UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, **Case No.23-cr-60173-KMW (Graham)**

Plaintiff,

vs.

CAROLYN D. WADE and TRACY WADE,

Defendant.
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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

COMES NOW the Defendant, **CAROLYN D. WADE** (hereinafter "Ms. Wade"), through undersigned counsel, pursuant to the Fifth Amendment of the Due Process Clause of the Fifth Amendment of the United States Constitution, and hereby move this Honorable Court to Dismiss Counts 4, 5, 8 and 9 of the Superseding Indictment because the government's decision to file those charges was motivated by vindictiveness. In support thereof, Ms. Wade states:

Procedural and Factual Background

On September 14, 2023, Ms. Wade was indicted in the Southern District of

Florida one count of wire fraud, in violation of 18 U.S.C. Sec. 1343 (1). (DE# 3). In summary fashion the indictment alleged that Ms. Wade had caused the submission of a materially false and fraudulent application for a Paycheck Protection Program (PPP) loan from the Small Business Association (SBA), and that on June 7, 2021, Ms. Wade used the wires to submit the fraudulent PPP loan application.

Ms. Wade was one of seventeen Broward Sheriff Deputies accused of falsifying paperwork to obtain PPP loans or Economic Disaster Loans (EIDL). *See* 17 Broward deputies charged in pandemic loan fraud, South Florida Sun Sentinel, updated October 12, 2023, https://www.sun-sentinel.com/2023/10/12/multiple-broward-sheriffs-employees-facing-indictments-over-pandemic-relief-fund-misuse/3, Like Ms. Wade, almost all of the other BSO deputies were only charged with wire fraud counts that reflected the number of loans they received.[1] Ms. Wade's jury trial commenced on May 13, 2024. (DE 62).

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[1] The indicted law enforcement deputies

- Stephanie Diane Smith, was charged with having received two PPP loans on behalf of herself as a sole proprietor doing business as Children 1st Basketball Training and Agape Smith Vending "based upon materially false information about the borrower's total gross business income for the year 2019, as well as a falsified Internal Revenue Service tax form submitted with her applications."
- La'Keitha Lawhorn, a 16-year sheriff's veteran, was charged with three counts of wire fraud. State records show she created her business, Home Empire Enterprises, LLC, before the pandemic, in November 2019. According

During the trial, the defense filed a motion to dismiss the indictment due to prosecutorial misconduct. (DE 65). Specifically, the defense alleged that the Government, through Assistant United States Attorney David Snider, improperly interfered with two material defense witnesses. The defense intended to call Haydee Granados, f/n/a Haydee Rivera, and her husband, Eduardo Rivera, to testify as defense witnesses. The defense theory at trial was that Haydee prepared Ms. Wade's PPP loan application and included false information without Ms. Wade's knowledge.

Prior to the trial, both Haydee and Eduardo, through their lawyer, indicated that they would testify at the trial. However, the day before they were scheduled to testify, AUSA Snider advised their lawyer that they could be charged with assisting Ms. Wade to commit PPP fraud if they testified at the trial.

The Court conducted an evidentiary hearing on the motion to dismiss the indictment. (DE 67). The attorney for Haydee and Eduardo testified at the

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to the indictment, Lawhorn, 41, applied for and received three PPP loans on behalf of herself and her company, Home Empire Enterprises.

- Jean Pierre-Toussaint, 35, was charged with one count of wire fraud.
- Alexandra Acosta, 37, was charged with one count of wire fraud for one PPP loan on Sept. 14. Ms. Acosta, one of three deputies to go to trial, faced a superseded indictment which added charges of conspiracy to defraud the Small Business Administration and making false statements to the SBA

hearing. The Court denied the motion to dismiss for prosecutorial misconduct. (DE 67).

Notably, after the defense filed the motion to dismiss, but before the evidentiary hearing, Mr. Snider approached the undersigned three times requesting him to withdraw the motion to dismiss for government misconduct. Undersigned counsel explained that he would not and could not because he believed that there was a factual basis for the motion and that his client was extremely bothered that Mr. Snider had "threatened the witnesses and put fear in them to prevent them from testifying for the defense”. Undersigned explained that he believed the facts and circumstances, as well as the case law, supported the motion.

Additionally, AUSA Snider approached the defense’s legal assistant, Hendrith Smith, in an effort to persuade the defense to withdraw the motion to dismiss. While noticeably upset, Mr. Snider stated, that he does not take too lightly ethical attacks against him because he values his ethical responsibilities and reputation.

After the Court denied the motion to dismiss, Mr. Snider, still upset, spoke with Ms. Wade’s co-counsel, Mr. Wilcox, and indicated that he was not happy about the defense's motion to dismiss questioning him ethically, as he values him ethical duties. He further indicated the defense should not have filed the motion. In response, Mr. Wilcox stated to Mr. Snider that there was a good faith basis for filing the motion and that the defense team was merely discharging its duty to effectively and zealously represent Ms. Wade.

