23-7097

NO.: _____

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2024



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UNITED STATES OF AMERICA,
Respondent,

v.

TRAVIS C. CROSBY,
Petitioner.

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On Petition for Writ of Certiorari
To the Court of Appeals
For the Eleventh Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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Travis C. Crosby # 29357-509
FCI Edgefield/POB 725
Edgefield, SC 29824
Pro se

## QUESTIONS PRESENTED

(1) Whether the Eleventh Circuit erred in finding that the district court did not abuse its discretion by admitting Rule 404 (b) evidence of fraudulent PPP loan activity regarding separate conspiracies unrelated to the conspiracy with which Petitioner was charged?

(2) Whether the Eleventh Circuit erred in finding that the district court did not err in holding Petitioner accountable for the PPP loans of Keith Maloney and Mark Stewart when there was insufficient evidence that Petitioner recruited them and reasonably foresaw that their loans would be fraudulent, and the District Court failed to state the basis for finding their loans to be relevant conduct?

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**IN THE**

**SUPREME COURT OF THE UNITED STATES**

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgments below.

## OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at Appendix A to the petition and is

[X] unpublished;

## JURISDICTION

The dates on which the United States Court of Appeals decided the case was on January 3, 2024. **See Appendix A.**

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

## STATUTORY PROVISION INVOLVED

**Federal Rules of Evidence, Rule 404 (b) Other Crimes, Wrongs, or Acts.**

**(1)** Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

**(2)** Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

## STATEMENT OF THE CASE

This case stems from Petitioner's participation in the Paycheck Protection Program ("PPP") and a loan he received based on false representations. The PPP program was enacted in March 2020 to provide emergency relief to small businesses that were suffering as a result of the Covid-19 pandemic. **(Presentence Investigation Report ("PSR") ¶ 11.)** Businesses could apply for loans as long as the funds were ultimately spent on certain expenses including payroll for employees. **(Id. ¶ 13.)** The amount of money a business could receive was based on the number of employees and average monthly payroll. **(Id. ¶ 14.)**

### A. Petitioners PPP Loan

Rodericque Thompson, one of the government's cooperating witnesses and a named co-conspirator who had previously pled guilty, recruited Petitioner and other business owners to obtain PPP loans to which they were not entitled by falsely misrepresenting the number of employees they had and their monthly payroll expenses. **(Id. ¶ 24.)** Thompson met a man named James Davis—whose real name was Rasheed Gaines—at a halfway house after they had both been released from federal prison for

prior fraud convictions. **(9/21/22 Trial Tr. at 127; Dkt. 192 at 1-2; Dkt. 198 at 3.)** Thompson asked Davis to recruit people who had small businesses so he could apply for fraudulent PPP loans on their behalf and offered to pay Davis a $10,000 recruiter fee for each business he referred. **(9/21/22 Trial Tr. at 127-28.)** Thompson specifically wanted people who already had established businesses because "it made it look legitimate." **(Id. at 126.)**

Davis was the brother of Petitioner's then-girlfriend. **(9/22/22 Trial Tr. at 334.)** Davis knew that Petitioner owned a trucking business called Faithful Transport Services, LLC ("Faithful"), and he referred Petitioner to Thompson to apply for a PPP loan. **(9/21/22 Trial Tr. at 128.)** Petitioner believed Davis was an attorney because he owned a company called "Legal for Less," and he advertised that business on his car and on social media. **(9/22/22 Trial Tr. at 336, 339).** Petitioner testified that Thompson gave legal advice and everything." **(Id. at 339.)** Davis had in fact given Petitioner legal advice on other issues before and had filed documents on his behalf. **(Id. at 339-40.)**

Davis told Petitioner that Thompson was a loan advisor and had been in the business for 16 years "help[ing] black businesses out." **(Id. at 334, 336, 343.)** Davis encouraged Petitioner to reach out to Thompson and get a loan. **(Id. at 354.)** Petitioner contacted Thompson and gave him the information about his business, and Thompson filled out the loan application. **(9/21/22 Trial Tr. at 124-25.)** Thompson asked Petitioner to fill out the loan application originally but ended up doing it himself "because he was having problems understanding it" and "was nervous about putting in the wrong information." **(Id. at 142.)** Thompson knew that the businesses would have to inflate their monthly payroll and number of employees, so he used the same formula for every

loan application he filled out: 16 employees and monthly payroll of $120,000, which would yield a $300,000 PPP loan. **[9/21/22 Trial Tr. at 177-78.]** In reality, Petitioner was the business's only employee and its average monthly payroll was $5,000. **(PSR ¶ 56.)**

