UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

vs. **Case No. 2:20-cr-114-JES-MRM**

CASEY DAVID CROWTHER
____________________________________/

APPELLANT CROWTHER'S MOTION FOR RELEASE PENDING APPEAL[1]

TIME SENSITIVE - DEFENDANT REQUIRED TO SURRENDER FOR SERVICE OF SENTENCE JULY 30, 2021

Casey David Crowther (Crowther), the Defendant-Appellant herein, by his undersigned appellate counsel, William Mallory Kent, hereby moves for his release on conditions pending appeal, pursuant to Title 18, U.S.C. § 3143(b)(1).

FACTS AND PROCEDURAL HISTORY

Crowther proceeded to trial on counts one, two, three and four of a second superseding indictment charging Crowther in count one with bank fraud in violation of 18 U.S. C. § 1344 and in count two with false statement to a financial institution in violation of 18 U.S.C. § 1014. Counts three and four charged money laundering in violation of 18 U.S.C. § 1957 (deriving from the conduct in counts one and two,

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[1] Pursuant to the Local Rule, counsel has requested the position of the Government on this motion and Assistant United States Attorney Trent Reichling has responded that the Government opposes this request.

all of which derived from an Small Business Administration (SBA) loan). Prior to trial Crowther pled guilty to counts five and six, which charged bank fraud and false statements in connection with an unrelated residential mortgage loan.[2] Crowther was convicted of all counts and sentenced by this court to a total term of imprisonment of 37 months concurrent on all counts. A copy of the judgment is annexed hereto as Exhibit A.

Crowther had been released on conditions during the pendency of the indictment and the Court allowed Crowther to remain free on conditions after the verdict and sentencing with a self-surrender date of July 30, 2021.

Crowther made a motion for judgment of acquittal at the close of the evidence and filed a written motion for new trial after the verdict (Doc. 140), both of which motions were denied by this Court. (Doc. 169-2) A copy of the Defendant's Renewed Motion for Judgment of Acquittal or Alternatively for New Trial is annexed hereto as Exhibit B.

Crowther retained appellate counsel and filed a timely notice of appeal. By this motion Crowther is requesting the Court permit Crowther to remain free on conditions of release pending the appeal.

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[2] Count seven of the second superseding indictment was dismissed on motion of the Government.

RELEASE PENDING APPEAL

Release pending appeal by the defendant is governed by 18 U.S.C. § 3143(b)(1), which provides, in pertinent part:

> 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 . . . .

18 U.S.C. § 3143(b)(1).

THIS APPEAL PRESENTS A SUBSTANTIAL QUESTION OF LAW

In *United States v. Giancola*, 754 F.2d 898, 900-01 (11th Cir. 1985), the United States Court of Appeals for the Eleventh Circuit adopted the interpretation of this portion of the statute previously made the Third Circuit in *United States v. Miller*, 753 F.2d 19 (3d Cir. 1985). The Eleventh Circuit observed that in *Miller*, the Third Circuit had held that the proper interpretation of the "substantial question" provision was that it required "first, that the appeal raise a substantial question of law or fact, and second, that 'if that substantial question is determined favorably to the defendant on appeal, that decision is likely to result in reversal or an order for a new trial of all counts on which imprisonment has been imposed.'" *Giancola*, 754 F.2d at 900 (quoting *Miller*, 753 F.2d at 23-24).

The Eleventh Circuit observed that the Third Circuit had interpreted "the likely to result in reversal" language as going to the significance of the substantial issue to the ultimate disposition of the appeal. *Giancola*, 754 F.2d at 900 (citing *Miller*, 753 F.2d at 23). The Eleventh Circuit agreed with the Third Circuit that "[a] court may find that reversal or a new trial is 'likely' only if it concludes that the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial." Id.; see also *United States v. Hicks*, 611 F. Supp. 497, 499 (S.D. Fla. 1985)

("Thus, in determining whether there is a substantial question, a court must keep in mind that it is not being asked to reverse its position on issues decided at trial, nor is it being asked to grant a new trial. It must decide only that a significant issue exists that merits appellate review and that the issue is critical enough to the defendant's conviction that a contrary appellate ruling would warrant a reversal." (citing *Giancola* and *Miller*)).

SUBSTANTIAL QUESTION TO BE PRESENTED ON APPEAL

Whether the Court Erred in Denying Crowther's Renewed Motion for Judgment of Acquittal or Alternatively for a New Trial?

This appeal presents a question of first impression in this and every other Circuit, in essence, whether the Government can sufficiently prove legal falsity under the bank fraud and bank false statement statutes when the loan was governed by the Paycheck Protection Program (PPP) of the CARES Act and the governing law was in constant flux, ambiguous or conflicting. No Circuit Court of Appeal has addressed criminal liability under the PPP. Crowther's case will be a test case for fundamental economic and legal principles. Crowther incorporates by reference herein the arguments made in the Renewed Motion for Judgment of Acquittal or Alternatively for New Trial (Doc. 140) annexed hereto as Exhibit B.

NO RISK OF FLIGHT OR DANGER TO THE COMMUNITY

Crowther has been released on conditions since his first appearance and was allowed to remain free on conditions of release after the verdict and after sentencing with a self surrender date of July 30, 2021. Crowther therefore clearly does not pose a risk of flight or danger to the community.

CONCLUSION

Crowther submits that his appeal raises a substantial legal question. Crowther is not required to establish that the ultimate result on appeal will be reversal on this issue. Instead, this Court need do no more than decide that within the meaning of 18 U.S.C. § 3143(b), the issue which Crowther will raise on appeal is sufficiently substantial to satisfy the requirements of the statute, i.e., that is "one of more substance than would be necessary to a finding that it was not frivolous. It 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). Such is the question of first impression in this case.

Although Crowther pled guilty to count six and was sentenced to a concurrent 37 months imprisonment on that count, were the appeal of counts one through five successful, it would mandate a resentencing of count six, and as to that count, standing alone, the guideline range would have been 0-6 months in Zone A, qualifying Crowther for the equivalent of a probationary sentence. Therefore his conviction by guilty plea as to count six does not foreclose release on appeal.

Accordingly, Crowther respectfully requests this Honorable Court order Crowther be released on conditions pending the resolution of his appeal.