At the conclusion of all the evidence, closing arguments and the Court's instructions, the jury began their deliberations. (DE 68). The deliberations began in the afternoon of May 20, 2024 and continued on May 21, 2024. During the deliberations, the jury advised the Court on three separate occasions that it was deadlocked. (DE 68) The first two times the Court read the jury the Allen Charge. *See* 11th Circuit Pattern Jury Instructions Criminal Case, T5. The third time the jury advised the Court that it was deadlocked, the Court, over the government's objection, declined to read the Allen charge and declared a mistrial. (DE 68).

After the Court declared the mistrial, undersigned counsel proposed resolving the case by having Ms. Wade return the PPP loan money in exchange for a dismissal. AUSA Snider rejected the proposal and indicated that the government would not drop the case but would refile it unless Ms. Wade pleaded guilty to the original charge and repaid the money. AUSA Snider further indicated that if the government refiled the case, it would charge Ms. Wade with making a false statement to the SBA for each page that she DocuSigned, (SBA) would likely add a defendant or defendants.

On June 27, 2023, the government filed a superseding indictment and just as AUSA Snider threatened, the government charged Ms. Wade with additional charges and added her husband, Tracy Wade as a defendant. Count 1 of the superseding indictment charges Ms. Wade and Tracy Wade with conspiring to commit wire fraud with Haydee Rivero f/k/a Haydee Granados,[2] in violation of 18 U.S.C. § 1349. Count 2 charges Tracy Wade singularly with a substantive count of wire fraud, in violation of 1343. This count involves a PPP loan that Mr. Wade obtained from the SBA. Count 3 charges Ms. Wade and Tracy Wade with a substantive count of wire fraud, in violation of 1343. This count is essentially the same as the single count of wire fraud that Ms. Wade was charged with in the original indictment.

[2] Haydee Rivero f/k/a Haydee Granados is charged separately in an information with one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371, *United States v. Haydee Rivero f/k/a Haydee Grenado*, case no. 21-60124-Cr-Smith. Undoubtedly, this single charge by way of information is a result of her cooperating as a witness for the government against the Wades.

Count 4 of the superseding indictment charges Ms. Wade and Tracy Wade with conspiring with Haydee Granados to make a false statement to the SBA, in violation of 18 U.S.C. § 371. Count 5 of the indictment charged Carolyn Wade with making a false statement against the SBA, in violation of 15 U.S.C. § 645(a). The alleged false statement(s) alleged in Count 5 appears to be related to the wire fraud count alleged in the original indictment and count 3 of the superseding indictment.

Counts 6 and 7 of the superseding indictment charges Tracy Wade with separate counts of making false statements to SBA, in violation of 645(a). These counts appear to be related to the loan that is referenced in Count 2 of the superseding indictment.

Count 8 and 9 charges Ms. Wade with separate counts of making false statements to the SBA, in violation of 15 U.S.C. § 645(a). Again, the false statements in these counts appear to be related to the wire fraud count alleged in the original indictment and count 3 of the superseding indictment. Count 10 of the indictment charges Tracy Wade with another count of making a false statement to the SBA. The false statement alleged in Count 10 appears to be related to the loan referenced in Count 2 of the superseding indictment.

Ms. Wade is seeking dismissal of counts 4, 5, 8 and 9 of the indictment because the government's decision to file those charges was motivated by vindictiveness.

ARGUMENT AND MEMORANDUM OF LAW

"Reindictment violates due process whenever a prosecutor adds new charges merely to retaliate against the defendant for exercising statutory or constitutional rights." *United States v. Kendrick*, 682 F.3d 974, 981 (11th Cir. 2012) citing *United States v. Spence*, 719 F.2d 358, 361 (11th Cir.1983). As a general matter, a superseding indictment is potentially vindictive only if it "add[s] additional charges or substitute[s] more severe charges based on the same conduct charged less heavily in the first indictment." *United States v. LaDeau*, 734 F.3d 561, 570 (6th Cir. 2013). Vindictiveness in this context means the desire to punish a person for exercising his rights. *United States v. Barner*, 441 F.3d 1310, 1315 (11th Cir. 2006).

Defendants may challenge the government's charging decisions for actual or presumptive vindictiveness. *United States v. Zakhari*, 85 F.4th 367, 379 (6th Cir. 2023); *See LaDeau*, 734 F.3d at 566. A defendant can show actual vindictiveness by producing objective evidence that a prosecutor acted to punish the defendant for standing on their legal rights. *See LaDeau*, 734 F.3d at 566. However, if a defendant establishes that "(1) the prosecutor has some stake in deterring a defendant's exercise of their rights and (2) the prosecutor's conduct was somehow unreasonable," then the district court may find that there is a "reasonable likelihood of vindictiveness" and may presume an improper vindictive motive. *Id*.

