UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FORIDA

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

UNITES STATES OF AMERICA,

v.

ERIC DEAN SHEPPARD,

Defendant.

_____________________________________/

REPLY IN SUPPORT OF DEFENDANT'S MOTION FOR NEW TRIAL UNDER RULE 33 OR, IN THE ALTERNATIVE, TO DISMISS FOR PROSECUTORIAL MISCONDUCT

Defendant Eric Dean Sheppard, by and through undersigned counsel, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, respectfully submits this reply brief in support of his motion to dismiss for prosecutorial misconduct, or for new trial [D.E. 204], and states as follows:[1]

INTRODUCTION

Sheppard was acquitted of 8 out of 14 counts, and convicted of 6 out of 14 counts, for wire fraud and aggravated identity theft during a trial that was cumulatively impacted by dozens of errors, the government's prosecutorial misconduct, and a broken-up trial schedule.

DISCUSSION

I. Errors Related to 404(b) Evidence

In its response brief, the government continues to misrepresent the facts concerning its 404(b) notice and evidence submitted at trial.

To start, the government claims that these 404(b) issues were "extensively litigated" before trial and during trial. [D.E. 215 at 2]. Not so. The parties submitted pre-trial briefing on 404(b), and the Court denied the defense's request for a hearing. [D.E. 123 at 16]. The Court's pre-trial order acknowledged that it was *relying* on the government's representations about the anticipated

[1] This Motion should not be construed as an abandonment or waiver of any other motions or objections made prior to or during trial that are not addressed herein. *See Rand v. Nat'l Fin. Ins. Co*., 304 F.3d 1049, 1052 (11th Cir. 2002) (It is a "settled rule in federal courts ... that a party may assert on appeal any question that has been properly raised in the trial court. Parties are not required to make a motion for a new trial challenging the supposed errors as a prerequisite to appeal.")

evidence, which turned out to be inaccurate. *Id.* at 11. The Court's Order made it clear that it would revisit the admissibility of the evidence during trial, depending on the testimony. *Id.* at 8 (finding the evidence *would be* relevant *if* the anticipated testimony had an established basis during trial). For these reasons, the defense believed the 404(b) issues were still open when trial began.

Then, during trial, the Court heard brief argument—mostly from the defense again asking for a hearing, or, at the very least, a proffer immediately prior to the government introducing said evidence, so that the Court could determine whether the government met the required threshold for admission. The Court declined to hold the requested hearing; nor did the Court make any further ruling on this evidence before it permitted the government to introduce it.[2]

While the government's response does its best to muddy the waters, [D.E. 215 at 3], there can be little dispute that its 404(b) papers, on which the Court relied in its pretrial ruling, were misleading and inaccurate. The defense showed this in the motion for new trial, citing to the 404(b) papers at length. [D.E. 204 at 2-6]. In summary, the government originally claimed that Sheppard himself forged Graff's name on Visa application documents, which were alleged "*misrepresentations to federal agencies*" like alleged misrepresentations to the SBA. [D.E. 204 at 3; D.E. 77]. Then, after seeing the defense response, the government completely changed its story, claiming for the first time that Graff's signature was forged on an *engagement letter* for a law firm (which was not a submission to a governmental agency, as initially represented, and one of the reasons it was 404(b) evidence), and that forgery on the engagement letter "reflected" Sheppard's handwriting. [D.E. 116]. On cross examination, Graff admitted (1) that he went "back and forth" about whether or not it was Sheppard who forged his name on the engagement letter, and (2) he never saw Sheppard sign *his* (Mr. Graff's) name on any document, and thus Graff was not familiar with Sheppard's version of Graff's signature or what it would look like, nor did he have any evidence that Sheppard directed anyone else to forge it. [12/11/23 AM Tr. at 121:17-122:10].[3] As there remains a dispute between the parties about this testimony, and the government did not include the full Q-and-A in its response, it is included here in full:

[2] The government did not address Sheppard's claim that a mistrial should have been entered after the government improperly used the 404(b) evidence for propensity purposes during closing argument, also addressed below. [D.E. 204 at 12-13].

[3] Sheppard's motion for new trial accidentally miscited this as from the 12/6/23 AM transcript. It is corrected here as from the 12/11/23 AM transcript.

