UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITES STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

______________________________________/

DEFENDANT'S MOTION TO DISMISS

The Defendant Eric Dean Sheppard, by and through his undersigned counsel, submits this Motion to Dismiss to dismiss the Superseding Indictment [D.E. 60] in its entirety, pursuant to Fed. R. Crim. P. 12(b)(3) because the Superseding Indictment is the product of vindictive prosecution, Counts 10-14 fail to state an offense, and the forfeiture charges are defective.

BACKGROUND

Mr. Sheppard was charged in June of 2022 with six counts of Wire Fraud, one count for each of the six different loan applications he allegedly applied for through three different companies. A little less than a year after Mr. Sheppard was charged, Mr. Sheppard and the Government engaged in failed plea negotiations, where the Government threatened Mr. Sheppard with adding an additional charge of Aggravated Identity Theft charge if Mr. Sheppard did not accept the plea. Mr. Sheppard ultimately rejected the plea offer and elected to go to trial. In what can only be described as a vindictive effort to punish Mr. Sheppard for exercising his constitutional right to go to trial, the Government filed a Superseding Indictment, not only adding the Aggravated

Identity Theft charge it had threatened, but also added four additional counts of Aggravated Identity Theft and six additional counts of Wire Fraud less than five weeks prior to trial.

The Superseding Indictment drastically changed the charges against Mr. Sheppard. It charged Mr. Sheppard with six additional Wire Fraud counts which were deliberately not charged for more than a year since the original Indictment. [D.E. 60 at 7]. Instead of having one count for each of the loan applications, the Government is now is charging four separate counts for each loan: Counts 1-3 relate to the electronic submission of the HM Four's EIDL loan application, and two documents submitted in support of that loan; Counts 4-6 relate to the electronic submissions of Alfaya Trails' PPP loan application to Bank 1, and two documents submitted in support of that loan; Counts 7-8 relate to the electronic submissions of Alfaya Trails' PPP loan application to Bank 2, and one document submitted in support of that loan and Count 9 relates to the electronic submission of HMMD's PPP loan application. *Id*. As such, the Government stacked the charges for three loan applications into nine separate counts. *Id*. Additionally, the Government charged Mr. Sheppard with five additional counts of Aggravated Identify Theft, which it also deliberately did not include in the original Indictment. The Government has always contended that Mr. Sheppard forged signatures of other persons for six documents submitted in support of the four different loan applications and did not charge Aggravated Identity Theft.[1] *Id*. at 8. The Government's actions are clear and vindictive: it intentionally did not charge eleven counts in the original Indictment, which it knew about, and waited over a year until Mr. Sheppard elected to go to trial, **and less than five weeks before trial,** to supersede the Indictment and drastically change

[1] As the Court is aware, each count of Aggravated Identity Theft, carries a potential mandatory minimum two year sentence.

the charges against Mr. Sheppard in a malicious manner. As such, dismissal of the Superseding Indictment in its entirety is warranted.

Finally, the Superseding Indictment alleges that Mr. Sheppard "did knowingly transfer, possess, and use, without lawful authority, the means of identification of another person," "during and in relation to" the Wire Fraud Counts 2, 3, 6, 8, and 9. *Id*. at 8. Defense counsel brought the Supreme Court's recently issued opinion regarding the elements of Aggravated Identity Theft. The Superseding Indictment fails to allege a necessary element of an Aggravated Identity Theft offense as described by the Supreme Court in *Dubin v. United States*, 143 S.Ct. 1557 (2023): that the defendant's misuse of another person's means of identification must be **<u>at the crux</u>** of what makes the underlying offense criminal. As such, dismissal is warranted on these counts as well.

<u>ARGUMENT</u>

I. <u>Legal Standard</u>.

A Defendant can also move to dismiss an indictment for failure to state an offense or because it contains a defect. Fed. R. Crim. P. 12(b)(3)(B). The "Eleventh Circuit has made clear that '[a]n indictment that tracks the wording of the statute under which an offense is charged will meet these constitutional requirements if the language sets forth the essential elements of the crime. . . .'" *United States v. Roemmele*, 04-60206-CR, 2011 WL 4625357, at *5 (S.D. Fla. Aug. 3, 2011), report and recommendation adopted, 04-60206-CR, 2011 WL 4625348 (S.D. Fla. Oct. 3, 2011) (citing *United States v. Harrell*, 737 F.2d 971, 975 (11th Cir. 1984)); *see also United States v. Johnson*, 981 F.3d 1171, 1179 (11th Cir. 2020) ("While it is generally enough for an indictment to track statutory language, [] simply tracking statutory language does not suffice when the resulting indictment fails to 'fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offen[s]e intended to be punished.'")