In the instant case, the government filed additional charges against Ms. Wade after Ms. Wade exercised two distinct rights. The first right Ms. Wade exercised was her right to move for a dismissal based on prosecutorial misconduct after the government advised the attorney her defense witnesses that the defense witnesses would likely be prosecuted if they testified at the trial. (DE 66 and 67).

It is well-settled that a defendant "being tried by a jury is entitled to the uncoerced verdict of that body". *Brewster v. Hetzel*, 913 F. 3d 1042, 1053 (11th Cir. 2019), citing *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988). Thus, if coercive, a defendant has a right to challenge the reading of an Allen charge if it is coercive. *See United States v. Woodard,* 531 F.3d 1352, 1364 (11th Cir. 2008)

("We will find that a district court has abused its discretion in giving a modified *Allen* charge only if the charge was inherently coercive").

In this case, Ms. Wade exercised her right by objecting to the Court reading to the jury the *Allen* charge a third time the after the jury advised the Court that they were deadlocked. (DE 69).

In cases involving increased charges after a mistrial, federal courts, including the Eleventh Circuit, have held that no realistic likelihood of vindictiveness is found when a jury is deadlocked <u>and both parties agree that a declaration of mistrial is a necessity</u>. <u>These courts[3] generally reason that no appearance of vindictiveness is created when a prosecutor adds charges after a mistrial caused by a hung jury, because the defendant has exercised no protected right against which the prosecutor might retaliate.</u> *United States v. Mays*, 738 F. 2d 1188, 1190 (11th Cir. 1984). As established, Ms. Wade and the government did not agree.

[3] United States v. Whaley, 830 F.2d 1469, 1479-80 (7th Cir. 1987), *abrogated in part on other grounds by United States v. Durrive*, 902 F. 2d 1221 (7th Cir. 1990); *See also United States v. Khan,* 787 F. 2d 28, 32 (2d Cir. 1986) ("Defendant did nothing here that was likely to inspire the wrath of the prosecutor."); *United States v. Whaley,* 830 F. 2d 1469*,* 1479 (7th Cir. 1987) ("Appellant Whaley took no action; he exercised no statutory or constitutional right, and cannot now claim that he was penalized for exercising such a right."); *United States v. Marrapese,* 826 F. 2d 145, 149 (1st Cir. 1987) ("[I]t is unlikely any retaliatory animus flowed from the first trial's ending in a mistrial; after all, the mistrial was due to a hung jury, not to any legal challenge by Marrapese.").

In addition, defense counsel owes a duty to his client to render effective assistance of counsel and the failure to object to a third reading of the *Allen* charge, especially given the circumstances, which included the noticeable negative body language of the jury. *See Brewster v. Hetzel*, at 1058-1059 (defendant's ineffective assistance of counsel claim based on his attorney's failure to object or move for a mistrial given the totality of the circumstances involving the jury's inability to reach an unanimous verdict and the judges' reaction to the deadlock).

After Ms. Wade filed the motion to dismiss the indictment due to prosecutorial misconduct, AUSA Snider, at some point, approached every member of the Ms. Wade's defense team to express his displeasure about the motion being filed. He expressly asked the undersigned attorney to withdraw the motion. 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.

After the jury advised the Court for the third time that they were deadlocked, AUSA Snider asked the Court to read the *Allen* charge for a third time, and Ms. Wade's counsel objected. AUSA Snider had a stake in having the Court to read the *Allen* charge for the third time. Additionally, AUSA Snider had a stake in requesting that the motion to dismiss be withdrawn.

AUSA Snider's filing additional charges against Ms. Wade is unreasonable and retaliatory. As stated above, the overwhelming majority of the BSO deputies that were charged with PPP fraud were only charged with wire fraud counts related to the PPP loans they received. Moreover, there was sufficient evidence for the government to charge counts 5, 8, and 9, false statements to the SBA, when the initial indictment was filed. Accordingly, this Cout should find that AUSA Snider's filing of additional charges against Ms. Wade is presumptively vindictive.

Conclusion

Based upon the above facts, arguments and citation of authorities, this Court should dismiss Counts 4, 5, 8 and 9 of the superseding indictment because the government's decision to file those charges was motivated by vindictiveness.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 31, 2024, I electronically filed the foregoing motion/document with the Clerk of the Court using CM/ECF. I also certify that the foregoing motion/document is being serving on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing, on this 19th day of August, 2024.

Respectfully Submitted,

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