

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 23-60173-CR-KMW(s) (GRAHAM)

UNITED STATES OF AMERICA

vs.

**CAROLYN DENISE WADE and
TRACY D. WADE,**

Defendants.

**UNITED STATES' RESPONSE IN OPPOSITION
TO DEFENDANT CAROLYN DENISE WADE'S AMENDED MOTION
TO DISMISS COUNTS 4, 5, 8 AND 9 OF THE SUPERSEDING INDICTMENT [DE 130]**

Introduction

The United States of America, by and through its undersigned counsel, hereby responds in opposition to the “Amended Defendant Carolyn D. Wade’s Motion to Dismiss Counts 4, 5, 8 and 9 of the Superseding Indictment for Vindictive and Retaliatory Prosecution and Incorporated Memorandum of Law,” which Defendant Carolyn Denise Wade (“Defendant”) filed on August 21, 2024, at docket entry (“DE”) 130 (the “Motion” or “Mot.”).¹ In sum, the Motion seeks dismissal of Counts 4, 5, 8, and 9 of the Superseding Indictment (the “New Counts”), as to Carolyn Wade only, based upon Defendant’s assertion that “the government’s decision to file those charges was motivated by vindictiveness” (Mot. at 1, 8). Specifically, Defendant asserts that the government’s decision to file the New Counts after a mistrial was improperly motivated by

¹ The Motion amended a prior motion to dismiss filed by Defendant on August 19, 2024 (DE 128). On August 21, 2024, the Court entered an Amended Paperless Order Referring Motion (DE 133), pursuant to which the Court denied as moot the original motion to dismiss (DE 128), and referred this amended Motion (DE 130) to U.S. Magistrate Judge Patrick M. Hunt for a report and recommendation. Counsel for Defendant did not confer with the government before filing the original motion or this amended Motion, as required by Local Rule 88.9.

Defendant taking the following two actions during the jury trial on the original indictment: 1) filing a motion to dismiss the indictment for prosecutorial misconduct (which the Court denied); and 2) objecting to the Court reading an *Allen* charge after the jury advised the Court that it was deadlocked (which the Court sustained). Defendant's theory to dismiss the New Counts is both legally and factually erroneous.

As explained herein, the Motion wholly fails for the following three reasons: 1) as a matter of well-settled law, the filing of the New Counts following a mistrial, notwithstanding Defendant's unsuccessful motion to dismiss and *Allen* charge objection, does not give rise to a presumption of prosecutorial vindictiveness; 2) even assuming, solely for the sake of argument, that a presumption of prosecutorial vindictiveness could arise in these circumstances, such presumption is rebutted by the government's legitimate basis for filing the New Counts, which is disclosed herein; and 3) Defendant has not established actual prosecutorial vindictiveness.

Accordingly, the United States respectfully asks the Court to deny the Motion (DE 130) in its entirety.

Procedural History

1. Original Indictment and May 2024 Trial

On September 14, 2023, a grand jury sitting in the Fort Lauderdale Division of this Court (the "Grand Jury") returned an indictment (DE 3) (the "Indictment") charging Defendant with one count of wire fraud, in violation of Title 18, United States Code, Section 1343. In sum, the Indictment alleged that, from May 2021 through August 2021, Carolyn Wade, then employed by the Broward County Sheriff's Office (BSO) as a Deputy Sheriff in the Detention Department, participated in a scheme to defraud in which she obtained a loan through the Small Business

Administration (SBA)’s Paycheck Protection Program (“PPP”) based upon materially false information. Such materially false information allegedly included, among other things, that a sole proprietorship having the business legal name “Carolyn Wade” earned “\$113,560” of gross income in 2019. The Indictment resulted from an investigation that led to similar charges against 16 other then-current or former BSO Deputy Sheriffs. These charges were alleged in indictments and an information filed around the same time, but all in separate cases, in the Southern District of Florida.