Thompson set up the online account with the lender and is the one who completed and submitted the PPP loan application. **(9/21/22 Trial Tr. at 146-47.)** Once Faithful received the PPP funds, Thompson instructed Petitioner how much and to whom he should disburse the money. **(Id. at 162; PSR ¶¶ 54, 60.)** Petitioner wrote false payroll checks to Antonio Hosey and other individuals, who were not Faithful employees. **(9/21/22 Trial Tr. at 86.)** Hosey was allowed to testify, over defense trial counsel's objection, about him cashing checks for other businesses. **(Id. at 87.)**

**B. Rule 404(b) issue**

The government supplied notice that it intended to introduce certain evidence under Federal Rule of Evidence 404 (b). **(Dkt. 132.)** As evidence of Petitioner's fraudulent intent, the government sought to admit (1) evidence that Petitioner referred Keith Maloney and Mark Stewart into the scheme,1 (2) evidence of Thompson's conspiracy with other individuals identified in the Superseding Indictment under the same scheme, and (3) the fact that individuals who cashed checks received from Petitioner also cashed checks for other people who received PPP fraudulent loans. **(Id. at 3-4.)** As to the second category of evidence, the government claimed it was being offered not to impugn Thompson's character, "but to establish that Petitioner's co-conspirator engaged in nearly identical conduct with at least four other individuals in and around the same month." **(Id. at 6.)** As to the third category, the government claimed it was being

offered to show that "it was neither a mistake nor accident that Petitioner wrote these individuals payroll checks" because those individuals did the same for others in the conspiracy. **(Id. at 7.)**

Petitioner objected to admission of evidence regarding acts of other alleged coconspirators as evidence of his knowledge and intent. **(Dkt. 198.)** At a pretrial hearing, the court expressed concern that the government would be introducing evidence of conduct by people who were not tied to Petitioner and about whom he may not have even known. **(9/15/22 Hr'g at 7.)** Without Petitioner at least knowing about them, their conduct seemed isolated and not relevant, from the court's perspective. **See id.** The court was further concerned with whether Rule 404 (b) covers acts by individuals other than the defendant. **(See id. at 11-12.)** The government claimed that the actions of others proved Petitioner's intent, that because they conspired and pled guilty, their intent could be imputed to the Petitioner. **(Id. at 13.)** When asked by the district court for what purpose under Rule 404 (b) the government thought the evidence was admissible, it responded that the permissible purpose was lack of mistake, that if there were checks cashed by others as part of a broader scheme that were consistent with the checks written by the Petitioner, it shows that the Petitioner's checks to those individuals were for a fraudulent purpose. **(Id. at 16.)** The district court admitted the evidence under Rule 401 rather than Rule 404 (b) because it "is necessary to complete the story of the crime and [sic] inextricably intertwined with the evidence regarding the charged offense." **(Dkt. 213 at 1-2.)** The court's order offers no further explanation for admissibility. As a result, Rodericque Thompson was allowed to testify regarding many other fraudulent loan applications he had completed on behalf of other small businesses, all claiming the same

number of employees and monthly payroll and all seeking the same amount. **(9/21/22 Trial Tr. at 176-79.)** Defense trial counsel renewed his objection. **(Id. at 179.)** Antonio Hosey was also allowed to testify, over objection, to his involvement in other schemes. **(Id. at 86-87.)** And the case agent, William Cromer, testified to the many witnesses he interviewed as part of Thompson's scheme and for whom Thompson submitted false PPP loans. **(9/22/22 Trial Tr. at 319-321.)** After trial, the jury convicted Petitioner on all counts on September 22, 2022. **(9/22/22 Trial Tr. at 461-62).**

**C. Petitioner's Supposed Referral of Maloney and Stewart**

Thompson also testified that Petitioner referred two clients to him, Keith Maloney and Mark Stewart, through a third party named Derek Black. **(9/21/22 Trial Tr. at 172.)** The transcript is revealing here, because the prosecutor literally had to put words in Thompson's mouth regarding the details of this referral, including the fact that Black "shared in the referral fee" and that Petitioner "continue[d] to provide [Thompson] their contact information and assist [Thompson] in getting in touch with them." **(Id. at 173.)** Thompson never explained—nor did the government probe—why Petitioner would send these so-called referrals to Thompson through a "third party" when he had been communicating directly with Thompson regarding his own loan. Thompson provided inconsistent testimony regarding the referral fee, testifying in one breath that Petitioner split the fee with the so-called "third party," Derek Black, and in the next breath that he had to split it with James Davis. **(See id. at 172-74.)** Importantly, none of that testimony was volunteered by Thompson but was spoon-fed to him by the prosecutor.

