UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES

v. Criminal No. 2:20-cr-114-FTM-66MRM

CASEY DAVID CROWTHER

Defendant.
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DEFENDANT'S RULE 29(a)
MOTION FOR JUDGMENT OF ACQUITTAL

Defendant, Casey D. Crowther ("**Crowther**"), through undersigned counsel, and pursuant to Fed. R. Crim. P. 29(a), hereby files his Rule 29(a) Motion for Judgment of Acquittal.

I. INTRODUCTION

The evidence presented by the Government is wholly insufficient to sustain a conviction against Crowther as to Counts I through IV of the Second Superseding Indictment. Simply put, the (a) CARES Act, (b) the Small Business Administration ("**SBA**") interim final rules, (c) the subject loan agreement, and (d) the CARES Act disclosures contained conflicting provisions regarding authorized purposes for Paycheck Protection Program ("**PPP**") loans. It is clear from the Government's own evidence that the SBA and the Government have not been defrauded and sustained absolutely no losses or damages resulting from Crowther's actions. Specifically, the Government's evidence demonstrates that after the Bank Proceeds were disbursed by the Bank to Target, the only occasions by which the SBA would ever disburse Government funds to the Bank would be either where (a) the borrower sought loan forgiveness; or (b) the lender invoked the loan's default provisions. The undisputed evidence demonstrates that Target Roofing and Sheet Metal, Inc. ("**Target**"), Crowther's company, did not seek forgiveness and did not default on the loan. The undisputed evidence also shows that the Bank Proceeds were ***not*** Government funds, but instead were the Bank's own funds lent to Target directly by the Bank. At all times material, the subject PPP Loan has been a performing loan to Target that – by the Bank's own criteria – continues to be in good standing. *See* DiCicco and DiIorio testimony, supra. The Government's evidence also demonstrates that Crowther did absolutely nothing to defraud either the Bank or the SBA or any other Government agency.

Next, the Government itself has acknowledged and admitted that the governing law was conflicting and confusing regarding the permissible uses of PPP loans and has resolved to provide clarification to lenders and borrowers. Under these circumstances, the rule of lenity mandates a judgment of acquittal in Crowther's favor.

Importantly, John Miller, the Government's SBA witness, was unable in his testimony to provide any meaningful guidance regarding what requirements are imposed on borrowers with respect to permissible uses of loan funds and effectively acknowledged the inconsistencies in the governing law and confusion to the public that has been caused by such inconsistencies. Miller Tr. at pp. 68-69 (stating merely that "if a borrower knowingly uses the proceeds for an unauthorized purpose, the borrower could be held legally liable"); 53 (referring to SBA interim final rule stating that the SBA would be revising the SBA FAQs in prior interim final rules to conform to the statute and overriding conflicting guidance in the FAQs).[1] Miller also testified that unless the borrower has defaulted on the PPP loan or otherwise sought forgiveness of the loan, at all times material the loan remains a transaction between the bank and the borrower. *Id.* at p. 67-68 (stating that absent loan forgiveness or default on a PPP loan, there are no Government funds that go to the borrower). Kyle DiCicco and Kristin DiIorio of Sanibel Captiva Community Bank (the "**Bank**"), who testified as the Government's witnesses, testified that absent loan forgiveness or a default on the loan, PPP loans involve money lent from the Bank's own funds to the borrower and do not involve any proceeds from the SBA or the federal Government.[2] DiCicco and DiIorio further testified that the subject PPP loan between the Bank and Target Roofing and Sheet Metal, Inc. ("**Target**") was a performing loan that specifically involved proceeds lent to Target from the Bank's own funds (the "**Bank Proceeds**"), not any SBA or Government funds.

Although the SBA has resolved to rectify inconsistencies in the governing law that have brought about confusion to lenders and borrowers alike, at the time of trial

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[1] References to the transcript from Miller's trial testimony are denoted herein as "Miller Tr. at p._." Copies of the relevant excerpts from Miller's trial testimony are attached hereto as **Composite Ex. "A"**.

[2] At the time of filing the instant Motion, the transcripts of DiCicco's and DiIorio's respective trial testimony were not available. Accordingly, the relevant points from their trial testimony is presented herein in summary form.

the SBA still has not done so. Thus, the Government's own evidence demonstrates that there was a complete lack of notice to the public with respect to the legally permissible uses of the Bank Proceeds.