Respectfully submitted,

KENT & McFARLAND
ATTORNEYS AT LAW

s/ William Mallory Kent

WILLIAM MALLORY KENT
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CERTIFICATE OF SERVICE

I certify that on July 14, 2021, I caused a true and correct copy of Crowther's Motion for Release Pending Appeal to be served via CM/ECF upon all counsel of record.

s/ William Mallory Kent
William Mallory Kent

EXHIBIT A

JUDGMENT

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v.

CASEY DAVID CROWTHER

Case Number: 2:20-cr-114-JES-MRM

USM Number: 73797-018

Nicole Hughes Waid, Retained
2390 Tamiami Trail N., Ste 100
Naples, FL 34103

JUDGMENT IN A CRIMINAL CASE

On March 22, 2021 the Defendant plead guilty to Counts Five and Six of the Second Superseding Indictment and was adjudicated guilty. On March 26, 2021, the Defendant was found guilty by a jury to Counts One, Two, Three, and Four of the Second Superseding Indictment. Offenses include:

Title & Section	**Nature of Offense**	**Date Offense Concluded**	**Count Number(s)**
18 U.S.C. §§ 1344 and 2	Bank Fraud	February 10, 2021	One & Five
18 U.S.C. §§ 1014 and 2	False Statement to a Financial Institution	April 13, 2020	Two
18 U.S.C. §§ 1957 and 2	Illegal Monetary Transaction	April 21, 2020	Three
18 U.S.C. §§ 1957 and 2	Illegal Monetary Transaction	April 24, 2020	Four
18 U.S.C. §§ 1014 and 2	False Statement to a Financial Institution	July 31, 2020	Six

Defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Count Seven of the Second Superseding Indictment is dismissed on the motion of the United States.

IT IS ORDERED that 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 shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Date of Imposition of Judgment:

June 29, 2021

John E. Steele

JOHN E. STEELE
SENIOR UNITED STATES DISTRICT JUDGE

July 1, 2021

Casey David Crowther
2:20-cr-114-FtM-29MRM

IMPRISONMENT

Defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of **37 months**, as to each count, all such terms to run concurrently with one another.

The Court makes the following recommendations to the Bureau of Prisons:

Incarceration in a facility close to family (Pensacola, Florida).

Defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons **on or before 12:00 P.M. on July 30, 2021** as notified by the United States Marshal.

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 U.S. Marshal

Casey David Crowther
2:20-cr-114-FtM-29MRM

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of **36 months**, as to each count, all such terms to run concurrently with one another.

MANDATORY CONDITIONS

1. Defendant must not commit another federal, state, or local crime.
2. Defendant must not unlawfully possess a controlled substance.
3. Defendant must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of placement on supervision and at least two periodic drug tests thereafter, as determined by the probation officer. Defendant must submit to random drug testing not to exceed 104 tests per year.
4. Defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.
5. Defendant shall cooperate in the collection of DNA, as directed by the probation officer.

The defendant shall comply with the standard conditions that have been adopted by this court as well as any other conditions on the attached page.

Casey David Crowther
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STANDARD CONDITIONS OF SUPERVISION

As part of Defendant's supervised release, Defendant must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for Defendant's 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 Defendant's conduct and condition.

1. Defendant must report to the probation office in the federal judicial district where Defendant is authorized to reside within 72 hours of Defendant's release from imprisonment, unless the probation officer instructs Defendant to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, Defendant will receive instructions from the court or the probation officer about how and when Defendant must report to the probation officer, and Defendant must report to the probation officer as instructed.
3. Defendant must not knowingly leave the federal judicial district where Defendant is authorized to reside without first getting permission from the court or the probation officer.
4. Defendant must answer truthfully the questions asked by Defendant's probation officer
5. Defendant must live at a place approved by the probation officer. If Defendant plans to change where Defendant lives or anything about Defendant's living arrangements (such as the people Defendant lives with), Defendant 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, Defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. Defendant must allow the probation officer to visit Defendant at any time at Defendant's home or elsewhere, and Defendant must permit the probation officer to take any items prohibited by the conditions of Defendant's supervision that the probation officer observes in plain view.
7. Defendant must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses Defendant from doing so. If Defendant does not have full-time employment Defendant must try to find full-time employment, unless the probation officer excuses Defendant from doing so. If Defendant plans to change where Defendant works or anything about Defendant's work (such as Defendant's position or Defendant's job responsibilities), Defendant 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, Defendant must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. Defendant must not communicate or interact with anyone Defendant knows is engaged in criminal activity. If Defendant knows someone has been convicted of a felony, Defendant must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If Defendant is arrested or questioned by a law enforcement officer, Defendant must notify the probation officer within 72 hours.
10. Defendant 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. Defendant 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 Defendant poses a risk to another person (including an organization), the probation officer may require Defendant to notify the person about the risk and Defendant must comply with that instruction. The probation officer may contact the person and confirm that Defendant has notified the person about the risk.
13. Defendant 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. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature:__________________________________ Date:___________________________

Casey David Crowther
2:20-cr-114-FtM-29MRM

ADDITIONAL CONDITIONS OF SUPERVISED RELEASE

1. You shall participate in a substance abuse program (outpatient and/or inpatient) and follow the probation officer's instructions regarding the implementation of this court directive. Further, Defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Substance Abuse Treatment Services. During and upon completion of this program, Defendant is directed to submit to random drug testing.

2. You shall participate in a mental health treatment program (outpatient and/or inpatient) and follow the probation officer's instructions regarding the implementation of this court directive. Further, Defendant shall contribute to the costs of these services not to exceed an amount determined reasonable by the Probation Office's Sliding Scale for Mental Health Treatment Services.

3. You shall provide the probation officer access to any requested financial information.

4. You shall cooperate in the collection of DNA, as directed by the Probation Officer.

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total criminal monetary penalties under the schedule of payments set forth in the Schedule of Payments.

	Assessment	AVAA Assessment[1]	JVTA Assessment[2]	Fine	Restitution
TOTALS	**$600.00**	**$0.00**	**$0.00**	**$0.00**	**$2,068,700.00**

Defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If Defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	Total Loss	Restitution Ordered
Sanibel Captiva Community Bank 1037 Periwinkle Way Sanibel, FL 33957	$2,068,700.00	$2,068,700.00

SCHEDULE OF PAYMENTS

Special assessment shall be paid in full and is due immediately.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of 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, unless otherwise directed by the court, the probation officer, or the United States attorney.

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

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.

FORFEITURE

Defendant shall forfeit to the United States those assets previously identified in the Order of Forfeiture, that are subject to forfeiture.

Defendant shall be held liable for an order of forfeiture in the amount of **$2,739,081.21**.

