No. 24A____

IN THE

Supreme Court of the United States

ERIC DEAN SHEPPARD,

Applicant,

v.

UNITED STATES,

Respondent.

APPLICATION FOR BAIL PENDING APPEAL

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

Applicant is Eric Dean Sheppard. Respondent is the United States of America. The proceedings below are *United States v. Eric Dean Sheppard,* No. 1:22-cr-20290 (S.D. Fla.) and *United States v. Eric Dean Sheppard*, No. 24-12072 (11th Cir.).

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To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Pursuant to 18 U.S.C. § 3143(b), Applicant Eric Sheppard respectfully requests that he be issued bail pending appeal of his convictions for wire fraud, including any timely petition for certiorari to this Court. Sheppard has recently been forced to commence serving an 18-month sentence for these convictions, and the courts below denied his application for bail pending appeal.

INTRODUCTION

Applicant Eric Sheppard was convicted of wire fraud even though the banks he supposedly defrauded neither suffered nor stood to suffer any harm to any traditional property interest. Sheppard's appeal, currently pending in the Eleventh Circuit, thus raises the same question that this Court will decide later this Term in *Kousisis v. United States*, No. 23-909—namely, whether fraudulent inducement is a valid theory of wire fraud. If the petitioners prevail in *Kousisis*, Sheppard will win his appeal and secure an acquittal. Yet by denying bail pending appeal, the courts below are requiring Sheppard to serve his 18-month sentence while this Court decides whether the theory underlying his convictions is valid. As a consequence, Sheppard may well serve his *entire* sentence before his appeal is complete, notwithstanding this Court's grant of certiorari on an issue dispositive of Sheppard's appeal.

That is unjust. The only disputed question on Sheppard's bail application is whether his appeal presents a "substantial" question, 18 U.S.C. § 3143(b), i.e., a question that "very well could be decided the other way," *United States v. Perholtz*, 836

F.2d 554, 555 (D.C. Cir. 1987) (per curiam). This Court's grant of certiorari in *Kousisis* necessarily means that Sheppard's appeal presents a substantial question. The Eleventh Circuit's unexplained decision nevertheless to deny Sheppard bail pending appeal flies in the face of that reality. This Court should grant this application and afford Sheppard bail pending appeal.

OPINIONS BELOW

The two-judge order of the Eleventh Circuit denying Sheppard's request for bond is unpublished and is attached as Exhibit A. The one-judge order of the Eleventh Circuit denying Sheppard's request for bond is unpublished and is attached as Exhibit B. The district court's order denying Sheppard's renewed motion for bond is unreported and attached as Exhibit C. And the district court's initial order denying Sheppard bond is unreported and attached as Exhibit D.

JURISDICTION

Pursuant to 18 U.S.C. § 3143(b), a "judicial officer" "shall order the release" of an individual who "has filed an appeal or a petition for a writ of certiorari" if several statutory requirements are satisfied. *See Morison v. United States*, 486 U.S. 1306, 1306 (Rehnquist, C.J., in chambers). This Court further has jurisdiction pursuant to 28 U.S.C. § 1651(a) and 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Applicant Eric Dean Sheppard was convicted of wire fraud for fraudulently inducing banks participating in the Paycheck Protection Program (PPP) to extend two loans. Sheppard's scheme contemplated no pecuniary or other property harm to

the banks, nor did his scheme cause them such harm. The terms of the loans, including processing fees and the interest rate, were set by regulation, and Sheppard has since paid the loans back with interest due. The banks (the supposed victims here) received in exchange for the loans the exact value they contracted for. The district court nonetheless sustained Sheppard's convictions on the theory that contemplated property harm is irrelevant; fraudulently inducing a transaction, the court held, was enough.

1. In response to the COVID-19 pandemic, Congress enacted several economic-relief programs, including the Paycheck Protection Program, "a temporary program targeted at providing small businesses with the funds necessary to meet their payroll and operating expenses and therefore keep workers employed." *Springfield Hosp., Inc. v. Guzman*, 28 F.4th 403, 409 (2d Cir. 2022); *see In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1247 (11th Cir. 2020)). PPP's basic architecture was that banks and other private lenders would make the loans, with the Small Business Administration (SBA) guaranteeing the loans on behalf of the government. *See Springfield Hosp.*, 28 F.4th at 409; *see also* 85 Fed. Reg. 20,811, 20,815 (Apr. 15, 2020).

Unlike most loans, the terms of PPP loans were set by regulation. The SBA did not require borrowers to back the loans with collateral or a personal guarantee. *See* 85 Fed. Reg. at 20,816. And the SBA set the interest rate at one percent and provided that lenders would receive processing fees in a pre-determined amount depending on the size of the loan. *See id.* at 20,813, 20,816. The SBA selected this rate because, "for

lenders" like the banks here, the rate "offers an attractive interest rate relative to the cost of funding for comparable maturities." *Id.* at 20,813.

In general, borrowers were entitled to receive PPP loans equal to 2.5 times their monthly payroll. 85 Fed. Reg. at 20,812. In an interim final rule, SBA stated that "[p]ayroll costs consist of compensation to employees" and that "independent contractors [do not] count as employees for purposes of PPP loan calculations." *Id.* at 20,813. The purpose of this carveout for independent contractors was to prevent double dipping: "independent contractors ha[d] the ability to apply for a PPP loan on their own so they d[id] not count for purposes of a borrower's PPP loan calculation." *Id.*

2. Eric Sheppard is a Florida resident. At the start of the COVID-19 pandemic, Sheppard's companies were converting a 60,000-square-foot building for use as a Burlington Coat Factory. 12/19/23 PM Tr. 13:3-14, 30:12-14.[1] Because of mandatory shutdowns, many of the subcontractors removed their workers from the Burlington site. *Id.* 13:3-14. But under the companies' agreement with Burlington, the project was subject to a strict completion deadline, 12/19/23 AM Tr. 92:1-13, such that his companies were required to pay roughly $3,000 in liquidated damages for each day of delay, 12/19/23 AM Tr. 99:9-16, 101:15-16. And many of the construction workers who were pulled from his project and others in the area still wanted to work, so Sheppard

[1] The transcripts in this action have not been posted on the district court's docket but have been provided to counsel. Sheppard would be happy to provide them if the Court so requests.

met with them, and agreed they would be paid to work on the store. 12/19/23 PM Tr. 16:4-17:2. Before the pandemic, Sheppard had never applied for any government funding, 12/19/23 PM Tr. 19:24-20:1, but during this period, his companies received PPP loans and used them for some of the expenses related to the project. *See* 1/10/24 PM Tr. 56:22-58:8.

The government charged Sheppard in connection with his companies' receipt of PPP loans in a fourteen-count superseding indictment. *See* Dkt. 60. As relevant here, four of those counts alleged that Sheppard committed wire fraud in connection with two PPP loans: an application for $148,397 on March 11, 2021; and an application for $148,591 on March 12, 2021. *See* 18 U.S.C. § 1343. The government's central theory at trial was that Sheppard misrepresented his businesses' entitlement to receive PPP funds because he claimed as eligible payroll expenses sums paid to workers who were classified as independent contractors. *See* Dkt. 170 at 9-12.[2]

[2] The government alleged two additional misrepresentations, but neither added anything legally relevant here. First, the government asserted that Sheppard misrepresented that his businesses did not operate in "excluded industries," which would have rendered them ineligible for PPP loans. CA11 Doc. 20, at 4. Second, the government asserted that Sheppard misrepresented that his businesses sustained a revenue decline in 2020, which likewise would have rendered them ineligible for certain PPP loans. *Id*. Like the employee-status theory on which the parties focused their briefing below, these theories asserted that Sheppard committed fraud either by misrepresenting his businesses' eligibility to receive PPP loans or the amount of the PPP loans they were eligible to receive. None of the representations affected the pecuniary value of the loans from the perspective of the lending banks.

The evidence showed that although Sheppard may have misrepresented the employment status of his workers, he put the PPP funds toward the program's approved purposes—paying workers—rather than using the funds to line his pockets. The unrebutted testimony of Sheppard's expert witness was that Sheppard paid over $920,000 to workers during the relevant period, which was more than twice the amount of the PPP loans he received. 1/10/24 PM Tr. 56:22-58:8.

The government's primary theory below was that the banks were the victims of Sheppard's scheme. But critically, the government offered no proof that the banks suffered—or stood to suffer—harm from Sheppard's alleged misrepresentations. The banks agreed to make PPP loans on terms set by the government, *supra* at 3-4, and received the federally established interest rate and processing fees they contracted for. Indeed, the government's theory in defending the convictions below was that if the banks did not make the loans to Sheppard, they would have made them to someone else—by regulation on the same terms and for the same interest and fees in return. *See* 4/8/24 Hr'g Tr. 40 (the "harm" is that the money would "have gone elsewhere," *i.e.*, to other PPP borrowers).

3. The jury nonetheless found Sheppard guilty of wire fraud.[3] Sheppard moved for a judgment of acquittal, explaining that his convictions for wire fraud were invalid

[3] The jury acquitted Sheppard of five additional wire-fraud counts. Ex. C, at 2. The jury separately convicted Sheppard of two counts of aggravated identity theft, *see* 18 U.S.C. § 1028A, but the district court later vacated those convictions in light of this Court's subsequent decision in *Dubin v. United States*, 599 U.S. 110 (2023). Ex. D, at 25. The government has cross-appealed that decision, which is not at issue in this application.

because "by making the loans to Sheppard, the Banks could realize only financial benefit—they stood to gain fees for making the loans—and faced no potential financial harm from issuing a PPP loan to a borrower later determined to have been ineligible." Dkt. 205, at 18.

The district court denied the motion and sustained Sheppard's convictions on a fraudulent-inducement theory. According to the district court, it was irrelevant whether the banks "faced potential financial harm," Ex. D, at 29 (internal quotation marks omitted), or "were actually harmed" by Sheppard's scheme, *id.* It thus rejected Sheppard's arguments "that the banks received the value of their bargain and even stood to gain financially by making the loans" because, the district court concluded, it was sufficient that Sheppard's "misrepresentation as to his businesses' eligibility for loans affected the banks' understanding of the nature of the bargain." *Id.* at 30. The court then sentenced Sheppard to 18 months' imprisonment for his wire-fraud offenses. Ex. E, at 2.

4. In the same order, the district court denied Sheppard's motion for bail pending appeal, finding no "substantial question" under "Eleventh Circuit precedent," Ex. D, at 42-43, but permitted him to self-surrender to federal custody. In reaching that self-surrender holding, the court necessarily found by clear and convincing evidence that Sheppard was not a flight risk or danger to the community. *See* 18 U.S.C. § 3143(a); Ex. D, at 43.

On June 28—two months before Sheppard's August 23 surrender date—Sheppard filed a renewed motion for bond. His renewed motion argued (among other

things) that this Court's intervening grant of certiorari in *Kousisis* conclusively proved that Sheppard's appeal would raise a substantial question under Section 3143(b). The district court did not rule on the motion for more than a month after it was fully briefed, issuing its decision just four days before Sheppard's surrender date. *See* Ex. C. The court again denied the motion, asserting that "[a] decision by the Supreme Court in *Kousisis* … would have no impact on this loan fraud case." *Id.* at 8.

5. Sheppard sought emergency relief in the Eleventh Circuit. *See* Fed. R. App. P. 9. On August 23, Judge Brasher denied Sheppard's motion in an unreasoned order. Ex. B. Sheppard then surrendered to federal custody to begin serving his sentence.

Pursuant to Federal Rule of Appellate Procedure 27(c), which provides that the court "may review the action of a single judge," Sheppard requested that the Eleventh Circuit review Judge Brasher's single-judge order. Several weeks later, on October 9, 2024, a two-judge panel consisting of Judge Brasher and Judge Abudu reviewed Judge Brasher's original order and denied Sheppard's motion. Ex. A.

ARGUMENT

"The statutory standard for determining whether a convicted defendant is entitled to be released pending a certiorari petition is clearly set out in 18 U.S.C. § 3143(b)." *Morison v. United States*, 486 U.S. 1306, 1306 (1988) (Rehnquist, C.J., in chambers). That statute provides that a "judicial officer" may grant bail if the officer finds four factors are met. First, the officer must find "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released." 18 U.S.C. § 3143(b)(1)(A). Second, the officer

must find that the appeal "is not for the purpose of delay." *Id.* § 3143(b)(1)(B). Third, the officer must find that the appeal "raises a substantial question of law or fact." *Id.* And fourth, the officer must find that the substantial question, if resolved in the defendant's favor, is "likely to result in" a reversal, a new trial, or a reduced sentence. *Id.*

Three of those factors were not contested by the government in the court of appeals and are not at issue in this Court. In allowing Sheppard to self-surrender, the district court necessarily determined that Sheppard was "not likely to flee or pose a danger to the safety of any other person or the community if released." 18 U.S.C. § 3143(a), (b)(1)(A); *see* Ex. D, at 43. There is no argument that Sheppard's appeal is "for the purpose of delay." 18 U.S.C. § 3143(b)(1)(B). And success on appeal would "result in … reversal" of Sheppard's wire-fraud convictions. *Id.*; *see United States v. Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam) (noting that the "likely to result in" inquiry presumes "the resolution of that question in the defendant's favor").

Thus, the only question before the Court is whether Sheppard's appeal of his wire-fraud convictions will present a "substantial question." 18 U.S.C. § 3143(b)(1)(B). The courts of appeals have concluded that a substantial question is "one that very well could be decided the other way." *Perholtz*, 836 F.2d at 555 & n.2 (collecting cases); *see United States v. Bannon*, 2024 WL 3082040, at *1 (D.C. Cir. June 20, 2024) (citing same). As explained next, there should be no real dispute about this factor either because Sheppard's appeal presents the same question currently

pending before this Court in *Kousisis*—namely, whether the fraudulent-inducement theory is a valid theory of wire fraud.[4]

I. Sheppard's appeal presents a "substantial question" on which this Court has already granted certiorari.

It is unusually clear that this case presents a "substantial question" because the Court has granted certiorari in *Kousisis v. United States*, No. 23-909, to decide the precise issue that will govern Sheppard's appeal.

1. In *Kousisis*, the Court granted the defendants' petition for certiorari to determine whether "a scheme to induce a transaction in property through deception, but which contemplates no harm to any property interest, constitutes a scheme to defraud under the federal wire fraud statute." *Kousisis* Pet'rs' Br. i. There, the defendants were convicted of wire fraud for obtaining contract funds for bridge repairs. *United States v. Kousisis*, 82 F.4th 230, 233-34 (3d Cir. 2023). The defendants obtained the contract funds in part by falsely certifying that they would and did buy paint supplies from disadvantaged business enterprises (DBEs). *Id.* at 234-35. They argued that they did not commit wire fraud because the promise to use DBE subcontractors had no financial value, and that PennDOT "received the repairs it paid for." *Id.* at 236, 240. But the Third Circuit rejected that argument, holding that defendants

[4] Two circuits have adopted a less "demanding standard." *Perholtz*, 836 F.2d at 555. Those circuits ask only whether a question is "fairly debatable," "fairly doubtful," or "one of more substance than would be necessary to a finding that it was not frivolous." *Id.*; *see United States v. Garcia*, 340 F.3d 1013, 1020 n.5 (9th Cir. 2003); *United States v. Messerlian*, 793 F.2d 94, 96 (3d Cir. 1986). This Court need not parse these differences because Sheppard's appeal is substantial even under the more rigorous standard.

violate the wire-fraud statute whenever they obtain money through deception, even if the alleged victim suffered no harm. *Id.* at 240, 242 ("Appellants secured PennDOT's money using false pretenses and the value PennDOT received from the partial performance of those painting and repair serves is no defense to criminal prosecution for fraud.").

In short, *Kousisis* tees up the validity of the "fraudulent inducement" theory of wire fraud. *Kousisis* Pet'rs' Br. 2. Under that theory, a defendant is guilty of wire fraud for fraudulently inducing a transaction through deception, even if the scheme, "if completed as devised, would not cause property harm." *Id.* at 24. Petitioners in *Kousisis* argue that theory is invalid, and later this Term, this Court will decide whether they are right.

2. Sheppard was convicted of wire fraud on the same theory. The government offered no evidence that Sheppard's scheme contemplated property harm to the lending banks or that his scheme actually caused such harm. *Supra* at 5-6. Instead, the district court sustained Sheppard's convictions on the fraudulent-inducement theory. The district court believed it was irrelevant under the wire-fraud statute whether the banks "faced potential financial harm" or were "actually harmed" by Sheppard's scheme. Ex. D, at 29. It thus was unmoved by Sheppard's argument that "the banks received the value of their bargain and even stood to gain financially by making the loans," *id.* at 30. In other words, the district court reached the same legal conclusion

as the Third Circuit in *Kousisis*—substitute "PennDOT" for "the banks" and "receiving repairs" for "making the loans," and the district court's reasoning could just has easily appeared in *Kousisis* itself.

