No. 24A598

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT E. CARTER,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

EMERGENCY APPLICATION TO STAY ORDER OR IN THE ALTERNATIVE FOR RELEASE ON BAIL, PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Statutes & Rules

TO THE HONORABLE AMY CONEY BARRETT, ASSOCIATE JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

INTRODUCTION

Applicant Robert E. Carter moves for an emergency stay of the Seventh Circuit's order, or in the alternative for continued release on bail, pending the disposition of the petition for certiorari filed simultaneously with this application.[1] Absent relief, the Applicant will be forced to report to prison on December 18, 2024; he therefore respectfully requests expedited consideration of this application and an administrative stay pending its resolution.

An individual Justice is authorized to issue a stay "for a reasonable time to enable the party aggrieved to obtain a writ of certiorari." 28 U.S.C. § 2101(f). Such action is proper if there is "(1) 'a reasonable probability' that this Court will grant certiorari, (2) 'a fair prospect' that the Court will then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers). Similarly, any judicial officer-including a Circuit Justice-"shall order" release on bail pending disposition of a certiorari petition, so long as (i) the Applicant is not likely to flee or pose any danger, and (ii) his appeal presents a "substantial question of law" that, if decided in his favor, is "likely to result in ... reversal" or "a new trial." 18 U.S.C. § 3143(b). Explicating that standard, Justices have looked to whether there exists "a

[1] Applicant has been on pre-trial release since December 7, 2022, and post-sentence release since October 17, 2024. Applicant is requesting that the status quo be maintained until resolution of the petition and Kousisis.

reasonable probability that four Justices are likely to vote to grant certiorari." *Julian v. United States*, 463 U.S. 1308 (1983) (Rehnquist, C.J.); see also U.S. Mem. in Opp. 12, *Warner v. United States*, No. 07A373 (Nov. 2007) (objecting to bail, as "there is no reasonable probability that this Court will grant certiorari").

Thus, whether framed as a stay under 28 U.S.C. § 2101(f) or release on bail under 18 U.S.C. § 3143(b), the legal standard is materially the same: Is there a reasonable probability of certiorari, and do the equities favor maintenance of the status quo until this Court has an opportunity to consider the certiorari petition?

Here the answer to both questions is undeniably yes. Applicant's certiorari petition presents three questions warranting this Court's review under the objective certiorari criteria. And absent a stay or release, the Applicant will have to report to prison to serve a sentence before this Court has had an opportunity to rule on (1) whether the conduct for which he was convicted was actually illegal; (2) whether giving a victim something of value in exchange for use of its property can constitute a violation of the wire fraud statute pursuant to the fraudulent inducement theory of prosecution; and (3) whether the government is required to prove an actual deprivation of property as an element of the offense of wire fraud beyond a reasonable doubt.

Moreover, the Applicant's petition for certiorari presents a question that this Court has already granted certiorari on. In *Kousisis v. United States*, No. 24-909, this Court granted certiorari to determine "**Whether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting**

economic harm on the alleged victim was not the object of the scheme."[2](cert. granted, June 17, 2024)

OPINIONS BELOW

The three-judge order of the Seventh Circuit denying Applicant's request for bail pending appeal is unpublished and is attached in the Appendix at App. 3.[3] The three-judge order of the Seventh Circuit denying Applicant's request for rehearing and rehearing en banc is unpublished and is attached in the Appendix at App. 4. The three-judge order denying the Applicant's motion to stay pending the filing of a writ of certiorari and bail pending appeal pursuant to Rule 41(d)(2) is unpublished and attached in the Appendix at App. 5. The district court's order denying Applicant's motion for reconsideration of bail pending appeal bond is unreported and attached in the Appendix at App. 7. And the district court's initial order denying Applicant bail pending appeal and motion for reconsideration are unreported and attached in the Appendix at App. 21 and App. 23.

JURISDICTION

Pursuant to 18 U.S.C. § 3143(b), a "judicial officer" "shall order the release" of an individual who "has filed an appeal or a petition for a writ of certiorari" if several statutory requirements are satisfied. See *Morison v. United States*, 486 U.S. 1306, 1306 (Rehnquist, C.J., in chambers). This Court further has jurisdiction pursuant to 28 U.S.C. § 1651(a) and 28 U.S.C. § 1254(1).

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[2] The Applicant's question presented is: "Whether fraudulent inducement of a commercial contract violates the federal wire fraud statute when neither loss of property nor economic harm to the property are the object of the transaction."

[3] The Appendix is attached here for reference as well.

STATEMENT OF THE CASE

The Applicant was president of a small business transportation company. To grow the company, he sought to lease additional semi-tractors from two semi-tractor leasing companies. As a start-up company, the Applicant was required to have a third-party corporate guarantor. The Applicant made misrepresentations and false statements about his third-party guarantor which induced one company to enter a contract for three semi-tractors and two trailers. However, before the company would provide the semi-tractors, it required the Applicant to meet several conditions: (1) pay a cash security deposit of $17,500 against future non-payment and execute a security deposit agreement in favor of the leasing company; (2) execute an agreement permitting the leasing company to automatically withdraw cash payments from Applicant's business bank account; and (3) secure a commercial grade insurance policy that insured the full economic value of the tractors and trailers. (Pet. App. 27-35) The conditions were to be met before the semi-tractors and trailers could be delivered. The Applicant met all these pre-conditions. The leasing company verified that the conditions were met and delivered the semi-tractors and trailers.

Months into the contract, the leasing company withdrew $7,200 under the ACH agreement. However, several ACHs were rejected. The company notified the Applicant and requested payment. The Applicant sent an electronic payment of $27,927 to satisfy the payment request. Subsequently, another ACH was rejected, and payment was requested. As before, the Applicant sent an electronic payment of $11,675 to satisfy the payment request. Ultimately, the Applicant stopped making

payments to the company and it terminated the lease. Upon termination, the company requested that the Applicant return the semi-tractors and trailers. The Applicant immediately returned the equipment. At the time he returned the semi-tractors and trailers, Applicant had paid the leasing company a total of $64,302.

The government charged the Applicant with wire fraud and attempt to commit wire fraud. It's theory of prosecution was that the Applicant fraudulently induced a contract and fraudulently obtained the semi-tractors. The Applicant moved to dismiss arguing that *Ciminelli v. United States,* 598 U.C. 306 (2023) barred the prosecution because the lease contracts were not traditional property, and the other leasing company terminated negotiations resulting in no contract or agreement. Additionally, the Applicant argued that even if the contract was fraudulently induced and the semi-tractors obtained by fraud, he could not be prosecuted for wire fraud because the company entering the contract received something of equal or greater value prior to providing the semi-tractors and trailers. (Pet. App. 27-36)

Also, the Applicant had paid the company for use of the semi-tractors and trailers. Finally, the company was not deprived of the property because it was fully insured and returned to the company. (Pet. App. 27) The district court held that *Ciminelli* did not apply because the semi-tractors were traditional property, and it was irrelevant that the Applicant had given something of value in exchange for the property and made payments because the property was obtained by fraud. (Pet. App. 52-60)

At trial, Applicant sought to argue that he acted in good faith and that there was no deprivation of property because the company received something of value in exchange. (Pet. App. 36-46) The district court told the Applicant that he could not present a defense of no deprivation of property or benefit of the bargain because it "smacked of legal argument." (Pet. App. 36-41) It also held that there was no such thing as a good faith defense in the Seventh Circuit. (Pet. App. 41-46) The district court also denied the Applicant's request for a good faith instruction that explained to the jury that under the anti-fraud statutes even false statements, misrepresentations, and false pretenses were not actionable unless done with fraudulent intent. It also denied an instruction modifying the definition of scheme to defraud by explaining that if the victim received all that it bargained for, the victim was not deprived of any property. The jury convicted the Applicant within 45 minutes.

The district court sentenced the defendant to three years in prison and ordered restitution of $29,056. It also denied the Applicant's motion for bail pending appeal. The district court gave the Applicant 60 days to self-surrender on December 18, 2024. A couple of weeks after sentencing, the Applicant learned of this Court's grant of certiorari in *Kousisis*. When examining the questions presented by *Kousisis* and the facts surrounding his case, they were a near image of those that the Applicant had raised in the district court when seeking dismissal of the indictment against him, a theory of defense, and a motion for a new trial. Applicant filed a motion for reconsideration of his request for a bail pending appeal.

The district court denied the motion. It reasoned that (1) *Kousisis* presented a question of honest services fraud not loss by a private entity; (2) Seventh Circuit and Supreme Court case law supported the Applicant's convictions because pecuniary loss and intended financial loss are not required to sustain a wire fraud conviction; and (3) it held that even if the attempted wire fraud count is dismissed, the substantive wire fraud count would still be upheld because there was an actual loss. (Pet. App. 7-11) Applicant appealed to the Seventh Circuit arguing that he had raised a substantial question like that raised by *Kousisis* and since the Supreme Court was now going to answer that question, he met the substantial question test. A three-judge panel denied the motion. (Pet. App. 3)

Applicant responded with a petition for rehearing and rehearing en banc. (Pet. App. 4) He argued that the Seventh Circuit's decision conflicted with other federal appeals court decisions who have considered and decided the same issue. Further, he argued that there was a question of exceptional importance, the panel decision conflicted with the Supreme Court and Seventh Circuit cases and finally that the decision conflicted with similar cases decided by the Seventh Circuit which had released appellants on bail pending appeal. The same panel construed the petition as a motion for reconsideration and denied the petition.

Finally, the Applicant filed a motion for stay of the order and issuance of the forthcoming mandate. (Pet. App. 5) He argued that there was more than a substantial possibility that this Court would grant review based on its recent precedent and the Court's grant of certiorari in *Kousisis*. Further, that this Court is deciding important

questions that will "squarely be decided" by this Court and that there are important issues at stake which have produced a real circuit split. The Applicant argued that there is a likelihood that the Court will reverse when it answers the questions in *Kousisis*. Applicant also argued that there was good cause for the Seventh Circuit to maintain the status quo giving the equities in the case and the irreparable harm that the Applicant faces because time spent in prison cannot be reclaimed and given that the Supreme Court is considering the same question or issues raised by the Applicant's petition, a stay was justified. The same three-judge panel again denied the motion.

The government filed an original 25-count indictment against the Applicant in this case and detained him for 46 days before the Applicant obtained his release pending trial. The Applicant has remained free for over two full years and now he is on the verge of being ordered to prison for conduct that this Court will very likely hold is not criminal. The original indictment contained 17 counts of wire fraud, six counts of money laundering and two counts of aggravated identity theft. On a motion to dismiss, the Applicant prevailed with the government not opposing dismissal on the money laundering and selected wire fraud counts. The government later informed the court that it would remove an over half million-dollar forfeiture allegation and file a superseding indictment charging only one count.

When the government filed its superseding indictment, it charged the Applicant pursuant to its fraudulent inducement theory with one count of wire fraud based on a fraudulently induced contract with Ryder Transportation Services, Inc.,

("RTS") and an attempted wire fraud count based on terminated negotiations with Nuss Truck Equipment ("NTE"). The government's fraudulent inducement theory is dangerous, overbroad, and abusive. It essentially turns every breach of contract claim into a violation of the federal wire fraud statute. And, as demonstrated by the petition filed simultaneously with this application, it relieves the government of the burden to prove a deprivation of property and allows the government to completely escape proving an essential element of a wire fraud prosecution: criminal and fraudulent intent. (Pet. App. 41-46)

In the district court below and in the Seventh Circuit, the Applicant argued that he could not be charged with wire fraud because (1) there was no scheme to defraud these leasing companies and (2) giving something in exchange for the right to use the victim's property is inconsistent with an intent to defraud. This Court has repeatedly held that the wire fraud statute requires that some money or property be targeted. Essential to that property is deprivation. If the victim isn't deprived of any property right, he cannot be defrauded. That is the view of five federal courts of appeals. (See Kousisis, Merits Br.) Six federal appeal courts now say that the deprivation of property is not required, all that is required is a deceptive act aimed at money or property. This is the major dispute that brings this cause before this Court now and that is why it is difficult to understand why neither the district court nor the Seventh Circuit acknowledge the dispute as a substantial one.[4]

[4] The Seventh Circuit is one of the six circuits who embrace the fraudulent inducement theory. And given the fact that the dispute involves the circuit's own precedent, that should have been sufficient to demonstrate a "substantial question."