DEFENSE: Let's talk about what you have said about the engagement letter signing. *Do you agree that you have gone back and forth about whether or not it's your testimony that Eric signed the engagement letter*?

GRAFF: Yes.

DEFENSE: And the reason that you have gone back and forth is because honestly, you've never seen Eric sign your name, right?

GRAFF: Correct.

DEFENSE: And so you couldn't say that for sure he signed your name, right?

GRAFF: I didn't see him sign the document.

DEFENSE: And you couldn't for sure swear that he did [sign] like you did with others?

GRAFF: Correct.

[Defense reserves motion with Court based on this testimony].

[12/11/23 (Graff Cross) 121:17-122:10]. The government's spin on this testimony is, in essence, that the only reason Graff has gone "back and forth" on whether Sheppard forged Graff's name on the engagement letter is because he did not see Sheppard do it. But Graff's testimony is much more than that. It is an admission that he is speculating and that, contrary to the government's assertions, he cannot confirm for the jury that it is Sheppard's handwriting on the engagement letter based on the handwriting alone, unlike other documents he was shown during trial which he confirmed *without hesitation* contained Sheppard's handwriting, despite also not witnessing Sheppard filling out those documents.[4] Had the Court known Graff was speculating about Sheppard's handwriting on the engagement letter—as opposed to the definitive statements in the briefs, on which the Court relied, that Graff would confirm Sheppard forgeries—the prejudicial 404(b) evidence may not have come in and the trial would have been altered dramatically.[5]

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[4] With no factual predicate and no persuasive case law, the government speculates there was "no one more qualified" than Graff to give an opinion on Sheppard's handwriting.

[5] Similarly, had Graff's testimony come *after* the testimony of Salem Maged and Heimdal Barrios, the Court may have been more questioning of the accuracy of the government's representations about Graff's testimony. Testimony from Salem Maged and Heimdal Barrios about two other purported instances of forgery by Sheppard were thoroughly disproven and totally rejected by the jury. Salem Maged was shown, by the defense, to be an unreliable witness with a history of lying and fraudulent behavior. Heimdal Barrios was shown, by the defense, to be the creator and last modifier of a letter he incorrectly claimed in his testimony he was not involved with.

When it came time to cross examine Graff on his speculative claims, the government improperly objected and impeded the defense's ability to do so. One of the government's pervasive and consistent theories in the case was that if something was *not* done by Sheppard himself, it must have been done at his direction because nobody does anything at Sheppard's companies without his approval or direction. This was demonstrably false, and the defense was prepared to prove just that. Specifically, the defense sought to contradict and impeach Graff's testimony by asking Graff about former project manager, Scott Fish, with whom Graff had worked, and who stole over a million dollars from the companies, right under Sheppard's nose. [12/11/23 Tr. 141:17-142:142:20]. As explained in the motion, the Court erroneously sustained the government's objections to every single question on this topic. [D.E. 204 at 6].

Now, post-trial, the government maintains that its objections were well-placed, and the Court's rulings were not erroneous because, "What Mr. Fish might have done years earlier . . . had no relevance to the events at HM Management *in 2018*." [D.E. 215 at 6]. This argument fails for two reasons. First, Sheppard's lack of control before 2018 is probative of his lack of control in 2018 and beyond. Second, what's good for the goose is good for the gander. The government did not limit its questioning of Graff to the events of 2018. To the contrary—to persuade the Court to permit Graff to opine as the handwriting expert, the government elicited testimony from Graff about his familiarity with Sheppard dating back to the 1970s, and with Sheppard's companies going back to the early 2000s. [*See*, e.g., 12/06/23 PM Tr. 3:4-14; 4:6-8:23]. Graff also made blanket statements, without temporal limitation, about whether Sheppard's employees would "go rogue." [D.E. 215 at 6]. Moreover, 2018 is not even the relevant time frame. The charges in the indictment relate to events that occurred in 2020 and 2021. If the government was permitted to go back to 2018 events with Graff, the defense should have been permitted to go back to earlier events involving Scott Fish from 2016.

