UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-60173-CR-WILLIAMS/GRAHAM

UNITED STATES OF AMERICA

vs.

TRACY D. WADE,

Defendant.
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UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S RENEWED MOTION TO STAY JAIL SENTENCE PENDING APPEAL

Introduction

The United States of America, by and through its undersigned counsel, hereby responds in opposition to the "Renewed Motion to Stay Jail Sentence Pending Appeal," filed on behalf of Defendant Tracy D. Wade ("Defendant") on August 1, 2025 (DE 288) (the "Renewed Motion to Stay"). To remain on bond pending appeal, Defendant must establish that his appeal will raise a substantial question of law or fact likely to result in reversal or an order for a new trial. He has again failed to do so. As the government explained in its prior response on this matter (DE 251 at 3),[1] the Eleventh Circuit defines a "substantial question" as one that is "close" or "very well could be decided the other way." The Renewed Motion to Stay presents only two legal issues as the basis for the requested relief, and neither comes close to meeting this high burden.

The first issue concerns the Court's rulings on certain evidentiary objections the defense made when Defendant was testifying on cross examination at trial. Specifically, Defendant asserts that the Court should not have permitted the government to cross-examine Defendant about

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[1] The United States hereby incorporates by reference its Response in Opposition to Defendant's Motion to Stay Jail Sentence Pending Appeal, filed on April 12, 2025 (DE 251).

other SBA pandemic-relief loan applications associated with Defendant and Wade Funeral Home that contained materially false information. The second issue concerns the Court's decision not to provide the jury with a good-faith defense instruction. The Court's rulings on these two issues were correct, as explained herein, and will be reviewed on appeal for clear abuse of discretion. Under that highly deferential standard, it is extremely unlikely that the Eleventh Circuit will disturb either ruling, much less reverse the jury's guilty verdict on all counts or order a new trial. Even assuming, for the sake of argument, that either ruling constituted a clear abuse of discretion (and they certainly did not), the result would not change unless the Eleventh Circuit also found that the purported errors were not harmless. That is simply implausible given the overwhelming evidence independently supporting the jury's guilty verdict on all counts charged.

For these reasons, among others discussed herein, the Bail Reform Act requires Defendant to serve his term of imprisonment during the pendency of his appeal. Accordingly, the Court should deny the Renewed Motion to Stay, and Defendant should surrender as ordered by 2:00 p.m. on August 27, 2025 (DE 286).

Pertinent Procedural History

On March 12, 2025, the Court sentenced Defendant to a 90-day term of imprisonment for his seven felony convictions resulting from the October 2024 jury trial of this case, which were: conspiracy to commit wire fraud (Count 1), wire fraud (Counts 2-3), conspiracy to commit offenses against the United States (Count 4), and making false statements to the SBA (Counts 6, 7 and 10). The judgment directed Defendant to surrender for his sentence by April 14, 2025 (DE 242 at 2). On April 9, Defendant filed his initial motion to stay his sentence pending appeal (DE 247). As grounds for the request, the motion merely asserted that "[t]here may be legal issues with the conduct of the trial" that appellate counsel had yet to identify (DE 251 at 4-5). At a hearing on April 14, the Court deferred ruling of the motion to stay, granted Defendant's *ore tenus* motion to extend his surrender date to July 28, 2025 (DE 253), and permitted Defendant to file any supplemental motion at least two weeks before the new surrender date. On July 5, Defendant asked the Court to extend Defendant's surrender by an additional 30 days so appellate counsel could obtain transcripts from a pretrial motion hearing. In an Order entered on July 24, the Court directed Defendant to surrender on or before 2:00 p.m. on August 27, 2025, and advised that "[n]o further extensions will be granted." (DE 286). Defendant filed this Renewed Motion to Stay on August 1.

Pertinent Facts

The Superseding Indictment alleged that Defendant and his wife, co-Defendant Carolyn Wade (who was also convicted at the October 2024 trial) conspired to obtain, and obtained, PPP loans (and forgiveness thereof) based on materially false and fraudulent information. It also alleged defendants conspired to make (and made) false statements to the SBA in connection with their PPP loans and loan forgiveness.

