UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM

UNITED STATES OF AMERICA,

vs.

ERIC DEAN SHEPPARD,

Defendant.
_________________________________/

SHEPPARD'S MOTION TO CONTINUE (BIFURCATE) JUST THE RESTITUTION AND FORFEITURE HEARINGS OR, IN THE ALTERNATIVE, TO CONTINUE SENTENCING

On January 16, 2024, a jury returned its mixed verdict, finding defendant Eric Sheppard ("Sheppard") guilty of counts 5, 7, 8, 9, 13 and 14, and not guilty of the remaining counts. DE#190. The Court initially set sentencing for April 5, 2024, DE#191, then continued the date twice, until June 7, 2024. DE#211, 231.

The Probation Department filed the initial Presentence Report on April 3, 2024, noting that:

> As of disclosure of this presentence investigation report, the government advised they are working on obtaining the precise amount of restitution owed to the victims. Accordingly, pursuant to 18 U.S.C. § 3664(d)(5), if the victims' losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the government or the probation officer shall inform the Court, and the Court shall set a date for the final determination of victims' losses, not to exceed 90 days after sentencing.

DE#226 at 18. As of 10 days prior to the scheduled June 7, 2024, sentencing date (i.e., May 28, 2024), neither the government nor the Probation Department had provided Sheppard with proposed restitution calculations.

On May 30, 2024, government counsel notified Sheppard that the government would be seeking restitution for "the attorney's fees ($131,550.44) and the cost to Mr. Cupersmith of time spent preparing for the trial testimony and the trial testimony ($93,350)." Then, on June 3, 2024, government counsel provided "a summary along with exhibits relating to the restitution that the US is seeking for the SBA [totaling $654,066.88], not[ing] that for the NorthEast and CrossRiver loans [which Sheppard already paid back], [the government is] only using the PPP loan processing fee number [$14,849.40]."

Also on June 3, 2024, the government filed a motion for preliminary order of forfeiture seeking "a forfeiture money judgment in the amount of $893,575" pursuant 18 U.S.C. § **981(a)(1)(C)**. DE#252 at 1. The Court ordered an expedited response, due June 6, 2024. DE#254. Today, the government filed an amended motion for forfeiture seeking the same amount, but also invoking, for the first time, 18 U.S.C. § **982(a)(2)(A)**, DE#255 at 1, arguing that "although a reference to section 982(a)(2)(A) was mistakenly left off the Indictment and Superseding Indictment, the Court may still use section **982(a)(2)(A)** as a basis for forfeiture against the Defendant." *Id.* at 2 n.2. The Court then denied as moot the original motion [DE#252] for forfeiture of property. *See* DE#256.

Significantly, these forfeiture motions were filed four-plus months after the verdict, two months after disclosure of the PSR and one month after the government filed its objections [DE#235] to the PSR. Until the week of sentencing, the government did not ask the Court to enter any forfeiture orders. Yet, the Federal Rules of Criminal Procedure provide that:

> As soon as practical after a verdict or finding of guilty … on any count in an indictment or information ***regarding which criminal forfeiture is sought***, the court must determine what property is subject to forfeiture under the applicable statute…. If the government seeks a personal money

> judgment, the court must determine the amount of money that the defendant will be ordered to pay.

Fed. R. Crim. P. Rule 32.2(b)(1)(A) (emphasis added).

The legal issues implicated by the government's recent submissions are complex, particularly given its effort to obtain restitution and/or forfeiture (on a different statutory theory than charged in the superseding indictment)—including for loans already repaid, loans that were the subject of acquitted counts, and loans that were not charged at all. *See, e.g.*, *Appellate Brief filed in United States v. Tardon*, 11 Cir. No. 12-151140 (brief filed May 28, 2024); *Appellate Brief filed in United States v. Javat,* 11 Cir. No. 20-11137 (oral argument heard on January 30, 2024); *Petition for Writ of Certiorari filed in Waked v. United States,* 20-1370, 142 S. Ct. 72 (2021) (cert. denied). The time available between the government's submissions and the June 7, 2024, sentencing is insufficient to thoroughly research and brief the legal issues and investigate / respond to the factual claims advanced by the government in its quest to impose hundreds of thousands of dollars in financial penalties. *See* 18 U.S.C. § 3664(d)(5) ("If the victim's losses are not ascertainable by the date that is 10 days prior to sentencing, the attorney for the Government or the probation officer shall so inform the court, and the court shall set a date for the final determination of the victim's losses, not to exceed 90 days after sentencing."); Fed. R. Crim. P. 32.2(b)(2)(B) ("Unless doing so is impractical, the court must enter the preliminary order sufficiently *in advance of sentencing* to allow the parties to suggest revisions or modifications before the order becomes final as to the defendant under Rule 32.2(b)(4).") (emphasis added).

Accordingly, Sheppard asks the Court to continue (*i.e.*, bifurcate) just the restitution and forfeiture hearings to allow him the usual 14 days to respond to the government's submissions and set a date in the future for the court to determine restitution and forfeiture; or alternatively, to continue the June 7, 2024, sentencing hearing altogether and consolidate all of these issues into a single proceeding at a later date convenient for the Court.

Undersigned consulted with government counsel who advised that the government opposes a request to continue the sentencing and opposes a request to continue any portion of the sentencing, including restitution and forfeiture.

Respectfully submitted,

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