3. Sheppard should be granted bail pending appeal because his case presents the same question as is currently pending before this Court in *Kousisis*. Where (as here) this Court grants certiorari on the central question in a case on appeal, Section 3143(b)'s "substantial question" standard is readily satisfied. *Cf. McDonnell v. United States*, No. 15A218 (U.S. Aug. 31, 2015) (staying mandate to allow petitioner to remain free pending disposition of certiorari petition).

Of course, this Court is not often asked to grant bail pending appeal after a grant of certiorari because, where the other statutory requirements are met, lower courts typically grant bail themselves. *See, e.g.*, *United States v. Kaloyeros*, No. 1:16-cr-776-VEC (S.D.N.Y.), Dkt. 1044, at 1 ("ORDERED that Moving Defendants' Motion for Bail is GRANTED pending disposition of *Ciminelli v. United States* (No. 21-1170) and *Percoco v. United States* (No. 21-1158) in the United States Supreme Court."); *Kaloyeros*, No. 1:16-cr-776-VEC, Dkt. 1043 (noting government's consent); *see also United States v. Silver*, 203 F. Supp. 3d 370, 375 (S.D.N.Y. 2016) (noting continuation of bail pending *McDonnell v. United States*, No. 15-474 (U.S.)). This case is unusual

only in that the district court and Eleventh Circuit refused to acknowledge the import of this Court's grant of certiorari in *Kousisis*.

4. a. The government's primary argument below was that *Kousisis* is immaterial to this case because the construction of the wire-fraud statute that petitioners advance in *Kousisis* is already the law in the Eleventh Circuit. CA11 Doc. 20, at 16.

This makes no sense. If petitioners' position in *Kousisis* is already the law in the Eleventh Circuit, then Sheppard was entitled to bail under Section 3143(b) even before this Court granted certiorari. In *Kousisis*, petitioners argue that a scheme defraud is one "that, if completed as devised, would not cause property harm" to the victim. *Kousisis* Pet'rs' Br. 24. Sheppard is not guilty of wire fraud under that rule, for there is no dispute that his alleged scheme contemplated no property harm to the lending banks, nor caused them any such harm. The banks stood to receive—and in fact received—the processing fees and interest rate they contracted for. *Supra* at 6.

If, on the other hand, Eleventh Circuit case law currently construes the wire-fraud statute more broadly than the petitioners' rule in *Kousisis*, Sheppard is just as clearly entitled to bail. As explained above, the grant of certiorari in *Kousisis* means that Sheppard's argument on appeal now presents a substantial question.

In the courts below, the government read Eleventh Circuit case law to sweep more broadly than the petitioners' rule in *Kousisis*. Existing Eleventh Circuit precedent requires that a deception go to an "essential element of the bargain" to satisfy the wire-fraud statute. *United States v. Takhalov*, 827 F.3d 1307, 1314 (11th Cir. 2016) (quoting *United States v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007)). According to

the government's argument below, this essential-element test allows a wire-fraud conviction for misrepresentations that have "no pecuniary value to [the victim]." CA11 Doc. 26, at 12. But the outcome here would be different under the petitioners' rule in *Kousisis*. A representation that has no pecuniary value to the victim is not one that would harm the victim's property rights if believed. Thus, if the petitioners prevail in *Kousisis*, Sheppard would be acquitted, even if circuit precedent would allow for his conviction.

Indeed, unlike the government below, the Solicitor General understands the petitioners in *Kousisis* to advocate for a different rule than the one currently reflected in Eleventh Circuit case law. The Solicitor General contends that the *Kousisis* petitioners argue for a "net pecuniary loss" requirement. *Kousisis* Gov't Br. 20. Eleventh Circuit precedent, by contrast, holds that any deception that goes to an "essential element of the bargain" satisfies the wire-fraud statute. *Takhalov*, 827 F.3d at 1314 (quoting *Shellef*, 507 F.3d at 108). According to the Solicitor General in *Kousisis*, the "'essence of the bargain' standard" still ensnares defendants where, as here, their scheme neither contemplated nor caused harm (pecuniary or otherwise) to any property interest. *Kousisis* Gov't Br. 44.

That should be the end of the matter. Sheppard's wire-fraud convictions are not valid under the petitioners' rule in *Kousisis*. If that rule is already the law in the Eleventh Circuit, then his appeal presented a "substantial question," 18 U.S.C.

§ 3143(b), before this Court granted certiorari. If that rule is not the law in the Eleventh Circuit, then the grant of certiorari in *Kousisis* proves that Sheppard's appeal presents a "substantial question." *Id.* Either way, Sheppard should be granted bail.

b. Below, the government also claimed that *Kousisis* would not affect this case because "judicial decisions cannot make law beyond the facts of the cases in which those decisions are announced." CA11 Doc. 20, at 18 (quoting *Watts v. BellSouth Telecomm'ns, Inc.*, 316 F.3d 1203, 1207 (11th Cir. 2003)). Thus, the government argued, the fact that *Kousisis* concerns alleged fraud arising from "contract matters" means that it will not bear on alleged fraud arising from misrepresentations concerning "PPP eligibility." *Id.*

That is quite wrong. Where "a precedent of this Court has direct application in a case," lower courts must follow that precedent. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). And "[w]hen an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which" courts "are bound." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). It should thus go without saying that this Court's interpretation of the wire-fraud statute will affect criminal defendants beyond the *Kousisis* petitioners themselves. That is why, for example, this Court is currently holding petitions for certiorari in other cases raising the question presented in *Kousisis* on quite different facts, *see, e.g., Porat v. United States*, No. 23-832, and why the Solicitor General has agreed other such cases should be held, *see, e.g.*, Mem. for the United States 1, *Bolos v. United States*, No. 24-286. The government's suggestion that this Court's as-yet-

unwritten opinion in *Kousisis* should be limited to its facts should (if renewed here) be rejected out of hand.

Nor is there any basis to treat the contracting and lending contexts differently. For one thing, loans are contracts. For another, the text of the wire-fraud statute does not distinguish between government contracts (as in *Kousisis*) and private contracts (as here). And all parties in *Kousisis* recognize that the case will have implications beyond the government-contracting context. *See, e.g.*, *Kousisis* Gov't Br. 9 (arguing that the *Kousisis* petitioners' rule would "carve out numerous paradigmatic frauds—such as obtaining funds by lying about veteran status, essential product features, or the destination of charitable donations"); *id.* at 41-44 (similar); *Kousisis* Pet'r's Br. 40 (arguing that under the government's rule, "[t]he federal mail and wire fraud statutes would become an all-purpose hammer for everyday deception"); *id.* at 40-43 (similar).

c. Finally, the government has at times suggested that Sheppard's convictions could be sustained because *the government*—not the banks—suffered harm from his conduct. *E.g.*, CA11 Doc. 20, at 19. The theory is that because the Congress created PPP for a specific public-policy purpose and guaranteed loans to the banks for that purpose, it is injured by the issuance of loans that do not satisfy the eligibility criteria.

In affirming Sheppard's conviction, the district court expressly did not "reach the question of whether SBA was harmed." Ex. D, at 31. For good reason. The object of the defendant's scheme must be "to obtain the [victim's] money or property." *Kelly v. United States*, 590 U.S. 391, 393-94 (2020). Here, the object of Shepard's scheme

was not to obtain any money or property from SBA—it was to obtain loan funds from the banks.

II. Sheppard should not be required to serve his full prison term while his appeal is pending.

A grant of bail pending appeal is particularly appropriate here given that Sheppard's sentence is only 18 months. *See supra* at 7. With good-time and other credits, that term may translate to less than a year in prison. *See* 18 U.S.C. §§ 3624, 3632.

It is quite unlikely that the appeal in this case will be resolved in the Eleventh Circuit in that timeframe, even setting aside the potential need to seek further review in this Court. The Eleventh Circuit takes an average of 11.6 months to resolve a criminal appeal. U.S. Courts, Table B-4A, *Median Time Intervals In Months for Civil and Criminal Appeals Terminated on the Merits*, https://www.uscourts.gov/file/77814/download. And this appeal is far from typical, given the need to await a decision in *Kousisis* that may not be issued until late in the Court's Term.

Thus, this Court's decision on bail will determine whether Sheppard has a meaningful chance to benefit from his appeal of his convictions. If he must stay in prison during the appeal, he is nearly certain to serve his entire sentence before his appeal is resolved. There is no just reason for him to do so—particularly when the result of his appeal may well be that he did not commit wire fraud at all.

CONCLUSION

For the foregoing reasons, this Court should grant the application and order that Sheppard be granted bail pending conclusion of his appeals, including a petition for a writ of certiorari, if timely sought.

Respectfully submitted,

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October 21, 2024

EXHIBITS

Ex. A

11th Cir. Two-Judge Order Denying Release

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-12072

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross Appellant,

versus

ERIC DEAN SHEPPARD,

Defendant-Appellant-Cross Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:22-cr-20290-BB-1

Before BRASHER and ABUDU, Circuit Judges.

BY THE COURT:

Appellant's "Motion for Court Review of Single-Judge Order Denying Continued Release Pending Appeal" is DENIED.

Ex.B

11th Cir. Single-Judge Order Denying Release

In the

United States Court of Appeals

For the Eleventh Circuit

No. 24-12072

UNITED STATES OF AMERICA,

Plaintiff-Appellee-Cross Appellant,

versus

ERIC DEAN SHEPPARD,

Defendant-Appellant-Cross Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:22-cr-20290-BB-1

ORDER:

Appellant's motion to exceed the word limit in his reply in support of his motion for release pending appeal is GRANTED.

Appellant's motion for release pending appeal is DENIED.

Appellant's motion for a temporary or administrative stay is DENIED AS MOOT.

/s/ Andrew L. Brasher

UNITED STATES CIRCUIT JUDGE

Ex. C

S.D. Fla. Order
Denying Renewed Motion for Release

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 22-cr-20290-BLOOM

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant(s).
_____/

OMNIBUS ORDER ON DEFENDANT'S RENEWED MOTION FOR BOND PENDING APPEAL AND MOTION FOR 5 MINUTE CONFERENCE

THIS CAUSE is before the Court upon two separate motions: (1) Defendant Eric Dean Sheppard's ("Defendant") Renewed Motion for Bond Pending Appeal, ECF No. [273], filed on June 28, 2024; the Government filed a Response in Opposition, ECF No. [277], to which Defendant filed a Reply, ECF No. [280]; and (2) Defendant's Motion for a 5-Minute Status Conference Before August 23, 2024, ECF No. [286], filed on August 13, 2024. The Court has reviewed the motions, the record in this case, the applicable law, and is otherwise duly advised. For the reasons that follow, Defendant's Renewed Motion for Bond Pending Appeal, ECF No. [273], and Defendant's Motion for a 5-Minute Status Conference Before August 23, 2024, ECF No. [286], are denied.

I. BACKGROUND

On August 23, 2023, the Government filed a Superseding Indictment charging Defendant with nine counts of Wire Fraud (18 U.S.C. § 1343) and five counts of Aggravated Identity Theft (18 U.S.C. § 1028A). ECF No. [60]. In the Superseding Indictment, the Government alleged that Defendant engaged in a scheme and artifice to defraud the Small Business Administration (SBA),

which administers the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan (EIDL) Program, as well as lenders administering the PPP loan program. *See id.* at 5. The Superseding Indictment charged Defendant with submitting false and fraudulent Payment Protection Program ("PPP") and EIDL loan applications on behalf of three entities: HM-UP Development Alafaya Trails, LLC ("Alafaya Trails"), HM Management and Development, LLC ("HMMD"), and HM Four, LLC.

Defendant proceeded to a jury trial on all fourteen counts, ECF No. [189]. On January 16, 2024, the Jury returned a verdict of guilty on six counts of the Superseding Indictment (Counts 5, 7, 8, 9, 13, and 14): four counts of Wire Fraud (Counts 5, 7, 8, 9) and two counts of Aggravated Identity Theft (Counts 13 and 14). The Jury returned a verdict of not guilty on eight counts (Counts 1, 2, 3, 4, 6, 10, 11, and 12). On June 3, 2024, the Court acquitted Defendant of Counts 13 and 14. ECF No. [251].

The conduct underlying Counts 5, 7, 8 and 9 for Wire Fraud is as follows:

- Count 5: For the February 11, 2021 incident involving the electronic submission of false and fraudulent IRS Form 941s (Employer's Quarterly Tax Return) in support of Alafaya Trails' PPP second draw loan application, from the Southern District of Florida to Bank Processor 1. ECF No. [189] at 7.
- Count 7: For the March 11, 2021 incident involving the electronic submission of a false and fraudulent PPP second draw loan application on behalf of Alafaya Trails, from the Southern District of Florida to Bank Processor 2, resulting in a PPP loan of approximately $148,397.00. ECF No. [189] at 7.
- Count 8: For the March 11, 2021 incident involving the electronic submission of false and fraudulent IRS Form 1065 (U.S. Return of Partnership Income) in support of Alafaya Trails' PPP second draw loan application, from the Southern District of Florida

to Bank Processor 2. ECF No. [189] at 7.

- Count 9: For the March 12, 2021 incident involving the electronic submission of a false and fraudulent PPP loan application, IRS Form 1065 (U.S. Return of Partnership Income), and IRS Form 1067 (U.S. Return of Partnership Income), and IRS Form 940 (Employer's Annual Federal Unemployment Tax Return) on behalf of HMDD, from the Southern District of Florida to Bank 3, resulting in a PPP loan of approximately $148,591.00. ECF No. [189] at 7.

On June 7, 2024, this Court sentenced Defendant to 18 months as to each of Counts 5, 7, 8, and 9, to be served concurrently with each other, ECF No. [283] at 144. At the sentencing hearing, the Court found that the intended loss of Defendant's fraud was $443,575.00, which enhanced the offense level calculation by twelve points under United States Sentencing Guidelines § 2B1.1. U.S. Sent'g Comm'n, Guidelines Manual, § 2B1.1 (Nov. 2023).

The Court used three loans to calculate the intended loss: (1) the April 15, 2020 PPP loan to HM Management and Development from Paypal/WebBank, which was since forgiven, where Defendant requested $146,587.00 and received $146,457.00 ("the $146,587.00 loan"), which was not tied to a specific count: (2) the March 11, 2021 PPP loan to Alafaya Trails from ACAP SME/Northeast Bank of a value of $148,397.00, underlying Count 7 ("the $148,397.00 loan"); (3) the March 12, 2021 PPP loan to HM Management and Development, LLC, from Cross River Bank of a value of $148,591.00, underlying Count 9 ("the $148,591.00 loan"). ECF No. [283] at 49-50; *see also* Government Exhibit 72.

II. LEGAL STANDARD

A. Motion for Reconsideration

"[N]o statute or Federal Rule of Criminal Procedure authorizes the filing of a motion for reconsideration in a criminal case." *United States v. Vives,* 546 F. App'x 902, 905 (11th Cir. 2013).

Yet, the Eleventh Circuit has permitted the filing of motions for reconsideration in criminal cases. *See United States v. Phillips*, 597 F.3d 1190, 1199-1200 (11th Cir. 2010). "In adjudicating motions for reconsideration in criminal cases, district courts have relied on the standards applicable to motions for reconsideration filed in civil cases pursuant to Rule 59, Federal Rules of Civil Procedure." *United States v. Brown*, No. 3:18-CR-89-J-34JRK, 2019 WL 7067091, at *1 (M.D. Fla. Dec. 23, 2019) (listing cases). "The only grounds for granting a Rule 59 motion are newly discovered evidence or manifest errors of law or fact." *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quotations and citations omitted). A motion for reconsideration cannot be used "to relitigate old matters, raise argument or present evidence that could have been raised prior" to the Court's ruling. *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

III. DISCUSSION

A. Renewed Motion for Bond Pending Appeal

Defendant styles his motion as a "Renewed Motion for Bond Pending Appeal[,]" ECF No. [273]. However, Defendant seeks reconsideration of issues the Court previously addressed at the sentencing hearing, ECF No. [283], and in its prior Omnibus Order, ECF No. [251]. Accordingly, the Court applies the standard for a motion for reconsideration to Defendant's Renewed Motion.