EXHIBIT B

DOC. 140 - DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL OR ALTERNATIVELY FOR A NEW TRIAL

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.
_______________________________/

DEFENDANT'S RENEWED MOTION FOR JUDGMENT OF ACQUITTAL OR ALTERNATIVELY FOR A NEW TRIAL

Defendant, Casey D. Crowther ("**Crowther**"), through undersigned counsel, and pursuant to Fed. R. Crim. P. 29(c) and 33 and M.D. Local Rule 3.01, hereby files his Renewed Motion for Judgment of Acquittal or Alternatively for New Trial.

I. INTRODUCTION

After deliberating for less than two (2) hours during lunch on a Friday afternoon, the jury returned a guilty verdict against Crowther with respect to Counts I through IV of the Second Superseding Indictment. The speed at which the jury returned the verdict is disconcerting because it clearly was not enough time for the jury to meaningfully consider 144 trial exhibits, the Court's jury instructions, and the complex legal issues surrounding the Paycheck Protection Program ("**PPP**"). No reasonable jury could have found Crowther guilty beyond a reasonable doubt with respect to Counts I through IV for the following reasons:

- Target and Crowther complied with the requirements of the CARES Act;

- The governing law was ambiguous and the rule of lenity applies;
- The evidence was insufficient to prove falsity beyond a reasonable doubt;
- The *Takhalov* case precludes criminal liability against Crowther;
- The government's evidence contradicts that Crowther knowingly engaged in any criminal conduct;
- The admission of the Government's summary witness' exhibits was erroneous and warrants a new trial because the exhibits were not a fair and accurate depiction of the bank statements and should not have been admitted; and,
- The admission of the Government's theory of the 39 employees was erroneous as it was not intrinsic evidence, confused the jury, and was unduly prejudicial.

Since the inception of this case, the defense has argued that the Government is fundamentally misinterpreting the governing law. During trial the Government put forth characterizations of the CARES Act to the jury that are not supported by the law or the constantly evolving PPP guidance. It is easy to see how one could misinterpret the law - the Small Business Administration ("**SBA**") and Department of Treasury have acknowledged that their agencies also misinterpreted the enabling statute and published conflicting, confusing, and incorrect guidance to borrowers and lenders in the form of Interim Final Rules ("**IFRs**"). Notably, the SBA acknowledged that the governing law was conflicting long before this trial began and resolved to provide clarification to lenders and borrowers. *Ex. G16* (stating that "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"). The trial record is clear that this incorrect guidance led to conflicting loan documents and disclosure certifications. Here, the charges in the Second Superseding Indictment can only be interpreted within the parameters of the CARES Act and the conflicting regulations.

The Government's case relied upon an inaccurate interpretation of the CARES Act, and its own Second Superseding Indictment misstates the Act.

Consequently, the Government obtained a conviction against Crowther on a theory premised on (1) money is not fungible, and (2) it is against the criminal law for a company owner to purchase a boat, if the company receives a PPP loan, even if the Bank suffers zero loss. Not only is that not the governing law, but also Crowther had been given zero notice that such conduct was prohibited. The Court should grant judgment of acquittal in Crowther's favor or, alternatively, a new trial, based upon (a) the rule of lenity; or (2) lack of intent to defraud, consistent with the Eleventh Circuit's ruling in *United States v. Takhalov*, 827 F. 3d 1307, 1310 (11th Cir.), *as revised* (Oct. 3, 2016), *opinion modified on denial of reh'g*, 838 F. 3d 1168 (11th Cir. 2016).

II. EVIDENCE AT TRIAL

The charges set forth in Counts I through IV rise or fall on whether Crowther violated the law governing permissible uses of bank proceeds ("**Bank Proceeds**") pursuant to the CARES Act. Yet, the evidence at trial proved only that the governing law and regulations passed to "interpret" the law were ambiguous, confusing, and conflicting. Crowther was not given fair notice of conduct that might give rise to criminal prosecution.

A. The Governing Law Does Not Support Convictions Against Crowther

The CARES Act ("**Act**") accurately states the law and the legislative intent of Congress. Under Section 1102(a)(2)(A)(ii) of the CARES Act, the term "covered loan" means "a loan made under this paragraph during the covered period[.]" Importantly, the evidence at trial demonstrated that the CARES Act – i.e., the enabling statute – specifically provides that the Bank Proceeds from the loan ***may*** be used for various purposes; however, the Act does not require that funds ***shall*** be used only for specifically enumerated purposes. Section 1102(a)(2)(F) of the Act provided borrowers the opportunity to have the loan forgiven ***if*** the borrower chooses to apply for forgiveness:

> (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. (emphasis added)

The Government's theory of its case at trial was based upon an inaccurate interpretation of the Act. Specifically, the Government argues that 1) money is not fungible; 2) the loan proceeds must be used solely on the allowable uses stated above; and 3) the loan proceeds were specifically earmarked funds. All of these theories are not only inaccurate but they conflict with the enabling statute.

First, the false statement attributed to Crowther in the Second Superseding Indictment is premised on the Government's misinterpretation of the Act. The

Government quite simply misstates the law, "PPP loan proceeds were required to be used for certain permissible expenses, including payroll costs, mortgage interest, rent and utilities." *D.E. 62, pg. 3*. The CARES Act does not require the borrower to use loan proceeds specifically for certain expenses; the borrower ***may*** apply for forgiveness of the sum of certain expenses as enumerated in the Act. The Government's flawed interpretation of the statute appears to follow inaccurate guidance provided by the SBA and Department of Treasury via the published IFRs. [1] *See Ex. G16*. The May 8, 2020 SBA Inspector General Flash Report titled "SBA's Implementation of the Paycheck Protection Program Requirements" stated, in relevant part: ". . . We identified the following areas, however, that did not fully align with the Act's provisions . . . Loan Proceeds Eligible for Forgiveness." *Ex. G18*. Specifically, the Flash Report determined that Section 1102(a)(2)(F) of the CARES Act conflicted with IFR Section III(2)(r), as follows:

CARES Act Requirement	**Interim Final Rule**
During the covered period, an eligible recipient ***may***, in addition to the allowable uses of a loan . . .*Id*. at p. 19.	The proceeds of a PPP loan ***are to be*** used for:

The CARES Act Disclosure Form found in the loan packet and relied upon by the Government as the source of Crowther's false statement, utilizes the same

[1] There was an abundance of testimony at trial regarding the enormous volume and confusing nature of interim final rule ("**IFR**") changes promulgated by the SBA. Kyle DeCicco, the Bank's Senior Vice President and Senior Loan Officer, testified that there were approximately fifty (50) IFR changes and that he was not an expert on them. DeCicco Tr. at p. 10:21-24. Diane Knott, the Government's summary witness, testified that she has not read every applicable IFR. Knott Tr. at p. 23:3-17.

inaccurate and misleading language found in the IFRs. Specifically, the Disclosure that Crowther signed in connection with the subject PPP loan states, in relevant part: "Borrower ***will*** use the proceeds of this PPP Loan ***solely for***: a. payroll costs;…". *Ex. 10, at pp. 1-2*. This requirement clearly misstates the law and imposes restrictions on the use of funds that are not required by the Act.