The facts of this case are straightforward, and they make clear that the government used the fraudulent inducement theory as the basis for prosecution in this case. Indeed, the government charged in the indictment that the Applicant entered a contract with RTS based on misrepresentations and false pretenses and statements and that he attempted to do so with NTE. At trial, the Applicant raised the issue of deprivation of property as a defense to the charges. (Pet. App. 36-41) The district court specifically ordered that the Applicant could not advance deprivation of property as a defense, nor would he be allowed to even mention it to the jury. (See Pet. App. 36-46) The district court also ordered that the Applicant could not argue that the victims received the benefit of their bargains, specifically telling the Applicant that these "smacked of legal argument." Both issues are now already before the court so it is more than reasonably likely that this Court will grant certiorari here.

REASONS FOR GRANTING THE APPLICATION

I. APPLICANT MEETS THE REQUIRED CRIERIA FOR RELIEF

1. The Applicant presents substantial questions and makes a strong showing that this Court is likely to grant certiorari and ultimately reverse.

The questions proposed by the Applicant's petition filed today are pari-passu with those raised by *Kousisis*. For example, the petition ask whether the government can sustain a conviction for wire fraud under the fraudulent inducement theory when the victim demands and receives something of value before parting with its property. The district court below held that it doesn't matter what the victim received in

exchange for the property, nor does it matter if the victim was paid for use of the property. If the property was obtained by fraud, then it violates the wire fraud statute.[5] The Seventh Circuit embraced this view in both *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006) (lying about the status of an MBE and performing work by unauthorized labor constitutes fraud in the inducement and violates the federal fraud statute) and in *United States v. Kelerchian*, 937 F.3d 895 (7th Cir. 2019) (paying the full price for the property is irrelevant and constitutes fraud in the inducement where the seller of the property was exposed to risks that it did not bargain for and the purchaser of the property was not legally authorized to do so) and perhaps this is why it denied all relief sought by the Applicant in that court.

But as both the Applicant's petition and that of *Kousisis*, which this court has already granted argues, this view of fraud in the inducement sweeps too broadly. Neither Congress nor the Founders envisioned a criminal statute so broad that it criminalizes even innocent conduct. It is hard to square giving a victim something in exchange for its property with the intent to defraud them of that property. Recent federal appeals courts' holdings illustrate the point. In *United States v. Milheiser*, 98 4th 935 (9th Cir. 2024) customer sales representatives falsely represented that they were the regular providers of print toner to clients. They also falsely stated that the price of print toner was increasing and that if they purchased toner now, they could get a lower price. The clients believed the lies and bought the toner. The government prosecuted on the fraudulent inducement theory. The Ninth Circuit reversed the wire

[5] At an ex parte hearing on the issue, the district court itself recognized the circuit split stating, "The Second Circuit has something like and honest services defense, but the Seventh Circuit does not." (See Pet. App. 41)

fraud convictions holding that the clients had received exactly what they paid for, reasoning that, "we have made clear that even if misrepresentations result in money or property changing hands, they still may not necessarily constitute fraud." *Id* at 935.

The Ninth Circuit is not alone. In two recent D.C. Circuit cases, the court reversed convictions for similar reasons. In *United States v. Guertin*, 67 F.4th 445 (D.C. Cir. 2023) and *United States v. Barrow* No. 21-3081, July 19, 2024 (D.C. Circuit 2024) the mail and wire fraud convictions were reversed because the court concluded that the federal government as an employer is not defrauded of money or property simply because the defendant induced his employment contract by lying or concealing nefarious behavior. What matters, the court held, is deprivation of the government's property.

The Fifth Circuit Court of Appeals recently granted a stay in an appeal pending the decision in *Kousisis*. There, the district court dismissed an indictment based on this Court's holding in *Ciminelli* that the right to accurate information does not support a prosecution for securities fraud. The government claimed that the defendants fraudulently induced the purchase of stock in a pump and dump scheme. However, the money that was used was that of the defendants not the victims. If the alleged victims purchased the stock, then they received something in exchange for their money. The company was real. The stock was real. There was therefore no deprivation of property. *United States v. Constantinescu*, No. 4-20143 Oct. 22, 2024 (5th Cir. 2024)

Each of these cases focuses on the question specifically raised by the Applicant in his petition, whether deprivation of property is an essential element of the offense of wire fraud and whether without the deprivation of property, there can truly be an intent to defraud. It seems clear in *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987)that this Court required the government to charge in the indictment and prove as an element of the offense, the deprivation of property. Indeed, the Seventh Circuit has held as much in *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1520 (7th Cir. 1993) and *Kelerchian, 937 F.3d 895.* Regarding the deprivation of a property interest the Seventh Circuit held:

> "This property interest issue takes us to the edges of federal mail and wire fraud law and poses Kelerchian's strongest challenge to any of his convictions. In McNally v. United States, the Supreme Court explained that the federal mail fraud statute is "limited in scope to the protection of property rights." 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), superseded by statute on other grounds, 18 910*910 U.S.C. § 1346. To establish mail fraud, the government thus must "prove as an element of the offense ... that the defendant deprived the victim of a property right." United States v. F.J. Vollmer & Co., 1 F.3d 1511, 1520 (7th Cir. 1993), citing McNally, 483 U.S. at 359-61, 107 S.Ct. 2875."

Thus, if the Seventh Circuit is right, then there was no deprivation of property by the Applicant in this case and his convictions are invalid. First, NTE terminated the negotiations with the Applicant resulting in no agreement or contract at all, there was no loss or deprivation of its property. Second, RTS was fraudulently induced to enter the contract based on financial misrepresentations, however, it was not willing to release the property to the Applicant on that condition alone. (Pet. App. 27-35) RTS altered the benefits and burdens of the contract by requiring that the Applicant meet several conditions prior to delivery of the semi-tractors and trailers.

As the facts demonstrate, RTS made the following demands: (1) a security deposit in the amount of $17,500 and a security deposit agreement for insuring against future non-payment; (2) unconditional withdrawal access from the Applicant's business bank account and (3) commercial grade insurance for the full economic value of its property at Applicant's expense. These conditions had to be met before any property was to change hands. The Applicant complied and met all the conditions required. But these conditions demonstrate two things (1) RTS wasn't deprived of its property because it received something in exchange and (2) the conditions are inconsistent with an intent to defraud. (Pet. App. 27-35)

There is an even more compelling reason that deprivation of property did not occur here. Even when RTS terminated the lease agreements, it requested that the Applicant return the equipment which the Applicant promptly did. So, on top of receiving all the benefits, RTS received its property back, making it the only party to prosper from the transaction. The question thus remains, how is the Applicant guilty of wire fraud if RTS demanded and received benefits from its alteration of the burdens of the contract? Moreover, during the contract, RTS demanded and received payments for ACH rejections. Viewed as a whole, the only way that the government was allowed to maintain these convictions was using the fraudulent inducement theory. That theory allowed the government to claim a misrepresentation, false pretense, or false statements by demonstrating only that the Applicant "obtained" the property.

The fraudulent inducement theory as shown above allows the government to escape a critical requirement under the wire fraud statute: criminal and fraudulent intent. If the government need only show that the property was "obtained" through fraudulent means, then there is no limit to the amount or type of conduct that the federal government can reach. Criminal and fraudulent intent are read completely out of the federal fraud statutes. This is the kind of government expansion that *McNally, Skilling v. United States, 561 U.S. 358 (2010), McDonnell v. United States,*579 U.S. 550 (2016) *Kelly v. United States,* 590U.S. 391 (2020) *and Ciminelli,* have all worked to prevent.

Yet, the government continues to find unique ways to tests the reach of federal criminal statutes. Indeed, this Court recently limited the government's use of the federal identity fraud statutes because it swept too broadly, capturing innocent conduct which the government criminalized. In *Dubin v. United States*, 599 U.S. 110, 143 S. Ct. 1557 (2023) this Court held:

> "In contrast to the staggering breadth of the Government's reading of § 1028A, this Court has "`traditionally exercised restraint in assessing the reach of a federal criminal statute,'" Marinello v. United States, 584 U. S. ___, ___, 138 S.Ct. 1101, 1109, 200 L.Ed.2d 356, and prudently avoided reading incongruous breadth into opaque language in criminal statutes. See, e.g., Van Buren v. United States, 593 U. S. ___, 141 S.Ct. 1648, 210 L.Ed.2d 26. The vast sweep of the Government's reading—under which everyday overbilling cases would account for the majority of violations—"underscores the implausibility of the Government's interpretation." Id., at ___, 141 S.Ct., at 1668. While the Government represents that prosecutors will act responsibly in charging defendants under its sweeping reading, this Court "cannot construe a criminal statute on the assumption that the Government will `use it responsibly.'" McDonnell, 579 U.S. at 576, 136 S.Ct. 2355. P. 1573.

The Applicant's conduct here demonstrates how irresponsibly the government behaves when charging crimes under these overly broad theories like fraudulent inducement. The government charged fraudulent conduct in which the victim acted to protect its own property. What's more, the victim succeeded. These actions were taken before RTS was willing to part with its property. RTS demanded and received a cash payment against future non-payment. It demanded and received commercial grade insurance for the full value of its property. And it demanded and received the ability to unconditionally withdraw money from the Applicant's business bank account, which it used. (Pet. App. 27-35)

These actions all negate an intent to defraud. But the district court, the Seventh Circuit, and the government say these acts are irrelevant because the property was "obtained" by fraud. That view is a "staggering breadth" of the reading of the federal fraud statutes. Under this "vast sweep of the Government's" and the lower courts reading of the federal fraud statutes, everyday breach of contract claims, and other innocent conduct would now be covered by the fraudulent inducement theory. The principles of federalism and due process demand that this Court prevent that from happening.

2. There will be irreparable injury absent relief and the public interest lies in resolving these critical issues.

The district court below with the Seventh Circuit's blessing concluded that *Kousisis* is about honest services fraud. First, the district court and the Seventh Circuit are wrong in concluding that *"Kousisis concerns a question of honest services*

to a government entity, not loss caused by fraud on a private entity." The government did not charge Kousisis with honest services fraud, (18 U.S.C. §1346) it charged him with wire fraud under 18 U.S.C. § 1343 and conspiracy to commit wire fraud under 18 U.S.C. § 1349. These are the exact same statutes that the government charged the Applicant under. The question before this Court does not challenge honest services. It challenges whether fraudulent inducement of a contract can constitute wire fraud when the defendant performs under the contract even though he obtained the contract by fraud.

That is the exact question raised by the Applicant in his petition. Indeed, the Applicant's petition goes farther than *Kousisis*. He argues, as noted above, that a fraudulently induced contract does not violate the wire fraud statute when the victim receives something of value in exchange before the victim parts with its property. *(Dist. Ct. Dkt. #166)* And he argues that where the victim alters the nature and benefits of the bargain in its favor, acts to secure its property, eliminates its risks, and suffers no injury to nor deprivation of its property, there is no scheme to defraud nor an intent to defraud. *(Dist. Ct. Dkt. #201, 219, 225, 229, 235, 321, 388, 396)*

Also, the honest services fraud theory was so vague and ambiguous that this Court limited it to only schemes that involve "classic bribes or kickbacks." *Skilling v. United States*, 561 U.S. 358, 402 (2010) Neither the Applicant nor *Kousisis* concern bribes or kickbacks which further demonstrates the erroneousness of the Seventh Circuit's approval of the district court's analysis.

Second, the district court invoked a Seventh Circuit precedent whose narrow reasoning may be in question after this Court decides *Kousisis*. It relied upon the Seventh Circuit's holding in *United States v. Weimert*, 819 F.3d 351 (7th Cir. 2016) (reversing a conviction for wire fraud in a commercial negotiation) that the "fraud statutes reach misrepresentations that affect the seller and buyer on either side of the deal." But if this Court rules that the misrepresentations must be designed to inflict some harm, which is likely, *Weimert's* reasoning will be further narrowed. Moreover, *Weimert* did not involve an evaluation of a fraudulently induced contract and whether performance under the contract, despite misrepresentations, constitutes fraud. This is the issue raised by the Applicant and the one now before this Court. Thus, the district court's reliance on and the Seventh Circuit's approval of *Weimert* in this case is both inapplicable and misplaced.