The Court previously denied Defendant's Motion for Release Pending Appeal, ECF No. [251], finding that "Defendant's argument for acquittal under Counts 5, 7, 8, and 9 for wire fraud is foreclosed by Eleventh Circuit precedent so it does not present a substantial question of law under 18 U.S.C. § 3143(b)(1)(B), as it is not a close question that could be decided the other way." *Id.* at 43. Defendant now raises two new arguments in support of release pending appeal: first, on June 17, 2024, the Supreme Court granted certiorari to decide whether fraudulent inducement is a valid theory of wire fraud, thus demonstrating that Defendant's arguments on appeal are

substantial. *See Kousisis v. United States*, No. 23-909, 2024 WL 3014475 (U.S. June 17, 2024); ECF No. [273] at 1-2. Defendant asserts that the appeal of his wire fraud convictions will present the same substantial question of law as in *Kousisis*: whether fraudulent inducement constitutes a valid theory of wire fraud, or as framed in the *Kousisis* petition, "[w]hether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme." Pet. for Cert. at i, *Kousisis v. United States* (No. 23-909). ECF No. [273] at 4. Second, Defendant contends the Court erred in calculating "intended loss" when determining Defendant's Guidelines range for two PPP loans totaling approximately $300,000.00: Defendant always intended to pay back the two loans underlying Counts 7 and 9—and in fact did pay them back — so that the loans should not have been included in the Court's "intended loss" calculation. *Id.* at 2. Correcting for this error essentially halves Defendant's Guidelines range, from 24-30 months to 12-18 months so that Defendant's sentence on remand could be shorter than the "expected duration of the appeal process," 18 U.S.C. § 3143(b)(1)(B)(iv), warranting his release on bond pending appeal. *Id.* at 14-15.

The Government responds that neither issue presents a substantial question of law warranting reversal of the Court's prior decision to deny bond pending Defendant's appeal. ECF No. [277] at 1. First, the Government asserts that the Supreme Court's review of the *Kousisis* decision does not call into question the Eleventh Circuit's decision in *United States v. Watkins*, 42 F4th 1278 (11th Cir. 2022), or the many cases in which loan fraud have been prosecuted using the wire fraud statute. *Id.* at 2. Second, the Court determined the loss amount at sentencing based on the actual loss amount, not the intended loss. *Id.*

Defendant replies that the Court could not have been clearer that its ruling was with regard to intended loss. ECF No. [280] at 2. Further, nothing about the fraudulent inducement theory is limited to cases involving government contracting (as opposed to private contracting, like a loan

from a bank), nor is there anything unique about the government contracting context that would suggest the Supreme Court's decision next term will be limited. ECF No. [280] at 3.

i. Substantial Question of Law

Sections 3143(b)(1) and (2) require this Court to release a defendant on bond pending appeal if four conditions are met:

(1) the defendant is not a flight risk or danger to the community;

(2) the appeal is not for the purpose of delay; and

(3) the appeal raises a substantial question of law or fact that

(4) is likely to result in reversal or a more favorable sentence.

See 18 U.S.C. § 3143(b).[1] A substantial question of law "is a 'close' question or one that very well could be decided the other way." *United States v. Giancola*, 754 F.2d 898, 901 (11th

[1] The text of the statute states as follows:

> (1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—
>
> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—
>
> (i) reversal,
>
> (ii) an order for a new trial,
>
> (iii) a sentence that does not include a term of imprisonment, or
>
> (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.
>
> If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.
>
> (2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

18 U.S.C. § 3143(b).

Cir. 1985).

First, the Court notes that the grant of certiorari in *Kousisis* occurred after the Court issued its Order on Defendant's Motion for Release Pending Appeal, ECF No. [240], and could not have been raised previously. ECF No. [251]. *See Michael Linet, Inc.*, 408 F.3d at 763; *see also Kousisis v. United States*, No. 23-909, 2024 WL 3014475, at *1 (U.S. June 17, 2024). However, the grant of certiorari in *Kousisis* does not change the Court's prior determination that Defendant's appeal does not present a substantial issue of law warranting release on bond pending appeal.

In *United States v. Kousisis*, the Supreme Court granted certiorari to resolve a 6-5 circuit split on the fraudulent inducement theory of mail and wire fraud on three issues:

- Whether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme.
- Whether a sovereign's statutory, regulatory, or policy interest is a property interest when compliance is a material term of payment for goods or services.
- Whether all contract rights are "property."

Pet. for Cert. at i, *Kousisis v. United States* (No. 23-909). Only the first question presented could possibly reach Defendant's conduct. Though that first question presented is broad, it strains credulity to believe that Defendant's conduct would be covered by the grant of certiorari in *Kousisis*, such that *Kousisis* makes the issue in this case a substantial question of law.

In *Kousisis*, the defendants misrepresented that they were subcontracting with a disadvantaged business enterprise, which was required to obtain a government contract. *See United States v. Kousisis*, 82 F.4th 230, 234-5 (3d Cir. 2023), *cert. granted*, No. 23-909, 2024 WL 3014475 (U.S. June 17, 2024). Due to this misrepresentation, the defendants obtained the contract and timely performed on it. However, the disadvantaged business enterprise was just passing along paint supplies to defendants but did not do any work or supply any materials on the project, contrary to defendants' representation. *Id.* at 235. After a jury trial, defendants were convicted, in

part, of wire fraud. On appeal, the defendants argued that they should be acquitted of the wire fraud counts, as the government was merely deprived of an "intangible interest" — the presence of a true disadvantaged business enterprise — and not of property under the wire fraud statute,18 U.S.C. § 1343. *Id.* at 236. The Third Circuit disagreed, holding that defendants "set out to obtain millions of dollars that they would not have received but for their fraudulent misrepresentations." *Id.* at 240. The Third Circuit ruled that the object of the scheme was not the misrepresentation of the disadvantaged business enterprise participation, but the millions of dollars obtained from the government agencies, which was clearly property. *Id.* Further, the Third Circuit rejected the defendants' contention that the district court's jury instructions "were faulty because they did not "require[ ] the 'economic harm' that characterizes a property deprivation; [or the] proof that the scheme contemplated obtaining property of which the victim was deprived." *Id.* at 243. Instead, the Third Circuit found that the jury was properly instructed of the law that a government agency is "partially deprived of the benefit of its bargain when it paid the full contract price because of a false pretense[,]" which can sustain a wire fraud conviction. *Id.* at 243.

In *Kousisis*, there is a colorable argument that inflicting economic harm was not the object of defendants' scheme. Defendants performed high-quality work for a low price for government agencies , and can argue they did not seek to inflict an economic *harm* on the government agencies. Instead, they sought to mislead the government agencies to hire them, contractors that were not actually subcontracting with a disadvantaged business enterprise, instead of a contractor who was. However, here, the object of Defendant's scheme was economic harm on the banks or the SBA: to deprive banks (temporarily) or the SBA (if there was a default on the loans) of money. *Id.* at 236. A decision by the Supreme Court in *Kousisis*, a case where a contractor impeccably performed on a government contract but misrepresented its relationship with a disadvantaged business enterprise to obtain this contract, would have no impact on this loan fraud case.

Further, the Court has already rejected Defendant's argument that the applicability of *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), as revised (Oct. 3, 2016), opinion modified on denial of reh'g, 838 F.3d 1168 (11th Cir. 2016) and *United States v. Watkins*, 42 F.4th 1278, 1286–87 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 1754 (2023), to the facts here raises a substantial issue of law. *See* ECF No. [251] at 42-43. A motion for reconsideration cannot be used "to relitigate old matters[,]" and the Court declines to reconsider that issue. *Michael Linet*, 408 F.3d at 763.

Accordingly, this Court does not find that the grant of certiorari in *Kousisis* warrants a reconsideration of the Court's Omnibus Order, ECF No. [251] at 42-43. Defendant should not be released on bond pending appeal as his appeal does not raise "a substantial question of law or fact" likely to result in reversal or a more favorable sentence. *See* 18 U.S.C. § 3143(b).

ii. Intended Loss

At Defendant's sentencing hearing, the Court followed Sentencing Guideline § 2B1.1 and the accompanying Commentary to determine the loss amount, which is "the greater of the actual or intended loss." ECF No. [283] at 49; U.S. Sent'g Comm'n, Guidelines Manual, § 2B1.1, cmt. n.3(A) (Nov. 2023). Prior to Defendant's sentencing, Defendant paid back in full the two PPP loans for which he was convicted under Counts 7 ($148,397.00) and 9 ($148,591.00). The Court therefore turned to the intended loss of the fraud for its offense level calculation and found it "would appear to include as the intended loss the loan of 146,587.00, the loan of 148,397.00, and the loan of 148,591.00." ECF No. [283] at 49-50. This amounted to a loss of $ 443,575.00, which enhanced Defendant's offense level calculation by twelve points. *Id.* at 50.

Under Sentencing Guideline § 2B1.1, if the loss pursuant to Defendant's fraud exceeds $6,500.00, the Defendant is subject to an increase in the offense level. The offense level increases proportionately to the loss amount. According to the Commentary accompanying Sentencing

Guideline § 2B1.1, the "loss is the greater of actual loss or intended loss[:]"

> (i) Actual Loss.—"Actual loss" means the reasonably foreseeable pecuniary harm that resulted from the offense.
>
> (ii) Intended Loss.—"Intended loss" (I) means the pecuniary harm that the defendant purposely sought to inflict; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value).
>
> (iii) Pecuniary Harm.—"Pecuniary harm" means harm that is monetary or that otherwise is readily measurable in money. Accordingly, pecuniary harm does not include emotional distress, harm to reputation, or other non-economic harm.
>
> (iv) Reasonably Foreseeable Pecuniary Harm.—For purposes of this guideline, "reasonably foreseeable pecuniary harm" means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense.

U.S.S.G. § 2B1.1, cmt. n.3(A).[2] Both parties agree the definitions in the Commentary are applicable to the Court's calculation of the Defendant's Guidelines.

Defendant does not dispute that the loan Defendant applied for on April 15, 2020, in which he requested $146,587.00 and obtained $146,457.00 for a PPP loan to PayPal/WebBank, counts toward Defendant's intended loss. Defendant did not pay that loan back. Instead, the loan was forgiven.

However, Defendant asks the Court to reconsider its ruling that the $148,397.00 and $148,591.00 loans count towards intended loss. Defendant argues that the intended loss must be calculated based on the Defendant's subjective intent. ECF No. [273] at 9. Defendant asserts that he intended no loss and testified at trial that he intended to pay the loans back, which means the two PPP loans, underlying the counts of conviction — totaling $296,988.00 — should not have

[2] A proposed amendment to Guideline 2B1.1 would move the definition of intended loss and actual loss from the Commentary to 2B1.1 to the guideline itself, effective November 1, 2024. *See* U.S. Sent'g Comm'n, 2023-2024 Proposed Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary, Proposed Amendment: Rule for Calculating Loss, available at https://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20231221_rf-proposed.pdf at 3-4 (last accessed August 13, 2024).

been included in the Court's loss calculation. *Id.* at 12-14. Among others, Defendant cites a case by the Northern District Court of Georgia where the court found a defendant's intended loss was zero when the defendant "fraudulently obtained timber sales contracts that he nevertheless fully intended to perform and from which he intended that the loggers suffer no loss." *United States v. Syme*, No. CR 1:23-CV-00205-SDG, 2024 WL 1053295, at *5 (N.D. Ga. Mar. 11, 2024); ECF No. [273] at 9-10.

It is unclear why Defendant believes the Court did not calculate the intended loss based on Defendant's subjective intent at sentencing. Defendant asks the Court to recalculate the intended loss using Defendant's subjective intent, which the Court already did. In doing so, Defendant inappropriately asks the Court "to relitigate old matters" that were already determined at sentencing. *Michael Linet*, 408 F.3d at 763.

"The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *Arthur*, 500 F.3d at 1343. Defendant argues that the Court "erred in calculating 'intended loss' when determining [Defendant's] guideline range." ECF No. [273] at 2. The Court construes this argument as Defendant stating that the Court committed a "manifest error[] of law or fact" in its calculation of intended loss. *Arthur,* 500 F.3d 1343 at 1343. The Court does not find that it committed such error. The Court agrees with Defendant that it must look to the subjective intent of Defendant to determine the intended loss. Calculating intended loss requires the Court to determine the pecuniary harm that "the defendant *purposely* sought to inflict[,]" a subjective inquiry. U.S.S.G. § 2B1.1, cmt. n.3(A)(ii)(I) (emphasis added). The Court applied that subjective inquiry and determined that Defendant intended to cause the loss of the loan amounts contained in Count 7 ($148,397.00) and Count 9 ($148,591.00). Both loan amounts are properly included in the Court's intended loss calculation.

Further, Defendant argues that if "the Court does not grant bond pending appeal,

Sheppard's ability to appeal this sentencing error will be destroyed." ECF No. [273] at 3. Because the Court does not believe it committed a sentencing error, it does not find that this is a ground to grant bond pending appeal.

Accordingly, Defendant's Renewed Motion for Bond Pending Appeal, ECF No. [273], is denied.

B. Motion for a 5-Minute Status Conference Before August 23, 2024

Defendant seeks a 5-minute status conference as soon as possible before August 23, 2024, regarding Sheppard's Renewed Motion for Bond Pending Appeal or for an Extension of his Self-Surrender Date, ECF No. [286]. Because the Court has denied the Renewed Motion for Bond Pending Appeal, Defendant's Motion for a 5-Minute Status Conference is denied.

CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Renewed Motion for Bond Pending Appeal, **ECF No. [273]**, is **DENIED**.
2. Defendant's Motion for a 5-Minute Status Conference Before August 23, 2024, **ECF No. [286]**, is **DENIED**.

DONE AND ORDERED in Chambers at Miami, Florida on August 16, 2024.

BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

Ex. D

S.D. Fla. Order Denying Release

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 22-cr-20290-BLOOM

UNITED STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant(s).
_____/

OMNIBUS ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL AND MOTION FOR ACQUITTAL

THIS CAUSE is before the Court upon three separate motions: (1) Defendant Eric Dean Sheppard's ("Defendant") Motion for Judgment of Acquittal, ECF No. [205], filed on February 2, 2024; the Government filed a Response in Opposition, ECF No. [214], to which Defendant filed a Reply, ECF No. [218]; and (2) Defendant's Motion to Dismiss for Prosecutorial Misconduct or for a New Trial ("Motion to Dismiss"), ECF No. [204]; the Government filed a Response in Opposition, ECF No. [215], to which Defendant filed a Reply, ECF No. [219]; and (3) Defendant's Provisional Motion for Release Pending Appeal or, in the Alternative, for Self-Surrender, ECF No. [240]; the Government filed a Response in Opposition, ECF No. [245], to which Defendant filed a Reply, ECF No. [249]. The Court has reviewed the motions, the record in this case, the applicable law, and is otherwise duly advised. For the reasons that follow, Defendant's Motion for Judgment of Acquittal is granted in part and denied in part, ECF No. [205], Defendant's Motion for New Trial is denied, ECF No. [204], and Defendant's Provisional Motion for Release Pending Appeal or, in the Alternative, for Self Surrender, ECF No. [240], is granted in part and denied in part.

I. BACKGROUND

On August 23, 2023, the Government filed a Superseding Indictment charging Defendant with nine counts of Wire Fraud (18 U.S.C. § 1343) and five counts of Aggravated Identity Theft (18 U.S.C. § 1028A). ECF No. [60]. In the Superseding Indictment, the Government alleges that Defendant engaged in a scheme and artifice to defraud the Small Business Administration (SBA), which administers the Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan (EIDL) Program, as well as lenders administering the PPP loan program. *See id.* at 5. Defendant allegedly submitted false and fraudulent Payment Protection Program ("PPP") and EIDL — loans issued by the SBA under a program — loan applications on behalf of three entities, HM-UP Development Alafaya Trails, LLC ("Alafaya Trails"), HM Management and Development, LLC ("HMMD"), and HM Four, LLC, and forged signatures of other persons for certain documents submitted in support of the loan applications. ECF No. [84] at 1; *see also* ECF No. [60] at 1-3 (describing the PPP and EIDL programs).

Defendant proceeded to a jury trial on all fourteen counts, ECF No. [189]. On January 16, 2024, the Jury returned a verdict of guilty on six counts of the Superseding Indictment (Counts 5, 7, 8, 9, 13, and 14): four counts of Wire Fraud (Counts 5, 7, 8, 9) and two counts of Aggravated Identity Theft (Counts 13 and 14). The Jury returned a verdict of not guilty on eight counts (Counts 1, 2, 3, 4, 6, 10, 11, and 12).