Defendant pleaded not guilty and proceeded to a jury trial. The trial commenced on May 13, 2024, in the Miami Division before Senior United States District Judge Donald L. Graham. In its case in chief, the government called 10 witnesses and introduced 90 exhibits into evidence. The defense called one witness (Defendant’s husband, Tracy Wade) and introduced a handful of exhibits. The Court denied all motions for judgment of acquittal pursuant to Rule 29. The Court also conducted an evidentiary hearing on Defendant’s motion to dismiss the indictment based on prosecutorial misconduct (DE 65) (the “Misconduct Motion”), which Defendant filed in the overnight hours before the fourth day of trial. At the end of the hearing, the Court denied the Misconduct Motion.²

The case was submitted to the jury on May 20, 2024, and the jury deliberated for two days. During its second day of deliberations on May 21, the jury submitted three notes to the Court, each of which indicated they were deadlocked (DE 71 at 2, 3, and 4). After receipt of the first note (DE 71 at 4), the Court re-read the Eleventh Circuit instruction on the duty to deliberate (B11) (Tr.

² The United States disputes Defendant’s representations and characterizations of the facts and circumstances concerning the Misconduct Motion that she asserts in this Motion. However, as explained further herein, the facts and circumstances concerning the Misconduct Motion have no bearing on the resolution of this Motion since, under binding precedent, they neither give rise to a presumption of vindictiveness nor establish actual vindictiveness.

at 9-10).³ After receipt of the second note (DE 71 at 3), the Court had a discussion with the parties (outside the presence of the jury) concerning case law on an *Allen* charge (Tr. at 14-23). Following that discussion, the Court suggested advising the jury to make one last attempt to reach a verdict, without reading the Court's proposed *Allen* charge. Defendant did not object to the Court's suggestion (Tr. at 22-23). At that point, for the first—and only—time during trial, the government asked the Court to give its proposed *Allen* charge (Tr. at 22). The Court declined to do so. Instead, the Court advised the jury to take one last opportunity to see if it could reach a verdict. After receipt of the third note (DE 71 at 2), the government did not renew its request for an *Allen* charge and consented to the mistrial. The Court declared a mistrial based upon the jury's failure to reach a unanimous verdict (DE 72). At no time during trial did the Court provide the jury, in writing or orally, the Eleventh Circuit Pattern *Allen* charge or the Court's modified version of such *Allen* charge.

2. Post-Trial Plea Negotiations

Two days after the mistrial, on May 23, the government contacted defense counsel by email to ask if they were interested in a plea discussion to resolve the case without the need for a new trial. Later that day, counsel responded affirmatively, and the parties had a telephone discussion the next day, May 24. During the May 24 plea discussion, the government proposed a plea offer and, immediately after the call, memorialized its verbal offer in writing and formally extended the plea offer to Defendant by email to her counsel of record.

³ Citations to "Tr." refer to the transcript of the jury trial proceedings on May 21, 2024, which include all proceedings during the jury's second day of deliberations, a copy of which is filed herewith as Exhibit 1.

The material terms of the May 24 plea offer included Defendant agreeing to waive indictment and plead guilty to an information that would charge her with one count of making a false statement to the SBA, in violation of Title 15, United States Code, Section 645(a). In its written offer, the government noted that the maximum penalty for this offense was two years' imprisonment and a fine of up to \$5,000, which was significantly less than the maximum penalty for wire fraud charged in the original indictment (that is, 20 years' imprisonment and a fine of up to \$250,000). The government's written offer further advised that, in exchange for this plea, the government would agree to dismiss the original indictment, and recommend in the plea agreement a sentence of time served with no probation, no fine, no forfeiture, and restitution of \$20,833.

The government asked defense counsel to respond to the May 24 plea offer by Friday, May 31, 2024, at 5:00 p.m., giving Defendant a full week to consider the offer. The government received no response until June 4, 2024, when defense counsel sent an email at 10:15 p.m. advising that Defendant had rejected the May 24 plea offer.⁴

3. June 18, 2024 Status Conference

On June 18, Judge Williams held a status conference hearing, via Zoom, on the parties' intentions regarding a new trial (DE 85). The government advised the Court and defense counsel that it intended to retry Defendant, and that it expected the grand jury to return a superseding

