

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

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

v.

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

Defendants.

**DEFENDANT CAROLYN D. WADE’S REPLY TO UNITED STATES’ RESPONSE IN
OPPOSITION TO DEFENDANT’S AMENDED MOTION TO DISMISS THE
ADDITIONAL CHARGES IN THE SUPERSEDING INDICTMENT FOR VINDICTIVE
AND RETALIATORY PROSECUTION**

COMES NOW the Defendant, **CAROLYN D. WADE** (hereinafter Mrs. Wade”),
by and through her undersigned counsel, pursuant to Federal Rules of Criminal
Procedure 12 (b), and hereby submits this Reply in support of the Motion to
Dismiss the Additional Charges in the superseding indictment against Mrs.
Wade as Vindictive. In support of this Motion, the Mrs. Wade state as follows:

1. Contrary to the government’s assertion in its Response filed September 4,
2024, the mistrial was not granted on the parties’ consent. After the jury’s
second communication of its deadlock to the Court, defense counsel

advised the Court that the language of a further *Allen* Charge reading basically imposes undue coercion on the jury where it said that a substantial majority of the number in favor, and that those who disagree should reconsider whether their doubt is a reasonable one. See Transcript of Trial, May 21, 2024, page 15, paragraph 15.

2. Additionally, in support of its objection to the further reading of the *Allen* Charge, Mr. McCray informed the Court that there was authority to support the Court's taking into account the body language of the jurors. See Transcript of Trial, May 21, 2024, page 16, paragraph 3.
3. The Court inquired further about the case defense counsel referenced and afforded the defense an opportunity to retrieve his laptop from downstairs and provide the citation. See Transcript of Trial, May 21, 2024, page 17, paragraph 3.
4. Mr. Snider offered authority to the Court in support of its position that it is essentially the judge's call to give a further *Allen* instruction even after the second time the jury was deadlocked, in essence pushing for a third reading. See Transcript of Trial, May 21, 2024, page 17, paragraph 14.

5. Upon presenting this court with the *Rubinstein v. Yehuda*, 38 F.4th 982 (11th Cir. 2022) citation and the test it enunciated, the appeals court turned its attention to the five factors it outlined as guidance for the district Judge to consider, inclusive of the “body language” of the jurors. See Transcript of Trial, May 21, 2024, page 19, paragraph 5.
6. Thereupon, the court expressed its inclination not to provide the *Allen* charge again, but to ask the jury to make “one last attempt to deliberate. See Transcript of Trial, May 21, 2024, page 21, paragraph 20.
7. Mr. Snider then inquired whether the court would give an *Allen* charge, in the event the jury remained deadlocked, to which the court responded that it would not. See Transcript of Trial, May 21, 2024, page 22, paragraph 2.
8. At that point Mr. Snider registered his position in opposition, not in agreement:

“MR. SNIDER: So the Government’s position is that the Court give the *Allen* charge now” See Transcript of Trial, May 21, 2024, page 22, paragraph 6.

9. The Court recessed at 2:29 pm briefly, and resumed at 3:17 pm.

Thereafter, the Court addressed the lawyers stating it received communication indicating that the jury continues to be deadlocked and that the Court was going to have them enter the courtroom and declare this case a mistrial and excuse them for the afternoon. See Transcript of Trial, May 21, 2024, page 23, paragraph 21.

10. In response to the court's request for any comment from counsel, the government stated:

“MR. SNIDER: I think the government—we asked for the *Allen* charge. I think the Court overruled us. I just want the record to be clear.”

“THE COURT: Of course. I decided that it wasn't appropriate. This is our third attempt. “See Transcript of Trial, May 21, 2024, page 24, paragraph 6.

11. In fact, the mistrial was granted over the Government's objection. The defendant's objection to a third reading of the *Allen* charge was in essence, an appeal against verdict being attained by coercive means as established in *Brewster v. Hetzel*, 913 F.3d 1042, 1053 (11th Cir. 2019) citing

Lowenfield v. Phelps, 484 U.S. 231 (1988). Defendant's challenge to the third reading of the *Allen* charge on the authority of *Rubenstein v. Yehuda*, was an assertion of her fundamental protected right to have a jury make a finding on the facts before it, free from the coercive nature of extensive unwarranted deliberations. *United States v. Woodard*, 531 F.3d 1352, 1364 (11th Cir. 2008).

12. The facts underpinning the granting of a mistrial in Defendant's first trial are distinguishable from *United States v. Mays*, 738 F.2d 1190 (11th Cir. 1984) in that Defendant, Carolyn Wade, asserted a fundamental protected right establishes the presumption of prosecutorial vindictiveness.
13. Moreover, the facts on which the government relies to rebut any presumption of vindictiveness are dubious. Although the government asserts in its opposition that it learned of the conspiracy alleged in Count 4 only after it interviewed Haydee Granados in June 2024, from as early as at least February 15, 2024, during defense team's phone call with Mr. Snider, the government was aware of the theory of defense that Haydee Granados was the point person for the loan application, had been given access to the Defendant's Womply and email accounts, and that the mode

of communication between the parties was primarily by texts and emails between Tracy Wade, Haydee Granados and Carolyn Wade. The government was aware that the Defendant indicated Haydee approached Tracy Wade who was a friend of Haydee's husband and that Haydee was preparing PPP loans for others for a fee. The government also knew that it intended to prove its case by looking at the IP addresses of the Wade Funeral Home, the Defendants' cell phones, the IP addresses for the Defendants' home analyzing log on information with the SBA, and the lending bank and supportive PPP platforms. The government was aware that among the IP addresses it knew belonged to the Defendants, it also had unidentified IP addresses in the chain of activities about which defense counsel inquired and had stipulated to knowing that IP address ending in .125 (Haydee Granados Rivero's IP address) was responsible for uploading the fraudulent IRS schedule C form.

