IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 1:22-cr-20290-BB-1

UNITED STATES OF AMERICA,

Plaintiff, June 7, 2024
9:38 a.m.

vs.

ERIC DEAN SHEPPARD,

Defendant. Pages 1 THROUGH 154

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE BETH BLOOM
UNITED STATES DISTRICT JUDGE

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COURTROOM DEPUTY: Calling Criminal Case Number 22-20290, United States of America v. Eric Dean Sheppard.

Counsel, please state your appearances for the record.

MS. JIMENEZ: Good morning, Your Honor. Aimee Jimenez on behalf of the United States. With me is Assistant United States Attorney Ana Maria Martinez, Assistant US Attorney Mitch Hyman, FBI Special Agent Sarah Halleran.

THE COURT: Good morning to each of you.

MR. SREBNICK: Good morning, Judge. Howard Srebnick, together with Mr. Zarrow, Mr. Cavallo, Ms. Weintraub, Mr. Etra, on behalf of Mr. Sheppard, who is present. And two of my paralegals are here helping me with some of the IT.

THE COURT: Hi. Good morning to each of you.

Mr. Sheppard, good morning once again, sir.

THE DEFENDANT: Good morning, Your Honor.

THE COURT: As you know, the purpose of this morning's proceeding is to determine an appropriate sentence in your case, a sentence that is sufficient but is not greater than necessary to serve the goals of sentencing.

As you know, on January 12th of this year, you were found guilty by a jury of your peers to Counts 5, 6, 7, 8, 9, 13, and 14 of a 14-count Superseding Indictment. Counts 5, 7, 8, and 9 charged you with wire fraud, in violation of 18, United States Code, Section 1343, and Count 13 and 14 charged you with aggravated identity theft, in violation of 18, United

States Code, Section 1028A. The Court subsequently entered a judgment of acquittal, ECF 251, with regard to Counts 13 and 14. You were found not guilty as to the remaining counts of the Superseding Indictment.

The Government is seeking forfeiture in this case, as well as restitution. And as you know, the Court did enter an order that rescheduled the restitution, as well as the forfeiture hearing, for August of 23rd of this year.

In preparation for this morning's proceeding, the Court has received and reviewed the following items. I will refer to each by its docket entry. There were two sealed -- actually, three sealed filings, because Mr. Cupersmith's letter is also a sealed filing. So I will refer to those filings as well, since the Court did review each of those.

Docket Entry 190 is the jury's verdict; Docket Entry 226 is the Draft Disclosure of the Presentence Investigation Report; Docket Entry 235 is the Government's Objections to the Presentence Investigation Report; Docket Entry 236 is the Defendant's Notice of Filing a Redacted Copy of the Sentencing Memorandum; and the sealed -- 238 is the Defendant's Sealed Sentencing Memorandum with Objections; Docket Entry 241 is the Government's Response to the Defendant's Objections; and Docket Entry 242 is the Defendant's Response to the Government's Objections; Docket Entry 246 is the Final Addendum 1 Disclosure of the Presentence Investigation Report.

And Docket Entry 248 is a sealed filing, and that consists -- the filing is the Defendant's Notice of Filing Letters in Support of Sentencing, and consists of letters written by Alan Glaser, Carrie Meyers Garazi, Edward Garazi, Eric Gordon, Gerson Sepin, Jarred Axson, Jennifer Rapp, Jordan Sheppard, Judi Meyers, Lee Zimmerman, Liad Zadok, Lloyd Nechtman, Mark Raymond, Michael Tobin, Pablo Carreno, and Rabbi Robert Davis.

Docket Entry 253 is the Government's Notice of Unresolved Objections; and Docket Entry 258 is the Government's Sentencing Memorandum Regarding Restitution for Victim Under the Mandatory Victims Restitution Act; and Docket Entry 261 is a sealed letter from Neil Cupersmith.

Have you had a full opportunity to review each of these documents with your attorneys?

THE DEFENDANT: I have, Your Honor.

THE COURT: Do you need any additional time, sir?

THE DEFENDANT: No, Your Honor.

THE COURT: Are there any additional documents that the Court should have received and reviewed in preparation for this morning's proceeding? I'm not sure if I should direct this to you, Mr. Srebnick, or to the other attorneys.

MR. SREBNICK: Judge, I did submit, this morning, which I'll use during the course of the proceedings, a demonstrative exhibit that is the -- what I call the loan table. But other than that, there's no additional papers to be submitted this morning.

THE COURT: All right. And I did receive this. My courtroom deputy provided a three-page table. Has the Government received this as well?

MS. JIMENEZ: I did receive it this morning, Your Honor. The Government will be referring to one trial exhibit. That's Government's Exhibit 72, which is the summary of the loans. I can provide the Court a copy. I had offered it.

THE COURT: That was referred to in the Government's objections, as well as its argument with regard to the loss amount. So certainly if you wanted to publish it at this time, or the appropriate time, you may certainly do so.

So other than the three-page table that Mr. Srebnick has provided to the Government and to the Court this morning, are there any other documents that the Court should have received and reviewed in preparation for today?

MR. SREBNICK: Judge, there's one other thing that we provided the Government that's reflected in the table. And that is that three of the loans that were the EIDL loans have been repaid in full prior to today. We provided the Government with proof that Mr. Sheppard has repaid those loans, and it's reflected on the table that I have provided to the Court this morning.

THE COURT: All right. I believe that the payoff of those loans was also attached to the Defendant's reply, correct? Are we referring to different loans?

MR. SREBNICK: They were the ones that you have just made reference to, and then the additional loans of the EIDL brand.

THE COURT: All right.

MS. MARTINEZ: Your Honor, I just want to let the Court know that to the extent that the Court would rely on that, I would need to verify with the SBA the amounts on behalf of the victim; however, I think you have bifurcated that issue, and I'm sure Mr. Srebnick and I can resolve that; in other words, just the verification of it. But as of now, I cannot verify that with the victim.

THE COURT: All right. I understand.

Are there any other documents that the Court should have received and reviewed in preparation for today, Mr. Srebnick?

MR. SREBNICK: No, Your Honor.

THE COURT: Ms. Jimenez?

MS. JIMENEZ: No, Your Honor.

THE COURT: And Mr. Srebnick, is there any legal reason why sentence should not be imposed today?

MR. SREBNICK: No legal reason.

THE COURT: All right. There are several objections. If we can proceed to the specific objections with regard to the facts relating to Paragraphs 11, 12, and 15, and then we'll address the other objections that relate to the proper calculation of the advisory guidelines.

MR. SREBNICK: Your Honor, I believe the Probation office has included our objections, and they don't go to the guideline computations. And so we would be satisfied with the Probation office's response for the purposes of today.

THE COURT: All right. So are you requesting that that -- I just want to make sure that with regard to the Probation officer's response, that that was properly incorporated in ECF 246. If not, I would direct the Probation office to prepare another revised PSI.

MR. SREBNICK: Understood.

THE COURT: So what is it that you're requesting, Mr. Srebnick? Are you requesting that the Probation officer prepare another PSI reflecting those changes?

MR. SREBNICK: No, Your Honor. The addendum suffices.

THE COURT: All right. Thank you.

And for the record, may I have the name of the Probation officer that is with us this morning.

PROBATION OFFICER: Good morning, Your Honor. Stephanie Galvez, US Probation.

THE COURT: Good morning.

All right. So have we addressed the specific objections to Paragraphs 11, 12, and 15?

MR. SREBNICK: Yes, Your Honor.

THE COURT: All right. Then let's perhaps move chronologically to -- I believe the next objection is the loss amount, Paragraph 57.

MR. SREBNICK: Yes, Your Honor.

The question of loss, Your Honor, in this case, is one that is atypical for most cases. And let me -- of course, those persons that were involved in the case know that I did not participate in the trial. So I've reviewed the record, including some of the features of this case that make this very different than most.

The Government is seeking -- despite verdicts of not guilty on more counts than were found guilty of, the Government is seeking that the Court apply a loss figure that includes all of the loan amounts that were applied for, even those that were not charged, even those for counts that resulted in acquittals, and even for those that have been repaid in full before today.

As we stand today here before the Court, Eric Sheppard has repaid all of the loans that are the object of counts of conviction.

THE COURT: But how is that relevant under Eleventh Circuit case law? The fact that Mr. Sheppard may have repaid some of the loans, how is that relevant to calculating the proper loss amount, when the Court is to look at the greater of the actual or intended loss?

MR. SREBNICK: Understood.

So if actual is loss is zero, and the Court is looking to intended loss, the question in a loan case for intended loss is whether the Defendant genuinely intended to repay the loan as scheduled.

And in this case, as to the counts of conviction, and indeed as to every single loan, with the exception of the original PPP loan -- and we'll get to that in a moment -- Mr. Sheppard has repaid those loans in full. And that goes to whether the Court believes that he intended to do so, as promised when he took out the loan.

The Government values the loss in this case as the face amount of the loans. But a loan, by its terms, is not intended to be kept forever. By way of analogy, someone who leases a car for the weekend, and gives a bad check for the lease of the car, the loss, the intended loss, is not the value of the car. It's the rental amount. And in this case the Government seeks to hold Eric Sheppard responsible for the full value of the loss of the full amount of the loans, and that is not consistent with the case law.

We've cited several cases that explain that intended loss in a loan case, different from a typical theft case, takes into account the Defendant's intent, the genuine intent that is reflected by his actions.

In our pleading, we refer to United States v.

Henderson, 19 F.3d 917, a Fifth Circuit case, 1994, quote: "Where the defendant intends to repay the loan, or replace the property, the intended loss is zero. The district court must determine if the defendant actually intended to cause a loss to either the bank -- and if so, the amount of the intended loss. Only if this value is greater than the actual loss to the banks should it be used to determine the defendant's sentence."

Another Fifth Circuit case, in 2010, United States v. Harris, instructs the Court that: "Obtaining a loan fraudulently is different from stealing property outright because defendants who fraudulently obtain loans often intend to pay them in full." And here, the district court in that Fifth Circuit case was ordered consider whether the defendant had intended any loss at all.

In the Eighth Circuit, United States v. Hartstein, 2007, quote: "We've repeatedly characterized intended loss with reference to a defendant's actual subjective intent. That intent should drive our analysis."

In the Third Circuit, quote from United States v. Diallo, D-I-A-L-L-O, 2013: "We caution that fraud guideline has never endorsed sentencing based to the worst-case scenario potential loss, and admonished sentencing courts to consider actual or intended harm." Quote: "We look to the defendant's subjective expectation, not to the risk of loss to which he may have exposed his victims." Quote: "It is clear that a district court errs when it simply equates potential loss with intended loss without deeper analysis."

Quote: "We reproach the government for its argument that district courts can implicitly draw reasonable references that a defendant intended to cause the full potential loss, noting, if district courts could silently draw such inferences, there would be little left of our court's admonition that district courts must perform a deeper analysis than simply calculating the potential loss."

And finally, Judge, the Third Circuit, in a case called Kopp, K-O-P-P, 1991: "The district court here erred by equating the loss with the full amount of the loan. We hold that fraud loss is, in the first instance, the amount of money the victim has actually lost estimated at the time of sentencing, not the potential loss as measured at the time of the crime."

Now, in this case, since we have a verdict, and the verdict tells us much about what the nature of the so-called scheme was -- we have a group of loans, roughly $1.9 million worth, that were applied for that the Government seeks to hold Eric Sheppard responsible for under the EIDL program. The jury acquitted Mr. Sheppard of the EIDL counts.

The scheme that the Government was left to proceed with then was under the PPP program. And in that regard, the jury rendered a mixed verdict. I'd like to put on the screen the counts -- I'll put it on the ELMO, if that's okay, Judge.

And I've highlighted in yellow the counts of conviction, 5, 7, 8, and 9. And what is significant about the dates is that Counts 1, 2, 3, and 4, all acquittals, all not guilty, reflect a jury verdict that, prior to the date of Count 4, the jury rejected the Government's claim that there was fraud in the application process, and that alleged fraud included both an EIDL submission and a PPP program submission.

And so the verdict of not guilty on those counts means something. And it means that the jury did not accept the Government's view that a scheme to defraud was hatched before January of 2021. And yet, the Government is ambitiously seeking to hold Mr. Sheppard responsible for all of the loans for which there were applications, including loans that were not even funded, and including loans where one pot of money was being sought through multiple applications; the first application might be rejected, then Mr. Sheppard would apply again. The Government treats that as two losses, even though it's only one loan amount that's at issue, and I'll get into some details with the chart.

And so what I think is a fair inference in terms of the loss, and the intended loss, is that first we define the scheme that the jury accepted as one that began on or about -- not before, but on or about February of 2021. And so, temporally, whatever relevant conduct the Court's going to consider would start with that date, with that time period, and it would have to exclude the prior applications because we have an affirmative verdict of not guilty that precedes it.

Second, the scheme would have to exclude the EIDL program altogether, because the only verdicts about EIDL were verdicts of not guilty.

We created a table that I submitted this morning. I suppose I'll just mark it as Defense Sentencing Exhibit Number 1. And it expanded upon the table that we had included in our Sentencing Memo. And so the first page of this three-page exhibit relates to loans that the Government seeks to hold Eric Sheppard responsible for under a relevant conduct theory prior to the date that the jury's verdict reflects a scheme began. And therefore, we submit that those loans, both temporally and those related to EIDL, cannot be considered and are not part of the so-called relevant conduct.

THE COURT: So Mr. Srebnick, talk to me about the Eleventh Circuit case law. Because the United States has cited Eleventh Circuit case law that tells this Court that the Court, for purposes of calculating the intended loss, can include the conduct that constitutes acquitted conduct.

So -- and they've cited two Eleventh Circuit cases. United States v. Campbell and United States v. Barakat. I know you've cited to the Seventh Circuit, the Third Circuit. Why should the Court follow those circuits, when the Eleventh

Circuit has told this Court that the Court should consider that conduct in determining the intended loss?

MR. SREBNICK: Well, as we've previewed, the Sentencing Commission is now rejecting that theory that the courts have followed until now. And effective November, the theory would no longer hold. That means that, effective November, the Court would not be able to consider acquitted conduct, that our court system will respect jury verdicts. Otherwise, why are we having trials at all, if the acquittal is going to count for nothing?

And so that's my first response. And I think appellate review of this case will be governed by that new sentencing guideline application. And so the Court would be well-served to -- as some other judges have already in this district -- to apply that principle going forward.

Second, given the difference in the features between the EIDL loans and the PPP loans, I think the Court can be very comfortable that because the EIDL loans did not focus on the distinction the Government urged the jury to draw between W-2 employees versus independent contracted workers that the EIDL loans don't share the same features that the PPP loans -- which there are two convictions of PPP loans, of course. And so the Court should feel comfortable that excluding EIDL loans not only is respectful of the jury's verdict, but also consistent with our theory that it doesn't even fall within the relatedness to the PPP loans, totally different features, and therefore not relevant conduct for purposes of evaluating the loss associated with the scheme involving PPP loans.

We also have another feature of this case that makes it atypical in deciding what loss is. Remember that this was a program -- the PPP program was a program by which the lenders were giving money guaranteed by the SBA and did not expect repayment of those loans. They were forgivable. And so had Eric Sheppard not been the borrower in this instance, but some other applicant had been the borrower for the exact same amount of money, that other borrower would have sought forgiveness of the loan and the lender would be in exactly the same position.

The SBA, on the other hand, had as its objective, its policy objective, to have these funds available for companies to continue to employ real people who needed jobs. And I don't need to get into the distinction for purposes of this hearing between W-2 or 1099. Suffice it to say that Eric Sheppard -- his companies used these monies to pay real people, workers, consistent with the objective of our Congress in making sure that companies like Eric's companies would function during the pandemic and keep people off the unemployment lines.

And so whether it's fraudulent or not -- and you've heard our arguments under Rule 29 and why we believe that the Court should have granted a Rule 29 on the loan fraud theory that the Government advanced -- even at this point, where we accept the Court's ruling for purposes of today's discussion, the money still went through Eric Sheppard's company into the hands of people who needed work, and performed work, honorable work, real work, which distinguishes this case from the many different cases we've seen in this district where the borrower literally takes the money and runs, where the borrower doesn't even have a real company that's putting people to work, where the borrower takes the money and buys Lamborghinis, Ferraris, vacations, luxury homes.

None of that happened here. To my knowledge, this may be the only case in our district where the borrower used the money as the program intended, albeit understanding that it was not supposed to -- according to the Government's presentation -- go to so-called 1099 independent contractors, but was limited to W-2s.

Now, had this loan -- these loans been restructured, it could have been done perhaps more properly, and perhaps Eric Sheppard wouldn't be here today. But still, for purposes of you deciding what is the appropriate punishment for a man who borrowed these funds not for personal frolics, but to put people back to work during the pandemic, I submit to you that in calculating the loss the Court should rely exclusively on the fact that Mr. Sheppard repaid all the loans of conviction.

Second, intended to repay the loans and not seek forgiveness for all of the other loans, with the exception of -- the very first loan is the only one that was forgiven, and it's the here at the top of table, and it's the very first loan at the earliest stages of the application process. And from my review of the record, and my understanding of how that loan came to pass, obviously, the Government made a decision in the original Indictment to ask the grand jury to indict him for that, and then made a second presentation to the grand jury, a Superseding Indictment, which removed, dismissed, and abandoned from the trial jury's consideration, and indeed perhaps even from the grand jury's consideration, whether that very first loan was even part of the scheme.

And so I think the Court should hold the Government to its decision, its decision to abandon the theory that the very first loan application was fraudulent. And the jury obviously didn't accept it because they acquitted Mr. Sheppard of every single count occurring in 2020. And then, most tellingly, Judge, the jury acquitted Mr. Sheppard of Count 4, which was a second draw on that same April 2020 PPP loan that the Government abandoned. And so to the extent that the jury rejected the Government's theory that Mr. Sheppard was scheming as late as January 19 of 2021, it necessarily follows the jury would have rejected, had the Government not abandoned, the claim that the scheme began almost one year earlier.

On the chart, one of the things I've tried to illustrate, on this page in particular, under the Government's theory, the Court should hold Mr. Sheppard liable both for the $203,000 related to Counts 4, 5, and 6, which, as the right column reflects, was not funded, and then Mr. Sheppard reapplied with a different processor, Bank Processor 1 and Bank Processor 2, for the same loan. It was funded in an amount of $148,000, plus or minus. Under the Government's theory, because he applied twice for that same loan -- he would have only been granted one -- the Government says the Court should consider both of those amounts in computing intended loss, in the face of him having paid it off in full.

And so, in deciding, Judge, whether it be under our circuit or any other circuit, intended loss always goes to the defendant's intention. And the facts in this case establish that Mr. Sheppard intended to, and indeed did, repay every single loan that was in the time frame of the conspiracy.

Now, to the extent that the Court -- if this were a civil courtroom, and the Court was pondering this very first transaction, the forgiven one which I've just addressed -- certainly if the Court thought that it's appropriate for Mr. Sheppard to repay that loan, as -- in fact, he did get the loan. He did use it for the intended purpose of hiring workers. But yes, he got forgiveness for that loan. As we see it, if the Court thought that that was the appropriate disposition, certainly if this was a civil case, Mr. Sheppard is in a position to repay that loan because certainly it was a loan, and it was forgiven. And if forgiveness had not been granted, he would have repaid the loan. But it was granted.

If I can have one moment, Your Honor.

THE COURT: Certainly.

(Pause in proceedings.)

MR. SREBNICK: Your Honor, my colleagues have aptly pointed out that the cases from the Eleventh Circuit -- and I should have been more direct about it -- those were not loan cases that the Government cites, Campbell and Barakat. Those are actual taking the money and not ever intending to repay those tax cases, for example. So those cases don't share the same features as the loan cases that I have cited to.