In the government's case in chief, the Court received in evidence, among other things: <u>five</u> PPP loan applications (each an SBA Form 2483-C) that all contained materially false information, including false income information for fictitious businesses (GXs 116, 117, 157, 158, and 159); and <u>two</u> PPP loan forgiveness applications (each an SBA Form 3508S) that all contained materially false information, including that the borrower (Defendant) had complied with all of the PPP rules (GXs 118 and 160).[2]

Furthermore, in the government's case in chief, the Court received in evidence dozens of records establishing Defendant's direct involvement in the application and forgiveness processes for his and Carolyn Wade's fraudulent PPP loans. Defendant's direct involvement evidenced in those records included, but was not limited to, Defendant:

- receiving 30 one-time codes to log into the website (Womply) hosting his and Carolyn Wade's PPP loan applications;
- performing 19 successful logins on Womply's website (17 to his PPP loan application and 2 to Carolyn Wade's PPP loan application);
- making 30 modifications to the PPP loan applications (13 to his application and 17 to Carolyn Wade's application);
- uploading 4 bank statements and linking a bank account;
- verifying his identity twice;
- electronically signing (via DocuSign) PPP documents in 5 instances, and electronically initialing (via DocuSign) PPP documents in 38 instances;
- receiving $20,833 in fraudulent PPP loan proceeds in his personal bank account; and
- writing and depositing checks to fabricate payroll after receipt of the fraudulent PPP loan proceeds.

The records in evidence establishing these facts (among others) were summarized in the demonstrative exhibit received in evidence as government exhibit 1000.1.

[2] Government exhibits 157, 158, and 159 were the virtually identical SBA Forms 2483-C that resulted in Defendant's fraudulent PPP loan in the amount of $20,833 (SBA loan number 6261949003), and government exhibit 160 was the SBA Form 3508S that resulted in forgiveness of Defendant's fraudulent PPP loan. Government exhibits 116 and 117 were the virtually identical SBA Forms 2483-C that resulted in Carolyn Wade's fraudulent PPP loan in the amount of $20,833 (SBA loan number 6697269001), and government exhibit 118 was the SBA Form 3508S that resulted in forgiveness of Carolyn Wade's fraudulent PPP loan.

In the defense case, Defendant testified on direct and cross examination that both his and Carolyn Wade's PPP loan and loan forgiveness applications contained materially false information. For example, he admitted that there were no businesses named "Tracy Wade" and "Carolyn Wade," and that the gross income amounts represented in their PPP loan applications were false (that is, "$112,430" for the fictitious business "Tracy Wade" and "113,560" for the fictitious business "Carolyn Wade") (10/21 Tr. at 126; 10/22 Tr. at 5). However, Defendant denied that, at any point during the PPP loan application or forgiveness process, he knew there was any false information in the PPP loan applications, the PPP loan forgiveness, or the supporting documents. Indeed, Defendant testified that he "had no idea any fraudulent activity had taken place" before the prosecution was initiated (10/21 Tr. At 118).

On cross examination, the government sought to impeach Defendant's testimony that he had "no idea" that his and Carolyn Wade's PPP loans were based on false information by demonstrating that he was not credible. The government did this through several lines of inquiry, but the line of inquiry to which Defendant objected—and raises in the Renewed Motion to Stay as grounds for remaining on bail pending appeal—concerned other SBA pandemic-relief loan applications associated with Defendant and Wade Funeral Home that contained materially false information.

First, the government asked Defendant if he applied for a separate PPP loan for Wade Funeral Home (*i.e.*, not the $20,833 loan for the fictious business "Tracy Wade"). 10/22 Tr. at 33. At sidebar, the defense objected on the ground that this inquiry related to previously excluded 404(b) evidence (10/22 Tr. at 34-35), and that it was not relevant (10/22 Tr. at 36). The Court overruled the objection, finding that the government was not offering the testimony as 404(b) evidence since Defendant was now testifying (10/22 Tr. at 36-37), and that the inquiry was relevant because the government was "asking [Defendant] about his knowledge of other PPP loans since the subject of the examination is PPP loans." (10/22 Tr. at 37).[3] The government proceeded to ask Defendant if he was aware of a PPP loan application for Wade Funeral Home submitted on May 6, 2021, seeking a PPP loan in the amount of $701,878. Defendant said he was not aware of that. The government then showed Defendant documents from a PPP loan application for Wade Funeral Home (marked only for identification as government exhibits 168, 169, and 170 and not offered into evidence), which was dated May 6, 2021, and sought a PPP loan of $701,878 based on representations in the application that Wade Funeral Home had $3,368,990 in payroll and 45 employees. Defendant testified that he had not seen the documents before, and that Wade Funeral Home never had $3 million in payroll and 45 employees.