The relevance of the Scott Fish line of questioning is obvious. Fish, who had the same role as Jeff Vasilas at the company (but earlier in time, from 2012 through 2016) did improper and illegal things to the detriment of the companies, including theft and alteration of documents, *without Sheppard's knowledge or involvement*. Graff knew that and was the person who Fish reported to during this time, and who replaced Fish temporarily due to these thefts, but the defense was prevented from impeaching his testimony in front of the jury.[6]

Finally, the government argues that any error concerning admission of 404(b) evidence was harmless given the "overwhelming" evidence of guilt. [D.E. 215 at 7]. Clearly, the jury did not agree with that sentiment. The jury acquitted Sheppard on most counts—8 out of 14 charges. These acquittals included charges involving forgeries, where the jury believed Sheppard's testimony and the defense evidence that Sheppard was not responsible for the forgeries. The government's claim that the evidence is "overwhelming," and any error should therefore be considered "harmless," is just a poor excuse for their improper admission of evidence and for improperly blocking relevant and critical impeachment testimony.

In truth, Graff's testimony was extremely prejudicial and far from "harmless." Graff was the only government witness who (1) tied Sheppard to the 941s, through his flimsy handwriting testimony, and (2) cast doubt on the defense case concerning Jeff Vasilas. The 404(b) evidence that came in through Graff, and the defense's inability to fully cross-examine Graff demonstrating his bias, were extremely prejudicial and detrimental to Sheppard. Graff's 404(b) testimony only came in because of the government's misrepresentations about what he would say.

II. <u>Errors Related to Variance of the Superseding Indictment</u>

In the motion for new trial, the defense argued that the Court erred by admitting evidence of the Uncharged Loans, creating a variance from the Superseding Indictment. [D.E. 204 at 6]. In response, the government admits that most of the Uncharged Loans were not mentioned in the Indictment, Bill of Particulars, or the Superseding Indictment, and there was no 404(b) notice.[7]

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[6] The government continues to refer to Graff's testimony as "unimpeached." While this is partially true on some areas of testimony, where the defense was improperly prevented from questioning Graff on significant issues, it is not true overall. Graff was shown to be a tax cheat and liar. Graff was paid approximately $150,000 a year by Sheppard's companies, but only reported $15,000 per year to the Florida Department of Revenue. He had no explanation for this over one-million-dollar tax fraud that spanned several years. He admitted that he only reported $15,000 per year, on average, and that this was a *tax benefit* to him. [12/11/23 T. (Graff) 54:5-23]. Despite these admissions, the government in its response referred to this as a "baseless smear that Mr. Graff committed tax fraud." Obviously, it was not baseless as Graff admitted he benefitted from his own deception to a tune of a million dollars.

[7] This is precisely why the government's reliance on *United States v Davis*, 172 F. App'x 175 (9th Cir. 2006), is misplaced. In *Davis*, uncharged conduct <u>was</u> sufficiently noticed in a 404(b) notice. Here, there was no 404(b) filing for this evidence, and the government's position is the defense

[D.E. 215 at 7, 11].[8] Nonetheless, the government claims the Uncharged Loans are "intrinsic to the offense" such that they (1) "arose out of the same transaction or series of transactions" as the offense, (2) were "necessary to complete the story of the crime," and (3) were "inextricably intertwined with the evidence" regarding the charged offense. [D.E. 215 at 9], citing *U.S. v. Ellisor*, 522 F.3d 1255, 1269 (11th Cir. 2008).

The government does not even try to explain how the Uncharged Loans satisfy these three prongs; it cannot. Each loan was a separate transaction that stood alone. Each had its own paperwork, signatures, and supporting documentation submitted to the lenders. The Uncharged Loans spanned April 2020 through the end of 2021. This was not one single transaction or series of transactions, the Uncharged Loans were *not necessary* to complete the story, and the evidence was not "inextricably intertwined." Many of the Uncharged Loans were never even funded. Each loan was kept and tracked separately, and when the government produced documentation regarding the Uncharged Loans, each Uncharged Loan had its own distinct folder and set of documents, so it would have been very easy to limit the documentary evidence to the Charged Loans.

The government further claims the defense should not have been surprised that the Uncharged Loans became a focus at trial because *some of them* were mentioned in the original Indictment, the government produced documents in discovery about them, and the government disclosed witnesses and exhibits concerning the Uncharged Loans. [D.E. 215 at 11-12]. As to the original Indictment, the fact that it referred to some of the Uncharged Loans and then later dropped those loans from the Superseding Indictment is *precisely why* Sheppard was surprised they became a focus of the trial for the prosecution. Their intentional omission from the charges in the Superseding Indictment was a clear message otherwise.