With regard to acquitted conduct that Your Honor inquired about, while it is true that, as of the Eleventh Circuit law today, you may consider acquitted conduct before the guidelines change, if the Court goes that way, the Court need not. It's not obligatory. The Court isn't bound to do so. The Court can choose to reject, as the jury did, the Government's theory, particularly with regard to the EIDL loans, which, as I pointed out earlier, don't share the same features as the PPP program loans. And so, in deciding whether the EIDL loan applications, and that so-called scheme that the Government would suggest -- in deciding whether it's, quote, related to the PPP program, related to being the test, the Court can, and should, as we submit, given particularly the jury's verdict, reject the theory that they are related.

The Government put forward what it thought was its best case on the EIDL loans, the ones that Mr. Sheppard himself handled. And so I go back to my demonstrative exhibit. The Government started its EIDL scheme theory in its original Indictment, but then dismissed and abandoned those counts when it superseded the Indictment. And then opted, instead, to go with the EIDL count referenced in Count 4 -- excuse me -- Count 4 -- excuse me -- the original Count 4, which was now Counts 1, 2, and 3 of the Superseding, and the jury rejected it. And those were the loans where the Government surely thought it had its best case against Mr. Sheppard. And still, the jury rejected the Government's theory.

And then none of the modifications of those loans were even charged. And yet, the Government, as you can see from the table, is seeking over a million dollars in EIDL loan losses that were not even funded and would not have been forgiven. Those were loans that would be repaid.

And so we suggest that the Court should reject the Government's ambitious effort to saddle Mr. Sheppard with loss figures -- we're not here for restitution or forfeiture. But in terms of deciding what he intended to do, in suggesting that he intended to take those funds, particularly the EIDL funds, and keep them forever. That's simply not supported by this record.

And does the Court follow -- just to be sure that I've made the point about double counting, where the Government says, for example, this 150 -- excuse me -- the same loan 203,000 was not funded, that was ultimately funded in the March 11, 2021 application, under the Government's theory, a double count for that.

And so what I leave the Court with as to the counts of conviction -- and you can find those amounts here: March 11, 2021, Count 7; Count 9, March 12 of 2021, two loans, each in the approximate amount of $148,000, for a grand total of $296,000 of PPP loans that Mr. Sheppard obtained, if you accept the jury's verdict, with inaccurate information about the workers, for a total of 296,000, that Mr. Sheppard has paid in full. And so we submit to the Court loss should be zero. But in all events, the loss should never exceed the $296,000 that were the subject of the two counts that I just referenced.

THE COURT: All right. Let me ask you -- because I do see that the Government's citation is not a wire fraud case. But let me ask you with regard to the Court's concern with regard to unwarranted sentencing disparities, if, in fact, courts in this district have been putting aside the amounts in terms of calculation of the intended loss with regard to acquitted conduct.

I understand the argument; however, the Government is making -- and will make an argument -- they've certainly made it in their briefs -- that the uncharged conduct was part of the relevant conduct. They're going to make that argument. So I'm going to give you an opportunity to make your argument with regard to the relevance that the Eleventh Circuit tells the Court that the Court should consider the relevant conduct.

As well, with regard to the payoff, where would the Court find -- I understand, Mr. Srebnick, that that is how you define the intended loss. But if the Court rejects that definition -- that is, regardless of the payoff, that the intended loss was the loss of each of the loans that were paid to Mr. Sheppard through his companies, and that would include the uncharged conduct, but would not include the acquitted conduct. So I just -- because I know you're going to make an argument in response. But Ms. Jimenez has been very clear in her briefing that the uncharged conduct, that is the -- Counts 1, 2, 3 -- all of the EIDL loans -- that that uncharged conduct was part of the relevant conduct.

As well, the argument has been made that the acquitted conduct should be part of the relevant conduct. I somewhat agree that -- and I want to hear the Government respond with regard to the unwarranted sentencing disparities, if, in fact, the Court considers the acquitted conduct. And regardless of whether Congress applies the guideline retroactively or not, there will be individuals post-November that will be calculated differently in terms of the intended loss.

So can you address the uncharged conduct, as part of the relevant conduct. And if you can advise the Court of the amounts that you believe the intended loss should be, putting aside the payoff by Mr. Sheppard.

MR. SREBNICK: So when we say: "Uncharged," it means uncharged in the second Indictment --

THE COURT: That's correct.

MR. SREBNICK: -- the Superseding Indictment. Right.

But -- and that's where I think the focus of the Court can include the fact that they were initially charged and the Government abandoned those charges. So the grand jury was presented with an Indictment a second time. And I don't know if it was because the grand jury decided, upon further review, that these events that occurred in 2020 are not supported by the Government's theory. We don't know because we're not there. We do know, though, that the grand jury dismissed the charges that had been initially brought in the first Indictment.

I think the Court has to give some consideration to that and hold the Government to that. Because otherwise it's a manipulation of the process, asking you, Your Honor, to make a finding that a jury was supposed to make had the Indictment not dismissed those charges. And you can reasonably infer that if the jury returned not guilty verdicts for everything that occurred in 2020, up through February of 2021, that same jury would have made the same finding if the Government hadn't dismissed and abandoned those charges relating to events in 2020.

With regard to your question as to EIDL as to the relevant conduct component, the Court needs to assess if it's -- the EIDL loans are, quote, related to the PPP loans in terms of the alleged scheme. The PPP loan scheme was focused on the distinction between independent contractors and employees, which is not a feature of the EIDL loan applications. And so those loan programs, while they're both loans, and they have, you know, the same general features of loans that you borrow money and you repay them, the nature of the programs and the alleged scheme regarding mischaracterizing independent contractors as employees is not a feature of the EIDL loan applications or that so-called scheme that the Government would have. So they are not sufficiently related to allow the Court to consider them as relevant conduct, particularly when you have acquittals that would suggest the jury rejected the Government's theory outright.

I hope I've answered your question.

THE COURT: You've answered -- because there's three arguments that are being made. One is the uncharged conduct, the EIDL loans. The second is the acquitted conduct. And the third is the Court should consider, for purposes of a proper calculation, Mr. Sheppard's payoff of the loans.

MR. SREBNICK: Right. And so --

THE COURT: And the arguments are diverging, and I'm failing to see how the payoff of the loan -- where there's any case law that would support the Court's consideration of that.

With regard to acquitted conduct, I obviously am well aware that Congress will -- or the Sentencing Commission has certainly recommended the Court not consider acquitted conduct post-November.

And the uncharged conduct certainly bleeds into the entire argument that it's relevant conduct, which the Eleventh Circuit has said the Court should consider for purposes of the Defendant's scheme.

MR. SREBNICK: Let me start where you ended.

Consider -- the courts have said it can be considered if they are sufficiently related, and if you find by a preponderance of the evidence that the Defendant committed the misconduct that the jury said he didn't commit, particularly as to acquitted conduct. And in this case, you have the benefit that the uncharged conduct occurred before the acquitted conduct. And so, if the jury found not guilty in 2021, or early 2021, there's little reason to conclude that a jury -- and therefore, we suggest a court -- should hold him guilty as if he had committed those same alleged crimes in 2020.

With regard to the loan repayment, I'm going to use the words from the other circuits, because there are several circuits that use these three words. You have the actual loss to consider, the intended loss, but the courts all reject the potential loss. And that's the number the Government is trying to give you. They're actually giving you something worse. They're giving you potential, plus multiple attempts at the same loan.

So they're saying it's not just the potential $203,000 he was trying to get that ultimately only ended up being 148. They're saying double count it, potential 203, plus 148, which he paid off. And to me, that atypicality tells you that this is a case that's very different from every single case that the Government has cited.

Thank you, Judge.

THE COURT: All right. Thank you, Mr. Srebnick.

Ms. Jimenez?

MS. JIMENEZ: Yes. Thank you, Your Honor.

All right. On the issue of loss, I think we start with intended loss. The Government is not aware of -- at least in the Eleventh Circuit, of any carve-out for a wire fraud involving loans versus wire fraud involving other types of scheme -- schemes.

The Government charged in the Superseding Indictment a scheme to defraud, a scheme to defraud that went on for about six pages of the Indictment. And as the Court knows, you have a scheme to defraud, the Defendant's participation in the scheme to defraud, and the Defendant intending to defraud. And that's what the jury found. And then there are specific wires in furtherance of that scheme, interstate wires in furtherance of that scheme, that are examples of carrying out the scheme.

I don't think that Defense counsel should speculate as to changes made to the Superseding Indictment. Clearly, the Superseding Indictment is somewhat different from the original Indictment. And that was intended to focus, and did focus, on the identity theft and the forgeries that occurred in relation to the loans; however, the scheme that was charged remained the same. The Government charged the same scheme in the original Indictment that it charged in the Superseding Indictment. The Government charged the same time frame in both, which started in April of 2020, with that first PPP loan that was submitted to PayPal and WebBank.

The Government, at no point in its presentation to the jury, abandoned any aspect of the Defendant's conduct that constituted that scheme to defraud. It was pandemic fraud. He intended to defraud the SBA. He intended to defraud the lenders. He intended to get whatever money was available from those programs from beginning to end.

In fact, the Court allowed what the Defense calls uncharged conduct. We don't believe it to be uncharged conduct. It was part of the Defendant's scheme. It was part of the Government's evidence about the scheme. And the Court allowed -- and in fact, the Defense did not even object to the presentation with the PayPal witness that involved the April 2020 loan, which was fraudulent, the subsequent forgiveness of that loan, which was fraudulent. There was not even any objection to that.

There was the submission of the first PPP loan on behalf of HM Management, in January 2020, to Cross River Bank, which did not result in a loan. That was fraudulent. That was not objected to at trial.

So it was a scheme that actually began at the end of March, with the testimony of Mr. Jeff Graff, who talked about submitting an EIDL loan on behalf of HM Four to the SBA, when essentially the SBA had not even set up its portal. So the Defendant went from attempting to submit an SBA loan -- an EIDL loan to the SBA, to April of 2020, when the PPP program kicked off, submitting a fraudulent loan there. When those funds ran out, he turned back to the EIDL program and submitted fraudulent loans to the SBA, including loans -- talk about double counting -- including a loan for the parent company HM Four, after the original company HM-UP Development Alafaya Trails had received a loan.

And then, in January 2020, when the PPP loan program was re-funded, he turned back to that program. And then when that program ended, he then continued with the EIDL loan modifications for the three loans that had been funded in 2020. So it was ongoing conduct that went back and forth.

With respect to the intended loss, the guidelines say it's pecuniary harm that the Defendant purposely sought to inflict, which includes pecuniary harm that would have been impossible or unlikely to occur, for instance, in a Government sting operation. So it is everything the Defendant intends to do, all of the harm the Defendant intends to cause. And of course, here we have findings that he intended to defraud the SBA and the lenders.

Now, I'm not aware of any case that says if you, on the eve of your sentencing, pay off these loans, you now get to eliminate the loss amount. I'm not aware of any case that says that.

THE COURT: I agree with you. I agree with you on that point. And I have not -- I understand the Defendant's argument with regard to defining intended loss, but I agree with you.

Putting that part aside, I do want to ask you about the acquitted conduct.

MS. JIMENEZ: Certainly.

THE COURT: Because it would appear to the Court that that may result in unwarranted sentencing disparity, if the Court specifically calculates the loans that the Government is seeking to include in the intended loss, if, in fact, Mr. Sheppard was acquitted of those counts.

MS. JIMENEZ: So obviously we start with the current state of the law, which is that acquitted conduct can be considered, as long as it's been proved by a preponderance of the evidence, which I submit to the Court it was.

But let me focus on the upcoming amendment, which says: "Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes in whole or in part the instant offense of conviction."

So we have HM Four wire fraud counts for which the Defendant was acquitted. And I think, for purposes of loss amount, obviously, Count 1 is the submission of the HM Four loan application. Now, the Defendant admitted that he submitted that loan application. There was also conduct, ongoing conduct, that occurred over the course of a month. Between October of 2020 and November of 2020, there were multiple wires. And there was a variety of conduct, some of which -- I think a lot of it was not in dispute. That is that he used his wife's name to submit this loan application, that he claimed his wife was 80 percent owner and that he was 15 percent owner, when the tax returns showed for both of those years, 2019 and 2020, that there was no change in the ownership.

There was a bank statement that -- and I'm not talking about the banker's letter. But there was a bank statement the Defendant submitted to the bank, which is not in dispute -- I'm sorry -- to the lender, which is not in dispute. He creates the bank account for HM Four October 20th, the day that he applies. He then transfers $60,000 from the Alafaya Trails account into the HM Four account on November 16th, 2020. He pulls out a bank statement to reflect that money in the account.

On the very same day -- the following day, November 17, he withdraws $50,000 back to the Alafaya Trails account. But in the meantime, he's generated this bank statement that he supplies to the SBA, and he tells the SBA in his email that the money was for ACH, and vendors, and essentially for the business activity in the account, which was false. And when the Defendant was presented with that email on the stand, he basically acknowledged -- and I have it in my notes -- the email said: "Used for ACH or wire to fund either the payroll account and vendor account for the work that is ongoing," and the -- which is Exhibit 58-4. And the Defendant said on the stand: "Well, that's a stupid statement because I was clearly confused between HM-UP and HM Four. So I think I miswrote that."

So a lot of the conduct involving HM Four, the Defendant acknowledges or cannot be disputed because it's in the bank statements.

THE COURT: But I guess I'm failing to follow your -- you're, in essence, arguing the evidence that the Government put forth. But the jury rejected that. With regard to Count 1, the jury rejected the wire fraud on October 22nd, 2020.

MS. JIMENEZ: That was the submission of the application. And it did.

THE COURT: And the jury rejected the November 4th, 2020, November 12th, 2020, and January 19th, 2021.

MS. JIMENEZ: Well, sticking with the HM Four, Your Honor, the -- I think that the thrust of the concern, or what they acquitted on, was the aggravated identity theft with respect to the banker's letter and the lease agreement.

And yes, they did. But my point is there were other wires, there was other conduct that is essentially not in dispute relating to the HM Four account -- the HM Four loan application.

With respect to the second draw PPP loan, again, I go back to the amendment, which is: "Relevant conduct does not include conduct for which the defendant is criminally charged and acquitted, unless such conduct also establishes in whole or in part the instant offense of conviction."

The Defendant was convicted of Count 5 in the Superseding Indictment, which are the Forms 941 that were submitted in support of that loan application.

THE COURT: Well, in support of Alafaya Trails's PPP second draw loan application.

MS. JIMENEZ: Correct. Which was acquitted Count -- acquitted Count -- it was acquitted Count 4, Your Honor.

So Counts 4, 5, and 6 relate to that PPP second draw loan application in 2021 to PayPal.

Count 5, which are the Forms 941, I think standing alone don't mean a whole lot. And I think that that's where the Court can consider what the amendment says, which is: "Unless such conduct also establishes in whole or in part the instant offense of conviction." The jury convicted the Defendant on the submission of those false Forms 941, which related to that loan application, which was Count 4 of the Superseding Indictment. So clearly, we've got mixed messages from the jury.

But nevertheless --

THE COURT: Hold on. When you say: "Mixed messages" --

MS. JIMENEZ: Well, I mean --

THE COURT: -- they specifically looked at different wires that constituted the wire fraud.

MS. JIMENEZ: They did.

THE COURT: So if you're asking the Court to consider the acquitted conduct in Counts 4 and 6, then, if you can address the argument that's been made that it's double dipping, if, in fact, the second draw loan application was for $203,125.

MS. JIMENEZ: Well, it was made to a different lender. It -- it was a loan application that had the submission of wires and false -- falsified documents between January and March of 2021. It was, again, ongoing, and it involved multiple wire transmissions.

The Defendant did -- did try again with a different lender. But I do think that under -- under what intended loss is, that that wire should count. And even under the acquitted conduct amendment, it relates to a count of conviction that makes the count of conviction relevant, that is, the Forms 941. And I think the Court can consider it as part of the loss amount.

I would add that the acquitted conduct amendment also does not prohibit the Court from considering acquitted conduct as a sentencing factor under 3553(a). And in fact, the commentary to the amendment says: "Nothing in the guidelines manual abrogates the Court's authority under 18 USC, Section 3661, which states: 'No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense, which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.'"

And so it just goes to the ongoing, relentless, repetitive conduct of submitting false information and false documents that occurred between the beginning of the scheme and the end of the scheme that was charged in this case.

Uncharged loans. I mean, I don't agree with the characterization that they are uncharged. I think that they were part of the scheme, and the Government presented evidence about all of those loans, and the Court is required to consider and include relevant conduct in its calculation.

So either it's part of the scheme -- which we submit it was, and it was presented as evidence in the trial, and also relevant conduct, all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. And I've extensively briefed that issue why all of these loans were related to each other. Whether it was going to PayPal or Cross River, or Northeast Bank, or the SBA, it was for the purpose of obtaining pandemic relief funds, and there were lies and misrepresentations throughout.

I would add that, with respect to the amendment, it says that uncharged, dismissed, or other relevant conduct was expressly excluded from the acquitted conduct amendment. And that is -- and the Court, under the relevant conduct guideline, shall consider the relevant conduct. And that is conduct that is part of the same scheme or course of conduct.

I want to address this general benefits rule that the Defendant cited. And I don't think he expressly referred to it this morning as general benefits rule. But it's this guideline provision -- I have not seen it used in any PPP fraud or EIDL loan fraud. But I don't think the Court has to rule whether or not these programs constituted a government benefit because the Defendant has not claimed -- and I don't think he can claim -- that his businesses were intended recipients of this money.

And so, unless the Court wants me to address that further -- I actually have case law -- again, it's not in the PPP context or EIDL context, but I don't think in my filing I had actually cited to any case law. So I want to point out a couple of cases.

THE COURT: Well, I was going to ask about that, as well as the Stafford Act.

MS. JIMENEZ: Sure.

THE COURT: Because I know that they are filed objections. So if you want to address it, certainly.

MS. JIMENEZ: Right. So if I could just -- just on this government benefits rule, the way that this provision reads, it says: "In cases involving a government benefit, loss shall be considered to be not less than the value of the benefits obtained by unintended recipients or diverted to unintended uses, as the case may be."

So it establishes a floor for the loss amount in cases involving government benefits. And again, I have not seen any case that treats these programs specifically as government benefits, at least under this provision; however, I would like to cite a couple of cases, United States v. Aldissi, A-L-D-I-S-S-I, which is 758 Fed. Appx. 694. This is Eleventh Circuit 2018. It involved wire fraud convictions. These were scientists who submitted fraudulent research proposals to obtain federal funds under a small business research program.

The court upheld the intended loss amount of 24 million, which was 10 million awarded research proposals, 12 million of unfunded proposals. The defendants there argued that there was no loss because they had performed all the work under the contract. And there was not an issue with respect to whether or not it was a government benefit. The court found that it was, but the court essentially ended its inquiry when it found that the scientists were not eligible for the funding; in other words, they were not intended recipients because they had committed fraud in obtaining those loans.

Same with United States v. Agrawal, A-G-R-A-W-A-L, 97 F.4th 421. This is a Sixth Circuit case from this year, 2024. Similarly, it was a Department of Energy grant to fund research. And there the court went through the mechanisms of applying the government benefits rule and reiterated the point that it sets a floor for the loss amount. And the court basically said this was an unqualified recipient and therefore the loss was the total amount of the grant.

The court said that the misrepresentations in the applications meant that, in this case, the Department of Energy would not have funded these grants, if they had known of the misrepresentations. And so the court treated the recipients of the loans -- I'm sorry -- of the grants, as unintended recipients.

I think that is the case here. Both of the PPP loans, without W-2 employees, these businesses were not intended recipients. And for the EIDL loans, as Mr. Motes testified, without an economic injury, these businesses should not have been applying. Not to mention that multiple of those EIDLs involved parent companies -- HM Four, Sheppard Flagler Holdings, HM Six -- companies with no actual businesses, no actual income of their own.

So on the other enhancement, my partner here, Annie Martinez, is going to address that, Your Honor.

THE COURT: All right. Let me just stay with the intended loss. That if the Court were to not consider the acquitted conduct, and only the four counts of conviction, Counts 5, 7, 8, and 9, can you advise the Court, of the loans that were sought with regard to the PPP second draw loan application on February 11th, the Alafaya Trails second draw loan application, and as to Counts 8 and 9, the second draw loan application, as well as the loan related to the application on March 12th, what are the amounts?