Further, a Defendant can also move to dismiss an indictment pursuant to Rule 12(b)(3)(A)(iv) for selective or vindictive prosecution. "[A] superseding indictment adding new charges that increase the potential penalty would violate due process if the prosecutor obtained the new charges out of vindictiveness. . . Vindictiveness in this context means the desire to punish a person for exercising his rights." *United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006). A Court should "evaluate the 'realistic likelihood of vindictiveness' in a particular factual situation, including a pre-trial situation, and to determine whether any facts make a presumption of vindictiveness proper." *Id*. at 1317. The Eleventh Circuit has held that *without more*, a prosecutor does not act in a vindictive manner when it carries out a threat made during plea negotiations to reindict the defendant on more serious charges if he does not plead guilty to the offense with which he was originally charged. *United States v. Watson*, 400 Fed. Appx. 442, 445 (11th Cir. 2010). Yet, the facts presented here are "more" than those outlined by the Eleventh Circuit, and do rise to the level of vindictive prosecution to warrant dismissal.

II. **The Government Failed to Plead a Necessary Element of Aggravated Identity Theft.**

The Court should dismiss Counts 10-14 for failure to state an offense. The Supreme Court recently narrowed and limited the application of the Aggravated Identity Theft statute and outlined the necessary elements for that charge in *Dubin v. United States*, 143 S.Ct. 1557 (2023). Dubin was convicted of health care fraud after he overbilled Medicaid for treatment of a patient performed by the company he helped manage. *Id*. at 1563. The submitted claim contained falsehoods related to how the services were provided. *Id*. The government also charged Dubin with aggravated identity theft, arguing that "§ 1028A(a)(1) was automatically satisfied because petitioner's fraudulent billing included the patient's Medicaid reimbursement number ('a means of identification')". *Id*.

The Supreme Court expressly rejected the Government's broad reading of § 1028A(a)(1), stating that the "Government, by its own admission, wielded § 1028A(a)(1) well beyond ordinary understandings of identity theft." *Id*. at 1564. Under the Government' reading "as long as a billing or payment method employs another person's name or other identifying information, that is enough." *Id*. at 1563. The Supreme Court explained that this unbounded reading of the Aggravated Identity Theft statute would essentially convict every lawyer who rounds up her hours and bills her client electronically, or a waiter who serves flank steak but charges a filet mignon using an electronic payment. *Id*. at 1563. Such a sweeping reading "cover[s] any time another person's means of identification is employed in a way that facilitates a crime" and "bears little relationship to the common understanding of identity theft." *Id*. at 1567. "**The text and context of the statute do not support such a boundless interpretation.**" *Id*. at 1563 (emphasis added).

The Supreme Court limited its application and held that "§ 1028A(a)(1) is violated when the defendant's misuse of another person's means of identification is <u>at the crux</u> of what makes the underlying offense criminal." *Id*. at 1573 (emphasis added). "In other words, the means of identification specifically is a key mover in the criminality[,]" "the locus of [the criminal] undertaking," rather than merely "passive," "passing," or ancillary employment in a crime. *Id*. at 1568.

In fact, the Court clarified that "**being at the crux of the criminality requires more than a causal relationship, such as 'facilitation' of the offense or being a but-for cause of its 'success.'**" *Id*. at 1573 (emphasis added). As such, the Supreme Court held that Dubin was not properly charged with identity theft because the "crux of [] [his] overbilling was inflating the value of services actually provided, while the patient's means of identification was an ancillary part of the Medicaid billing process." *Id*. at 1563.

In the case before this Court, the Government failed to include a necessary element of Aggravated Identity Theft as outlined in *Dubin*: that the alleged identity thefts are the "crux" of the underlying crimes (or even necessary for the alleged crimes to be completed). Although the Superseding Indictment tracks the statutory language of § 1028A(a) it completely fails to allege or even address the necessary element outlined in *Dubin*.

In fact, the Defendant submits the Government intentionally made substantial changes to the Superseding Indictment to make it look like the Identity Theft charges are key to those corresponding alleged wire frauds. In the original Indictment, each count of wire fraud was related to each loan application, while in the Superseding Indictment, the Government separated the wire fraud counts to encompass each electronic submission, irrespective of loan application. [D.E. 60 at 7]. For example, Count 1 relates to the electronic submission of HM Four's EIDL loan application, while Count 2 and 3 are the electronic submissions of an alleged false lease agreement and banker letter submitted in support of that loan. *Id*. It is undisputed that these specific documents were NOT required for the submission and therefore, were not at the crux of the alleged crime. The Government also charged Mr. Sheppard with aggravated identity theft in relation to Counts 2 and 3: the electronic submission of the allegedly false lease agreement and banker letter, but not Count 1: the electronic submission of the loan application. *Id*. In pleading this way, the Government wants to make it seem like since the alleged use of another's identity directly relates to the wire fraud count of the submission of that document, it must be the crux of that crime (i.e. since the alleged identity theft of the banker in the banker letter related to the electronic submission of the bank letter, it must be the crux of that wire fraud).