Following the jury's verdict, Defendant filed a Motion for Judgment of Acquittal and a Motion for a New Trial. At issue are the guilty verdicts on Counts 5, 7, 8 and 9 for Wire Fraud; and Counts 13 (tied to the predicate offense of wire fraud in Count 8) and 14 (tied to the predicate offense of wire fraud in Count 9) for Aggravated Identity Theft. The conduct underlying the counts is as follows:

- Count 5: For the February 11, 2021 incident involving the electronic submission of

false and fraudulent IRS Form 941s (Employer's Quarterly Tax Return) in support of Alafaya Trails' PPP second draw loan application, from the Southern District of Florida to Bank Processor 1. ECF No. [189] at 7.

- Count 7: For the March 11, 2021 incident involving the electronic submission of a false and fraudulent PPP second draw loan application on behalf of Alafaya Trails, from the Southern District of Florida to Bank Processor 2, resulting in a PPP loan of approximately $148,397. ECF No. [189] at 7.
- Count 8: For the March 11, 2021 incident involving the electronic submission of false and fraudulent IRS Form 1065 (U.S. Return of Partnership Income) in support of Alafaya Trails' PPP second draw loan application, from the Southern District of Florida to Bank Processor 2. ECF No. [189] at 7.
- Count 9: For the March 12, 2021 incident involving the electronic submission of a false and fraudulent PPP loan application, IRS Form 1065 (U.S. Return of Partnership Income), and IRS Form 1067 (U.S. Return of Partnership Income), and IRS Form 940 (Employer's Annual Federal Unemployment Tax Return) on behalf of HMDD, from the Southern District of Florida to Bank 3, resulting in a PPP loan of approximately $148,591. ECF No. [189] at 7.
- Count 13: For the March 11, 2021 incident involving the use of a falsified IRS Form 1065 tax return electronically submitted to Bank Processor 2 in support of Alafaya Trails' PPP second draw loan application, using the name, EIN and PTIN of N.C. ECF No. [189] at 8.
- Count 14: For the March 12, 2021 incident involving the use of a falsified IRS Form 1065 tax return electronically submitted to Bank 3 in support of HMDD's PPP loan application, using the name, EIN and PTIN of N.C. ECF No. [189] at 8.

II. LEGAL STANDARD

A. Motion for Judgment of Acquittal

Under Rule 29(c) of the Federal Rules of Criminal Procedure, a Defendant may move for a judgment of acquittal after a Jury Verdict or Discharge.

> (1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 14 days after a guilty verdict or after the court discharges the jury, whichever is later.
> (2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.
> (3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

Fed. R. Crim. P. 29(c).

When deciding a motion under Rule 29, the district court must determine "whether the evidence, examined in the light most favorable to the Government, was sufficient to support the jury's conclusion that the defendant was guilty beyond a reasonable doubt." *United States v. Williams*, 390 F.3d 1319, 1323-24 (11th Cir. 2004) (citing *United States v. Varkonyi*, 611 F.2d 84, 85-86 (5th Cir. 1980)). Thus, the test is whether a reasonable jury could find, beyond a reasonable doubt, that the defendant is guilty of violating the statutes alleged in the indictment. *United States v. Macko*, 994 F.2d 1526, 1532 (11th Cir. 1993). Applying this test, "[a]ll credibility choices must be made in support of the jury's verdict." *Williams*, 390 F.3d at 1323 (citing *United States v. Gianni*, 678 F.2d 956, 958-59 (11th Cir. 1982) and *United States v. Burns*, 597 F.2d 939, 941 (5th Cir. 1979)). Because a jury may choose among reasonable constructions of the evidence, "[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *Id.* at 1323-24 (quoting *United States v. Young*, 906 F.2d 615, 618 (11th Cir. 1990); *United States v. Vera*, 701 F.2d 1349, 1357

(11th Cir. 1983)). "A conviction must be affirmed unless there is no reasonable construction of the evidence from which the jury could have found the defendant guilty beyond a reasonable doubt." *United States v. Ignasiak*, 667 F.3d 1217, 1227 (11th Cir. 2012) (citation omitted).

B. Motion for New Trial

Federal Rule of Criminal Procedure 33(a) states that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "'When considering a motion for a new trial, the district court may weigh the evidence and consider the credibility of the witnesses.'" *United States v. Brown*, 934 F.3d 1278, 1297 (11th Cir. 2019) (quoting *United States v. Albury*, 782 F.3d 1285, 1295 (11th Cir. 2015)). "A motion for a new trial based on the weight of the evidence is 'not favored' and is reserved for 'really exceptional cases." *Id.* at 1297 (quoting *United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985)). "The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Martinez*, 763 F.2d at 1312-13. "[T]o warrant a new trial, the evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Witt*, 43 F.4th 1188, 1194 (11th Cir. 2022); *Brown*, 934 F.3d at 1297; *Martinez*, 763 F.2d 1313. The Eleventh Circuit has explained, that "'[i]n evaluating whether specific trial errors warrant a new trial, we apply the harmless-error standard.'" *United States v. Jefferson*, 824 F. App'x 634 (11th Cir. 2020) (quoting *United States v. Jeri*, 869 F.3d 1247, 1259) (11th Cir. 2017) (a civil case)); *see* Fed. R. Crim. P. 52(a) (defining harmless error standard as requiring that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

A district court may grant a new jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a). For instance, a party may assert that "the verdict is against the weight of the evidence, that the damages are

excessive, or that, for other reasons, the trial was not fair to the party moving." *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940). Thus, a motion for new trial should be granted "when the verdict is against the clear weight of the evidence or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict." *Brown v. Sheriff of Orange Cnty., Fla.*, 604 F. App'x 915 (11th Cir. 2015) (per curiam) (quoting *Lipphardt v. Durango Steakhouse of Brandon, Inc.*, 267 F.3d 1183, 1186 (11th Cir. 2001)). Additionally, the motion "may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." *Id.* "[G]ranting motions for new trial touches on the trial court's traditional equity power to prevent injustice and the trial judge's duty to guard the integrity and fairness of the proceedings before [her] ...." *Sherrod v. Palm Beach Cnty. Sch. Dist.*, 237 F. App'x. 423, 424 (11th Cir. 2007) (quoting *Christopher v. Florida*, 449 F.3d 1360, 1366 n. 4 (11th Cir. 2006)). Ultimately, "motions for a new trial are committed to the discretion of the trial court." *Montgomery v. Noga*, 168 F.3d 1282, 1295 (11th Cir. 1999).

III. DISCUSSION

A. Motion for Judgment of Acquittal

i. Counts of Aggravated Identity Theft

The Jury found Defendant guilty of Aggravated Identity Theft on two Counts:

- Count 13 of the Superseding Indictment, for using the Name, Employer Identification Number ("EIN"), and Preparer Tax Identification Number ("PTIN") of Certified Public Accountant Neal Cupersmith ("Cupersmith") on a falsified IRS form 1065 tax return submitted in support of Alafaya Trails' PPP second draw loan application for a loan funded by Northeast Bank on March 11, 2021. ECF No. [60]; Government Exhibit 20-11. The Aggravated Identity Theft conviction relates to the underlying Wire Fraud in Count 8.

- Count 14 of the Superseding Indictment, for using the Name, EIN, and PTIN of Cupersmith on a falsified IRS form 1065 tax return submitted to Cross River Bank in support of HMDD's PPP loan application on March 12, 2021. ECF No. [60]; Government Exhibit 22-3. The Aggravated Identity Theft conviction relates to the underlying Wire Fraud in Count 9.

Examining the evidence "in the light most favorable to the Government," as the Court must, *Williams*, 390 F.3d at1323- 24, the facts underlying these Counts are as follows. Defendant applied for PPP loans for two of his companies, Alafaya Trails and HMMD in March 2021. PPP loans were SBA-backed loans that helped businesses keep their workforce employed during the COVID-19 crisis. Accordingly, the employers' payroll expenses were used to calculate the amount of money the applicant businesses were eligible to receive under the PPP. ECF No. [60] ¶ 3. In the PPP loan application, businesses, through authorized representatives, had to state their: (a) average monthly payroll expenses, and (b) number of employees. *Id.*

When Defendant applied for both the PPP loan from Northeast Bank and from Cross River Bank, Defendant sent the requested income tax return form 1065 for Alafaya Trails and HMMD, respectively. The tax returns forms were false, and contained false payroll figures, revenues, and business type. Government Exhibit 20-11; Government Exhibit 22-3. The forms were signed by Cupersmith — Defendant's companies' usual accountant and tax preparer — and stated Cupersmith's firm name, address, phone number, EIN, and PTIN in the tax preparer box. In fact, Cupersmith's signature had been forged, and the tax return was prepared by Defendant, not Cupersmith.

Defendant argues that a judgment of acquittal is required on both counts of Aggravated Identity Theft under *Dubin v. United States*, because the crux of his conviction for wire fraud was not a misrepresentation about the identity of Cupersmith. 599 U.S. 110, 114 (2023). ECF No. [205]

at 4-5. The crux of Defendant's fraud was that he misrepresented the characteristics of his businesses and their eligibility for participation in PPP, not Cupersmith's identity. *Id.* Finally, Defendant's use of Cupersmith's identity was not a but-for cause of the fraud, which is required for it to be at the crux of the fraud under *Dubin*. *Id.* at 5. Moreover, Defendant argues that, unlike in *Dubin*, Cupersmith's name did not even play a causal role in the approval of his PPP loan application as banks did not rely on the form on which Cupersmith's name appeared to approve the loans. *Id.* at 7-8. Because the misidentification is not a cause of the fraud, it cannot be at the crux of the Wire Fraud. ECF No. [205] at 8.

The Government responds that the elements of Aggravated Identity Theft are met and thus Defendant's convictions under Counts 13 and 14 satisfy *Dubin*. ECF No. [214] at 21-27. Under both Counts 13 and 14, there was fraud or deceit "about identity" as Defendant stole Cupersmith's identity to misrepresent that he had prepared the Defendant's tax returns, which was akin to defendant Linton's use of the doctor's identity to claim he authorized prescriptions in *United States v. Gladden*, 78 F.4th 1232, 1245 (11th Cir. 2023). The Government asserts Defendant's misuse of identity was at the crux of what made Defendant's conduct criminal and sustains a conviction of Aggravated Identity Theft under *Dubin*. ECF No. [214] at 22-27. Moreover, contrary to Defendant's assertion, the banks did review and rely on the 2020 income tax return. *Id.* at 25.

Defendant replies that under *Dubin* (1) lending credibility to fraud cannot be at its crux, but is merely ancillary to the fraud, and (2) because Cupersmith's name played no causal role in the fraud, it cannot be at the crux of it. ECF No. [218] at 1, 5. First, Defendant's misrepresentations about his accountant's identity are not what made the underlying conduct fraudulent. ECF No. [218] at 1. Here, the crux of the Wire Fraud were misrepresentations about W-2 employees and the industry in which Sheppard's businesses operated, not Cupersmith's identity. *Id.* at 4. Second, Defendant argues that there is no evidence that the tax forms containing Cupersmith's identity

were actually relied on by the banks, so that there is no causal relationship between the identity theft and the underlying offense as required under *Dubin*.[1] ECF No. [218] at 5-9.

a. The Supreme Court's Analysis in *Dubin*

Titled "Aggravated Identity Theft[,]" 18 U.S.C. § 1028A states as follows:

> Whoever, during and *in relation to* any felony violation enumerated in subsection (c), knowingly transfers, possesses, or *uses*, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028A(a)(1) (emphasis added).

In *Dubin*, the Supreme Court rejected a sweeping reading of the statute that encompassed"defendants who fraudulently inflate the price of a service or good they actually provided" if the "billing or payment method employs another person's name or other identifying information[.]" *Dubin*, 599 U.S. at 114. To do so, *Dubin* went through a methodical analysis of the text of 18 U.S.C. § 1028A(a)(1): the Supreme Court explained what the term "uses" and "in

[1] As to Count 13, Defendant explains that the Government's only evidence of reliance on form 1065 is based on a guidance tool of Northeast Bank, which indicates that Northeast Bank looks at forms 1065 when reviewing PPP loan applications. Government Exhibit 20-3; ECF No. [218] at 5-6. That tool is irrelevant because the bank only requested a form 1065 for a partnership, but treated Alafaya Trails as a corporation and did not request a Form 1065 for such corporations. ECF No. [218] at 6. Moreover, there is no support for the proposition that Northeast Bank relied on the 1065, as its Senior Vice President, Toye, explained at trial that it instead relied on Defendant's form 940 to substantiate average monthly payroll and determine Defendant's eligibility to participate in the PPP program. ECF No. [218] at 6. Toye's testimony also established that the 1065 form was not needed to substantiate revenue decline. ECF No. [218] at 7, [205-3].

As to Count 14, Defendant argues the testimony of Associate Program Manager Spencer Lord at Cross River Bank establishes that the Cross River underwriter did not read the 1065 form which contained Cupersmith's identifying information. ECF No. [218] at 7-8. Instead, there was evidence that the bank relied on the 940 form. ECF No. [218] at 8. Though Cross River did initiate a process of verifying the tax return by providing to Defendant an IRS form 4506-6-T to execute at closing, the loan was approved before Cross River could use the form and the Government (?) had no evidence of what Cross River relied on in approving the loan. ECF No. [218] at 8-9. If Cross River had reviewed the form 1065, they would have seen that its NAICS (North American Industry Classification System) business code did not match the code on the PPP application, Government Exhibit 22-3 at 1, 22-6, and did not exist in the NAICS business clarification list. *Id.*

relation to" meant in the context of the statute, and how the statute's title illuminated the core of conduct the statute meant to encapsulate.

First, the Supreme Court interpreted the meaning of the word "uses" in the statute: it held that for someone to "knowingly … *use*[], without lawful authority, a means of identification of another person[,]" there must be deception going to "who" is involved rather than just "how" or "when" services were provided. *see* § 1028A(a)(1); *Dubin*, 599 U.S. at 123. The Supreme Court explains this is required because "identity theft is committed when a defendant *uses* the *means of identification itself* to defraud or deceive." *Id.* (emphasis added). [2]

When read in the context of the statute, the word "use" merely requires that the defendant actually committed identity theft: as detailed by the Court,

> This understanding of identity theft also supports a more targeted definition of "uses." The word "use" appears in these definitions with a specific meaning: Identity theft encompasses when a defendant "uses the information to deceive others," Black's 894 (emphasis added), and "the fraudulent ... use" of a means of identification, Webster's xi (emphasis added). In other words, identity theft is committed when a defendant uses the *means of identification itself* to defraud or deceive. This tracks the Sixth Circuit's heuristic. When a means of identification is used deceptively, this deception *goes to "who" is involved, rather than just "how" or "when" services were provided*. Use of the means of identification would therefore be at "the locus of [the criminal] undertaking," rather than merely "passive," "passing," or ancillary employment in a crime. *Jones*, 529 U.S. at 855–856, 120 S.Ct. 1904.

Id. at 123 (emphasis added).

Second, the Supreme Court clarified the meaning of "in relation to" in § 1028A, which

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[2] Use, the third of three verbs listed in the statute ("transfers, possesses, or uses"), means something like this:

> There is the defendant [who] has gone through someone else's trash to find discarded credit card and bank statements and thus has taken possession unlawfully. There is the bank employee who passes along customer information to an accomplice, and thus transfers it unlawfully. Then there is use involving fraud or deceit about identity: a defendant [who] has used another person's identification information to get access to that person's bank account.

Dubin, 599 U.S. at 126-27 (citation and internal quotation marks omitted) (alterations in original).

meant whether the "use of the means of identification is at the crux of the underlying criminality." *Id.* at 122. When read in the context of the statute, "in relation to" clarifies that the use of the means of identification must occur "during and in relation to any felony violation enumerated in subsection (c)." In other words, the means of identification has to play a "central role" or be a "key mover" in the predicate offense:

> This supports a reading of "in relation to" where use of the means of identification is at the crux of the underlying criminality. These definitions refer to offenses built around *what the defendant does with the means of identification in particular.* In other words, the means of identification specifically is a *key mover* in the criminality. This *central role* played by the means of identification, which serves to designate a specific person's identity, explains why we say that the "identity" itself has been stolen. *See, e.g., Spears*, 729 F.3d at 756 ("identity theft" occurs when someone's "identity has been stolen or misappropriated"). This helps explain why the examples resulting from the Government's theory do not sound like identity theft. If a lawyer rounds up her hours from 2.9 to 3 and bills her client using his name, the name itself is not specifically a source of fraud; it only plays an ancillary role in the billing process. The same is true for the waiter who substitutes one cut of meat for another; we might say the filet mignon's identity was stolen, perhaps, but not the diner's.
>
> *Id.* at 122–23 (emphasis added).