Further, the Applicant's question regarding fraudulent inducement of a contract raises a fact pattern dispute. That is, even if there was deception; and fraudulent misrepresentations induced the contract, the factual circumstances (i.e. conduct of the Applicant) surrounding the inducement before the victim parted with its property, takes the conduct beyond the reach of the wire fraud statute. Indeed, that is what the Seventh Circuit held could happen in a factually different case when in *Kelerchian*, it confined its analysis to the facts before it.

Then, the Seventh Circuit blessed the district court's reasoning that this Court's holding in *Shaw v. United States*, 580 U.S.___(2016) supported the Applicant's convictions because the wire fraud statute does not require either an

actual or intended financial loss. But as *Kousisis* argues, *Shaw* is distinguishable in its facts and the criminal statute involved. There, the bank received nothing of value equal to its risks. And though there was no monetary loss to the bank, the bank fraud provision at issue required no ultimate or intent to cause loss where the defendant targeted an account owned and controlled by a depositor of the bank who had relinquished control of his money to the bank for deposit. *(Kousisis Brief, ¶2, at pg. 34-37)* Indeed, the government argues in opposition to the petition for certiorari that economic harm or loss is not a necessary feature of obtaining money or property. Thus, the district court itself highlighted the substantial nature of the question presented by the Applicant. *(Gov't Resp. Br. to Kousisis Pet. for cert.)*

Finally, the district court below with the Seventh Circuit's approval reasoned that even if the attempted wire fraud count is reversed, the substantive wire fraud count will be upheld because the Applicant was convicted of making misrepresentations that ultimately resulted in loss. It concludes that this distinguishes Applicant's case from the facts and legal issues in *Kousisis*. Not so, and the district court erred in its analysis. Kousisis induced a contract by fraud, so did the Applicant. Kousisis performed satisfactorily under the contract and the Applicant partially performed resulting in no harm to the victim's property. A notable distinction in this case is that the Applicant gave the victim something of value in exchange for the use of its property before the victim signed the contract and before it parted with its property.

The Kousisis victims did not suffer an actual loss, and the victim of Applicant suffered an "incidental loss." The property right here, the semi-tractors, was not injured, nor did the victim lose the semi-tractors. The semi-tractors were fully insured by the Applicant, and they were voluntarily returned to the victim at their request. Thus, there is no loss of property, only an incidental loss as a byproduct of the use of the semi-tractors. Incidental losses cannot be the basis for a wire fraud conviction, says both this Court in *Kelly* and the Third Circuit in *Kousisis*.

The Seventh Circuit too has held that when losses are a byproduct of the deceitful scheme, they do not satisfy the statutory requirement for wire fraud. *United States v. Walters* 997 F. 2d 1219 (7th Cir. 1993) As reflected in the Applicant's motions filed below, he argued that the victim's loss was incidental and a byproduct of the scheme, not the purpose or object of the scheme. And before "obtaining" the victim's property, the Applicant paid a cash security deposit against future non-payment to the victim, provided the victim with unconditional access to withdraw funds from his business bank account, and insured the victim's property for its full economic value, all demands that the victim required be met before it parted with the property. Critically, RTS never had any money or property at risk.

Moreover, it bears repeating that both the district court and the Seventh Circuit misses the mark. If this Court holds that the material misrepresentations that induced the contract with RTS must be directed at "harming the victim" or causing an "economic loss" then the conviction on count one cannot stand. What's more is that this Court could also hold that the actions of a party who performs under

the contract or who provides protection to the victim constitutes acts that are inconsistent with both a scheme or intent to defraud. It could also hold that the pre-conditions that the Applicant was required to meet are inconsistent with an intent to defraud. The Seventh Circuit's precedent in *United States v. Pritchard*, 773 F.2d 873 (7th Cir. 1985) suggested that paying for property that the defendant has fraudulently obtained would be inconsistent with fraudulent intent, a major issue in the cases before this Court now.

As expressed in detail above, the Applicant paid for the use of the property he obtained through misrepresentations and Kousisis performed the services under the contract he obtained by misrepresentations. Six circuits say this fraudulent inducement theory is valid and five say that it is not. This Court will now resolve the circuit conflict. The risks are high and only this Court can resolve the issue consistently with the principles of federalism and due process.

Considering the aforementioned, the Seventh Circuit's order should be stayed, or the Applicant should remain released on bail, pending disposition of his petition and the resolution in *Kousisis*. This relief is particularly necessary given that the Applicant has been on bail for over two years and was sentenced to three years in prison for conduct that is very likely non-criminal. This Court will issue an opinion in *Kousisis* by the end of this term, in about seven months or less. Needless to say, it would be grossly unfair and a serious irreparable injury to compel the Applicant to report to prison in such a short period of time, just to later have the legal basis on

which the convictions are based invalidated. Equity requires that the status quo be maintained.

II. A STAY IS APPROPRIATE IN THIS CASE

A motion to stay the mandate (or order) pending a certiorari petition is appropriate if there is a "reasonable probability" of certiorari, a "fair prospect" of reversal, and a "likelihood" of irreparable harm. *King, 133 S. Ct. at 2*; see also *Wise v. Lipscomb*, 434 U.S. 1329, 1333-34 (1977) (Powell, J., in chambers). Justices will also grant release, under 18 U.S.C. § 3143(b), if there is "a reasonable probability that four Justices are likely to vote to grant certiorari," *Julian, 463 U.S. at 1308*, and the Applicant is neither a flight risk nor a public threat. This court has recently granted stays on the criteria that (1) the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether it will suffer irreparable injury without a stay, (3) whether the stay will substantially injure other parties interested in the proceedings and (4) where the public interest lies. *Labrador v. Poe*, 144 D. Ct. 921, 931 (2024) (Kavanaugh J., concurring in the grant of stay)

Framed either way, the Applicant should be granted relief. There is no dispute, at the threshold, that he is not a flight risk or threat to public safety. Nor is there any doubt that "irreparable harm" would otherwise result: If the Applicant begins his three-year sentence on December 18, 2024, only one week after this Court is set to hear argument in a case having a direct impact upon the Applicant's conviction as will be required absent relief from this Court, he will have no remedy if this Court later invalidates his convictions. (By contrast, if a stay is granted and then the Court

denies review, the Applicant would still serve his entire three-year sentence.) The dispositive question is thus whether there is a "reasonable probability" that this Court will grant certiorari. The answer is clearly "yes." The theory on which the Applicant was convicted is unquestionably broad, historically unprecedented, and directly in conflict with decisions of this Court and five Circuits. There is a more than substantial probability that this Court will grant the Applicant's petition.

First, this Court has already granted the petition in another case, *Kousisis*, which raises the same or similar issues. Second, the questions posed in the Applicant's petition support and bolster the underlying reasons that *Kousisis* should be granted the relief sought there. More specifically, the petition presents factual circumstances from which this Court can explain the boundaries of the federal fraud statutes and why the principles of federalism and due process require restricting the government's expansion of the fraudulent inducement theory. Third, the petition presents the question of whether deprivation of property is an element of the offense of wire fraud and should be presented to a jury and proved beyond a reasonable doubt. Resolving that question as a companion issue to *Kousisis* is essential to ensuring that federal criminal statutes do not reach beyond their intended limits.

Finally, this court has held petitions with the consent of the government which raises the same or similar issues until this Court decides *Kousisis*. (*See Bolos v. United States,* 24-286 S. Ct. (2024) *see also, Porat v. United States,* 23-832 S. Ct. (2023*)* That is an outcome that is likely here as well and *is* another basis for granting the relief sought here.

1. **The Applicant is not a flight risk or threat and absent relief; he would begin serving his sentence before this Court can review his dubious conviction.**

The Applicant is clearly not a flight risk or a threat to the public, so the threshold requirements for release under § 3143(b) are plainly satisfied. He remains on post-sentencing release after having been on pre-trial release for more than two years. (D. Ct. Dkt. #28, 29) Moreover, the irreparable harm from denying relief would be stark and inequitable. If Applicant is required to begin his three-year sentence now, this Court will not have an opportunity to consider the validity of his conviction until after he has served nearly seven months in prison. It would be grossly unfair to condemn the Applicant to prison only to later hold that his convictions were legally flawed. Finally, if this Court grants a stay and then denies review, there is no harm done. A 36-month sentence is a 36-month sentence, whether it begins on December 18, 2024, or June 30, 2025. The equities thus decisively favor preserving the status quo.

2. **There is a reasonable probability of certiorari as to the scope of the fraudulent inducement theory and whether deprivation of property is an element of the offense of wire fraud and whether giving something of value in exchange for property supports a scheme or intent to defraud.**

The Applicant's simultaneously filed petition raises two important questions and one important question that has already been granted certiorari by this Court. More specifically, *Kousisis* already asks whether a fraudulent induced commercial contract violates the wire fraud statute when there is no harm or loss as the object of the scheme. That is the same question as the one posed by the Applicant. Indeed, this

court has granted petitions *(writs of certiorari before judgement)* where the issues raised are the same or similar in nature or where the issues complement the questions that this Court has been asked to resolve.[6] *See United States v. Fanfan,* 542 U.S. 956 (2004) *granting certiorari before judgment and deciding the case alongside United States v. Booker* 543 U.S. 220 (2005) As noted above, there are two other pending petitions raising similar issues.

But the Applicant's petition raises an important question that bolsters *Kousisis* and the other cases by asking the Court to clarify the reach of the wire fraud statute based on the use of the fraudulent inducement theory in a factual circumstance where the victim is given something of value in exchange for its property, receives protection of its property, and then has its property returned to it. These circumstances directly implicate (1) the deprivation of property issue raised by *Kousisis* and (2) the intent to defraud issue that flows from deprivation of property. Clarifying whether the government is required to prove deprivation of property to a jury beyond a reasonable doubt clears up any ambiguity about the role that deprivation of property plays under the federal fraud statutes.

For example, as the Seventh Circuit held in *Kelerchian,* a "fraudster who fraudulently induces a contract" that would otherwise not be entered into but for the fraud, and the "fraudster provides the money, goods or services that are required under the contract takes us to the edge of the reach of the wire fraud statute." *Kelerchian,* 937 F.3d 895 Under the facts laid out by the Applicant below, his

[6] In the last four years this court has granted 14 such petitions alone.

prosecution would be beyond the reach of the wire fraud statute. And so would any other where these facts were present or similar. Without guidance and absent review, lower courts will continue to be faced with far reaching conduct that may or may not be prosecutable pursuant to the fraudulent inducement theory. That will precipitate, not resolve the conflict.

3. The Applicant's Case and the Fifth Circuit Case of *Constantinescu*

Kousisis identifies the split that is present amongst the circuits and the 6-5 circuit split makes clear that the fraudulent inducement theory is both dangerous and destructive. The Applicant need not revisit that spilt. But the Applicant's case and the current case of *Constantinescu* pending in the Fifth Circuit Court of Appeals illustrate why certiorari in this case would be granted. *Constantinescu* test the fraudulent inducement theory in the context of factual circumstances regarding a securities fraud prosecution. The government charged the defendants with securities fraud claiming that they fraudulently induced the increase in the price of shares in a pump and dump scheme.

The defendants moved to dismiss, arguing that *Ciminelli* barred their prosecutions because there was no property targeted by the defendants and that the information that they tweeted was about their own trading positions. The district court dismissed the case. The government appealed. It argues on appeal that the defendants targeted money with their tweets by fraudulently inducing an increase in the price of shares. The defendants maintain on appeal that they did not deprive anyone of their money or property and that there was no financial loss or economic

harm. Thus, they argue that their actions amounted to, and the government charged, a scheme to deceive and not one to defraud. As noted above, the appeal is stayed pending a decision in *Kousisis*.

The Applicant made the same argument below in the district court regarding the semi-tractors. In moving to dismiss the superseding indictment, the Applicant argued that the allegations were insufficient to charge a scheme to defraud because (1) giving RTS something of equal or greater value in exchange for use of its property is inconsistent with a scheme to defraud; (2) actual payment for the use of the property under the contract was also inconsistent with a scheme to defraud and (3) returning the property to RTS did not support a scheme to defraud. Thus, based on these acts, RTS may have been deceived, but it was not defrauded. The key to a prosecution for property fraud is that the victim is "deprived" of a property right.

