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, April 8, 2024
9:06 a.m.

vs.

ERIC DEAN SHEPPARD,

Defendant. Pages 1 THROUGH 59

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE BETH BLOOM
UNITED STATES DISTRICT JUDGE

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(Call to order of the Court, 9:06 a.m.)

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.

MS. MARTINEZ: Annie Martinez on behalf of the United States. Good morning, Your Honor.

THE COURT: Good morning.

MS. WEINTRAUB: Good morning, Your Honor. Jayne Weintraub on behalf of Eric Sheppard. Along with me, co-counsel Jonathan Etra, who you know; Jason Zarrow, who is here from O'Melveny Myers from Los Angeles; Chris Cavallo; Howard Srebnick, and our client is present before the Court -- oh. And I apologize -- and Jeff Fisher is as well -- same firm. He is on Zoom.

THE COURT: All right. Good morning to each of you.

Who is going to be presenting the arguments on behalf of the Defendant?

MR. ZARROW: I will be, Your Honor.

MS. WEINTRAUB: Mr. Zarrow.

THE COURT: All right. Thank you, sir.

MS. WEINTRAUB: As well as Mr. Fisher.

THE COURT: I'm sorry. So there will be two individuals?

MR. ZARROW: No, Your Honor. Just me.

THE COURT: All right, then.

And on behalf of the Government?

MS. JIMENEZ: Myself, Your Honor.

THE COURT: All right. Thank you.

Before the Court for hearing are two separate motions, both filed by the Defendant, docket Entry 204, the Defendant's Motion for a New Trial, and Docket Entry 205, the Defendant's Motion for Judgment of Acquittal. I'm not certain how you would like to divide the argument by way of the motions, but I have reserved an hour for the hearing. So I would suggest that you use the available time.

MR. ZARROW: Your Honor, thank you.

We'd like to focus today on the acquittal motion. If you have questions on the new trial motion, of course we'll answer them, but otherwise I'd like to spend my time on the Rule 29. And I defer to you, of course, on how you'd like to structure the argument.

I have three points today. I think it might be more convenient for everyone if I make a point, the Government responds to that first point, and then I reply, and then the same thing for the second point, and then the third point. Two of them relate to the Dubin case, and then one is about the wire fraud convictions.

THE COURT: Yeah. What I would suggest -- and I want to make sure -- it's Mr. Zarrow? Yes?

MR. ZARROW: Zarrow.

THE COURT: Zarrow.

Mr. Zarrow, what I would request is, rather than going back and forth, if you want to focus on the Motion for Judgment of Acquittal, then I would suggest that you make argument with regard to the wire fraud, the traditional property interest, the focus on the Ciminelli case, and also focus on the Dubin case and the issue with regard to Dubin and at the crux of criminality. Because what I'm trying to avoid is just a going back and forth. Obviously, the Government will have an opportunity to respond to each of your arguments, and I'm certainly going to give you the opportunity to rebut that response.

MR. ZARROW: Sure. Thank you.

Good morning. May it please the Court. Jason Zarrow on behalf of Eric Sheppard.

As I said, I'd like to spend my time today on three issues. I'll actually start --

(Court reporter interruption.)

MR. ZARROW: Sorry.

Good morning. May it please the Court. Jason Zarrow on behalf of Eric Dean Sheppard.

I'd like to spend my time today on three issues. Two of them relate to the Dubin case. One of them relates to the wire fraud convictions. I'll start with the Dubin argument. And the first argument accepts everything the Government has said in its opposition brief as true and demonstrates that Mr. Sheppard is not guilty of aggravated identity theft under the Supreme Court's decision in Dubin.

So what does Dubin say? Dubin says: "A defendant uses another person's means of identification in relation to a predicate offense when this use is at the crux of what makes the underlying conduct criminal." That's at Pages 131 and 132.

THE COURT: When the use of the means of identification...

MR. ZARROW: Correct.

THE COURT: Right. So in this case, I just want to understand that the argument is -- on the part of the Government, and certainly as the Court stated in the Fullerton case -- and I understand that with regard to the Fullerton case that that is a district court in Texas. Although certainly it recognizes the Gladden case, and obviously we're going to focus on the Eleventh Circuit. But I want to focus on that specific issue with regard to what the Government's claim is.

The Government's claim is that Mr. Sheppard forged Cupersmith's signature on this 1065 in order to lend credibility and reliability to the tax returns, so that the Defendant's application could receive less scrutiny by the lenders. Is that -- in sum and substance, that's what they're arguing.

MR. ZARROW: That's what I understand their argument to be, and that's why I think that the convictions must be vacated. Because lending credibility to a fraud is, by definition, just semantically and linguistically not at the crux of the fraud for the reasons we state, citing many dictionary definitions in the Dubin case in our reply brief; something that lends credibility to the fraud, might facilitate a fraud, might move the fraud along, might make it easier for the loan applications to be approved. But that is definitionally different than being at the crux of the fraud.

And what Dubin says is that the crux of the fraud is what makes the underlying conduct fraudulent. And this Court has already said in its January 5th order that what makes the underlying fraud fraudulent is misrepresentations about the nature of Mr. Sheppard's businesses, not misrepresentations about anybody's identity. So I think, when you state the Government's argument like that, that is our case for why the convictions must be vacated.

THE COURT: But do you see a difference, Mr. Zarrow, between an overbilling, which is what Justice Sotomayor observed, and she focused on not the "who," but she focused on the "what" and the "when" -- but in terms of an overbilling versus the use of a tax return and a CPA's name on that tax return?

MR. ZARROW: Yes. But I don't think the difference is material to this case. And I think this goes to the heart of the problem with the Government's argument, which is that they are confusing necessary and sufficient conditions for there to be aggravated identity theft under Dubin.

So what Dubin says is you need two things -- two different things for there to be a conviction for aggravated identity theft. You need a use that is deceptive, and that deceptive use must be at the crux of the fraud. The Government's position in this case is that you only need the first thing; you only need a deceptive use. But that, of course, writes out of Dubin the at the crux of the fraud element. The deceptive use needs to be at the crux of the fraud.

And so what I think the Government is saying in this case -- if we want to put this in terms of the statutory title or really just a shorthand, the Government is saying it is sufficient to convict somebody of aggravated identity theft under Section 1028A when you have ordinary identity theft. But the statute, of course, punishes aggravated identity theft. And Dubin says aggravated identity theft is ordinary identity theft, plus, it must be at the crux of the underlying fraudulent scheme.

And so I think a really easy way to sum this up is there must be ordinary identity theft to commit aggravated identity theft. That's the necessary condition. But it doesn't mean that every ordinary identity theft is also aggravated identity theft. You need something more. And what's lacking in this case is that something more.

In the Dubin case, what you had was there was no forgery -- no forgery that was at the crux of the fraud. In this case, what you're missing is the nexus, the relationship between the use or alleged misuse of Mr. Cupersmith's identity and what made the underlying conduct fraudulent. And the reason I put emphasis on that last phrase is I think it's really important in Dubin that what you're looking at is the relationship between the use or misuse of the ID and what made the underlying conduct fraud. And this Court has already said -- and I think the Government will have to agree -- that what made the underlying conduct fraudulent were misrepresentations about the nature of Mr. Sheppard's businesses, not misrepresentations about Mr. Cupersmith's identity.

THE COURT: So if we look specifically at the exhibit -- that is, the 1065 -- it's the amount that was paid to the employees that is at the crux of the criminality, correct?

MR. ZARROW: Correct. Correct.

