No. 24A396

IN THE
Supreme Court of the United States

ERIC DEAN SHEPPARD,

Applicant,

v.

UNITED STATES,

Respondent.

REPLY IN SUPPORT OF APPLICATION FOR BAIL PENDING APPEAL

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INTRODUCTION

The district court sustained Eric Sheppard's convictions based on the fraudulent-inducement theory. The legitimacy of that theory will be tested in *Kousisis v. United States*, No. 23-909, which will be argued in the Court next month. This is therefore an unusually straightforward case for bail pending appeal. Sheppard's appeal plainly presents a substantial question likely to result in reversal or a new trial, just as *Kousisis* itself does. And the government does not dispute that all of the other elements necessary for relief are met.

In arguing that Sheppard should nevertheless serve most or all of his sentence while this Court considers *Kousisis*, the government departs from the district court's decision that will be the subject of Sheppard's appeal—and even from its own arguments against bail it advanced below. In the lower courts, the government's primary argument against bail was that the Eleventh Circuit has already adopted the rule petitioners ask this Court to follow in *Kousisis*, so this Court's decision will not change the outcome in Sheppard's case. As Sheppard explained in his application, that argument makes no sense. *See* Appl. 13-15. Indeed, the government does not seriously press it here. That is, the Solicitor General does not dispute that if this Court adopts the petitioners' rule in *Kousisis* (namely, that a "scheme to defraud" must contemplate harm to a traditional property interest), then Sheppard should be granted bail pending appeal—regardless of the current state of the law in the Eleventh Circuit.

Instead, the government pivots to arguing that Sheppard's scheme inflicted "harm to a traditional property interest"—in other words, that it caused "economic

harm" to the banks and the Small Business Administration (SBA). Opp. at 12. It is too late, however, for the government to reinvent this prosecution to distinguish it from *Kousisis*, much less to defeat bail pending appeal based on theories no court has ever accepted. At any rate, the government's new theories fail even on their own terms.

ARGUMENT

Although the government attempts (Opp. 14-17) to manufacture a dispute over the standard that governs here, there is no real disagreement between the parties on the dispositive question before this Court—namely, whether Sheppard's wire-fraud convictions are valid under the petitioners' rule in *Kousisis*. The government accepts that bond is warranted if "[a] decision in favor of the defendants in *Kousisis* would … likely" result in vacatur or reversal of Sheppard's convictions. Opp. 12.[1]

Accordingly, the only question is whether Sheppard's alleged scheme contemplated property harm—that is, whether the scheme, if completed as devised, would

[1] In the courts below, the parties disputed whether Sheppard's appeal "raise[d] a substantial question." 18 U.S.C. § 3143(b)(1)(B); *see* CA11 Doc. 20, at 1 ("Sheppard has not shown that this case poses a substantial question and thus this Court should deny his motion for release pending appeal."); CA11 Doc. 26, at 1. Now, the government tries (Opp. 14-17) to move the action to the "likely to result in" vacatur or reversal criterion under Section 3143(b)(1)(B). The government's effort to reframe the debate is purely academic because the parties agree that Sheppard is entitled to bail if a favorable decision in *Kousisis* is likely to affect the outcome in his case. So too the government's contention that Sheppard must show "a likelihood … that this Court would grant certiorari" after an appellate decision "affirming applicant's convictions." Opp. 10. Regardless of whether that is the right standard under Section 3143(b) when the defendant's case has not yet been heard by a court of appeals, this Court would grant, vacate, and remand Sheppard's case if a favorable decision in *Kousisis* was controlling and the Eleventh Circuit affirmed. Thus, Sheppard's application for bail

have harmed the victim's property rights. It would not have (and, in fact, caused no property harm).

A. Sheppard's scheme contemplated no harm to the lending banks' property rights.

The district court sustained Sheppard's conviction exclusively on the theory that he defrauded the lending banks. In doing so, the district court held that it was irrelevant whether the banks "faced potential financial harm" or "were actually harmed" by Sheppard's scheme. Ex. D, at 29.

The Solicitor General seems to understands that this rationale is untenable if the *Kousisis* petitioners prevail. *See* Appl. 15-16. Consequently, the government argues that the banks suffered "a harm to a traditional property interest" under this Court's decision in *Shaw v. United States*, 580 U.S. 63 (2016).

Shaw does not help the government. The bank in *Shaw* suffered property harm because it was denied the ability to use its funds to make money. *See* 580 U.S. at 66. The defendant essentially stole deposited funds and gave the bank no value in return, thus depriving the bank of its "right to use the funds as a source of loans that help the bank earn profits." *Id.*[2]

Here, by contrast, the banks exercised their right to use their funds and received in return exactly the economic value they expected. Interest rates and

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comes down to the question whether he is likely to prevail under the petitioners' rule in *Kousisis*.