Yet, in looking at the Superseding Indictment as whole, it is clear that the means of identification is not the crux of the criminality <u>nor did the Government plead that it was</u>. The

Superseding Indictment alleges that Mr. Sheppard engaged in a scheme to defraud, and to obtain money and property by allegedly submitting false and fraudulent loan applications. *Id*. at 5-6. According to the Superseding Indictment, some of the allegedly falsified documents submitted in support of the loan applications contained the names and forged signatures of others. Yet, glaringly missing from the Superseding Indictment are any allegations that Mr. Sheppard's misuse of another person's means of identification is at the crux of what makes the underlying offense criminal, or that the means of identification specifically is a key mover in the criminality." To the contrary, the allegations make clear that the means of identification is ancillary to the crime, and not at the crux.

III. The Government engaged in Vindictive Prosecution, Stacking Charges and Adding Eleven New Charges Less than Five Weeks before Trial, on Charges it Knew For More than a Year when the Original Indictment was Pending.

As explained above, the Government deliberately did not charge eleven counts in the original Indictment, which it knew about, and waited until after Mr. Sheppard had elected to go to trial, and less than five weeks before trial, to supersede the Indictment and drastically change the charges against Mr. Sheppard in a vindictive manner. This is not a classic situation as outlined in *United States v. Watson*, 400 Fed. Appx. 442, 445 (11th Cir. 2010), where the prosecutor merely carried out a threat made during plea negotiations to reindict the defendant on more serious charges if he did not plead guilty to the offense with which he was originally charged. The case involved here involves "more," as required by *Watson*.

Here, the Government knew of Mr. Sheppard's various loan applications when it filed the original Indictment in June of 2022. The Government produced over 10,000 documents in early August of 2022, including each loan application file. Yet, it deliberately chose not to prosecute the six counts of Wire Fraud that it now claims were related to documents submitted in support of the loan applications (rather than the submission of the application itself), even though it very well knew of this information. Additionally, the Government also deliberately chose not to charge Mr. Sheppard with the five counts of Aggravated Identity Theft, even though it also knew of these documents when it filed the original Indictment. Further, in plea negotiations, the Government threatened Mr. Sheppard with filing one additional charge of Aggravated Identity Theft but did not advise Mr. Sheppard of four other additional Aggravated Identity Theft charges, or of the additional six charges of Wire Fraud they ultimately included in the Superseding Indictment. Only after Mr. Sheppard rejected the Government's offer and elected to go to trial, did the Government supersede the Indictment to add <u>six</u> new Wire Fraud charges, stacking the Wire Fraud charges with several counts for each loan application, and also added <u>five</u> new Aggravated Identity Theft charges. On these facts, it is clear that the Government acted improperly, in a vindictive manner, to punish Mr. Sheppard for electing to go to trial, and therefore, the Superseding Indictment should be dismissed in its entirety.

IV. **<u>The Forfeiture Charge is Defective and Should be Dismissed</u>**.

The forfeiture allegations in the Superseding Indictment are defective and should also be dismissed. The Government alleges that the property subject to forfeiture includes: "a sum of at least approximately $893,145 in U.S. currency, which represents the total amount of funds constituting, or derived from, proceeds traceable to the alleged offenses and fraud scheme . . ." [D.E. 60 at 9]. Yet, the charges in the Superseding Indictment allege that the three loans resulted in payment of approximately <u>$446,988, not $893,145</u>. *Id.* at 7. Moreover, the Government's number of forfeiture does not take into consideration the amount of monies paid back to date. These fatal errors in the Superseding Indictment warrant dismissal.

Additionally, the government now seeks forfeiture on the Defendant's home which was bought and purchased in 1999. Again, as evidence of vindictiveness, knowing the Defendant's family home is worth approximately 6 million dollars, it seeks forfeiture due to the alleged criminal conduct to secure $456,000 loans, which, he has been diligently paying back. The Defendant always had an office until he had to shut it down, like many, due to the pandemic. Mr. Sheppard temporarily brought his files and office computer equipment to his home. The fact that due to Covid, and closing his office, he brought his files to his home temporarily, does NOT subject to the home to forfeiture.

WHEREFORE, Defendant, Eric Dean Sheppard, respectfully requests that this Court dismiss the Superseding Indictment because it is the product of vindictive prosecution, Counts 10-14 fail to state an offense, and the forfeiture charges are defective.

MEET AND CONFER CERTIFICATION

The defense conferred with the Government who opposes relief requested herein.

Dated: September 15, 2023

Respectfully submitted,

NELSON MULLINS
One Biscayne Tower, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Telephone: 305.373.9400

By: */s/ Jayne C. Weintraub*
Jayne C. Weintraub
Florida Bar No. 320382
Jonathan Etra
Florida Bar No. 686905
Christopher Cavallo
Florida Bar No. 0092305

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2023 the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

/s/ *Jayne C. Weintraub*
Jayne C. Weintraub