THE COURT: So I'm trying to wrestle with that argument. Because if, in fact, the Court accepts this interpretation, any time that a defendant files a tax return claiming an overpayment, where the underlying criminality is the theft of those funds -- right -- that individual is entitled to an overpayment -- and uses the accountant's name and that accountant's PTIN, that doesn't constitute aggravated identity theft?

MR. ZARROW: So I think a tax case might actually be different because there might be a tighter nexus between an accountant's name and a tax fraud, when what matters is you're substantiating the amount owed or --

THE COURT: But isn't that what this, in essence, is? It's -- the applications are an amalgamation of all these documents, including what's required, which is the 1065, that is the partnership income.

MR. ZARROW: No, Your Honor. And the second point is, I think it would matter how the Government, in a tax case like that, presents its case. If the Government wants to say to the jury: "You should convict this person of tax fraud because they misrepresented who the tax preparer was" -- if that's the Government's case -- what's at the crux of the Government's case -- I think maybe, maybe you would have aggravated identity theft under Dubin.

But this case is certainly one step removed, because I don't even think -- I'm fairly certain, in fact, in this case that the Government is not claiming that at the crux of the fraud were misrepresentations -- what made the underlying conduct fraudulent were misrepresentations about Cupersmith's name. They said to the jury -- I think you've identified it -- that the point of this was to move the fraud along, to lend credibility to the fraud. Just definitionally that cannot be at the crux of the fraud because at the crux of the fraud is what made the conduct fraudulent.

THE COURT: But the focus in this case is what Mr. Sheppard did with the means of identification, right? He fraudulently used the name and the PTIN and the EIN, and that was the means of identification. Isn't that the focus?

MR. ZARROW: So the focus is two things. As I said earlier, you need a deceptive use, what you're calling a fraudulent use, and you need a nexus to the underlying offense. And what's missing in this case is the nexus to the underlying offense. There is a nexus, of course. Because as the Government says, it lent credibility to the fraud. And my second argument is going to take issue with just the factual support for that argument.

But accepting everything the Government says as true, as a legal matter, that is not a sufficient nexus under Dubin because the Government's position in this case is essentially that facilitating a fraud -- lending credibility to a fraud, is the same as facilitating a fraud -- is sufficient under Dubin. And Dubin expressly says facilitating is not enough. You need more than facilitating.

THE COURT: So let's look at the Eleventh Circuit case law. Obviously, the Court is bound by Dubin, but the Court is certainly equally bound by the Eleventh Circuit's interpretation of Dubin. And in the Gladden case, the Court drew a distinction between the two individuals, Ms. Linton and Mr. Gladden. So can you explain the distinction and how that supports your argument?

MR. ZARROW: Yes, Your Honor. So I think Gladden, of course, maps on exactly to Dubin because the Eleventh Circuit was applying Dubin. So it's the same crux of the fraud test --

COURTROOM DEPUTY: Slow down. Counsel, slow down.

MR. ZARROW: I'm sorry. I'm sorry.

The basic question that the Eleventh Circuit was asking and was posing to district courts is: Why was the person convicted of fraud, what was at the crux of the underlying fraud? And with respect to the defendants who were convicted of aggravated identity theft, and their convictions were sustained on appeal, what was at the crux of their underlying frauds were lies about patients' names and doctors' names, whereas that was not at the crux of the fraud with respect to the one person whose convictions was vacated.

And I would point the Court to Pages 1245 and 1246 of the Gladden opinion, if you want to see the Eleventh Circuit's verbal formulation, their gloss on Dubin's crux of the test.

And they repeat this twice, which is why you know this is significant. I'm looking at the last paragraph -- the last sentence of the paragraph that carries over from 1245 to 1246. And the court says: "Because Dr. Almirol's signature on the prescription form directly enabled" -- that's the keywords, "directly enabled" -- "Linton to bill for the medically unnecessary products, the means of identification specifically was a key mover in the criminality." And "key mover," of course, is a synonym for "at the crux" in the Dubin case.

So what the Eleventh Circuit says -- their verbal formulation is directly enabled. And that was true of the person who lied about the doctors and the patients because Medicaid doesn't -- or the insurance companies don't reimburse for prescriptions that aren't written to real people or by real doctors.

In this case, you can map that on to the Government's argument about lending credibility. In this case, misrepresentations about Mr. Cupersmith's identity did not directly enable him to get PPP funds. They maybe facilitated him getting PPP funds, but what directly enabled him to get the PPP funds is exactly what this Court said was at the crux of the fraud in its earlier order; misrepresentations about having W-2 employees, construction industry, revenue decline, things about his business. And so I think if you look at Gladden, and you apply the verbal formation that Gladden uses, you get to the same result as our argument under Dubin. The same would be true, of course, under Carter.

THE COURT: Let me ask you to square that with the court's statement. And it actually states -- and I'm looking now on Page 1244, where the court notes that, in Dubin, the court clarified that: "The statute proscribes uses of a means of identification involving fraud or deceit about identity, thus, directs the statute's focus to offenses built around what the defendant does with the means of identification in particular."

So in this case, as the Court noted, didn't Mr. Sheppard use Mr. Cupersmith's means of identification as part of the scheme to defraud or the wire fraud?

MR. ZARROW: Well, we disagree with that factually. But even if you accept that as true, you still have to ask: Is it the sufficient type of relationship? Is the nexus close enough between the underlying conduct? And both Dubin and Gladden say that the answer to that question is no.

What you're looking for is direct enabling, to use the language of Gladden, or at the crux of the fraud, the heart of the fraud, the gravamen of the heart of the fraud -- you can come up with any number of synonyms for the point. But what I really want to focus on and draw attention to is: You need to look at what makes the underlying conduct fraudulent. And if the reason the underlying conduct is fraudulent is because there was a misrepresentation about somebody's identity, then you have aggravated identity theft. That was true in Gladden for the two defendants whose convictions were sustained because they lied. Their fraud -- part of their fraud was lying about who the doctors were that wrote prescriptions or who the patients were that received the prescriptions.

THE COURT: So the focus should be on the misrepresentation about the identity, as opposed to the use of the means of identification?

MR. ZARROW: So it's the relationship -- the focus should be on the relationship between the use of the means of identification and the underlying fraud, the reason the person was convicted of the underlying crime. That's what Dubin says right at the end at 130 and 132, when the court announces the test: "Petitioner's use of the patient's name was not at the crux of what made the underlying overbilling fraudulent."

So what the Supreme Court is looking at there is: Why was the person guilty -- why was David Dubin guilty of healthcare fraud and was it because of the misuse of the means of identification? Same analysis in Gladden. But what you're looking at is the relationship between the use of the means of identification in the underlying crime. And the Government's argument in this case just means, as a matter of law, that there isn't a sufficient nexus.

The Court's January 5th order identifying what's at the crux of the fraud means the exact same thing. Lending credibility to a fraud is not the same thing as being at the crux of a fraud. Those are mutually inconsistent categories -- mutually exclusive categories. And so the Government's position in this case demonstrates why we think the convictions must be vacated as a matter of law, accepting everything they say about the evidence as true.

THE COURT: So what is the distinction, Mr. Zarrow, between your argument and the Government's argument that the Defendant's use of Mr. Cupersmith's identity was like Linton's use in the Gladden case -- Linton's use of the doctor's identity to claim the prescriptions were authorized by the doctors? Here, the use of the means of identification was that the accountant authorized, in fact, was the individual that prepared the form. So how is there a distinction here?

MR. ZARROW: So I think that's actually very different, and I think that points up why the convictions need to be vacated in this case.

In the Gladden case, the use directly enabled the person to get billing receipts from the insurance company because insurance companies don't reimburse unless there's a doctor who's writing a prescription. If I wrote a prescription, no insurance company would reimburse it, obviously. So what's at the crux -- part of what is at the crux of the fraud in the Gladden case is a misrepresentation about who the prescribing doctor is. That was the fraud. The healthcare fraud was lying about who the doctor is.

