UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM

UNITED STATES OF AMERICA,

vs.

ERIC DEAN SHEPPARD,

Defendant.
______________________________/

DEFENDANT ERIC DEAN SHEPPARD'S RENEWED MOTION FOR BOND PENDING APPEAL

Defendant Eric Dean Sheppard renews his motion for bond pending appeal under 18 U.S.C. § 3143 based on two important developments postdating this Court's initial denial of bond.

First, on June 17, the Supreme Court granted certiorari to decide whether fraudulent inducement is a valid theory of wire fraud. *See Kousisis v. United States*, No. 23-909, __ S. Ct. __, 2024 WL 3014475 (U.S. June 17, 2024). This Court sustained Sheppard's wire fraud convictions on a fraudulent inducement theory. The Court held that Sheppard was guilty of wire fraud for fraudulently inducing two banks to extend Paycheck Protection Program ("PPP") loans, rejecting Sheppard's argument that fraudulent inducement alone, in the absence of actual or "potential financial harm," [D.E. 251 at 29 (quotations omitted)], cannot ground a conviction for wire fraud. That issue will be resolved by *Kousisis*. And the Supreme Court's grant of certiorari shows that Sheppard's arguments on appeal are substantial.

Second, the Court erred in calculating "intended loss" when determining Sheppard's Guidelines range. In 2015, the Sentencing Commission amended the Guidelines to make clear that "intended loss" turns on a defendant's "subjective" intent. *See* U.S.S.G. Supp. to App. C, Amend. 792 (2015). In doing so, the Commission approved two loan-fraud cases in which the courts held that the critical question is whether the defendant intended to repay the loan. *United States v. Confredo*, 528 F.3d 143, 152 (2d Cir. 2008); *United States v. Sanders*, 343 F.3d 511, 527 (5th Cir. 2003). Eleventh Circuit case law post-dating the 2015 Amendment is in accord. *See United States v. Ridling*, 2022 WL 4137723, at *3 (11th Cir. Sept. 13, 2022) (rejecting recklessness "mental state" as insufficient for purposeful intended loss in loan-fraud case (quotations omitted)).

Here, the Court's "intended loss" calculation was based in relevant part on the face value of two PPP loans totaling approximately $300,000. The government did not argue—and the Court did not find—that Sheppard *subjectively* intended to abscond with the money. (In fact, the government invoked language and case law that was expressly rejected by the Sentencing Commission when it amended the Guidelines in 2015.) And all the evidence in this case shows that Sheppard intended to pay those two loans back, which he in fact did. Because the government did not carry its burden to prove that Sheppard subjectively intended not to pay back the loans, those loans should not have been included in the Court's "intended loss" calculation. Removing those loans from the "intended loss" loss calculation has a significant impact on Sheppard's Guidelines range. It reduces his Offense Level by four levels, yielding a Guidelines range of 12-18 months (compared to the 24-30 month range this Court calculated).

If the Court does not grant bond pending appeal, Sheppard's ability to appeal this sentencing error will be destroyed. Sheppard is likely to serve his whole sentence during appeal, meaning the Eleventh Circuit will have no ability to grant effective relief—especially given that the Eleventh Circuit is likely to wait for the Supreme Court's instructions in *Kousisis*. And today, the government filed a notice of appeal [D.E. 271], meaning the appellate process is likely to take even longer. Because all of the Section 3143 factors are satisfied, Sheppard should be granted bond.

ARGUMENT

18 U.S.C. § 3143(b)(1) and (2) require the Court to release a defendant on bond pending appeal if four conditions are met: (i) the defendant is not a flight risk or danger to the community; (ii) the appeal is not for the purpose of delay; and

(iii) the appeal raises a substantial question of law or fact that (iv) is likely to result in reversal or a more favorable sentence. The Court has already held that Sheppard is not a flight risk or danger to the community. And in light of new developments—the Supreme Court's grant of certiorari in *Kousisis* and the Court's "intended loss" calculation at sentencing—the Court should now find that the remaining factors are satisfied. If the Court denies bond, Sheppard may be forced to spend time in prison he is not obligated to serve or lose his ability to secure effective relief altogether.

A. Sheppard's Wire Fraud Conviction Presents A Substantial Question

1. The Supreme Court's grant of certiorari in *Kousisis* shows that Sheppard's appeal of his wire fraud convictions will present a substantial question. In *Kousisis*, the Supreme Court will decide whether fraudulent inducement constitutes a valid theory of wire fraud—as framed in the petition, "[w]hether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme." Pet. for Cert. at i, *Kousisis v. United States* (No. 23-909). That same question will determine the validity of Sheppard's convictions.