In his petition filed with this Court today, the Applicant asks this court to address deprivation of property in the context of an element of the offense of property fraud crimes under the federal fraud statutes. This Court has made such a determination before. In *Neder v. United States,* 527 U.S. 1 (1999), this Court evaluated whether "materiality" was an element of the offense of property fraud under the federal fraud statutes. It concluded that the statutory text and history of the federal fraud statutes required that materiality be submitted to the jury and found beyond a reasonable doubt. Thus, this Court held that materiality is an element of the offenses of mail, wire, and bank fraud. Deprivation of property must be held to be an element of the offense under the federal fraud statutes. If not, as the

Applicant's and *Constantinescu* cases demonstrate, the government will continue to contort itself under the fraudulent inducement theory to bring traditional state law crimes within reach of federal criminal jurisdiction. Deprivation of property is also an issue raised by *Kousisis*, *Porat*, and *Bolos*. Accordingly, this Court is certain to address that issue making the Applicant's petition almost certain to be granted, even if it is ultimately "held" until *Kousisis* is decided.

4. Without determination of deprivation of property as an element of the offense, the federal fraud statutes are vague.

Another reason that this Court is more than likely to grant certiorari in Applicant's case is that without a determination regarding the deprivation of property, the federal fraud statutes are vague, and it is difficult to discern what conduct is criminal when the government applies an overly broad theory of prosecution like the fraudulent inducement theory. The government's use of the fraudulent inducement theory without deprivation of property is contrary to this Court's teachings about how to construe vague criminal fraud statutes. It departs from at least two basic principles this Court has set forth.

First, "an ambiguous criminal statute is to be construed in favor of the accused." *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994); see also *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015). This rule of lenity "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Thus, as this Court explained in invalidating the original "honest services" fraud theory, "when there are two rational readings of a criminal statute, one harsher than the other, we are to

choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987).

The federal fraud statutes do not clearly establish that deprivation of property is an element of the offense. This is why the district court below and the government relied on the legal refrain that neither economic loss nor the intent to cause financial harm are relevant. That is also why the government is advancing this argument in *Kousisis*, that this Court has never held that economic loss or loss of property is a requirement under the federal fraud statutes. The government escapes through the broad window of ambiguity because it does not have to prove what should be an important requirement under the fraud statutes, that the victim's property was targeted and that it was deprived of or lost because of a defendant's criminal acts.

Second, criminal statutes should be read narrowly as has been noted earlier. But this court reinforced that notion just last term in *Fischer v. United States*, 603 U.S. ____ (2024) when interpreting the obstruction of justice statute. There, this Court narrowed the reach of subsection (c)(2) of the statute and prescribed exactly what the government must prove to initiate and sustain a prosecution under that subsection. Justifying the limited reach of the subsection, this Court held that, it would be "improper to substitute for those fine-grained statutory distinctions the charging discretion of prosecutors and the sentencing discretion of district courts." *(Fischer v. United,* 603 U.S. ___ 12, n.2*)* Further, it reasoned that, when interpreting congressional intent of the meaning of words in a statute "the Court must decide how it is linked to its surrounding words, and give effect, if possible, to every to every

clause and word of the statute." *Yates v. United States*_574 U.S. 528, 536 (plurality opinion) *see also Williams v. Taylor*, 529 U.S. 362, 404 quoting *United States v. Menasche*, 348 U.S. 528, 538-539

Because the government's theory of prosecution under the fraudulent inducement theory sweeps so broadly, it is necessary for the Court to interpret what conduct can be reached by deciding whether Congress intended that "deprivation of property" be a required element under the federal fraud statutes. A determination on this important issue informs the accused of exactly what conduct is prohibited and the government will know what conduct it can charge when exercising its prosecutorial discretion. The Applicant's questions gives this Court that avenue.

Here, the government's fraudulent inducement theory dramatically upsets the balance of power between the federal government and the states. Most fraudulently induced contracts are covered by state common law fraud principles. That is because the terms of a contract are often defined by state law. Thus, the remedy for an aggrieved party is a civil breach of contract claim, not a federal criminal prosecution.[7]

5. Maintaining the district court opinion below creates a federal crime of nearly all commercial negotiations that result in a contract involving fraud

As the amicus curiae argues in *Kousisis* and the Applicant's petition points out, the district court opinion below sustaining the government's position that all that is required is for a defendant to "obtain" property by fraud will create a federal crime of

[7] This point is emphasized by the fact that RTS never brought a civil contract claim for fraud, it brought a civil contract claim for breach of contract, the exact place that this case belonged. It should have never been in a federal criminal court.

every commercial negotiation that results in a contract, but which is later determined to have been induced by fraud. The Applicant's case makes this point most vividly. RTS received something of value during the negotiations. And it secured its property during the negotiations. These benefits to RTS came after it had relied upon the fraudulent financial statements, making it clearly unlikely that the Applicant was seeking to deprive RTS of its property or intentionally defraud it.

But let's take for example, a small business painter who agrees to paint ten apartment complexes and he agrees to use only paint manufactured in the United States. He is also required to pay a bond to guarantee his work and secure an insurance policy to cover any damage that he or his employees might otherwise cause. He represents and warrants that he has met these conditions, and a contract is signed and emailed to the owner. However, it is later discovered that the painter did not use paint manufactured in the United States and instead of a bond and insurance, he deposits cash into a bank account to cover any damages.

Under the government's theory of fraudulent inducement, the painter is guilty of wire fraud and faces 20 years in prison because, had the owner known that paint from Canada was used and that there was no bond, he would not have entered the contract. But all ten of his apartment buildings were painted to his satisfaction and any damage to the buildings were paid for out of the cash that the painter deposited.

Plainly, Congress did not intend that the federal government should charge either the Applicant or the painter with wire fraud. What property deprivation did either suffer? RTS received its semi-tractors back and was paid $64,302 for their use.

The owner of the apartments got his apartments painted and suffered no damage to them. This is why the fraudulent inducement theory must be struck down and why the Applicant's petition compliments the issues raised by *Kousisis*. The government's fraudulent inducement theory makes a felon of any citizen engaged in negotiations resulting in a contract that involved some false statement, misrepresentation or false pretense. It relieves the government of proving what should be an essential element of an offense under the federal fraud statutes and it reads the mens rea requirement completely out of the statute. The Applicant's petition is thus more than probable to be granted by this Court.

6. There is no harm to the government if the application is granted and the public interest is served.

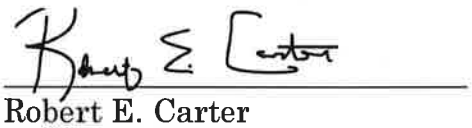
If this application is granted, the government will not suffer irreparable harm. Indeed, at stake is the applicant's freedom for conduct that is likely not criminal. The district court specifically found that the applicant is not a danger to the community, and as noted above, if this Court decides against *Kousisis*, the term of imprisonment can still be served. Further, both the applicant and the public have a right to know what conduct constitutes a crime before they are to be held liable for it. The Fifth, Sixth and Fourteenth amendments require no less. It would be a true miscarriage of justice to imprison a man for conduct that does not violate the criminal laws.

CONCLUSION

The Applicant respectfully requests that this Court stay the order of the Court of Appeals or grant release on bail, pending disposition of the Applicant's petition of certiorari and that the order of this court granting the requested relief be maintained

until the resolution of *Kousisis*. He further request an administrative stay pending resolution of this application.

Respectfully submitted,



DATED: December 13, 2024

Robert E. Carter
Defendant-Appellant, Pro Se
2206 Highland #308
Eau Claire, WI 54701
715-514-1127
robert.e.carter@outlook.com

No. _____

In The

Supreme Court of the United States

ROBERT E. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PROOF OF SERVICE

I hereby certify and declare under penalty of perjury pursuant to 28 U.S.C. 1746 that on December 17th, 2024, and pursuant to Supreme Court Rule 29, I mailed a copy of the attached Emergency Application to Stay Order by overnight express mail to the individual at the address noted below and I also sent a copy of the same to that individual at the email address listed below as follows:

Elizabeth Prelogar
Solicitor General of the United States
Department of Justice
950 Pennsylvania Ave. N.W., Room 5616
Washington, D.C. 20530-0001
202-514-2217
supremectbriefs@usdoj.gov

DATED: December 13, 2024

Robert E. Carter
Petitioner, Pro Se

APPENDIX TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604
Office of the Clerk
Phone: (312) 435-5850
www.ca7.us courts.gov

ORDER

November 25, 2024

Before
AMY J. ST. EVE, Circuit Judge
THOMAS L. KIRSCH II, Circuit Judge
DORIS L. PRYOR, Circuit Judge

No. 24-2950

UNITED STATES OF AMERICA,
Plaintiff - Appellee
v.
ROBERT E. CARTER,
Defendant – Appellant

Originating Case Information:
District Court No: 3:22-cr-00124-wmc-1
Western District of Wisconsin
District Judge William M. Conley

Upon consideration of the DEFENDANT APPELLANT'S EMERGENCY MOTION
FOR STAY OF MANDATE PENDING APPLICATION TO THE SUPREME COURT
OF THE UNITED STATES FOR BAIL PENDING APPEAL AND WRIT OF CERTIORARI, filed on November 25, 2024, by the pro se appellant,

IT IS ORDERED that the motion is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604
Office of the Clerk
Phone: (312) 435-5850
www.ca7.us courts.gov

ORDER

November 22, 2024

Before
AMY J. ST. EVE, Circuit Judge
THOMAS L. KIRSCH II, Circuit Judge
DORIS L. PRYOR, Circuit Judge

No. 24-2950

UNITED STATES OF AMERICA,
Plaintiff - Appellee
v.
ROBERT E. CARTER,
Defendant – Appellant

Originating Case Information:
District Court No: 3:22-cr-00124-wmc-1
Western District of Wisconsin
District Judge William M. Conley

Upon consideration of PETITION FOR REHEARING AND REHEARING EN BANC,
construed as a motion to reconsider this court's order denying bail pending appeal, filed on November 21, 2024, by the pro se appellant,

IT IS ORDERED that the motion is DENIED. See Seventh Circuit Operating Procedure 1(a)(2).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen
United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604
Office of the Clerk
Phone: (312) 435-5850
www.ca7.us courts.gov

ORDER

November 19, 2024

Before

AMY J. ST. EVE, Circuit Judge
THOMAS L. KIRSCH II, Circuit Judge
DORIS L. PRYOR, Circuit Judge

No. 24-2950

UNITED STATES OF AMERICA,
Plaintiff - Appellee
v.
ROBERT E. CARTER,
Defendant – Appellant

Originating Case Information:
District Court No: 3:22-cr-00124-wmc-1
Western District of Wisconsin
District Judge William M. Conley

The following are before the court:

1. MOTION FOR LEAVE TO FILE INSTANTER MOTION APPEALING FROM THE DENIAL OF BAIL PENDING APPEAL AND RECONSIDERATION IN EXCESS OF PAGE LIMIT, filed on November 6, 2024, by counsel for the appellant.

2. DEFENDANT-APPELLANT'S MOTION APPEALING

THE ORDER OF THE DISTRICT COURT DENYING THE MOTION FOR RECONSIDERATION AND BAIL PENDING APPEAL AND A STAY OF THE JUDGMENT AND SENTENCE, filed on November 6, 2024, by counsel for the appellant.

IT IS ORDERED that the motion for leave to file the oversized motion is GRANTED.

IT IS FURTHER ORDERED that the motion for release pending appeal is DENIED. See 18 U.S.C. § 3143(b). The appellant shall surrender as ordered by the district court.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

OPINION and ORDER

22-cr-124-wmc

ROBERT E. CARTER,

Defendant.

A jury convicted defendant Robert E. Carter, who represented himself at trial, of two counts of wire fraud. On October 17, 2024, this court sentenced Mr. Carter to concurrent terms of 36-months imprisonment on each count, followed by concurrent 3-year terms of supervised release, and ordered that he pay restitution in the amount of $29,056.84. (Dkt. #426). Carter, who continues to represent himself, has filed a notice of appeal, a motion for leave to proceed in forma pauperis on appeal, and a CJA Form 24 requesting transcripts at government expense, which is construed as a motion under 28 U.S.C. § 753(f). (Dkt. #419, #422, #424.) Subsequently, Carter filed a motion under Federal Rule of Criminal Procedure 35(a) to "correct" the sentence and order of restitution. (Dkt. #425.) Specifically, Carter argues that the court incorrectly determined the amount of loss at issue for purposes of both the calculation of his sentence and the amount of restitution. Carter has also filed a motion for reconsideration of its order denying bail pending appeal. (Dkt. #429.) The motions are denied for the reasons set forth below.