In this case, as Your Honor has already noted, the fraud isn't putting Mr. Cupersmith's name on the Form 1065 -- and I'll get to the factual component of the argument in a second -- but even if you accept the Government's factual recitation, the fraud was lying about the nature of Mr. Sheppard's businesses. And that is very different than the Gladden case, where the fraud was a lie about who somebody was. It was a lie about who the doctor was.

And so I think that is the key difference, and you've honed right in on it. What directly enabled Mr. Sheppard -- using the language in Gladden, what directly enabled him to get PPP funds? According to the Government, misrepresentations about the nature of his businesses, not misrepresentations about anybody's identity. And I think that's it.

THE COURT: Thank you.

MR. ZARROW: If I may, I'll move on to the second part of our Dubin argument.

THE COURT: Thank you.

MR. ZARROW: And so, Your Honor, do you mind if I just actually grab a water cup?

THE COURT: Not at all.

(Pause in proceedings.)

MR. ZARROW: So the first argument accepted everything the Government has said in this case as true and explained why just as a matter of logic, as a matter of English, lending credibility to a fraud can't be at the crux of the fraud. It just doesn't work.

The second argument is that, as a matter of undisputed fact, Mr. Cupersmith's identity didn't actually lend credibility to this fraud. And I think the first question the Court might have is: Well, why does that matter? Why does this factual argument matter at all? And it matters under Dubin because on Page 131 of the Dubin opinion --

THE COURT: Hold on. Let me follow you.

Okay.

MR. ZARROW: On Page 131 of the Dubin opinion, right before the all caps Gorsuch, J. concurring, the Supreme Court says: "To be clear, being at the crux of the criminality requires more than a causal relationship, such as facilitation of the offense, or being a but-for cause of its success." And in this case, as a matter of undisputed fact, we have no causal relationship, no but-for cause of its success. And so under this aspect of Dubin, the clarification of what the at the crux of the fraud test means, and as a matter of three undisputed facts, the conviction also needs to be vacated. Although our opinion is you don't need to reach this question, because even if you accept everything the Government has said, as you've summarized their argument, it's not just aggravated identity theft.

So the three undisputed facts. The three undisputed facts are: First, as Your Honor has noted, Mr. Cupersmith's name appeared on a 1065 tax form. So the question is, in this case: Did the tax form matter? Did Mr. Cupersmith's name matter? And the three facts are: First, no witness with personal knowledge testified that any of the banks reviewed, looked at, the 1065 tax form. If nobody looked at the 1065 tax form, then obviously they could not have looked at Mr. Cupersmith's name on the tax form.

Second, the documentary evidence from the banks, from the loan processors, shows what documents the banks and loan processors looked at, and they did not look at the Form 1065. The Form 1065 is not listed on any of the documents considered. This is Government's Exhibit 23. And this is -- which is Exhibit, I think, A to our Rule 29 Motion and Exhibit D to our Rule 29 Motion with respect to the Cross River loan. So the supporting documents, the actual documentary proof in this case, refutes the Government's factual contention.

Even if you disagree with us on those first two points, we still win because the third point is dispositive and undisputed. The Government cannot dispute the fact that there is no evidence, none whatsoever, not testimonial and not documentary, that anyone looked at Mr. Cupersmith's name and attached any significance to it in approving the loans. What matters, as we've just discussed, is the role played by Mr. Cupersmith's name in relation to the underlying fraud, and there's no evidence that anybody even looked at his name.

THE COURT: But if I may ask, Mr. Zarrow, do you see in any of these cases a requirement that, in a PPP or otherwise a loan fraud case, where the bank relies on the forms, there has to be shown that reliance?

MR. ZARROW: So let me answer that question in two parts, Your Honor. The first is: Right now, we're just applying the exact language of Dubin. Dubin says what you need is more than a causal relationship, and what I'm demonstrating here is there is less than a causal relationship. There's no causal relationship.

And the second point is, I don't think there are any cases addressing this. I'm not sure it's come up yet. The Dubin opinion is pretty fresh. It was last term. And so I'm not sure. This might be a novel question before this Court. So I don't know that anyone has grappled with this, but the language of Dubin is directly on point.

THE COURT: And I understand. But since Dubin, has any court focused on the reliance of, in this case --

MR. ZARROW: Not to my knowledge.

THE COURT: -- the bank?

MR. ZARROW: Not to my knowledge.

So the third point, as I was saying, is there's no evidence that anyone looked at Mr. Cupersmith's name, that it played any role whatsoever, not even a but-for role, in the fraud. And I think this hole in the Government's case is by design. The Government could have called the loan processors, the people who looked at the documents, but they didn't. Presumably, they didn't call them because those people didn't look at Mr. Cupersmith's name.

Again, the theory here is that one of the people at the loan processors took the Form 1065, went to the bottom, or the top, or wherever Mr. Cupersmith's name was, and thought to themselves: "Aha. This is a credible PPP application." But there's no evidence that that happened in this case. And that point is undisputed. The Government cannot get up here and say somebody actually looked at Mr. Cupersmith's name.

And as I understand the Government's response, they say there's no proof that the banks -- that the loan processors didn't look at Mr. Cupersmith's name. I'm not sure, in fairness to the Government, they really engaged with the Mr. Cupersmith's name aspect of it or his identification number, et cetera. I think really what they are saying is there's no proof that anyone looked at the Form 1065.

But regardless -- I disagree with the Government's characterization with respect to the 1065. The Government doesn't get to prove its case through a negative. The Government can't sustain a conviction that carries with it a two-year mandatory minimum to be run consecutively to the penalty for the underlying fraud by saying there's no proof that something didn't happen.

It is Government's burden to prove through evidence beyond a reasonable doubt that Mr. Sheppard committed aggravated identity theft. What that means under Dubin is they have to prove through evidence that Mr. -- his use of Mr. Cupersmith's identity -- alleged use -- played more than a causal relationship, and they haven't done that with evidence in this case.

THE COURT: But in looking at the causation requirement between the use of the means of identification and the offense -- I just want to turn it on its head, Mr. Zarrow, because if, in fact, there was a bank officer that said: "We specifically looked at Neal Cupersmith's signature and that played a role in allowing us to determine it was legitimate, and it gave credibility" -- let's say that all of that, which is really the Government's argument -- was part of the case, is that really important for purposes of the Court's focus?

In other words, does the means of identification have to have caused the success of the underlying offense, is really the heart of the question. Because I don't know if the testimony would have changed Dubin's analysis. Right? Because it has to be at the crux of the criminality. So does it really matter who relied upon it and who didn't?

MR. ZARROW: Well, that's exactly our first argument, Your Honor. Even if the Government proved that Mr. Cupersmith's name lent credibility to the fraud, we would still have the missing at the crux element. Our point now is simply they also didn't prove that it lent credibility. And I think under this aspect of Dubin that we've been talking about, that's also important. They have to prove as a matter of fact what their theory before the Court is.

Their theory before the Court is that it lent credibility. And what I'm saying is there is no evidence that that happened. And I don't think that the Government can get up here and represent to you that it did happen because there's a hole in the record. And when there's a hole in the record in a criminal case on an important point, that means the conviction must be vacated.

So those are our two Dubin arguments, Your Honor. If you have any questions remaining, I'm happy to address them. Otherwise, I'll move on to fraud --

THE COURT: Well, it was really going to be my question to the Government, where -- the requirement that the bank has to rely on the form, but I think you've fleshed that out.

MR. ZARROW: Thank you, Your Honor.