To support its theory that Petitioner recruited Maloney and Stewart into the conspiracy, the government offered a composite exhibit of text messages between

Thompson and Petitioner. **(Id. at 179; Gvt. Trial Ex. 34.)** The government asked Thompson to translate what Petitioner meant by the following text: **(Gvt. Trial Ex. 34 at 1.)** Thompson testified that that by "I got 2 people," Petitioner was saying that he had two people to list as employees to support the fraudulent payroll claims. **(9/21/22 Trial Tr. at 180.)** Thompson claimed that the very next text, "I got 3 people," referred to three businesses Petitioner was referring to Thompson for PPP loans. **(Id.)** The prosecutor walked Thompson through the rest of the texts and asked him to translate what is not readily apparent from the plain language of the texts, and Thompson claimed that the texts were referencing Petitioner sending Maloney and Stewart to Thompson. **(Id. at 180-81.)** This directly contradicts Thompson's testimony that Petitioner made these referrals through a "third party" named Derek Black, further undermining Thompson's credibility.

In another text, Thompson told Petitioner that he spoke with Maloney and that Maloney wants to apply for a loan. **(Gvt. Trial Ex. 34 at 2.)** He asked Petitioner for Maloney's phone number, which Petitioner provided. **(Id.)** The next day, Thompson told Petitioner that Maloney's loan was approved, and Petitioner replied that he prayed his would be approved too. **(Id.)** Thompson was asked to interpret a final set of text messages that he claimed referenced Maloney and Stewart and the referral fees Petitioner supposedly received. **(9/21/22 Trial Tr. at 192-93.)**

After Petitioner's loan was approved, Thompson told him to sign some documents to accept and told him that his PPP money would come a few days later. **(Gvt. Trial Ex. 34 at 5.)** Petitioner responded: "So when ill [sic] get that other 3?", which Thompson testified was referring to his referral fee for Maloney. **(9/21/22 Trial Tr. at 192.)**

Nothing else in the text refences Maloney, and Thompson's interpretation is completely inconsistent with his other testimony. The "other 3" cannot be referring to 3 references, because Thompson claimed Petitioner only referred him two businesses. Nor could it be referring to $3,000, because Thompson testified that the referral fee was $10,000. Thompson's interpretation of Petitioner's text, and his claim that it was proof of the referral fee, is simply not credible and is contradicted by his own testimony. Unsurprising for a man twice convicted of federal fraud offenses. But it was the only evidence the government ever offered—either at trial or at sentencing—to support its "recruitment" theory.

There was no testimony or evidence connecting Petitioner to Stewart and his business's loan at all during trial other than one sentence where Thompson said Petitioner referred him. **(9/21/22 Trial Tr. at 172.)**

Keith Maloney was prosecuted in the same case as Petitioner for his fraudulent PPP loan; Mark Stewart was prosecuted separately. **(See Dkt. 1; see also U.S. v. Stewart, Case No. 1:20-cr-319-LMM.)** Both pled guilty before Petitioner's trial and sentencing, and there were cooperation obligations in both of their plea agreements. **(See Dkt. 95 1 at 7-8; see also U.S. v. Stewart, Case No. 1:20-cr-319-LMM, Dkt. 8-1 at 7-9.)** Despite their cooperation agreements, the government chose not to call either Maloney or Stewart to testify at Petitioner's trial or sentencing, relying on Thompson's spotty testimony alone. The timing is also curious—Stewart pled guilty two years before Petitioner's trial but was not sentenced until right after the trial. **U.S. v. Stewart, Case No. 1:20-cr-319-LMM, Dkts. 8-1 and 25.)** Maloney pled guilty well over a year before Petitioner's trial but was likewise not sentenced until right after trial. **(See Dkts. 95-1,**

**258.)** This strongly suggests that the government wanted to delay their sentencings because it contemplated enforcing their cooperation agreements during Petitioner's trial, but the government must have determined that their testimony would not have been helpful to its case.