Second, the CARES Act Disclosure was not a document that the Bank relied upon in its determination for funding the loan. The CARES Act Disclosure form is an SBA form that is only triggered upon an application of forgiveness by the borrower. The evidence at trial was clear that Target never applied for forgiveness of the loan; therefore, the certifications made on the CARES Act Disclosure form are moot and should not have been considered by the jury. The loan proceeds remain an asset of the Bank and no SBA or government funds were ever involved. *DeCicco Tr. at pp.11:2-7.*[2] Furthermore, the Bank's loan documents (as opposed to the SBA disclosure forms) align with the true intent of the CARES Act. The loan documents found at *Ex. 9 at p. 1*, state:

> PROMISE TO PAY: In return for the loan, Borrower promises to pay to the order of the Lender the amount of TWO MILLION NINETY EIGHT THOUSAND SEVEN HUNDRED AND NO/100 DOLLARS, plus interest on the unpaid principal balance, and all other amounts required by this note.
>
> 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

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[2] The relevant excerpts from the testimony are attached follows: DeCicco is Composite Attachment "A"; Miller is Att. "B"; DiIorio is Att. "C"; Portinari is Att. "D'; Knott is Att. "E".

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payment of principal on a covered mortgage obligation) c. Any payment on a covered rent obligation d. Any covered utility payment.

The evidence at trial further proved that Target's use of the bank proceeds was not restricted as the Government argued because Crowther did not seek forgiveness of the loan. Section 2 of the Loan Agreement between the Bank and Target states, in relevant part:

> (a) CARES Act Forgiveness. This Loan has been originated under the SBA's Paycheck Protection Program pursuant to the Coronavirus Aid, Relief, and Economic Security Act (the "Act"), sections 1102 and 1106, in which all or a portion of the Loan proceeds ***will*** be forgiven, provided the Borrower has complied with all terms of the Act, including, but not limited to, certain representations made to the Lender and the Borrower's use of Loan proceeds, as more particularly described in the Act. The Borrower understands that the final decision regarding forgiveness of the Loan rests with the SBA, who shall have the right to review the Borrower's financial statements and accounting records in connection with any such determination. Failure by the Borrower to comply with the Act or any requests of the Lender or the SBA ***may*** result in the Borrower having to repay the Loan. *Ex. 14 at p. 2.*

The testimony corroborated the loan documents. Kyle DeCicco, the Bank's Senior Vice President and Senior Loan Officer, testified:

A. The proceeds of the loan is a loan with Sanibel Captiva Community Bank loan funds.
* * *
Q. There are no SBA loan proceeds in this loan; correct?
A. That's an SBA guaranteed loan. They are not loan proceeds.
Q. All right. So that's correct?
A. That is correct.
* * *
Q. So do you understand that provision to be, if somebody, being an applicant, a borrower in this case, applies for forgiveness, they're not required to, but they may; correct?
A. Correct.
Q. And if they do apply for forgiveness, then it is triggering the requirements of the Paycheck Protection Program, and specifically that last paragraph you read.
A. That's what it says; yes.
Q. And so if somebody doesn't apply for forgiveness, that paragraph, that section, doesn't even apply to that borrower.

A. Correct.
Q. And they're still responsible . . .
A. For the loan. For the promissory note.
DeCicco at pp. 26:4-5 and 11-15; 33:17-34:4.

DeCicco further testified:

Q. Okay. So, now if someone bought a boat, and applied for forgiveness, and used the boat as forgiveness, that would be violating this provision; correct?
A. I would certainly assume so.
Q. Yes. So this is specifically to the CARES Act, disclosing to the borrower, if they applied for forgiveness pursuant to the CARES Act, what they can use the funds for?
A. Yes. *Id* at p. 46:1-8.

Accordingly, the evidence demonstrated that the CARES Act disclosures regarding permissible uses of the bank proceeds applied only if Target had sought loan forgiveness. Yet, there was zero evidence at trial that Target ever sought forgiveness of the loan. Notably, DeCicco testified that (a) he was not aware of any demand by the SBA that Target repay the Bank Proceeds to the Bank; and (b) Crowther was in good standing with the Bank. *Id. at p. 16:17-25*. DeCicco testified:

Q. And you're unaware of any demand, direction, by the SBA, to Target Roofing, to repay any amount back to Sanibel Captiva Bank.
A. Correct.

* * *

Q. So there's been no submission of – excuse me – of loan forgiveness request at this time.
A. No. *Id*. at pp. 39:3-6 and 24-25.

DeCicco effectively testified that because Target never filed for forgiveness, the manner in which the Bank Proceeds were utilized made no difference. DeCicco testified:

Q. So it has nothing to do with somebody buying a boat, or misrepresenting a boat, if they've never filed for forgiveness, because it's still just a loan; correct?
A. Based on that statement right there?

Q. Yes.
A. I'd say yes. *Id. at p. 45:19-25.*

* * *

Q. But if a company doesn't file for forgiveness, they just repay that loan; correct?
A. That's correct. *Miller Tr. at p. 62:8-10.*

DeCicco further testified:

Q. Okay. But there are no SBA loan proceeds in this loan at all.
A. The loan was funded out of liquidity of Sanibel Captiva Community Bank.
Q. . . . And Sanibel Captiva Community Bank does not receive any proceeds from the SBA unless there is either a forgiveness payment by SBA or a guaranty by SBA for this loan.
A. The bank received a loan origination fee from the SBA.
Q. Right. The bank received a fee, but that wasn't towards this loan. This didn't fund the loan.
A. That's correct. *Id.* at pp. 47:22-25 and 48:1-7.