In *United States v. Kousisis*, 82 F.4th 230 (3d Cir. 2023), the defendants were convicted of wire fraud for fraudulently inducing the Pennsylvania Department of Transportation ("PennDOT") to issue government contracts meant to benefit disadvantaged businesses ("DBEs"). *Id*. at 233-34. The defendants obtained the contracts in part by certifying that they would and did buy millions of dollars of paint supplies from a DBE. *Id*. at 234-35. The defendants argued that they did not commit wire fraud because they "fully discharged" their obligations under the contracts—PennDOT, the defendants argued, suffered no financial harm because it "received the repairs it paid for." *Id*. at 236, 240. The Third Circuit rejected the argument and sustained the defendants' convictions. It held that "DBE participation was an essential component of the contract," and that "[w]ithout it, the nature of the Parties' bargain would have been different." *Id*. at 241. Thus, the Third Circuit held, the defendants were guilty of wire fraud notwithstanding the fact that their scheme was not designed to cause PennDOT financial or economic harm.

This Court upheld Sheppard's conviction on a similar theory. The Court rejected Sheppard's argument "that the banks received the value of their bargain and even stood to gain financially by making the loans," concluding that his "misrepresentation as to his businesses' eligibility for loans affected the banks' understanding of the nature of the bargain." [D.E. 251 at 30.] Just as PennDOT had an interest in knowing whether it was contracting with a company using a DBE, this Court held that the lending banks had an "interest" in knowing whether PPP borrowers were in fact eligible under the program. [*Id*. at 30-31 (quoting *United States v. Watkins*, 42 F.4th 1278, 1286-87 (11th Cir. 2022)).]

In reaching that conclusion, the Court held that it was irrelevant whether the banks "faced potential financial harm" from Sheppard's scheme. [D.E. 251 at 29 (quotations omitted).] In other words, the Court sustained Sheppard's conviction on a theory of fraudulent inducement: Sheppard was guilty of wire fraud for fraudulently inducing the banks to enter into the loan agreements, regardless of whether the banks were harmed financially. The Supreme Court's forthcoming decision in *Kousisis* will almost certainly determine the viability of that theory. And its grant of certiorari shows that the issue is substantial. After all, the Supreme Court does not grant certiorari to resolve insubstantial issues. *Cf. United States v. White*, 2020 WL 4548226, at *4 (S.D. Fla. Aug. 6, 2020) (Bloom, J.) (according "significant weight" to Eleventh Circuit's grant of oral argument in concluding that a question was substantial).

2. Even setting aside *Kousisis*, the Court's previous denial of bond merits reconsideration. The Court concluded that Sheppard's arguments for acquittal were "foreclosed" by the Eleventh Circuit's decision in *Watkins*. [D.E. 251 at 42-43.] With respect, that conclusion is at least debatable. In *Watkins*, the defendant instructed his friend to apply for commercial loans on his own (the friend's) behalf

while concealing from the bank that the defendant was "the true recipient of the loan." 42 F.4th at 1286. The defendant argued that he did not commit bank fraud "because no misrepresentations were made as to the requested loan amount or the terms of the agreement." *Id.* The Eleventh Circuit rejected that argument as "nonsensical." *Id.* In the ***commercial loan*** context, a bank obviously has a financial "interest in knowing to whom they are loaning money and for what purpose." *Id.* That information affects the nature of the bank's bargain—i.e., the financial risk the bank is incurring and what it must receive in return. Banks charge one borrower a higher interest rate than another based on the borrowers' credit or require more or a different type of collateral. The same is true of the loan's intended purpose. The identity of the borrower and purpose of a commercial loan are essential elements of a bank's bargain because they determine the likelihood of repayment and thus the "price" (interest rate, collateral, etc.) the bank is willing to pay.

But the PPP loan context is very different. Sheppard's PPP eligibility did not affect the "price" the banks were willing to pay because that "price" was etched in stone by the federal government. Federal regulations promulgated by the SBA dictated that would-be borrowers were not required to back PPP loans with collateral or a personal guarantee. *See* 85 Fed. Reg. 20,811, 20,816 (Apr. 15, 2020). And the SBA fixed the interest rate at 1% and pre-determined processing fees by regulation to incentivize lenders to participate in the program. *See id*. at 20,813, 20,8016. Thus, unlike in *Watkins*, Sheppard's misrepresentations could not have gone to the nature of the bargain because ***there was no bargain to be had***. The banks enforced the PPP eligibility criteria only to enforce the government's regulatory interest in the program, which cannot ground a conviction for fraud. *See Kelly v. United States*, 590 U.S. 391, 400-01 (2020) (government's "prerogatives over who should get a benefit and who should not" are not property interests protected by the fraud statutes).