Consequently, it is impossible to hold Crowther criminally liable as to Counts I through IV of the Superseding Indictment where the underlying law is so obviously ambiguous. To do so would result in a clear denial of Crowther's fundamental due process rights. This denial of due process is particularly evident given that the Government failed to introduce any evidence whatsoever demonstrating what is (and what is not) a legally permissible use of the Bank Proceeds.

Thus, it is clear that the Government's evidence is insufficient to sustain a conviction against Crowther with respect to any of the Counts I through IV of the Second Superseding Indictment. Accordingly, Crowther requests that this Court enter a judgment of acquittal in his favor pursuant to Rule 29(a).

II. ARGUMENT

A. Standard

Rule 29(a) states: "After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). In *United States v. Green*, No. 8:12-cr-205-T-17MAP, 2016 U.S. Dist. LEXIS 180440 at *1 (M.D. Fla. Dec. 30, 2016), the Middle District of Florida stated:

> Rule 29(a) of the Federal Rules of Criminal Procedure requires the Court to enter "a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). When reviewing the Defendant's motion for judgment of acquittal, the Court determines whether the relevant evidence, viewed in the light most favorable to the Government, is sufficient to support a jury's finding of guilt. *United States v. Taylor*, 972 F.2d 1247, 1250 (11th Cir. 1992). "The district court must accept all reasonable inferences tending to support the Government's case." *Id*. The district court must also resolve any conflicts in the evidence in favor of the Government. *Id*.

Green, 2016 U.S. Dist. LEXIS 180440 at *8.

By its express terms, Rule 29(a) includes two (2) requirements. "First, the motion can be granted only after the prosecution has presented its case. Second, the court must find the evidence insufficient to support a conviction." *United States v. DSD Shipping, AS*, No. 15-00102-CG, 2016 U.S. Dist. LEXIS 46413 at *18-19 (S.D. Ala. Apr. 6, 2016) (quoting *United States v. Torkington*, 874 F. 2d 1441, 1444 (11th Cir.

1989)). On a Rule 29(a) motion, the district court considers the sufficiency of the Government's evidence as it stood at the close of the Government's case. *United States v. Aaron*, No. 3:12-cr-170-J-34JBT, 2013 U.S. Dist. LEXIS 158336 at *6-7, n.3 (Nov. 5, 2013) (citing *United States v. Moore*, 504 F. 3d 1345, 1348 (11th Cir. 2007)).

Here, the evidence as it stands at the end of the Government's case is grossly insufficient to sustain a conviction against Crowther with respect to any of the Counts I through IV of the Second Superseding Indictment. Accordingly, a judgment of acquittal should be entered in Crowther's favor.

B. The Government's Evidence Fails to Sustain a Conviction for Bank Fraud

The Government's evidence cannot sustain a conviction for bank fraud; the evidence on the record does not support an intent to defraud. A scheme to defraud includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact. To act with intent to defraud means to knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud. *Eleventh Circuit Pattern Jury Instructions.*

In *United States v. Takhalov*, 827 F. 3d 1307 (11th Cir. 2016), the Eleventh Circuit stated:

> For this reason, the law in the Eleventh Circuit

> makes clear that a defendant "schemes to defraud" only if he schemes to "depriv[e] [someone] of something of value by trick, deceit, chicane, or overreaching." ***But if a 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.***
>
> From that conclusion, a corollary follows: a schemer who tricks someone to enter into a transaction has not "schemed to defraud" so long as he does not intend to harm the person he intends to trick. And this is so even if the transaction would not have occurred but for the trick. ***For if there is no intent to harm, there can only be a scheme to deceive, but not one to defraud.***
>
> Consider the following two scenarios. In the first, a man wants to exchange a dollar into four quarters without going to the bank. He calls his neighbor on his cell phone and says that his child is very ill. His neighbor runs over, and when she arrives he asks her to make change for him. She agrees; the quarters pass to the man; the dollar passes to the woman; and they part ways. She later learns that the child was just fine all along. The second scenario is identical to the first, except that instead of giving the woman a true dollar, he gives her a counterfeit one.
>
> The first scenario is not wire fraud; the second one is. Although the transaction would not have occurred but-for the lie in the first scenario—the woman would have remained home except for the phony sickness—the man nevertheless did not intend to "depriv[e] [the woman] of something of value by trick, deceit, [and so on]." But in the second scenario he did intend to do so.