⁴ In his June 4 email rejecting the May 24 plea offer, defense counsel made a counteroffer, which proposed Defendant pleading guilty to theft of government property, in violation of Title 18, United States Code, Section 641. Before the government could respond to that counteroffer, counsel sent a follow-up email an hour later at 11:15 p.m., which asked the government to agree that, for purposes of this statute, the loss amount was less than \$1,000 (which, in effect, would constitute a misdemeanor punishable by a term of imprisonment of less than one year, as opposed to a felony). The government responded the next day, June 5, advising that while it would consider resolving the case with a plea to this offense, the government could not agree to a statutory loss amount of less than \$1,000 since there was no factual basis to support that number. About an hour later, counsel replied that Defendant was unwilling to plead guilty to a felony. No further plea negotiations ensued.

indictment the following week. The government further advised that it expected the superseding indictment would include additional charges against Defendant and a new defendant. At the conclusion of the hearing, the Judge Williams thanked the government for its candor and advised that the Court would set a trial for a future date once the superseding indictment was filed.

4. Superseding Indictment

The Grand Jury returned the Superseding Indictment on June 27, 2024 (DE 188), which charged Defendants Carolyn Wade and Tracy Wade with one or more of the following offenses: conspiracy to commit wire fraud, in violation of Title 18, United States Code, Section 1349 (Count 1); wire fraud, in violation of Title 18, United States Code, Section 1343 (Counts 2-3); conspiracy to make false statements to the SBA, in violation of Title 18, United States Code, Section 371 (Count 4); and false statements to the SBA, in violation of Title 15, United States Code, Section 645(a) (Counts 5-10).

With respect to the conspiracy to commit wire fraud (Count 1), the Superseding Indictment alleged that, from May 2021 through August 2021, Defendants agreed with each other, with Haydee Rivero, f/k/a Haydee Granados (“Granados”), and with others, to obtain PPP loans based upon materially false and fraudulent information, including fictitious tax documents.⁵ The substantive wire fraud counts alleged that, from May 2021 through August 2021, Defendants participated in a scheme to defraud in which they obtained PPP loans based upon materially false and fraudulent information, including fictitious tax documents. Count 2 charged Tracy Wade with causing the execution of a wire communication in interstate commerce related a fraudulent

⁵ Granados was charged by information filed on July 1, 2024, in case number 24-60124-CR-Smith. The information charges Granados with one count of conspiracy to commit wire fraud and make false statements to the SBA, in violation of Title 18, United States Code, Section 371.

PPP loan in his name, and Count 3 charged both Defendants with causing the execution of a wire communication in interstate commerce related to a fraudulent PPP loan in Carolyn Wade's name.⁶

The conspiracy to make false statements to the SBA (Count 4) alleged that, from May 2021 through August 2021, Defendants agreed with each other, with Granados, and with others, to make false statements to the SBA in PPP loan applications (using SBA Form 2483-C) and SBA PPP loan forgiveness applications (using SBA Form 3508S). Additionally, Carolyn Wade and Tracy Wade were each charged individually with three counts of making false statements to the SBA in their respective PPP loan applications and forgiveness applications (Counts 5, 8, and 9 as to Carolyn Wade and Counts 6, 7, and 10 as to Tracy Wade).

Overview of the Instant Motion

The Motion seeks dismissal of the New Counts (defined *supra* as Counts 4, 5, 8, and 9), as to Defendant Carolyn Wade only, based upon a theory that two particular events at trial improperly motivated the government to thereafter seek the New Counts.⁷ Those two events, which Defendant characterizes as an exercise of a protected right, were: 1) Defendant filing the Misconduct Motion (DE 65), which the Court denied (DE 67); and 2) Defendant objecting to the Court reading an *Allen* charge after receipt of the jury's second note indicating that it was deadlocked, which the Court sustained (Tr. at 21-23). These two events are the only basis upon which the Motion asserts vindictive prosecution and seeks to dismiss the New Counts as violative of Defendant's due process rights.

⁶ The execution of the wire alleged in Count 3 was the same unit of prosecution for the sole count of wire fraud alleged in the original indictment.

⁷ The Motion does not seek dismissal of Count 1 as to Carolyn Wade and Tracy Wade, Count 4 as to Tracy Wade, or Counts 6, 7, and 10 and to Tracy Wade.

Discussion of Applicable Law

The resolution of this Motion is governed by a body of well-established precedent from the Supreme Court and the Eleventh Circuit. As a starting point, the general rule is that “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978); *see also United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006) (“As a general rule, as long as the prosecutor has probable cause to believe the accused as committed a crime, the courts have no authority to interfere with a prosecutor’s decision to prosecute.”) (citing *United States v. Cole*, 775 F.2d 748, 757 (11th Cir. 1985) and *United States v. Spence*, 719 F.2d 358, 361 (11th Cir. 1983)).