The district court ordered Maloney to pay restitution jointly and severally with Thompson—making no mention of Petitioner—even though Maloney was sentenced after Petitioner's trial. **(Dkt. 258 at 6.)** The same is true for Stewart; his restitution is due jointly and severally with Thompson and Hosey with no mention of Petitioner even though he too was sentenced after Petitioner's trial. **United States v. Stewart, Case No. 1:20-cr-319-LMM, Dkt. 25 at 6.)**

Petitioner testified that he never received any referral fees. **(9/22/22 Trial Tr. at 345.)** Indeed, he testified that he barely knew Maloney (who was a friend of his cousin) and did not know Stewart at all, and the government offered no evidence to the contrary. **(Id. at 345-46.)** Petitioner's cousin was in the car with him when he was talking on the phone to James Davis about the loan and his cousin directed Maloney to Thompson. **[Id. at 346.]** And although the government subpoenaed Petitioner's bank records, there was no evidence or a referral fee or any money at all being deposited other than the PPP loan funds.

### D. Petitioner's Sentencing

The district court held a sentencing hearing on January 19, 2023. The U.S. Probation Office prepared a PSR that initially calculated the loss amount to be

$300,000—the amount of the loan to Petitioner[1]. **(PSR ¶ 77.)** The government objected that Petitioner should be held accountable for Maloney's and Stewart's loans, and the PSR adopted the government's position. **(Id.)** Based on the total loss of $900,000, the PSR recommended a 14-level enhancement under USSG section[2] 2B1.1 (b) (1) (G). **(Id.)** Also based on this loss amount, the PSR recommended a restitution order in the amount of $900,000. **(PSR at p. 29.)** The Probation Officer calculated a Total Offense Level 28 with Criminal History Category 1, which yielded a custody guideline range of 78-97 months' imprisonment. **(PSR at 29.)**

Regarding the loss amount, the government argued that Petitioner recruited Maloney and Stewart into the conspiracy and that therefore their loans were reasonably foreseeable to Petitioner. **(1/19/23 Sent. Tr. at 19.)** The government claimed that the evidence showed that he "provided their information and brought them to Mr. Thompson," and was therefore "aware that what they would do was apply for a fraudulent government-backed loan." **(Id. at 19-20.)** The government further referred generically to text messages allegedly showing that Petitioner not only recruited the individuals but also received a referral fee. **(Id. at 20.)** While there was a text message discussed at trial where Petitioner sent Maloney's phone number to Thompson, there was no evidence that he provided any information about Stewart; nor was there evidence that Petitioner knew anything about Maloney's and Stewart's businesses, how many employees they had, what their expenses were, and whether their loan applications were fraudulent. Petitioner reiterated his position that he did not recruit the other individuals

[1] Petitioner only details here the sentencing issues that were contested below and resolved in the government's favor.
[2] Petitioner only details here the sentencing issues that were contested below and resolved in the government's favor.

and that it was not reasonably foreseeable to him that Malone and Stewart would receive loans. **(Id. at 22-23).**

The court overruled Petitioner's objections to both loss and restitution, finding that the government met its burden in showing that the Maloney and Stewart loans were reasonably foreseeable to Petitioner. **(Id. at 23.)** The court was not specific in stating its basis for finding the loss to include the two extra loans, but just said generically that it found the assertion that Petitioner recruited Maloney and Stewart to be "supported by the evidence." **(Id. at 17; see also id. at 23** ("The evidence does support that [Petitioner] is the one that recruited Mr. Maloney and Mr. Stewart into the scheme, so I think that the government has easily met its burden of proof on this particular issue.").) After sustaining two of Petitioner's objections to the PSR, the court calculated his Total Offense Level to be 23 and a Criminal History Category 1, which yielded a custody Guideline range of 46-57 months. **(Id. at 24.)** The court sentenced Petitioner to 46 months' imprisonment and $897,172.61 restitution to be paid jointly and severally with Thompson, Maloney, and Stewart. **(Id. at 35.)**