My colleague, Mr. Fisher, who argued the Dubin case in the Supreme Court, reminds me that, in the Dubin case, the name was actually pretty important to the fraud. It was a Medicaid billing case, and the specific patient's name was important to the fraud. It was a Medicaid billing case, and Medicaid allocates eight hours per year of refunds for psychological testing to each eligible patient. And Mr. David Dubin represented that Patient L received psychological services in order to get Medicaid reimbursement.

And by using that specific patient's name, what he did was unlock benefits for this specific patient, Patient L. So in that sense, Mr. Dubin's use of Patient L's identity in that case was really a but-for cause of getting reimbursement for Medicaid. And what we have in this case, and the reason we say in our briefs that this is an easier case than Dubin, is you don't even have that but-for relationship. There's no proof.

In Dubin, the Government did prove that the name was at least necessary to get Medicaid reimbursement. It unlocked those eight hours. In this case, you don't have that evidence. So in that sense, I think this is an easier case for us than it was in Dubin.

THE COURT: And maybe Mr. Fisher can answer that question. It was my understanding that the patients actually had received the services.

MR. ZARROW: So Your Honor, I was on the briefs with Mr. Fisher, so I'm familiar --

THE COURT: I'm looking at the Dubin case. In this case, the patient's means of identification was not used deceptively.

MR. ZARROW: Correct. That was what was missing -- at the end of the day, the Supreme Court said that was missing in the Dubin case.

THE COURT: Right. But isn't that a distinction from the use of the means of identification here?

MR. ZARROW: Correct. And that's why in the first part of the argument I was talking about confusing necessary and sufficient conditions.

And just to summarize what the important point I think is, the Government's position is that Mr. Sheppard committed a violation of Section 1028A by committing ordinary identity theft by using a means of identification deceptively. But what Dubin says is not only do you need ordinary identity theft, you also need something aggravating, and that something aggravating is the causal relationship.

So I agree with Your Honor's point that this case is somewhat -- somewhat factually distinguishable from the Dubin case, but it is not distinguishable from the legal rule that the Supreme Court articulated to resolve the Dubin case. And my point about the Medicaid billing in Dubin is simply that in that case the use of the means of identification, although arguably not deceptive -- there was a big dispute with the Government about that -- at least was a but-for cause of the fraud's success. Whereas, in this case, there is no evidence that the use of the means of identification was a but-for cause in the fraud's success, which is why on that aspect of Dubin, I think this is actually an easier case than Dubin.

MR. FISHER: Your Honor, since you asked, if you would like, I could give a quick supplement to my colleague there.

THE COURT: Certainly. Of course.

Thank you, Mr. Fisher.

MR. FISHER: And then I will turn it back over to those of you in the courtroom.

THE COURT: Thank you, sir.

MR. FISHER: So just to answer the question that you asked about the use of the patient's name in Dubin, you're right the patient received services in Dubin. But the patient did not receive the services that were identified on the form. And so, for that reason, the Government said it was a fraudulent form because it claimed a service that was reimbursable at a higher rate than the service that was noted on the form.

And so the point -- the argument the Government made in Dubin was because you cannot get Medicaid reimbursement without a patient's name on the form, that patient's name was essential to the commission of the Medicaid fraud, and --

THE COURT: Well -- but was it essential? Mr. Fisher, was it essential or did Justice Sotomayor find that was ancillary and it wasn't at the crux? In fact, didn't Justice Sotomayor say that the petitioner's use of the patient's name was not at the crux of what made the underlying overbilling fraudulent, the crux was a misrepresentation about the qualifications of the petitioner's employee?

MR. FISHER: You're right. It was not at the crux, but it was essential. And the Government emphasized --

THE COURT: Where would the Court find that? Mr. Fisher, where would the Court find the Supreme Court stating that the use of the patient's name was essential, as opposed to ancillary?

MR. FISHER: Well, there's two places I would point you to. Just -- I'm working here off memory, but it is up and down the Government's brief in the case, and we never disputed that it was essential --

THE COURT: I'm speaking of the Court's opinion. I understand it may have been in the brief.

MR. FISHER: I'm just giving you the background before a direct answer.

THE COURT: Of course.

MR. FISHER: The Government argued up and down the case that you cannot get reimbursement for a Medicaid claim without an actual patient's name and a proper Medicaid ID. We never disputed that. Then when the court said -- the court, at the beginning of the opinion, recited the Government's arguments, again, using some of the words that have been used today, the court, Justice Sotomayor, summarized the Government's argument at the beginning of the opinion, saying the Government says the name facilitated the fraud because you cannot receive Medicaid benefits without a Medicaid patient's name, and she said: "That's not enough."

And I think the thing you would look for in a court's opinion -- I'm not sure the precise language you've asked me for is there, but the argument the court rejected was that having a name be the but-for cause of completing the fraud is not enough. And I think, you know, the idea of a but-for cause would be something that would facilitate the fraud, or -- you know, I think that's even more than lending credibility to the fraud. So that's just the thing I wanted to make clear from Dubin, is the idea that's being propounded today would have been the case in Dubin as well, but the court said that was not enough.

THE COURT: And Mr. Fisher, before I turn it back over to Mr. Zarrow, I just want to make clear that in the case before the Supreme Court that you argued the means of identification -- that is, the patients' names here -- were not used in a manner that was fraudulent or deceptive, correct?

MR. FISHER: Well, that was a matter of dispute. The Government said it was used in a fraudulent manner because it claimed certain services given to that patient that was not given to the patient. And what the court said is -- I think the court just left that argument to the side, and said none of that matters because the real dispute here -- I'm sorry -- the real fraud here is just overbilling for a service, not lying about who received the service.

THE COURT: Right. I mean, the court specifically stated that the fraud was in misrepresenting how and when the services were provided to a patient, not who received the services.

MR. FISHER: That's correct.

MR. ZARROW: Your Honor, if I may?

THE COURT: Thank you, Mr. Fisher. Appreciate it.

MR. FISHER: Thank you. Thanks for your indulgence.

MR. ZARROW: If I may, I don't think the last point you made is distinguishable from your January 5th order, where you said that the crux of the fraud of this case were misrepresentations about the nature of Mr. Sheppard's businesses. I don't think that point, which goes to the heart of the Dubin case, is distinguishable from this one, as you've already identified.

And the point I really want to hammer home before I move on to fraud, is that a deceptive use is not sufficient -- it is a necessary condition under Dubin, but it is not sufficient to sustain an aggravated identity theft conviction because you need to look at the relationship between that deceptive use and the underlying crime. And the -- what's missing in this case legally and factually is the requisite relationship between the two.

If I may, I'll move on to the fraud convictions.

THE COURT: Thank you.

MR. ZARROW: So I'd like to begin, Your Honor, by situating this in context a little bit. This conviction in this case implicates the fraudulent inducement theory of fraud. And there's an ongoing debate in the Courts of Appeals between the Government and criminal defendants about whether and in what circumstances fraudulent inducement can constitute wire and mail fraud.

You have the Eleventh Circuit's decision in Takhalov. That was 2016. That is binding published precedent of the Eleventh Circuit. Three years later, Chief Judge Pryor writes a concurrence, in United States v. Feldman, criticizing Takhalov's treatment of fraudulent inducement, but that's a concurrence. And then you have the Ciminelli case. And what happened in the Ciminelli case, when we were in the Supreme Court, is the Government abandoned its right to control theory, and said in its opposition brief that Mr. Ciminelli, much like the Government argues here, fraudulently induced the victims to enter into a transaction.

Mr. Ciminelli's response was: "Well, perhaps, but the victims in that case got everything that they bargained for."