Of course, a prosecutor’s discretion is subject to constitutional restraints, and using prosecutorial action merely to punish a person for exercising a protected statutory or constitutional right violates due process. *See United States v. Goodwin*, 457 U.S. 368, 372 (1982). However, because “the imposition of punishment is the very purpose of virtually all criminal proceedings,” and “motives are complex and difficult to prove,” a court will not presume a vindictive prosecutorial motive except in certain procedural and factual circumstances where “a reasonable likelihood of vindictiveness exists.” *Id.* at 372-73. The line of cases discussed below demonstrate that a “reasonable likelihood of vindictiveness,” and thus a presumption, effectively exists only after new charges are brought following a verdict (and most commonly when more severe charges are filed after a successful appeal). By contrast, in a pretrial posture, that is, before a verdict is rendered (including when a mistrial is declared), the circumstances required to trigger

a presumption of prosecutorial vindictiveness are exceedingly rare (and effectively nonexistent in the Eleventh Circuit).

The Supreme Court first considered the constitutional implications of a prosecutor's pretrial decision to modify charges in *Bordenkircher*, 434 U.S. at 357. In that case, the prosecutor obtained a superseding indictment, with charges carrying more severe penalties, after explicitly warning the defendant during plea negotiations that the prosecutor would do just that if the defendant refused to plead guilty to the original charges. The Court held that the prosecutor did not violate the defendant's due process rights because, unlike a defendant who faces increased charges after exercising a legal right to appeal a conviction, the discouraging effect on the defendant's assertion of his trial rights was "an inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas." *Bordenkircher*, 434 U.S. at 364 (internal citations omitted).

Building on *Bordenkircher*, the Supreme Court in *Goodwin* declined to adopt a presumption of prosecutorial vindictiveness where the government obtained a felony indictment after the defendant who, after initially expressing an interest in pleading guilty, demanded a jury trial on the original misdemeanor charge. Again, distinguishing between a pre-verdict and post-verdict posture, the Court explained that a defendant before trial is "expected to invoke procedural rights that inevitably impose some burden on the prosecutor," and the invocation of such rights "is an integral part of the adversary process in which our criminal justice system operates." *Goodwin*,

457 U.S. at 381. Applying these principles, the Court held that it was “unrealistic” to presume a vindictive motive when new charges follow the exercise of such a pretrial right. *Id.*⁸

In *United States v. Mays*, 738 F.2d 1188 (11th Cir. 1984), the Eleventh Circuit directly addressed whether a presumption of vindictiveness applied when the government filed additional charges in a superseding indictment after a mistrial. In holding that no such presumption applied in those circumstances, the Eleventh Circuit, guided by *Bordenkircher* and *Goodwin*, recognized that “in a pre-trial setting, as opposed to appellate situations . . . the Court has viewed prosecutorial actions resulting in the enhancement of charges with less alarm.” *Id.* at 1189. Indeed, it observed that “[t]he *Goodwin* court was reluctant to invoke a presumption of vindictiveness in the pre-trial context, inasmuch as it might inflexibly fetter the prosecutor’s discretion.” *Id.* at 1190.

Applying these principles, the *Mays* reached the following conclusion:

The declaration of the mistrial after the first trial did not result from [defendant’s] assertion of a protected right, but came about because the jury was simply unable to reach a verdict. It is true that the mistrial was granted at [defendant’s] behest, but a motion for mistrial because the jury is unable to agree cannot be said to engender a “punitive” or “vindictive” response. The mistrial follows as a matter of course from the jury’s inability to agree upon a verdict. It does not result from an attack upon a conviction. [Defendant] did not pursue any right such as would instigate retaliatory action on the part of the prosecution. Thus, the additional charges cannot be characterized as having arisen from any exercise of a protected right. For this reason, we do not believe there is a presumption of vindictiveness under these circumstances.

Id. at 1190.