OPINION

1. Motion to Correct Sentence Under Rule 35(a) (dkt. #425)

Rule 35(a) states that, "[w]ithin 14 days after sentencing, the court may correct a sentence that resulted from arithmetical, technical, or other clear error." Carter's motion does not raise the type of error or mistake that falls within the scope of Rule 35(a). Rather, he attempts to

challenge findings made by the court based on the evidence presented during trial and in anticipation of sentencing. As the Seventh Circuit has explained, the scope of Rule 35(a) is "narrow" and does not allow parties to raise, after sentencing, arguments that should have been made at the sentencing hearing. United States v. Clark, 538 F.3d 803, 811 (7th Cir. 2008).

Accordingly, Carter's belated objections, which do not demonstrate clear error with respect to the court's calculations, are improper and fall outside the scope of Rule 35(a).1 United States v. Porretta, 116 F.3d 296, 300 (7th Cir. 1997) ("The motion plainly does not ask the court to cure an obvious arithmetical, technical or other clear error, and flies in the face of the advisory committee's admonition that it 'did not intend that the rule relax any requirement that the parties state all objections to a sentence at or before the sentencing hearing.'"); United States v. Venson, 366 F. App'x 662, 665 (7th Cir. 2010) ("Rule 35(a) motions are very narrow and allow the court to correct a sentence only for 'arithmetical, technical, or other clear error'; reconsideration of the discretionary application of the guidelines is inappropriate.").

Importantly, Carter has also filed a notice of appeal from the conviction and sentence that he now seeks to challenge under Rule 35(a). (Dkt. #419.) The filing of a notice of appeal largely divests a district court of jurisdiction. United States v. Turchen, 187 F.3d 735, 743 (7th Cir. 1999) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."). There are exceptions for ancillary matters and clerical errors, but neither of these exceptions apply to the arguments raised by Carter in his pending motion to correct sentence now on appeal. See id.; United States v. McCoy, 770 F.2d 647, 650 n.3 (7th Cir. 1985) ("A district court is without jurisdiction to entertain a motion to correct or reduce a sentence after a notice of appeal has been filed").

Although a notice of appeal does not divest a district court of jurisdiction to decide a Rule 35(a) motion, Fed. R. App. P. 4(b)(5), and the court retains authority to correct clear, obvious error, see United States v. Shenian, 847 F.3d 422,

424 (7th Cir. 2017), Carter has not made that showing. Because Carter has not identified a valid basis for relief under Rule 35(a), apart from arguments already rejected at sentencing, his motion to correct sentence (dkt. #425) is DENIED.

2. Motion to Reconsider Denial of Bail on Appeal (dkt. #429)

Carter also seeks reconsideration of the court's decision to deny him bail pending an appeal, arguing that the United States Supreme Court recently granted certiorari review in Kousisis v. United States, 82 F.4th 230 (3rd Cir. 2023), which he believes is relevant to his defense. In Kousisis, the defendants were charged with fraud for exploiting the United States Department of Transportation's disadvantaged business enterprise ("DBE") program in order to obtain lucrative contracts for government projects. Id. at 233-34. The defendants argued that the fraudulent misrepresentations they made to obtain the contract by falsely claiming compliance with DBE requirements did not deprive the government of a property interest that would support a wire fraud conviction because the government received the benefit of the work it paid for. Id. at 236.

The Third Circuit rejected that argument, noting that the objective of the fraudulent misrepresentations about meeting the DBE requirements was to obtain millions of dollars that it would not otherwise have been entitled to had it not been for their false statements. Id. at 240-42. The Seventh Circuit has also rejected similar arguments. See United States v. Leahy, 464 F.3d 773, 786-89 (7th Cir. 2007) (affirming a conviction stemming from a fraudulent scheme to cheat the City of Chicago out of funds slotted for minority and women-owned businesses).

Carter speculates that the Supreme Court will reverse Kousisis and hold that fraudulent inducement of a contract in which the victim's financial loss was not the objective of the scheme does not qualify as fraud. (Dkt. #429, at 7-9.) Reasoning further that he performed on the lease agreement with Ryder Transportation Services ("RTS") by making payments under that contract, at least in part, Carter argues the fraudulent misrepresentations that he admittedly made to obtain the contract similarly do not

constitute fraud. (Dkt. #429, at 3.) Carter contends, therefore, that he should be allowed to remain on bail until after the Supreme Court decides the Kousisis case. (Id. at 9.)

To begin, the Kousisis case concerns a question of honest services to a government entity, not loss caused by fraud on a private entity. Regardless, based on the jury's factual findings after a full trial, Carter's convictions, including the one on count two for making false statements in an attempt to lease trucks from Nuss Truck and Equipment ("NTE"), remain consistent with Seventh Circuit precedent. See United States v. Weimert, 819 F.3d 351, 357 (7th Cir. 2016) (the fraud statutes "reach a seller's or buyer's deliberate misrepresentation of facts or false promises that are likely to affect the decisions of a party on the other side of the deal").

The convictions are also consistent with existing Supreme Court precedent holding that the wire fraud statute "demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." Shaw v. United States, 580 U.S. 63, 67 (2016); see also Schmuck v. United States, 489 U.S. 705, 715 (1989) ("The relevant question is whether the mailing [or wire] is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing [or wire] later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud.").

Finally, even if the lack of a monetized loss to NTE because it ultimately chose not to lease trucks to Carter were later determined to require a reversal of his conviction on count two, his material, fraudulent misrepresentations to RTS caused an actual, monetary loss, further distancing Carter's conviction on count one from the facts and legal issues in Kousisis.

For all these reasons, the court remains unpersuaded that the issues raised by defendant present a substantial question justifying bail pending appeal. Accordingly, Carter's motion for reconsideration (dkt. #429) is DENIED.

3. Motions to Proceed IFP and for Free Transcripts (dkt. #422, #424)

Mr. Carter moves to proceed in forma pauperis on appeal, and he has provided an affidavit in support, which indicates that he expects to spend only $500.00 on expenses related to his appeal. (Dkt. ##422-423, ¶ 29.) He has also filed a CJA Form 24 requesting transcripts at government expense, which is construed as a motion under 28 U.S.C. § 753(f). (Dkt. #424.) Under that provision, a party proceeding in forma pauperis is entitled to a free transcript only if the "trial judge or a circuit judge certifies that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal." Carter has represented himself capably in this case and has shown no inclination for utilizing stand-by counsel that was appointed to assist him.

Although Carter was allowed to proceed in forma pauperis previously in this case, his supporting affidavit discloses substantial assets that preclude extending that status any further under the criteria found in the Criminal Justice Act, 18 U.S.C. § 3006A(a)(1). (Dkt. #423.) See United States v. Durham, 922 F.3d 845, 847 (7th Cir. 2019); Charles Allen Wright, et al., 16AA Federal Practice and Procedure § 3970.1 (5th ed. 2020). Accordingly, both his motion for leave to proceed in forma pauperis (dkt. #422) and the request for transcripts at government expense (dkt. #424) are DENIED.

ORDER

IT IS ORDERED that defendant Robert Carter's motions (dkt. #422, #424, #425, #429) are DENIED as set forth in this Opinion and Order.

Entered this 25th day of October, 2024.
BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

APPENDIX E

United States District Court
Western District of Wisconsin

UNITED STATES OF AMERICA JUDGMENT IN A CRIMINAL CASE (for offenses committed on or after November 1, 1987)

UNITED STATES

v.

Robert E. Carter

Case Number: 0758 3:22CR00124-001

Defendant's Attorney: Pro Se
(Peter R. Moyers as Standby Counsel)

Defendant, Robert E. Carter, was found guilty on Counts 1 and 2 of the superseding indictment. Defendant has been advised of his right to appeal.

ACCORDINGLY, defendant is adjudicated guilty of the following offenses:

Date Offense Concluded
January 8, 2021

Count Numbers
1 & 2

Title & Section
18 U.S.C. §§ 1343 and
1349

Nature of Offense
Attempt to Commit Wire Fraud, Class C felony

Defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that defendant shall notify

the United States Attorney for this district within 30 days of any change of name, residence, or maiJing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, defendant shall notify the Court and United States Attorney of any material change in defendant's economic circumstances.

Defendant's Date of Birth: 1979
Defendant's USM No.: 57560-054

Defendant's Residence Address:
Eau Claire, Wisconsin

Defendant's Mailing Address:
Same as above

District Judge
William M. Conley

Date Signed
October 17, 2024

IMPRISONMENT

As to Counts 1 and 2 of the superseding indictment, it is adjudged that defendant is committed to the custody of the Bureau of Prisons for a term of 36 months on each count, to run concurrently. I recommend that defendant be afforded the opportunity to participate in educational and vocational programming and that he be afforded prerelease placement in a residential reentry center with work release privileges.

Defendant is neither a flight risk nor at least a physical danger to the community. Accordingly, execution of the sentence of imprisonment is stayed until December 18, 2024, between the hours of noon and 2:00 p.m., when defendant is to report to an institution to be designated by further court order. The present release conditions are continued until that date. Although I find no basis to delay defendant's reporting to serve his sentence beyond that date for reasons addressed in my earlier opinion and order, this should give defendant sufficient time to seek an emergency stay from the Seventh Circuit.

The U.S. Probation Office is to notify local law enforcement agencies, and the state attorney general, of defendant's release to the community.

RETURN

I have executed this judgment as follows:

Defendant delivered on to _ at ,with a certified copy of this judgment.

United States Marshal

By
Deputy Marshal

SUPERVISED RELEASE

Defendant's terms of imprisonment are to be followed by 3-year terms of supervised release on each count, to run concurrently. In light of the nature of the offense and defendant's personal history, along with the statutory mandatory conditions of supervision, I adopt condition numbers 1 through 20 as proposed and justified in the revised presentence report.

The requirement for drug testing set forth at 18 U.S.C. § 3583(d) is waived

If, when defendant is released from confinement to begin his term of supervised release, either defendant or the supervising probation officer believes that any of the conditions imposed today are no longer appropriate, either one may petition the Court for review.

Defendant is to abide by the statutory mandatory conditions.

Statutory Mandatory Conditions

Defendant shall not commit another federal, state, or local crime. [Note: Any defendant that has been convicted of a felony offense, or is a prohibited person, shall not possess a firearm, ammunition, or destructive device pursuant to 18 U.S.C. §§ 921 and 922.]

Defendant shall not illegally possess a controlled substance. Defendant is subject to drug testing according to 18 U.S.C. §§ 3563(a)(5) or 3583(d), unless waived by the Court.

Defendant shall cooperate with the collection of DNA by the U.S. Justice Department and/or the U.S. Probation and Pretrial Services Office as required by Public Law 108-405.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

Defendant shall comply with the standard and special conditions that have been adopted by this Court.

Standard Conditions of Supervision

1) Defendant shall not knowingly leave the judicial district in which defendant is being supervised without the permission of the Court or probation officer;

2) Defendant is to report to the probation office as directed by the Court or probation officer and shall submit a complete written report within the first five days of each month, answer inquiries by the probation officer, and follow the officer's instructions. The monthly report and the answer to inquiries shall be truthful in all respects unless a fully truthful statement would tend to incriminate defendant, in violation of defendant's constitutional rights, in which case defendant has the right to remain silent;

3) Defendant shall maintain lawful employment, seek lawful employment, or enroll and participate in a course of study or vocational training that will equip defendant for suitable employment, unless excused by the probation officer or the Court;

4) Defendant shall notify the probation officer within seventy-two hours of any change in residence, employer, or any change in job classification;

5) Defendant shall not purchase, possess, use,

distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician. Defendant shall not use any product containing cannabidiol (CBD) or tetrahydrocannabinol (THC), except as prescribed by a physician;

6) Defendant shall not visit places where defendant knows or has reason to believe controlled substances are illegally sold, used, distributed, or administered;

7) Defendant shall not meet, communicate, or spend time with any persons defendant knows to be engaged in criminal activity or planning to engage in criminal activity;

8) Defendant shall permit a probation officer to visit defendant at home, work, or at some other mutually convenient location designated by the probation officer at any reasonable time and shall permit confiscation of any contraband observed in plain view by the probation officer;

9) Defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

10) Defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court;

11) Defendant shall report to the probation office in the district to which defendant is released within 72 hours of release from the custody of the Bureau of Prisons, unless instructed by a U.S. Probation Officer to report within a different time frame; and

12) Defendant shall not possess a firearm, ammunition, destructive device, or dangerous weapon.