MS. JIMENEZ: So Your Honor, with respect to the PPP loans that were funded, we start with April 15, 2020, which was funded and then forgiven. And if the Court recalls, there was evidence about that loan where the Defendant submitted a spreadsheet with purported salaries and withholdings, of which there were none. And he disavowed that that spreadsheet was -- he said that -- he stated that he had applied for that loan, but then he disavowed that spreadsheet when it was presented to him, and said that somebody else had put it in the loan file. So that loan was funded, which was April 15th, 2020.

And then the forgiveness application, which was in 2021, that was approved, again, with false information. He submitted a false labor report, indicating a long list of individual who had purportedly received wages, and these were individuals who were independent contractors. Mr. Jeff Graff was on that list. Mr. Martin Joe Beirne was on that list. And that application was funded, and that application was forgiven, and both of those were fraudulent.

And then, in terms of other funded PPP loans, we have the March -- so the first one was 146,587. The two other funded PPP loans for March 11 and March 12, to Northeast Bank and to Cross River Bank, and those amounts are 148,397 for the Northeast Bank loan and 148,591 for the Cross River Bank loan.

I will add that there was a January Cross River Bank loan application that was denied, that was also fraudulent, where there was a false Form 940 submitted with respect to that loan as well.

THE COURT: Okay. Is there anything further with regard to the intended loss?

MS. JIMENEZ: No, Your Honor. Not on intended loss.

THE COURT: Okay. Anything further, Mr. Srebnick?

MR. SREBNICK: Yes, Judge.

I want to address Your Honor's point about the loan repayment by the time of sentencing. I understand that you're focusing on that. And I'd ask you to consider for the moment, let us assume that Eric Sheppard had not yet repaid the loans because under the terms of the loans they were over time. The Court would still have to engage in the inquiry as to what was his intent when he took the loan. Was his intent -- as I used the example with renting a car -- was he intending to steal the car for good, and then you use the value of the car, versus was Eric Sheppard intending, particularly with the EIDL loans, to take the money and never pay it back. And indeed he was paying it back, but accelerated the repayment in light of these proceedings. But still, it establishes that he wasn't intending to take the money and never pay it back, and we know he had the ability to pay it back.

THE COURT: And Mr. Srebnick, what case would the Court look to that the Court should factor in the Defendant's intention to pay back a loan when the Defendant obtains a false and fraudulent loan?

MR. SREBNICK: I would go right to the guideline.

I'll just direct you to -- we've already cited the out-of-circuit cases that apply that guideline. I'm sorry. I grabbed the wrong -- thank you.

Give me one moment. It is 3 --

THE COURT: What provision under 2B1.1 should the Court look to?

MR. SREBNICK: I think it's -- the cases that I cite reference the guideline application -- bear with me one second.

3B1, under the notes, "Loss under subsection" -- I'll put it on the ELMO. I just reproduced it. And forgive my editorializing.

THE COURT: I'm sorry. You said 3?

MR. SREBNICK: 3B.

THE COURT: The role in the offense?

MR. SREBNICK: No. No I'm sorry. Under the notes of 2B --

THE COURT: Okay. 2B1. All right.

MR. SREBNICK: That defines loss.

THE COURT: All right.

MR. SREBNICK: Means the pecuniary harm that Defendant purposely sought to inflict. So that's how you determine what did he purposely seek to inflict. And it's a pecuniary harm. How much financial harm did he intend to inflict upon the lender? That's why I think the simplest example I've reverted now three times is to borrowing a car, or leasing a car, and stiffing the rental company for the loan -- for the lease amount.

It doesn't mean the defendant wasn't going to return the car, when he rents it for the week and gives a bad check. It's not the full value of the car. It's the -- how much did the defendant take in terms of the value of the lease for that week. Here, it's the value of the time, value of money, the interest. But these loans, particularly the EIDL loans, Eric Sheppard was paying interest on those loans, 3.5 percent, which at the time was roughly the market rates for those EIDL and other loans in the marketplace, given what the interest rates were at the time.

And the fact that Eric was paying those back, and then ultimately accelerated the payment before today, is, in my view, telling that he wasn't going to keep the money indefinitely. He was try treating it like any other loan his businesses have taken over the course of the last several decades.

And so, in deciding did he purposely seek to inflict the full face value of the loan as a loss to the lender, or to the SBA, I think the evidence doesn't support the Government's theory that the Court should apply the full amount of the loan. That would be what we described in other cases as the potential loss. If he didn't intend to repay it back, that would be how you would calculate the loss.

Next, in terms of how he deployed the funds, at trial, the Court saw the -- saw exhibits -- I think it was Defense Exhibit Z3, that Eric Sheppard, his business -- to keep the business going during the pandemic, he spent of his own money, apart from the loan amounts, well over $4 million, to keep the business going, so that, among other things, people could remain in the workforce.

And so the loan amounts -- I think the grand total of the loans that Eric obtained during the time period from these EIDL, SBA, was approximately $893,000 -- is dwarfed by the amount of money that he personally used of his business funds apart from the loans to keep the businesses going. And the amounts of money me he borrowed were deployed in an amount that is consistent with what is -- maybe it was just characterized as payroll, but for workers, to keep people working.

And so it's significant that the money was used for that purpose, which makes it very different from these other cases. There is an Eleventh Circuit case -- these government contracts cases that the Government has cited to today are -- first of all, those are grant cases, gift cases, not loan cases. And in then some government contract cases, a case called Bazantes, B-A-Z-A-N-T-E-S, 978 F.3d 1227, Eleventh Circuit, 2020, the court does consider, in the Eleventh Circuit, even when someone obtains the money, a loan that he should not have obtained, he wasn't qualified for, there may have been fraud involved, but provides services for that money, the court does offset -- does offset -- the amounts in determining what loss or what intended loss the Defendant had in mind.

And so the combination of these cases, particularly the out-of-circuit cases, make it super clear that in a loan case you do consider, Judge, what was the course of conduct by the Defendant to establish what was his intent. And with the exception of the first PPP loan, where it was forgiven, before the jury finds there to have been any scheme, that is the only amount, $146,000.

And so I think, in answer to your question -- I did the math for you, Judge -- the two counts of conviction, Counts 4 and 9 -- and I'll get in a moment to Count Number -- bear with me -- Counts 7 and 8. I'll get to that in a moment, because 7 and 8 just replicate Count 4. I hope the Court's followed me on that. He applied for the loan. It was denied in the first instance, went to another bank and got 148,000. The Government says to you: "Let's use the larger amount because that was the more ambitious application," but it was the same pot of money.

THE COURT: So hold on. If you can go back --

MR. SREBNICK: Yes, Judge.

THE COURT: -- with regard to the argument. So you're saying the $203,125 was never obtained?

MR. SREBNICK: Correct. Not funded.

THE COURT: Not funded. So part of the intended loss, not the actual loss.

MR. SREBNICK: Except that it was eventually funded by a different bank, 148,397. The first bank --

THE COURT: Right. But there were two separate banks.

MR. SREBNICK: But he would only qualify for one loan, and a single -- only one institution could lend the money. And so it wasn't like he could qualify for both. He could only qualify for one. He tried it with one bank. It didn't work. He tried with another one. It does work for the amount of 148,397.

But even giving the Government credit for the larger amount, the original application, that would be 203,125, plus the 148,591 -- I did the math wrong -- 591. And I'll do the math in a moment. It's those two loan transactions that matter, for purposes of limiting the exposure to just the counts of conviction. And I'll just do the math in the moment. I'm sure someone at Defense counsel table can do it better than I can.

And even if you include the third PPP loan, it still is less than $550,000 between all three of them, which is the breakpoint under the guidelines.

THE COURT: I'm looking at the Bazantes case, Mr. Srebnick, and I'm failing to see how that would be relevant, when that relates to services provided.

MR. SREBNICK: So in Mr. Sheppard's case, as I've just described, the money was used to pass it on to workers. And I understand he didn't qualify for it, those workers were not correctly categorized as W-2 under the IRS rules, and the Government's position is that that therefore created a fraud, and we've dealt with that. But the money went to them. The intended purpose of the money from the Congress was to get the money into the hands of workers, and that's where the money went.

And so, in terms of loss, who is the loser here? Who is the financial loser in this case? It wasn't the banks. They didn't lose any money. And the SBA gave the money to Mr. Sheppard through the banks, and he then transmits it to the workers who really were the intended beneficiaries of these programs. And that goes back to our argument that, under the cases of government programs, you do consider if the money went for its intended purpose.

And I began my presentation with this simple point: If Eric Sheppard had never applied for this money, and someone else had, the SBA would not have received the money in return, because these were forgivable loans. And so the SBA is in no worse position for Eric Sheppard having obtained these loans, so he could pay workers, than the SBA would have been had some different company characterized those exact same human beings as W-2 employees in a way the Government would have found acceptable.

THE COURT: All right. So continuing with the -- and Ms. Jimenez, are you in agreement with regard to -- and I understand that there was an effort with regard to Bank Processor 1 and 2, but would you agree that the amount that was obtained was, in fact, the $148,397?

MS. JIMENEZ: That's correct. Yes.

THE COURT: All right. All right. Anything further?

MR. SREBNICK: One moment, Your Honor.

No, Your Honor.

MS. JIMENEZ: Your Honor, again, I go back to the very first PPP loan, April 15th, 2020, that was attained and was forgiven, both fraudulently. The fact that the Defendant took the money from those loans, that he wasn't supposed to be getting in the first place, because he actually had operating businesses that were successful, and he just put the money into his businesses and that money just flowed through the businesses, and he used the money, as we saw during the trial, for business purposes, for personal purposes, that doesn't mean that you get to take the money that you have in those accounts -- because he had private loans of millions of dollars, he had rental income from the Alafaya Trails business -- because he had that money, that he was -- because he had operating businesses, it doesn't mean that now that he shows a chart where he lumps together the funds that come into his various businesses over the course of a year and a half, that he gets to negate an intended loss, where he intended to obtain the full amount of each of those loans that he -- some of which he was successful for and some of which he was not. And the relevant conduct guidelines and the intended loss guidelines tell the Court that he should be held responsible for all of it.

THE COURT: All right. I understand the argument.

Let me state that the argument is preserved, but I do not believe that the payoff of the loan by Mr. Sheppard is properly calculated by this Court in determining the intended loss.

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 if Probation can advise of the amount, and I believe the advisory guideline calculation should change as a result of that.

PROBATION OFFICER: Yes, Your Honor.

The total offense level is then reduced by four levels, resulting in a total offense level of 21.

THE COURT: Can you give me the amount of the intended loss, calculating the three loans, please, and where that falls under 2B1.1 in terms of the enhancement.

PROBATION OFFICER: Would you like me to start from the base offense level?

THE COURT: I don't need -- I just need, on the 2B1.1, the loss and the total loss, and then I'll determine the enhancement.

PROBATION OFFICER: Okay. So with a loss of 443,575, that results in 2B1.1(b)(1)(G), which is 12 points.

THE COURT: Okay. If I could just be mindful of my staff, particularly my court reporter, let's go ahead and take a 10-minute recess, please.

COURT SECURITY OFFICER: All rise.

(Recess from 11:04 a.m. to 11:15 a.m.)

THE COURT: All right. Go ahead and have a seat.

Welcome back.

MS. WEINTRAUB: Judge, Mr. Sheppard is in the men's room. He'll be right out.

THE COURT: All right.

(Pause in proceedings.)

THE COURT: All right. Let us -- let me acknowledge the presence of the Defendant.

Let us continue to address the objections to the PSI or the calculation of the advisory guidelines.

On behalf of the Defendant?

MR. SREBNICK: Judge, I'm sorry. I couldn't hear.

THE COURT: On behalf of the Defendant, let us continue to address the objections to the PSI, or the calculation of the advisory guidelines.

MR. SREBNICK: I believe our next objection was to the sophisticated means enhancement. And our objection is at Docket Entry 238, the sealed version, or the unsealed version at Page 20. And the Government -- if we can turn to the Probation office -- suggests that this particular scheme should include a two-level upward adjustment for sophistication. And yet, the hallmark of one of these loan fraud cases is the submission of something false.

And so the question is: Was there something particularly sophisticated about characterizing workers as employees, when they were independent contractors? Because that's the heart of what the Government's case is, that these workers, these real people, were mischaracterized, even though they were indeed workers.

And we submit that the documents the Government relies upon to support its suggestion that there was some level of sophistication are just run-of-the-mill documents. You see them in tax cases. You see them in loan cases. It's a loan application that contains, according to the Government's theory, misrepresentations, but nothing out of the ordinary. This case does not involve offshore accounts. It does not involve the kind of long planning of sophisticated activities to, you know, fool the world.

And so we suggest that this case does not fit within the sophisticated means enhancement. We cited United States v. Adepoju, A-D-E-P-O-U -- excuse me -- A-D-E-P-O-J-U, Fourth Circuit, 2014, that the complexities and intricacies must be, quote: "Above and beyond," close quote, "the complexities and intricacies that are already inherent in the alleged fraud."

And in that case, like this case, it involved allegations of bank fraud, allegations of stolen identity, as well as allegations of forged checks in order to withdraw money from an account. And in that case, the Fourth Circuit agreed with the defense that such conduct did not rise to the level of a sophisticated means.

Thank you, Judge.

THE COURT: Thank you, Mr. Srebnick.

Ms. Jimenez?

MS. JIMENEZ: Yes, Your Honor.

Sophisticated means enhancement can apply to the execution or the concealment of the offense. And in this district, I think we see a lot of -- for instance, in the healthcare fraud realm for sure, a lot of sophisticated means enhancements imposed because of the concealment aspect, where you have shell companies and money disappearing through those shell companies.

But it also applies to the execution of the scheme. And the sophisticated means enhancement example, as to the sophisticated scheme and the way it was executed, provides this example: A telemarketing scheme. Locating a main office of a telemarketing scheme in one location and the soliciting operations of the scheme in a different location, that indicates sophisticated means under the guidelines.

And the case law in the Eleventh Circuit is clear that each action on its own need not be sophisticated, but repetitive and coordinated conduct, though no one step is particularly complicated can be a sophisticated scheme. And that's US v. Barrington 648 F.3d --

THE COURT: And I have Barrington, and I have the Bruey cases that you have cited. And in each of those cases -- for example, in the Bruey case, there was the establishment of fictitious entities, corporate shells. What is it here that was especially complex or especially intricate in terms of filing these loan applications?

MS. JIMENEZ: Well, there were income tax returns that were fraudulent. There were income tax returns that the Defendant prepared and submitted in the spring of 2021, many months before his own accountant would have started working on those income tax returns. And these are not 1040EZ. These are corporate partnership income tax returns that had false information about revenues and salaries. And they were entirely prepared without any input from the accounting firm, which had, for 25 years, prepared those partnership income tax returns.

There were a number of the 941s, which report quarterly wages, federal income tax withholdings on those wages, Medicare, and Social Security taxes owed. There were unemployment tax forms, the 940s, that also have to report unemployment taxes. There were the spreadsheets with false labor and wage reports. There were, submitted to -- well, also in connection with the EIDLs, but he submitted false profit and loss statements for Alafaya Trails, and on and on and on.

I mean, some of the conduct, I would submit to the

Court, was sophisticated, and I would say particularly those income tax returns, the changing of the business code to reflect a construction business, instead of being a landlord of real estate -- of commercial real estate. And then there was also repetitive, ongoing conduct, which was the false -- all of these false -- particularly the false tax forms, including also Florida Department of Revenue forms, throughout the period of the scheme that does qualify as sophisticated conduct.

I mean, we've seen a number of PPP loan fraud cases where the defendants essentially outsource that part of the fraud to somebody else. I mean, there was a large case here in the Southern District where many, many people were charged and they were paying a very hefty accommodation to Mr. James Stote, who was preparing all the false documentation. So for those individuals, who outsourced that aspect of the fraud, we were not seeking sophisticated means.

But here, it was homegrown. It was all in-house. It was all the Defendant. And these were company partnership returns. And so I think that there was a level of sophistication that merits the enhancement, Your Honor.

THE COURT: Is there any other cases besides Bruey and Barrington that you're relying upon? Because I see a distinction in each of those cases. And the Eleventh Circuit notes that, in Bruey, she created false business -- Google business pages, business websites to correspond to the business information, Google reviews by alias accounts, which had purported feedback.

In all, the court notes the totality of the circumstances show that Bruey created false documents. Twelve applications were funded, two dozen fraudulent applications were in all submitted. I'm trying to see the difference between creating false documents and submitting them through portals, where the sophistication lies, where the Eleventh Circuit has told the courts that, in looking at sophisticated means, there has to be something more. There has to be something specific that would tell the Court that this is sophisticated. Other than the creation of false documents and the submission, what other actions would constitute sophisticated means?

MS. JIMENEZ: Well, they are not just any false documents. Like I said, some are sophisticated income tax returns. The Defendant submitted or created false business records, those profit and loss statements, board minutes. The Defendant also created a false impression about banking activity for HM Four by moving money into that -- first of all, he created a number of bank accounts for businesses on the EIDL side, for businesses that otherwise did not have bank accounts -- Sheppard Flagler Holdings, HM Six, HM Four -- and then he moved money in and out of the HM Four account to create essentially a false bank statement that left the impression there was activity in that business.

So I think -- and there are a number -- I haven't cited them, but there are a number of cases that do say what Barrington says, that is, ongoing, repetitive, coordinated conduct, even if looking at each individual act on its own is not sophisticated, it does amount to sophisticated means. And I would submit here we have both. We have the representative conduct, and some of the supporting documentation, you know, required some sort of expertise. I don't think anyone could have -- just anyone could have prepared those income tax returns.

THE COURT: But is it the mere preparing and submission? Because, in Barrington, the court noted that after the conspirators failed to obtain unique registrar employee passwords that they installed key loggers on registrar computers, using stealthy means and personal contacts, where the passwords were changed. They gained after-hours access. I mean, the totality of those circumstances certainly showed sophisticated means. They had to learn to negotiate the FAMU computer system. They logged on to -- multiple occasions, to practice and learn.

Here you have Mr. Sheppard's computer and the submission of documents to a portal. I understand -- I'm asking because the Court has had many cases involving the CARES Act and PPP loans, and I'm failing to find what here is truly sophisticated.

MS. JIMENEZ: Well, Your Honor, like I said, I've had cases where the individual was submitting one loan, or a couple of loan applications, and I've had cases where they're submitting tax forms. And for the most part, at least what I've seen, those tax documents tend to be outsourced to either a tax preparer, who is in on the fraud, or someone with that sort of expertise. And here, we did not see any evidence of anyone who was preparing these documents, particularly the tax documents, on behalf of the Defendant.

THE COURT: All right. Is there anything further?

MR. SREBNICK: Only if you have questions, Your Honor.

THE COURT: I don't. Because I find -- certainly the Court sat through the trial, and I do not find that Mr. Sheppard's actions were especially complex or especially intricate conduct pertaining to the execution or concealment of the offense. And I don't find, based on a preponderance of the evidence, that the Government has sustained its burden, and the objection would be sustained to the enhancement, and the two-level enhancement will not apply.

What other objections do we have?

MR. SREBNICK: Your Honor, we object to the adjustment upward for obstruction, which my colleague Mr. Cavallo will address any details. But the general proposition, we have a mixed verdict, which suggests the jury accepted some --

certainly some of Mr. Sheppard's testimony and acquitted on that basis. The Government is suggesting that because the jury did not accept all of the Defense arguments for acquittal that the Court should find an obstruction based on his testimony. I think that, given a few factors -- one is under Dunnigan -- the Court would need to have a finding of a particular fact that was a statement by the Defendant that was demonstrably false, not simply lapses in memory, not simply a credibility contest over who is more credible, et cetera.