Since *Mays*, the Eleventh Circuit has in several cases reaffirmed that a presumption of vindictiveness does not apply in pretrial circumstances. *See, e.g., United States v. Kendrick*, 682

⁸ In reaching this conclusion, the Court noted that “[a] prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the society interest in prosecution” and that “an initial decision should not freeze future ones” because “the initial charges filed by a prosecutor may not reflect the extent to which an individual is legitimately subject to prosecution.” *Id.* at 382.

F.3d 974, 983 (11th Cir. 2012) (affirming that no presumption of vindictiveness applied when government brought a new indictment against a defendant after an acquittal); *United States v. South*, 77 Fed. Appx. 959, 967 (11th Cir. 2008) (affirming that no presumption of vindictiveness applied when government brought a superseding indictment after defendant withdrew his guilty plea); *Barner*, 441 F.3d at 1316 (reversing district court, under abuse of discretion standard of review, for applying presumption of vindictiveness when government filed fifth superseding indictment after defendant filed several pre-trial motions, including an unsuccessful motion to dismiss the prior indictment based on prosecutorial misconduct).

In a posttrial setting, even when the government's decision to file more serious charges after a defendant's successful appeal does give rise to a presumption of vindictive prosecution, the government may rebut this presumption with an objective explanation justifying the prosecutor's actions. *See United States v. Jones*, 601 F.3d 1247, 1260-61 (11th Cir. 2010) (affirming denial of motion to dismiss on grounds of prosecutorial vindictiveness where government rebutted presumption by providing objective explanation for filing new charges after appeal).

Once rebutted, a defendant's vindictive prosecution defense will survive only if she can affirmatively demonstrate actual prosecutorial vindictiveness. To establish actual prosecutorial vindictiveness, the defendant has the burden of establishing, by objective evidence: 1) the prosecutor acted with genuine animus toward the defendant; and 2) the defendant would not have been prosecuted but for that animus. *See Barner*, 441 F.3d at 1322 (citing *United States v. Wilson*, 262 F.3d 305, 314 (4th Cir. 2001)). "In order words, [defendant] must show that the government's justification is pretextual." *Jones*, 601 F.3d at 1261.

Argument

1. No presumption of prosecutorial vindictiveness applies here.

The procedural and factual circumstances of this case do not give rise to a presumption of prosecutorial vindictiveness. As in *Mays*, the government here obtained the Superseding Indictment after the declaration of a mistrial, which places this case in the same pretrial posture where a presumption does not exist. Also, as in *Mays*, the mistrial here “did not result from [Defendant’s] assertion of a protected right, but came about because the jury was simply unable to reach a verdict.” *Mays*, 738 F.2d at 1190. Moreover, here, the mistrial was granted upon the parties’ consent. See Order at DE 72. Notably, the Motion does not cite a case where the Eleventh Circuit applied a presumption of vindictiveness in *any* pretrial setting, let alone a case where, following a mistrial, the government added charges that carry substantially *less severe* penalties (as it did here).⁹ The government is unaware of any such case.

Furthermore, just like in *Mays* where the Court found that the defendant “did not pursue any right such as would instigate retaliatory actions on the part of the prosecution,” *id.*, the two grounds asserted in the Motion—Defendant’s filing of the Misconduct Motion and *Allen* charge objection—are the type of pretrial invocation of procedural rights that the Supreme Court and the Eleventh Circuit have consistently said do not give rise to a presumption of vindictiveness. See,

⁹ The two Sixth Circuit cases cited by Defendant are inapplicable. In *United Staes v. LaDeau*, 734 F.3d 561 (6th Cir. 2013), the Sixth Circuit found a presumption existed where the government filed a superseding indictment after the district court *granted* defendant’s motion to suppress that “eviscerated” the government’s case, and the additional charges exposed defendant to substantially harsher penalties. Similarly, in *United States v. Zakhari*, 85 F.4th 367 (6th Cir. 2023), the defendant asserted presumptive vindictiveness where the government added a new count that substantially increased his mandatory minimum, without new evidence and after vigorous motions practice. In that case, the Sixth Circuit did not “reach the ultimate question of vindictiveness,” but simply remanded for further development of the record. *Id.* at 384.

e.g., *Goodwin*, 457 at 381 (“[i]t is unrealistic to assume that a prosecutor’s probable response to such motions is to seek to penalize and to deter.”); *Barner*, 441 F.3d at 1320 (“[e]ven a pre-trial motion based on prosecutorial misconduct is not so unusual that it should engender a presumption.”) *Id.* at 1320. Like in *Barner*, the denial of the Misconduct Motion here further militates against a presumption because “the government had no obvious reason for vindictive retribution.” *Id.*

Accordingly, under *Bordenkircher*, *Goodwin*, *Mays*, *Barner*, and the additional cases cited herein, the Court should find that no presumption of vindictiveness applies in this case.