Takhalov, 827 F. 3d at 1312-1313 (citing *United States v. Bradley*, 644 F. 3d 1213, 1240 (11th Cir. 2011) (emphasis added).

The Government's evidence cannot sustain a conviction for bank fraud as it fails to prove an intent to cause loss or injury. Target Roofing has never applied for forgiveness and no SBA proceeds are involved. The SBA has suffered no loss or injury. The subject PPP Loan has been a performing loan to Target that – by the Bank's own criteria – continues to be in good standing. There is no evidence of any loss or injury on the record and, as such, a judgment of acquittal should be entered on behalf of Crowther.

C. Demonstrates That the Governing Law Was Ambiguous

All of the charges against Crowther set forth in Counts I through IV of the Second Superseding Indictment rise and fall on whether Crowther violated the relevant law governing the PPP loan program. Yet, the law that Crowther was required to adhere to was nothing less than ambiguous because the language of the CARES Act directly conflicted with the interim final rules ("**IFRs**") promulgated by the SBA. Because the IFRs conflicted with the language of the enabling statute, there was significant confusion regarding what were and were not permissible uses of Bank Proceeds for Target and other recipients of loan proceeds. Against this confusing backdrop, it is impossible to hold Crowther criminally liable under the circumstances of the evidence introduced by the Government.

In *United States v. Phifer*, 909 F. 3d 372 (11th Cir. 2018), the Eleventh Circuit stated:

> The rule of lenity holds that a law must speak "in language that is clear and definite" if it is to render something a crime. *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971) (citation and internal quotation marks omitted). Two principles underlie this rule. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so fair as possible the line should be clear." *Id*. at 348 (citation and internal quotation marks omitted). And second, the separation-of-powers doctrine requires legislatures, not courts, to define crimes. *See id*. Under the rule of lenity, when a criminal law is ambiguous, we resolve doubts in favor of the defendant. *Id*.

Phifer, 909 F. 3d at 383-84 (vacating conviction and remanding for retrial with instructions that if the jury concluded that ethylone did not meet at least one of the generally accepted definition of a "positional isomer", the rule of lenity would require the jury to return a verdict of not guilty).

More recently, in *United States v. Caniff*, 955 F. 3d 1183 (11th Cir. 2020), the Eleventh Circuit has described the rule of lenity as follows:

> The rule of lenity holds that if at the end of the interpretive road—having exhausted the applicable semantic and contextual canons of interpretation, and thus "seiz[ed] everything from which aid can be derived," *Ocasio v. United States*, 136 S. Ct. 1423, 1434 n.8, 194 L. Ed. 2d 520 (2016) (internal quotation marks omitted)—meaningful doubt remains about the application of a criminal statute to a defendant's conduct, then the doubt should be resolved in

> the defendant's favor. *See* Scalia & Garner, supra, at 296-302. The rule is born of the principle that the law "must speak 'in language that is clear and definite' if it is to render something a crime," *United States v. Phifer*, 909 F.3d 372, 383 (11th Cir. 2018) (quoting *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971)), and serves the twin aims of (1) ensuring that the public is given a "fair warning" that punishment will follow when "a certain line is passed" and (2) preserving the "separation-of-powers doctrine, [which] requires [that] legislatures, not courts . . . define crimes," *id*.

Caniff, 955 F. 3d at 1191 (11th Cir. 2020) (holding that the rule of lenity required resolving doubts in the defendant's favor); *see also*, *United States v. Pierre-Louis*, No. 00-434-CR-GOLD/SIMONTON, 2002 U.S. Dist. LEXIS 29320 at *6-16 (S.D. Fla. Mar. 22, 2002) (applying rule of lenity and granting defendant's judgment of acquittal); *United States v. Tucor Int'l, Inc.*, 35 F. Supp. 2d 1172, 1185 (holding that rule of lenity would have required dismissal of the indictment even absence the court's conclusion that applicable statute exempted the type of agreements at issue in the case).