In every civil case that Your Honor's ever heard, where there are witnesses for each side, one side wins, one side loses. But it's not the case that every time someone loses a case that the parties on the losing side are accused of obstructing or perjury. People's recollections, people's way they express themselves can differ. Juries can make credibility findings without making a finding by the Court that there's any kind of obstructive effort by the person who is on trial.

And particularly given the Sixth Amendment rights at stake, to find that a defendant who goes to trial and testifies, where a jury finds him not guilty of more counts than they find him guilty of, we suggest that applying an obstruction enhancement in that case wouldn't be appropriate and would really chill defendants' rights to testify.

And if the Court has any specific questions about the trial testimony, Mr. Cavallo's available.

THE COURT: All right. Mr. Cavallo?

MR. CAVALLO: Thank you, Your Honor.

So just going in order as they're addressed in the briefing, the first alleged act of obstruction was Mr. Sheppard's testimony that he did not decide who was W-2 and who was independent contractor status at his companies, and that he denied knowledge of who was an employee versus W-2 at his companies.

And, as far as I can tell, the primary thing the Government cited -- or was cited in the PSR, was Mr. Sheppard's 2019 deposition, so a deposition before any of the conduct at issue, in which he acknowledged that Mr. Graff, who testified at trial, and some CJUF workers, were independent contractors. And in the same deposition, he also testified that HM Management had, quote, payroll taxes for some employees, but no payroll for independent contractors.

So based on this, the Government is alleging that Mr. Sheppard committed perjury and lied at trial, when he said he didn't know who was W-2 and who was an independent contractor.

So the first point I want to make is that Mr. Sheppard didn't testify that he didn't know the difference between W-2 and 1099. His trial testimony was mostly that he was uninvolved in determining which was which, and he was uninformed about the hiring process and how workers -- upon their hiring, how they are classified. And he was also confused on the differences in independent contractors and W-2 employees, as far as how that would be reflected in their paychecks and any resulting tax implications. So I think the Government's trying to oversimply his testimony.

And I also would say his trial testimony is actually perfectly consistent with his 2019 deposition. In the 2019 deposition, as at trial, he admitted HM Management paid payroll taxes through 2019. That's exactly what he testified during his deposition. He also testified, contrary to Mr. Graff's testimony, that it was Mr. Graff who decided to be a 1099 independent contractor, again, long before any of the conduct at issue.

And Mr. Sheppard's testimony was never disproven. In fact, the Government put on its own evidence that it was Mr. Graff who benefited from the change from a W-2 employee to a 1099 contractor. And we saw those in the tax documents, where Mr. Graff ended up declaring much less income tax to the State of Florida after that change. So we don't believe Mr. Sheppard's testimony on this point was conclusively disproven.

And by the way, as a final point, the Government could have put on Jeanette Gonzalez. She was a witness who had immunity. She never testified as to who made the decision to be W-2 or 1099. They had every opportunity to put her on, and they chose not to.

So that's the first obstruction point. I can move on, unless Your Honor has any questions.

THE COURT: Well, the Government is raising four specific times when Mr. Sheppard's testimony was false, and has, in fact, referenced the fact that Mr. Sheppard testified to the jury that it was Mr. Vasilas who may have been responsible. But testimony admitted into evidence, including the exhibits, showed that, in fact, the loan applications were following the death of Mr. Vasilas. So it seems like that would not be -- that would be completely contrary to the evidence. And I think you're asking the Court to find that the testimony in this case was not --

MR. CAVALLO: Your Honor, I don't want to cut you off, but that was just my argument on the very first point of four.

THE COURT: Right. There's four specific parts that the Government relies upon. And it's incumbent -- obviously, it is an enhancement. It's incumbent upon the Government to show that this is more than just Mr. Sheppard not remembering, that, in fact, it could be argued to the jury, and the jury could believe the testimony -- and in fact, they did -- on several of the counts.

But I am trying to reconcile some of the evidence that was directly shown that contradicted Mr. Sheppard's testimony.

And that's what the Government bears out in its briefing.

MR. CAVALLO: Let me jump right into just I think what you believe are the main issues then.

First of all, I think it's really important to look at Count 6. Count 6 of the Superseding Indictment is February 26th, 2021, and it's submission of a false tax return. And it's after they found Mr. Sheppard guilty of Count 5, a few weeks earlier, for submitting false 941s.

What does this tell us? The only thing that this can tell us, unless this is a conflicted verdict, is that the jury believed someone else was involved. The jury did not reject that Mr. Vasilas or someone else was involved in this, period.

The Government also wanted an aiding and abetting jury instruction. So we can't draw from -- conclusively from these verdicts that Mr. Sheppard was the one who hit submit, Mr. Sheppard is the one who filled in the documents, Mr. Sheppard -- you know, all the things they are alleging he lied about. We cannot conclusively draw that from the jury's verdict. And I think the jury was telling us: "We do believe someone else was involved in this."

So I think -- and by the way, on the last argument they make, I just completely disagree with. Their last argument for obstruction, Mr. Sheppard obstructed by falsely denying that he had any knowledge or participation in the loans. And then their reasoning is that the money went into his bank account -- his companies' bank accounts, he was the sole signer on the accounts, he controlled the accounts, all the IP addresses for the applications come from his house, his email is used, so on and so forth. None of that proves that Mr. Sheppard is the one who did these things, and not someone else, like Mr. Vasilas.

And I would add there was ample evidence, undisputed trial evidence, Jeff Vasilas had authority to come and go to the house, even when Mr. Sheppard wasn't home. Mr. Vasilas had easy access to Mr. Sheppard's home, and he was there often. There was evidence he stayed overnight when Mr. Sheppard wasn't home. We put a gate proposal in evidence, if Your Honor remembers. I don't have the exact trial number. But it's a gate proposal that Mr. Vasilas DocuSigned from Mr. Sheppard's house, and it has Mr. Sheppard's IP address on it. And Mr. Glenn Sheppard testified he was at the house all the time with Mr. Vasilas, and Mr. Vasilas was always on Mr. Sheppard's computer doing work. So these indicia of it being obstruction just don't add up, and they cannot lead you to a conclusion that Mr. Sheppard's testimony was willfully wrong.

So -- and I believe I've addressed the really -- the heart of the obstruction. I don't believe the jury rejected that Mr. Vasilas was uninvolved and couldn't have been the one to fill out some of these forms.

I would add that Mr. Graff wasn't shown all of the

941s. He was shown a lot of them, but he wasn't shown all of them. I think he admitted there was different handwriting on them in places. Some of them were typed. The signatures varied wildly. The signatures varied on them. Mr. Sheppard's name was spelled wrong in some of the signature areas.

So I don't believe you can take the jury's verdict and just say: "Well, it's got to be obstruction. They just totally disregarded everything he said." I don't believe that you can take the verdict and say: "This must mean there was willful false testimony."

THE COURT: Have you addressed each of the four points? Because it is incumbent upon this Court to make specific findings, if the Court finds that the Defendant obstructed justice. So I just want to make sure I give you the opportunity, before Ms. Jimenez speaks, in terms of the specific evidence or testimony that would lead this Court to believe that it was not a willful intent, but rather confusion, mistake, or a faulty memory.

MR. CAVALLO: There's one more I don't think that has come up in your questions, or of what I've said, which is that the Government alleges that Mr. Sheppard testified falsely that he spoke to Cupersmith and Zaslow, the accountants.

THE COURT: Yes. With regard to the employees.

MR. CAVALLO: Regard to -- well, I believe it said --

THE COURT: With regard to the PPP loans and whether he should -- what he should to do with the employees versus the independent contractors.

MR. CAVALLO: Correct, Your Honor. And I think our briefing pointed out that, even I believe the testimony they cited, or at least other parts of the testimony, Mr. Sheppard's language was very hedging, you know, "I believe that was our conversation," couldn't get into details, "Can't exactly tell you the specifics of the conversation." And so we think that reflects uncertainty and faulty memory, not willful intent.

And most importantly, Mr. Zaslow did confirm that Mr. Sheppard affirmatively raised the issue of applying for the government programs in an email, and that email is in evidence. And Mr. Zaslow did confirm there was a subsequent phone call a few weeks later.

Also, again, this doesn't go to any of the counts. I mean, the Defense's position is that this April 2020 loan was uncharged. That amount hasn't been included in the Court's loss calculation. So this is a very early conversation in 2020 before the conduct. So we don't believe it goes to any of the guilty counts.

Oh, sorry. One other important thing, Your Honor. I believe you said some of the applications were submitted after Mr. Vasilas died. Mr. Vasilas died after all the successful applications. Mr. Vasilas was alive for all of the applications. I believe the only applications Mr. Vasilas had passed away was much later EIDL extensions that don't involve W-2, don't involve 1099, don't involve 941s, don't involve tax returns.

THE COURT: Well, I'll read from what the Government's contention is: "The EIDL modification files from the SBA show that the Defendant continued to submit false and forged documents to support his loan applications after Mr. Vasilas died. Mr. Vasilas's last text message to the Defendant was dated July 14th, 2021, and the resolution and certification documents submitted for the HM Management and Alafaya Trails modifications were dated September 2021."

MR. CAVALLO: Right, Your Honor. But that -- I don't even believe we argued Mr. Vasilas was involved in EIDL. It was Nationwide, and Mr. Sheppard admitted he did the EIDL for HM Four. Mr. Vasilas was there to assist with PPP. So Mr. Vasilas not being around for later EIDLs is meaningless, frankly, Your Honor. I don't believe that was ever our position. And there was no evidence from the SBA that there was any false returns they obtained, even for those specific loans you're talking about. They totally rejected that they had received any false returns.

Thank you, Your Honor.

THE COURT: Thank you, sir.

Ms. Jimenez?

MS. JIMENEZ: Yes, Your Honor.

So I tried to set out four categories of testimony the Defendant gave that was intentionally false and material.

The first category was the Defendant denying that he decided, that he was a decision-maker at his companies, as to who was W-2 and who were independent contractors, and he denied knowing whether the people who worked were W-2s or 1099s. And and I cited testimony, which I'm not going to read now -- but I cited testimony where he gave that testimony.

Mr. Graff testified that the Defendant was the decision-maker as to who was W-2, who was 1099. It was established at trial that there was one company, HM Management and Development, that had three employees up until 2018, no other company. And that one of those three employees, W-2 employees, was the Defendant's housekeeper Elba Baluarte. It is incredible to think that Jeanette Gonzalez, Jeff Graff, Jeanette Gonzalez's daughter, Vanessa Gonzalez, at HM Management, would have decided that Elba Baluarte, the housekeeper, was a W-2 employee because of them, not because of the Defendant.

The deposition transcripts -- I don't have them in front of me -- 79-1, 79-2, 79-3, taken in 2019, just before he started applying for these loans, there was no hesitation. It was clear. It was direct. These people were contractors. They are not W-2 employees. They all received 1099s. That's what he said, did not equivocate.

Neil Cupersmith, of course, testified no companies had W-2 employees, except HM Management, which had three historically. Then, of course, that's corroborated by the tax returns, the IRS records, the Defendant's 404(b) letter to counsel. He says: "I make all decisions at the company and Jeff Graff is a consultant. He's not an employee."

That was Paragraph 58 in the PSR. Paragraph 59 in the PSR, the category is these Forms 941. The Defendant, at trial, denied -- and I have the testimony laid out in my response -- denied knowing what the forms were for, denied having seen them before -- that is the ones that were submitted to the lender -- denied that he submitted them to PayPal, denied that the handwriting was his. Now, the jury did convict the Defendant on that count as to those 941s.

The Defendant's own exhibit, Exhibit P1, was an email to PayPal on that day, February 11th, 2020, the day of the submission of those 941s to PayPal. The Defendant's email -- in that email, he says to PayPal: "I received them from the accounting department and I have submitted them to you." That's what he says. Which, at trial, he said: "Oh, I didn't write that email. I didn't," even though that was the Defense's own exhibit at trial.

Jeff Graff recognized the Defendant's handwriting as to those 941s that had handwriting. Some of them were typed. It was the Defendant's signature on those 941s. The jury was shown withdrawal slips from the bank, that had handwriting of the Defendant, withdrawing funds from the HM-UP Development Alafaya Trails account. They were shown those withdrawal slips next to the Forms 941 that were handwritten with the name of the business; same handwriting. The Defendant denied on the stand, directly to me, that that was his handwriting.

Jeff Graff, knowing the Defendant his entire life, I would submit, is a -- beyond a handwriting expert. He was intimately familiar with the Defendant's handwriting and his signature. His signature was on the bank records. His signature was on those forms.

Then Paragraph 60, the next category, advice the Defendant received from his accountants, on direct, and then on cross-examination, the Defendant -- first of all, they put in an April 20, 2020 email, which I don't have in front of me. Then we put in an April 21, 2020 email, again, setting up a phone call that occurred the following morning, April 22nd, 2020 with both of his accountants. And the Defendant testified that the accountants gave him advice about the PPP program. That he -- that they gave him the advice as to which company should be the applicant, which was HM Management, instead of HM-UP. That he had indicated 80 employees on that PayPal application, but they told him: "No you need to refer back to 2019, the number of employees or workers you had in 2019."

He gave specific details about this purported advice that the accountants gave him. Both Mr. Cupersmith and Mr. Zaslow denied that in that conversation that they had with the Defendant on April 22nd, 2020, or at any point when they dealt with the Defendant, that they discussed with him anything about the PPP program. Nothing at all was asked by the Defendant about it -- PPP or EIDL, I should say, either one -- and no advice was given by them, solicited or unsolicited, on that issue at any point. It was unequivocal.

And I cited for the Court an Eleventh Circuit case, where there was an obstruction of justice enhancement imposed, where the Defendant denied engaging in drug-trafficking activity, and there were two witnesses who contradicted that. I think, based on the accountants' testimony alone, this obstruction of justice enhancement should be imposed. Their testimony was uncontrovertible. The jury believed them. The Defendant's own exhibit -- well, not his exhibit, but our April 21st email corroborates that.

There is no possibility, on that issue, on that subject, that the Defendant was testifying from faulty memory or was confused. He gave specific items of advice that these accountants purportedly gave him, which they flat out denied.

THE COURT: So let me -- I just want to -- because I'm following you with regard to the three -- now the fourth point.

MS. JIMENEZ: We're getting to four.

THE COURT: Well, the fourth point is with regard to Cupersmith and Zaslow, right?

MS. JIMENEZ: No. The fourth point is Jeff Vasilas.

THE COURT: Jeff Vasilas, which is what I asked Mr. Cavallo, in terms of the submission of the applications.

MS. JIMENEZ: Right.

THE COURT: Then if I can stay on the point with Mr. Cupersmith and Mr. Zaslow.

MS. JIMENEZ: Yes.

THE COURT: Because the law requires that the Court find, obviously, the testimony was under oath -- it was -- that it was false, material, and given with the willful intent to provide false testimony.

So if I look at the testimony, when Mr. Sheppard was asked: "So you told the accountants you had applied on behalf of HM-UP for this PPP loan application, and their advice back to you was: 'No, you should have applied on behalf of HM Management.' Is that what they told you?"

And the Defendant says: "Again, I don't know the exact conversation from four years ago, but it was -- the only thing I remember talking about was HM Management is the company that I should apply for the PPP loan. That's my recollection."

So where would the Court find the willful intent to provide false testimony? I understand that you've cited to a case where two individuals said that the defendant was involved in the criminal activity, the defendant denied it, and the court found that that was sufficient. But here -- because the other two, I'm wrestling with the testimony the Defendant was a decision-maker regarding employees and who are the W-2s or 1099s. Mr. Graff testified. The jury was free to accept or reject his testimony. They rejected it on some. They accepted it on some. Elba Baluarte didn't testify.

So it's hard to find that the mere fact that Mr. Graff testified, and contradicted Mr. Sheppard, that this Court should make a finding that the Defendant willfully obstructed justice.

MS. JIMENEZ: Well, Mr. Graff testified -- and that -- with respect to the Forms 941, Mr. Sheppard testified that he had not seen them before, didn't know what they were, didn't do anything related to them. Mr. Graff specifically recognized the Defendant's handwriting on the Forms 941 that were submitted to the lender, that the Defendant denied having ever seen before. His handwriting, Mr. Graff testified, was on those forms.

That was corroborated by bank withdrawal slips that were shown to this jury, withdrawal drawl slips of the Defendant that were put side by side with those handwritten 941s that had the same handwriting. The Defendant denied it was his handwriting, and he also denied that he had ever seen those forms. So that is the Jeff Graff testimony that I am speaking about.

With respect to Mr. Cupersmith, on direct, it was elicited from the Defendant: "In terms of getting assistance generally for the first PayPal loan application" -- again, that was April 2020 -- "who did you speak with to get help? Who do you recall speaking to?"

"Well, I spoke to Neil Cupersmith, Alex Zaslow, and I was taking information from what Jeff Graff told me."

That's where he starts. That was on direct, December 19, 2023, p.m. session, Pages 39 to 40.

He goes on: "Did you have -- did you speak to the accountants around this time period?"

"Yes."

"What do you recall about that?"

"I recall the email -- we emailed back and forth about setting a time to call because I was trying to get guidance about this application, and we set up a phone call and -- a phone call regarding that."

"What do you recall about the discussion with the accountants about -- as reflected here about this?"

"I don't remember all the conversation." And then he goes: "I asked him about the 2019 compared to 2020, and that's when they said: 'You have to use 2019 workers.'" And he said: "You can get -- Jeanette knows all about this stuff" -- referring to what Cupersmith and Zaslow said to him. "Jeanette knows about all this stuff."

And I said: "Okay."

And he also said: "From -- how do you call it -- an LLC, he was telling me that it really should be HM Management."

So this is brought out on direct examination that he received advice from his accountants in April of 2020, when he's starting to apply to PayPal, about the workers, about the company, and that the accountants gave him advice about the PPP. And that is to suggest to this jury that: "Whatever I did with respect to PPP, I got advice from my accountants," and that was false.

THE COURT: And that was directly contradicted by Mr. Cupersmith and Mr. Zaslow?

MS. JIMENEZ: Correct. Mr. Cupersmith was asked, 12/12/23, p.m., at Pages 18 to 19: "Did the Defendant, at any point when COVID began, reach out to you to ask about how to qualify for a PPP loan?"

"No, he didn't."

"Did the Defendant reach out to ask about how to apply for a EIDL loan?"

"No, he didn't."

And it was much more specific with Mr. Zaslow because Mr. Zaslow testified on rebuttal after the Defendant had given testimony about the advice that Mr. Zaslow and Mr. Cupersmith had given him on the phone about the PPP. And Mr. Zaslow was asked, Trial, January 10, 2024, p.m., Pages 137 to 138: "What was the situation you discussed in that call with the Defendant?"

"That he had not paid us for the returns that we prepared, and we weren't going to release them until he did."

As part of the emails that had been introduced, there was a discussion about the Defendant wanting his tax returns completed. Then the next question: "All right. In that conversation, did Mr. Sheppard ask you anything about Paycheck Protection Program loans?"

Answer: "No, he did not."

"Did he ask you anything about Economic Injury Disaster Loans?"

"No, he did not."

"Did he ask you anything about any government loans?"

"No, he did not."

"Did he ask you whether -- you know, as to what company should be applying for any type of government loan?"

"No, he did not."

"Did he ask you about what tax year or what year -- what year's figures or number of laborers he should be using for any type of loan?"

Answer: "No, he did not."

"Did you provide him -- you -- was Mr. Cupersmith on the call as well?"

Answer: "Yes."

"Did you or Mr. Cupersmith provide him or offer him any advice -- given the time frame we were talking about, April of 2020, did you provide him -- irrespective of whether he requested it, did you provide him any advice regarding applying for any government type of loan?"

Answer: "No. We provided no advice on government loans."

"Did you -- subsequent to that conversation that occurred shortly after this email, did you at any point in 2020, or in 2021, provide Mr. Sheppard any advice regarding any COVID-related government loan?"

Answer: "No, we did not."

That was, as I said, January 10th, 2024, p.m., at Pages 137, 138.

