UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA
Plaintiff

CASE NO.: 23-CR-60173-2

vs.

TRACY D. WADE
Defendant.

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REPLY TO GOVERNMENT RESPONSE TO MOTION TO STAY JAIL SENTENCE PENDING APPEAL

Background.

Tracy D. Wade is set to surrender this upcoming Wednesday, August 27, 2025 to serve a 90-day jail sentence for PPP loan fraud. On August 1, 2025, he filed a Renewed Motion to Stay Jail Sentence Pending Appeal, discussing the merits of two specific issues he intends to raise on appeal. (D.E. 288). On August 15, 2025, the Government filed a Response opposing a stay of the jail sentence pending appeal. (D.E. 289). Mr. Wade, through undersigned counsel, now files his Reply. He is requesting that this Court stay the 90-day jail sentence until the disposition of his pending direct appeal. If he loses the direct appeal, he would have to surrender to serve the jail sentence. If he wins the direct appeal, he would not have to serve the jail sentence. In contrast, if the jail sentence is not stayed he will have to serve it regardless of the outcome of the appeal as that will not be known in 90 days.

One other factual update is that the initial Appellant's Brief in the Eleventh Circuit Appeal case had been due August 20, 2025, and undersigned counsel moved for a 5-day extension until this coming Monday, August 25, 2025. The Appellant's Brief must and will be filed on Monday.

Argument.

The first substantive legal issue is that the Court erred by permitting the Government to introduce evidence of uncharged loan applications they viewed as demonstrating wrongdoing by Mr. Wade, specifically an application for a $700,000 PPP loan for Wade Funeral Home and applications for EIDL loans that stated the funeral home made and spent hundreds of millions of dollars a year when the accurate numbers were in the hundreds of thousands. As discussed in the Renewed Motion to Stay, none of these loans resulted in criminal charges and there was no evidence adduced that Tracy Wade had anything to do with these applications, in contrast to the charged PPP loans where the Government had computer logins and other evidence directly linking Mr. Wade to the applications and the defense was that he did access and sign the charged loan information which included false statements but did not read the information that Government cooperating witness Haydee Granados had uploaded which is what was fraudulent. For the uncharged loans, Mr. Wade testified unrebutted that he either had nothing to do with the application (the funeral home PPP loan) or that the errors on it were typos he never saw which were corrected with the Government before the loans were properly funded based on accurate information, and were being repaid on schedule (the EIDL loans).

The Renewed Motion to Stay argues that this uncharged loan evidence was not admissible as 404(b) evidence (which is what this Court consistently ruled, and is mainly because there was no evidence, let alone a preponderance, that Mr. Wade committed any bad acts with regard to the uncharged loans), was not admissible as impeachment evidence (because there was no contrary testimony from Mr. Wade to impeach), and were not admissible as 608(b) evidence (mainly because Mr. Wade denied the bad conduct the Government was asking about, and the rule requires the Government to take that answer and not bring before the jury extrinsic evidence, which is exactly what the Government did). (D.E. 288 pp. 18-27).

The Government's merits argument is that "Defendant's knowledge, intent, and credibility were central issues in this case" and therefore the uncharged loan application evidence "was relevant evidence admissible to impeach Defendant's credibility". (D.E. 289 p. 9). But the doctrine of impeachment is not some sort of blanket permission to introduce anything that, in the opposing parties view, impeaches a witness's credibility. The ultimate *purpose* of impeachment is to damage a witness's credibility in the eyes of the trier of fact, but the *substance* of impeachment in this context is introducing a prior statement which is inconsistent with trial testimony. *See United States v. Frye*, 243 Fed. Appx. 575, 576 (11th Cir. 2007). If there is no inconsistency between a prior statement and trial testimony, there is by definition nothing to impeach and the prior statement cannot be admitted for that purpose. Here, Mr. Wade never testified at trial about these uncharged loans at all except when asked by the Government, and then he denied knowledge of them. He also never made some blanket statement like "I have never submitted false information to the Government" which would be inconsistent with evidence that he had done so in some uncharged incident. The uncharged loans could not have been properly admitted for impeachment because there was nothing to impeach. The defense made this argument in their Amended Motion (D.E. 288 pp. 23-24) and the Government in their Response still fails to identify any prior statement inconsistent with the uncharged loan applications. (D.E. 288 p. 9) That Mr. Wade testified he had "no idea" about the false information on the charged PPP loans, which appears to be what the Government suggests was the predicate for impeachment, is not inconsistent with any aspect of the uncharged loan applications, and the Government cannot and does not make any specific argument that it was.

The Government's argument is really a 404(b) argument in disguise—these other loans show Mr. Wade was a bad person who had tried to commit similar fraud against the Government on other occasions so he probably meant to do so here. But the 404(b) argument was squarely rejected by this Court at trial, that ruling was never modified, and the Government does not try to explicitly argue in their Response that this evidence was admissible under 404(b), instead disguising that argument as one related to impeachment. The Court should maintain its prior 404(b) ruling, which was correct for multiple reasons (D.E. 288 pp. 19-23), and reject the Government's attempt to substitute 404(b) for the doctrine of impeachment.