[2] *Shaw* also cited the bank's right as a bailee, 580 U.S. at 66, but the government does not contend that the banks here had bailment rights in the disbursed funds.

processing fees on PPP loans were set by federal regulation. *See* Appl. 3-4. And, as the government itself recognizes, if the banks had not lent the funds to Sheppard, they would have used the money "to make PPP loans to eligible businesses." Opp. 12; *see also id.* at 3 (same). By law, those loans would have been on the exact same terms. Thus, unlike the scheme in *Shaw*, Sheppard's scheme involved no property *harm* to the banks. The banks would have earned the same returns regardless of Sheppard's alleged misrepresentations.[3]

Nor does the government's invocation of *Shaw* even distinguish this case from *Kousisis*, for the government makes an identical argument there. In *Kousisis*, the government maintains that the alleged victim, PennDOT, suffered property harm because it was deprived of its right to use the contract funds it was induced to part with. *See Kousisis* U.S. Br. 26. As the *Kousisis* petitioners explain, that is simply a repackaged version of the right-to-control theory this Court rejected in *Ciminelli v. United States*, 598 U.S. 306 (2023). *See Kousisis* Reply Br. 8. Like PennDOT in *Kousisis*, the banks here "received the full economic benefit of [their] money"; they simply made the loans (i.e., exercised their right to use) "without complete information," which does not "establish harm to a property interest." *Id.* *Kousisis* will determine whether the government's reading of *Shaw* is correct.

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[3] To be very clear, Sheppard is not arguing that the fact that he ultimately repaid the loans "wipes away his prior misconduct." Opp. 18; *see also id.* at 12. The point is that there was no "prior misconduct" (in the sense of no wire fraud) because his scheme contemplated no property harm to the banks. As the government appears to recognize, the banks would have earned the same returns whether they made PPP loans to Sheppard or someone else.

The government's gesture (Opp. 13-14) at the jury instructions does not affect the calculus here. Sheppard argues on appeal that there is insufficient evidence to support his conviction, and "sufficiency review … does not rest on how the jury was instructed." *Musacchio v. United States*, 577 U.S. 237, 243 (2016). In any event, the instruction the government cites did not require the jury to find what the *Kousisis* petitioners argue is required. The instructions required the jury to find "loss or injury." Dkt. 187 at 6. But they did not require the jury to find loss or injury *to a traditional property interest*. Nor did the instructions here make clear that a victim does not suffer such harm merely because it is deceived into parting with its money. *See Kousisis* Reply Br. 11-14.

B. The government's alternative argument that Sheppard's scheme harmed the SBA cannot sustain his conviction.

The government alternatively maintains (Opp. 13-14, 19) that Sheppard should be denied bail because his scheme harmed the SBA. The Court should reject the government's attempt to defeat bail based on this untested theory. *See* Ex. D, at 31 (expressly declining to reach this ground). For both procedural and substantive reasons, the government cannot defeat Sheppard's application for bail based on this entirely new argument.

1. The government first asserts (Opp. 13) that Sheppard inflicted harm on the SBA because he received loan forgiveness on a $148,000 loan he sought in April 2020. But Sheppard was not convicted of fraud in connection with this loan. In its original indictment, the government charged him with fraud related to this loan. Dkt. 3 at 5-6. But in its superseding indictment, the government *dropped* this count. *See* Dkt. 60

at 7. Needless to say, Sheppard's convictions cannot be affirmed on the ground that he received forgiveness on a loan he was not convicted of "fraudulently obtain[ing]." Opp.13; *cf. Ciminelli*, 598 U.S. at 310 & n.1 (noting shift in government's factual position from "an earlier indictment"). A court faced with a challenge to the sufficiency of the evidence "cannot affirm a criminal conviction on the basis of a theory not presented to the jury," *Chiarella v. United States*, 445 U.S. 222, 236 (1980), much less a theory that the government chose to abandon. *See also McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991) (similar).