While it is true that the government produced thousands of pages of records in discovery, it is also true that many of the documents produced in discovery were not used or mentioned during the proceedings. And much of the discovery was produced *before* the government superseded and seemingly narrowed its case to the Charged Loans.

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should have known the Uncharged Loans would become a feature of the case some way other than a 404 notice. This is burden shifting.

[8] The exceptions to this are three funded loans—one PPP and two EIDL loans—which were charged in the original Indictment but were later dropped in the Superseding Indictment, as explained in the motion for new trial. [D.E. 204 at 7].

The government argues that "notice" of these loans was given in its witness and exhibit list, and suggests Sheppard *waived his right* to challenge admission of this evidence at trial because he did not challenge it pre-trial. This argument is without merit. Many of the witnesses and documents served multiple purposes. For example, the government points out that it included witnesses from PayPal and the SBA on its witness list. But both PayPal and the SBA had Charged Loans in addition to those Uncharged Loans that became an improper and prejudicial focus of the case. Clearly, Sheppard did not waive his right to challenge the admission of this uncharged conduct, as the defense objected to it at trial. The government has no valid reason for the lack of notice for evidence that became a focus of the case. The fact it may have been included in broad discovery dumps totaling thousands of pages is not an excuse for the government's failure to properly notice it as 404(b) evidence.

In sum, the government's broad claim that "all of the loan applications were inextricably intertwined with evidence about the loans that were specifically mentioned in the Superseding Indictment, and they were related to each other factually and in time," [D.E. 215 at 10], is false. *Inextricably intertwined* seems to be the government's fallback position for everything, such that the outer bound of relevant evidence is limitless. But many of the Uncharged Loans were not funded, were submitted on behalf of different companies (with different EINs) also not named in the Superseding Indictment, and were not related to each other factually, as explained in the motion. The fact that they happened within the same general timeframe does not render them inextricably intertwined—indeed, these programs were only available during a relatively short time frame. The government's justification for failing to include the Uncharged Loans in a 404(b) does not pass muster—especially because they became a focus of the trial.

III. <u>Errors Related to Dismissal Of Juror No. 3 Over Defense Objections</u>

The Court may excuse a juror and replace him or her with an alternate if, prior to the time the jury retires to consider its verdict, the juror becomes, or is found to be, "unable or disqualified" to perform his duties. Fed.R.Crim.P. 24(c). The decision to remove a juror is left to the discretion of the Court when there are facts present which convince the Court that the juror's ability to perform is impaired. *U.S. v. Smith*, 550 F.2d 277, 285 (5th Cir. 1977). The government argues in its response brief that the excusal of Juror No. 3 was like the exclusion of the juror at issue in *U.S. v. Fajardo*, 787 F.2d 1523, 1525 (11th Cir. 1986). In *Fajardo*, the juror at issue was sick (or having sinus trouble) and was *constantly distracting the other jurors* by repeatedly gagging, sniffling, snorting, blowing his nose, and wiping his nose on his sleeve. *Id.* The court noted:

> [The juror was] not only blowing his nose, but very loudly snorting at regular intervals of about every minute and a half. Every time he'd do that, all the jurors would sort of shutter and cringe, and they obviously were not paying attention, because everytime [sic] he did that, the other jurors would either lean forward or lean back or lean away from him, and obviously they could not pay attention to what was going on while that was happening. He was disrupting the other jurors' attention, obviously. In addition, he would very visibly take his hand and wipe his nose or wipe it on his sleeve, which obviously was again disruptive of the other jurors and the trial in general. I don't think there's any doubt in my mind that Mr. Norris should have been excused, not only for his own health reasons, but also for the disrupting effect it had on the trial.

Id. at 1526.

Fajardo is inapt. Juror No. 3 was not sick and was not disrupting his fellow jurors.[9] Rather, his wife was sick and the only impact it may have had was on the trial court's schedule, which was already very much up in the air. In fact, the Court originally agreed this was not good cause to excuse him:

> THE COURT: All right. I am not willing to excuse this juror, who has not asked to be excused. He's asked to be accommodated . . . And *with regard to the Government's bare claim* that this juror is overwhelmed *and distracted by his wife's medical condition*, I am certainly willing to bring this juror out and to ensure that that is not an issue in this case with regard to his attention and focus on the trial.