Here, the rule of lenity clearly requires acquittal. The Government's own evidence shows that the governing law regarding permissible uses of the Bank Proceeds was vague, ambiguous, and conflicting. Importantly, the CARES Act – which was the enabling statute under which the PPP loan program was enacted – specifically provides that the Bank Proceeds ***<u>may</u>*** be used for various purposes; however, the Act does not require that funds ***<u>shall</u>*** be used only for specifically enumerated purposes. The CARES Act states, in relevant part:

> (F) Allowable uses of covered loans.—

> "(i) In general.— During the covered period, an eligible recipient ***may***, in addition to the allowable uses of a loan made under this subsection, use the proceeds of the covered loan for—
>
> "(I) payroll costs;
>
> "(II) costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
>
> "(III) employee salaries, commissions, or similar compensations;
>
> "(IV) payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation);
>
> "(V) rent (including rent under a lease agreement);
>
> "(VI) utilities; and
>
> "(VII) interest on any other debt obligations that were incurred before the covered period.

CARES Act, Sec. 1102(a)(2)(F) (emphasis added).

After the CARES Act was signed into law by then-President Trump, the SBA issued a series of IFRs addressing, *inter alia*, eligibility for PPP loans and how loan proceeds that are lent directly by financial institutions to borrowers using the lender's own funds may be utilized. It is no secret that these IFRs attempted to change the nature of the relevant CARES Act provisions regarding how the Bank Proceeds could be utilized and directly conflicted with the relevant CARES Act language. On April 15, 2020, the SBA issued the following IFR stating, in relevant part:

> The CARES Act was enacted to provide immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the "Paycheck Protection Program." Loans

> guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness.

85 Fed. Reg. 20811-20812.

The SBA's April 15, 2020 IFR stated, in relevant part:

> s. What happens if PPP loan funds are misused?
>
> If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

85 Fed. Reg. 20814.

Although the April 15, 2020 purported to subject individuals who knowingly misused loan proceeds to liability, the fact remains that the relevant provisions of the CARES Act directly conflicted with the SBA IFRs as to what were considered permissible versus mandatory uses of loan proceeds.

On June 16, 2020, the SBA issued an IFR that flatly conflicted with Sec. 1102(a)(2)(F) of the CARES Act. The June 1, 2020 SBA IFR stated, in relevant part:

> The proceeds of a PPP loan ***<u>are to be used</u>*** for:
>
> i. payroll costs (as defined in the Act and in 2.f);
>
> ii. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
>
> iii. mortgage interest payments (but not mortgage prepayments or principal payments);

> iv. rent payments;
>
> v. utility payments;
>
> vi. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or
>
> vii. refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. If you received an EIDL loan from January 31, 3030 through April 3, 2020, you can apply for a PPP loan. If your EIDL loan was not used for payroll costs, it does not affect your eligibility for a PPP loan. If your EIDL loan was used for payroll costs, your PPP loan must be used to refinance your EIDL loan/ Proceeds from any advance up to $10,000 on the EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.

85 Fed. Reg. 36311 (emphasis added).

While the CARES Act identified permissive uses for the Bank Proceeds, the June 16, 2020 IFR purported to make mandatory only limited uses of the Bank Proceeds. Importantly, the June 16, 2020 IFR was published after Crowther had both applied and been approved for the subject PPP loan. Consequently, when the boat purchase and promissory note repayment occurred, the SBA had not taken the position that the Bank Proceeds could not lawfully be used except for specified purposes.

Importantly, the SBA acknowledged that its own IFRs were confusing, ambiguous, and conflicted with the enabling statute. On February 5, 2021, the SBA issued an IFR stating, in relevant part:

> This rule should be interpreted consistently with the sets of Frequently Asked Questions (FAQs) regarding the PPP that are posted on SBA's and the Department of the Treasury's (Treasury) websites, the consolidated interim

> final rule implementing updates to the Paycheck Protection Program (86 FR 3692 (January 14, 2021)) and the interim final rule on second draw PPP loans (86 FR 3712 (January 14, 2021)); ***however, the Economic Aid Act overrides any conflicting guidance in the FAQs, and SBA will be revising the FAQs to fully conform to the Economic Aid Act as quickly as feasible.***

86 Fed. Reg. 8284.

In other words, by the SBA's own admission the SBA's IFRs (in which the FAQs were set forth) were conflicting with the enabling statute. Miller confirmed this interpretation in his trial testimony. *See* Miller Tr. at p. 53 (referring to SBA interim final rule stating that the SBA would be revising the SBA FAQs in prior interim final rules to conform to the statute and overriding conflicting guidance in the FAQs). To this day, the SBA has not yet clarified these admitted inconsistencies, which clearly create confusion regarding the purposes for which loan proceeds may be used. The Government's evidence demonstrates that the law was unclear. Under these circumstances, the rule of lenity clearly requires acquittal. *See*, *e.g.*, *Phifer*, 909 F. 3d at 383-84; *Caniff*, 955 F. 3d at 1191.