In its analysis, the Supreme Court then reiterated its definition of both "uses" and "in relation to".

> Taken together, from text to context, from content to common sense, § 1028A(a)(1) is not amenable to the Government's attempt to push the statutory envelope. A defendant "uses" another person's means of identification "in relation to" a predicate offense when this use is at the crux of what makes the conduct criminal. To be clear, being at the crux of the criminality requires more than a causal relationship, such as " 'facilitation' " of the offense or being a but-for cause of its "success." *Post*, at 1575, 1576 – 1577 (GORSUCH, J., concurring in judgment). Instead, with fraud or deceit crimes like the one in this case, the means of identification specifically must be used in a manner that is fraudulent or deceptive. Such fraud or deceit going to identity can often be succinctly summarized as going to "who" is involved.
>
> *Id.* at 131–32. The Court set forth the "at the crux" requirement (what the defendant does with the means of identification in relation to the predicate offense, here wire fraud): "the means

of identification specifically must be used in a manner that is fraudulent or deceptive." *Id.* It also sets forth the "identity theft" requirement: "Such fraud or deceit going to identity can often be succinctly summarized as going to 'who' is involved." *Id.*

b. Parties' Differing Interpretations of *Dubin*

Facing this Court are differing interpretations of the Aggravated Identity Theft statute, 18 U.S.C. § 1028A, and Supreme Court and Eleventh Circuit case law interpreting it. *See Dubin v. United States*, 599 U.S. 110, 114 (2023); *United States v. Gladden*, 78 F.4th 1232, 1245 (11th Cir. 2023); *Carter v. United States*, No. 22-12744, 2024 WL 20847, at *9 (11th Cir. Jan. 2, 2024).

The Government argues that because Defendant used Cupersmith's means of identification fraudulently, the conduct falls within the scope of § 1028A and is "at the crux" of the predicate offense i.e. the wire fraud here. ECF No. [214] at 24-26. The Government's argument reads *Dubin* as only setting forth one requirement: that Defendant stole another's identity and used it in a deceptive manner for it to be "at the crux" of the underlying offense. *Id.* at 27. An out-of-circuit decision in a PPP fraud case in the Western District Court in Texas best supports the Government's reading here. *See United States v. Fullerton*, 2023 WL 6150782 (W.D. Tx. Sept. 20, 2023).

Defendant argues that § 1028A and *Dubin* require more than the means of identification being used in the predicate offense i.e. more than just identity theft. *See generally* ECF Nos. [205], [218]. *Dubin* also requires that the means of identification be "at the crux" of what makes Defendant's conduct criminal, which in turn requires more than fraudulent use of the means of identification by Defendant. As *Dubin* observes, it requires more than "but-for" causation or facilitation of the offense. ECF No. [218] at 2-5 (quoting *Dubin*, 599 U.S. at 131). Instead, it requires that the means of identification be a "key mover" or play a "central role" in the underlying offense. *Id.* (quoting *Dubin*, 599 U.S. at 123). An in-circuit district court decision best supports

Defendant's reading. *United States v. Noble*, No. CV 1:23-CR-00165-SDG, 2024 WL 253623, at *2 (N.D. Ga. Jan. 23, 2024).

c. The Statute and Post-*Dubin* Eleventh Circuit Precedent

After an analysis of § 1028A, *Dubin*, *Gladden*, *Carter*, and the subsequent case law, this Court agrees with the *Noble* court and Defendant. *Dubin* and binding Eleventh Circuit precedent require more than fraudulent use of a means of identification for the means of identification to be at the crux of the underlying offense. Here, Defendant's misuse of Cupersmith's means of identification was not "at the crux" of the Wire Fraud for Counts 13 and 14. Because Defendant's conviction does not fall within the scope of § 1028A, Defendant's conviction on both counts for Aggravated Identity Theft shouldmust? be vacated. Reading the *Dubin* opinion together with the text of the statute, the "identity theft" and the "at the crux" requirement *both* have to be satisfied for there to be an Aggravated Identity Theft conviction. *Dubin* sets forth two requirements for an Aggravated Identity Theft conviction: that (1) the "identity theft" requirement: the deception (the use of the means of identification of another) goes to "who" is involved, rather than just "how" or "when" services were provided, *Dubin,* 599 U.S. at 123 and (2) the "at the crux" requirement: that use of the means of identification is a "key mover" of — or plays a "central role" in — the predicate offense, *id.* at 122–23.

The elements under § 1028A confirm that reading: Aggravated Identity Theft under 18 U.S.C. § 1028A requires the Government to prove that (1) the defendant knowingly transferred, possessed, or *used* (i.e. committed identity theft) another person's means of identification; (2) without lawful authority; *and* (3) during and *in relation to* (i.e. the misidentification was "at the crux" of the predicate offense) the specified wire fraud counts alleged in the Superseding Indictment. *See, e.g,* Eleventh Cir. Pattern Jury Instr. O40.3 (Mar. 2023) (emphasis added). Both the use of the means of identification of another (identity theft) and that this use was in relation to

the predicate offense (at the crux) are required for an Aggravated Identity Theft conviction under § 1028A.

This reading is confirmed by Eleventh Circuit case law. The Eleventh Circuit's analysis in *Carter* bolsters this analysis as it asked first about whether Carter misrepresented "who received the services" (i.e. whether he committed identity theft) *and* whether his use of the means of identification "was 'at the crux of what made' the entire scheme fraudulent" in affirming a defendant's conviction for aggravated identity theft. *Carter*, No. 22-12744, 2024 WL 20847, at *9.

While the "identity theft" requirement is relatively straightforward, a close reading of *Dubin* and Eleventh Circuit case law serves to further elucidate the "at the crux" requirement.[3] The Eleventh Circuit clarified that "Section 1028A's reach is [] limited to situations where 'a genuine nexus' exists between the use of a means of identification and the predicate offense." *Gladden*, 78 F.4th at 1244. Section 1028A and *Dubin* make clear that at least three types of causation are insufficient to sustain a finding that the means of identification is "at the crux" of an offense. The plain text of the statute states as follows:

> **(a) Offenses.--(1) In general.**--Whoever, during and *in relation to* any felony

[3] As spelled out by Justice Gorsuch in a concurrence in *Dubin*, the Supreme Court left unanswered of what level of causation is required for a means of identification to be "at the crux" of an offense:

> When, exactly, is a "means of identification" "at the crux," "a key mover," or a "central role" player in an offense? No doubt, the answer "turns on causation, or at least causation often helps to answer the question." *United States v. Michael*, 882 F.3d 624, 628 (C.A.6 2018). The Court agrees but stresses that "a causal relationship" of any kind will not suffice. *Ante,* at 1573. At the same time, however, it studiously avoids indicating whether the appropriate standard is proximate cause or something else entirely novel. *Ibid.* All of which gives rise to further questions. In virtually every fraud, a "means of identification" plays some critical role in the fraud's success—good luck committing a mail or wire fraud, for instance, without relying heavily on the name of the victim and likely the names of other third parties. Just how much "causation" must a prosecutor establish to sustain a § 1028A(a)(1) conviction? For that matter, how does one even determine the extent to which a "means of identification" "caused" an offense, as compared to the many other necessary inputs?

Id. at 134–35 (Gorsuch, J., concurring). Eleventh Circuit case law provides further clarification.

> violation enumerated in subsection (c), knowingly transfers, possesses, or *uses*, without lawful authority, a means of identification of another person shall, in addition to the punishment provided for such felony, be sentenced to a term of imprisonment of 2 years.

18 U.S.C. § 1028A(a)(1) (emphasis added).

The statute's use of "during *and* in relation to" indicates that it cannot simply be that the misidentification occurred *during* the fraud, it must also be "in relation to" it (emphasis added). If "in relation to" merely required the use of the means of identification "during" the fraud, then the term "in relation to" would be superfluous. That cannot be. It is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 449, 151 L. Ed. 2d 339 (2001) (citation and internal quotation marks omitted). Accordingly, "in relation to" requires more than just that the means of identification was used during the fraud. Further, the Supreme Court in *Dubin* made clear that "being at the crux of the criminality requires more than a causal relationship, such as 'facilitation' of the offense or being a but-for cause of its success." 599 U.S. at 131-32. Accordingly, for the means of identification to be "at the crux" of the underlying criminality, i.e. used "in relation" to an underlying offense:

(1) a defendant must do more than "knowingly transfer[], possess[], or use[], without lawful authority, a means of identification of another person" *during* an enumerated felony, under the terms of 18 U.S.C. § 1028A(a)(1);

(2) the means of identification of another person must do more than facilitate the offense; and

(3) the means of identification of another person must be more than a but-for cause of the enumerated felony's success.

Some additional causation, some genuine nexus between the identity theft and the enumerated offense (here wire fraud) is therefore required.

The Eleventh Circuit cases construing *Dubin* clarify what additional level of causation is required. The difference in outcome between the two defendants's convictions in *Gladden* hinged on the "identity theft" requirement, yet the case still sheds light on what causation is necessary for the means of identification of another to be "at the crux" of the predicate offense. In *Gladden*, the Eleventh Circuit upheld the conviction for Aggravated Identity Theft of an employee, Linton, who represented to pharmacy benefit managers and insurance companies that the compounding pharmacy she worked for was filling prescriptions for patients, when the products were actually being sent to the compounding pharmacy's owner. *Gladden*, 78 F.4th at 1245. Defendant Linton was using the names of a doctor to represent to insurance companies that the doctor "had authorized the additional prescriptions when, in fact, he had not." *Id.* at 1245. In addition, she used the names of patients to refill prescriptions in patients' names "even though [patients] were neither aware of nor received any product[.]" *Id.* The Eleventh Circuit found that this "deception centered on the identity of the individual receiving the product[.]" *Id.* Unlike in *Dubin*, the employee "did not provide a service to a client while merely misrepresenting how the service was performed to inflate the bill." *Id.* at 1246. Moreover, the Eleventh Circuit explained that "[r]ather, Linton used the means of identification of former patients and prescribing doctors to overbill for certain products. Linton's conduct thus falls squarely within the classic variety of identity theft left untouched by *Dubin*." *Id.* at 1245-46 (11th Cir. 2023) (internal citations and quotation marks omitted). Accordingly, Linton's conduct fell within the purview of the Aggravated Identity Theft statute because she misrepresented to *who* the products went. *Id.* That such misidentification occurred satisfied the first *Dubin* requirement: that deception goes to "who" is involved, rather than just "how" or "when" services were provided, *Dubin,* 599 U.S. at 123.

In contrast, in the same case, the Eleventh Circuit vacated defendant Gladden's conviction after he filled a medically unnecessary prescription for a patient due to an erroneous jury instruction, which stated contrary to *Dubin* that "[t]he means of identification at least must facilitate, or have the potential of facilitating, the crime alleged in the indictment[.]" *Gladden*, 78 F.4th at 1248. Though the patient never needed the prescription for medical reasons, she did receive the prescription and it was prescribed by a doctor. As explained by the Court, "Gladden did not forge the name of the prescribing doctor on the prescription. Nor did he misrepresent who would be receiving the filled prescription. Rather, [one of Gladden's sales representatives] had her 'doctor buddy' write a prescription for her minor daughter, which she was lawfully entitled to do." *Id.* at 1249. As a result, the Eleventh Circuit found that Gladden did not "misrepresent *who* received the prescriptions." *Id.* at 1248 (emphasis added). The only misrepresentation that occurred was whether the prescription was medically necessary." *Id.* at 1249. Accordingly, the "identifying information was merely ancillary to the deception." *Id.* As the Eleventh Circuit further explained, "While Linton misrepresented *who* was receiving the prescriptions, Gladden's misrepresentation to the insurance companies and [pharmacy benefit managers] involved only whether the prescriptions were medically necessary." *Id*. at 1248–49 (emphasis added). The "identity theft" requirement was satisfied for Linton because she misidentified who received and authorized the prescriptions, but it was not satisfied for Gladden.

But such misidentification must also be "at the crux" of the underlying offense. Linton's conviction, the Eleventh Circuit instructs, was sustained since the "evidence at trial is more than sufficient to establish that she knew the means of identification of Donald and Doris Edenfield, Derrick Wester, and Dr. Almirol were 'used ... during and in relation to' the health care fraud conspiracy" *Id.* at 1246. Linton's use of the means of misidentification was "at the crux" of the underlying criminality because:

> Linton's forgery of the [patients'] identities is *at the heart of the deception*: Linton used the identities of the [patients] to continue refilling prescriptions in their names, even though they were neither aware of nor received any products. Because the deception centered on the identity of the individual receiving the product, Linton committed identity theft. *See Dubin*, 143 S.Ct. at 1568 ("This central role played by the means of identification, which serves to designate a specific person's identity, explains why we say that the 'identity' itself has been stolen."). The use of the fraudulent identities *was central to the scheme* at Global; Linton's fraudulent representation that individuals such as the Edenfields and Wester were the recipients of the prescriptions issued in their names *directly enabled* Global to continue billing for medically unnecessary prescriptions.

Gladden, 78 F.4th at 1245 (emphasis added).

In *Carter v. United States*, No. 22-12744, 2024 WL 20847, at *9, the Eleventh Circuit reiterated the "heart of the deception" language from *Gladden*, concluding that "Carter's forgery of the students' identities is thus 'at the heart of the deception' and his conduct 'falls squarely within the classic variety of identity theft left untouched by *Dubin*.'" *Id.* at *9. *Gladden* and *Carter* therefore further clarify what it takes for the means of identification to be "at the crux", a "key mover", or playing a "central role" in the predicate offense: the means of identification has to be at the "heart of the deception", "central to the scheme" or "directly enable[]" the predicate offense. *Gladden*, 78 F.4th at 1245.

Similarly interpreting *Dubin* and *Gladden* as setting forth two requirements, the Northern District of Georgia explained that when "the Court reads *Dubin* and *Gladden* in conjunction with one another, aggravated identity theft occurs when (1) a defendant misuses a means of identification and (2) the misuse is material to the predicate offense." *Noble*, No. CV 1:23-CR-00165-SDG, 2024 WL 253623, at *2. In the case, the *Noble* court found that the first requirement was met: the defendant did misuse the means of identification of another person. However, this misuse was not "at the crux" of (or material to, in the *Noble* court's words) the predicate offense .

Noble pled guilty to two counts of theft of government funds and one count of aggravated identity theft, after being indicted for purportedly submitting false and fraudulent EIDL

applications to the SBA during the COVID-19 pandemic. ECF No. [4], *United States v. Noble*, No. 23-cr-00165-SDG (N.D. Ga. May 18, 2023); ECF No. [1], *United States v. Mays, et al.*, No. 1:22-cr-343-SDG-JKL-2 (N.D. Ga. Sept. 9, 2022). Noble was accused of having a co-conspirator, Mays, submit a fraudulent EIDL application using the personal identification of a person, initials O.O. Noble and Mays had misrepresented to O.O. that they were applying for a business grant on O.O.'s behalf. *Noble*, No. 23-cr-00165-SDG, ECF No. [11] at 4-5. O.O. had kept $9,000 of the EIDL grant and given Mays $1,000. *Id.* Noble moved to withdraw his guilty plea of aggravated identity theft after *Dubin* was published. The Court found that the withdrawal of this guilty plea was warranted because the use of O.O.'s means of misidentification was not material to the fraud:

> Where Noble admitted he used another's means of identification—O.O.'s name, perhaps also her address and various identification numbers—his use of the means of identification was not material to the small-business-loan fraud. Whether the loan application was successful hinged not on O.O.'s identifying information but on her business records. And where Noble acted fraudulently and deceptively—by filing loan applications using "false gross revenues, costs of goods sold, number of employees"[13]—his actions did not involve identity because business records are not a means of identification specific to O.O. The information that Noble misrepresented went not to "who" O.O. was, but to the "what" and the "how": what her business consisted of, and how her business qualified for a loan.