2. Even if a presumption of vindictiveness applied, solely for the sake of argument, the government rebuts it.

Although no presumption of prosecutorial vindictiveness applies to this case, the government nevertheless voluntarily provides this Court with an objective explanation for its decision to file the New Counts. The government does this to affirmatively establish for the record that counsel was properly acting well within his prosecutorial discretion, and thereby rebut any presumption of vindictiveness applied solely for the sake of argument.

First, similar to *Mays*, where the Eleventh Circuit deduced that “the mistrial moved the government to reassess the manner of presenting the evidence supporting Defendant’s involvement in the underlying transaction,” 738 F.2d at 1190, the jury’s inability in this case to unanimously agree that the government had met its burden on the elements of wire fraud caused the government to consider an alternative charge that did not require the same measure of proof. Specifically, after the mistrial, the government sought an alternative charge that did not require the government

to prove that Defendant acted with intent to defraud.¹⁰ The offense of making a false statement to the SBA, and conspiring to do the same, both of which carry maximum penalties that are far less than wire fraud, were appropriate charges to accomplish that legitimate goal. Furthermore, the government did not consider these offenses as additional charges in the original indictment because, had the government proved the elements of wire fraud beyond a reasonable doubt (as it fully expected to do), an additional conviction of making false statements to the SBA (or conspiring to do the same) would not have affected the calculation of the offense level under the Sentencing Guidelines.

Second, with respect to the conspiracy alleged in Count 4, the government had not developed sufficient evidence to support this charge when the original indictment was returned in September 2023. The government first interviewed Granados in June 2024 (weeks after the mistrial was declared). It was not until that interview, and additional investigative steps that followed, that the government formed the view that it has sufficient evidence to prove a conspiracy and that the charge was appropriate.¹¹

In *Goodwin*, the Supreme Court explained why “[t]here is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting.” 457 U.S. at 381. One of its articulated reasons was that “[a]t this stage of the proceedings, the prosecutor’s assessment of the proper extent of prosecution may not have crystalized.” *Id.* That

¹⁰ The government observed that, in the June 2024 trial of another former BSO Deputy Sheriff, Judge Scola instructed the jury that the elements of this charge were: 1) defendant knowingly made any false statement; and 2) the false statement was for the purpose of obtaining for herself or for any applicant any loan or for the purpose of influencing in any way the action of the SBA. *United States v. Alexandra Acosta*, 23-cr-60170-RNS, at DE 68 at 12.

¹¹ For the same reason, the government could not have sought Count 1 (conspiracy to commit wire fraud) when the original indictment was returned. That said, the Motion does not seek dismissal of Count 1.

is exactly what happened here with respect to the New Counts. The government's objective explanation for filing the New Counts not only rebuts any presumption of vindictiveness applied for the sake of argument, it also underscores why, in these pretrial circumstances, the court should not presume the government had a vindictive motive in the first place.

3. Defendant has not established actual vindictiveness.

Because the government has provided an objective explanation for the New Counts, "it is incumbent on [Defendant] to demonstrative actual vindictiveness" for this Motion to survive. *Jones*, 601 F.3d at 1261. Defendant has not done so. As courts have observed, establishing actual vindictiveness is "exceedingly difficult" because it requires the defendant to prove animus and causation, that is: "(1) the prosecutor wanted to punish the defendant for exercising [her] rights (animus); and (2) the prosecutor's animus caused the prosecutor to bring charges of increased severity (causation)." *United States v. Myrie*, No. 809-CR-572-T-30TGW, 2011 WL 250550, at *3 (M.D. Fla. Jan. 26, 2011). Although it is unclear from the Motion that Defendant is even attempting to assert a claim of actual vindictiveness, for the avoidance of doubt, there is nothing raised in the Motion that could be interpreted as establishing the elements of actual vindictiveness.¹²