The testimony of John Miller, the Government's SBA witness, was in accord:

Q. Okay. So, when [do] the SBA proceeds ever come into play with regard to a 7A loan, is it only during either the guaranty when there's a default, or with a Paycheck Protection Program when there's actually forgiveness?
A. Yes. The government funds would only come into play for a 7A loan in the event of a guaranty purchase, as you suggest – or when a guaranty is honored. Or in the case of the Paycheck Protection Program forgiveness.

* * *

Q. But, with a borrower who has not defaulted on the loan, and a borrower who has not applied for forgiveness, there's no SBA proceeds applied to that loan.
A. Not to the loan; correct. There would have been proceeds applied to the lender for making that loan.
Q. That goes to the lender.
A. That goes to the lender. Correct.
Q. But no SBA proceeds going to the borrower.
A. No SBA proceeds going to the borrower; correct.
Miller Tr. at p. 67:12-19; 67:23-68:1-6.

Thus, the undisputed evidence demonstrated that Target was not restricted from using the Bank Proceeds as described within the CARES Act Disclosure form because Target had not sought loan forgiveness.

Third, and more importantly, the record is abundantly clear that Target and Crowther utilized the amount of the loan on payroll and other allowable expenses in compliance with the Act. Even excluding amounts for payroll spent on the 39 employees and family members that the Government alleged were improper, the sum of all allowable expenses still far exceeded the amount of the PPP loan. The record contains payroll and bank statements – including other allowable expenses – for which Diane Knott, the Government's summary witness, credited in Target's favor as forgivable expenses. The Government's witness Evelyn Portinari, the Director of Human Resources at Target, testified that the entire loan was utilized for payroll. *Portinari Tr. at pp. 46:22-25, 47: 1-10.* The payroll records show payroll expenses exceeded the loan amount by over $1 million during the covered period. *Exs. A4, A5.* The record is clear that Crowther intended to use the loan to pay Target's payroll expenses because that is exactly how the Bank Proceeds were utilized.

The Government's objective with this prosecution and at trial was to impose stricter regulations on the borrower than the Act requires, including the theory that the loan proceeds are earmarked funds. However, the Act specifically disallows earmarking of funds. Section 1106(b) states: "An eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to ***the sum of*** the following costs incurred and payments made during the covered period: (1) Payroll costs…" (emphasis added). "Payroll costs" are defined under the Act as the "sum of payments of any compensation with respect to employees" that is, *inter alia*, a "salary, wage, commission, or similar compensation . . ." Section 1102(a)(2)(A)(viii). Section

1106(d)(1) states: "The amount of loan forgiveness under this section shall not exceed the principal amount of the financing made available under the applicable covered loan." The statutory language is crystal clear that if the sum of payroll costs equals the principal amount of the loan, these expenses may be forgiven.

Moreover, the evidence at trial established that the Act is devoid of any requirement that the Bank Proceeds be specifically earmarked for any particular purpose. At trial, Miller testified:

> Q. So when the lender then provided the funds to the borrower, was it required to be in a segregated account?
>
> A. The Act – I don't recall anything requiring that.

Miller Tr. at p. 61:3-5.

Separately, DiIorio testified:

> Q. The PPP regulations don't require segregation of funds, do they?
>
> A. No.

DiIorio Tr. at p. 4:9-11.

The Act is intentionally devoid of these more stringent requirements in order to comply with the legislative intent of Congress, which wanted to distribute money quickly to small businesses as part of an economic stimulus package. The speed at which the Act was passed clearly led to confusion and the basis for this instant motion. The Government may wish that additional requirements had been included in the Act but prosecutors ***cannot*** impose stricter regulations than the law requires on a borrower and it cannot make those acts criminal without prior notice to the borrower.

Finally, the trial record does not support a conviction under 18 U.S.C. §1344 or 18 U.S.C. §1014 where the Bank itself testified that no misrepresentations were made to the Bank in connection with the subject PPP loan applications. DeCicco testified:

> Q. . . . Do you see – was there any misrepresentation in those documents from Target Roofing?
> A. No. The client, the borrower, filled out the application just as every one of our customers did, or had to.

Id. at p. 15:21-24.

DeCicco testified that the Bank suffered no loss or injury:

> A. This [is] an asset of Sanibel Captiva Community Bank, and I'm assuming it's carried as a liability on Target Roofing's balance sheet.
> Q. . . . When Sanibel Captiva Bank is looking at Target Roofing, sole shareholder Casey Crowther, this loan is looked at as a liability for them; correct?
> A. Yes.
> Q. The bank hasn't defaulted Target Roofing on this loan; correct?
> A. No, we have not.
> Q. Do you see the bank as a victim of this loan?
> A. No.
> Q. There's been no injury to the bank from this loan.
> A. No.
> Q. Do you feel there was any misrepresentations by Target Roofing with regard to the SBA loan application?
> A. No.
>
> * * *
>
> Q. . . . There is the loan forgiveness and if the borrower doesn't pay.
> A. That would be the next point. If the loan was not forgiven, and the first payment was missed, we could invoke the guaranty.
> Q. And there have been no payments missed on this loan; correct?
> A. Correct.
> Q. And there's been no forgiveness filed; correct?
> A. Correct.

DeCicco Tr. at pp. 14:23-15:15; 47:5-14.

DeCicco further testified that the first payment on the loan is not due until November 2021. *Id. at pp. 13:15-14:2.*

III. ARGUMENT

A. Standard

In *United States v. Miranda*, 425 F. 3d 953 (11th Cir. 2005), the Eleventh Circuit set forth the standard for determining a motion for judgment of acquittal pursuant to Fed. R. Crim. P. 29(c). The Eleventh Circuit stated:

> In considering a motion for the entry of a judgment of acquittal, a district court must view the evidence in the light most favorable to the government, and determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. The prosecution need not rebut all reasonable hypotheses other than guilt. The jury is free to choose between or among the conclusions to be drawn from the evidence presented at trial, and the district court must accept all reasonable inferences and credibility determinations made by the jury. The District Court's determination that the evidence introduced at trial was insufficient to support the jury's verdict of guilt is [an] issue of law entitled to no deference on appeal.

Id. at 959 (citation omitted).

In *United States v. Martinez*, 763 F. 2d 1297 (11th Cir. 1985), the Eleventh Circuit stated:

> The decision to grant or deny a new trial motion based on the weight of the evidence is within the sound discretion of the trial court. An appellate court may reverse only if it finds the decision to be a clear abuse of that discretion. While the district court's discretion is quite broad, there are limits to it. The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. The evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand. Motions for new trials based on weight of the evidence are not favored. Courts are to grant them sparingly and with caution, doing so only in those really "exceptional cases." Applying these

> principles, courts have granted new trial motions based on weight of the evidence only where the credibility of the government's witnesses have been impeached and the government's case had been marked by uncertainties and discrepancies.