Then the Government argues this uncharged loan evidence was admissible pursuant to Rule 608(b), an argument they did not make at trial but which the defense anticipated and addressed in the Amended Motion. (D.E. 288 p.24-27, D.E. 289 p. 9). The bottom line is this argument fails because, even if this evidence would have otherwise been admissible via 608(b) (which the defense does not agree with), it clearly was not once Mr. Wade denied knowledge of the uncharged loans or responsibility for knowingly submitting any uncharged false statement to the government. "If the witness denies the conduct, such acts may not be proved [under 608(b)] by extrinsic evidence and the questioning party must take the witness' answer." *United States v. Garza*, 172 Fed. Appx. 983, 989 (11th Cir. 2006). The defense Amended Motion discussed this well-settled rule and how it definitionally means 608(b) could not have been used to admit this evidence, since the Government introduced the substance of it via extrinsic evidence, their questioning of Mr. Wade after he denied knowledge or involvement or having even seen the documents the prosecutor was reading from. (D.E. 288 pp. 25-26). Despite this provision being fatal to their 608(b) argument and discussed in the Amended Motion, the Government ignores it in their Response.

The Government then turns to a harmless error argument. (D.E. 289 pp. 9-10). Their view is that the charged loan documents themselves, and their cooperating witness Haydee Rivero's testimony, were enough to demonstrate Mr. Wade would have been convicted despite the error in introducing uncharged crime evidence that he tried to defraud the government out of hundreds of thousands of dollars of additional funds. The most obvious demonstration that the Government is wrong is that they previously tried essentially the same case, but without the uncharged crimes evidence, against Carolyn Wade and that trial resulted in a hung jury. Clearly the documentary evidence in this case was not independently sufficient to prove guilt beyond a reasonable doubt to any jury, since it was not to one actual jury. The Government has the burden of proving harmless error. *United States v. Sweat*, 555 F.3d 1364, 1367 (11th Cir. 2009) Only if they can show that the error did not affect the outcome of the proceeding or a defendant's substantial rights can the harmless error standard save the Government from the consequences of trial error. Fed. R. Crim. P. 52(a).

If we are at the harmless error stage, the defense has by definition raised a "substantial question of law" and under these facts it is not likely that the Eleventh

Circuit would find this error harmless. 18 U.S.C. § 3143(b)(1)(A). Therefore, this Court should grant a stay of the jail sentence and allow the Eleventh Circuit to decide this issue without requiring Mr. Wade to serve his jail sentence in advance of that decision. Here the evidence of Mr. Wade's knowledge of the charged crimes was not overwhelming, particularly when the Government's own witness acknowledged she was the one who created and uploaded the primary false document necessary to secure the charged PPP loan, and where Mr. Wade testified that although he did log in to the application and electronically sign it, he did not independently review it and instead relied on Ms. Granados and her husband to complete the application and do so accurately and legally. The Government cannot meet their high burden to benefit from a declaration that the error in admitting substantial uncharged crime evidence, of conduct far more serious than the charged crime, was harmless.

The second issue Mr. Wade intends to raise on appeal is that it was error to deny a defense request for a good faith jury instruction. (D.E. 288 pp. 28-32). The Government responds that the issue was not preserved for appeal and alternatively that it was not an abuse of discretion to deny the good faith instruction. (D.E. 289 pp. 10-12). The issue was preserved for appeal. The defense requested the instruction and the Court denied it. The defense did not raise any additional argument when the Court asked if the defense had anything to add the next day. That was not a waiver of the previous request for the good faith instruction. The

Government cites no cases stating that failing to raise additional argument after an invitation to do where a requested jury instruction has already been denied is a waiver of the issue. The purpose of preservation is to allow the trial court to rule on an issue before claiming error on appeal and asking the appellate court to weigh in. That purpose was met here—this Court was aware the defense wanted a good faith instruction, and with that awareness, it denied the giving of the instruction

The failure to give the good faith instruction was an abuse of discretion because the good faith instruction is a standard instruction, and the defense put on evidence of good faith via Mr. Wade's testimony that he and his wife relied entirely on Ms. Granados and her husband, who recruited them to submit the PPP loans and said they could and would take care of everything. Ms. Granados herself testified that she created false documents and submitted them to the Wades application, and did not discuss that with the Wades. The defense was that the Wades had an honest belief that Ms. Granados was lawfully completing the PPP applications. A good faith instruction would have told the jury that such an honest belief could not be fraudulent intent. The jury instructions given did not contain this language, which was at the heart of the defense. Therefore the failure to give the good faith instruction does qualify as an abuse of discretion.

Conclusion.

For the foregoing reasons, Mr. Wade respectfully requests that the Court grant him permission to remain at liberty pending the disposition of his pending appeal. The requirements of 18 U.S.C. § 3143 are satisfied. Mr. Wade is not any risk of flight or danger to the community, and he has legitimate, non-frivolous appellate issues. That the Government has been unable to answer the legal substance of the issues, particularly with regard to the uncharged crimes evidence, is dispositive. It is likely the Government will similarly be unable to produce a valid basis for the admission of the uncharged crime evidence on appeal, and therefore that the Eleventh Circuit will reverse. This Court should allow Tracy Wade to remain at liberty in the community, taking care of his daughter, being a partner to his wife, running his business, and otherwise contributing to the lives and well-being of those around him. If Mr. Wade loses his appeal, he will have to serve the 90-day sentence. There is no reason to make him serve it before the Eleventh Circuit rules given that valid, non-frivolous issues are being raised on appeal and that he is no danger to the community and poses no risk of flight.

Respectfully submitted,

s/ Daniel Tibbitt______
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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 2025, I electronically filed the foregoing with the Clerk of Court for the Southern District of Florida using the CM/ECF system, and served a copy on counsel for the government, Assistant United States Attorney David Snider, as well as all persons registered for electronic service through the CM/ECF system.

s/ Daniel Tibbitt______
Daniel Tibbitt