Noble, 2024 WL 253623, at *4. Ultimately, the Court found Noble's case to be so similar to defendant Gladden's that it could lift Gladden's analysis almost word for word:

> Changing the names and replacing "medically" and "prescription" with "economically" and "loan" yields the following:
>
> > [Noble's] conviction for aggravated identity theft was based on the [loan] that [Mays] obtained for [O.O.] .... [T]he [loan] in question was not [economically] necessary .... The deception at the heart of [Mays] and [Noble's] conduct, then, was obtaining [economically] unnecessary [loans]. The use of [O.O.'s] identifying information was merely ancillary to the deception; indeed, at no point did [Mays] and [Noble] misrepresent who received the [loans].
> >
> > The conduct underlying [Noble's] identity theft conviction is thus distinct from Linton's. While Linton misrepresented who was receiving the prescriptions, [Noble's] misrepresentation ... involved only whether the [loans] were [economically] necessary.
>
> *Id.* at 1248–49. This Court therefore reaches the same conclusion: Noble's conduct

constituted fraud, but not aggravated identity theft. *Id.* at 1249.

Noble, No. CV 1:23-CR-00165-SDG, 2024 WL 253623, at *4. The court therefore vacated Noble's guilty plea for aggravated identity theft under *Dubin*.

d. The Instant Case

The Court analyzes whether Defendant's conviction falls within the scope of the Aggravated Identity Theft statute by asking: whether (1) under the identity theft requirement, the deception (the use of the means of identification of another) goes to "who" is involved, rather than just "how" or "when" services were provided, *Dubin,* 599 U.S. at 123, and whether (2) under the "at the crux" requirement, the use of the means of identification is "at the crux" of the predicate offense, *id.* at 122–23. For this second question, in the Eleventh Circuit and Supreme Court's interchanging formulations, this is akin to asking if there is a genuine nexus between the identity theft or the predicate offense, whether the identity theft is a key mover of or directly enabling the predicate offense, or at the heart of the deception. In a motion for acquittal, this Court must construe the evidence in favor of the Government, and "[a]ll credibility choices must be made in support of the jury's verdict." *Williams*, 390 F.3d at 1323.

Both parties agree that the first requirement is met: Defendant concedes that Defendant committed identity theft here by using Cupersmith's name, signature, firm information, EIN and PTIN in the tax form preparer box of the form 1065, thus satisfying the requirement that he used the means of identification of Cupersmith to misrepresent "who" is involved: Cupersmith was not involved in drafting the form 1065. The issue before this court is whether the second requirement is met: whether the means of identification — Cupersmith's signature and firm information used in the tax preparer box of a fraudulent form 1065 — is "at the crux" of the predicate offense (here two counts of wire fraud). The Court finds it is not.

In finding so, the Court recedes from its previous analysis in its prior Order on Defendant's

Motion for Acquittal, ECF No. [170]. The Court is convinced by cases construing the "at the crux" requirement issued in the aftermath of that Order, namely *Joseph v. United States*, 23-cv-22529, *12024 U.S. Dist. LEXIS 36494, *7-8 (S.D. Fl. Feb. 29, 2024); the in-circuit court's decision in *United States v. Noble*, No. CV 1:23-CR-00165-SDG, 2024 WL 253623, at *4 (N.D. Ga. Jan. 23, 2024), discussed above; the Fifth Circuit's decision interpreting *Gladden* in *United States v. Croft*, 87 F.4th 644, 648 (5th Cir. 2023), which the Supreme Court denied a writ of certiorari for on April 1, 2024, *cert. denied*, No. 23-6895, 2024 WL 1348964 (U.S. Apr. 1, 2024). Those cases demonstrate that § 1028A and *Dubin* require that the means of identification play a more central role in the predicate offense to be "at the crux" of it than it did in this case.[4]

Since this Court's previous Order, case law has further clarified what use of a means of identification is "at the crux" of the predicate offense. *See, e.g., Noble*, No. CV 1:23-CR-00165-SDG, 2024 WL 253623, at *4. For instance, this Court found that a defendant's use of the means of identification of another was at the crux of the underlying offense when a defendant filed fraudulent tax returns in the *victims'* names. *Joseph*, 23-cv-22529, *12024 U.S. Dist. LEXIS 36494, *7-8. There, a co-defendant "prepared and electronically filed federal tax returns for

[4] In its prior Order on Defendant's Motion for Acquittal submitted at the close of the government's evidence, ECF No. [162], the Court ruled as follows:

> In this case, Sheppard's use of the means of identification of Neal Cupersmith, M.S., or H.B. would be "in relation to" or "at the crux" of the Wire Fraud if that identification were used in a scheme to defraud the lenders of loan proceeds. The evidence supports that he has done so. That is because, in the light most favorable to the Government and as set forth below, the tax filings, the Lease, and the Bank Letter were false and used to induce the Lenders to disburse loan proceeds, specifically by seeking to deceive them that Sheppard's companies were entitled either to PPP or EIDL funds. As such, Sheppard's use of those individuals' means of identification is at the crux of the Wire Fraud. It is irrelevant whether their use was necessary to the loan applications or whether the use of those means of identification did in fact cause the disbursement of loan proceeds. That is because neither the language of the Aggravated Identity Theft statute nor the reasoning in *Gladden* impose such requirements.

ECF No. [170] at 13. Due to the benefit of additional case law, the Court no longer stands by this reasoning.

individuals who did not give either [defendant] or [the co-defendant] permission or authority to possess their personal identifying [*2] information used on the returns, or to file the returns on their behalf." *Id.* at *1-2. There, this Court found that the defendant has misrepresented "who received the services" — satisfying the identity theft requirement. *Id.* at *7. This Court also found the names of the victims were at the heart of the deception, as Defendant "used [the victims' information] to file fraudulent tax returns *in their names*." *Id.* at *8 (emphasis added). The means of identification of another person therefore "directly enabled" the fraud under *Gladden*, 78 F.4th at 1245, and was a "key mover" in the underlying fraud. This is distinguishable from the case at issue here: here, Defendant did not use Cupersmith's means of identification to file Cupersmith's tax returns and recover Cupersmith's tax refund.

The Fifth Circuit also interpreted *Gladden*, in a decision in which the Supreme Court denied certiorari in April 2024. The Fifth Circuit upheld an aggravated identity theft conviction under § 1028A when the defendant created a school for K-9 instructors, Universal K-9, and represented that four instructors taught specific courses at the school when none actually did. There, the defendant used the identity of the four instructors to obtain certification from the Texas Veterans Commission ("TVC"). The certification would then enable defendant to offer courses to veterans who would pay tuition with G.I. Bill funds paid by the Department of Veteran Affairs. The Court made clear that "Universal K-9's application would not have been approved without the names of the instructors, their qualifications, and information about the classes they would teach." *Id.* at 646. The Fifth Circuit made clear that this remained within the scope of § 1028A under *Dubin* as "Croft's misrepresentations about 'who' was teaching courses at Universal K-9 were the basis—and 'heart of'—his wire fraud convictions." *Croft*, 87 F.4th at 648. Accordingly, the Court explained that "[a]t its core, Croft's application to the TVC was fraudulent *because of* his misappropriation of the victim trainers' means of identification. This theft was the 'key mover

in [his] criminality.'" *Id.* at 649 (emphasis added) (quoting *Dubin*, 599 U.S. at 122-123).

In contrast to those cases, there is much less of a nexus between Defendant's use of Cupersmith's means of identification — signature, EIN and PTIN — and the wire fraud underlying Counts 13 and 14. According to the Government's theory, Defendant used Cupersmith's – his company's accountant — signature, name, EIN and PTIN to "convey[] to the lenders that the figures reported on the tax returns were reliable" when in fact they were false. ECF No. [214] at 27. This is different than the defendants in *Croft* and *Joseph* who committed aggravated identity theft: in those cases, it was *only* because they were using the other person's means of identification – using other people's names to obtain certification of a school in *Croft* or filing another person's tax returns in *Joseph* – that they were entitled to the fraudulent benefit. There, the identity thefts did more than just "'facilitation' of the offense or being a but-for cause of its 'success.'" *Dubin,* 599 U.S. at 131–32. They "directly enabled" the predicate offense. *Gladden*, 78 F.4th at 1245. Accordingly, there was a "genuine nexus … between the use of a means of identification and the predicate offense." *Gladden*, 78 F.4th at 1244.

Here, there is no such genuine nexus. Defendant applied for loans for his own companies, and merely misrepresented that the forms were prepared by his usual tax preparer, when they were not. As the Government conceded at oral argument, ECF No. [227], the fraud could also have been successful had Defendant not appended Cupersmith's name, signature and information at the end of the form 1065 but merely used his own. Indeed, Defendant could have submitted the exact same tax return for his own companies Alafaya Trails and HMMD without falsely representing that they were prepared by his accountant Cupersmith, and the outcome of the fraud could have been the same. The "key mover" in his fraud was the false payroll and business information, not the identity of the tax preparer. Where Cupersmith's means of identification did not even cause the fraud, it cannot be "at the crux of the wire fraud" because "being at the crux of the criminality requires

more than a causal relationship, such as "'facilitation'" of the offense or being a but-for cause of its 'success.'" *Dubin,* 599 U.S. at 131–32.

Construing the evidence "in the light most favorable to the Government[,]" *Williams*, 390 F.3d at 1323-24, Defendant did use the means of identification of Cupersmith (1) during an enumerated felony; (2) the means of identification is a cause of the enumerated felony's success, as it lent credibility to the fraud, but not a but-for cause, and (3) the misuse of the means of identification of another facilitated the offense in some way. That is not enough for the means of identification to be "at the crux" of the predicate offense. Defendant's case is much more like *Noble*, where,

> [w]hether the loan application was successful hinged not on O.O.'s identifying information but on her business records. And where Noble acted fraudulently and deceptively—by filing loan applications using 'false gross revenues, costs of goods sold, number of employees'—his actions did not involve identity because business records are not a means of identification specific to O.O.

Noble, No. CV 1:23-CR-00165-SDG, 2024 WL 253623, at *4. Similarly here, whether Defendant's fraud was successful did not hinge on Cupersmith's identity, but on the false payroll information he appended to his loan application to obtain loan for his businesses that his businesses were not entitled to. The means of identification was not a "key mover" in the fraud under *Dubin*. It cannot "directly enable" the fraud or be "at the heart of the deception" as required by the Eleventh Circuit. This case is unlike *Croft* where "Croft's application to the TVC was fraudulent *because of* his misappropriation of the victim trainers' means of identification.'" *Croft*, 87 F.4th at 649 (emphasis added).

The Court ultimately agrees with Defendant that his use of Cupersmith's identity to falsely represent that his own accountant prepared the fraudulent tax forms was ancillary to the wire fraud, and not at its crux. But the Court does not ask whether the bank *actually* relied on the fraudulent means of identification, as the Defendant urges the Court to do. There is no such actual reliance

requirement in the current case law. Instead, the Court follows the Eleventh Circuit and Northern District of Georgia's approach of considering the relationship between the identity theft and the predicate offense, and asks whether the identity theft is "at the heart of the deception[,]" *Gladden*, 78 F.4th at 1245, or "material to the predicate offense." *Noble*, 2024 WL 253623, at *2.[5] It is not.

Defendant's use of the means of identification of Cupersmith — Cupersmith's signature, EIN and PTIN on the form 1065 when applying for PPP loans with Northeast Bank and Cross River Bank — was not at the crux of Defendant's wire fraud. Accordingly, the Court acquits Defendant of Count 13 and 14 for Aggravated Identity Theft.

ii. Counts of Wire Fraud

i. Traditional Property Interest

Next, the Court turns to the second argument in Defendant's Motion for Acquittal, ECF No. [205]. Defendant argues that there was no scheme to defraud here as his actions did not target a traditional property interest. ECF No. [205] at 13-1. Specifically, Defendant argues that Sheppard's wire fraud convictions cannot be sustained based on a harm to the Small Business

[5] The Government relies on an out-of-circuit district court decision for its position that Defendant's use of Cupersmith's means of identification is at the crux of both counts of wire fraud. *United States v. Fullerton*, 2023 WL 6150782 (W.D. Tx. Sept. 20, 2023). The defendant was charged with aggravated identity theft after "Defendant allegedly used the name and forged signature of a certified public accountant, S.S., to indicate that the form had been completed by a tax preparer, when in fact, S.S. did not prepare any of the forms for the PPP application" when submitting fraudulent form 940 and 941s in support of a PPP application. *Id.* at *1. There, "Defendant stole an accountant's identity and forged his signature for the purpose of signifying that the tax records were properly prepared." *Id.* at *4. After the defendant moved to dismiss this count of the indictment, the court held "[t]his action directly legitimized the loan applications and increased the likelihood that they would be approved by the appropriate financial institutions." *Id.* This was enough for the court to uphold the defendant's charge of aggravated identity theft under *Dubin*. Like the Government in its response brief, the court in this case stopped at the "identity theft" requirement – tied to the statutory term "uses" – of *Dubin* and discussed it as being identical to the "at the crux" requirement: the court held that "[h]is fraud thus centered on 'who' was involved in the fraudulent action. Because his use of S.S.'s identity was 'used in a manner that is fraudulent or deceptive,' *Dubin*, 143 S. Ct. at 1573, Count 10 properly states facts that would constitute a charge of aggravated identity theft under § 1028A." *Id.* at *4. *Dubin* requires more than the occurrence of identity theft during a predicate offense: the identity theft must be "at the crux" of the predicate offense. Accordingly, the Court declines to follow the reasoning of *Fullerton*.

Administration (SBA) because any harm that could have been suffered by the SBA was not to a "traditional property interest." *Id.* at 16-17. *Ciminelli v. United States*, 598 U.S. 306, 309 (2023). Instead, the SBA's harm, to the extent it could suffer one, is purely "regulatory," and regulatory interests are not protected by the wire fraud statute because that statute "protects property rights only." *Cleveland v. United States*, 531 U.S. 12, 19- 20 (2000); *see also Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020). ECF No. [205] at 16. Similarly, the banks did not suffer a harm to a traditional property interest because they received what they bargained for: they made a loan, guaranteed by the government, on which they had no financial exposure. ECF No. [205] at 17-18 (quoting *United States v. Kachkar*, 19-12685, 2022 WL 2704358, at *4 (11th Cir. July 12, 2022)). The Government argues that Defendant carried out a scheme to defraud that targeted traditional property interests by making material misrepresentations in PPP and EIDL loan applications and in supporting documents in order to obtain loan proceeds, i.e. money, from the banks and the SBA to which he was not entitled. ECF No. [214] at 5. In addition, the SBA served as a guarantor for the loans, paid back loan amounts with interest if and when the loans were forgiven, for instance in 2021 when SBA reimbursed WebBank after it forgave Defendant's May 2020 PPP loan amount (plus interest). ECF No. [214] at 6.

According to the Wire Fraud statute:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both….

18 U.S.C. § 1343.

A Wire Fraud conviction under 18 U.S.C. § 1343 requires "a person (1) intentionally participate[] in a scheme or artifice to defraud another of money or property, and (2) uses or

'causes' the use of the [] wires for the purpose of executing the scheme or artifice." *United States v. Bradley*, 644 F.3d 1213, 1238 (11th Cir. 2011).[6] "To gauge a defendant's intent to commit a fraudulent scheme, then, we must determine whether the defendant attempted to obtain, by deceptive means, something to which he was not entitled." *Id.* at 1240.

The Court starts with Defendant's argument that the banks were not harmed and received merely what they bargained for, following the Eleventh Circuit's decision in *Takhalov*. In *Takhalov*, defendants had hired women to pose as tourists and lure visiting businessmen into defendants' bars and night clubs. *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. YEAR), *as revised* (Oct. 3, 2016), *opinion modified on denial of reh'g,* 838 F.3d 1168 (11th Cir. 2016). Defendants were convicted of wire fraud under the wire fraud statute, 18. U.S.C. § 1343. The government argued that the women's "concealment of their bar-affiliation to the men were material misrepresentations sufficient to constitute fraud." *Takhalov*, 827 F.3d at 1311. The Eleventh Circuit held that the businessmen got exactly what they bargained for — a drink with a woman at a club — so that the misrepresentation did not go to the nature of the bargain, and so did not constitute a scheme to defraud. The Eleventh Circuit explained that "if the defendant does not intend to harm the victim – to obtain, by deceptive means, something to which [the defendant] is not entitled – then he has not intended to defraud the victim." *Id*. at 1313. "[A] 'scheme to defraud,' as that phrase is used in the wire-fraud statute, refers only to those schemes in which a defendant lies about the nature of the bargain itself." *Id.* Indeed,

> § 1343 forbids only schemes to *defraud*, not schemes to do other wicked things, *e.g.*, schemes to lie, trick, or otherwise deceive. The difference, of course, is that deceiving does not always involve harming another person; defrauding does. That

[6] "The first element, a scheme or artifice to defraud, 'requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property.' *United States v. Maxwell,* 579 F.3d 1282, 1299 (11th Cir.2009) (emphasis added). 'A misrepresentation is material if it has a natural tendency to influence, or is capable of influencing, the decision maker to whom it is addressed.' *Id.* (internal quotations and alteration omitted)." *United States v. Bradley*, 644 F.3d 1213, 1238–39 (11th Cir. 2011).