This Court stated that *Watkins* rejected the argument that "not all loan contexts are the same," [D.E. 251 at 43], but *Watkins* does not stand for that proposition. *Watkins* simply held that misrepresentations about the identity of a commercial borrower and the purpose of a commercial loan went to the nature of that bargain. It did not hold that *all* representations made in connection with *any* type of loan automatically go to the nature of the bargain—or that a misrepresentation that speaks only to the federal government's regulatory interest in a loan program can sustain a conviction for wire fraud. Because the applicability of *Takhalov* and *Watkins* to the facts here is an issue "that very well could be decided the other way," *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985), the Court should reconsider its denial of bond, even setting aside the Supreme Court's forthcoming decision in *Kousisis*.

B. The Court Should Also Grant Bond Based On Debatable Sentencing Error

Separately, the Court should grant bond pending appeal because it debatably erred in calculating "intended loss" under the Sentencing Guidelines without regard to Sheppard's subjective intent to repay the PPP loans.

Under Section 2B1.1, "intended loss" "means the pecuniary harm that the defendant purposely sought to inflict." U.S.S.G § 2B1.1, Application Note 3(A)(ii). In adopting this definition in 2015, the Commission made expressly clear that sentencing courts were to evaluate the defendant's "subjective" intent. *See* U.S.S.G. Supp. to App. C, Amend. 792 (2015). Specifically, the Commission explained that it was "adopt[ing] the approach" set out by then-Judge Gorsuch in *United States v. Manatau*, 647 F.3d 1048 (10th Cir. 2011), which held that "a subjective inquiry is required." U.S.S.G. Supp. to App. C, Amend 792 (2015). The government and district courts within this Circuit have since acknowledged that the "intended-loss determination is a subjective inquiry." Br. of the U.S., *Ridling v. United States*, No. 21-10777, 2021 WL 4988552, at *17 n.3 (11th Cir. 2021); *see also United States v. Syme*, 2024 WL 1053295, at *5 (N.D. Ga. Mar. 11, 2024) (Eleventh Circuit "holdings on calculating loss under § 2B1.1 are consistent with the idea that the critical inquiry is the defendant's subjective intent").

Directly relevant here, the Commission cited approvingly to two loan-fraud cases confirming Sheppard's argument. In one of those cases, *United States v. Confredo*, 528 F.3d 143 (2d Cir. 2008), the Second Circuit held that "[a] defendant who applied for, or caused someone else to apply for, a $1 million loan, fully expecting at least $250,000 to be repaid, intended a loss of no more than $750,000[.]" *Id*. at 152. The Commission also cited approvingly to *United States v. Sanders*, 343 F.3d 511 (5th Cir. 2003), which similarly held that intended loss in a loan-fraud case turns on the defendant's intent to repay the loan. *Id*. at 527. These cases illustrate how the "intended loss" inquiry is supposed to be conducted in loan-fraud cases: They confirm that sentencing courts must evaluate whether the defendant subjectively intended to repay the loan. Only if the government proves that the defendant did not intend to repay the loan should the full, face value of the loan be counted as "intended loss."

Eleventh Circuit case law is in accord. In *United States v. Ridling*, 2022 WL 4137723 (Sept. 13, 2022), the defendant argued that the district court improperly rejected his argument "that he intended to repay all the loans" by using a recklessness standard to determine his intent. *Id.* at *2. Emphasizing the Guidelines use of the word "purposely," the Eleventh Circuit held that the district court's application of a "recklessness standard to determine intended loss" was error because "recklessness is a less culpable mental state" than purposely. *Id.* at *3 (quotations omitted). That analysis confirms that subjective intent to repay is what matters. If subjective intent did not matter, the Eleventh Circuit would have affirmed the district court's sentence in *Ridling* because under an objective test, no inquiry into the defendant's mental state—reckless or otherwise—would be required. *See also* [D.E. 238 at 17-18 (collecting cases).]

The government could not carry its burden under this standard—and did not even try. In its sentencing brief [D.E. 241 at 5-8], the government did not cite any evidence showing that Sheppard subjectively intended not to repay the two PPP loans for which he was convicted (more on the government's sentencing brief momentarily). Nor did the government adduce any such evidence at trial.

The trial record shows the opposite—namely, that Sheppard treated the PPP loans as typical loans that he was required to pay back. PPP loans were forgivable, so if Sheppard did not intend to pay them back, there was an easy way to accomplish that goal: seek forgiveness. But as to the PPP loans at issue here, Sheppard expressly testified that he "never thought about" seeking forgiveness—it "wasn't part of [his] thought process." [1/9/24 PM Tr. 61:9-63:6 (testifying that he did not consider seeking forgiveness "prior to" July 2022)].[1]

Sheppard's actions confirm his testimony. Sheppard could have sought forgiveness on his PPP loans for well over a year before his indictment was unsealed but he did not do so. [*Id.*] In fact, by the time the indictment was unsealed, Sheppard's loan-deferral period had all but lapsed,[2] meaning he could have—but did not—seek to avoid his obligation to start repaying the loans. And at trial, Sheppard testified that he was treating the loans as typical loans and "paying them back" [1/8/24 AM Tr. 11:6-24], which he has now done in full. Of course, Sheppard's payment of the loans after his indictment does not conclusively prove Sheppard's intent at the time he submitted his allegedly fraudulent applications—but it is still probative of his intent. And there is no contrary evidence. Moreover, Sheppard's