And the reason that matters, if you look at our reply brief in that case, is that the wire fraud statute punishes a scheme that, if completed as intended, would amount to fraud at common law. And at common law, in 1872, when the mail fraud statute, which uses the same language as the wire fraud statute, was enacted, a misrepresentation that does not cause injury was not actionable fraud.

So, of course, in Neder v. United States, the Supreme Court says: "You don't need a completed fraud and therefore you don't need injury." But that doesn't mean that injury is irrelevant to fraud. What you need is a scheme that if it went all the way to the end would amount to actionable fraud at common law. It's the same concept as punishing attempt. It still has to be an attempt that would amount to the ultimate crime if completed all the way through.

Of course, Ciminelli didn't resolve that argument, but Takhalov did. Takhalov precedent in the Eleventh Circuit says: "A defendant is innocent of the fraud if the defendant," quote, "has tricked the victims into entering a transaction" -- that's fraudulent inducement -- "but nevertheless gave the victims exactly what they asked for and charged them exactly what they agreed to pay." That's no injury. So what Takhalov said is fraudulent inducement with no injury is not fraud under the wire fraud statute.

The Government in this case has hypothesized two victims, as we've said in our briefing. There's the SBA and there are the lending banks. I'm actually going to start today -- I know we started in our briefs with the SBA, but I'd like to start today with the banks because the banks as victims theory maps on directly to that holding in Takhalov.

Mr. Sheppard did not scheme to defraud the banks under Takhalov because of the banks got exactly what they bargained for. They bargained for a PPP loan, with a PPP interest rate and processing fees, and that's exactly what they got. Any misrepresentation about eligibility to participate in the PPP program did not go to the bank's financial interests, i.e. property interest in the transaction. It went to the Government's administrative interests in administering the PPP program, but it did not -- and this is a crucial point -- go to the bank's property interest in the transaction.

And I think an easy way to see this is to imagine a hypothetical universe in which Mr. Sheppard's businesses loan applications were rejected -- they, according to the Government, truthfully reported W-2 wages and were rejected. And I think in that hypothetical universe there are two possibilities. One is the banks make a PPP loan to some other qualifying borrower. I think that's likely, because as we all know the PPP program was very popular. It eventually ran out of money. And in that universe, the banks would be in the exact same position they are today. They would get the processing fees. They would get the interest rate. It would just be someone else, not Mr. Sheppard. So certainly no harm in that case.

The other alternative is that the banks make no other PPP loan. The banks sit on their money. In which case, at least as the record in this case shows, they are worse off than they are today having made a loan to Mr. Sheppard because they lose out on the interest and the processing fees.

The Government's theory, as I understand it, Your Honor, is that when the Government points to harm, it says the banks lost the time value of money. They point to the one percent interest rate, which they call, quote, very advantageous. And the major problem with that theory is there's no evidence in support. The Government did not put on any evidence that the banks would have been in any different position financially, much less better off, had they not made a loan to Mr. Sheppard and had they made a loan to someone else.

The Government can't support a criminal conviction with speculation about what might have been. They need evidence. If the Government wants to say the banks lost the time value of money, it needed to put on a witness to say the banks would have lent at seven percent interest and it would have outweighed the processing fees and the one percent interest for Mr. Sheppard.

THE COURT: So this argument somewhat goes outside of

Ciminelli. I mean, you're basically arguing that the bank was not harmed because it got what it bargained for.

MR. ZARROW: That's exactly right.

THE COURT: So could there ever be a scenario of wire fraud where -- I mean, the bank provides a loan to one who otherwise is not eligible. I mean, the bank is getting the interest, the bank enters into an agreement, the bank now recoups the money because it's fully reimbursed. Couldn't there always be that argument that the banks are never harmed?

MR. ZARROW: It depends on what role the eligibility criteria play. And this is what the Takhalov decision says. If it speaks to the finances of the transaction, if the eligibility criteria, for example, are the amount of collateral, then that would speak, of course, to the bank's financial risk in a transaction, then I think the answer is yes.

If the eligibility criteria speak to the bank's property interest -- and this is the significance of Ciminelli -- if it relates to the bank's property interest, then yes, you may have fraud -- wire fraud. But if the eligibility criteria don't speak to the bank's financial interests -- to the bank's property interest, then the answer is no. And what the Government has failed to prove in this case is that the PPP eligibility criteria spoke to the bank's property interest in a transaction. In the words of Takhalov, the banks got exactly what they bargained for.

If the Government wanted to prove that the banks didn't get what they bargained for financially, it was incumbent on the Government to put on that proof, and it didn't. And that, we submit, should be the end of wire fraud convictions in this case.

THE COURT: So if the Court follows the argument that's being made -- I want to understand how I got it wrong in this Court's order on the Rule 29 Motion for Judgment of Acquittal. Because this Court relied upon the Eleventh Circuit's decision in United States v. Vernon, where the Eleventh Circuit found that the Government had provided sufficient evidence of the defendant's intent to participate in a scheme to defraud as part of a wire fraud, where the defendant received loan proceeds. How is that case distinguishable from this case?

MR. ZARROW: Your Honor, as I understand the Court's order, what you were identifying there is that loan proceeds are a property interest. It is a traditional property interest that comes within the ambit of the Ciminelli decision. And we agree with that, but simply identifying a property interest is not enough. Under Takhalov, and under the common law that's incorporated into the wire fraud statute, you also need a harm to the property interest.

Candidly, I don't recall at this moment what the facts of Vernon are. I do know the facts of this case. And on the facts of this case, the Government has not proved a scheme that would harm a traditional property interest. But there's no dispute, to be sure, that loan proceeds are property. They most certainly are. The point I'm making now is that there is no harm to that property interest because under Takhalov the banks got exactly what they bargained for.

And I think if -- you can filter through any number of hypotheticals simply by asking: Was the misrepresentation material to the finances of the transaction? Was it material to the bank's property interest in the transaction? If the answer is yes, you might have wire fraud. If the answer is no, you don't have wire fraud.

In this case, the misrepresentations about PPP eligibility -- the Government did not prove that misrepresentations about PPP eligibility were material to the bank's financial interest in the transaction.

THE COURT: So post-Takhalov, what cases should the Court look to that would support your argument that there is a requirement to show an intent to harm the lenders or a direct harm to the lenders? Where would the Court look for that argument and that decision that would instruct this Court?

MR. ZARROW: Your Honor, we cited an Eleventh Circuit decision called Masino. It's an unpublished -- I think it's Masino. It's an unpublished decision. That's a case about fraud being run by a charity, but the charities were not harmed. They got what they bargained for.

We cited to a Sixth Circuit opinion by Judge Sutton. That one involved fraud relating to the sale of pills, medications. And the Sixth Circuit holds in that case -- I think it's Waters -- that buying pills for their market price, even if you have misrepresented something sort of ancillary to that, is not fraud. I think those are the two leading cases.

Other than Takhalov itself, of course. And Takhalov is the law of the Eleventh Circuit until the court goes en banc and changes it if a petition comes up.

THE COURT: Of course.

MR. ZARROW: I think there was a case out of the Western -- I believe it was the Western District of Texas somewhat recently -- that's obviously in the Fifth Circuit -- called Constantinescu, 2024 --

THE COURT: Hold on. Because it's not in your brief. Hold on.

MR. ZARROW: It's not, Your Honor.

THE COURT: Give me an opportunity to write it down.

MR. ZARROW: Constantinescu.

THE COURT: All right. And the cite?

MR. ZARROW: 2024 Westlaw 1221579.

That case -- the Fifth Circuit follows Takhalov, so it talks a lot about the intent to harm element. But I think if the only case we had was Takhalov, we would still win because Takhalov says a defendant does not commit wire fraud when the supposed victim gets exactly what they bargained for. And in this case, the banks did get exactly what they bargained for. Any harm that was suffered in this case was administrative harm suffered by the Government.