Special Conditions of Release

13) Provide the supervising U.S. Probation Officer any and all requested financial information, including copies of state and federal tax returns.

14) Refrain from incurring new credit charges, opening additional lines of credit or opening other financial

accounts without the prior approval of the supervising U.S. Probation Officer.

15) Not transfer, give away, sell or otherwise convey any asset worth more than $200 without the prior approval of the supervising U.S. Probation Officer.

16) Refrain from seeking or maintaining any employment that includes unsupervised financial or fiduciary-related duties, without the prior approval of the supervising U.S. Probation Officer.

17) Submit person, property, residence, papers, vehicle, computers [as defined in 18 U.S.C. § 1030(e)(1), or other electronic communications, data storage device,,or media], or office to a search conducted by a U.S. Probation Officer at a reasonable time and manner, whenever the probation officer has reasonable suspicion of contraband or of the violation of a condition of release relating to substance abuse or illegal activities; failure to submit to a search may be a ground for revocation; defendant shall warn any other residents that the premises defendant is occupying may be subject to searches pursuant to this condition.

18) Have no contact with any representatives of the victims (Russ Transportation Services, Nuss Truck and Equipment, and Osborn and Son Trucking) in person, through written or electronic communication, or through a third party, unless authorized by the supervising U.S. Probation Officer. Defendant shall not enter the premises or loiter within 1,000 feet of the victims' residences or places of employment.

19) File all tax returns in a timely manner and provide copies of all federal and state income returns to the supervising U.S. Probation Officer. Defendant will apply 100 percent of defendant's yearly federal and state tax refunds toward payment of restitution.

20) Defendant shall provide the supervising U.S. Probation Officer advance notification of any devices associated with or falling within the general category of information technology (IT) that produce, manipulate, store, communicate or disseminate information used by defendant. This includes external and portable hard drives. The probation office is authorized to install

applications to monitor any such devices owned or operated by defendant. Defendant is required to comply with the monitoring agreement and may not disable or circumvent any applications. Defendant shall consent to and cooperate with unannounced examinations of any technological equipment owned or used by defendant, including but not limited to retrieval and copying of all data from all information technology devices and any internal or external peripherals based on reasonable suspicion of contraband or illegal activity. The examinations may involve removal of such equipment for the purpose of conducting examination.

ACKNOWLEDGMENT OF CONDITIONS

I have_read or have had read to me the conditions of supervision set forth in this judgment, and I fully understand them. I have been provided a copy of them. I understand that upon finding a violation of probation or supervised release, the Court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

Defendant Date

U.S. Probation Officer Date

CRIMINAL MONETARY PENALTIES

Defendant shall pay the following total financial penalties in accordance with the schedule of payments set forth below.

	Assessment		Restitution
1	$100.00	$0.00	$29,056.84
2	$100.00	$0.00	$0.00
Total	$200.00	$0.00	$29,056.84

It is adjudged that defendant is to pay a $200 criminal assessment penalty to the Clerk of Court for the Western District of Wisconsin immediately following sentencing. Defendant is encouraged to pay the assessment as agreed upon in the plea agreement to ensure he is not precluded from participating in programming for non-payment while in the federal prison system.

Defendant does not have the means to pay a fine under §5E1.2(c) without impairing his ability to support himself, his family, and pay restitution upon release from custody, so I will impose no fine.

RESTITUTION

As to Count 1 of the superseding indictment, defendant is to pay mandatory restitution in the amount of $29,056.84 to the U.S. Clerk of Court for the Western District of Wisconsin to be disbursed to the victim, Ryder Transportation Services. The U.S. Attorney's Office is to provide the victim's address to the Clerk of Court following sentencing.

Notwithstanding defendant's likely inflated net worth claims, he does not have the economic resources to allow himself to make full payment of restitution in the foreseeable future under any reasonable schedule of payments. Pursuant to 18 U.S.C. § 3664(f)(3)(B), therefore, he is to begin making nominal payments of a minimum of $500 each month, beginning within 30 days of defendant's release from custody. Defendant shall notify the Court and the United States Attorney General of any material change in his economic circumstances that might affect defendant's ability to pay restitution. No interest is to accrue on the unpaid portion of the restitution.

DEFENDANT: ROBERT E. CARTER
CASE NUMBER: 0758 3:22CR00124-001

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order:
(1) assessment;
(2) restitution;
(3) fine principal;
(4) cost of prosecution;
(5) interest;
(6) penalties.

The total fine and other monetary penalties shall be due in full immediately unless otherwise stated elsewhere.

Unless the Court has expressly ordered otherwise in the special instructions above, if the judgment imposes a

period of imprisonment, payment of monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court, unless otherwise directed by the Court, the supervising U.S. probation officer, or the United States Attorney. Defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

In the event of a civil settlement between victim and defendant, defendant must provide evidence of such payments or settlement to the Court, U.S. Probation Office, and U.S. Attorney's Office so that defendant's account can be credited.

APPENDIX F

Activity in Case 3:22-cr-00124-wmc USA v. Carter, Robert Order on Motion for Miscellaneous Relief

From wiwd_ecf@wiwd.uscourts.gov <wiwd_ecf@wiwd.uscourts.gov> Date Thu 10/17/2024 4:21 PM

To wiwd_nef@wiwd.uscourts.gov <wiwd_nef@wiwd.uscourts.gov>

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
NOTE TO PUBLIC ACCESS USERS Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

Western District of Wisconsin

Notice of Electronic Filing

The following transaction was entered on 10/17/2024 at 4:20 PM CDT and filed on 10/17/2024

Case Name: Case Number: Filer:

USA v. Carter, Robert 3:22-cr-00124-wmc

Document Number:417(No document attached)

Docket Text:
**** TEXT ONLY ORDER****

For reasons mentioned in its order dated October 16, 2024 (dkt. #[4141), as well as those stated on the

record at the sentencing proceeding held today, the defendant's motion for bail pending an appeal and, alternatively, to stay the judgment (dkt. #[401]) is DENIED. In particular, the court finds a substantial likelihood that defendant's conviction on at least one if not both counts of fraud will be upheld; and, as explained at sentencing, even if the concurrent sentences were not upheld and the case were remanded for further proceedings, the court would likely impose the same sentence under the relevant factors found in 18 U.S.C. § 3553(a). Finally, by virtue of giving defendant until December 18, 2024, to voluntarily surrender, he should have ample time to request an emergency stay order from the Court of Appeals for the Seventh Circuit. Signed by District Judge William M. Conley on 10/17/2024. (nln)

3:22-cr-00124-wmc-1 Notice has been electronically mailed to:

Tomislav Z. Kuzmanovic tkuzmanovic@hinshawlaw.com, twellstein@hinshawlaw.com

Megan Renee Stelljes megan.stelljes@usdoj.gov, CaseView.ECF@usdoj.gov, USAWIW.EFILE@usdoj.gov, andrea.erickson@usdoj.gov, bridget.fitzgerald@usdoj.gov, gwen.mcgillivray@usdoj.gov, sharolyn.heiser@usdoj.gov

Peter R. Moyers peter@moyerslawfirm.com

Catherine Elizabeth Whitecwhite@hurleyburish.com, mbaisden@hurleyburish.com

Chadwick Michael Elgersmachadwick.elgersma@usdoj.gov, CaseView.ECF@usdoj.gov, USAWIW.EFILE@usdoj.gov, jennifer.frank@usdoj.gov

Robert E. Carter robert.e.carter@outlook.com

3:22-cr-00124-wmc-1 Notice will be delivered by other means to::

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

OPINION and ORDER

v.

22-cr-124-wmc

ROBERT E. CARTER,

Defendant.

Defendant Robert E. Carter was charged in a superseding indictment with two counts of wire fraud by sending false financial statements and fake wire transfer documents to two truck-leasing companies, Ryder Transportation Services ("Ryder") and Nuss Truck& Equipment ("Nuss"), while attempting to obtain trucks. (Dkt. #213.) After a two and-a-half-day trial, during which defendant represented himself with standby counsel, a jury found defendant guilty as charged on both counts. Mr. Carter continues to represent himself and has filed a motion for new trial, challenging several rulings and evidentiary issues at trial. (Dkt. #382.) He also requests a bond allowing him to remain out of custody pending an appeal. (Dkt. #401.) For the reasons set forth below, defendant's motion for new trial will be denied, while the court will reserve a ruling as to his motion to remain on release pending an appeal until he appears for sentencing on Thursday, October 17, 2024.

OPINION

A district court may, upon a defendant's motion, "grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The decision whether to grant a new trial is within the district court's discretion and is generally "reserved for only the most extreme Case: 3:22-cr-00124-wmc Document #: 414 Filed: 10/16/24 Page 1 of 5 cases." United States v. Coscia, 4 F.4th 454, 465 (7th Cir. 2021) (citation omitted). A new trial is appropriate "only if there is a reasonable possibility that the trial error had a prejudicial effect on the jury's verdict." United States v. Maclin, 915 F.3d 440, 444 (7th Cir. 2019) (citation omitted); United States v. O'Brien, 953 F.3d 449, 456 (7th Cir. 2020) (a new trial should be granted "only if the evidence preponderates heavily

against the verdict, such that it would be a miscarriage of justice to let the verdict stand") (citation omitted). "The ultimate inquiry is whether the defendant was deprived of a fair trial." United States v. Friedman, 971 F.3d 700, 713 (7th Cir. 2020). Defendant raises the following arguments in support of his motion for new trial: (1) the court erred by allowing the government to introduce evidence of his financial condition as proof that he falsified his financial status; (2) the court erred by allowing the owner of another trucking company, Sandy Osborn, to testify about a meeting with defendant in 2017, while preventing him from attacking Osborn's credibility on cross examination; (3) the weight of the evidence was against the jury's verdict because defendant intended to make lease payments for the trucks once he obtained them; (4) the court denied subpoenas for three additional witnesses; and (5) the court made incorrect evidentiary rulings related to defendant's bank account statements and emails sent to defendant, which would have shown that he was making payments under his lease with Ryder. (Dkt. #382.)

The court held multiple pretrial conferences to address the defendant's motions and submissions regarding his theory of defense, which was that the financial statements and wire transfer documents that he submitted by electronic mail to the trucking companies – while false – were not fraudulent because he had a good-faith intent to honor the leases once approved. (Dkt. #321.) As the court advised defendant during pretrial hearings and in two separate, written rulings before trial, good faith is a defense to fraud only if the defendant harbored a genuine belief that his statements were true when made. (Dkt. #331, at 11; Dkt. #351, at 5). This limitation is consistent with Seventh Circuit case law and the pattern jury instructions on good faith in the context of fraudulent statements and misrepresentations. See William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit (2023 ed.) 6.10 at 143, 623; United States v. Dunn, 961 F.2d 648, 650 (7th Cir. 1992) ("[g]ood faith, or the absence of intent to defraud, constitutes a complete defense to a charge of mail fraud," but only if the defendant had "'a genuine belief that the information . . . is true'" when being sent or given) (citation omitted).

The government presented ample evidence showing that defendant sent false financial information to Ryder and Nuss as part of a scheme to obtain trucks from them through fraudulent means. Moreover, defendant admitted in both his opening and closing statements that he knowingly sent the trucking

companies false financial information to obtain lease agreements for trucks, asserting that this dishonest business practice was merely "unethical" but not illegal. (Tr. 1 (dkt. #387) at 117:4-12; Tr. 2 (dkt. #385) at150:24-25–151:1-4, 153:2-7.) The jury rejected this argument and found defendant guilty of both counts of fraud.

