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 should not be required to spend months in prison while the Supreme Court considers whether the theory underlying his convictions is valid. Sheppard was convicted on a fraudulent inducement theory. *Kousisis v. United States*, No. 23-909, __ S. Ct. __, 2024 WL 3014475 (U.S. June 17, 2024), will decide if that is a valid theory of wire fraud.[1] The government's assertion that *Kousisis* will not affect Sheppard's convictions because that case involves government contracting and this case involves loans is nonsense. The very first question presented in *Kousisis*—which the government omits from its

[1] Undersigned counsel, Jeff Fisher and Jason Zarrow, of O'Melveny & Myers, were recently retained to represent petitioners in *Kousisis*. We have not yet made our appearances on the docket.

opposition—squarely tees up "the validity of fraudulent inducement theory of mail and wire fraud." Pet. for Cert., *Kousisis v. United States*, U.S. No. 23-909, 2024 WL 750795, at *i. That is the same legal theory grounding Sheppard's convictions.

Meanwhile, the government's assertion that this Court did not commit sentencing error is based on a misrepresentation of the record. The government insists that the Court calculated "actual loss," not "intended loss." But the Court could not have been clearer that its "ruling [was] with regard to intended loss." [6/7/24 Tr. 46-47.] Because this Court calculated intended loss incorrectly (at the government's urging), the Eleventh Circuit is likely to reverse. But Sheppard will not be able to secure effective relief on appeal unless he is granted bond because his appeal is likely to last longer than his sentence.

This Court should grant Sheppard bond pending appeal.

ARGUMENT

A. Sheppard's Convictions Present A Substantial Question

1. The government asserts that the Supreme Court's decision in *Kousisis* will not affect Sheppard's convictions because "[t]he petition for certiorari" in *Kousisis* "posed several questions centered around government contracts" [D.E. 277 at 2], which, the government apparently believes, have no broader application. The government is demonstrably incorrect.

The government ignores the first question presented in *Kousisis*—and the remainder of the petition. As the preface to the questions presented make clear, the Supreme Court took the case to resolve a circuit split "on the validity of the fraudulent inducement theory of mail and wire fraud." *Kousisis* Pet., 2024 WL 750795, at *i. Thus, the very first question asks "[w]hether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim is not the object of the scheme." *Id*. And the rest of the petition identifies a circuit split about the fraudulent inducement theory, argues that the theory is wrong, and explains that the theory has grave implications. Nothing about the fraudulent inducement theory is limited to cases involving government contracting (as opposed to private contracting, like a loan from a bank), nor is there anything unique about the government contracting context that would suggest the Supreme Court's decision next Term will be so limited. Certainly, the government identifies no such hidden distinction.

As the petition makes perfectly clear, *Kousisis* will decide whether deception without harm—i.e., fraudulent inducement—is a valid theory of wire fraud. The government does not dispute that Sheppard was convicted on such a theory. Sheppard should not languish in prison while the Supreme Court considers whether the theory supporting his convictions is valid.

2. The government offers no response to Sheppard's argument that this Court's reliance on *United States v. Watkins*, 42 F.4th 1278 (11th Cir. 2022), to sustain his convictions raises a substantial question. [*See* D.E. 273 at 6-9.] As Sheppard explained, *Watkins* was a commercial loan case where misrepresentations about the borrower's identity self-evidently affect the parties' "bargain." 42 F.4th at 1286-87. This is not a commercial loan case. And there was no bargain to be had because all the terms of a PPP loan were set by federal regulation. The government has never even attempted to explain why *Watkins*'s holding about the types of representations that go to the nature of a commercial bargain would apply in this context where commercial bargaining was legally impossible.

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

The Court should also grant bond because it erred in calculating intended loss under the Guidelines by ignoring Sheppard's subjective intent to repay the loans. [D.E. 273 at 9-15.] The government invited this error when it led the Court astray by relying on a legal standard regarding intended loss that has been expressly repudiated. [*See* D.E. 273 at 13-14.]

Instead of confessing error, the government misrepresents that "[t]he Court determined the loss amount at sentencing based on the *actual* loss amount, not the *intended* loss." [D.E. 277 at 2.] No, it didn't. Here is the Court's holding reproduced in full:

> As we know, the loss amount under 2B1.1 is the greater of the actual or intended loss. And with regard to the **intended loss**, let me make a comment that I am somewhat concerned that the Court should be considering acquitted conduct. But I agree that uncharged conduct that is relevant conduct is important for the Court to consider. And based on what has been presented to the Court, understanding that Mr. Sheppard has been found guilty by the jury of Counts 5, 7, 8, and 9 it would appear to the Court that the loans based on the Government's Exhibit 72 as well as what has been presented to the Court this morning would appear to include as the **intended loss** the loan of 146,587. The loan of 148,397, and the loan of 148,591.
>
> **And that is the Court's ruling with regard to the intended loss.**
>
> The Government does bear the burden by a preponderance of the evidence and the objection is sustained in part and that is the amount of the loss or **the intended loss that the Court is calculating**. So the probation can advise of the amount and I believe the advisory guideline calculation should change as a result of that.

[6/7/24 Tr. 46-47 (emphasis added); *see id*. at 47 (asking Probation to "give me the amount of the intended loss … and where that falls" under the Guidelines).

The government's inability to offer any defense of its position or the Court's intended loss calculation confirms that the Eleventh Circuit is likely to reverse (if the government does not confess error before then). But it is imperative that Sheppard be granted bond in the meantime. If he is not, his ability to obtain effective relief from the Court of Appeals will be destroyed since his appeal will almost certainly last longer than his sentence.

CONCLUSION

This Court should grant Sheppard bond pending appeal.

Respectfully submitted,

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