Furthermore, as if the conflict between the CARES Act and the IFRs were not confusing enough, the subject Loan Agreement between the Bank and Target contained language directly conflicting with the CARES Act Disclosures that were provided by the Bank to Target. Section 2 of the Loan Agreement states:

> LOAN FORGIVENESS:
> Borrower may apply to Lender for forgiveness of the amount due on this loan in an amount equal to the sum of the following costs incurred by Borrower during the 8-week

> period beginning on the date of first disbursement of this loan:
>
> a. Payroll costs
>
> b. Any payment of interest on a covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation)
>
> c. Any payment on a covered rent obligation
>
> d. Any covered utility payment
>
> The amount of loan forgiveness shall be calculated (and may be reduced) in accordance with the requirements of the Paycheck Protection Program, including the provisions of Section 1106 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") (P.L. 116-136). Not more than 25% of the amount forgiven can be attributable to non-payroll costs.

Gov't Ex. 9 at p. 1.

By contrast, the CARES Act Disclosures that Crowther signed in connection with the subject PPP loan states, in relevant part:

> Borrower ***<u>will</u>*** use the proceeds of this PPP Loan ***<u>solely for</u>***:
>
> a. payroll costs;
>
> b. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
>
> c. business related mortgage interest payments (but not mortgage prepayments or principal payments);
>
> d. rent payments;
>
> e. utility payments;
>
> f. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or
>
> g. refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020.

Gov't Ex. 10, CARES Act Disclosures at pp. 1-2.

Consequently, besides the conflicting language in the CARES Act and the SBA IFRs, the CARES Act Disclosures also were in direct conflict with the language of the Loan Agreement. Under these circumstances, there is absolutely no way that Crowther had fair warning that any punishment would follow based upon how he spent the Bank Proceeds or could have inferred that any particular conduct relating to the Bank Proceeds would be criminally unlawful. Accordingly, acquittal is required based upon the rule of lenity. *See*, *e.g.*, *Phifer*, 909 F. 3d at 383-84; *Caniff*, 955 F. 3d at 1191.

D. Judgment of Acquittal Should Be Entered in Crowther's Favor With Respect to Counts I and II Because the Evidence is Legally Insufficient to Prove Falsity Beyond a Reasonable Doubt

Separately, judgment of acquittal should be entered in Crowther's favor with respect to Counts I and II because the Government's evidence is legally insufficient to prove falsity beyond a reasonable doubt. As explained *supra*, the Government's evidence demonstrates that the relevant provisions of the CARES Act directly conflicted with the SBA's relevant IFRs regarding what constituted legally permissible uses of the Bank Proceeds. Because the legal requirement regarding use of the Bank Proceeds is ambiguous and confusing, the Government is required to prove that Crowther is guilty beyond a reasonable doubt with respect to each objectively reasonable interpretation of the law regarding falsity. Here, the Government has entirely failed to do so, as the evidence is insufficient to show falsity under each objectively reasonable interpretation of the governing law. Accordingly, judgment of acquittal must be entered in Crowther's favor.

With respect to the charge against Crowther for Bank Fraud (Count I), the Government is required to prove the following elements beyond a reasonable doubt in order to obtain a conviction under 18 U.S.C. § 1344:

> (1) the Defendant knowingly carried out or attempted to carry out a scheme [to defraud a financial institution] [to get money, assets, or other property from a financial institution] ***by using false or fraudulent pretenses, representations, or promises about a material fact***;
>
> (2) the false or fraudulent pretenses, representations, or promises were material;
>
> (3) the Defendant intended to defraud [the financial institution] [someone]; and
>
> (4) the financial institution was federally [insured] [chartered].
>
> A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact.