2. Nor do the loans actually at issue here support denying bail on a harm-to-the-SBA theory. Sheppard was convicted of wire fraud in connection with two (and only two) loans totaling roughly $300,000. Appl. 5. The government asserts that Sheppard's scheme contemplated inflicting property harm on the SBA because "he likely would have" sought forgiveness on these loans had he not been indicted. Opp. 13. Once again, this theory of intended property harm is off-limits because the government did not argue the theory at trial. *See Chiarella*, 445 U.S. at 236. "Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury." *McCormick*, 500 U.S. at 270 n.8; *see also United States v. Starr*, 816 F.2d 94, 100 (2d Cir. 1987) (refusing, in a property fraud prosecution based on alleged harm only to private parties, to consider affirming conviction on appeal based on harm to the government). The government did not argue that Sheppard's scheme contemplated property harm because he intended to seek forgiveness. Nor did the government argue this theory to

the district court in defending Sheppard's convictions. This theory is pure *post hoc* invention.

In any event, the theory is also factually untrue. The government offered no evidence that Sheppard's scheme involved him later seeking forgiveness on these loans. Sheppard himself testified that he "didn't think about" seeking forgiveness until the government charged him with fraud. 1/9/24 PM Tr. 61:9-63:6. His conduct was entirely consistent with his testimony. Under the terms of the program, payments on PPP loans were deferred for 24 weeks plus ten months unless the borrower sought forgiveness during that period. *See* 85 Fed. Reg. 38,304, 38,306 (June 26, 2020). By the time Sheppard's indictment was unsealed, Sheppard's loan-deferral period had all but lapsed, meaning he could have—but did not—seek to avoid his obligation to start repaying the loans. If, as the government now maintains, Sheppard actually intended to seek forgiveness, he presumably would have done so at some point in the many months before his obligation to repay kicked in.

The government notes that Sheppard "did not make any payments on the March 2021 PPP loans until after he was indicted." Opp. 13. But that is no surprise. Payments on the loans were not due until after Sheppard was indicted. The fact that Sheppard did not *prepay* his loans is not evidence that his scheme contemplated seeking loan forgiveness. Again, just the opposite: That Sheppard did not seek forgiveness in the pre-payment period is powerful evidence that he was not planning to do so later.

3. The Solicitor General lastly contends (Opp. 18-19) that the government's harm-to-SBA theory would allow Sheppard's convictions to be sustained on harmless-error grounds. But the harmless-error doctrine provides the government no additional shelter here. The evidence is either sufficient to sustain Sheppard's convictions or it is not. And if it is not, the conviction must be reversed. Which is why the government cites exactly zero cases for its suggestion (Opp. 18-19) that any "error" in considering Sheppard's sufficiency claim could somehow be harmless.

At any rate, the government's closing flourish that Sheppard unlawfully obtained nearly $1 million and used the funds to pay for "a Mercedes, a BMW, and private-school tuition," Opp. 19, is ineffectual. The government did not prove at trial that Sheppard's scheme contemplated property harm. Therefore, he is entitled to bail pending appeal, regardless what he did with the money.[4]

* * *

The government does not dispute that "this Court's decision on bail will determine whether Sheppard has a meaningful chance to benefit from his appeal of his convictions." Appl. 17. Indeed, the government appears to admit that, if his bail

[4] The government's factual assertions also misrepresent the record. In calculating the amount of loss contemplated by Sheppard's scheme, the government relies on loans for which Sheppard was acquitted, Dkt. 190 at 1 (Counts 1, 2, and 3), and the uncharged loan discussed above. The government is also wrong that Sheppard used the PPP funds to line his pockets. The undisputed evidence showed that Sheppard deposited the funds in accounts he used for multiple purposes. That was permissible under terms of the program; there was no rule against comingling PPP funds with other funds. 11/28/23 AM Tr. 118:21-25; *id.* at 120:20-23. And the government has never disputed that he spent far more from those accounts to pay workers during the pandemic. *See* Appl. 6 (citing 1/10/24 PM Tr. 56:22-58:8).

application is denied, he will be able to avoid only the "collateral consequences" of his conviction by prevailing on appeal. Opp. 18 (quoting *Spencer v. Kemna*, 523 U.S. 1, 9 (1998)). The government nonetheless insists that the proper course is for Sheppard to be deprived of his liberty while this Court decides *Kousisis* and the courts below subsequently apply *Kousisis* to Sheppard's case.

There is no justice in that. Bail is necessary to ensure that Sheppard does not serve a sentence obtained on a theory of wire fraud that this Court may soon reject. And of course, if the government is correct—either about the questions to be decided in *Kousisis*, or about whether *Kousisis* will affect the outcome in this case—it will not be harmed by a grant of bail, as Sheppard will still be required to serve his sentence after his appeal is resolved.

CONCLUSION

For the foregoing reasons, this Court should grant the application and order that Sheppard be granted bail pending conclusion of his appeals, including a petition for a writ of certiorari, if timely sought.

Respectfully submitted,

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