Id. at 1312-13 (citations omitted).

Viewing the evidence in the light most favorable to the Government, it is evident that no reasonable jury could have found Crowther guilty beyond a reasonable doubt with respect to Counts I through IV. Moreover, the Government's case was marked by a misinterpretation of the law that would be a miscarriage of justice to allow the jury's verdict to stand. Accordingly, a judgment of acquittal must be entered in Crowther's favor pursuant to Rule 29(c); alternatively, this Court should grant a new trial pursuant to Rule 33.

B. Target and Crowther Complied with the Requirements of the CARES Act

The evidence at trial demonstrated that Target and Crowther complied with the requirements and terms of the CARES Act. Importantly, the Second Superseding Indictment was premised on Crowther's alleged violations of the CARES Act. *D.E. 62 at p. 5* (stating that forgivable loans to small businesses were authorized by the CARES Act). The charging document, however, also made reference to requirements that were not part of the CARES Act, but instead were imposed only by virtue of SBA interim final rules that conflicted with the language of the CARES Act. *D.E. 62 at p. 3* (stating that "PPP loan proceeds were required to be used for certain permissible expenses, including payroll costs, mortgage interest, rent, and utilities").[3]

Specifically, the evidence at trial demonstrated that the amount of the subject PPP loan was $2,098,700.00. *DeCicco Tr. at p.11:2-7.* Critically, the Government's summary witness testified that Target paid over $3 million in payroll to employees during the relevant time period. *Knott Tr. at pp.12:8-25, 13:1-25, and 14:1-12.* Accordingly, even excluding amounts for payroll spent on the 39 employees and family members that the Government alleged were improper, the sum of all allowable expenses still far exceeded the amount of the loan.

This payroll expenditure was a permissible use of the Bank Proceeds as defined in Sec. 1102(a)(2)(F) of the Act (described more fully above). The only additional statutory requirements are included in Section 1106(b) (stating that "[a]n eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the sum of the following costs incurred and payments made during the covered period: (1) Payroll costs . . .") and 1106(d)(1) ("The amount of loan forgiveness under this section shall not exceed the principal amount of the financing made available under the applicable covered loan.") It is not only a reasonable interpretation of the Act to believe that money expended on certain expenses equal to

[3] The Second Superseding Indictment inaccurately refers to the Bank Proceeds as "PPP loan proceeds", which is intentionally misleading. The proceeds of the subject loan came from the Bank's own assets, not SBA or Government assets.

the loan amount during the covered period would be allowable (and possibly forgivable) expenses, it is exactly what the plain text of the CARES Act requires.

The evidence at trial demonstrated that the sum of the payroll costs and other allowable expenses far exceed the loan amount. The Government, however, effectively attempted to superimpose additional requirements over the plain language of the CARES Act that are not actually the law. To be clear, the only law that Crowther was required to follow was the CARES Act, and the evidence at trial demonstrates that he fulfilled the requirements of the Act. No reasonable jury could have found otherwise based on the evidence at trial. Because the charges set forth in Counts I through IV of the Second Superseding Indictment rise and fall on whether or not Crowther violated the CARES Act, in the absence of any violation of the CARES Act (not the conflicting IFRs), no reasonable jury could have found Crowther guilty beyond a reasonable doubt with respect to Counts I through IV.

C. The Governing Law Was Ambiguous

Although the plain text of the CARES Act and the evidence at trial demonstrate that Target and Crowther acted properly with respect to permitted uses of the Bank Proceeds, judgment of acquittal in Crowther's favor is also required because the governing law (i.e., the CARES Act and the IFRs) were conflicting and resulted in ambiguity that legally precludes criminal liability against Crowther. 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 law governing the PPP loan program. Yet, the law that Crowther was actually required to adhere to was

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ambiguous, confusing, and conflicting and provided no guidance (or incorrect guidance) regarding how and under what circumstances criminal liability might be imposed.

For one thing, the evidence at trial showed that the language of the CARES Act directly conflicted with IFRs promulgated by the SBA. Because the IFRs conflicted with the language of the enabling statute, there was significant ambiguity and a complete lack of meaningful guidance regarding what were (and were not) permissible uses of the Bank Proceeds. Against this confusing backdrop, it is legally impermissible to hold Crowther criminally liable based on the evidence at trial.

In *United States v. Caniff*, 955 F. 3d 1183 (11th Cir. 2020), the Eleventh Circuit 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. Phifer*, 909 F. 3d 372

(11th Cir. 2018) (holding that the law must speak in language that is clear and definite in order to render something a crime); *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 absent the court's conclusion that applicable statute exempted the type of agreements at issue in the case).

Here, the rule of lenity requires acquittal. Specifically, the CARES Act provided that Crowther ***may*** use the Bank Proceeds for expenses such as payroll, continuation of group health care coverage, and rent. *See CARES Act, Sec. 1102(a)(2)(F)*. The June 16, 2020 IFR, however, purported to ***require*** that the Bank Proceeds be utilized for certain business expenses; notably, to the exclusion of all other expenses. *See 85 Fed. Reg. 36311*. DeCicco, who was the Bank's Senior Vice President and Senior Loan Officer, testified there were over fifty (50) IFRs. *DeCicco Tr. at p. 10:21-24*. Although DeCicco's testimony as to this point was not accurate, it nonetheless serves to highlight the significant confusion created by the large number of IFRs promulgated by the SBA that were ambiguous and conflicting with the language of the CARES Act, which even Bank employees found overwhelming. DeCicco testified that he was not an expert on the IFRs. *Id*. Knott, another Government witness, testified that she had not even read every applicable IFR. *Knott Tr. at p. 23:3-17*. Given that the Bank's Senior Vice President and Senior Loan Officer, along with the Government's summary witness, clearly did not have a grasp on the specific requirements of the voluminous IFRs that were issued by the SBA over a truncated time period, it is not comprehensible how Crowther (or any small business owner in Crowther's position) reasonably could have been expected to comprehend exactly what the law required and what it prohibited. *See*, *e.g.*, *Phifer*, *909 F. 3d at 383-84* (holding that laws must speak in clear and definite language in order to render something a crime); *Caniff*, 955 F. 3d at 1191 (11th Cir. 2020) (holding that the rule of lenity required resolving doubts in the defendant's favor).