Second, the government asked Defendant about two applications that Defendant had submitted to the SBA for Economic Injury Disaster Loans (EIDLs) for Wade Funeral Home during the COVID-19 pandemic. One EIDL application represented that Wade Funeral Home had $465 million in revenue and $175 million in expenses for the 12-month period ending January 31, 2020; the other EIDL application represented that Wade Funeral Home had $350 million in revenue and $250 million in expenses for the same period. The defense objected again, arguing that this inquiry also related to previously excluded 404(b) evidence, was not relevant, and was confusing under Rule 403. The Court overruled the objection, finding that the government was not offering

[3] The government also confirmed for the Court at sidebar that its inquiry related to the same PPP loan application referenced in government exhibit 2002 in evidence, which was an email, dated May 6, 2021, with the subject line "wade funeral home," along with an attachment thereto consisting of a printout from "smartbiz" referencing application number "6781674" for an "estimated loan amount" of "$701,873" (GX 2002). (10/22 Tr. at 29).

the testimony as 404(b) evidence (because Defendant was testifying on cross examination), that it was relevant (because, among other things, Defendant had completed the application himself and had received the EIDL—all facts that the defense did not contest), and that it was not confusing (10/22 Tr. at 45-51). The government proceeded to show Defendant (but not offer into evidence) the EIDL applications (marked for identification as GXs 900 and 906). Defendant testified that he had applied for the EIDLs, but insisted that the two sets of inflated revenue and expenses for Wade Funeral Home were "clearly" typographical errors. (10/22 Tr. at 54). In its closing argument, the government argued that Defendant making two sets of different typos in two different EIDL applications was not credible.

At the charging conference held on October 21, the Court stated that it had not yet heard any testimony that would raise a good-faith defense and asked, "does anyone anticipate that coming up?" (10/21 Tr. at 196). In response, defense counsel articulated its position that the good-faith instruction applied "based upon the trust that Mr. and Mrs. Wade had with the Riveros" (10/21 Tr. at 197). On this basis, the Court found that the good-faith defense had not been raised, but the Court stated that the defense could raise the issue again after all of the testimony was completed (10/21 Tr. at 197). Because of the Court's ruling at that point, the government reserved its argument that the good-faith instruction should not be given, other than to state its position that—regardless of any additional testimony—the instruction could never apply to the false statement counts because that offense does not have an element of intent to defraud (10/21 Tr. at 197).

During the continued charging conference held on October 22, the Court asked the defense if it had any cases or argument to support its position that the good-faith instruction should be provided. The defense offered no cases, no argument, and did not object when the Court stated it would remove the good-faith defense instruction from the jury instructions (10/22 Tr. at 66-67).

Argument

I. The challenged evidentiary rulings do not present a substantial question of law or fact likely to result in reversal or an order for a new trial.

The Court's decision to permit the government to cross-examine Defendant about the PPP loan application for Wade Funeral Home and the two EIDL applications for Wade Funeral Home were correct evidentiary rulings. The Eleventh Circuit reviews the district court's evidentiary rulings for clear abuse of discretion. *United States v. Smith*, 459 F.3d 1276, 1295 (11th Cir. 2006) (citation omitted). "An abuse of discretion arises when the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *United States v. Baker*, 432 F.3d 1189, 1202 (11th Cir. 2005).

Moreover, "[t]he district court possesses broad discretion to admit evidence if it has any tendency to prove or disprove a fact in issue" and "the court's discretion to exclude evidence under Rule 403 is narrowly circumscribed." *United States v. Norton*, 867 F.2d 1354, 1361 (11th Cir.1989) (citations omitted) (quoting *United States v. Betancourt*, 734 F.2d 750, 757 (11th Cir.1984)). As such, exclusion of evidence under Rule 403 is an "extraordinary remedy[,] which should be used only sparingly since it permits the trial court to exclude concededly probative evidence.' The balance under the Rule, therefore, should be struck in favor of admissibility." *Id.* In reviewing such evidentiary rulings, the Eleventh Circuit "look[s] at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact." *United States v. Elkins*, 885 F.2d 775, 784 (11th Cir.1989).

Under this framework, it is extremely unlikely that the Eleventh Circuit will find that the Court abused its discretion with respect to the evidentiary rulings raised in the Renewed Motion to Stay. Defendant's knowledge, intent, and credibility were central issues in this case, and Defendant had testified on direct examination (and cross examination) that he had "no idea" that there was any false information in any of the PPP applications that were in evidence. The government's inquiry on cross examination regarding the PPP application for Wade Funeral Home and the two EIDL applications for Wade Funeral Home—all of which contained materially false information—was relevant evidence admissible to impeach Defendant's credibility, as the Court correctly ruled. Furthermore, the line of inquiry was permissible under Rule 608(b)(1), which allows specific instances of a witness's conduct to be inquired into on cross examination if they are probative of the character for untruthfulness of the witness. Both the Wade Funeral Home PPP application and the two EIDL applications for Wade Funeral Home were probative of untruthfulness since they each contained materially false income information for Wade Funeral Home, the small business Defendant owned and operated.