Regarding restitution, Petitioner argued that the $88,298.05 in loan proceeds seized from his bank and forfeited should be deducted from the restitution amount. **(PSR ¶ 74; 1/19/23 Sent. Tr. at 3-4.)** The government opposed crediting the forfeiture towards restitution because the court lacks the authority to make such deduction. **(1/19/23 Sent. Tr. at 21.)** The government has discretion in whether to forfeit the funds or allow it to be credited towards restitution. **(Id.)** After a side conversation between the attorneys, Petitioner's trial counsel announced that the government had indeed decided to recommend that the forfeited funds be applied towards restitution but that the process

would take time. **(Id. at 21-22.)** Petitioner timely filed a Notice of Appeal on January 20, 2023. **(Dkt. 281).** The Eleventh Circuit affirmed in an unpublished opinion on January 3, 2024. **See Appendix A.**

## REASONS FOR GRANTING THE WRIT

The reason for granting the writ is to decide whether evidence without a connection to the offenses in which Petitioner was charged can be admitted at trial to prove Petitioner guilty of the charged offenses. The government presented evidence of other individuals engaged in similar fraud activities as Petitioner to prove that Petitioner's action in his charged fraud was not because of a mistake on his part.

Then, at sentencing, the government used the relevant conduct of others as relevant conduct for Petitioner; even though, there was insufficient evidence to prove Petitioner's foreseeability of their conduct.

## SUMMARY OF ARGUMENT

The government charged, and its evidence supported, no more than a rimless hub-and-spoke conspiracy in which a central conspirator works through several individuals but none of whom worked with each other. In such a scenario, there is not one conspiracy, but several independent conspiracies.

Because there was no overarching conspiracy between Petitioner and the other PPP loan applicants, the district court abused its discretion in allowing the government to introduce evidence of those other loan applications to prove Petitioner's intent and lack of mistake under Fed. R. Evid. 404 (b). Evidence of the prior bad acts of unconnected individuals should not be allowed to probe a defendant's state of mind. Nor was such

evidence "intrinsic" to his charged crime under Fed. R. Evid. 403 because he was not in a conspiracy with them.

There was insufficient evidence to prove that Petitioner "recruited" other individuals into the conspiracy to which he belonged and that any loss to the government from their PPP loans was reasonably foreseeable to him, he should not have been held accountable for the loss stemming from their loans. Should this Court not reverse and remand the conviction for new trial, it should nonetheless remand for a new sentencing based on a loss amount and restitution amount of $300,000 rather than $900,000.

## ARGUMENTS

**Issue One:** Whether the Eleventh Circuit erred in finding that the district court did not abuse its discretion by admitting Rule 404 (b) evidence of fraudulent PPP loan activity regarding separate conspiracies unrelated to the conspiracy with which Petitioner was charged?

**Supporting Facts and Argument:** This Court's test for the admissibility of evidence under Rule 404 (b) requires (1) that the evidence be relevant to an issue other than the defendant's character; (2) that it be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act; and (3) that the probative value of the evidence cannot be substantially outweighed by its undue prejudice or other considerations under Rule 403. United States v. Matthews, 431 F.3d 1296, 1310-11 (11th Cir. 2005). A district court abuses its discretion in admitting such evidence when its decision rests on "a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." United States v. McNeal, 591 F. App'x 760, 762 (11th Cir. 2014).

By its plain language, Rule 404 (b) only applies to the prior acts of the person whose knowledge/intent/motive/lack of mistake is in question. See Fed. R. Evid. 404 (b); see also McNeal, 591 F. App'x at 762 (noting that the evidence must be sufficient to allow a jury to conclude that the defendant committed the prior act). Nothing in the rule allows a party to introduce prior bad acts of other people to prove the defendant's knowledge/intent/motive/lack of mistake. Indeed, even this Court's cautionary instruction on Rule 404 (b) evidence specifically refers to evidence of similar acts "done by the Defendant." 11th Cir. Pattern Jury Instr. T1.1 (rev. Mar. 2022.)

The government's Rule 404 (b) notice indicated that it intended to introduce evidence of other witnesses' prior acts, including Hosey and Thompson. **(Dkt. 132 at 4, 6-7.)** In its explanation, the government argued that such evidence against Thompson "establishes his motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, and lack of accident regarding the offenses charged in the Superseding Indictment." **(Id. at 6.)** The government further claimed that evidence of Thompson's schemes with others were "essential to explaining his intent, motive, preparation, and plan for conspiring with [Petitioner] to obtain a fraudulent PPP loan." **(Id. at 7.)** But neither Thompson's nor Hosey's states of mind were at issue in Petitioner's trial; indeed, they had already pled guilty to their roles in the conspiracy. Nor were their states of mind probative at all of Petitioner's state of mind.