Defendant does not demonstrate that any of the court's rulings as to the crimes charged were erroneous. See United States v. Coffman, 94 F.3d 330, 333 (7th Cir. 1996) (explaining that the wire fraud statute punishes the scheme, "rather than the completed fraud"). Nor does he otherwise establish that he was denied the opportunity to present relevant evidence. Even assuming that an impropriety occurred and that defendant did not waive objection, there is no reasonable probability that the errors he references affected the verdict, which in light of his own, admitted fraudulent statements to two truck leasing companies regarding his capacity to pay, the jury reached after deliberating for just 45 minutes. While defendant also complains about the length of time the jury took to reach a verdict, interpreting the swiftness of their decision as a sign that they did not adequately weigh the evidence, the far more reasonable inference is that "they found the evidence strong and did not require much time to reach unanimity." United States v. Garcia, No. 18-cr-688, 2021 WL 3033534, at *4 (N.D. Ill. July 19, 2021); see also United States v. Cunningham, 108 F.3d 120, 123-24 (7th Cir. 1997) ("The time it takes the jury to decide is not the relevant factor. The weight of the evidence is."). Because defendant does not establish that he was deprived of a fair trial, his motion for new trial under Rule 33(a) is denied.

Turning to the motion for release on bond pending an appeal, defendant argues that he is not a flight risk, and there were errors of such an egregious nature that he is likely to win reversal. (Dkt. ##401-402.) Bond pending appeal is governed by the Bail Reform Act of 1984, which states that release requires "clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community," and a demonstration that the appeal "raises a substantial question of law or fact likely to result" in reversal, a new trial, or a sentence of no imprisonment. 18 U.S.C. § 3143(b)(1). A substantial question is "a 'close' question or one that very well could be decided the other way." United States v. Bilanzich, 771 F.2d 292, 299 (7th Cir. 1985). While the court is not persuaded that defendant has identified any question of a substantial nature that would support a likelihood of reversal,

his motion for bond pending appeal will await further hearing at sentencing.

ORDER

IT IS ORDERED that defendant Robert Carter's motion for new trial (dkt. #382) is DENIED. Defendant's motion for bond pending appeal (dkt. #401) is RESERVED.

Entered this 16th day of October, 2024.

BY THE COURT:
/s/

WILLIAM M. CONLEY
District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
* *

UNITED STATES OF AMERICA,
Plaintiff

Case No. 22-CR-124-WMC

-vs-
ROBERT CARTER,

Madison, Wisconsin
July 15th, 2024
8:35 a.m. - 5:27 p.m.

Defendants,
* *

STENOGRAPHIC TRANSCRIPT OF FIRST DAY OF JURY TRIAL HELD BEFORE THE HONORABLE WILLIAM M. CONLEY

BRIAN CLARK, PLAINTIFF WITNESS, SWORN

THE COURT: And if you'd be kind enough. Just move forward towards the mic. And we'll begin. Go ahead.

DIRECT EXAMINATION

BY MS. STELLJES:

Q What, if anything, did you discuss with Mr. Carter about Ryder's requirements for leasing?

A Initially, we talked about what needs he had and what types of equipment he would need. We discussed a proposal -- he was provided with a proposal of what it would cost to lease through our company. And then once we decided to move forward, then we had to generate some contracts to be signed, and then we had to get a certificate of insurance, which we commonly do, and then we asked for financials from a credit perspective to review.

Q Does Ryder do business with start-ups?

A We do. Not all the time. But, yes, we will.

Q Who is Michael Johnson?

A He's one of our credit analysts at Ryder.

Q Why are you sending him those financial statements?

THE COURT: Counsel, he's already testified to this. If there's something you want to expand on, you may, but we don't need to repeat testimony.

BY MS. STELLJES:

Q Did Michael Johnson approve Carter's lease?

A Yes, with some stipulations.

Q What were those stipulations?

A We needed the guaranty. We needed a deposit. I believe it was around $16,000 as a down -- it's not a down payment; it's a deposit. And then we had to set up ACH payments, which is a monthly draw from their account, based on the -- the invoices.

Q What happened next?

A After -- after we signed the agreements and everything was processed?

Q I was asking about if you signed the agreements.

A Yeah, yeah. So we moved forward with signing the agreements, and Robert -- he gave us all the stuff we needed to set up the account, and we -- we got the equipment ready, and then he picked it up and started running it.

THE COURT: Cross-examination.

C R O S S - E X A M I N A T I O N

BY THE DEFENDANT:

Q Do you recall, during that interview, whether or not Ryder made additional requests of the defendant?

A To do business with us?

Q Correct.

A Yeah, we discussed the deposit and the ACH and the things I mentioned a little bit ago, yeah.
Q And so in your -- in your experience, those -- would Ryder require additional security if it -- if it accepts the initial financial representations that are made?

A It depends on the -- on the deal, really. I mean, we -- sometimes we ask for security. Sometimes we don't. It all depends on the credit analyst.

Q You said you sent the -- this email was sent during your negotiations with the defendant about the guarantee of a contract. At this point, you had not -- Ryder had not decided that it would move forward with the defendant; correct? You were still trying to get additional information?

A No, the -- this agreement would come after credit directed me in that direction.

Q Okay. And did you receive –

THE COURT: You're saying no -- had Ryder -- not you personally -- but had Ryder already agreed to do business when credit asked for this additional information, or do you know?

THE WITNESS: So, yes, based on the conditions if they were met, yes.

THE COURT: And those conditions would have included what? With respect to a general guaranty.

THE WITNESS: It would have -- there would be a guaranty between the two companies along with deposits and other things, so.

THE DEFENDANT: 46. Defense Exhibit 46.

THE COURT: Do you recognize that exhibit?

THE WITNESS: Yes.

Q What is it?

A That's an email between Michael Johnson and I referring to the -- the deposit and, you know, setup of the credit for the account.

THE COURT: And I will admit Exhibit 46. [Ex rec'd]
BY THE DEFENDANT:

Q So at this point, you were -- or the credit department was now saying that they were willing to do business with the defendant if he met these additional security requirements; correct?

A Correct, yes.

Q Okay. And this point -- this was after Ryder had received those financial documents, correct -- the 2018 and '19 documents in Government Exhibit 1.1?

A Yes, yep.

Q What was the exact -- what were those additional security measures that Ryder wanted after it received those financial statements?

A There was a deposit, and then I believe we set up ACH on the account for the payments.

THE COURT: Base -- you just said you set a base what?

THE WITNESS: Oh, ACH payments.

THE COURT: Which stands for?

THE WITNESS: Automated Clearing House. That's a -- it's like an EFT draft where you authorize your bank to –

THE COURT: So that the bank will stand behind the obligation?

THE WITNESS: No, it's -- it's a payment. So –

THE COURT: It gives you permission to seek payment from the bank?

THE WITNESS: Well, it gives us permission to draft payment from their bank account, every month, based on a -- an agreement ,so.

BY THE DEFENDANT:

Q And during your dealings with the defendant, did the defendant agree with that additional security condition?
A Yes.

Q And did the defendant agree to make a -- or cash deposit with Ryder as a condition?

A Yes.

Q And were these conditions required before the defendant received any property from Ryder?

A Yes.

Q So Ryder received a $16,000 deposit from the defendant; correct?

A Yes.

Q Ryder received an ACH authorization to automatically withdraw payments; correct?

A Yes.

Q And Ryder received a security agreement executed by the defendant; correct?

A Yes.

Q All before the defendant got tractors; right?

A Yes.

Q -- ask you was Ryder willing to do this deal without the defendant paying or meeting these additional criteria?

A No. No.

MICHAEL JOHNSON, PLAINTIFF WITNESS, SWORN

BY MS. STELLJES:

Q And what's your title there?

A I'm a lease credit analyst.

Q What are your duties as a lease credit analyst?

A I review financial statements and credit profiles to mitigate a risk for Ryder

Q Do you look at how long a company's been in business?

A Yes.

And what does Ryder require in terms of that?

A Companies must be in business for a minimum of three years to get a lease from Ryder.

Q Say a company's not been in business for three years, what option does that company have to lease trucks from Ryder?

A The only option that we have available is a cross-corporate guaranty.

Q And what's a guaranty?

A It's kind of like a cosigner, but it's another company that will cosign for another company.

Q One company guaranteeing the other company's –

A Correct.

Q What's this document, Mr. Johnson?

A This would be the balance sheet for Carter Transportation Group.

Q For the start-up?

A Yes.
Q What weight, if any, did you give to this document?

A None.

Q Why not?

A Because they hadn't been in business for three years. So they had to have a cross-corporate guaranty.

Q So the sole basis for your credit approval decision, then, was the financial statements of Carter Industries; correct?

A Correct.

THE COURT: Cross-examination.

C R O S S - E X A M I N A T I O N

BY THE DEFENDANT:

Q What would a cir- -- situation or circumstance in a financial situation where you have determined that the positive trend of these financial statements that you saw was going up, that was, according to you, more than sufficient assets, but you required additional security -- why would that be the case?

A I typically ask for when dealing with start-ups because there are guarantees, there's a chance that company could go under. So I always try to secure the account.

Q With -- even with a company with strong financials, they would -- there's a possibility, you're saying, that that company would go under?

A Well, I try to set companies up on automatic payments because oftentimes, start-ups don't have a history of making payments. So we want to make sure that the payments are coming in. And trucking companies -- it's a very volatile industry. So I like to get some security on top of that just in the event that that company does go under.

Q Isn't it true that your position was that if the defendant di not meet these additional security requirements, you would not have approved this deal?

Q All right. Let me show you what's marked as Defense Exhibit 46. It's already been admitted.

Q Do you recognize -- I'm sorry. You are listed on this email chain; correct?

A Yes.

Q And on this email chain, down at the bottom, where it says "Hi, Michael" -- do you see that section?

THE WITNESS: Yes.

Q So here, you are discussing the additional -- or Brian Clark, who you dealt with, is discussing the additional requirement of a $16,000 security deposit; correct?

A Yes.

Q And you tell him that nothing can be done or move forward without that deposit; correct?

A It says that I'm waiting for the $16,000.

Q Right. So that meant that you weren't going to do anything else until you got that $16,000; correct?

A Correct.

Q Okay. And what were you requesting further from the defendant?
A A W-9.

Q Would you have done this deal or approved the deal without the W-9?

A So we just started requiring W-9s a few years ago because the funds go into an interest-bearing account. So I can't say if this is before or after, but it looks like it's asking for a copy of the W-9.

THE COURT: And for the benefit of the jury, can you explain what a W-9 is.

THE WITNESS: It's a tax document. That's really all I know. It's a tax document that we ask for tax purposes.

THE COURT: And do you know why Carter has begun to ask for that from its customers?

THE WITNESS: Why Carter is asking for it?

THE COURT: I apologize. Why Ryder is now asking it of their customers to provide that?

THE WITNESS: To my knowledge, it's because security – once we collect security, it goes into an interest-bearing account. So

for tax purposes, to my knowledge.

Q Does Ryder generally require a lessee to cover its tractors?

A There -- so there is an option where you can self-insure, but the credit has to be really strong. We don't offer it a lot. So usually, yes, the customer has to cover their insurance.

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,
Plaintiff,

-vs- Case No. 22-CR-124-WMC

ROBERT E. CARTER,

Madison, Wisconsin
July 9, 2024
2:38pm

Defendant.

STENOGRAPHIC TRANSCRIPT OF FINAL HEARING HELD BEFORE U.S. DISTRICT JUDGE WILLIAM M. CONLEY

THE COURT: All right. Then we'll remove the business continuity bullet point. And you said there was additional objections?

MS. STELLJES: Yes. On slide 12, there appears to be some language in there that goes to legal issues, "no deprivation of property," the "benefits of the bargain received." This hearkens back to defendant's pretrial motions to dismiss the indictment. For example, he filed the motion based on Ciminelli saying that there was no deprivation of a traditional property interest in this case and, therefore, the indictment should be dismissed. Those issues are for the Court, and the Court's already decided –

THE COURT: Yeah. And I agree with that to the extent that that's what he's getting at, and it may be a matter of phrasing with respect to -- I think what you're really saying is that not only did you not intend to defraud, but there wasn't any loss by the victims.

THE DEFENDANT: That's correct because –

THE COURT: So that's not a –

THE DEFENDANT: -- that's part of the definition.

THE COURT: You're not making a deprivation of property argument to the jury.

THE DEFENDANT: Correct.

THE COURT: You're arguing to them that you never intended to defraud them and nor were they misled or did they lose anything.

THE DEFENDANT: Correct.

THE COURT: So you need to come up with a different bullet point than "deprivation of property" –

THE DEFENDANT: But –

THE COURT: -- and I think it's the same with respect to "benefits of the bargain." If you want to say the victims got what they wanted, that's fine, but it's not -- you're not making a legal argument to the jury. You're making a factual statement to the jury.