Finally, even assuming for the sake of argument that these evidentiary rulings could meet the threshold of clear abuse of discretion, any error would likely be deemed harmless given the overwhelming evidence of Defendant's guilt. The Eleventh Circuit "review[s] preserved assertions of error—both constitutional and nonconstitutional error—for harmlessness." *United States v. Pon*, 963 F.3d 1207, 1227 (11th Cir. 2020) (citation omitted); see also Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). A nonconstitutional error is harmless unless it "resulted in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict."

United States v. Guzman, 167 F.3d 1350, 1353 (11th Cir. 1999) (citation and quotation marks omitted).

As outlined above, and as set forth in detail in the United States' Response in Opposition to Defendant's Post-Verdict Motion for Judgment of Acquittal (DE 207 at 4-11), overwhelming evidence supported Defendant's convictions. This included, but was not limited to, the voluminous documentary evidence establishing Defendant's direct involvement in his and Carolyn Wade's PPP application and forgiveness processes, including Defendant's online activity (logins, modifications, document uploads, identity verifications, and electronic signatures and initials), Defendant's phony payroll checks, and the credible testimony of cooperating witness Haydee Rivero. On this record, excluding the testimony about other SBA pandemic-relief loans associated with Defendant and Wade Funeral Home could not have impacted the jury's verdict.

II. The Court's decision not to provide a good-faith jury instruction does not present a substantial question of law or fact likely to result in reversal or an order for a new trial.

The good-faith instruction requires an underlying evidentiary foundation. *See United States v. Williams*, 728 F.2d 1402, 1404–05 (11th Cir. 1984). A district court's refusal to give a requested jury instruction is reviewed for abuse of discretion. *United States v. Lopez*, 590 F.3d 1238, 1248 (11th Cir. 2009). A district court does not abuse its discretion in denying a good-faith instruction where the defense was otherwise substantially covered by the court's instruction on intent. *United States v. Holzendorf*, 576 F. App'x 932, 936 (11th Cir. 2014).

As explained above, during the charging conference on October 21, the Court stated that it had not heard any testimony establishing a good-faith defense and asked the parties if that defense was anticipated. (10/21 Tr. at 196). The defense stated its "position" was that the good-faith instruction applied "based upon the trust that Mr. and Mrs. Wade had with the Riveros" (10/21 Tr. at 197). The Court did not accept that as a basis for the good-faith instruction, because it was not a sufficient basis under Eleventh Circuit caselaw, but the Court stated that it would allow the defense to raise the issue again after completion of all the testimony. The Court also encouraged the defense to read the Eleventh Circuit pattern jury instructions and what was required for the instruction. (10/21 Tr. at 197). The next day, after the close of all evidence, the Court told the defense that it was "willing to listen if there's anything new." (10/22 Tr. at 66). The defense did not respond. It offered no cases, no argument, and did not object when the Court stated it would remove the good-faith defense instruction from the jury instruction. (10/22 Tr. at 66-67).

To the extent that an objection on this issue is preserved for appeal, it was clearly not an abuse of discretion for the Court to not provide the good-faith instruction.[4] The record did not support a basis for the instruction, and with respect to the wire fraud counts, it was also substantially covered by the Court's jury instructions on intent, which stated that the jury could not convict Defendant without finding that he acted with intent to defraud and that "to act with 'intent to defraud' means to act knowingly and with the specific intent to use false and fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud." (10/22 Tr. at 140-141; DE 186 at 11). Furthermore, as a matter of law, the good-faith instruction does not apply to the charges that did not have the element of intent to defraud. *See United States v. Zoriano*, 817 F. App'x 817, 821 (11th Cir. 2020) ("Because intent to defraud is not an element of

[4] As the defense notes in the Renewed Motion to Stay, it is not clear whether the jury received written instructions that included the good-faith defense instruction. The copy of the instructions filed by the Court on CM/ECF does include the good-faith instruction, even though the Court did not read this instruction to the jury. *See* DE 186 at 18.

the crimes charged in [defendant's] indictment, good faith is not a complete defense to those charges. Thus, the district court did not abuse its discretion in declining to give [defendant's] requested good faith instruction because the instruction was not a correct statement of the law.")

Accordingly, the Court's decision not to provide a good-faith jury instruction is not likely to result in reversal or an order for a new trial.

Conclusion

Defendant has failed to establish that his appeal will raise a substantial question of law or fact likely to result in reversal or an order for a new trial. Accordingly, the Bail Reform Act requires Defendant to serve his term of imprisonment during the pendency of his appeal. The Court should deny the Renewed Motion to Stay, and Defendant should surrender as ordered by 2:00 p.m. on August 27, 2025 (DE 286).

Respectfully submitted,

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