And as I argued in my response, the juxtaposition of the Defendant's testimony and the accountants' testimony, which was unequivocal -- it removes any possibility that he was unable to recall. It was brought out on direct examination of the Defendant.

The last category was denying that he took part in the preparation for the submission of false documents to the lenders in 2021. He denied that he had anything to do with the submission of false documents to the lenders in 2021. He admitted that he submitted loan applications in 2021, but denied knowing about or having anything to do with the preparation or submission of any false documents to the lenders in 2021. And for that, he blamed Mr. Jeff Vasilas.

And I gave examples of the testimony -- well, no -- right -- that he did it -- I mean, right -- that he doesn't know anything about the preparation or the submission of the false documents. So it's not only that Jeff Vasilas did it. It's that it was done, obviously, without his knowledge, without his consent. And you know, I point out all the evidence in the case where, of course, everything goes to him, all the email communications are with him, the IP address coming back to his house.

The false documents that I referenced that occurred in September 2021, I reference them because they included -- not only do they have false information about the management -- who was the management of the companies, HM Management and HM-UP, which did make it to the SBA, but they had signatures, and they included the purported signature of Jeanette Gonzalez. And Jeff Graff had testified about Jeanette Gonzalez's signature. There was a check that was shown to the jury that had an endorsed check by Jeanette Gonzalez, which was very different from the signature on those documents, and that was September 2021.

And nothing that the Defense put in involving Jeff Vasilas had anything to do -- except Jeff Vasilas doing his work as a contractor. That's who he was, he was a contractor.

But I think the clearest and I think irrefutable evidence of obstruction of justice has to do with the testimony about the advice the accountants gave him, and the testimony about denying having anything to do with 941s, that he, in an email, says he submitted to PayPal. And two, where his handwriting is recognized on those very same 941s, corroborated by the bank records, the withdrawal slips that show the same handwriting -- his withdrawal slips.

THE COURT: Anything further?

MS. JIMENEZ: No, Your Honor, unless you have questions.

THE COURT: Mr. Cavallo?

MR. CAVALLO: Yes. May I please approach?

The Government spent a lot of time talking about -- I lost track of the numbering, but the conversation with the accountants about applying.

First of all, I would point out that when Mr. Cupersmith testified he claimed that there was never any communication whatsoever about the government loan programs. It was on us, the Defense, in our cross-exam, to show him emails that he never produced to the Government, that we obtained ourselves, that there was emails that specifically referenced -- from Mr. Sheppard to the Cupersmith firm, talking about: "I'm applying for government loans. I'm applying for the government programs."

THE COURT: What exhibit are you referring to, sir?

MR. CAVALLO: I will get you the exhibit number, Your Honor. I don't have it in front of me.

THE COURT: Well, if you're showing that that refutes the direct testimony of Mr. Cupersmith and Mr. Zaslow, then yes, it would be important, because I am finding that that testimony is material.

MS. JIMENEZ: Your Honor, if I could just add, there was an email which precipitated ultimately the phone call on April 22nd. There was an email on April 20th -- I also don't have it in front of me -- where he mentions to the accountants that he was applying for government loans. The thrust of the email was that he wanted to get his tax returns, but he mentions in the email government loans.

Mr. Cupersmith, I acknowledge, did not remember -- I had not seen that email -- but Mr. Cupersmith did not remember that that had been brought up in some email. He did -- he was adamant that they had no discussion about any PPP loans or government loans. But there was, in an email, a mention of that, when the Defendant was emailing them to set up a phone call about getting his tax returns.

THE COURT: Well, was Mr. -- was Mr. Sheppard referring to his communication with Mr. Cupersmith's office with regard to the PPP loans in that email?

MS. JIMENEZ: It just --

MR. CAVALLO: Yeah.

THE COURT: Well, what does the email say?

MR. CAVALLO: Your Honor, I'm sorry. The Internet went out. I have it on my computer. I just have to pull it up. But the email says, in black and white, to Mr. Cupersmith -- and I will get it -- even if we have to move on to the next topic, I'll get it and blow it up. The email says: "I'm applying for government loans. We have to talk."

And then there's more to the email, which we'll show you. And then, subsequently, there's emails that we put into in evidence, also where Mr. Sheppard is setting up a phone call with Mr. Zaslow and Mr. Cupersmith. There is then a PayPal document that was produced by PayPal, that's a Government exhibit, that says -- a message from Mr. Sheppard to PayPal, that says: "I spoke with my accountants. I need to change some of the things on the application."

And then, Your Honor, there is a corrected application that is submitted that changes things from the original application. That is the timeline. We went through it in trial. The PayPal representative didn't dispute that another application had been submitted on that date and was ignored.

MS. JIMENEZ: That was not in evidence.

MR. CAVALLO: It's in evidence --

THE COURT: All right. Well, I would like to see that evidence if, in fact, you're claiming it refutes Mr. Cupersmith and Mr. Zaslow's testimony.

MR. CAVALLO: We'll put it up. And Mr. Zaslow was brought on, I would also add, after the Defense case, as a rebuttal witness. He was brought in at the very end of the case, even after the Defense case.

And also, I think it's really, really important to go back to something Mr. Srebnick said. In the Superseding Indictment, they removed this April 2020 application. It was a count in the original Indictment, and they removed it. If the jury believed that that application was fraudulent, and there was misrepresentations in it, there is no way that the jury would have acquitted Mr. Sheppard of Count 4.

Count 4 is a second draw based on the -- some of the same data to the same entity. If the jury believed there was anything wrong or fraudulent in that April 2020 application and loan, there is no way they would have acquitted on Count 4.

The jury believed that the bad acts, the misconduct, the crime, began -- Count 5, February 11, 2021, when 941s were submitted. That's what the jury found.

So all of this stuff about April 2020, and did he call about the application, and did he ask questions, there's evidence he did, which we can show you. There's Mr. Zaslow's testimony that he didn't ask some questions. And you have couched language from Mr. Sheppard: "I don't remember the exact conversation."

I mean, I don't know how you can make a finding of perjury based on this mishmash, and then especially given the jury's acquittal on Count 4. Count 4 is just an extension of everything that happened that they're talking about in this loan from April of 2020.

THE COURT: I would like to see that email because I think, if that directly refutes Mr. Cupersmith's testimony, then certainly that would be important for the Court in making any type of finding.

MR. CAVALLO: The Government has it. They know it exists. We have it. It's in evidence. We'll get it pulled up somehow.

MS. JIMENEZ: There was an April 21st email as well.

MR. CAVALLO: We'll get it pulled up somehow.

So in Docket Entry 238, it's also quoted, Your Honor -- well, there's testimony about this email on Page 33 to 34. So I want to give Your Honor time to get there.

THE COURT: Yeah, I am.

MR. CAVALLO: The bottom of 33.

THE COURT: Hold on.

(Pause in proceedings.)

THE COURT: This is a sealed filing, so it's just taking me a long time.

MS. JIMENEZ: There's also Government's Exhibit 81, which, again, is the April 21st email.

THE COURT: Just read it to me.

MS. JIMENEZ: I don't have it, Your Honor.

THE COURT: What does it say?

MS. JIMENEZ: I have it referenced in my response.

THE COURT: All right. Here it is.

Monday, March 30th, 2020: "Hi, Alex. Hope all is good and healthy. Please let me know if you filed my personal 2018. I applied for some of the government programs. They asked for tax returns. The 2018 is not on. They will not process the application."

Is that the email you're referring to, Mr. Cavallo?

MR. CAVALLO: I believe so, Your Honor. There's a subsequent email. It's Government Trial Exhibit 81, on April 21st, and that also talks about getting PPP.

(Pause in proceedings.)

MR. CAVALLO: So the point is, Your Honor, he -- there are emails in evidence where he's talking about the government programs with the accountants, and his language is couched as to: "I don't remember the exact conversation. I don't remember specifics." But it's absolutely true that he referenced the government programs and even in emails. And it's also true from the PayPal exhibits that -- that references a call with accountants.

THE COURT: All right. Is there anything further, Mr. Cavallo?

MR. CAVALLO: Yes, Your Honor.

On the 941s issue, the Government -- one of the things the Government argues is that this is perjury because Mr. Graff said: "That's Mr. Sheppard's handwriting on the 941s. He filled them out." That is an opinion, Your Honor, opinion testimony. I don't believe that that's sufficient, for lay opinion testimony on handwriting to make a finding of perjury that that had to be Mr. Sheppard who filled those out because that's what Mr. Graff says.

And again, I go back to there's clear indications from the jury that they believe someone else was involved, when you look at Count 6, and that there was someone else doing things and submitting things. So again, I don't believe that the Government has met their burden of convincing you, on a mixed verdict case, that the jury had to, you know, believe Mr. Sheppard was lying.

THE COURT: All right.

MS. JIMENEZ: Your Honor, if I could just add --

THE COURT: Is this with regard to the exhibit?

MS. JIMENEZ: Yes. So first with respect to the 941s, there's also -- like I said, the Defendant's own exhibit, P1, which the Defendant then disavowed. In P1, it's an email to PayPal, where he's telling them: "I got the 941s from my" -- so-called -- "accounting department, and I submitted it to you." That was February 11, 2021, the day of the wire transmission to PayPal. That's for the 941. On the stand, he said somebody else wrote that, he didn't write that email.

On the accountants, there was testimony at the trial because the Defense brought up this email. And the testimony was that what we discussed -- so the email was essentially asking to speak to these accountants. That's what that email was, because he wanted the tax returns because he was applying for government loans. The discussion with the witnesses, both witnesses, was: "Well, did you end up speaking with the Defendant?"

"Yes."

"What did you discuss?"

"The tax returns. That we were not going to turn over to tax returns until he paid us."

And the questions then about: "Any discussion about PPP loans, any discussion about government loans?"

"No. No. No."

That's what -- so it was an email requesting to speak with them. They flatly denied having any discussion with him about any government loans, and the Defendant's testimony was that he received advice from them about the government loans.

THE COURT: All right.

Anything further?

MR. CAVALLO: I would just say, again, Your Honor, this all relates to an April 2020 loan that --

THE COURT: Well, it certainly does. I mean, the email on the Government's Exhibit 81 is from Mr. Sheppard to Mr. Cupersmith on April 21st, 2020, where he says: "Up until today, I still don't have my 2018 return and still cannot get the PPP money again starting tomorrow."

MR. CAVALLO: Correct. If the jury believed there was anything wrong with that loan, there's no possible way they can acquit on Count 4. It's not possible. It's an extension of the loan, a second draw with the same entity, based on the same underlying data. If the jury believed there was anything wrong with April 2020, they do not acquit on Count 4. It's the same facts, the same company, the same everything.

THE COURT: All right.

MS. JIMENEZ: I don't have a case to cite to the Court on drawing whatever Defense counsel wants to draw out of an acquittal on a particular count. What we can draw from the acquittal on a particular count is that the jury believed the Government did not prove that count beyond a reasonable doubt. And all of these inferences about what it suggests about other counts and other parts of the Indictment is completely improper. And the case law says that, that you cannot draw these types of conclusions from a jury's verdict.

The advice was -- yes, it was in April of 2020. But that was the kickoff of the PPP program. And the advice was --

to suggest to this jury that his accountants had given him advice on the PPP loans and the workers, or use 2019 workers, where these accountants very well knew that this Defendant did not have W-2 employees in 2019 and 2020 and going forward.

MR. CAVALLO: That's not even accurate, Your Honor.

THE COURT: Again, I don't want to retry this case.

MS. JIMENEZ: Okay.

THE COURT: I mean, the Government --

MS. JIMENEZ: Nor do I.

THE COURT: -- is seeking an enhancement under obstruction of justice. The Government bears the burden.

Is there anything further, Mr. Cavallo?

MR. CAVALLO: No, Your Honor.

THE COURT: All right. With regard to the obstruction of justice enhancement, it is this Court's responsibility to make specific findings. And I just want to state with regard to this last point, that the testimony that the Government provided to the Court with regard to this question, is question: "So you told the accountants you had applied on behalf of HM-UP for this PPP loan application. Their advice back to you was: 'No. You should have applied on behalf of HM Management.' Is that what they told you?"

Mr. Sheppard: "Again, I don't know the exact conversation from four years ago, but it was -- the only thing I remember talking about was HM Management is the company and should apply for the PPP loan. That's my recollection, and --"

"So did you tell them you were applying on behalf of 80 employees?"

"I told them I'm supposed to apply for workers in 2020. And I told them, no, it was 2019," and then he goes on.

But with regard to whether there was a conversation, whether there was not, there's now two exhibits into evidence that show that there was a some knowledge given to Mr. Cupersmith that Mr. Sheppard applying for the loan.

With regard to the content of the conversation that was testified to at trial, for testimony to warrant the enhancement under 3C1.1, it has to be false concerning a material matter and result from the willful intent to provide false testimony, as opposed to from confusion, mistake, or faulty memory.

The Government has cited to a case that directly shows -- that's United States v. Vera -- that the testimony of two witnesses contradicted flatly and was irreconcilable with the Defendant's testimony, and that was with regard to the involvement in a marijuana growing operation.

With regard to these four prongs, let me say that I cannot find and make specific findings that there was obstruction of justice with regard to the testimony of Mr. Graff opposing the testimony of Mr. Sheppard.

The denial with regard to the handwriting -- and quite frankly, at the time of the trial, I was surprised that the Government didn't bring in a handwriting expert. It relied upon Jeff Graff, and the jury was free to accept it or reject it. But I can't find that that constitutes obstruction of justice.

And with regard to the conversation with Cupersmith and Zaslow, and the advice that was given, again, based on the testimony, the Court cannot find that there was a willful obstruction of justice, and the Government has not met its burden, and the objection is sustained.

What other objections do we have to the PSI?

MR. SREBNICK: I think from the Defense, that's it. The Government has an objection regarding the Stafford Act.

MS. MARTINEZ: Your Honor, the objection relates to a guideline enhancement, B12. It is the disaster fraud enhancement.

What I'm going to give the Court is a little bit of background, just to let the Court know the importance of what this particular enhancement is. Then I'll give you just a little bit of what I have in terms of the case law. And then also acknowledge from the outset that you will sentence this Defendant based on the 3553 factors. In the end, you're going to determine what is a fair sentence to him. The reason that I'm raising this enhancement is because, before we get to 3553, we do need to look at the guidelines and see where he fits in connection with his offense in this case versus other offenses that don't involve disaster fraud.

So to tell you about the context of this enhancement, this enhancement is unlike other enhancements. This enhancement came at the direction of Congress. Congress told the Sentencing Commission: "We need this." There was an act that was passed in 2007. And it was signed by the President in January of 2008. That Act wanted -- and it was entitled an act that is going to have enhanced penalties in disaster fraud cases. In short form, it's called the Disaster Fraud Act. That act did three things, Your Honor. It did not only create this particular enhancement. It also created the statute 18 USC 1040.

In addition, that act created increased penalties under wire fraud and mail fraud for cases involving disaster fraud. And third, it created a -- it directed the Sentencing Commission to create this disaster enhancement.

Again, Your Honor, just to get to the bottom line, the reason that I'm raising the importance of it is because I know in the end you're going to sentence this Defendant based on the 3553 factors. And regardless of what you rule on what I'm raising, I want the Court to be aware that this is a disaster fraud case. This is not like other cases that are not disaster fraud cases. And Congress specifically wanted for the guidelines to reflect an enhanced penalty.

So what happened? Congress creates that act and makes that direction. The Sentencing Commission gets running and creates an emergency amendment, which is not the one that you have now. The emergency one -- I'm going to read it to you, the way that I started out. And this is cited in our brief, but what I'm referring to is the report to Congress from the Sentencing Commission.

When they first wrote the emergency amendment, they said this enhancement was going to apply if the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid, in connection with -- in connection with a declaration of a major disaster or emergency, period.

THE COURT: Under the Stafford Act.

MS. MARTINEZ: No. I'm talking now about the emergency amendment. It's not what it ultimately turned out to be. I'm talking about the report to Congress from the Sentencing Commission.

What they first did, immediately right after the statute was signed, they passed an emergency amendment to the guidelines that went into effect immediately, that read: "If the offense involved fraud or theft involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid, in connection with the declaration of a major disaster emergency or -- major disaster or an emergency."

The reason I point that out is because the report then goes on to say that when they changed the wording to refer to the statute, what they meant to do -- what the Sentencing Commission meant to do was to make it broader -- not to narrow it -- to make it broader than the original emergency amendment. That's what they intended to do.

So the first thing is just to give you the context. It was never meant to be narrow. It was meant to be broad. It was broad initially, and the Sentencing Commission meant to make it broader by referring it to the statute.

Now, I do want to go to how we analyze it legally, Your Honor, you know, because we do have to go then to statutory interpretation. And we did go in our brief to the point that the statute -- if you just look at the statute, 1040, it uses the word "or," Your Honor, number one. It could be authorized or paid in connection with a declaration. It also uses the words "in connection with," not "funded by" or anything like that -- in connection with the Stafford declaration.

Now, in this case, the facts are there was a Stafford declaration for the disaster, for the pandemic. There was an emergency declaration under the Stafford Act. There were both. There were both. So there is no doubt -- there is no doubt that this case involved disaster fraud in connection with a Stafford Act declaration, because they were both, emergency and -- the way that it works, Your Honor, is, that -- you know, that the President makes the initial declaration. And then after that, the President approves disaster requests that are made by the states. The President did that with respect to all 50 states. So there's no question about that.

The only issue that we have, Your Honor, is that here we are, you know, in the United States of America. We're lawyers. And people get into -- you know, get a little bit into: Could we slice it and dice it in a different way? And yes, you could somehow read "in connection" out of it, and read this thing more narrowly to think that it means only if it was paid pursuant. If we were in that world, in that incredibly narrow world, let me tell you where we would be -- and it's not surprising for courts to be -- you know, to be careful. And I understand if the Court wants to be careful --

THE COURT: Well, I'm just questioning -- because I've handled a lot of these cases. Has the Department of Justice or your office ever sought to seek this enhancement here in the Southern District of Florida?

MS. MARTINEZ: In my understanding, in the Southern District, I have not found another case.

THE COURT: And how many PPP or CARES Act cases has the Department of Justice had since the pandemic?

MS. MARTINEZ: Let me address that, Your Honor.

Without a doubt -- and I'm going to give you where you could stand on all fours and be completely correct applying this, and where there's even any room for saying that it would not apply. But let me tell you the background. The background is that the United States did determine to be conservative initially. Conservative, I mean not politically, obviously. But conservative in the sense of not reaching out for it initially.

THE COURT: But do you believe that it's fair --

MS. MARTINEZ: Yes.

THE COURT: -- that today --

MS. MARTINEZ: Yes.

THE COURT: -- you're seeking an enhancement in this case, where you've told the Court that your office has never sought this enhancement in any of the cases, in any of the divisions, in any of the courthouses --

MS. MARTINEZ: Sure.

THE COURT: -- from Fort Pierce all the way to Miami?

MS. MARTINEZ: Let me address that.

First of all, I am proud to work for an office that was conservative at first. Okay? So I am not going -- I'm not going to fault that to begin with. I am proud for an office that was not overreaching and was not -- was conservative at first.

We have received guidance based on recent case law, where it was affirmed on standards of harmless error and --

THE COURT: You mean the case in the Middle District?

MS. MARTINEZ: There was two cases. There was a case in the Fourth Circuit. There is also another case in the Middle District that was affirmed by the Eleventh Circuit.

So I'm just saying -- I'm telling you where we're coming from. We are coming from that we have been given guidance that the case law is developing, that it has been affirmed, even if it hasn't been directly addressed. Because as the Court knows, in the Fourth Circuit, it was addressed as harmless error. And in the Eleventh Circuit case that came out of the Middle District, as the Court knows, in that one, what it was is that the Eleventh Circuit allowed the attorney to withdraw with an Anders Brief, saying that there was no meritorious issue to raise in the case.