> a defendant merely "induce[d] [the victim] to enter into [a] transaction" that he otherwise would have avoided is therefore "insufficient" to show wire fraud.

Id. at 1310. As the Eleventh Circuit later reiterated:

> In a scheme to deceive, the victim of the lie hasn't been harmed because he still received what he paid for. But in a scheme to defraud, the victim has been harmed because the misrepresentation affected the nature of the bargain, either because the perpetrator lied about the value of the thing (for example, promising something costs $10 when it actually costs $20), or because he lied about the thing itself (for example, promising a gemstone is a diamond when it is actually a cubic zirconium). Takhalov, 827 F.3d at 1313–14. Either way, though, the victim didn't get what he paid for.

United States v. Waters, 937 F.3d 1344, 1354 (11th Cir. 2019). Defendant argues that the banks are like the men in *Takhalov* and got exactly what they bargained for, so that Defendant's Wire Fraud convictions should be vacated. The Court disagrees.

First, in effect, Defendant argues that the banks have to have suffered "actual property harm" for a conviction to be sustained under the wire fraud statute. ECF No. [205] at 15. That is not what the text of the statute requires, which states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

13 U.S.C. § 1343.

That no actual harm is required for a conviction under § 1343 is further evidenced by the fact that even unexecuted schemes are punishable under the Wire Fraud statute:

> Significantly, the mail and wire fraud statutes 'punish unexecuted as well as executed schemes.' *Pelletier v. Zweifel,* 921 F.2d 1465, 1498 (11th Cir.1991). It is therefore unnecessary that the victim actually relies on the misrepresentation or omission; proof of intent to defraud is sufficient. *See id.* All that is necessary is that the scheme be reasonably calculated to deceive; the intent element of the crime is shown by the existence of the scheme. *United States v. Bruce,* 488 F.2d 1224, 1229 (5th Cir.1973).

Bradley, 644 F.3d at 1239. "This means that the government can convict a person for mail or wire fraud even if his targeted victim never encountered the deception—or, if he encountered it, was not deceived." *Pelletier v. Zweifel*, 921 F.2d 1465, 1498 (11th Cir. 1991), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008). It follows that there is no requirement that the banks were actually harmed for Defendant's wire fraud convictions to stand, nor for them to have faced "potential financial harm[.]" ECF No. [205] at 18. What matters is not actual harm, but whether or not Defendant had an "intent to harm, which means 'to obtain, by deceptive means, something to which [one] is not entitled.'" *United States v. Masino*, No. 18-15019, 2021 WL 3235301, at *8 (11th Cir. July 30, 2021). This means that a defendant must have "more than an intent to *deceive* in order to prove an intent to *defraud*." *Id*. (emphasis in original).[7]

Contrary to Defendant's argument, *Ciminelli* does not replace the intent to harm/defraud requirement with an actual harm requirement, but merely states that the language of the wire fraud statute applies so that the government "must prove not only that wire fraud defendants 'engaged in deception,' but also that money or property was 'an object of their fraud.'" *Ciminelli*, 598 U.S. at 312. There, the Supreme Court held that:

> the wire fraud statute reaches only traditional property interests. The right to

[7] In *Masino*, the Eleventh Circuit vacated defendants' conviction for wire fraud conspiracy under 18 U.S.C. § 1349 because there was no evidence "that the Masinos conspired to *harm* the charities by deceiving them about the bargain itself" when running a bingo parlor for charities in violation of Florida law. *United States v. Masino*, No. 18-15019, 2021 WL 3235301, at *9 (11th Cir. July 30, 2021) (emphasis in original). Because "there was no evidence that the Masinos ever collected—or conspired to collect—a penny more than the charities agreed to pay in the annual lease agreement" so "the evidence did not support a finding that the Masinos' conspiracy included an intent to defraud the charities; it supported only an intent to deceive the charities through misrepresentations that did not affect the value of the bargain." *Id.* at *10 (11th Cir. July 30, 2021). Instead,

> The conspiracy, rather, was aimed at misrepresenting whether employee compensation was solely for setup and cleanup, and whether the agreed-upon rent prices aligned with that of comparable locations in the local market. To support the jury's guilty verdict, there would have to be evidence that these deceptions would affect the price or the characteristics of the good being exchanged.
>
> *Id.*

> valuable economic information needed to make discretionary economic decisions is not a traditional property interest.

Id. at 316. In contrast, money (obtained from loan proceeds) is not only a traditional property interest, it is squarely covered by 13 U.S.C. § 1343's text which covers "obtaining *money* or property." 13 U.S.C. § 1343 (emphasis added).

Nor would Defendant repaying the loans negate Defendant's intent to harm the banks. ECF No. [218] at 2. The Eleventh Circuit clarified this point in *United States v. Kachkar*, No. 19-12685, 2022 WL 2704358, at *1 (11th Cir. July 12, 2022). In that case, Kachkar was convicted of eight counts of wire fraud by "obtain[ing] millions of dollars in loan funds by providing fake proof of collateral to a bank." *Id.* at *1. "Kachkar argued that he lacked intent to harm the bank because he sought out third-party financing to repay the loan." *Id.* at *5. The Eleventh Circuit found that this reasoning was insufficient, because:

> Under *Takhalov*, the term "harm" does not necessarily refer to a long-term financial loss on the part of the victim. See 827 F.3d at 1313–14. Instead, a "harm" occurs when the misrepresentation affects the victim's understanding of the nature or value of the bargain. *Id.*; *Waters*, 937 F.3d at 1353–54. If a defendant intends to make such a misrepresentation, it does not matter whether he intends to make up for any loss later. It is therefore irrelevant for purposes of *Takhalov* that Kachkar intended to secure third-party repayment on the loan.

Kachkar, No. 19-12685, 2022 WL 2704358, at *5.

Unlike in *Takhalov*, Defendant's misrepresentation as to his businesses' eligibility for loans affected the banks' understanding of the nature of the bargain. Though Defendant argues that the banks received the value of their bargain and even stood to gain financially by making the loans, ECF No. [205] at 18, this reasoning is foreclosed by binding Eleventh Circuit precedent. After *Takhalov*, the Eleventh Circuit dismissed an argument that a bank has "no interest in truly knowing who it is lending its money to or what purposes they intend to put the money towards[,]" by a defendant who sought to vacate his bank fraud loan conviction under 18 U.S.C. § 1344. The

Eleventh Circuit explained that "[b]anks have a clear interest in knowing to whom they are loaning money and for what purpose. Indeed, such information goes to the very nature of the 'bargain' itself, as banks are not willing to provide loans to anyone and everyone, or for every purpose." *United States v. Watkins*, 42 F.4th 1278, 1286–87 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 1754 (2023), and *cert. denied*, 143 S. Ct. 1754 (2023).

The Court also declines to find that money obtained from loan proceeds is not a traditional property interest under *Ciminelli*. Defendant does not seriously attempt to establish that what he obtained from banks — loan proceeds— is not a traditional property interest. As this Court previously found, "Sheppard does not argue, nor can he, that loan proceeds are not 'money or property' within the meaning of the Wire Fraud statute. *See, e.g., United States v. Vernon*, 593 F. App'x 883, 889 (11th Cir. 2014) (finding the government provided sufficient evidence of defendant's intent to participate in a scheme to defraud as part of a wire fraud where defendant received $114,211.33 in loan proceeds)." ECF No. [170] at 7.

Because the Court finds that Defendant's conviction as to Counts 5, 7, 8, and 9 can be upheld under a bank-as-victims theory, the Court does not reach the question of whether SBA was harmed or the Defendant's arguments as to regulatory interests. Accordingly, Defendant's Motion for Acquittal, ECF No. [205], is denied as to Counts 5, 7, 8, and 9.

ii. Sufficiency of Wire Fraud Evidence

Next, the Court turns to Defendant's argument that there was not enough evidence to sustain his conviction for Wire Fraud under Counts 5, 7, 8, and 9 of the Superseding Indictment.

First, Defendant argued that the Government did not sufficiently connect the 940, 941 and 1065 forms at issue to Defendant: the tie to Defendant was only supported by the "speculative and unsupported testimony" of the Government's handwriting expert, Graff. ECF No. [205] at 18. The Government responds that the evidence at trial was sufficient to convict the defendant of wire

fraud under Counts 5, 7, 8, and 9. ECF No. [214] at 3, 10-11. The Government is correct that there was substantial evidence connecting the forms at issue in the fraud to Defendant, such as that (1) Defendant was the sole signatory on the bank accounts that received the PPP funds, which funds he controlled and spent as he saw fit; (2) Defendant's personal information was provided for all of the loan applications, including his phone number, email address, home or office address, and copy of his driver's license; (3) communications between lenders and the loan applicant were with Defendant's email address; and (4) the loan applications were sent from Defendant's IP address. ECF No. [214] at 10. There is sufficient evidence to connect Defendant to the wire fraud. This is especially true in light of the fact that, as the Government correctly states, a Wire Fraud conviction requires only that the Defendant "transmits or causes to be transmitted" fraudulent material, and does not require transmission by the Defendant himself. 18 U.S.C. § 1343.

Second, Defendant argues as to Count 8 that the falsified 1065 form was not material in any way because the form was not even consulted in the loan approval process. ECF No. [205] at 19. The Government reiterates its previous argument that there is sufficient evidence to support Defendant's conviction under Count 8. ECF No. [214] at 10.

> To sustain a conviction for wire fraud, under 18 U.S.C. § 1343, the government must prove that the defendant: (1) participated in a scheme or artifice to defraud; (2) with the intent to defraud; and (3) used, or caused the use of, interstate wire transmissions for the purpose of executing the scheme or artifice to defraud.

United States v. Machado, 886 F.3d 1070, 1082–83 (11th Cir. 2018) (citation omitted). "A scheme to defraud requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property." *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009). "A misrepresentation is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision maker to whom it is addressed.'" *Id.*

However, Defendant's interpretation that to be material, the form has to be consulted is incorrect. That argument is foreclosed by Eleventh Circuit precedent. "Because the issue is whether a statement has a tendency to influence or is capable of influencing a decision, and not whether the statement exerted actual influence, a false statement can be material even if the decision maker did not actually rely on the statement." *See United States v. Neder*, 197 F.3d 1122, 1128 (11th Cir. 1999) (citation omitted). Moreover, the case Defendant cites for its definition of materiality pertains to a different statute, 18 U.S.C. § 1001, false statements in an offense involving international and domestic terrorism. ECF No. [205] at 19 (citing *United States v. Boffil-Rivera*, 607 F.3d 736, 742 (11th Cir. 2010)). The case is inapposite, as it recognizes that "the statement does not have to be relied upon and can be material even if it is ignored and never read." *Boffil-Rivera*, 607 F.3d at 742. The form 1065 sent as part of a fraudulent PPP loan application on behalf of Alafaya Trails submitted to Northeast Bank in Count 8 was capable of influencing a decision, namely the loan approval — regardless of whether it actually influenced the decision in the instant case.

Third, Defendant also argues that the Government did not adduce sufficient evidence to establish that Sheppard filled out the loan application for the Wire Fraud charged in Count 9, which were tied to the IP address in Sheppard's home office. ECF No. [205] at 19-20. Defendant argues that the Government failed to put on evidence that Defendant was the person who filled out the information from his home office. *Id.* The Government reiterates its argument that there was sufficient evidence. ECF No. [214] at 3, 10-11. The Court agrees with the Government. In a motion for acquittal, the Court must make "[a]ll credibility choices … in support of the jury's verdict." *Williams*, 390 F.3d at 1323. It is certainly credible that Defendant was the individual submitting loan applications for his companies from his home office IP address. Acquittal is not warranted under this argument as "a reasonable trier of fact could find that the evidence establishes guilt

beyond a reasonable doubt." *Id.* at 1324.

Finally, Defendant argues that the Government failed to establish that the workers were "independent contractors[,]" which would have made Defendant's company ineligible for PPP loans. ECF No. [205] at 20. The Government responds that it properly introduced evidence that Defendant's companies had paid zero in wages and employee compensation prior to the PPP loans, which was the relevant inquiry. ECF No. [214] at 11. The Government argues that the PPP loans were to cover 2.5 months of a business's employee wages and related compensation, so the relevant inquiry was focused on the defendant's companies prior wages, which the Government properly established to be zero or otherwise insufficient for PPP eligibility — and not whether Defendant's workers classified as "independent contractors." ECF No. [214] at 11.

The record demonstrates that the Government introduced evidence that Alafaya Trails (Count 5, 7, 8) and HMMD (Count 9) did not pay the wages and salaries that would have rendered him eligible for PPP loans. *See* 2018 Form 1065 for Alafaya Trails, Government Exhibit 30-1 at 7; 2019 Form 1065 for Alafaya Trails, Government Exhibit No. 30-2 at 8; 2020 Form 1065 for Alafaya Trails, Government Exhibit No. 30-3 at 8 (showing no wages and salaries for Alafaya Trails); IRS certification of lack of record for HMMD for years 2019, 2020 and 2021, Government Exhibit 12-5; 2019 HMMD Form 1065, Government Exhibit 12-1 at 1 (showing only $134,811 in wages); 2018 HMMD Form 940, Government Exhibit 12-2 (showing only $ 135,926.38 in payments made to employees); 2018 HMMD Form 941, Government Exhibit 12-3 (reporting only $36,123.78 in wages). That is sufficient to establish that the Defendant was not properly eligible for a PPP loan and to sustain his Wire Fraud conviction. The Government did not need to introduce further evidence that Alafaya Trails and HMMD's workers were independent contractors as opposed to bona fide employees.

Accordingly, there is enough evidence to sustain Defendant's conviction for wire fraud

under Counts 5, 7, 8, and 9 of the Superseding Indictment, ECF No. [60].

B. Motion to Dismiss for Prosecutorial Misconduct or for New Trial

Next, the Court turns to Defendant's Motion to Dismiss for Prosecutorial Misconduct or, in the Alternative, for New Trial Under Rule 33, ECF No. [204]. Defendant presents numerous arguments for a new trial, most of which are evidentiary challenges. "[N]ew trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Tucker v. Hous. Auth. of Birmingham Dist.*, 229 F. App'x 820, 826 (11th Cir. 2007). Moreover, the Court has already addressed those arguments in its Order on Motion *In Limine* Regarding Rule 404(b) Notice, ECF No. [123], or during the course of trial. The Defendant presents no additional arguments or law persuading the Court to alter its previous rulings. This is not a case where "the evidence [] preponderate[s] heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Witt*, 43 F.4th 1188, 1194 (11th Cir. 2022). The Government has introduced sufficient evidence to sustain Defendant's conviction for wire fraud for submitting falsified tax records. Accordingly, and as further detailed below, Defendant does not carry his heavy burden to show that it this one the "really exceptional cases" warranting the grant of a new trial. *Brown*, 934 F.3d at 1297.

First, Defendant argues that the Court erred by: (1) admitting 404(b) evidence from Mr. Graff relating to Defendant forging Graff's signature in prior instances, and then limiting the defense's cross-examination of Mr. Graff. ECF No. [204] at 1-2. The Government responds that these issues were carefully weighed by the Court in its order on Defendant's Motion *in Limine*, ECF No. [123]. The Court has previously rejected this contention both in its order, ECF No. [123] and at trial. As this Court previously ruled, the 404(b) evidence could be introduced insofar as that evidence was relevant to Defendant's intent in allegedly committing the charged offenses, here lack of mistake. ECF No. [123] at 7. Under the text of Rule 404(b)(2), evidence of past wrongs

"may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b). Moreover, upon the admission of the evidence, Defendant had the opportunity to cross-examine Graff as to the speculative nature of Graff's handwriting testimony, as Defendant itself indicates in reply. ECF No. [219] at 3. The Court did not err by admitting 404(b) evidence from Mr. Graff relating to Defendant forging Graff's signature in prior instances.