And if Your Honor doesn't have any other questions about the bank as victims theory, I think this would be a good opportunity to turn to the SBA as victims theory.

THE COURT: Thank you, sir.

MR. ZARROW: So the SBA as victims. I think, Your Honor, this one -- this argument by the Government fails for two interrelated reasons. The first reason is that Mr. Sheppard did not obtain anything from the SBA. The Government points to loan guarantees that the SBA made to the banks. But Mr. Sheppard didn't obtain those loan guarantees. They ran from the Government to the banks. And under the wire fraud statute, the Defendant must obtain the property from the victim. I would direct the Court -- this is in our brief -- to United States v. Walters. That's Judge Easterbrook's opinion for the Seventh Circuit, 992 F.2d 1219, where Judge Easterbrook persuasively lays out why this obtaining aspect of fraud is required under the statute.

And an important point. This is not just any well-reasoned Seventh Circuit case. It was cited approvingly and affirmed by the United States Supreme Court v. Kelly -- in Kelly v. United States at Footnote 2. So Judge Easterbrook's opinion was right, the Supreme Court says, in its evaluation of wire fraud.

The second interrelated reason is not only did Mr. Sheppard not obtain anything from the SBA, but SBA loan guarantees were not the object of the fraud. The object of the fraud in this case, Your Honor has already said in your mid-trial Rule 29, and the Government's already said in its briefs at Page 7 that the object were loan proceeds from the bank. It is true, I will concede, that SBA guarantees made to the banks may have been an incidental byproduct of the fraud. They actually may have been a foreseen or foreseeable incidental byproduct of the fraud. But under Kelly v. United States -- that's the Bridgegate case -- that is not sufficient. The object of the fraud needs to be the victim's property interest. And the SBA's property interest in a loan guarantee was not the object of Mr. Sheppard's fraud.

So for those two reasons, the SBA cannot be a victim in this case. And Your Honor --

THE COURT: Mr. Zarrow, I know I have given you -- I just want to ask that perhaps you'll wrap up, so I can give the Government an opportunity to respond.

MR. ZARROW: Sure. I can be done now. Thank you very much.

THE COURT: Thank you, sir.

Did you want to -- I don't want to stop you mid-sentence. I think you had finished your sentence. But is there anything further you want to say before the Government responds?

MR. ZARROW: No, Your Honor. I'll cover anything in rebuttal. Thank you.

THE COURT: All right, then.

MR. ZARROW: Thank you.

MS. JIMENEZ: Your Honor, I don't think I can speak fast enough with the three minutes that I have.

So --

THE COURT: Could we start with that argument, Ms. Jimenez, in terms of the case law that Mr. Zarrow has asked the Court to rely upon, Takhalov, and the cases that interpret Takhalov.

MS. JIMENEZ: Your Honor, in Takhalov, the issue was the Court essentially broke up scheme to defraud into two parts, intent to deceive and intent to defraud. Intent to defraud is intent to cause harm, intent to cause financial harm. I think what the Court said in its previous order is still unrebutted here and really un-rebuttable, which is: "Sheppard does not argue, nor can he, that loan proceeds are not money or property within the meaning of the wire fraud statute." There was intent to deceive and intent to defraud.

THE COURT: I think I'm focusing on the harm.

MS. JIMENEZ: Right. And what the Defense does is say this is not about intent to harm or intent to defraud. This is about having harm. And that's not -- in other words, having actual injury, having actual harm. That is not what Takhalov says. Takhalov says you need intent to deceive and intent to defraud.

And in Takhalov, the court talks about the nature of the bargain, whether the lie or the deceit goes to the nature of the bargain. The gentlemen go into the club. They purchase Grey Goose Vodka. They get Grey Goose Vodka. Intent to defraud here, it goes -- the fraud or the deceit went to the nature of the bargain, the loan. The loan should not have been issued to the Defendant.

There was one actual harm because the loan went to the Defendant, instead -- to the Defendant's business, instead of going to other businesses. The money was disbursed. There was actual harm. But of course actual harm is not required, as the Court knows, and that's basic of wire fraud, which I've pointed out in the Bradley Eleventh Circuit decision. You can have an unexecuted wire fraud scheme and there's still wire fraud.

So -- but Takhalov, again, does not say what the Defense is saying, that you need a harm. What it says is that you need intent to harm. And that is the Defendant's intent, and that is -- there's plenty of evidence in this case about that.

And then going on to the SBA --

THE COURT: I just want to -- which case, Ms. Jimenez, from the Eleventh Circuit -- because I know that Mr. Zarrow has focused the Court's attention to Sadler, to Walters, to Kelly -- but which case in the Eleventh Circuit post-Takhalov states specifically that there is -- that it is irrelevant whether, in fact, the bank or whoever it may have been was directly harmed?

MS. JIMENEZ: You know, I haven't looked at that, Your Honor. I mean, I looked at Takhalov. And obviously I don't think Takhalov is a problem in this case at all because, like I said, it divides intent to deceive and intent to defraud. And clearly we have intent to defraud. You do not need actual harm. And I'm not aware that these cases stand for the proposition that you need to have actual harm.

Although in this case we do. The loan proceeds went to the Defendant's businesses, when they should not have gone to the Defendant's businesses. That was harm. That was -- in other words, he got the money as a result of the fraud that he committed. I mean, that's the harm. It's money that should have gone elsewhere. And the Bradley decision does pre-date Takhalov, but it's an undisputed principle that for wire fraud you do not need actual harm. It mays: "Mail and wire fraud statutes punish unexecuted, as well as executed schemes." And so you do not need the harm, but you have it here. The banks disbursed the money.

And on the SBA side, they had both a regulatory interest and a financial interest. The PPP loan program was a government program. When the government money ran out, the banks did not continue to lend. And there was something in -- and I mentioned how the forms that the Defendant filled out were SBA forms. And something I had neglected to point out about those forms was the very basic 2483 form that the Defendant executed, and that we spent a lot of time focusing on. And the main certification on that form, where the Defendant certifies that all the information and documents provided would be true and accurate in all material respects -- I neglected to point out that the very next sentence on that certification says: "I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law." The Defendant is being told he is receiving a guaranteed loan from the SBA. That was on every single form that he filled out.

So this was -- I mean, this was both -- I mean, the focus on regulatory is misplaced because this was a government program. And I did cite the Griffin decision, which is out of the Seventh Circuit, which I think is -- it talks about the SBA guarantee being a property interest. But focusing on the financial interest, this was a government program. And when the government money ran out, the program ended.

So I mean, the argument that this -- that there was no intent to defraud because there was no intent to harm, is, I think -- I think an argument that is really baseless because going back to the point that the Court made in its prior order, the loan proceeds are property, and that's what the Defendant sought here, that's the intent that he had, and that's what he achieved -- I think answers all of those questions.

On Dubin, Your Honor, I'd like to just -- if I can, just sort of go back to the basics.

THE COURT: Hold on one second.

MS. JIMENEZ: Dubin -- the Supreme Court in Dubin was focused on the very broad language in the identity theft statute that the use without lawful authority of a means of identification of another person during and in relation to a predicate offense was very broad language, and it was concerned about the Government's overbroad reading of that language. And the court said: "The Government's reading would, in practice, place garden variety overbilling at the core of Section 1028A."