But we, as AUSAs, have been given the guidance that the case law is developing and that it would be appropriate in particular cases to seek it. But the reason that I also think it's fair -- and remember, I started my discussion by telling you I know the Court is ultimately going to sentence on the 3553 factors, and I just want the Court to consider what Congress wanted when it initially passed this, and I just wanted to tell you where I think you are on all fours.

THE COURT: No. I understand. I'm just concerned with regard to the selective application of this -- of this enhancement, where, in other cases, particularly before this

Court, the Government has never sought that enhancement.

MS. MARTINEZ: Again, Your Honor, the Court knows how much I respect you. I do absolutely reject the wording of selective --

THE COURT: Well -- but if it applied to one and not the other, is it a direction from your office that: "Beginning in" --

MS. MARTINEZ: No.

THE COURT: -- "June of 2024, we shall seek the enhancement with regard to all cases involving the CARES Act or PPP loans"?

MS. MARTINEZ: The direction nationally was to take a look at the cases that have come up, meaning that now we have a Fourth Circuit case, now we have an Eleventh Circuit case. Last night, I found a Southern District of New York District Court, which I can cite to the Court, but it was in a plea agreement situation, Your Honor. But in that case also the Court applied it.

So the guidance that we're getting is that we should look at it. And when I looked at it, Your Honor, I looked at what Congress intended. I also looked at the law. And we provided you a brief with statutory interpretation that I strongly believe is legally correct. So it's only to -- I mean, as prosecutors, to bring to the Court the importance of a disaster fraud case and a legally correct statutory interpretation.

But let me add one more thing, Your Honor. As part of your decision, I want to make you aware that -- and I think we said it in our brief. It's stronger on the EIDL -- the argument is stronger on the EIDL because that is absolutely funded through the Stafford Act. And in addition, in the case law that I found, Your Honor, it has involved EIDL.

I do strongly believe that the scheme in this case involved EIDL, because the Defendant was following the money. The first time that he considered filing for a pandemic loan, it was a Jeff Graff, HM Four, where Jeff Graff was telling him: "That's not a company that incurred the loss or any loss. So you shouldn't be applying for that." But that's what that they applied first. Then they went to PPP. Then they went to EIDL.

And when he went to EIDL, as the Court knows, it was not just one loan, but multiple. So he was trying to double dip. Even if the Court, as you have done -- you're not considering the HM Four Economic Injury Disaster Loan. Even as that, the Defendant had already received two other EIDL loans for companies where he is trying to claim a loss or some kind of economic injury that you couldn't possibly double dip. You couldn't possibly have HM Four receiving it and Alafaya receiving it, which it had, because one was owning the other. So you couldn't possibly have that. And he was now, for the third time, trying to claim economic injury on EIDL.

And in the first place, I have exhibits in evidence that there was no rental loss to begin with. There was no loss, meaning no economic injury. But then, even so, if you are giving him the HM Four one, he certainly wasn't then entitled to the Alafaya one. You can't claim the same economic injury over and over again.

And the only reason for raising that, Your Honor, is just to tell you that there is no question that this scheme to defraud involved Economic Injury Disaster Loans, and there's no question that you are on all fours. Every single case that has been affirmed is an Economic Injury Disaster Loan case. And that was funded by the Stafford Act, so it does apply.

And so, at a minimum, with the guidance that we've been given and as correct -- because I really did study it, Your Honor -- I really strongly do believe it's legally correct. It's just that we were conservative about it. And I don't think we should be blamed. I think it's fair to consider it. And why? Because a defendant next door, who is not being so relentless in a disaster fraud case, is different.

And let me tell you one more thing from the Commission's report to Congress. The reason that they're so concerned about disaster fraud -- one of the many reasons is that there's attention. When you do disaster fraud, they need to get the money out. So they don't have all the normal safeguards. And this is what the Sentencing Commission discussed when it was giving the report to Congress, and understanding. So Congress really thought it was very important to send a message to tell people, to recognize, that disaster fraud is different because you needed to get the money out. You couldn't protect -- have the normal protections for credit checks, blah, blah, blah.

So Your Honor -- and again, I understand the Court may wish to rule one way or another on this. I just ask you to consider it both as a guideline matter, and then, if not, as a 3553 matter.

THE COURT: All right. Thank you, Ms. Martinez.

Any response?

MR. SREBNICK: Judge, I don't know of any case in this district that's ever applied this. Even presently, as we speak today, the Government hasn't said there's another court with this kind of objection pending. The Probation office has reported none. And we're talking about two different acts altogether.

The Government's reliance on harmless error cases, as if that has become national policy, is curious to me. And how, under the guideline regime, which is supposed to have uniformity across the country -- that's the whole purpose of the guidelines -- we're now hearing that each district gets to decide how the Stafford Act applies to this guideline. It's a pure statutory question. And not one court in this district or anywhere else has -- on a full briefing has ever held consistent with the Government. It is deeply troubling that they picked Mr. Sheppard to test this issue, deeply troubling.

THE COURT: All right. Thank you, Mr. Srebnick.

Anything further, Ms. Martinez?

MS. MARTINEZ: No, Your Honor.

THE COURT: All right. Let me state that, first, I don't find that this is conduct related to the Stafford Act. I find that this is wholly unconnected.

I also, quite frankly, am concerned because this is conduct to which Mr. Sheppard has been acquitted. As you acknowledge, this is not with regard to the PPP. It's with regard to the EIDL loans.

Moreover, it's a question of fairness and creating unwarranted sentencing disparities. Because this Court has been involved in sentencing many individuals who have been involved in wire fraud related to PPP loans, related to the CARES Act, and this is the first time that the Court has addressed this issue. And I just -- I think it's a question of fundamental fairness. So the Court rejects the request for the enhancement and the objection is overruled.

Are there any further objections by either side to the facts contained in the Presentence Investigation Report or the calculation of the advisory guidelines?

MR. SREBNICK: We would be seeking, of course, a downward departure at the appropriate time, and a variance.

THE COURT: In terms of a variance -- well, let me calculate the guidelines, if there are no further objections.

On behalf of the Government, any further objections?

MS. JIMENEZ: No, Your Honor.

THE COURT: All right. Then the Court accepts all remaining facts in the Presentence Investigation Report. And with regard to the calculation of the advisory guidelines, it begins with a base offense level of seven.

As the Court has found with regard to the loss of the $443,550, there's a 12-level enhancement. The Court has rejected that this conduct constituted sophisticated means. As well, the Court has rejected that there should be an obstruction of justice enhancement.

As such, the adjusted offense level is 19. Mr. Sheppard has no criminal history, is entitled to a two-level reduction as a zero-point offender under 4C1.1. As such, the total offense level is 17.

With a criminal history category of I, the guideline range with regard to Counts 5, 7, 8, and 9, is 24 to 30 months; is that correct?

MR. SREBNICK: Yes.

MS. JIMENEZ: Yes, Your Honor.

THE COURT: In addressing the 3553(a) factors, Mr. Sheppard, certainly your attorneys have done an excellent job of compiling letters, and the Sentencing Memorandum that they've filed on your behalf; however, I want to ensure that you know that if there is anything that you would like to say, certainly you may do so. If there are individuals that are present on your behalf that would like to speak, they may certainly do so.

MR. SREBNICK: Would you like to do that now, Judge? Are we ready to go? I need a break.

THE COURT: Yeah, I know. I need to be mindful to my team. So why don't we -- it's 12:40. Can we take a lunch recess until 1:30. I'll see you back here at 1:30.

Okay. See you back here at 1:30.

COURT SECURITY OFFICER: All rise.

(Recess from 12:41 p.m. to 1:32 p.m.)

THE COURT: All right. Welcome back.

Go ahead and have a seat.

All right. We had previously addressed the calculation of the advisory guidelines. I have advised Mr. Sheppard that he has the right to speak and certainly allocute, and individuals certainly have the right to speak on Mr. Sheppard's behalf.

As well, I also want to mention that, as the Mandatory Victims Restitution Act applies, while the Court is scheduling a separate restitution hearing, I do want to advise the Government that if there are individuals that wish to be heard before the Court imposes a sentence, certainly those individuals may be heard as well.

On behalf of the Defendant?

MR. SREBNICK: Yes, Judge.

Thank you.

Judge, we have asked for the Court to vary down from the guidelines. And our ask is going to be consistent, we believe, with the atypicality of this case and other sentences that have been imposed in PPP cases. Your Honor has imposed many such sentences, as have other judges in this district and around the nation. And I think one thing we've seen about this case, it is quite different for the reasons we've discussed earlier today. One of which is that the monies that were borrowed were used for the very purpose of being able to keep people in our Florida communities employed during a very stressful time for many people, including for Mr. Sheppard.

I understand from the trial Your Honor heard testimony how the pandemic was going to adversely affect Mr. Sheppard's businesses precisely because people weren't working. His subcontractors were going out of business. There were not people available readily to finish the jobs that needed to be finished. It was putting his companies under severe financial stress. This Burlington Coat contract, penalties would be accruing. He needed people to get to work.

To do that, he took money of his own to get the business moving forward. And as the Court has found, used the PPP funds as well, as part of an effort to generate work for people in the community to get the job done. And that's exactly what he did. You saw the demonstrative exhibit. You saw the evidence at trial about Mr. Sheppard investing over $4 million of his own money, then some of the PPP money. At this point, we're talking about somewhere in the neighborhood of half a million dollars, based on the Court's finding today.

And so that money was deployed not so that Mr. Sheppard could go on vacation, and go spend it, in the proverbial terms of the Seventh Circuit, on wine, women, and song, but because -- for the exact reason why Congress passed this statute, these programs; in order to make sure that monies would be available to put people to work.

And I'd like the Court to have some background about Mr. Sheppard from the people who have known him the longest in his life. Today, as live witnesses, I just have two. I have someone who's known him since he was born, and that's his aunt, the Honorable Amy Donner, who's known him since the day he was adopted. And I also would like his daughter Jordan, who's known Eric since the day she was born, to tell the Court the two chapters of his life, his childhood through the eyes of his aunt, who saw him since the day of his birth, and through the eyes of his daughter, who has counted on Eric to be everything to her, and to her brother Jake, both of whom are in court today. And then I'll address why I think their testimony, plus the letters you've read and other comments that -- I'd like to share why they would warrant the Court to impose a sentence that doesn't require that he be taken from the community, that don't require that he be unable to continue to employ people through his businesses.

So, at this time, I'd ask Judge Donner to join me at the podium.

THE COURT: It's a pleasure to see Judge Donner.

Let me disclose that I worked with Judge Donner over the years when I worked as a state court judge.

It is good to see you.

JUDGE DONNER: Nice to see you too, Judge.

Judge, would you like me to be sworn in?

THE COURT: No. It's not necessary.

JUDGE DONNER: As you know, my name is Amy Steele Donner.

The first time I met Eric, he was a few days old, but I wasn't his aunt. I was the wife of his father's partner in the practice of law -- at a firm that probably you know, but many people here do not, Meyer, Weiss, Rose & Arkin -- Baron de Hirsch Meyer, who was very instrumental in giving lots of money to the University of Miami to be so successful, its school of law, and having written the letter for me to go to law school.

I met Eric when his parents received him, and they invited me to his house, their house, to meet him. So I know him -- I'm probably the oldest person in this courtroom, I'm unhappy to say. And I do know Eric the longest. He was a tiny baby, probably as bald as he is tonight. And I knew him for several years while I was not his aunt. Thereafter, his father and mother were related to my husband, my second husband, William Donner, who was Rosalie Donner Sheppard's brother.

And so, when I married him, Eric became my nephew. So from a child that I knew as a friend's child, he became my nephew. And I considered him my nephew from that time on.

Eric had a very difficult childhood. Difficult, because his mother, my sister-in-law, who I knew well, had lots of issues. The day Eric turned basically 12, I called his mother up to say that her father had died. And she was very angry. And I said: "Why are you so angry? Your dad just died." And she said: "Because today's the day I'm leaving my husband," and that was the day she left her husband and left her children.

And Eric was very sad about the relationship because his mother wanted to take him away from his father and take him to New Mexico, and then to North Carolina, and it was very difficult for him. He had an older brother and a younger sister, and he was very attached to his father. And for a long time he wasn't able to spend as much time with his father as he wanted.

But by the time he was 12 or 13, he was able to go back to live with his father, which happened to be around the corner from me. So Eric spent a lot of time at my house playing with my children, and my children played with him. So I knew him as an infant, and as a teenager, and then as a young adult. And his life was not easy. There was not a lot of money and there was a lot of stress. His mother resented greatly the fact that he wanted to live with his father, and she made his life very difficult.

And the more important part about his life with his family was that his mother was a very unloving person. She was rather cold. And then, when she went to New Mexico, when she ran away from the family, she was hit by a car and she became brain damaged, and she is to this day. And that has been very difficult for Eric to accept and to live with, because he loved his parents -- loved both of them. But he was very attached to his father, who then died.

Fortunately for him, he met his wife. Because with his wife came the parents he never had, which were Hillie and Judi Meyers. They were the people that gave him stability and gave him a lot of love.

Eric's not had an easy life. When you look at him today, and you hear about the fact that he became successful, that's just by accident. Because, from where he started, he shouldn't have been successful, because nobody else in his family was. But he became successful, and he worked hard, and he had the family now that he needed.

But he also has children now, two children. Jordan, who is already in college and doing very well, and his son who is only 15. His son is going to have to spend -- depending upon what sentence you bestow upon him, his high school -- perhaps many of his high school years without his dad. They are exceptionally close.

I have listened for the last three or four hours to the presentation that this Court has received. I spent almost 28 years on the bench. I've heard many of these same stories. I spent years on the criminal bench. I heard these stories. I heard the lives of the defendants. I've heard the lives of individuals they touched. This is a different kind of case. The people that were touched in this particular case happen to be the government.

The government is stronger than any one of us. It's not like a personal injury. It's not like armed robbery, or murder, or assault. It is a case that the government brought, which they had the right to bring, because they chose to. But I also see that the government is very punitive. Even the last request that you received to enhance the sentence, which has never been enhanced before, makes me understand why there was a 14-count Indictment, which is now a four-count conviction.

I don't believe that anything that happened before that was indicted even should be taken into consideration. And I'm asking this Court, because of everything I know about Eric, everything I know about his love for his family and his children, and everything I know about his children's love for him, that I'm requesting that this Court, in its discretion, give him probation, let him go home to his family.

You're going to have a restitution order, which he is going to have to fulfill. My understanding is, from the testimony I heard today, that he has paid back the loans that he received. I know that in white-collar crime that's not the issue. The issue is the crime itself. But I have to look at the cost analysis benefit to the country, because this is the United States, and to the Defendant. And I cannot see a cost benefit analysis in putting Eric in jail, and I'm asking this Court to give him probation. It is solely up to you, Judge, and I know you will do what you think is right.

I thank you.

THE COURT: Thank you, Judge Donner.

MR. SREBNICK: Judge, I'd like to present Eric's daughter, Jordan.

THE COURT: Hello, Jordan.

MS. J. SHEPPARD: Good afternoon, Judge Bloom.

My name is Jordan Sheppard, and I'm Eric Sheppard's daughter. I'm a rising senior at the University of Michigan, on the premedical track, and pursuing a bachelor of science in sociology of health and medicine. I came here today not only to support my father, and speak about what he has done for others, but about the strength of character and exceptional moral integrity that drives him to make a significant impact on people's lives.

My upbringing instilled in me a profound sense of compassion and generosity towards people from all walks of life. While both my parents played a pivotal role in shaping these values, it was undoubtedly my father, Eric Sheppard, who served as my guiding light, nurturing my sense of empathy and showing me the importance of giving back.

Throughout my life, my father's unwavering generosity has been a constant presence. Regardless of the time or expense involved, he never hesitated to assist anyone who sought help.

Despite everything my family has been going through the past two years now, my father still continues to prioritize helping others. Recently, at a basketball tournament in Orlando, a father on the team could not afford a hotel room and was sleeping in his car with his four-year-old daughter. As soon as my dad found out about this, he not only put them up at a hotel, but made it a point to be there to help drive the son to games while the father cared for his daughter.

To my dad, life is not about personal gain or awaiting something in return. He does not think twice about lightening the weight off of anybody's shoulders. His actions are quite the opposite of performative and rather demonstrate the sincerity of his heart and the pure honesty of his actions.

He himself doesn't understand this innate gift that he possesses to brighten someone's day, or even make a profound impact on people's lives by treating them with kindness, respect, and dedicating himself to making life slightly easier for others.

Many of my brother's and my teammates experience hardships, in which basketball is their only chance of receiving an education, or they are assisting a single parent raising their siblings, or they do not know where their next meal may come from. I can talk about countless instances where my dad has not only helped to support these individuals and their families, but has been a fatherlike figure and a constant source of reliability in this unpredictable world.

Our teammates call him when they need advice, when games go poorly, or even if they need a ride across town to get to practice. He is always there and holds such a strong presence in many individuals' lives.

The examples of how my father has used his special character to help others is infinite, and I am blessed to have such an inspiration in my life with a true heart of gold.

Beyond the profound influence my father has had on many others, I do not know how I can articulate the depth of his impact on my own life. Eric Sheppard is not only my father, he's my best friend, my biggest supporter -- I'm sorry --

THE COURT: Take your time.

MS. J. SHEPPARD: -- and the only person who believes that the sky is my limit.

After having an extremely difficult upbringing and course of life himself, I can say with confidence that he chose the right path on how to raise his children. My father has an unbelievably strong work ethic, and although he has a busy schedule, he always makes time for his family.

Growing up, my dad drove me to school every morning. We would listen to the Y-100 Elvis Duran Morning Show, and laugh until I would hug him and kiss his bald head goodbye for the day. No matter how much more time he had before work, he always made our morning car ride a part of our routine.

When I played basketball, I was always reassured that my dad would be sitting there in the first row of all my games, cheering me on and coaching me from the sidelines. No matter if my games or tournaments were in Miami Shores, or all the way out in Phoenix, Arizona, he was always there to support me.

When I was diagnosed with a chronic disease at 11 years old, I was confined to a hospital bed for weeks at one of my lowest points. I needed a blood transfusion, iron infusion, regular hospital visits, and was placed on an extremely strict regimen, taking 26 pills a day and following a strict diet.

Not being able to eat the foods I loved, and only tolerating binding foods, my dad would come every day, all the way to South Miami, to bring me a fresh baguette from a nearby bakery. No matter how busy he was, he would never fail to brighten my dark days with his small gestures that meant the world to me.

Applying to college was a daunting process, and this was when I first encountered severe anxiety. My dream school had always been the University of Michigan, but I was pessimistic in my chances of being accepted. The rest of my family would always say that I shouldn't get my hopes up, but my dad was the only one who would remind me of my potential and believed in my ability to achieve my goals. Without my dad's motivation and support, my dreams would have never become a reality. No matter what everyone else says, my dad is always there to believe in me.

My dad has been the guiding light, illuminating my path and supporting me through every endeavor at every stage of my life. From the infinite instances where he has uplifted me, to his consistent presence in every aspect of my life, he embodies the essence of a nurturing and supportive father.

The values he has instilled in me stem from his authentic character and the profound empathy he displays towards others. He is the dad that all my friends grab the phone to talk to when we are on a call. He is the father that shows up for their child, despite a busy work schedule. He is the father that never fails to remind his daughter of her beauty and worth. He is the husband who sets an example for my younger brother to bring just-because flowers for my mom, who always deserves them. He is a friend who supports the people in his life through thick and thin. He is a stranger who lends a hand to anybody in need.

As part of this statement, I also wanted to speak on behalf of my younger brother Jake, who is not a teenager of many words, but whose actions eloquently convey his thoughts and feelings. The bond between my 15-year-old brother and my dad is inseparable, to say the least. Their father-son connection transcends anything I've seen before, and my dad is the only person in the world my brother will open up to.

My brother looks up to my dad like no other, and the relationship holds paramount importance in his life. From talking sports all day, to showing my brother how to respect women and be a gentleman, Jake flourishes with my dad's love and guidance. When Jake is with my dad, he blossoms, revealing his full potential and the outstanding person he truly is. However, when he's apart from him, he tends to withdraw, become less talkative, especially now during this exceedingly stressful time and situation in our lives. Nobody else knows how to connect with him like my father does.