Petitioner sought a reversal his convictions and a remand for a new trial in his direct appeal to the Eleventh Circuit; because the admission of this evidence was not harmless.

The Eleventh Circuit denied this issue in part; because it found that it did not need to decide whether the district court abused its discretion in admitting Hosey's and Thompson's testimony about the fraudulent loan activity of other conspirators, because the error was harmless in light of the substantial independent evidence of Petitioner's guilt. **Appendix A at page 5.** The Eleventh Circuit also held that without considering Thompson's testimony (which the jury was entitled to consider), there was more than enough independent evidence to establish Crosby's guilt. Thus, the Eleventh Circuit stated that it was compelled to conclude that the challenged testimony had no substantial influence on the outcome on the verdict, and it affirmed Petitioner's convictions. See United States v. Dickerson, 248 F.3d 1036, 1048 (11th Cir. 2001). **See Appendix A page 7.**

Petitioner opposes the Eleventh Circuit's position that there was substantial independent evidence of Petitioner's guilt; because there was insufficient evidence to prove that Petitioner "recruited" other individuals into the conspiracy to which he belonged, or, that their actions were connected to him.

Petitioner opposes the Eleventh Circuit's position since the evidence was purely extrinsic, and it had nothing to do with the conspiracy in which Petitioner was found guilty of having participated. While the government charged a broad conspiracy, it only proved a rimless "hub and spoke" conspiracy rather than a single conspiracy. See United States v. Chandler, 388 F.3d 796, 807 (11th 19 Cir. 2004). The government's evidence showed that Petitioner was one of several conspirators, each of whom "deal[t] independently with the hub conspirator"— Rodericque Thompson—but who did not necessarily know about each other. See id. Other than the hub conspirator, the

government could not bring in a single witness to place Petitioner even in the same room as another business owner for whom a fraudulent loan was submitted—which is odd since other defendants had pled guilty by the time Petitioner went to trial. There was not one overarching conspiracy but "as many conspiracies as there were spokes," Petitioner's conspiracy with Thompson simply being one of many spokes in the rimless wheel. Id. There was no evidence that "the various spokes [were] aware of each other and of their common aim." See United States v. Seher, 562 F.3d 1344, 1367 (11th Cir. 2009); see also United States v. Huff, 609 F.3d 1240, 1243-44 (11th Cir. 2010). Thompson's and Hosey's wrongful acts with other spokes in the rimless wheel should not have been admitted as proof of Petitioner's state of mind and were otherwise completely irrelevant to Petitioner's alleged conspiracy with Thompson and Hosey.

This prejudiced Petitioner because he testified that he believed Thompson to be a legitimate loan officer. By presenting Petitioner's loan application as one in a long assembly line of identical fraudulent loans following the exact same pattern, the jury was able to impute fraudulent intent to Petitioner. This Court should reverse his conviction.

**Issue Two:** Whether the Eleventh Circuit erred in finding that the district court did not err in holding Petitioner accountable for the PPP loans of Keith Maloney and Mark Stewart when there was insufficient evidence that Petitioner recruited them and reasonably foresaw that their loans would be fraudulent, and the district court failed to state the basis for finding their loans to be relevant conduct?

**Supporting Facts and Argument:** Before a district court can include losses caused by other individuals as "relevant conduct" in calculating a defendant's total loss, it must engage in a two-step analysis guided by United States v. Huff, 609 F.3d 1240, 1243-

44 (11th Cir. 2010): As a threshold matter, it must make "individualized findings" regarding the scope of the jointly undertaken criminal activity between the defendant and the other actors, and second it must determine whether the other losses were reasonably foreseeable to the defendant. See United States v. Hunter, 323 F.3d 1314, 1319-20 (11th Cir. 2003). The court may not speculate as to whether a fact exists that would result in a higher Guideline range. United States v. Medina, 485 F.3d 1291, 1304 (11th Cir. 2007).

