern of improper absentee ballot voting, is one example where the Defendant’s political apparatus extends to acts by individuals who were not explicitly named as defendants in this case. Other examples include racial threats made to voters by elected officials who are admitted close political allies of the Defendant Brown. The evidence will show that these threats mimicked identical racial threats made by the Defendant Brown to other voters.

⁶ These nineteen references are cited in the Defendant’s Motion in Limine. (Def.’s Mot. in Limine nn., 1-4.)

Finally, a pretrial order which limits the introduction of evidence to acts by only Brown or his agents is problematic in a political context. The Fifth Circuit noted the fluid outlines of agency as it relates to political committees in Rove v. Thornburg, 39 F.3d 1273, 1289 (5th Cir. 1994). “The record contains no Committee membership roster or list, a fact we do not find particularly surprising in light of the nature of political campaign committees.” Id. The court noted that unincorporated political associations, like the Defendant and his allies in this case, “typically are loosely organized, written formalities are not required for membership; a person joins an association when - either expressly or tacitly - he is accepted as, and agrees to become, a member.” Id. at 1289-90.

WHEREFORE, the United States asks this Court for an Order DENYING the Defendant Ike Brown’s Motion in Limine.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2006 I electronically filed the foregoing Memorandum Of The United States Memorandum in Response to Defendant Ike Brown's Motion in Limine using the ECF system which sent notification of such filing to Wilbur O. Colom, Esq. of the Colom Law Firm, LLC, 200 Sixth Street, North, Suite 102, Columbus, Mississippi, 39701, Ellis Turnage, Esq., Post Office Box 216, 108 North Pearman Avenue, Cleveland, Mississippi, 38732, and, Christopher D. Hemphill, Esq., Dunn, Webb and Hemphill, P.A., 214 Fifth Street South, Columbus, Mississippi, 39701.

s/ Joshua L. Rogers

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