I was lucky enough to have my dad present in both milestones and my everyday life. But the thought of not seeing him in the crowd at my college graduation, or being able to hear his voice to call me before an exam, or teach my brother how to drive, or talk about our days every night at the dinner table, is shattering.

The thought of my brother not having him here and present during such formative years in his life is both gut-wrenching and detrimental. We all need my dad, but my brother Jake needs him the most.

My family has endured, and been enduring, an immense amount of pain and suffering the past two years. I myself, as strong as I may hold myself to be, have been crumbling to pieces at the thought of mine and my family's lives being turned upside down more than already has.

Eric Sheppard is a prime example of how to be a good person with a sensational moral compass. He embodies everything that I aspire to one day become. As I previously stated, I do not know if words are sufficient to explain the man that my father is, and what an honor it is to be his daughter. My father is the most honest, good-hearted, charitable, and brilliant man that I know. And I hope I have provided reason as to why I believe the Court should be lenient with his sentencing.

Judge Bloom, as much as my family needs my father, I, from the bottom of my heart, believe that this world is a better place with Eric Sheppard integrated within society.

Thank you so much.

THE COURT: Thank you for your words.

MR. SREBNICK: Judge, the sentiments expressed by Jordan are shared by so many people in the community. And you have read the letters, I know. Eric has been a fixture of our community for decades. And I think it's significant that he's 53 years old, and until this case, an unblemished record.

And what you have heard from Jordan about his acts of kindness, random acts of kindness -- he's not a guy that looked for fame and recognition on plaques, hospital walls, or gala dinners. He's the guy that a worker, who no one else knows who is suffering from an ailment, can turn to, or, without soliciting, have Eric show up and say: "How can I help you?"

I know you read about the Brazilian family who came here. It was recounted in two of the letters that were shared with you, Mr. Sepin's letter, and the letter provided by one of the other writers, Liad Zadok, about this Brazilian family came here, family member gets ill. These are people that Eric had no, you know, history with. But their kids played on the same ball team together. Eric made it his mission to help this family get the medical attention they could not afford. He didn't ask for reimbursement. He didn't care what insurance they did or didn't have.

Eric is the guy that every kid in the neighborhood wanted to hang out with. He's a superdad. And most of us as fathers would dream to have all the kids in the neighborhood wanting to come hang out with us, and Eric has filled that role in a way that makes other fathers aspire to do just that.

Turns out, Eric is an old friend of my sister's. Jen, his wife, grew up with my sister. And although Eric and I, we're unacquainted, other than through knowing his name, I certainly heard of him. And the letters say exactly what I had heard about him, what I had heard about him through other family members.

You read the letters of his sister-in-law Carrie -- that's his wife Jen's sister -- her husband Eddie Garazi, both of whom are here today. Footnote, Eddie Garazi and I grew up together since we were five years old. Our mothers were best friends since Cuba.

And so these are people who have a reputation in our community, the Sheppards. And Eric has the reputation of the guy you go to whenever you're in crisis. And that's why, when today he's in crisis, you see people turning out for him.

He's been described as loving and kind, reliable, supportive, not just by one person, but by everyone. And given the circumstances of this case, the uniqueness of this case, the atypicality of this case, it would be just, it would be fair, it would be proportional for the Court, in fashioning a sentence, to consider all of those good deeds for which he's never received any recognition, all of the mitzvahs he's done in his lifetime that no one else knew about.

And given that the crime for which he stands before the Court is one so different than the ones you've seen every day in the last four years here in this district, where people take money and spend it like rock stars, spend it like they are on someone else's dime -- that's not what Eric Sheppard did. And the Court should think about that in deciding what is the appropriate way to send the message to the community that it's not right to provide inaccurate information when applying for a loan. But likewise, it shouldn't result in the crushing of a human being, crushing his children, crushing his family, crushing the community. Because it would be awfully ironic that the man who borrowed this money so that he could put people to work would be relegated to a cage, where he can't put people to work, where he wouldn't be able to continue the tradition of using his best efforts to create jobs, to create opportunities for people.

You read the letters of the people who have worked with him or for him for years, some decades. Those are the people that would also be affected by a sentence that would incarcerate him, when the Court can fashion a sentence that doesn't require that he be removed from the community to the point where he can't even work, can't provide community service.

The sentences that have been imposed in these PPP cases that we cataloged for you, Judge, cases you will find on Page 36 of our Sentencing Memo, cases like United States v. Finley, where the district court in Brooklyn imposed a sentence of 24 months, where there was a total loss of $2.2 million from 29 PPP and EIDL loans; a case like Aqeel, A-Q-E-E-L, sentences ranging from 18 months to 44 months, for a $20 million SBA fraud. These are cases where people literally had no regard for how the money was going to be deployed. These were cases where the people thought they could take the money and use it however they wished.

Given the circumstances, where Eric was under a financial stress, and he applied for loans so he could keep people working -- and of course it benefits him to be able to keep his business moving forward. Of course it benefits him to avoid these really Draconian financial penalties that some of the contractors and people doing business with him were prepared -- and did, in fact, impose penalties for not getting the job done on time. I think there was a $1 million penalty because he couldn't get the job finished on time. It wasn't considered a force majeure, even though the whole world was paralyzed.

And so, in deciding what sentence do we impose for someone who borrowed roughly $500,000, has paid all of it back, with the exception of the 140-some-odd thousand that was a count -- that wasn't a count of conviction, but which he stands ready to repay, he can repay. He could pay it Monday, if not today -- knowing he has repaid all the loans, and knowing that he wasn't looking to go on a frolic with this money, I submit that the Court can, as Judge Donner suggested, impose a sentence that doesn't require incarceration per se.

It can be a sentence of probation with a condition that he be on home detention, where he can work, but cannot partake in other social events. He should be able, I suggest to the Court, continue providing for his -- emotional support for his children, that he could, for example, be able to take his children, his son, to activities. He could be a dad and continue in that role.

But not much is served by taking a bed over at the Federal Correctional Institute and putting Eric there for a period of months, when we can accomplish so much more by, number one, having him working while under home detention. All the restitution will have been paid. And no one will want to put themselves in the position that Eric finds himself today. Because as we all know from the criminal justice system, they say: "You can beat the rap, but you can't beat the ride." And it's out been a two-year ride for his family. No one would want to find themselves in the position that Eric finds himself in today for no financial gain. No financial gain.

So with that said, Judge, I suggest that the 3553 factors, which include the nature of the offense, and particularly the nature of the Defendant, and all the other atypical factors in this case, warrant a sentence that allows Eric to continue being a productive member of the community for this first-time offense.

Thank you.

THE COURT: Thank you, Mr. Srebnick.

Ms. Jimenez?

MS. JIMENEZ: Yes, Your Honor.

First of all, I know Your Honor did receive Mr. Cupersmith's letter. There was also a letter that had been provided to me some time ago, way before even the initial sentencing had been scheduled. It was my fault that I had saved it, but then ultimately did not file it with the Court. And it is from Mr. Leon Wildstein, who was referenced during the trial, and his grandson is here with us today. Could you please stand, sir.

What is your name?

UNIDENTIFIED SPEAKER: (Inaudible.)

MS. JIMENEZ: And Mr. Wildstein is 96 years old. He would have wanted to be here, but cannot be here. But he had provided this letter, which is addressed to Your Honor:

"Honorable, Judge Bloom. By way of introduction, my name is Leon Wildstein. I was born in Czechoslovakia in 1928, and emigrated to Montreal, Canada in 1948 after World War II.

"I have had many trades during my lifetime, but my most successful trade has been as a real estate developer. I've had the opportunity to develop all types of commercial and residential real estate, with many different partners, both in the United States and Canada. As I'm sure Your Honor remembers, I was mentioned several times during the course of the trial by both Mr. Sheppard directly and by his Defense counsel in their closing arguments.

"It is not really in my nature to write a letter of this type, and this is the first time I have ever done so; however, after hearing that Mr. Sheppard repeatedly lied about me to you and the jury, and seeing his Defense counsel endorse those lies during closing arguments, I decided it was important to be heard.

"Around 2009, I was introduced to Eric Sheppard by a real estate broker. Over time, I learned of various projects that Mr. Sheppard was involved with, and he expressed an interest in having me join him on a few real estate ventures.

"The main project we did together was the development of a 250000-thousand-square-foot shopping center in Miami, with major nationwide tenants. The business was structured so I was to be the main equity partner. We obtained a mortgage, and Mr. Sheppard was to develop it. I started this venture in my mid-80s, with the best of intentions to participate in a successful commercial real estate project.

"Once construction was complete, and all tenants commenced paying rent, the shopping center was, in fact, financially successful. Despite this, and the continued high occupancy of the shopping center, no distributions of any kind were made to me for over two and a half years. And when money was disbursed, I was consistently shortchanged.

"To further my concern, I received a default notice from the lender that the shopping center was in foreclosure. My immediate -- I immediately approached Mr. Sheppard about how this could happen, and all I received in response were lies. About two years went by, and I kept questioning and pleading with him about where all the money was going. I simply kept receiving excuses and lies.

"I came to discover that Mr. Sheppard had instructed most of the tenants to divert their rent payments directly to his management company, HM Management and Development. He was using the money for all kinds of things unrelated to the shopping center. This, of course, was in violation of the controlling loan documents. And at that point, I had no choice but to file suit against Mr. Sheppard.

"With the help of my grandson, and millions of dollars in legal fees, after four years in the state court system, we were able to regain management control over the shopping center.

"During course of my litigation against Mr. Sheppard, we retained nationally recognized forensic experts, who determined that he had indeed diverted the rent payments of several of the tenants to entities he controlled and for his personal benefit. Mr. Sheppard also provided me forged and false financial statements and other documents to support the fraud he was committing.

"In the end, he diverted over $8.4 million of rent monies during his time as manager of the shopping center. Mr. Sheppard used these diverted funds to pay for his personal expenses and maintain his lifestyle, including purchasing a striptease establishment. He used my money and our business as his personal piggy bank.

"Taking advantage and victimizing an elderly person in this late stage of his life shows that Mr. Sheppard will prey on anyone he deems vulnerable. Mr. Sheppard cares only for his own personal financial gain and is simply motivated by greed. He will lie and steal without hesitation to get what he wants. He does not care about who he tramples over in the process, even if it is those closest to him.

"The tiresome litigation process, enormous financial theft, and my inability to stop it sooner, really had an impact on me. I was frustrated and emotionally drained. The emotional and financial toll that Mr. Sheppard has caused me and my family during this late stage of my life is significant.

"Unfortunately, it seems I am one of his victims most impacted by his lies. One thing has become clear to me during the trial. I am but one in a long list of people Mr. Sheppard has tried to blame for his illegal conduct. I'm also just one on an even longer list of people Mr. Sheppard has hurt.

"Mr. Sheppard has never suffered any consequences for the harm he has caused to me and many others. I ask the Court to impose a substantial sentence on Mr. Sheppard to deter him from ever victimizing anyone else with his deceitful ways.

"Thank you for your consideration in taking the time to read this letter."

That's from Mr. Leon Wildstein.

MR. SREBNICK: May I request a copy of the letter?

MS. JIMENEZ: Yes. Of course.

MR. SREBNICK: Like now, please.

MS. JIMENEZ: I just have one copy of the letter.

MR. SREBNICK: Your Honor --

THE COURT: You want to look at it, Mr. Srebnick?

MR. SREBNICK: Yes, please.

THE COURT: Of course.

MS. JIMENEZ: I also have the letter from Mr. Cupersmith, who, as the Court knows, is too ill to be here in person. And Mr. Cupersmith was interviewed for the first time in July of 2022, and at that point the Government did not know if Mr. Cupersmith was a co-conspirator or a victim. And it was immediately clear from the interview that the FBI conducted that Mr. Cupersmith was victimized in this case.

And Mr. Cupersmith -- I think the letter was that very same day. After having a relationship with the Defendant for 25 years, he sent Mr. Sheppard a letter that very same day in July of 2022, telling him that he was discontinuing his services as Mr. Sheppard's accountant and the accountant for all of his businesses on that day.

And Mr. Cupersmith, who was reluctant to come down here to testify -- he was ill. He had actually had glaucoma surgery and then had heart issues. It was a great -- a great effort to him physically, and I think emotionally, to come down here to testify. And I can attest to that, having dealt with Mr. Cupersmith directly.

So in his letter, he says: "I'm now too ill to attend the sentencing in person" -- after he introduced himself in the letter -- "and therefore submit this letter. I have been informed that Mr. Sheppard remains convicted of the four wire fraud counts, although the convictions for the identity theft charges were reversed.

"I am a CPA, licensed in the Commonwealth of Pennsylvania and the state of New Jersey. I have been a practicing accountant, preparing tax returns for my clients for 57 years. I am a member in good standing with the AICPA of Pennsylvania and the New Jersey Society of CPAs. I note that I have served on several charitable boards in my community. I have raised millions of dollars for charitable causes and have improved the quality of life for the people, both young and old.

"I have prepared the financial documents to be used for the Jewish Community Center, built in 1997, and a new senior living home, providing independence, skilled nursing, and final care for the older citizens, built in 2008. I have always believed, if you're successful, you must donate your services back to the community.

"As I note below, I testified in the case involving Mr. Sheppard, and my partner Alex Zaslow also testified in this case. I want to describe to you how my health has deteriorated from July 28, 2022 until now.

"At least in part, I believe that my health deteriorated after I learned that Eric Sheppard stole my identity and fraudulently changed my firm's tax returns to enable him to receive funds from the Paycheck Protection Program.

"My profession and personal reputation have been and are very dear to me. I learned of the theft when two FBI agents showed up at my office. I received grand jury, and then trial subpoenas, that required me to spend a significant amount of time reviewing emails, correspondence, and past years' tax returns, producing documents, consulting with the United States

Attorney's office, and ultimately testifying.

"Mr. Sheppard changed the section of the returns dealing with the number of employees that I prepared, and forged my signature on the returns.

"As this Court recalls, I spent a significant amount of time on the witness stand, and counsel for Mr. Sheppard seeking to have me admit, among other things, that the returns I prepared were not accurate and that therefore it did not matter that my signature was forged on tax returns or that figures were changed. I testified in December 2023 for over five hours one day, and then two hours the next day.

"For the last two years, I have been on medicine to quiet my nerves. During the period that led up to the trial, I was treated for cardiac issues. On March 6th, 2024, I had my aortic valve replaced at Jefferson Hospital in Philadelphia. Before the case, the valve was only partially closed. The operation was successful; however, a piece of debris broke off from my heart and went into my brain, which caused a ministroke. I then suffered from vertigo, which caused severe dizziness. I only work part-time now.

"I can never be sure, but I believe the continued stress and aggravation as a result of subpoenas, production, interviews, and testimony caused my valves to continue to close and required surgery. I believe I have always had an excellent reputation as an accountant, and it hurt me deeply to see how the returns were altered and have my reputation subject to attack at the trial.

"I ask the Court to consider this background in setting an appropriate sentence."

That's from Mr. Cupersmith.

I think Ms. Martinez would like to speak to the Court.

MS. MARTINEZ: Your Honor, I just want to make a couple of points regarding the way the money was used.

THE COURT: All right.

MS. MARTINEZ: Your Honor, first, just to -- I understand Mr. Srebnick's point about some of the cases in this district, you know, where a company didn't even exist, whatnot. I understand that. I just want to tell you what I have in the bank accounts, and also tell you what this case is not.

This is not a case where the Defendant, say, had, you know, 20 W-2 employees, and he rounded up to 25 because some were 1099 and he didn't realize it. This is a case where an intelligent man, with an economics degree, repeatedly told banks that he had 80 W-2 employees, and also forged multiple types of different types of tax forms that -- every employer knows you have to withhold for a W-2. And every employer knows who they have as a W-2, because it's significant to the survival of the business, versus someone who is a 1099 that you could delay the payment on.

So the first thing to say is that the conduct in this case would drop the jaw of any business owner that is trying to live legitimately, because they know what it means to have somebody on your payroll and have to withhold, and then have to quarterly give that to the IRS, and they know the difference. And this Defendant not only ignored that, to the tune of 80, but then he did the same 80 -- Your Honor, the same 80? This is flagrant. The same 80 purported workers, those 1099s that came here and testified that they ultimately were not paid their last payment -- he took those same 80 and he repeated the 80 for another company with another bank.

So -- and then, on top of that, Your Honor, he took the same number of people and submitted a fraudulent forgiveness application, so that he would never have to pay back one of the loans that you have found to be included.

So first, I just want to say that it may be less dramatic than a Lamborghini case, but it still would drop the jaw of all the legitimate small business owners, who, Your Honor, did not do this -- did not do this, and they struggled during the pandemic and did what they could to survive legally.

And then, with respect to the usage of the money, Your Honor, I'm going to break it down the way it should be. Right? You apply for these loans by company. It has to be a real business, and you have to have employees for that real business. What the Defense has given you is a blob, a blob of taking every business he ever had together and trying to blob together all the money, and then extending the time period way beyond the time period; in other words, their expert took money all the way until the end of December 2021, a time period that far exceeded the time period.

So my first point is it's analyzed incorrectly. It's analyzed overbroadly. And then I'm just going to give you the facts from the evidence in the case. The evidence in the case is that Exhibit 41-2, which was a summary exhibit of the money flow to HM Management and Development -- that particular company, I pointed out because it received, in Exhibit 41-2 -- that particular company received two of the PPP loans that you have found are included. So that particular company, that particular bank account, received about 300,000, about 150 or so for each one.

Out of that bank account, Your Honor, during the relevant time period, which we actually exceeded -- we went through October of 2021. So we went, from when the money went in, to October. From that bank account, he paid his Bal Harbour home mortgage, $117,287. And the reason I point that out is because even if he had used it to pay some 1099s, you know, wouldn't people like to have, you know, an extra $117,000 that you can use to pay the mortgage on your Bal Harbour home?

I mean, you cannot ignore that he received this extra money and used it for his personal benefit out of the bank account of HM Management -- two of the loans. Because one of the loans, which was for a different company, he instead deposited it into the HM Management account.

He also used, out of that account -- about $290,000 of the money he used for American Express card and other credit card payments. And as the Court knows, those were things that he mixed personal and business.

And then, of course, there was a number of other things. I just want to move on to the next loan that he deposited. The next loan that you included is the Northeast PPP loan. And that one he deposited into the HM-UP Development Alafaya Trails account. In Exhibit 41-3, we can see that, out of that account, he also paid at least $23,000 of his home mortgage in Bal Harbour and 388,000 in credit cards combined -- again, that he combines personal and business.

My point is, he may have used it for some 1099s, but he certainly took a personal benefit that was very significant.

MS. JIMENEZ: Your Honor, I'm just going to make a couple of points about the sentence.

Going back to the enhancement that is not being applied, the pandemic enhancement. Obviously, this is pandemic funds. It's most certainly not selective prosecution. We received guidance recently about the application of that particular enhancement. And I think it applies in every PPP case, quite frankly.

And so this was money the Defendant didn't need and the Defendant was not entitled to get. And he's not one of these street fraudsters, who files something in Sunbiz, create a corporation that doesn't exist, and then go commit a fraud. This is a businessman with real businesses, someone who knows better. And I think, you know, to whom much is given, much is expected.

The Defendant could have paid this money back right away, if he learned or realized at some point he had committed a, quote, mistake. He could have paid it back when he knew that he was under investigation by the FBI. He could have paid it back when he was arrested in July of 2022. And instead, he pays it back just a couple days ago, or in the last -- some -- last night.

And I've had defendants come in to court, with much smaller sums, of course, and at sentencing pay the debt that they owe, or pay a portion of the debt that they owe. And all of those defendants stand in a very different posture than this defendant. Those are defendants who pled guilty, who accepted responsibility for their criminal conduct, who have lawyers who can make a credible argument that they're remorseful, and they are making efforts to make amends.