Second, Defendant argues that the Court erred by admitting evidence regarding uncharged loans, resulting in a variance from the Superseding Indictment, ECF No. [60]. ECF No. [204] at 6-8. The Government argues the Court did not err by admitting evidence of false, uncharged loan applications as these were intrinsic to the charged scheme to defraud. ECF No. [215] at 8-13 (quoting *United States v. Ellisor*, 522 F.3d 1255, 1269 (11th Cir. 2008)). Defendant replies that each loan was a separate transaction, and the loans were not inextricably intertwined. ECF No. [219] at 5-6. Defendant adds that the Government should have sought to introduce them as 404(b) evidence. *Id*. at 7. As discussed on the record, the Government sought to introduce evidence of Defendant attempting to modify and increase loans outside the dates of the Superseding Indictment to establish Defendant's intent to defraud. The Court allowed only loans submitted during the period of time of the scheme to defraud charged in the Superseding Indictment to be introduced, relying on case law offered by the parties. *Morris v. United States*, 112 F.2d 522, 528 (5th Cir. 1940) ("It is now well settled that as to crimes wherein fraudulent intent is one of the material allegations of the indictment, evidence of other and similar adventures of the defendant at or about the same time is properly admissible as bearing on the question of intent"); *United States v. Davis*, 172 F. App'x 175, 177 (9th Cir. 2006) ("The loans can be considered inextricably intertwined with an ongoing scheme to defraud HUD and do not constitute 'other acts' evidence under Fed.R.Evid.

404(b).").[8] Defendant cites no new law or justification for why the Court erred when it admitted the evidence of loans that occurred during the charged conduct.

Second, Defendant argues that the Court erred by dismissing a juror without cause near the end of trial, over Defendant's repeated objections. ECF No. [204] at 8-9. The Government responds that the juror's dismissal was proper: the juror had to accompany his wife, who had cancer and broken vertebrae, and needed emergency back surgery at numerous doctors' appointments which had a significant impact on the juror's ability to serve and on the Court's ability to continue trial. ECF No. [215] at 14-15. "A district court may remove and replace a seated juror before deliberations begin whenever 'facts arise … that cast doubt on [that] juror's ability to perform her duties.'" *United States v. Godwin*, 765 F.3d 1306, 1316 (11th Cir. 2014). Though Defendant is correct that the juror had initially indicated that attending the health appointments of his ailing wife would not distract him or prevent him from serving on the jury, the juror also indicated that that could change within the day or hour. The following day, it became apparent that the Court had to interrupt trial for various portions of time on a near-daily basis that week to accommodate the juror's demanding schedule. Given that, the Court properly dismissed the juror and replaced him with an alternate juror. Here, the Court's dismissal of a juror who had to attend to great personal responsibilities pertaining to serious health conditions suffered by his spouse, which could not be accommodated during the course of trial, was proper. In a footnote, Defendant requests leave to interview the juror. ECF No. [219] at 9 n. 12. Defendant cites no basis for such a request, and the request is accordingly denied.

Third, Defendant argues that the Court erred by admitting evidence of Defendant's alleged and uncharged tax violations, Defendant's failure to pay bills, as well as other inadmissible

[8] Contrary to Defendant's contention, the case was eventually identified as being from the Ninth Circuit on the record.

evidence of "bad character." ECF No. [204] at 9-10. Defendant argues that the Government's IRS expert spent substantial time testifying about Defendant's other alleged tax violations, which went far outside the scope of his expert disclosure. *Id.* The Government responds that the expert did not testify about tax crimes by Defendant but testified about the payroll and income tax records that the Defendant's businesses had filed or not filed with the IRS in order to demonstrate that the tax returns the defendant submitted to the lenders to support his PPP loan applications were false and fraudulent. ECF No. [215] at 15. Moreover, the Defendant's own tax returns were relevant as income and losses from partnerships get reported on the partner's personal income tax return. ECF No. [215] at 16. The Court agrees with its previous rulings and finds Defendant's business and personal tax records were admissible insofar as they related to a central issue at trial, namely whether Defendant had submitted fraudulent tax returns.

Fourth, Defendant argues the Court erred by denying re-cross examination of key witnesses after the government raised new issues, for the first time, during re-direct examination and by limiting the defense's cross-examination of key witnesses on material issues. ECF No. [204] at 11-12. For instance, the Court erred when it prevented questioning on one witness, Beirne, as to judgments against him for fraud and his own bankruptcy case as impeachment evidence. The Government responds that the Defendant was able to cross-examine at length relevant witnesses. ECF No. [215] at 17-18. Regarding Beirne, the Government argues that extrinsic evidence as Federal Rule of Evidence 608(b) allows a witness, on cross-examination, to be asked about "specific instances of a witness's conduct" if it is "probative of the character for truthfulness or untruthfulness." ECF No. [215] at 19. Asking the witness whether he had 22 pending lawsuits is not a specific instance that is probative of anything, much less the witness's character for truthfulness, where the lawsuits only included a civil complaint and a settlement agreement. *Id.* at 19-20.

The Court did not err when it limited the scope of re-cross examination. The Defendant similarly fails to establish that the Court erred when it denied re-cross examination subject to the Government purportedly introducing a new theory on cross examination. "Subject to the Sixth Amendment, the trial court has discretion to limit re-cross examination…. A defendant nonetheless does have a limited right to re-cross examination where a new matter is brought out on redirect examination." *United States v. Ross*, 33 F.3d 1507, 1518 (11th Cir. 1994). Defendant fails to establish what new theory warranted the re-cross examination of two witnesses in the case. Moreover, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986). The Court did not err when it declined re-cross examination on the testimony of two witnesses.

The Court did not err when it declined to admit complaints or settlement agreement as to Beirne. Under Rule 608(b),

> extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of: (1) the witness; or (2) another witness whose character the witness being cross-examined has testified about.
>
> Fed. R. Evid. 608(b).

Based on Defense counsel's characterization of the evidence in the record, the evidence pertained to pending civil lawsuits that were settled, including on bankruptcy issues. Defense counsel conceded that the only evidence of fraud of a criminal or civil nature were allegations made in complaints and inadmissible settlement agreements. The Court sees no reason to alter its prior ruling that such extrinsic evidence is either not probative of truthfulness and accordingly

inadmissible under Rule 608(b).

Sixth, Defendant argues that Prosecutors committed misconduct in a variety of situations, ECF No. [204] at 13-15, none of which have merit. Defendant argues that such misconduct occurred when the Government suggested in rebuttal that Defendant forged Graff's signature and, if he had forged before, he would do it again. *Id.* at 15. Such evidence of forgery was speculative. ECF No. [219] at 3. Defendant also argues that the Court erred by overruling the Defendant's objections to the Government's closing argument and not granting a mistrial based upon the Government's misconduct, when the Government represented to the Court that it would not use the alleged 404(b) evidence pertaining to Graff to show propensity. ECF No. [204] at 12-13. The Government responds that Prosecutors made no improper remarks during closing argument, and any error in their closing arguments constitutes harmless error because there was overwhelming evidence of the Defendant's guilt. ECF No. [215] at 20-21. The Court read to jurors instructions before the parties' closing arguments, which included the Rule 404(b) instruction, and the Prosecutor properly mentioned the Rule 404(b) evidence on rebuttal to establish absence of mistake. *Id.* at 21.

The Court is not persuaded that prosecutorial misconduct occurred when the Government mentioned Defendant's prior forgery of Graff's signature in rebuttal. During rebuttal, the Government told the jury that the prior forgery by Graff was being introduced to show that Defendant's forgeries of signature in the Counts listed in the indictment were not a mistake. Introducing 404(b) to establish "absence of mistake" is proper under Rule 404(b). *See* Fed. R. Evid. 404(b). For a finding of prosecutorial misconduct, "(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant." *United States v. Sosa*, 777 F.3d 1279, 1294 (11th Cir. 2015) (quoting *United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006)). "'A defendant's substantial rights are prejudicially affected when a reasonable

probability arises that, but for the remarks, the outcome of the trial would have been different. When the record contains sufficient independent evidence of guilt, any error is harmless.'" *Id.* The first requirement for prosecutorial misconduct is not met: this was not an improper remark establishing prosecutorial misconduct.

Ultimately, "motions for a new trial are committed to the discretion of the trial court." *Noga*, 168 F.3d at 1295. A new trial is not warranted in this case..

Accordingly, Defendant's Motion to Dismiss for Prosecutorial Misconduct, or, in the Alternative, for a New Trial, ECF No. [204], is denied.

C. Motion for Release Pending Appeal or for Self-Surrender

Defendant requests this Court permit his continued release pending resolution of a timely-filed appeal, as Defendant is not likely to flee or pose a danger to the community, and his appeal is not intended to delay and raises substantial questions. ECF No. [240]. The Government opposes the release pending resolution of an appeal, and argues Defendant has not established he is not likely to flee and that the appeal raises a substantial question of law. ECF No. [245]. Defendant replies that his preexisting family ties in South Florida, regular doctor appointments, and minor child at home make clear he is not likely to flee. ECF No. [249] at 2-4.

Section 3143(b)(1) and (2) require this Court to release a defendant on bond pending appeal if four conditions are met:

(1) the defendant is not a flight risk or danger to the community;

(2) the appeal is not for the purpose of delay; and

(3) the appeal raises a substantial question of law or fact that

(4) is likely to result in reversal or a more favorable sentence.

See 18 U.S.C. § 3143(b).[9]

The Court declines to release Defendant on bond pending his appeal. In this Order, the Court has acquitted Defendant on two counts, and carefully drew from Eleventh Circuit precedent when determining (a) to acquit Defendant on Counts 13 and 14 on Aggravated Identity Theft and (b) not to acquit Defendant on Counts 5, 7, 8, and 9 of the Superseding Indictment. Though the Court agrees with Defendant that the issue of Defendant's conviction for aggravated identity theft presented a "substantial question of law" under 18 U.S.C. § 3143(b)(1)(B), the Court resolved that issue in Defendant's favor. Any reversal on appeal on Counts 13 and 14 for Aggravated Identity Theft would lead to a longer sentence for Defendant, so would not lead to a more favorable sentence under 18 U.S.C. § 3143(b)(1)(B)(iv).

A substantial question "is a 'close' question or one that very well could be decided the other way." *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985). Defendant's argument

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[9] The text of the statute states as follows:

(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142(b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

(2) The judicial officer shall order that a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection (f)(1) of section 3142 and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained.

18 U.S.C. § 3143(b).

for acquittal under Counts 5, 7, 8, and 9 for wire fraud is foreclosed by Eleventh Circuit precedent so it does not present a substantial question of law under 18 U.S.C. § 3143(b)(1)(B), as it is not a close question that could be decided the other way. Defendant's proposition that *Watkins* is inapplicable because not all loan contexts are the same is not supported by the case law. ECF No. [249] at 6; *Watkins*, 42 F.4th at 1286-87. It is insufficient to make the Defendant's argument on the wire fraud counts a substantial question of law. The Court agrees with the Government that "the facts of this case do not raise a *Takhalov* issue." ECF No. [245] at 5.

However, Defendant is authorized to self-surrender to the Bureau of Prisons, to be discussed at the time of his sentencing hearing.

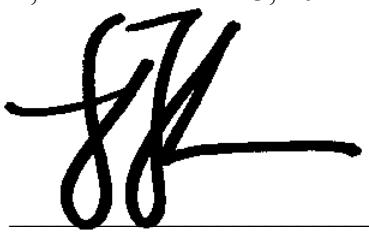
IV. CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** as follows:

1. Defendant's Motion for Judgment of Acquittal**, ECF No. [205]**, is **GRANTED IN PART** and **DENIED IN PART**.
    i. Defendant's Motion for Judgment of Acquittal is **GRANTED** as to Counts 13 and 14 of the Superseding Indictment.
    ii. Defendant is **ACQUITTED** of Counts 13 and 14 of the Superseding Indictment for aggravated identity theft.
    iii. Defendant's Motion for Judgment of Acquittal is **DENIED** as to Defendant's conviction for Wire Fraud under Counts 5, 7, 8, and 9 of the Superseding Indictment.
2. Defendant's Motion for a New Trial, **ECF No. [204]**, is **DENIED**.
3. Defendant's Provisional Motion for Release Pending Appeal, or in the Alternative, for Self-Surrender, ECF No. [240], is **GRANTED IN PART** and **DENIED IN PART**.

4. The Court's previous order on its previous Motion for Acquittal, ECF No. [170], is **VACATED IN PART** as to the Court's reasoning as to Aggravated Identity Theft under *Dubin v. United States*, 599 U.S. 110, 114 (2023).

DONE AND ORDERED in Chambers at Miami, Florida on June 3, 2024.



BETH BLOOM
UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

Ex. E

Amended Judgment of Conviction

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

UNITED STATES OF AMERICA

v.

ERIC DEAN SHEPPARD

§ **AMENDED JUDGMENT IN A CRIMINAL CASE**
§
§
§ Case Number: **1:22-CR-20290-BB(1)**
§ USM Number: 10499-510
§
§ Counsel for Defendant: **Howard Srebnick, Jayne Weintraub, Chris Cavallo**
§ Counsel for United States: **Ana Maria Martinez & Aimee Jimenez**

Date of Original Judgment: 6/7/2024
Reason for Amendment: Imposing Restitution as per ECF No. [293]

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☐	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☒	was found guilty on count(s) after a plea of not guilty	**5, 7, 8, 9 of the superseding indictment.**

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18 USC 1343.F Wire Fraud	03/31/2021	5s
18 USC 1343.F Wire Fraud	03/31/2021	7s
18 USC 1343.F Wire Fraud	03/31/2021	8s
18 USC 1343.F Wire Fraud	03/31/2021	9s

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 1s,2s,3s,4s,6s,10s,11s,12s. *Defendant was acquitted by the Court on counts 13s and 14s. *(See ECF No. 251).*

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States Attorney of material changes in economic circumstances.

Signature of Judge

BETH BLOOM
UNITED STATES DISTRICT JUDGE
Name and Title of Judge

August 28, 2024
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

18 months; Term consists of 18 months as to each of Counts 5s, 7s & 8s & 9s terms to run concurrently.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at surrender to the United States Marshal for this district or the institution designated by the Bureau of Prisons:

☒ On August 23, 2024 by 4:00 pm.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of : **three (3) years. Term consists of three years as to each of Counts 5s,7s,8s & 9s; terms to run concurrent.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.flsp.uscourts.gov.

Defendant's Signature _____ Date _____

SPECIAL CONDITIONS OF SUPERVISION

Financial Disclosure Requirement: The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

No New Debt Restriction: The defendant shall not apply for, solicit or incur any further debt, included but not limited to loans, lines of credit or credit card charges, either as a principal or cosigner, as an individual or through any corporate entity, without first obtaining permission from the United States Probation Officer.

Permissible Search: The defendant shall submit to a search of his/her person or property conducted in a reasonable manner and at a reasonable time by the U.S. Probation Officer.

Self-Employment Restriction: The defendant shall obtain prior written approval from the Court before entering into any self-employment.

Unpaid Restitution, Fines, or Special Assessments: If the defendant has any unpaid amount of restitution, fines, or special assessments, the defendant shall notify the probation officer of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments page.

	Assessment	Restitution	Fine	AVAA Assessment*	JVTA Assessment**
TOTALS	$400.00	**$317,969.80**	$20,000.00		

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

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If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the schedule of payments page may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

Restitution with Imprisonment - It is further ordered that the defendant shall pay restitution in the amount of **$317,969.80**. During the period of incarceration, payment shall be made as follows: (1) if the defendant earns wages in a Federal Prison Industries (UNICOR) job, then the defendant must pay 50% of wages earned toward the financial obligations imposed by this Judgment in a Criminal Case; (2) if the defendant does not work in a UNICOR job, then the defendant must pay a minimum of $25.00 per quarter toward the financial obligations imposed in this order. Upon release of incarceration, the defendant shall pay restitution at the rate of 10% of monthly gross earnings, until such time as the court may alter that payment schedule in the interests of justice. The U.S. Bureau of Prisons, U.S. Probation Office and U.S. Attorney's Office shall monitor the payment of restitution and report to the court any material change in the defendant's ability to pay. These payments do not preclude the government from using other assets or income of the defendant to satisfy the restitution obligations.

* Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. §2259.
** Justice for Victims of Trafficking Act of 2015, 18 U.S.C. §3014.
*** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☒ Lump sum payments of $400.00 due immediately, balance due

It is ordered that the Defendant shall pay to the United States a special assessment of $400.00 for Counts 5s, 7s, 8s, and 9s which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court. Payment is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
400 NORTH MIAMI AVENUE, ROOM 8N09
MIAMI, FLORIDA 33128-7716

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
FORFEITURE of the defendant's right, title and interest in certain property is hereby ordered consistent with the plea agreement. The United States shall submit a proposed Order of Forfeiture within three days of this proceeding.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) AVAA assessment, (5) fine principal, (6) fine interest, (7) community restitution, (8) JVTA assessment, (9) penalties, and (10) costs, including cost of prosecution and court costs.