14. From at least March 16, 2024 when the government received documents and information from Oto Analytics, Inc, dba Womply ("Womply"), in response to the government's trial subpoena issued on March 7, 2024, requesting information related to Carolyn Wade's PPP application, it

received some 20 named files containing other PPP loan applications of other persons including the names Haydee Granados, Tracy Wade, and others which had common IP addresses used in the application process. The nature of the common names and IP address information was sufficient pretrial to inform the government such that it knew or reasonably should have known through the exercise of further investigation – not the least of which include looking into the folders of the named 20 PPP applicants it had received from Womply. The government indicates it did not look at these files, but had it done so, the government would have determined that there was collaboration between Haydee Granados and others which might have been suggestive of a conspiracy. Where, as here, the alleged conspiracy set out in Count 4 of the superseding indictment could reasonably have been brought in the initial indictment, especially where the government had sufficient evidence in its possession, i.e., twenty (20) PPP files, to allege conspiracy in the original indictment, the defense’s well-established presumption of vindictiveness, is not rebutted. *Goodwin*, at 381.

15. The Due Process Clause protects defendants from vindictive treatment based on the exercise of a constitutional or statutory right. “Vindictiveness in this context means the desire to punish a person for exercising his rights.” *United States v. Barner*, 441 F.3d 1310, 1315 (11 Cir. 2006) (citing *United States v. Goodwin*, 457 U.S. 368, 372 (1982)).
16. “[A] superseding indictment supports a presumption of vindictiveness when the additional charges are based on the same conduct that was the subject of the first indictment, when the same sovereign was involved, and most importantly, when the decision to file increased charges directly followed the assertion of a procedural right.” *United States v. Garza-Juarez*, 992 F.2d 896, 907 (9th Cir. 1993). And, “[t]he presumption may be found more readily when the same conduct forms the basis for both indictments, but this is not essential to a showing of vindictiveness.” 992 F.2d at 907.
17. With Defendant Wade proving the presumption of vindictiveness, the burden shifts to the government to rebut the presumption.
18. “It is hornbook law that a federal court may dismiss an indictment if the accused produces evidence of actual prosecutorial vindictiveness

sufficient to establish a due process violation, or if he demonstrates a likelihood of vindictiveness sufficient to justify a presumption.” *United States v. Stokes*, 124 F.3d 39, 45 (1st Cir. 1997) (internal citations omitted).

19. The Supreme Court has expressly left open the possibility that a defendant could prevail on a vindictiveness claim in the pretrial context by proving “objectively that the prosecutor's charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do.” *Goodwin*, 457 U.S. at 384.
20. The government’s attempt to rebut the presumption of vindictiveness is further undermined by the fact that the basis of the false statements charges are essentially the same as the wire fraud charges. Nor does the government’s assertion that the additional charges are not more serious than the initial indictment undermine the established presumption of vindictiveness because the cumulative effect of the multiple charges exceed the cumulative effect of the original indictment. Wade’s maximum potential sentence was 20 years. See First Penalty Sheet. The threatened charges would increase her exposure to a sentence of 47 years. See Second Penalty Sheet of the Superseding Indictment. “[A]

superseding indictment adding new charges that increase the potential penalty ... violate[s] due process if the prosecutor obtained the new charges out of vindictiveness. [Cit.] 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) (citing *United States v. Spence*, 719 F.3d 358, 361 (11th Cir. 1983) and *United States v. Goodwin*, 457 U.S. 368, 372 (1982)). A presumption of vindictiveness arises when the facts suggest “a realistic likelihood of ‘vindictiveness.’” *Goodwin*, 457 U.S. at 384 (citing *Blackledge v. Perry*, 417 U.S. 21, 27 (1974)). Actual vindictiveness “ ‘essentially requires a showing that the prosecution's justification is pretextual.’ ” *Barrit v. Sec'y, Fla. Dept. of Corrs.*, 968 F.3d 1246, 1253 (11th Cir. 2020) (quoting *United States v. Kendrick*, 682 F.3d 974, 982 (11th Cir. 2012)).

21. While generally where a modification in charging decision by the government follows a mistrial occurring for neutral reasons such as a hung jury and without objection by the government, no presumption of vindictiveness is raised, in the instant case, the government objected to the mistrial insisting on a further Allen charge and in circumstances where the defendant asserted her right to a non- coerced jury verdict. As such, the

established presumption of vindictiveness is not overcome by the government, consequently in determining the likelihood of prosecutorial vindictiveness, the court must look to the totality of the objective circumstances surrounding the prosecutorial decision. *United States v. Contreras*, 108 F.3d 1255, 1263 (10th Cir. 1997).

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 the established presumption of vindictiveness, which its response does not rebut.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing reply motion/document with the Clerk of the Court using CM/ECF. I also certify that the foregoing motion/document is being served 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 11th day of September, 2024.

Respectfully Submitted,

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