[12/11/23 T. 4:13-19] (emphasis added). The Court then brought Juror No. 3 into the courtroom to be questioned on the record. Juror No. 3 advised that he could focus on the evidence without distraction. The Court kept him on the panel. Indeed, to that point, it appeared that Juror No. 3 paid as much or more attention to the evidence than the other jurors. The next day, Juror No. 3 informed the Court that his wife needed surgery and there may be partial trial days he would need off for

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[9] The government claims in its response that Juror No. 3's "ability to serve" was impaired by his wife's medical condition. [D.E. 215 at 15]. This is not supported by the record, as explained herein and in the motion. The Court dismissed the government's position as a "bare claim" without support- and yet they restated it in their response brief as if were a reason the juror was excused. (*Id.*) The only impact was on the trial schedule.

appointments. Again, this juror was not asking to be excused and never said he could not focus. All he said was he needed time off to attend his wife's appointments.[10]

When another Juror No. 12 had a comparable situation and advised she needed to attend the out-of-town trial of her sister's killer for an unknown number of days, the Court and the government agreed to adjourn the trial during that time.[11] What is notable is that the government never challenged Juror No. 12 over her availability, which further underscores the impropriety of Juror No. 3's excusal. What was also clear by this time was that Juror No. 3's background as a CEO of a construction company was extremely important (particularly to the Sheppard) given the ongoing construction at Alafaya Trails Shopping Center, which was a focus in the evidence of the case.[12] Simply put, the government seized the opportunity to bounce a juror in the middle of trial whom it regretted seating in the first place.

Critically, it was already apparent at the time of Juror No. 3's dismissal that the trial was going to be adjourned for three weeks and reset until at least January 6, 2024. Surely, in the weeks off that followed, Juror No. 3 could have arranged his personal situation so that it did not interfere with the trial. But he was never given the chance to explain that or be questioned about it on the record. Instead, he was excused. The government likening this situation to that in *Fajardo* is misplaced.

Nothing significant changed from the day before when the Court correctly stated, on the record, that this juror was not asking to be excused, was paying attention, and he should not be excused, except the government urging the Court to remove him. Respectfully, the result of these two similar juror situations, which both impacted the trial schedule, were inconsistent.

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[10] When he was selected as a juror, all parties were aware of his wife's illness, which he had been living with and tending to for some time.

[11] While this juror never ended up needing the time off, the government's disparate treatment of this juror and Juror No. 3 is obvious. The government stated Juror No. 3 should be excused because it was entitled to make a cogent presentation of evidence and it was being disrupted by adjournments. No such argument was advanced regarding this other juror.

[12] Earlier in the trial, this juror requested a day to complete his payroll and taxes—issues which dominated this trial. To the extent the Court does not find that the record supports a finding of prejudice in excusing this juror, the defense requests leave to interview the juror regarding these issues.

IV. Errors Related to Evidence of Uncharged Tax Violations and "Bad Character"

In the motion for new trial, the defense argued that the Court allowed impermissible testimony concerning alleged tax violations and bad character evidence. [D.E. 204 at 9]. The government's response concerning the testimony of its IRS expert is disingenuous and ignores the record. [D.E. 215 at 15]. For example, the government claims the IRS expert never gave an "opinion" that Sheppard violated any tax laws. [*Id.*] This is simply not true. Whether in the form of an "opinion" or merely other testimony, the expert repeatedly went beyond the expert witness disclosure filed by the government, as noted in the motion. [D.E. 204 at 9]. In particular, the IRS expert spent substantial time testifying about allegedly unpaid taxes and IRS penalties. Sheppard as a purported "tax violator" was a dominant theme of the testimony, and the examples discussed at length at trial had nothing to do with the allegations in this case.[13]

Where the impropriety of the testimony was glaring—such as how Sheppard allegedly did not file tax returns going all the way back to 2018[14]—the government compares that testimony to the testimony of Sheppard's expert, [D.E. 215 at 16]. There is no comparison. The defense expert had to talk about earlier periods of time to defend against allegations that Sheppard used the loan funds for personal expenses. Moreover, that testimony came long *after* the testimony of the government's IRS expert.