Critically, this Court need not engage in a complex statutory analysis in order to determine whether or not the CARES Act conflicted with subsequently-promulgated IFRs. The Government flatly and directed admitted to the public that the law regarding this matter was ambiguous, confusing, and conflicting long before this trial even began. Specifically, the May 8, 2020 SBA Inspector General Flash Report titled "Small Business Administration's Implementation of the Paycheck Protection Program Requirements" stated, in relevant part: ". . . We identified the following areas, however, that did not fully align with the Act's provisions . . . Loan Proceeds Eligible for Forgiveness." *Ex. G18.* The Flash Report determined, *inter alia*, that Section 1102(a)(2)(F) of the CARES Act conflicted with IFR Section III(2)(r) with respect to allowable uses of the Bank Proceeds. *Id. at p. 19*. Moreover, the SBA acknowledged that its own IFRs were confusing, ambiguous, and conflicting with the enabling statute. On February 5, 2021, the SBA issued an IFR stating, in relevant part: "*…however, the Economic Aid Act overrides any conflicting guidance in the FAQs, and SBA*

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will be revising the FAQs to fully conform to the Economic Aid Act as quickly as feasible.” Ex. G16 (emphasis added). Miller, the Government’s SBA witness, effectively admitted that the law was conflicting and confusing. *See Miller Tr. at p. 53:17-25*.

Against this backdrop, it is clear that the governing law that is applicable to Counts I through IV of the Second Superseding Indictment was confusing, ambiguous, and conflicting such that criminal liability cannot legally be imposed against Crowther.[4] The SBA could not even accurately interpret the enabling statute. 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. Additionally, here 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 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 . . .”. By contrast, the CARES Act Disclosures that Crowther signed in connection with the subject PPP loan states, in relevant part: Borrower ***will*** use the proceeds of this PPP Loan ***solely for***: a. payroll costs; . . .” *Ex. 10 at pp. 1-2*. Thus,

[4] Although the Court’s Order denying Crowther’s dismissal motion interpreted the Government’s charging document as charging Crowther with Bank Fraud (as opposed to violating the CARES Act), the Second Superseding Indictment specifically alleges violation of the CARES Act as the governing law that gives rise to the charges set forth in Counts I through IV. In the absence of any violation of the plain language of the CARES Act, there is no legal basis to hold Crowther criminally liable for any of the charges.

putting aside the conflicting language in the CARES Act and the SBA IFRs, the CARES Act Disclosures conflicted with the language of the Loan Agreement.

Between all of the inconsistencies in the CARES Act, the IFRs, the Loan Agreement, and the CARES Act Disclosures, there is simply no way that a reasonable jury could find Crowther guilty beyond a reasonable doubt with respect to Counts I through IV. Notably, at trial the Government attempted to pick and choose between conflicting and inaccurate regulations to come up with a false set of requirements that the Government claimed Crowther failed to adhere to. *See Ex. 16*. The Government's approach is obviously problematic because, in reality, the regulations were ambiguous and often incorrect and therefore provided Crowther with no notice or fair warning regarding what conduct might be prohibited and subject to prosecution. At trial, the Government attempted to impermissibly re-write the law in a manner that deprived Crowther of fundamental due process. Crowther's request for an ambiguity instruction was denied; the Court's failure to instruct the jury deprived Crowther of a meaningful opportunity to have the jury understand the Government's burden of proving any reasonable interpretation of the governing law beyond a reasonable doubt. Accordingly, judgment of acquittal in Crowther's favor 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. The Evidence Was 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. Because the legal requirement regarding use of the Bank Proceeds is ambiguous and confusing, the Government was required to prove that Crowther was guilty beyond a reasonable doubt with respect to each objectively reasonable interpretation of the law regarding falsity. Here, the Government entirely failed to do so, as the evidence was 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), in order to obtain a conviction under 18 U.S.C. § 1344, the Government was required to prove beyond a reasonable doubt, *inter alia*, that "the Defendant knowingly carried out or attempted to carry out a scheme to defraud and intended to defraud a financial institution" or, as to the second alternative method, "knowingly carried out or attempted to carry out a scheme to get money by using false or fraudulent pretenses, representations or promises about a material fact." Court's Jury Trial Instructions, *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). With respect to the charge against Crowther for False Statement to a Federally Insured Institution (Count II), in order to obtain a conviction under 18 U.S.C. § 1014, the Government was required to prove beyond a reasonable doubt, *inter alia*, that "the Defendant made a false statement or report[.]" *See* 11th Cir. Pattern Criminal Jury Instructions at p. 299 (emphasis added); *see also*, *United States v. Barber*, 591 Fed. Appx. 809, 819-20 (11th Cir. 2014).

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. The Third Circuit 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 failed to prove that either (a) its interpretation of the authorized uses of the subject Bank Proceeds was 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 failed to prove 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.

Notably, 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 *Takhalov* Case Precludes Criminal Liability Against Crowther

Separately, criminal liability against Crowther is precluded by the Eleventh Circuit's decision in the *Takhalov* case. In *Takhalov*, the Eleventh Circuit accepted Second Circuit precedent drawing a distinction between conduct that could be described as deceitful from conduct that could be described as fraudulent. The difference between these two concepts is that conduct on the part of a seller that is untruthful and which is intended to induce the purchaser to buy the product might be deceitful, but it is not fraudulent unless the purchaser pays for something that he did not receive or paid more than the product was worth. The Eleventh Circuit stated:

> The wire-fraud statute, 18 U.S.C. § 1343 does not enact as federal law the Ninth Commandment given to Moses on Sinai. For § 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 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. *See United States v. Starr*, 816 F. 2d 94, 98 (2d Cir. 1987).
>
> Here, the defendants feared that the jury might convict them of wire fraud based on "fraudulent inducements" alone. Hence they asked the district court to give the jurors the

> following instruction: that they must acquit if they found that the defendants had tricked the victims into entering a transaction but nevertheless gave the victims exactly what they asked for and charged them exactly what they agreed to pay.
> *Takhalov, 827 F. 3d at 1310.*

Here, the evidence at trial demonstrated that the Bank clearly was not victimized at all. The Bank did not consider itself to be a victim and there was no financial loss to the Bank. *DeCicco Tr. at pp. 14:23-15:15; 47:5-14*. The Bank continued to consider Target to be in good standing, even at the time of trial. *Id. at p. 16:17-25*. The evidence further established that the first payment on the loan is not due until November 2021. *Id. at pp. 13:15-14:2*.