See 11th Cir. Pattern Criminal Jury Instructions at p. 382 (emphasis added); *see also*, *United States v. Brown*, No. 3:18-cr-89-J-34JRK, 2019 U.S. Dist. LEXIS 203772 at *18-19 (M.D. Fla. Nov. 25, 2019); *United States v. Priester*, No. 3:08-cr-291-J-32JRK, 2008 U.S. Dist. LEXIS 115238 at *15 (M.D. Fla. Nov. 25, 2008); *United States v. Wooley*, No. 19-80093-CR-Rosenberg/Reinhart, 2019 U.S. Dist. LEXIS 195972 at *3 (S.D. Fla. Sept. 30, 2019).

With respect to the charge against Crowther for False Statement to a Federally Insured Institution (Count II), the Government is required to prove the following elements beyond a reasonable doubt in order to obtain a conviction under 18 U.S.C. § 1014:

> (1) ***the Defendant made a false statement or report***;
>
> – or –
>
> (when the alleged wrongdoing is overstating the value of an asset or income)
>
> [(1) the Defendant willfully overvalued land property or security;]
>
> (2) the Defendant did so knowingly and with intent to influence an action of the institution described in the indictment regarding an application, advance, commitment, or loan, or a change or extension to any of those; and
>
> (3) the deposits of the institution were insured by the Federal Deposit Insurance Corporation.

See 11th Cir. Pattern Criminal Jury Instructions at p. 299 (emphasis added); *see also*, *In re Britton-Harr*, No. 20-12417-A, 2020 U.S. Dist. LEXIS 23652 at *9 (11th Cir. July 27, 2020); *United States v. Barber*, 591 Fed. Appx. 809, 819-20 (11th Cir. 2014); *United States v. Grant*, 211 Fed. Appx. 889, 892 (11th Cir. 2006).

In *United States v. Harra*, 985 F. 3d 196 (3d Cir. 2021), the Third Circuit considered the question: "When a defendant is charged with false reporting based on an ambiguous reporting requirement, what is the prosecution's burden at trial as to the element of falsity?" *Id*. at 204. In this case, a group of bank executives were charged with false reporting. The jury found that "the executives' reporting constituted "false statements" for purposes of 18 U.S.C. § 1001, 15 U.S.C. § 78m, and related statutes and convicted Defendants on all counts." *Id*. The Third District stated:

> We hold today that to prove falsity beyond a reasonable doubt in this situation, the Government must prove either that its interpretation of the reporting requirement is the only objectively reasonable interpretation or that the defendant's statement was also false under the alternative, objectively reasonable interpretation. And because the Government here produced insufficient evidence from which a rational jury could find Defendants' statements false under this rule, we will reverse Defendants' false statements convictions and remand on those counts for entry of judgments of acquittal. As for Defendants' conspiracy and securities fraud convictions, however, which were charged in the alternative on an independent theory of liability, we will vacate and remand for trial.

Id.

Here, the Government has not proven that either (a) its interpretation of the authorized uses of the subject Bank Proceeds is the only objectively reasonable interpretation, or (b) Crowther's use of the Bank Proceeds was also false under alternative, objectively reasonable interpretations. Specifically, the Government has not proven falsity with respect to Counts I and II in reference to the various iterations of how the Bank Proceeds may be used, as set forth in (a) the CARES Act, (b) the IFRs, (c) the Loan Agreement, and (d) the CARES Act Disclosures. Having failed to do so, the Government also has failed to prove the element of falsity beyond a reasonable doubt, which is a prerequisite to any conviction with respect to Counts I and II.

This is particularly true given that the Government's own SBA witness testified regarding the ambiguity and confusion with respect to the inconsistencies between the CARES Act and the relevant IFRs. *See* Miller Tr. at p. 53 (referring to SBA interim final rule stating that the SBA would be revising the SBA FAQs in prior interim final rules to conform to the statute and overriding conflicting guidance in the FAQs).

Accordingly, based upon the rule set forth in *Harra* judgment of acquittal should be entered in Crowther's favor.