As to the first element, Defendant has not established animus. The Motion simply leaps to the conclusion that the "filing of additional charges against Ms. Wade after the filing of the motion to dismiss is objective evidence that AUSA Snider acted to punish Ms. Wade for exercising a legal right" (Mot. at 10). This is conjecture, which is seemingly deduced from Defendant's assertion that "AUSA Snider at some [sic] approached every member of the Ms. Wade's defense

¹² In the Motion, Defendant asks the Court to find that the filing of the New Counts is "presumptively vindictive" (Mot. at 11). The Motion does not expressly ask the Court to find actual vindictiveness.

team to express his displeasure about the motion being filed” and “expressly asked the undersigned attorney [Mr. McCray] to withdraw the motion” (Mot. at 10). This does not show animus, it shows a prosecutor who, while understandably caught off-guard by the allegations filed without notice at midnight after three days of trial, tried in good faith at the next available opportunity (which was in the courtroom the following morning) to clear up defense counsel’s apparent factual and legal misunderstanding of the issue raised in the Misconduct Motion.¹³ The Court’s denial of the Misconduct Motion further invalidates the notion that the prosecutor harbored animus toward Defendant. *See Barner*, 441 F.3d at 1320 (noting that the denial of defendant’s motion for prosecutorial misconduct provided “no obvious reason for vindictive retribution.”)

Defendant also summarily concludes that the prosecutor harbored animus toward Defendant because she objected “a third time” to the Court reading its *Allen* charge (Mot. at 10). Defendant is mistaken on both the facts and the law. Factually, the record shows that, after receipt of the second note that the jury was deadlocked (DE 71 at 3), the Court considered recent caselaw and decided that it was not going to give any *Allen* charge (Tr. 14-23). Instead, the Court proposed directing the jury to take one last opportunity to see if they could reach a verdict. Defendant did not object to this proposal. This was the only point during the trial where the government asked for an *Allen* charge, which is standard practice in the Eleventh Circuit. When the Court received the jury’s third and final note indicating they were deadlocked (DE 71 at 2), the government did

¹³ Counsel did not confer with the government prior to filing the Misconduct Motion, as required by Local Rule 88.9. Furthermore, the Misconduct Motion and a supplemental pleading were filed during the overnight hours, at 11:51 p.m. and 2:20 a.m., respectively, preceding the fourth day of trial. The government did not even see the Misconduct Motion until the next morning, thus providing no time for the government to discuss the matter with defense counsel, let alone file a written response with the Court.

not again ask for an *Allen* charge and consented to the declaration of a mistrial (Tr. at 23-24). Nothing in the record of these proceedings offers any objective evidence of animus.¹⁴

Having failed to establish animus, Defendant likewise fails to show causation. Defendant again assumes that the Misconduct Motion and *Allen* charge objection caused the government to bring the New Counts, but offers no objective evidence to support that claim. Moreover, as explained above, the government brought the New Counts, which are less severe than the original charge, because the elements thereof require less demanding proof and, with respect to Count 4 (conspiracy) are supported by newly developed evidence (that is, Granados' cooperation, which did not occur until after the mistrial). There is not a scintilla of evidence in the record that the government's justification is pretextual. *See Jones*, 601 F.3d at 1261. At bottom, the New Counts did not result from actual vindictiveness.

¹⁴ The government's course of conduct after the mistrial affirmatively demonstrates the absence of any animus toward Defendant. Just three after the mistrial, the government made the May 24 plea offer that proposed Defendant pleading guilty to the same charge later filed in the Superseding Indictment (making a false statement to the SBA), which carried a far less severe maximum penalty. That plea offer also proposed the government make a sentencing recommendation of time served, no probation, no fine, and no forfeiture. The government's transparent and good-faith effort to resolve this case without the need for a new trial or new charges belies any notion of animus.

Conclusion

In sum, the Motions wholly fails because: 1) there is no presumption of vindictiveness in this case; 2) even assuming there was such a presumption, the government has rebutted it; and 3) Defendant has not established actual vindictiveness. Accordingly, the United States respectfully asks the Court to deny the Motion (DE 130) in its entirety.

Respectfully submitted,

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