And the court went on to give those examples, about the lawyer rounding up when they bill, about -- and obviously, there's a client's name involved there -- when the waiter switches out the meat at the restaurant and provides the bill to the customer. Any type of billing situation --

THE COURT: But the court noted that the defendant's use of the means of identification of another person must have been used not merely as an ancillary feature of the wire fraud. So if the Court looks at cases since Dubin, particularly the Gladden case from the Eleventh Circuit --

MS. JIMENEZ: Right. And I just want to point out, though, that in the sort of -- I think the Defense plucks out phrases and language from Dubin without putting it into context. The but-for cause in Dubin, which existed, was the fact that you need to -- in order to submit a claim, in order to have a claim to Medicare -- Medicaid in this case -- you need to have the patient's identification. And so you don't get off the ground without it. That is a but-for cause. But that is quintessentially ancillary to the fraud because it had nothing to do with the lies. And that is what Dubin was focused on.

THE COURT: Well, when you say "the lies," there's the use of another means of identification, which must be a key mover in the criminality. That means it must be used in a manner that is fraudulent or deceptive. So we spent a lot of time, at least with Mr. Zarrow -- I'd like to spend some time with you -- understanding the Eleventh Circuit's decision in Gladden and the two individuals, Linton and Gladden. And how do you distinguish the Defendant Gladden and the Defendant's fraud here. That is, Gladden merely misrepresented that the prescriptions were medically necessary. Here, didn't the

Defendant merely misrepresent that the loans were economically necessary by virtue of having the accountant's name?

MS. JIMENEZ: No. And I think -- and if I could just go back to this point that I would like to make, is I think the Defense is trying to say that there are important lies and unimportant lies in a fraud scheme.

And I don't think that's what the court said in Dubin -- that, rather, in the constellation of lies that constitute the fraud, a lie must pertain to the identity that is the subject of the aggravated identity theft. And the question is: Does the lie go to the identity -- that is, the means of identification -- and was the means of identification used in a manner that was fraudulent or deceptive? The answer in Dubin, of course, was no. The means of identification was not used in a manner that was fraudulent or deceptive.

In Gladden, obviously, with respect to Ms. Linton, those prescriptions were signed by the doctor and they were altered to add medications, more expensive medications. And that was found to be sufficient under Dubin. Here, we have tax returns -- and obviously, in 2021, the lenders, pursuant to the SBA's requirements, were not requesting a lot of documents. It was just a few documents, essentially your payroll and your tax return. And the submission of the tax return with the false -- materially false information, purported to be authored and prepared by this accountant was, one, used deceptively and at the crux of what made the conduct criminal, that is, the submission of false information and false documents to qualify for this loan.

And I think in certain respects it's more egregious than Linton because you had a preexisting prescription that was authored by the doctor. Here, you have not just the information that's false on the tax return, now you have Mr. Cupersmith's signature that's also forged on this document that's purported to be his. So I think it's more significant.

I think -- I'd like to address the argument about Mr. Cupersmith being superfluous to the fraud or to the tax return. I think the Defendant could have potentially submitted a tax return without Mr. Cupersmith's name on it, and I think that there are multiple ways to commit the fraud. There's multiple ways of committing PPP fraud. And I think what that underscores is the use of Mr. Cupersmith's identity being aggravated identity theft. He could have done something else. And again, the focus here is on the Defendant's conduct, his criminality, what he did to commit this fraud.

He could have submitted a tax return with no accountant, presumably, that might have succeeded or might have not succeeded, but that's a different fraud. That's not the case we have here. The case we have here does use Mr. Cupersmith's identity. It forges his signature. It submits this document that claims to be prepared by him essentially on his behalf. That is at the crux of what made this -- this conduct criminal.

THE COURT: But why -- I guess I'm trying to square how that's at the crux. What do you see is the nexus that's required between the use of Mr. Cupersmith's name and PTIN and EIN and the underlying offense? Because it would appear to the Court that it was Mr. Sheppard representing the companies getting the loans -- or the company. The company actually got the loan. So is there a misrepresentation as to who received the loan? Isn't Mr. Cupersmith's name ancillary to the actual intent of the 1065, and that is to show the income or the amount that's paid by the partnership?

MS. JIMENEZ: Well, I think it goes back to Dubin and the fact that the way the Defense has framed or -- has framed Dubin, I think, misrepresents what that case says. And when I go back to the points that I made before, which is there aren't important lies versus unimportant lies in the context of the fraud, as long as there was a lie involving the use of -- or the misuse of someone's identity in a way that is deceptive. And being at the crux of the criminality is -- it doesn't mean it is the thing -- and I think the Court posed that question to the Defense -- it doesn't mean it's the thing that caused the loan to be approved, because at the end of the day we don't look to whether the banks relied on this particular document or not.

So it is at the crux because it is part of the fraud. I mean, the fraud was a submission of these documents to get the loan approved. That's what the Defendant did. That was the conduct of his criminality. And so I don't think Dubin says that this has to be the thing that causes the fraud to be successful. In Dubin, you simply had the identification of the patient having really nothing to do with the lies, the fraud in the case.

If the Defendant had submitted a letter saying: "Lebron James is my best friend," there is potentially the use or misuse of Mr. Lebron James's identity, but it doesn't go to the fraud.

THE COURT: Well, that would be a broad interpretation of 1028A, if, in fact, someone wrote a letter and said that someone is my best friend in order to receive certain monies and that was the key mover in the criminality. Is that how the Court should interpret --

MS. JIMENEZ: No. No. No. I'm saying that this is not that. I'm saying that if he had submitted a letter saying: "Lebron James is my best friend," he's using Lebron James's name without lawful authority, but that does not go to the fraud. It has nothing to do with the fraud, which is not what we have here.

The tax document was one of the documents requested -- one of the few documents requested. Again, it's payroll and tax return -- and it was false. It had false information. It was purported to be prepared by this very individual whose identity was used. He had nothing to do with that tax return. And so it is at the crux of this criminal conduct, which was to persuade the banks to approve the loan.

So I don't know if the Court misunderstood my example. The example was to point out how taking someone's name, but then it doesn't have to do with the fraud. I think that's what Dubin was getting at, which is the patient's name is necessarily on this form, but it has nothing to do with the actual fraud that was committed. And so I do think this case is outside of Dubin. I think I would -- one second.

(Pause in proceedings.)

MS. JIMENEZ: One thing that I would like to say also about the jury instructions --

THE COURT: I don't believe there's been an argument that the jury instruction was improper.

MS. JIMENEZ: No. And that's the point, that the jury was instructed -- with respect to these aggravated identity theft counts, the jury was instructed post-Dubin. It was instructed --

THE COURT: That's correct.

MS. JIMENEZ: -- with Dubin language. And the jury found beyond a reasonable doubt that the evidence supported those counts with respect to Mr. Cupersmith.

And so -- and I would just like to -- it's a basic tenet that's not in dispute. But in United States v. Stone, Eleventh Circuit, 1993, 9 F.3d 934, it says: "Few tenets are more fundamental to our jury trial system than the presumption that juries obey the court's instructions. The crucial assumption underlying the system of trial by jury is that juries will follow the instructions given them by the trial judge."

The jury was instructed regarding Dubin. So the Defendant wants this Court to overturn the jury's verdict. And not just this jury's verdict, but to find that no reasonable jury could have found the Defendant guilty of aggravated identity theft on this evidence, and this is evidence the Court must view in the light most favorable to the Government.

And so -- and I would add that -- I don't have time now, but obviously the cases the Government cited, in particular, the PPP cases, I think support the Government's view here that Mr. Cupersmith's identity -- the use of his identity satisfies Dubin.

THE COURT: I know I spent some time with Mr. Zarrow with regard to the reliance factor and the testimony that was presented at trial. Do you believe that that plays a role in determining whether there has been a violation of 1028A?