The government has the burden of demonstrating the loss amount by a preponderance of "reliable and specific" evidence. Id. Here, there was insufficient evidence to conclude that Petitioner was in any jointly-undertaken activity with Maloney and Stewart and that any losses caused by their actions were foreseeable to Petitioner. Further, the district court failed to make "individualized findings" to support its decision to hold Petitioner accountable for those loans. Petitioner sought resentencing but the Eleventh Circuit affirmed the sentencing by finding that the district court did not clearly err in holding Petitioner accountable for a $600,000 loss. Even though, the Eleventh Circuit also found that the district court did not make individualized findings at sentencing, as it should have, the record supports holding Petitioner responsible for this loss amount. **See Appendix A at page 10.**

First, there was insufficient evidence for the district court to hold Petitioner accountable for the loans of Maloney and Stewart. The government's theory on loss was that Petitioner recruited Keith Maloney and Mark Stewart into the conspiracy by referring them to Thompson and that it was therefore reasonably foreseeable to him that they would file fraudulent loans. Although the government had the ability to compel Maloney and Stewart to testify at Petitioner's trial and sentencing—and it delayed sentencing

Maloney and Stewart until after Petitioner's trial, presumably in contemplation of calling them as cooperating witnesses—it chose instead to rely on Rodericque Thompson's trial testimony alone and did not present any evidence at sentencing.

But Thompson's trial testimony was littered with inconsistencies and his interpretation of text messages with Petitioner simply made no sense. First, the prosecutor effectively had to spoon-feed Thompson the testimony it wanted to elicit. Second, he was inconsistent on whether Petitioner supposedly shared a referral fee with James Davis or the "third party" Derek Black (and it was never explained who Derek Black was supposed to be or why he was involved). **(9/21/22 Trial Tr. at 172-74**. And if Petitioner was communicating with Thompson so frequently, why would he refer Maloney and Stewart to Thompson through a third party? Third, Thompson said that Petitioner provided him the information he needed for both Maloney and Stewart and "continue[d] to provide [Thompson] their contact information and assist [Thompson] in getting in touch with them." **(Id. at 173.)** But the text messages he discussed make clear that, at best, Petitioner only sent Maloney's telephone number to Thompson (which also conflicts with Thompson's testimony that the referral was from Petitioner to Thompson through third-party Derek Black. **(Gvt. Trial Ex. 34.)** There was no evidence that Petitioner referred Stewart other than one line in Thompson's testimony. **(9/21/22 Trial Tr. at 172.)**

Fourth, Thompson simply made up an explanation of a text message where Petitioner claimed "I got 3 people," claiming that Petitioner was saying he had 3 referrals when the prior text saying "I got 2 people" referred to how many people could be listed on his fake payroll for his own PPP loan. **(Id.; 9/21/22 Trial Tr. at 179.)** Further to this

point, Thompson said that Petitioner referred Maloney and Stewart, not "3 people," and he also said that the referrals came through Derek Black and not directly from Petitioner further undermining Thompson's interpretation of this text. Thompson's testimony—to the extent it did not just parrot the prosecutor's leading questions—was grossly inconsistent and insufficient to support a finding that Petitioner recruited Maloney and Stewart.

And even if this Court finds there to have been sufficient evidence that Petitioner referred Maloney and Stewart to Thompson, there was no evidence that it would have been reasonably foreseeable to Petitioner that Maloney's and Stewart's PPP loan applications were fraudulent. There was no evidence that he knew anything about their businesses and whether they had sufficient employees or monthly payroll to support whatever their loan applications said.

Indeed, the government did not introduce Maloney's and Stewart's PPP loan applications at all, nor was there any evidence at trial or sentencing to support the inference that they even were fraudulent and that Petitioner would have known they were fraudulent. The mere fact that a defendant simply knows others are participating in a conspiracy is insufficient to prove that he agreed to be part of that conspiracy. See United States v. Anor, 762 F. App'x 707, 711 (11th Cir. 2019) (vacating and remanding conviction where district court did not make a particularized finding regarding the scope of the defendant's agreement).

The government's own strategic decisions and the district court's sentencing decisions further support Petitioner's argument that there was insufficient evidence to tie him to Maloney's and Stewart's loans. Despite having the right to call them to

corroborate Thompson's testimony given their plea agreements, the government put off sentencing for both until after trial. Neither Maloney nor Stewart received a substantial assistance departure recommendation from the government, further implying that whatever they had to say about Petitioner was not helpful to the government. And finally, the district court ordered their restitution to be paid jointly and severally with Thompson and Hosey but not with Petitioner, suggesting that the district court did not find the evidence at Petitioner's trial sufficient to include him in their restitution judgments.

