

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

UNITES STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

DEFENDANT’S REPLY IN SUPPORT OF HIS MOTION TO DISMISS

The Defendant Eric Dean Sheppard, by and through his undersigned counsel, submits his Reply in Support of his Motion to Dismiss the Superseding Indictment [D.E. 60] in its entirety. [D.E. 85].

The Government’s Response in Opposition [D.E. 108] is unpersuasive, flawed, and should be disregarded for the following reasons.

First, the Government contends that the Defendant “never explains why he thinks the ‘crux’ language is a necessary *element* of aggravated identity theft” nor “cite[s] which language in *Dubin* he thinks supports his reading.” [D.E. 108 at 5]. The Government’s argument is unpersuasive as the Defendant directly quotes the language of *Dubin v. United States*. [See D.E. 85 at 4-5].

Second, the Government claims that “*Dubin* spells out what courts should include in their aggravated identity theft *jury instructions* rather than what the grand jury must find to return an indictment for that offense.” [D.E. 108 at 5-6]. The Government’s reading is creative at best as *Dubin* doesn’t once mention that the opinion is made to spell out what courts should include in their jury instructions. In fact, the Court in *Dubin* doesn’t once mention jury instructions.

Third, the Government's reading of *Dubin* is flawed and defies logic. If *Dubin* only required courts to add the additional requirement (that the defendant's misuse of another person's means of identify must be at the crux of what makes the underlying offense criminal) in the jury instructions but not the indictment, indictments and jury instructions would consistently be at odds with one another, as is the case here. A reading of the Superseding Indictment demonstrates this inconsistency. [See D.E. 60 at pages 5-6, ¶¶ 4-8]. This reading would mislead jurors on the requirements of an Aggravated Identity Theft charge, a serious charge which carries a **mandatory two year minimum sentence per charge**.

Fourth, the Government did act with vindictiveness in charging Mr. Sheppard with eleven new charges just weeks before trial. Contrary to the Government's assertions, the Government told Mr. Sheppard it would not indict the aggravated identity theft charge if the Defendant pled guilty. It purposefully dangled this carrot and only after Mr. Sheppard chose to go to trial, brought eleven new charges. Furthermore, the Government's vindictiveness can also be found in its inaccurate and misleading Notice of Intent to Introduce 404(b) Evidence, pending before the Court. See [D.E. 77; 113].

Fifth, the Government fails to address Mr. Sheppard's main point regarding the forfeiture allegations: that the amount in the Indictment is defective. The Government charged the Defendant with three loans that resulted in payment of approximately **\$446,988, not \$893,145** as alleged in the forfeiture allegations. Moreover, the Government is aware that the home was bought in 2009 and that the mortgage payments for the home are on autopay. The Government will not be able to prove that the SBA funds were used to pay the mortgage. As the Government is well aware, the SBA funds were comingled; that in and of itself does not demonstrate those specific loan dollars were used to pay the mortgage rather than the additional monies funding the account. Defendant's

position is that the SBA dollars are not traceable. The Government's failure to address this basic point shows they know the Indictment is defective.

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.

Dated: October 3, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 3, 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