MS. JIMENEZ: There was a lot of questions by the Defense regarding the issue of reliance, and there's no case that I have seen that requires reliance to be -- to play any role here.

(Pause in proceedings.)

THE COURT: Is there anything further, Ms. Jimenez?

MS. JIMENEZ: No, Your Honor.

MR. ZARROW: Your Honor, I'll be brief because I know we're past time.

On Dubin, Section 1028A is not an anti-forgery statute. There is a statute that prohibits forgery. It's not Section 1028A. Section 1028A is the aggravated identity theft statute.

Second, the Government says that the misrepresentation does not need to be one of the things that caused the loan to be approved. That was the core argument from the Government. Gladden is directly to the contrary. The test that the Eleventh Circuit used in Gladden is whether it directly enabled the bills in that case to be paid. In this case, the Government has admitted that misrepresentations about Mr. Cupersmith's identity did not directly enable the PPP loans to be funded. The Government has just admitted that Mr. Sheppard's scheme would have succeeded even in the absence of Mr. Cupersmith's name.

Third, I heard no response to our argument that lending credibility to a fraud semantically, just as a matter of logic, as a matter of the language used in Dubin, cannot be at the crux of the fraud. It just doesn't work. And the Government's theory in this case about lending credibility is just another way of saying that Mr. Cupersmith's name facilitated the fraud. It's the same exact concept. And the Supreme Court expressly rejected in Dubin the idea that facilitating a fraud was sufficient.

Fourth, there was a question about the jury instructions. We did object to the jury instructions in this case on Dubin, and my --

THE COURT: Is that the basis of your motion for a new trial? Because I didn't see that --

MR. ZARROW: No.

THE COURT: -- in your arguments.

MR. ZARROW: No, Your Honor. We objected at the charge conference. It's not part of our new trial motion. If the convictions are sustained, we'll take it up on appeal. But I submit that the reason we're here is because there was instructional error.

Even if you don't think there's instructional error, the nature of sufficiency review is always that there's been a jury verdict and the defendant claims that it's wrong. But in this case, there was actually, in our view, an instructional error exactly on this point. And the problem in the instruction and in the Government's argument is that it treats a deceptive use as sufficient in and of itself to constitute aggravated identity theft without the requisite relationship to the underlying fraud. That's the core error here, the Government's argument -- what they told the jury in this case, lending credibility is just facilitation.

And the last point loops into something Your Honor said, which is the arch of Supreme Court case law on fraud statutes, aggravated identity theft statute. Over the past decade or so, the Supreme Court has been emphatic that prosecutorial overreach with these kind of statutes should not be permitted, that the Government has been overprosecuting, overcharging, and stretching these statutes beyond what their words and Supreme Court case law interpreting them allow.

This is another case, with respect to the aggravated identity theft conviction, where the Government is stretching Dubin beyond its breaking point. I would point the Court to the Supreme Court decisions in Ciminelli, in Kelly, in Muscarello, in Dubin, and other cases of that ilk where the Supreme Court says if you have two debatable interpretations, the narrower one is the one that needs to win. And in this case, the narrower interpretation, and the correct interpretation, is that lending credibility to a fraud is not aggravated identity theft that carries with it a two-year mandatory minimum that must run consecutive to the underlying crime. It's a very serious statute. The narrower reading must prevail.

On the wire fraud convictions, the Government focused on -- tried to draw a distinction between intent to harm and actual harm. And I do think there's a distinction between those two things, and I think both of them are important. Under Takhalov, what you need is an intent to harm. And what Takhalov says an intent to harm is, is a lie that is material to the finances of the transaction. And I never heard from the Government any argument about how a misrepresentation about PPP eligibility criteria were material to the finances of the transaction from the perspective of the banks who are posited as victims.

The Government argued that the harm in this case is that loans would have been made to other qualifying businesses, but that's our point. The banks would have been in exactly the same position that they are today if they made the loan to somebody else. The banks don't care whether it's Mr. Sheppard or someone else. Financially, it's all the same.

On top of that, the Government's victim in that scenario is the other business that didn't get the loan. Right? They've been crowded out of the market for PPP loans. But that's not a charged victim in this case. We're talking about the banks and we're talking about the SBA.

On the point of actual harm, I think the Government is misreading Neder v. United States, and the Eleventh Circuit case law applying Neder. What those cases say is that because

Congress punished a scheme to defraud, essentially, an intent crime, you don't need the scheme to be completed and actual harm to manifest. That does not mean that the scheme to defraud -- that harm is irrelevant because it still has to be a scheme to defraud. And so the question is: What is fraud? What is intent to commit fraud? And fraud requires injury. At common law, fraud requires injury. And that is why a scheme to defraud necessarily must be a scheme that if it was completed -- and in this case it was completed -- is -- is a scheme that causes injury. We don't have that in this case.

Last point is on the SBA loan guarantee. I think the Government is relying exclusively on United States v. Griffin. That's the Seventh Circuit case from 2023. As we pointed out in our reply brief, Griffin is a case about the relationship between the banks and the government lenders and the SBA, not between borrowers and the SBA. There's a huge difference because the lenders obtain the guarantee from the SBA. And the object of the lender's fraud is the guarantee from the SBA. That is not true when it comes to a borrower. I didn't hear any response to our argument on that.

And so, I'll leave the Court with this: As I said in connection with the Dubin case, the Supreme Court has sort of reined in fraud interpretations of these statutes. I think the Government is offering a very expansive interpretation of both. It's a fraudulent inducement bereft of injury interpretation of wire fraud, and it is a capacious definition of aggravated identity theft. Following the Supreme Court's instructions, following the Eleventh Circuit's decision in Takhalov, we think all of the convictions in this case need to be vacated.

Thank you.

THE COURT: Thank you, Mr. Zarrow. I appreciate the argument.

MS. JIMENEZ: Just one -- I'm sorry. Just one point on the jury instruction. The Court gave the Defense's jury instruction.

THE COURT: I thought that I did. But then again, it's not part of the two motions that are before the Court. So the argument that perhaps was raised at the charge conference, I'm assuming you have preserved. But be that as it may, it's not for the Court's consideration at this time, so I don't need to hear further argument.

I want to say that I appreciate everyone's time. I know that in the request for a hearing there were many other responsibilities and obligations. So I do appreciate you accommodating your schedule to appear here today.

We obviously are -- when I say "we," myself and my law clerk have spent a considerable amount of time reviewing the cases, and we will continue to review the cases in light of the argument that was presented today and issue a written opinion.

Thank you-all for your time.

MS. WEINTRAUB: Judge, does the Court have -- you know, we knew that this was going to be rather lengthy and it's a matter of picking and choosing at this point because of the limited time from the Court, which we appreciated and understand. And I just wanted to know if the Court had any questions with regard to the motion for a new trial. We are prepared, because of the scheduling, to rest on the briefs. We know the Court will read it carefully. There are significant points that were raised. But if the Court has any questions, I'm prepared to answer them.

THE COURT: With regard to ECF 104, let me -- I don't think -- I would have asked Mr. Zarrow. I think I went through the open questions that I had. And that's why I started the hearing with recognizing that both were scheduled for hearing. So to that extent, no, I don't have any additional questions that I prepared for either the Government or the Defendant, but thank you.

MS. WEINTRAUB: Yes, ma'am.

THE COURT: Okay. Have a nice afternoon. And thank you, Mr. Fisher. I'm going to go ahead and end this.

MR. FISHER: Thank you very much, Your Honor.

THE COURT: Okay, sir.

(Proceedings concluded at 10:29 a.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 8th day of April, 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 - 59.

IN WITNESS WHEREOF, I have hereunto set my hand at Miami, Florida, this 23rd day of October, 2024.

/s/Yvette Hernandez
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