Even though, the Eleventh Circuit had made it clear in prior decisions that a district court commits reversible error when it fails to make individualized findings regarding the scope of the jointly undertaken activity and the scale of its reasonable foreseeability to Petitioner, the Eleventh Circuit went against its own holdings. See United States v Hunter, 323 F.3d 1314, 1320-21 (11th Cir. 2003) ("to determine a defendant's liability for the acts of others, the district court must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant." United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir. 1993) (citing U.S.S.G. section 1B1.3, cmt. (n. 2)); United States v. Bush, 28 F.3d 1084, 1087 (11th Cir. 1994) (same); and United States v. Gosha, 772 F. App'x 833, 834 (11th Cir. 2019); see also United States v. Campbell, 279 F.3d 392, 400 n. 5 (6th Cir. 2002) (same, and cases cited therein); United States v. Studley, 47 F.3d 569, 574 (2d Cir. 1995) ("This determination, as it goes to prong one of the test, must be made before the issue of foreseeability, prong two, is reached."). The Eleventh Circuit failed to conduct a meaningful review when it allowed the district court to simply makes a finding that the evidence was sufficient but

does not explain what "reliable and specific evidence it used to calculate the loss amount." See United States v. Medina, 485 F.3d 1291, 1304 (11th Cir. 2007).

The district court did not point to any evidence supporting its finding that Petitioner should be attributed the loss associated with Maloney's and Stewart's loans. **(Id. at 23.)** It merely stated that its finding was "supported by the evidence" without saying what that evidence was. **(1/19/23 Sent. Tr. at 17; see also id. at 23** ("The evidence does support that Petitioner is the one that recruited Mr. Maloney and Mr. Stewart into the scheme, so I think that the government has easily met its burden of proof on this particular issue.").) In Medina, the Eleventh Circuit reversed the defendant's sentence when the district court's reasoning was generic: "With regard to the loss amounts for which each of the defendants is to be held accountable those are my findings." Id. Like the district court here, that court simply asserted that it made such findings without pointing to any specific evidence that would allow for meaningful review, which constituted clear error which the Eleventh Circuit should have recognized. See id.

The principles and limits of sentencing accountability under this guideline are not always the same as the principles and limits of criminal liability. Under subsections (a)(1) and (a)(2), the focus is on the specific acts and omissions for which the defendant is to be held accountable in determining the applicable guideline range, rather than on whether the defendant is criminally liable for an offense as a principal, accomplice, or conspirator. See note 2 of USSG Section 1B1.3.

A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as

a conspiracy. In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was:

(i) within the scope of the jointly undertaken criminal activity;

(ii) in furtherance of that criminal activity; and

(iii)reasonably foreseeable in connection with that criminal activity.

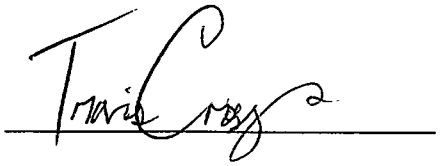
The conduct of others that meets all three criteria set forth in subdivisions (i) through (iii) (i.e., "within the scope," "in furtherance," and "reasonably foreseeable") is relevant conduct under this provision. However, when the conduct of others does not meet any one of the criteria set forth in subdivisions (i) through (iii), the conduct is not relevant conduct under this provision. See note 3 of USSG Section 1B1.3.

Neither Keith Maloney nor Mark Stewart's conduct is relevant conduct for Petitioner; because, neither can meet all three criteria set forth in subdivision (i) through (iii) of note 3 of the USSG section 1B1.3. Should this Court not reverse Petitioner's conviction for the grounds articulated in argument 1 above, it should nonetheless remand for resentencing.

## CONCLUSION

This Court should reverse the Petitioner's conviction because of the significant evidence that was admitted regarding other criminal acts by the Petitioner's co-conspirators to prove his state of mind. But even if this Court does not reverse the conviction, it should remand for resentencing regarding the proper loss amount that should be attributed to Petitioner.

Respectfully submitted on the 25 day of March 2024.



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