That is not the posture in which this Defendant finds himself today. This Defendant has never accepted responsibility for his criminal conduct. And he is, in my view, attempting to manipulate the Court because he's always had the ability to pay this money back. It was money his businesses did not need.

So he stands here saying to this Court that he has done nothing wrong. He does not accept responsibility. In my view, he has compounded that conduct with his trial testimony. Which, in the Government's view, he made numerous false -- knowingly false statements to deceive this jury, and committed obstruction of justice. And so I don't believe he is in a posture, like any other defendant who I see come to a sentencing to obtain leniency from the Court, having accepted responsibility and trying to show remorse and make amends. That is not this Defendant.

Just a note about Mr. Cupersmith. The Defendant had Mr. Cupersmith as his accountant for 25 years for all of his businesses. The Defendant -- the conduct in this case showed he did not hesitate to use Mr. Cupersmith's identity on those tax returns to forge his signature. And then he victimized Mr. Cupersmith again, in my view, by suggesting to this jury on the witness stand that Mr. Cupersmith and Mr. Zaslow, his accountants, had given him PPP advice about the very issue that was in this case.

And I know now that the Defendant's position regarding restitution is that Mr. Cupersmith is not a victim, that he's not entitled to restitution, that he's not entitled to recover his attorney's fees or his lost income.

And then, the last thing -- and I know -- I know that the Court denied the Government's request for an obstruction of justice enhancement, but I know that the Court, as the Government, takes lying on the witness stand seriously. And I think obstruction of justice is an offense that's committed against all of us. And while I think the Court, for whatever technical reasons, did not find that there was actual obstruction of justice in this case, I think that there was ample evidence that the Defendant knowingly lied on the witness stand, and I think that that should factor into the Court's sentence.

I think the Defendant needs to know that he cannot be placed under oath, and then address the jury of his peers, and lie to them with impunity. I think that that is conduct that should be reflected in the Defendant's sentence.

And I also am troubled by the substance of the false testimony that the Defendant gave. There were attacks on his lifelong friend, Mr. Graff, who was accused of -- baselessly accused of committing tax fraud. He blamed his accountants, as I mentioned, for giving him advice, faulty advice about the PPP program. He blamed his loyal bookkeeper for, I don't know, slipping false papers in the piles to have him unwittingly sign documents. And then, of course, there was the ultimate empty chair defense, blaming his deceased friend and business partner, who obviously could not come to court to clear his name.

And I'll say, at no point during this investigation or during the prosecution of this case -- and the investigation continued until the day we were in trial -- did we ever see one item of evidence to suggest that Mr. Jeff Vasilas was involved in committing this crime with the Defendant. And what I've seen in other cases is the defendant blaming the co-conspirator whom the Government wasn't able to arrest, or blaming the co-conspirator who's pled guilty, but the Government hasn't called for some reason. But I have to say there was a certain level of -- I don't know if outrage is the right word, but offense taken by blaming his deceased friend, again, whom the Government found not a single item of evidence. And we had ultimately obtained the phone communications between the Defendant and Mr. Vasilas, which also contained nothing.

So I ask that the Court take into consideration the Defendant's conduct. Obviously, the Court knows in every time it sentences someone that it's always the family who is impacted the most. But I think the criminal conduct in this case was serious, I think the Defendant's conduct displayed during the trial was serious, and I think the Court should take it all into consideration in its sentence.

Thank you, Your Honor.

THE COURT: Thank you, Ms. Jimenez.

Mr. Srebnick, is there anything further, sir?

MR. SREBNICK: Yes, Judge.

So in terms of the victim impact statements that the prosecutor read, so they read to us a letter I've not seen before today, but apparently the prosecutor has had since January 30 of 2024, or sometime shortly thereafter, that talks about the personal dispute between a Leon Wildstein, who signs the letter, and Mr. Sheppard, a matter that I understand was discussed during the trial. And there was apparently litigation between Mr. Wildstein and Mr. Sheppard that resulted in Mr. Wildstein, I understand, having to tender funds. And so, since I was not familiar with that coming in today, I just ran a search of who is Mr. Wildstein.

And what I found is a United States Court of Appeals Decision, Case Number 21-12780, in the United States Court of Appeals for the Eleventh Circuit, US Bank National Association, as Trustee v. Leon Wildstein. And if the Government knows that I have found the wrong Leon Wildstein, I'm sure they'll correct me.

And here's what the Eleventh Circuit was litigating -- was resolving litigation. US Bank National Association sued Wildstein for breach of contract. In its first motion for summary judgment on the issue of breach, US Bank argued that Wildstein breached the parties' guaranty agreement, when, one, he diverted to himself commercial real estate rental payments that should have been paid into a collateral bank account; two, when he, Wildstein, refused to surrender those rent payments on demand.

In a second motion for summary judgment on damages, the bank argued there was no genuine dispute, that it was owed the total value of the rents diverted by Wildstein. The district court agreed and granted both motions for summary judgment.

On appeal, Wildstein argues there's a dispute of material fact about whether he willfully breached the guaranty, whether he was protected by the limitation of liability provision in the guaranty, and the amount of damages he owes. "After careful review, we affirm the district court's grant of summary judgment."

Now, this is what I just found in two minutes by Googling "Wildstein," who apparently has himself found himself on the opposite end of the accusation of diverting funds. And the Court knows that to find summary judgment on behalf of a plaintiff of willful misconduct by a defendant in a civil case -- that's an extraordinary event in a civil courtroom, that someone can be found to have acted willfully with bad purpose on summary judgment.

And yet, the Eleventh Circuit found that Leon Wildstein acted willfully, which I understand to mean with bad purpose, doing something he knows the law forbids, in attempting to recover money, or to take money that he had diverted for his own benefit. Sounds very similar to what he was trying to accuse Mr. Sheppard of. And that case went to civil court, and it didn't turn out well for Mr. Wildstein there either.

Now, of course, Wildstein is not connected at all to this litigation in criminal court. He's just a disgruntled, losing litigant, in civil court, who is going to take out his venom on Mr. Sheppard. And I find it troubling that we're hearing about this for the first time on the last few minutes of Mr. Sheppard's sentencing.

And as with Mr. Cupersmith, while certainly his identity was misused, he had the option -- I'm told he could have appeared by Zoom. He didn't have to go through to all the trouble that the Government put him through. There was no dispute about his ID being used. And while certainly Mr. Cupersmith would have been stressed out about it, the suggestion about this causing Mr. Cupersmith's significant health issues being brought about on the day of Mr. Sheppard's sentencing seems to me to be a bit much. But in all events, what we know today about that is simply that Mr. Cupersmith, like other people in criminal cases, was a witness in the case.

With regard to the Government talking about how Mr. Sheppard would pay his mortgage with monies that he genuinely earned and legally earned from his business, the Government, of course, knows, and it was not a dispute at the trial, that Mr. Sheppard had bank accounts where the funds were commingled. And so now the Government is cherry-picking and saying: "Well, if some of the money went to his mortgage payments" -- they're trying to connect those payments as if those were loan payments or loan monies from the SBA.

But of course, you heard the undisputed evidence that Mr. Sheppard had well more than the loan amounts in the bank accounts from other sources, not the SBA, and that historically Mr. Sheppard, of course, paid his household expenses, paid his mortgage, and that was just routine.

But there's been no rebuttal by the Government to what you heard today about Mr. Sheppard's characteristics that defined him for the first 50 years of his life. And it's those characteristics, combined with the other factors we've already discussed today, that I think should guide the Court.

And if I could just have a moment to consult with my colleagues.

THE COURT: Yes. Of course.

(Pause in proceedings.)

MR. SREBNICK: Thank you, Judge. That's all.

THE COURT: All right. Thank you, Mr. Srebnick.

I want to thank the parties for a very thorough presentation.

And Mr. Sheppard, I want to first state the obvious. And that is that, at the age of 55, you've had no involvement in the criminal justice system until the conviction of the four counts of wire fraud. The jury found you not guilty of the other counts. And with regard to the aggravated identity theft, the Court believed that it applied the law in finding that it should grant a judgment of acquittal with regard to those two counts.

Sentencing an individual who has been significantly involved in the community, where the Court has received many letters attesting to your generosity, your love, your support, your kindness -- your daughter Jordan was extremely articulate with her thoughts and emotions. And I've heard, not only through the letters, but certainly here in the courtroom, from individuals that I greatly admire and respect, your aunt, Judge Amy Donner; your rabbi, Rabbi Davis, who is one of my rabbis, as well as my husband's.

You've had a significantly talented trial team throughout the course of the 17-day trial and the full-day sentencing hearing that we've had today, and it's been a pleasure working with them. And here we are at the time of your sentencing.

It is always the hardest on the family. Your family has been here each day throughout the 17-day trial. They've been here supporting you, crying at moments, certainly crying today. And it is certainly a blessing to have their love and support, and I'm certain that you appreciate that.

A jury of your peers found you guilty of four counts of wire fraud. They found that you willfully enriched yourself, that you engaged in a fraudulent act, and received money to which you were not entitled. And I do acknowledge that you have repaid most of those loans. And I've heard the request that you not be taken from your community and that the funds available put people to work, but the trial testimony also revealed that you received money to which you were not entitled. And whether it was from the government or a private entity, you committed a fraudulent act, a scheme, and the jury found you guilty.

Certainly this case did not involve Lamborghinis or expensive jewelry. But the evidence reflected that you received those monies, monies to which you were not entitled, that you fabricated documents, filed documents to receive monies that you knew you had no entitlement to.

I certainly credit you for having no involvement in the criminal justice system until this point in your life. It is clear that, in looking at the goals of sentencing, that there is an extremely low risk of you being involved in this type of activity. So rehabilitation certainly weighs in your favor.

But let me state that, with the amount of fraud and the amount of money that you, through your companies, enriched yourself, taking into consideration your personal history and characteristics, it is clear to this Court that a non-incarcerative sentence would not promote respect for the law. It would not serve as an adequate deterrent to you or to others contemplating this behavior. It would create an unwarranted sentencing disparity among individuals similarly situated here in this district and throughout the country. And certainly the Court can consider the advisory guidelines, but I believe that the guidelines are greater than necessary to serve those goals.

And as such, Mr. Sheppard, I've certainly considered the statements of all the parties. I have considered all of the filings, the Presentence Report, which does contain the advisory guidelines. And I've fully considered the statutory factors of 18, United States Code, Section 3553(a).

You have a financial ability, and the Court is finding that you have the ability to pay a fine, and a fine will be imposed. As well, restitution is mandatory. And as you know, the hearing is scheduled for August 23rd.

Mr. Sheppard, it is the judgment of this Court that you, Eric Dean Sheppard, will be committed to the Bureau of Prisons to be imprisoned for 18 months as to each of Counts 5, 7, 8, and 9, to be served concurrently with each other.

It is further ordered that you shall pay to the United States a total fine of $20,000. The fine is payable to the Clerk of the United States Court and shall be forwarded to the

US Clerk's office. The fine is payable immediately.

The US Bureau of Prisons, the US Probation Office, and the US Attorney's Office are responsible for enforcement of this Court's order.

You shall pay restitution in the amount determined on August 23rd, 2024, pursuant to 18, United States Code, Section 3664.

Once restitution has been determined, you shall pay restitution during your period of incarceration as follows: If you earn wages in a Federal Prison Industries job, then you must pay 50 percent of the wages earned toward the financial obligations imposed in this judgment. If you do not work in a Federal Prison Industries or UNICOR job, then you must pay a minimum of $25 per quarter toward the financial obligations imposed in this order.

Upon your release from incarceration, you shall pay restitution at the rate of 10 percent of your monthly gross earnings, until such time as this Court alters the payment schedule in the interests of justice.

The US Bureau of Prisons, the US Probation Office, and the US Attorney's Office shall monitor your payment of restitution and report to this Court any material change in your ability to pay.

The payments do not preclude the Government from using any other anticipated or unexpected financial gains, assets, or income that you may have to satisfy the restitution obligations. And the restitution shall be payable to the Clerk of the United States Court and forwarded to the victims.

Upon your release from imprisonment, you shall be placed on supervised release for a term of three years. This term consists of three years as to each of Counts 5, 7, 8, 9, all such terms to run concurrently.

Within 72 hours of your release from the custody of Bureau of Prisons, you shall report in person to the Probation office in the district where you are released.

While on supervised release, you shall comply with all mandatory and standard conditions of supervised release. And that's referenced in Part F of your Presentence Investigation Report.

You shall comply with the following special conditions, and there will be a permissible search, a financial disclosure requirement, no new debt restriction, a self-employment restriction, and the payment of any unpaid restitutions, fines, or special assessments.

It is further ordered that you shall immediately pay to the United States a special assessment of $100, as to each Counts 5, 7, 8, and 9, for a total of $400.

With regard to forfeiture, that will be determined on August 23rd. And now that the sentence has been imposed, do you or your attorneys --

MS. JIMENEZ: Your Honor, I'm sorry -- I'm sorry to interrupt. But I think -- with respect to forfeiture, I think we would ask -- we would ask the Court to enter a general order of forfeiture.

THE COURT: I'll order a general order, with the full findings by the Court to be made on August 23rd.

MS. JIMENEZ: Thank you, Your Honor.

THE COURT: And if you want to submit a proposed order within three days of these proceedings with regard to the general order.

PROBATION OFFICER: Your Honor, may I have one second to speak to the Government?

THE COURT: Certainly.

PROBATION OFFICER: Thank you.

(Pause in proceedings.)

THE COURT: Is there anything to place on the record?

Mr. Sheppard, now that the sentence has been imposed, do you or your counsel object to the Court's findings of fact or the manner in which the sentence was pronounced?

MR. SREBNICK: Those that we've already reserved. I assume we don't need to repeat them.

THE COURT: You do not, sir.

Mr. Sheppard, you do have the right to appeal the sentence imposed. Any Notice of Appeal must be filed within 14 days of entry of the judgment.

If you're unable to pay the cost of the appeal, you may apply for leave to appeal in forma pauperis, which means there would be no cost to you.

As the Court stated in its order, I advised the parties that I would address the issue with regard to a self-surrender the time of the sentencing hearing. I do note, Mr. Srebnick, that, in reviewing the Presentence Investigation Report, on Page 23, Paragraph 93, while I was aware by way of Mr. Sheppard's testimony that he is a survivor of testicular cancer, I did not know whether there were medical records or medication that the Court needs to be aware of that would support a delayed surrender.

MR. SREBNICK: What I was going to request, since the Court has set a restitution and forfeiture hearing that Mr. Sheppard would need to attend, perhaps the Court would simply allow him to continue on the same bond until that date. He'll appear on that date.

I presume the Bureau of Prisons will start the designation process as soon as they get your judgment and commitment order. And at that time, we may already know where he's going to be designated, and then the Court could set the surrender date at that time.

THE COURT: Does the Government wish to be heard?

MS. JIMENEZ: Well, Your Honor, I thought that he was going to receive a standard self-surrender date, something like

30 days out in the future, and that would be my request. I don't --

THE COURT: Well, I think what Mr. Srebnick is suggesting is, since the parties had requested the forfeiture and restitution, the Court scheduled that for a separate hearing on August 23rd, that in order to ensure that Mr. Sheppard is here to attend the hearing that he be allowed to self-surrender on that date. Is that correct?

MR. SREBNICK: What I'm --

THE COURT: You want Mr. Sheppard to self-surrender on August 23rd, correct?

MR. SREBNICK: Not exactly. I want him to remain on bond until August 23rd. And on that date, the Court would -- if we finish the hearing that day, self-surrender to wherever he needs to go. Because he may be designated to Pensacola and would need to travel to Pensacola.

If he surrenders before the 23rd, the marshals are going to have to move him to bring him back here for that hearing anyway. So my suggestion is we come on the 23rd. As soon as he gets designated, I'll let everybody know where he's designated to. Obviously, if he's designated here in Miami, he could report within 48 hours. If he has to travel somewhere, Mississippi or wherever they send him -- so the Court -- I'm expecting that he would surrender within a few days of that 23rd, maybe seven days, depending on where the designation is by the BOP.

THE COURT: Or he would surrender to the Office of the United States Marshals service on that date.

MR. SREBNICK: That's -- that's always an option. But that's a costly option for the marshals because then they have to transport him to Mississippi.

THE COURT: To the extent that his designation is in Mississippi and not in South Florida.

MR. SREBNICK: True. But either way, they have to move him. So he can drive to Homestead that same day, is my point. We'll know before the 23rd, I expect, where he's designated to, and we can address it as soon as we hear from the marshals.

THE COURT: Is there any objection?

MS. JIMENEZ: No, Your Honor.

THE COURT: All right. Then the Court will allow Mr. Sheppard to remain on the same conditions that were originally set by the magistrate judge. And those conditions remain from this point forward until Mr. Sheppard appears before this court on August 23rd for the restitution and forfeiture hearing.

The Probation officer has possession of the Defendant's passport. I would ask that the Probation officer retain the passport until the Defendant timely surrenders.

MS. JIMENEZ: Your Honor, I believe Mr. Hyman has something additional he wants to address with the Court about forfeiture.

THE COURT: Yes, sir?

MR. HYMAN: Just really quick, Your Honor. In regards to the general order of forfeiture, I just wanted to clear up our position is that the general order of forfeiture should require that the Defendant forfeit proceeds derived from his fraud scheme, pursuant to Title 18, United States Code, Sections 981, Subsection (a)(1)(C), and 982, Subsection (a)(2)(A).

And I just wanted to confer with the Court what you wanted in the general order of forfeiture.

THE COURT: Mr. Srebnick, is there any objection to that?

MR. SREBNICK: Certainly, as to their request that it include a reference to 982, there's an objection, because it's not alleged in the Indictment. That was the subject of the Government's amended motion, and that was something I brought to the Court's attention in our motion to continue the forfeiture hearing. The Government is seeking effectively to amend the Indictment to add a new theory of forfeiture.

THE COURT: It should be pursuant to 18, United States Code, Section 981(a)(1)(C).

MR. HYMAN: Your Honor, I want to preserve for the record that, you know, we're of the position that it should include both 981(a)(1)(C) and 982(a)(2)(A) because the PPP loans affected a financial institution.

THE COURT: I understand that's your position, but that's not alleged in your forfeiture count.

MR. HYMAN: I understand that, Your Honor. And I assume that Mr. Srebnick's response in opposition to our preliminary order of forfeiture will address that. And I think the Court will find that, even though it's not in the Indictment, that case law says that if we correct it prior to sentencing, and make sure -- and make clear that our intent is to seek forfeiture -- and in this case, in the Superseding Indictment, we went above and beyond that by saying that we want to forfeit the full amount of the proceeds.

And by making that correction prior to sentencing, I think the Court will find that you -- the Court can allow for forfeiture under 982 as well.

THE COURT: Well, at this point, Mr. Hyman, why don't you submit the order. And with regard to any legal challenge, or any legal basis to expand the scope of forfeiture, we can address that on August 23rd.

MR. HYMAN: Yes, Your Honor.

THE COURT: Is there anything further on behalf of Mr. Sheppard?

MR. SREBNICK: No, Your Honor.

THE COURT: Is there anything further on behalf of the

Government?

MS. JIMENEZ: No, Your Honor.

THE COURT: All right. Have a nice afternoon.

The best of luck to you, Mr. Sheppard.

COURT SECURITY OFFICER: All rise.

(Proceedings concluded at 2:55 p.m.)

UNITED STATES OF AMERICA)
ss:
SOUTHERN DISTRICT OF FLORIDA)

C E R T I F I C A T E

I, Yvette Hernandez, Certified Shorthand Reporter in and for the United States District Court for the Southern District of Florida, do hereby certify that I was present at, and reported in machine shorthand, the proceedings had the 7th day of June, 2024, in the above-mentioned court; and that the foregoing transcript is a true, correct, and complete transcript of my stenographic notes.

I further certify that this transcript contains pages 1 - 154.

IN WITNESS WHEREOF, I have hereunto set my hand at Miami, Florida, this 16th day of July, 2024.

/s/Yvette Hernandez
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