[1] Sheppard sought forgiveness for one PPP loan (an April 2020 loan that was omitted from the superseding indictment). But Sheppard's testimony about that loan further confirms his intent at the time of his applications. Sheppard explained that his "reasoning in seeking forgiveness for the first" PPP loan was that the lender emailed him encouraging him to do so. [1/8/24 AM Tr. 11:6-24.] That it took emails from the lenders to convince Sheppard to seek forgiveness strongly suggests that Sheppard's original intent when he applied for the loans was to treat them as ordinary loans and pay them back.

[2] Payments on PPP loans were deferred for 24 weeks plus ten months, unless the borrower sought forgiveness during that period. Sheppard's deferral period expired mere days after his indictment was unsealed. That means Sheppard had no repayment obligations under the terms of the loans until right after the indictment was unsealed.

words and conduct before he was indicted align with his post-indictment conduct: The undisputed evidence strongly indicates that Sheppard intended to pay these PPP loans back. Certainly, the government marshaled no contrary evidence, and thus could not carry its burden.

Rather than argue that Sheppard intended not to repay the loans, the government advocated for a standard that was expressly repudiated by the Sentencing Commission—a standard the government has acknowledged in other cases no longer applies. In its sentencing brief, the government argued to this Court that "[i]ntended loss is the pecuniary harm that was intended to result from the offense." [D.E. 241 at 7 (quotation omitted).] Thus, the government concluded, "the combined amount of all the loans that formed part of the defendant's scheme to defraud should be the intended loss in this case." [*Id*. at 8.]

The government erred because it used the wrong definition of "intended loss." As the government correctly acknowledged to the Eleventh Circuit in its brief in *Ridling*, "[t]he guidelines *used to define* intended loss as 'pecuniary harm that was intended to result from the offense.'" 2021 WL 4988552, at *17 n.3 (emphasis added). But the Commission "amended the definition to make clear that the defendant must subjectively intend the loss." *Id*. at n.2. Not only did the government's sentencing brief rest on the wrong legal standard, but it cited case law that the Sentencing Commission expressly rejected. Specifically, the government cited *United States v. Lane*, 323 F.3d 568, 590 (7th Cir. 2003), for the proposition that "intended loss under the Sentencing Guidelines … focuses on the conduct of the defendant and the *objective financial risk* to victims caused by that conduct." [D.E. 241 at 8 (emphasis added; quotations omitted).] But the Commission expressly rejected *Lane*—in fact, the very same quote cited to this Court by the government—when it amended the Guidelines in 2015 to make clear that a subjective inquiry is required. *See* U.S.S.G. Supp. to App. C, Amend. 792 (2015).

Under the amended Guidelines, calculating "intended loss" without regard to Sheppard's subjective intent to repay, as the government urged, was error. Because the government could not carry its burden to prove that Sheppard subjectively intended to abscond with the loan money, the two PPP loans on which he was convicted—totaling $296,988—should not have been included in the Court's loss calculation. Correcting for this error essentially halves Sheppard's Guidelines range, from 24-30 months to 12-18 months. *Compare* U.S.S.G. § 2B1.1(E), *with* (G) (four-point Offense Level reduction).

If Sheppard is not granted bond pending appeal, his claims of sentencing error are likely to be moot. The time it will take the Eleventh Circuit to decide Sheppard's appeal will in all likelihood exceed the time Sheppard is required to spend in prison.

The Eleventh Circuit is likely to wait for the Supreme Court's decision next Term in *Kousisis*. And the government has filed its own notice of appeal. [D.E. 271.] Assuming the government requests oral argument, Sheppard's appeal easily could exceed the 18 months he is currently required to serve. Because the bottom of Sheppard's Guidelines range would be six months lower than his current sentence if Sheppard is successful on appeal, his sentence on remand could be shorter than the "expected duration of the appeal process," 18 U.S.C. § 3143(b)(1)(B)(iv), and he should be granted bond pending appeal.

CONCLUSION

This Court should grant Sheppard bond pending appeal.

Respectfully submitted,

BLACK SREBNICK
201 South Biscayne Boulevard, Suite 1300
Miami, Florida 33131 / Tel (305) 371-6421

By: /s *Howard Srebnick*
Howard Srebnick
Florida Bar No. 919063

O'MELVENY & MYERS
Jeffrey L. Fisher (admitted *pro hac vice*)
Jason Zarrow (admitted *pro hac vice*)

NELSON MULLINS
Jayne C. Weintraub
Florida Bar No. 320382

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