UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM

UNITED STATES OF AMERICA,

vs.

ERIC DEAN SHEPPARD,

Defendant.
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SHEPPARD'S REPLY IN SUPPORT OF
[DE 240] PROVISIONAL MOTION FOR RELEASE PENDING APPEAL,
OR IN THE ALTERNATIVE, FOR SELF-SURRENDER

Defendant Eric Dean Sheppard has been released on bond for two years during the pendency of these proceedings without incident. Despite Sheppard's demonstrated history of compliance with conditions of release, the government asks this Court to deny him bond pending appeal. *See* DE 245. It offers only two arguments, both of which lack merit. First, the government halfheartedly suggests that Sheppard is a flight risk because he faces a lengthy prison sentence, ignoring the many factors showing otherwise—not only his compliance to date, but also his deep roots in the jurisdiction. Second, the government contends that Sheppard's appeal will not present substantial questions of law; briefing and argument on Sheppard's pending post-trial motions show otherwise.

At a minimum, the Court should allow Sheppard to self-surrender. The government offers no real argument in opposition to this modest request.

ARGUMENT

I. THE COURT SHOULD RELEASE SHEPPARD PENDING APPEAL

Section 3143(b) requires this Court to release Sheppard on bond if it finds: (1) by clear and convincing evidence that he is not a flight risk or danger to the community; (2) that his appeal is not for purposes of delay; and (3) the appeal raises a substantial question that (4) would result in reversal or a more favorable sentence if Sheppard prevails. 18 U.S.C. § 3143(b). The government does not argue that Sheppard is a danger to the community. Nor does it separately contest elements (2) and (4). *See* DE 245 at 3, 7-8 (acknowledging that if Sheppard prevails on appeal "his sentence will result in zero jail time"). The government's arguments that Sheppard is a flight risk and that his appeal will not raise substantial questions are meritless.

A. Sheppard Is Not a Flight Risk

The government acknowledges that its "main reason for opposing" bond is not its belief that Sheppard is a flight risk. DE 245 at 2. Indeed, the government stops short of arguing that Sheppard actually *is* a flight risk, observing only that Sheppard has an "incentive to flee" because he "is facing a lengthy prison sentence." That observation does not justify imprisoning Sheppard during his appeal for several reasons.[1]

[1] Taken at face value, the government's argument would seem to suggest that any defendant facing seven or more years in prison would be a flight risk and thus ineligible for bond. But if Congress wanted to deny bond pending appeal to defendants facing significant sentences, it would have said so. Instead, it enacted Section 3143(b), which allows the Court to focus on case specific factors, like Sheppard's history of compliance with conditions of release and many ties to the jurisdiction.

To start, Sheppard had the same basic "incentive to flee" the moment he was convicted of four counts of wire fraud and two counts of aggravated identity theft. But this Court allowed Sheppard to remain on bond (which requires a finding by clear and convincing evidence that he was not likely to flee, 18 U.S.C. § 3143(a)(1)). Since then, Sheppard has complied with all conditions of release, including after probation calculated a 57-71 month prison term and the government suggested even longer. There is nothing to suggest Sheppard would act any differently on appeal. His history of compliance with conditions of release while staring down a lengthy prison sentence is compelling evidence that he will comply with conditions of release while appealing a lengthy prison sentence (if one were imposed).

The government also ignores Sheppard's many ties to the jurisdiction. The government notes that Sheppard does not have children living at his home, DE 245 at 2, but the government is mistaken. As the Probation Office has confirmed, Sheppard has a 15-year-old son who resides at home with Sheppard and his wife, PSR at para. 88, and attends high school in this community. He also has a college-age daughter with a serious medical condition. *Id.* Moreover, his children are not the only anchors: Sheppard has other family members and numerous friends who submitted letters of support. *See* DE 247 (motion to seal), 248 (letters filed under seal). For his part, Sheppard is a cancer survivor with regular appointments with his doctors in South Florida, and he has substantial community and business interests in this jurisdiction.

Finally, the government notes that Sheppard has "more financial resources than most defendants." DE 245 at 2. The government's suggestion appears to be that wealthy defendants are a greater flight risk than poor defendants. That is a dubious proposition, and the government cites nothing in support. (If a defendant were poor, the government would cynically argue that the defendant has little to lose by fleeing.) But the Court need not engage in class-based speculation to reject the government's argument. Sheppard has committed substantial financial resources to continue litigating his case, retaining additional counsel versed in this area of the law. At every stage, Sheppard has proven himself a defendant committed to the legal process, not a risk of flight.