Next, the government argues that since Sheppard argued he paid workers during COVID, it was free to elicit that some workers claimed they were still owed money. [D.E. 215 at 17]. One has nothing to do with the other. Sheppard never claimed every worker was paid every dime he or

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[13] The government claims Sheppard's personal returns were relevant because Sheppard supposedly "bragged" about his wealth during trial. But it was the government that began the assault on Sheppard's wealth in its opening statement, and continuing throughout trial, such as showing photographs of Sheppard's house and scrutinizing his jewelry expenditures, forcing the defense to address the government's improper emotional appeals to the jury. From the beginning of trial, the government painted Sheppard as a greedy, rich, real estate tycoon, even though personal wealth was irrelevant under the PPP loan program. As for the defense, Sheppard never claimed to be wealthy. Instead, he testified that, if necessary, he would have found other means of getting money to fund the projects in Orlando, which could have been anything, not necessarily independent personal wealth. This is a far cry from "bragging" about being wealthy.

[14] Again, when the government sought information from its IRS Agent about the state of Sheppard's taxes *in 2018*—over objection as irrelevant and bad character evidence—the Court permitted such evidence. It is difficult to reconcile the government objecting to the 404(b) impeachment of Graff, on grounds it was too remote in time and irrelevant, and the Court's inconsistent rulings on this critical issue.

she may have claimed to be entitled. Sheppard never claimed that paying these people during COVID was evidence of good character. Sheppard's position was he used the COVID loan proceeds to pay workers, which he did. The government never once disputed that the payments Sheppard claimed were made, *were made*.

Finally, the government says that outstanding payments to workers were a "bias issue that . . . the jury should be aware of." [*Id.*] Considering that most of the testimony about outstanding payments was elicited by the government from its own witnesses on direct examination, this is an incredible argument. The government cannot open the door for itself. Demonstration of bias by government witnesses should have been left for the defense, on cross-examination, in a manner the defense thought was appropriate and not prejudicial. This is especially true, considering the government objected to, and successfully blocked, significant cross-examination by the defense, as discussed throughout the motion and this reply.

V. <u>Errors Related to Denial of Re-Cross Examination</u>

The government failed to respond to the examples given by the defense in the underlying motion. [D.E. 204 at 11]. The government's re-direct improperly raised new issues never asked about on direct, to establish that tax returns were required and reviewed by PayPal and Cross River Bank. This was not a situation where re-cross would have been "repetitive" or "cumulative" as the government now claims. [D.E. 215 at 19]. This was a situation that the defense was entitled to re-cross in order to have an opportunity to challenge false and misleading testimony put forth by the government for the first time on re-direct.

The government tries to shift the blame for its improper re-direct to the defense, claiming, "[Defense] counsel did not take yes for an answer from [PayPal] that the partnership's 1065 tax return was required." [D.E. 215 at 18]. Luckily for Sheppard, that is *true*. Defense counsel did not accept PayPal's baseless testimony that the 1065 tax return was required. The defense proved on cross-examination that the PayPal witness was unabashedly speculating and being untruthful. It was not until *re-direct* that the government first claimed the applicant was a partnership and treated as such—*which is false*—and misled the PayPal witness into giving favorable testimony for the prosecution. The Court prevented the defense from showing the jury with re-cross examination that PayPal's re-direct testimony was more speculation and untruths.

VI. Prosecutorial Misconduct During Trial and Closing Argument

As shown in the motion for new trial, which cited several examples, the government committed prosecutorial misconduct during its closing argument. [D.E. 204 at 13-15]. The government's response addresses those examples.

With respect to the government's misconduct in referencing the 404(b) evidence for propensity purposes in rebuttal closing, the government claims it was to show lack of "mistake." [D.E. 215 at 21]. While the prosecutor may have recited the word "mistake," the intended message to the jury was abundantly clear: *We showed you he did it once, and here he is, doing it again.* [D.E. 204 at 13]. Mislabeling propensity evidence as evidence of "mistake"—particularly in the context of what the prosecutor argued in closing (i.e., that the government proved Sheppard had forged before and therefore would again)—does not fix the problem or assuage the prejudice to Sheppard. *See United States v. Baker*, 432 F.3d 1189, 1205 (11th Cir. 2005) (recognizing that extrinsic evidence is inherently prejudicial to a defendant; it may cause the jury to convict not for the charged offense, but for the extrinsic offense; or it may lead the jury to conclude that the defendant is likely to repeat conduct; and "[e]ither inference may be inimical to the long-standing rule that propensity to commit crimes should not be the basis of a conviction").