Moreover, the evidence demonstrated that Target actually spent more money on employee payroll than the total amount of the Bank Proceeds. *Knott Tr. at pp.12:8-25, 13:1-25, and 14:1-12*. To the extent that Crowther made false representations regarding the purpose of wire transfers, the evidence demonstrated that the Bank literally did not care one way or the other. *DiIorio Tr. at pp. 9:23-25, 10:1-5*. 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. *Id. at p. 10:11-13*. These matters were not material.

The evidence shows that Crowther's intent never rose to intent to defraud pursuant to *Takhalov's* requirements. Crowther gave the Bank exactly what it bargained for; i.e., a promissory note on a performing loan for which the first payment has not yet come due. The Bank does not consider itself a victim, and Target remains in good standing with the Bank. Because Crowther's actions can only be characterized

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as merely deceitful but not fraudulent, no reasonable jury could have found Crowther guilty beyond a reasonable doubt with respect to Counts I through IV.

F. The Evidence is Insufficient to Convict Crowther on Counts III and IV

The evidence at trial also failed to prove a *prima facie* case against Crowther for Illegal Monetary Transaction (Counts III and IV), which requires proof of the following elements: (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 bank fraud; and (5) the transaction took place in the United States. *11th Cir. Pattern Crim. Jury Inst. at p. 494.*

The Government's case relied on Crowther's misrepresentations to Bank personnel regarding the purpose of the wires for the boat purchase and Adkins' repayment. Kristin DiIorio, however, testified that the Bank did not rely on the purpose of Crowther's wire transfers. *DiIorio Tr. at pp. 9:23-25 and 10:1-5.* Crowther's stated reasons for the wires were just as unimportant as the content of the memo line of a personal check, so far as the Bank was concerned. *Id. at p. 10:11-13*. Moreover, because Target 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. 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.

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

Finally, the evidence was insufficient to sustain a conviction on Counts I through IV of the Second Superseding Indictment because the evidence demonstrated that Crowther did not knowingly engage in any criminal conduct. As noted *supra*, all of the charges set forth in Counts I through IV required that Crowther *knowingly* engage in various prohibited acts. The evidence on the record does not support that Crowther knowingly engaged in any criminal conduct. The Government agrees that that the regulations interpreting the CARES Act were not only wrong, but thoroughly confusing. *Ex. G16*. No borrower in Crowther's position could have understood the legal requirements – the SBA and Department of Treasury could not even accurately interpret them. Target's payment of employees squarely negates any evidence that Crowther knowingly violated the law; Crowther simply applied for and received a loan on behalf of his company to pay employees and the employees were paid well over the amount of the loan. DiIorio 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. *DiIorio Tr. at pp. 8:18-25, 4-7.* Adkins also believed the $100,000 loan payment on a promissory note was a permissible use of the Bank Proceeds. *Ex. E18.* DeCicco, stated there was no evidence that any of the subject loan documents contained any false statements or misrepresentations. *DeCicco Tr. at p. 15:21-24*. Almost every government witness, not on the government payroll, appeared to share Crowther's interpretation of the Act. The evidence was insufficient to prove the elements of the offenses charged in Counts I through IV. Judgment of acquittal therefore must be entered in Crowther's favor.

H. Admission of the Government's Summary Witness' Exhibits was Erroneous

The Government's summary witness, Dianne Knott, testified on direct that the Government's summary exhibits were a fair and accurate depiction of the bank account statements and, as such, were admitted without objection. However, during cross examination, Knott testified that the summary exhibits were not an accurate summary of the bank statements that she reviewed. Knott testified as follows:

> Q: So I guess I am asking why does this account analysis start on 3/13/20 and the other analysis for the other accounts start on January 1st, 2020?
>
> A: Probably because I was actually running out of time. I just – I have another job that I was doing, and I just didn't have the time; and the deposits before that time frame did not appear relevant to the case, so I started it with 3/13, because that's when the bank statements for March started.
> *Knott Tr. at pp. 17:19-25; 18: 1.*

The testimony of the Government's summary witness alone is a valid basis for a new trial. First, Ms. Knott admits that her summary exhibits are, in fact, not a fair and accurate summary of the bank statements that she reviewed; this was not an oversight but an intentional exclusion because she was "running out of time" and this was merely a side job. *Id. at p. 18.* Her summaries are further put into question when she admits that she only included information that she deemed to be "relevant," yet she was presented as a summary witness. And although the summary exhibits had no title, it was later learned during cross examination that these exhibits only showed the Sanibel Captiva accounts, not all of the accounts provided to the summary witness. *Id. at 26:10-25, 27:1-22.* Allowing a verdict to stand based upon the admitted uncertainties and discrepancies of this Government witness alone would be a miscarriage of justice. However, the Government's attempt to provide the jury with evidence that only fit its theory of the case appeared to be a common theme prior to and throughout trial. The Government objected to the incorporation of all of the attachments to its own Exhibit 167 (*See Att. F*), objected to introduction of the entire Bank Loan package that was admitted by Crowther as Exhibit I, and was hostile to its own witnesses when the witness did not provide answers that fit the Government's theory of the case (after pre-trial attempts to exclude this exculpatory testimony failed). These type of uncertainties and discrepancies mark the record and mandate a new trial to serve the ends of justice.

I. Admission of the Government's Theory of the 39 Employees was Erroneous as it was Not Intrinsic Evidence, Confused the Jury, was Unduly Prejudicial

Admission of the Government's theory of the scheme regarding the 39 employees was erroneous. The alleged scheme was not intrinsic to charges of a false claim on an application to the Bank made months prior and no paperwork for this scheme was ever submitted to the Bank or any government agency. Admission of this Government theory confused the jury, was unduly prejudicial, and warrants a new trial.[5]

[5] This motion expressly incorporates all the arguments made in prior motions in limine, including D.E. 74 and D.E. 75.

IV. CONCLUSION

It is difficult to believe that a small business owner can be prosecuted and convicted of federal crimes based upon a government agency's admitted misinterpretation of an enabling statute and the imposition of more stringent requirements than the statutory language prescribes without proper Due Process. Accordingly, 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 pursuant to Fed. R. Crim. P. 29(c); (c) alternatively, order a new trial pursuant to Fed. R. Crim. P. 33; and (d) enter such 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.