B. Sheppard's Appeal Will Raise Substantial Questions

The government rests its case for imprisonment pending appeal on the absence of substantial questions. But it starts by attacking a strawman. The government asserts that "[j]ust because" the law is in flux does not mean a particular conviction will present a substantial question on appeal. DE 245 at 4. That is probably right. But it's not Sheppard's argument. Sheppard does not argue that "the existence of new case law in the areas of wire fraud and aggravated identity theft" necessarily means that his appeal will present a substantial question. *Id*. at 5. Rather, Sheppard's argument is that his convictions are doubtful (if not clearly incorrect) under the legal principles articulated in those cases.

Take Sheppard's aggravated identity theft convictions. *Dubin v. United States*, 599 U.S. 110 (2023), holds that the defendant's use of someone's means of identification must be at the crux of what makes his underlying conduct criminal. The parties dispute what that legal test means and how it applies to this case. The government takes the view that any conduct that lends credibility to a fraud must be at the crux of the fraud. Sheppard reads *Dubin* differently. In Sheppard's view, *Dubin* requires the Court to ask whether a "key mover" in Sheppard's wire fraud was his use of Cupersmith's identity—whether Cupersmith's identity played a "central role" in the fraud. *Dubin*, 599 U.S. at 122-23. In the words of *United States v. Gladden*, 748 F.4th 1232 (11th Cir. 2023), whether Sheppard's use of Cupersmith's identity "directly enabled" him to obtain PPP loans to which he was not entitled. *Id*. at 1245-46. Those questions answer themselves.

As the government admits, the wire fraud here centered on the provision of "materially false information about his businesses, wages and revenues." DE 245 at 7. On the government's (contested) view of the evidence, Sheppard's use of Cupersmith's identity might have "facilitated" that fraud by making it more likely to succeed or even may have been the "but-for cause of its 'success.'" *Dubin*, 599 U.S. at 131 ("facilitation" or but-for cause not enough). But it was not a "key mover" in the fraud, did not play a "central role" in the fraud, and did not "directly enable" Sheppard to obtain the PPP loans. The important point here, however, is not that Sheppard's reading of *Dubin* and *Gladden* is correct (it is); but rather that the Eleventh Circuit could agree with Sheppard.

The same is true for Sheppard's wire fraud convictions. The government contends that *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), is factually distinguishable, but Sheppard has never argued that this case is on all fours with *Takhalov* factually. Instead, Sheppard argues that he is innocent of wire fraud under the *legal* rule *Takhalov* articulated—namely, that a defendant is innocent of wire fraud where the alleged victim gets everything it bargained for. The government suggests that the lending banks did not get everything they bargained for because part of the "bargain" financially was a borrower who was eligible to participate in PPP. DE 245 at 6. But it has never cited any evidence supporting that theory nor has it offered a cogent explanation for why that would be the case—after all, the banks were financially indifferent to Sheppard's businesses' eligibility to participate in PPP because the banks got processing fees and interest regardless, and they would have loaned the same money to someone else on the *same terms* if they had not loaned it to Sheppard.

The government claims that *United States v. Watkins*, 42 F.4th 1278 (11th Cir. 2022), supports its position, but *Watkins* is clearly distinguishable, as Sheppard has explained in opposition to the government's notice of supplemental authority. *See*

DE 230.[2] In the commercial context, lenders have a financial (i.e., property) interest "in knowing to whom they are loaning money and for what purpose." *Watkins*, 42 F.4th at 1286. Not so here. The banks had no financial (i.e., property) interest in knowing, for example, whether workers paid by Sheppard's companies were technically "employees" who earned "W2" wages or were instead "independent contractors," because the banks stood to gain financially from lending to Sheppard and would have lent on the same terms to someone else if not to him. Not all "loan context[s]" are the same. DE 245 at 6. While the government proclaims that "[o]f course" Sheppard's representations "went to the nature of the bargain," DE 245 at 6, on these facts, the Eleventh Circuit easily could disagree, which is all that matters for purposes of this motion.

II. IN THE ALTERNATIVE, THIS COURT SHOULD ALLOW SHEPPARD TO SELF-SURRENDER

If this Court is disinclined to allow Sheppard to remain out-of custody—but under the Probation Office's supervision—all the way through the appeal, Sheppard requests that this Court at least allow him to self-surrender. The government offers no real argument in opposition, other than to cross-reference its suggestion that Sheppard is not a flight risk because he faces a lengthy prison sentence. *See* DE 245 at 8. The government's argument is even weaker here. There is no basis to conclude that Sheppard would flee during the few weeks it would take for the Eleventh Circuit to consider whether to allow him to remain under the Probation Office's supervision (rather than in custody) pending appeal, all while the Bureau of Prisons designates Sheppard to the facility where he would serve any sentence imposed by the Court.

[2] The government cited *Watkins* in its notice of supplemental authority but failed to explain the significance of that decision. *See* DE 228. Having now belatedly availed itself of that opportunity, it is clear *Watkins* is inapposite.

And there are practical reasons to allow Shepard to self-surrender, including a reduction in expenses that will ultimately be borne by the taxpayers.

Respectfully submitted,

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