E. The Government's Evidence is Insufficient to Sustain a Conviction Against Crowther for Counts III and IV

The Government's own evidence also fails to prove a *prima facie* case against Crowther for Illegal Monetary Transaction (Counts III and IV). The Government is required to prove the following elements in order to sustain a conviction against Crowther for Illegal Monetary Transaction:

> (1) the Defendant knowingly engaged or attempted to engage in a monetary transaction;
>
> (2) the Defendant knew the transaction involved property or funds that were the proceeds of some criminal activity;
>
> (3) the property had a value of more than $10,000;
>
> (4) the property was in fact proceeds of [describe the specified unlawful activity alleged in the indictment]; and
>
> (5) the transaction took place in [the United States][in the special maritime and territorial jurisdiction of the United States] [outside the United States but the Defendant was a United States person as defined by 18 U.S.C. § 3077 (excluding section (2)(D))].

See 11th Cir. Pattern Criminal Jury Instructions at p. 494.

The Government's case has always relied on Crowther's alleged misrepresentations to the Bank's personnel regarding the stated purpose of the wire transfers for the boat purchase and Steve Adkins promissory note repayment transactions. DiCicco and DiIorio testified, however, that the Bank does not care about the purpose of the PPP loan, as reflected in the loan documents, or the stated reasons for any wire transfers. Instead, Crowther's stated reasons to the Bank for the wire transfers were just as unimportant as the content of the memo line of a personal check, so far as the Bank was concerned. *See* DiCicco and DiIorio trial testimony.

Moreover, because Target has neither sought loan forgiveness nor defaulted on the PPP loan, there was no legal requirement that Target was required to use the Bank Proceeds solely for PPP-related purposes. In other words, at all times material the transaction remained a loan between the Bank, as the lender, and Target, as the borrower.

Accordingly, the Government's evidence is insufficient as to the second legal element (i.e., that Crowther knew the transaction involved property or funds that were the proceeds of some criminal activity) and the fourth legal element (i.e., that the proceeds were in fact proceeds of unlawful activities). As such, judgment of acquittal should be entered in Crowther's favor with respect to Counts III and IV of the Second Superseding Indictment.

F. The Government's Evidence Contradicts That Crowther Knowingly Engaged in Any Criminal Conduct

Finally, the Government's evidence is insufficient to sustain a conviction with respect to any charges set forth in Counts I through IV of the Second Superseding Indictment because the evidence demonstrates that Crowther did not knowingly engage in any criminal conduct. As noted *supra*, all of the charges set forth in Counts I through IV require that Crowther knowingly engage in various prohibited acts. *See* 11th Cir. Pattern Criminal Jury Instructions at p. 382 (requiring, *inter alia*, that the Government prove that Crowther knowingly carried out or attempted to carry out a scheme [to defraud a financial institution] [to get money, assets, or other property from a financial institution] by using false or fraudulent pretenses, representations, or promises about a material fact, in order to prove Bank Fraud in violation of 18 U.S.C. § 1344); 299 (requiring, *inter alia*, that the Government prove that Crowther knowingly and with intent to influence an action of the institution described in the indictment regarding an application, advance, commitment, or loan, or a change or extension to any of those, in order to prove False Statement to a Federally Insured Institution in violation of 18 U.S.C. § 1014); and 494 (requiring, *inter alia*, that the Government prove that Crowther knowingly engaged or attempted to engage in a monetary transaction, in order to prove Illegal Monetary Transaction in violation of 18 U.S.C. § 1957). DiIorio, however, testified that the wire transfer reflecting the promissory note repayment to Adkins would be considered an authorized use of the Bank Proceeds because the wire was for bonuses.

Moreover, based upon the testimony of DiCicco, there appears to be no evidence that any of the subject loan documents contained any false statements or misrepresentations. Accordingly, the evidence is insufficient to prove the elements of the offenses charged in Counts I through IV of the Second Superseding Indictment. Judgment of acquittal therefore must be entered in Crowther's favor.

III. CONCLUSION

Based on the foregoing, the Government's evidence is clearly insufficient to sustain a conviction with respect to Counts I through IV of the Second Superseding Indictment. Accordingly, Defendant, Casey David Crowther respectfully requests that this Court (a) grant this Motion in all respects; (b) enter a judgment of acquittal in Crowther's favor with respect to Counts I through IV of the Second Superseding Indictment; and (c) enter such other and further relief this Court deems just and proper.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Nicole H. Waid, attorney for Casey David Crowther, do hereby certify that I have, this day, filed the foregoing with the Clerk of Court via the CM/ECF system, which has caused a true and correct copy to be served on all counsel of record.

/s/ *Nicole H. Waid*
Nicole H. Waid, Esq.