With respect to the government's misleading statements concerning Jeanette Gonzalez, [D.E. 204 at 13], the government denies that intention and claims evidentiary support for its statements. While it is true Graff identified what he *believed* was one instance of her true signature, [D.E. 215 at 22], there was never any evidentiary basis established for that testimony. Moreover, as the Court heard during a mid-trial proffer, the government immunized Jeanette Gonzalez. If it wanted her signature identified, it should have called her. Importantly, it was improper and prejudicial for the prosecutors to tell the jury in closing argument that *any* document contained Ms. Gonzalez's *forged* signature, [e.g., D.E. 215 at 22 concerning "Resolution and Certification"], when Ms. Gonzalez never testified as to any forgery.[15] Even if a signature does not appear to match her purported "real signature," she could have authorized her signature to be written by someone else or could have provided her signature electronically.

As to the government's claim in closing that Graff identified "*each and every one* of these false 941s," [D.E. 204 at 15], the government does not address in its response brief the 940s and

[15] Note, the government gave Ms. Gonzalez immunity, but she apparently did not corroborate the theory of prosecution.

941s which Graff *was not even shown*, such as Gov't Trial Exhibits 20-8 and 20-9. This statement to the jury was false and misleading. When the AUSA is misstating the evidence in closing, it is highly unlikely to be "harmless." *See* e.g., *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995). Notably, as to the harm and prejudice this caused—the jury found Sheppard guilty on two counts in which the evidence included the 940s and 941s and not guilty on most other charges.

Moreover, throughout the trial, starting with its opening statement, the government repeatedly implied that Sheppard did something wrong by commingling the loan proceeds with other funds in his companies' accounts. Whether the government used the word *commingled* is unimportant, as "pointing out to the jury that the PPP and EIDL funds were deposited into business accounts that the defendant used interchangeably for business and personal expenses," [D.E. 215 at 23], is raising the commingling issue and telling the jury that it was improper and wrong. The government repeatedly reminded the jury that Sheppard's home mortgage, kids' tuition, and a bracelet, among other items, were all paid for out of the same bank accounts where the funded loans were deposited. But every government witness testified there was absolutely nothing wrong with the commingling of the funds. In fact, many testified that it was expected. The testimony from Sheppard's expert, Scott Bouchner, was unrebutted and unchallenged that there were more than enough non-government loan funds in the accounts to cover *all* personal expenses.

As to the remainder of the prosecutorial misconduct arguments advanced in the motion, the government does nothing more than claim its actions were not improper and any error was harmless given the evidence of guilt. As discussed above, the government is hard pressed to prove overwhelming evidence of guilt permitting harmless error where Sheppard was acquitted of most counts and the jury claimed deadlock after only a few hours deliberating. Indeed, there was *not* overwhelming evidence of guilt, and there is no basis in the record to justify the many blatant acts of misconduct. What is clear in the government's silence as to the many accusations, is the cumulative effect of all the issues raised herein dictate that the convictions be reversed. *See Baker v. U.S.,* 482 F.3d 1189 (11th Cir. 2005) (finding reversal appropriate where the cumulative effect of the errors is prejudicial, even if the prejudice caused by each individual error was harmless) *citing U.S. v. Blasco*, 702 F.2d 1315, 1329 (11th Cir.1983) ("A piecemeal review of each incident does not end our inquiry. We must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under our Constitution.").

CONCLUSION

For the reasons set forth herein, Defendant Eric Sheppard respectfully requests that this Court either (1) dismiss the charges for which he was found guilty, or (2) grant him a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

Dated: March 13, 2024.

Respectfully submitted,

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Florida Bar No. 320382
Jonathan Etra
Florida Bar No. 686905
Christopher Cavallo
Florida Bar No. 0092305

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 13, 2024, the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

By: /s/ Jayne C. Weintraub
Jayne C. Weintraub