THE DEFENDANT: Okay. So –

THE COURT: So it's got to be as to what the evidence is going to show.

THE DEFENDANT: Right. So deprivation of property is the actual -- the reason I put "no deprivation of property" is because that's the actual definition of intent to defraud. So I –

THE COURT: You're talking about in the jury instruction itself?

THE DEFENDANT: Correct. That's how it's actually defined.

THE COURT: I'm just going to -- just give me a moment. And what definition are you referring to?

THE DEFENDANT: Well, the one you're going to read to them says –

THE COURT: I'm asking you where is it. You tell me it's the definition. I just want to know where I'm looking.

THE DEFENDANT: So I need to pull up your instructions then.

THE COURT: It refers to false -- one or more false or fraudulent representations of -- pretenses, representations, or promises charged in the portion of Count 1 and 2. Is that what you're referring to?

THE DEFENDANT: No.

MS. STELLJES: It's on page 7 of the jury instructions tha chambers circulated on July 3rd. "A person acts with intent to defraud if he acts knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or property to the defendant or another or the potential loss of money or property to another."

THE COURT: Is that what you're referring to, Mr. Carter?

THE DEFENDANT: Correct.

THE COURT: It's still -- there's no reference to deprivation of property, and it does smack of a legal description rather than the real point of loss of property, so if you want to say "no loss of money or property," you can say that.

THE DEFENDANT: Okay.

THE COURT: Is the "benefit of the bargain" language you think you have taken from the instruction?

THE DEFENDANT: Are you suggesting that I change that or –

THE COURT: Yes.

THE DEFENDANT: -- delete that?

THE COURT: Unless there's something you want to point me to.

THE DEFENDANT: I want to keep it, but I can change it, the language. I can change -- I can take "benefits of the bargain received" out and say something else other than "benefits of the bargain," that they got what they wanted.

THE COURT: They got what they wanted. That's fine.

THE DEFENDANT: Right.

THE COURT: Any other objections to the bullet points on page 12 of 16 for the government?

MS. STELLJES: No, Your Honor.

THE COURT: All right. Anything more through 14 -- I'm sorry, yeah, through 14 for the government beyond what I've already instructed?

MS. STELLJES: I'd just like to preserve our objection that his "financial capability to pay for the use of property" is not relevant because his hope, willingness, capability –

THE COURT: And you're referring to what bullet point?

MS. STELLJES: "Financial capability to pay for use of property does not demonstrate" –

THE COURT: I'm sorry. I apologize. What slide are we on? What page?

MS. STELLJES: Slide 14, Attempt to Commit –

THE COURT: That helps me royal -- substantially. Okay. That does look like a legal argument, Mr. Carter. So that –

THE DEFENDANT: Okay. I can change it.

THE COURT: In its current form, it's out.

THE DEFENDANT: Okay.

THE COURT: Anything else through 14 for the government?

MS. STELLJES: The last bullet point on that same page," Fraudulent financial statements that played no role in the review are not material," that's a misstatement of the law because materiality is an objective standard.

THE DEFENDANT: I mean, I could change it to say, "The

financial statements are not material" or "were not material."

THE COURT: Fair enough.

APPENDIX J

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
* *

UNITED STATES OF AMERICA,
Plaintiff,
vs. Case No. 22-CR-124-WMC
ROBERT CARTER,

Madison, Wisconsin
July 3rd, 2024

Defendant.

11:30 a.m. to 11:51 a.m.
* *

STENOGRAPHIC TRANSCRIPT OF EX PARTE HEARING HELD BEFORE U.S. DISTRICT JUDGE WILLIAM M. CONLEY

THE COURT: All right. I am again calling United States versus Carter, 22-CR-124, for an ex parte hearing with defendant and standby counsel. I understand, Mr. Carter, you're back on the call from our earlier hearing that included the government. And, Mr. Moyers, you're on as well?

MR. MOYERS: That's correct, Your Honor.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Very good. Then, Mr. Carter, I suggest we start with your two ex parte motions. The first being this motion for a "theory of defense" instruction that I've sort of already addressed the -- I've never given that kind of a detailed instruction. Even if I were to give it -- your version of the theory of defense -- it seems to run afoul of the Seventh Circuit's law. I am going to give the basic Seventh Circuit controlling law, which is already reflected in the current instructions, and both sides will have to argue from there, but I don't see any reason to give more detailed so-called "theory of the defense" instruction. If you wanted to propose one or two sentences, maybe I could consider those. But as I've already ruled in open court, the Seventh Circuit just simply doesn't recognize some kind of a good-faith intent. In fact, their view is very different whether or not the -- the victims ever suffered an actual loss of money is not -- or it does not relieve a defendant from liability for wire fraud or a scheme to defraud if the object of the fraud was to obtain property through a material -- intentional material misrepresentation. So that will be the question for the jury, and not only has the Seventh Circuit said

that repeatedly -- particularly in U.S. v. Leahy, 464 F.3d 773, Seventh Circuit -- 2006 Seventh Circuit decision, but the United States Supreme Court has essentially said the same thing with respect to a scheme to defraud in Shaw versus The United States, 580 U.S. 63 at 2016, including – and now I'm quoting -- that "a scheme to defraud demands neither a showing of ultimate financial loss nor a showing of intent to
cause financial loss." That's at page 67 of the Shaw decision, and that is the law that the jury will be provided at trial. I'm happy to hear if you want to make any further argument with respect to a "theory of defense" instruction.

THE DEFENDANT: Yes. If -- if Your Honor will permit me,
there is one case law in the Seventh Circuit that I didn't cite that I'd like to talk about here -- or bring to the Court's
attention because it -- it seems to be different than what Your Honor just said. And that's United States v. Martin-Trigona.

THE COURT: Is that one -- is that one word? "Martin"?

THE DEFENDANT: It's two words: Martin, and then hyphen, Trigona.

THE COURT: T-R- --?

THE DEFENDANT: T-R-I-G-O-N-A.

THE COURT: Very good. And what do you think -- what's the cite of that case?

THE DEFENDANT: 684 F.2d 485.

THE COURT: And what do you think it stands for?

THE DEFENDANT: That good-faith defense exists. It specifically says, "Mail fraud is a specific intent crime." "Thus good faith, or the absence of an intent to defraud is a complete defense to a charge of mail fraud." "The defendant is entitled to present evidence concerning his beliefs, motives, and intentions regarding the various transactions and mailing in the alleged scheme to defraud. To the extent that Martin-Trigona sought to introduce evidence consistent with such a good faith defense, the trial Court erred in excluding it."

THE COURT: The problem is that in order to make that argument, you would have to find that you believe the false statements were true, and you seem to concede that the statements here -- at least as

to the financial representations -- particularly the -- the existence of -- of a trust that did not belong to you and financial representations in the financial statements that were inaccurate -- that you were making false representations. So if -- if I misunderstood what you believe the evidence will show, then perhaps we could consider some modification. But without some proof that the representations were true I don't --that instruction just isn't applicable.

THE DEFENDANT: Okay. All right. And then I just ask the Court if it could give me its opinion on one other Seventh Circuit case, which -- which I cited, and you've probably seen, but in Kelerchain -- when the Seventh Circuit considers the Kelerchain argument that they intentionally misrepresented and obtained the weapons that they obtained, the Court said that the reason it was -- the reason that they -- that was wire fraud there and they could be convicted is because of the legal status that was misrepresen- -- that was misrepresented and held that Leahy and the [Second] Circuit cases which it embraced said that frauds that do -- do no more than induce their victims to enter into a contract, but where they pay the money or perform the requirements under the contract takes us to the edge of the reach of the wire fraud statute. So are you saying that they're -- that does not establish a defense where the legal status isn't concerned? Are you saying, like, that's -- the Seventh Circuit didn't say that you could --that could be a defense?

THE COURT: I'm saying that in Leahy, the courts specifically rejected the notion that the government had to prove either that the defendant contemplated a harm to the victim or that there was an actual loss of money by the victim. The question is whether you intended, by providing materially -- material misrepresentations to induce property be turned over; not necessarily intended to harm the victim.

THE DEFENDANT: Right. But wouldn't that be exactly what the Seventh Circuit said? If you induce them to -- if you induce them by fraud to part with their property, but you do exactly what you said under the contract that was induced – because there's no issue of -- there's no issue of whether they were harmed or not. I'm not raising -- that's not a dispute. There's no dispute. So the government doesn't have to prove that, because there's no dispute about that. The -- the issue is that Seventh Circuit framed it in Kelerchain, it is if the contract is induced by misrepresentations, but the defense -- but the person performs under the contract and the legal status isn't an issue, then it's a defense to –

THE COURT: It's like what you're describing is an honest-services

kind of defense, but the Second Circuit seems to be approaching something like that. The Seventh Circuit has said the opposite.

THE DEFENDANT: But they actually rely on [Second] Circuit --in Kelerchain, they actually say, "our cases and --" it says "our case and Leahy and cases in the Second] Circuit." So they're actually agreeing with the [Second] Circuit. That's the language. They said "our case in Leahy and cases in the Second – [Second]Circuit demonstrate that where a defendant induces a contract by fraud, but performs under the contract, takes us to the edges of the reach of the wire fraud statute." So they're actually –

THE COURT: But -- but that's what it does. It takes you to the edge, but it's still a violation of the wire fraud statute. In other words, even if you believe that there'd be no harm done by them turning over these trucks to you, if you induce it by material misrepresentations -- intentionally induced it by material misrepresentations -- that's a violation of the wire fraud statute. That's why Leahy goes on to say that the government is not required to prove either contemplated harm to the victim or any actual loss. It's not required. What's required is that you intentionally induced those trucks to be turned over through material misrepresentations, and that's what the jury will be asked to decide in this case, but I -- I understand where you're -- you're trying to go, and I appreciate your giving me an opportunity to clarify what I understand to be the law in the Seventh Circuit.

THE COURT: Was there anything else you wanted to address to the Court ex parte today?

THE DEFENDANT: I just want to get clarity. So you're denying my theory of defense. And what's the reason for it?

THE COURT: I've never given that kind of a lengthy theory, and part of it, if not much of it, is inconsistent with the Seventh Circuit case law. What I will let you do is make an argument that either you did not intend -- or at least the government has not proven your intent -- to materially misrepresent facts in order to get trucks, and you can make those arguments freely, but I'm not going to give a separate independent theory of defense for good faith, which doesn't exist.

THE DEFENDANT: Okay.

THE COURT: Was there anything else you wanted to address today?

THE DEFENDANT: Just one final question.

THE COURT: Sure.

THE DEFENDANT: If -- if a good faith defense doesn't exist, why is there an instruction for it in the Seventh Circuit?

THE COURT: Again, it would be in the nature of a true -- true representation.

THE DEFENDANT: Okay.

THE COURT: But if you're conceding that they were false representations, then you're not entitled to the instruction. If the -- if the evidence at trial establishes that those statements were true, you may -- you might be entitled to such an instruction, and I'm certainly happy to reserve on that until the evidence comes in, and you can revisit it.

THE DEFENDANT: Okay. Thank you.

APPENDIX K

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
* *
UNITED STATES OF AMERICA
Plaintiff,
vs.
Case No. 22-CR-124-WMC
ROBERT E. CARTER,
Defendant.

Madison, Wisconsin
July 3, 2024
10:03.m. - 11:15 a.m.

* *

STENOGRAPHIC TRANSCRIPT OF FINAL PRETRIAL CONFERENCE HELD BEFORE U.S. DISTRICT JUDGE WILLIAM M. CONLEY

THE COURT: All right. I have both sides on the line, and I am calling Case No. 22-CR-124 for a telephonic pretrial conference. And I'll hear appearances for the government.

MR. ELGERSMA: Good morning, Your Honor. Chad Elgersma and Megan Stelljes for the United States.

THE COURT: And then for the defendant. Mr. Carter, you are appearing on your own behalf, having chosen to proceed to represent yourself; is that correct?

THE DEFENDANT: Good morning, Your Honor. Yes. That's correct.

THE COURT: All right. And then I understand we also have Attorney Moyers on the call as standby counsel.

MR. MOYERS: That's correct, Your Honor. Good morning.

THE COURT: Good morning, all. We are here to try to address as many of the issues as possible in advance of what will be the final pretrial conference in person next week. I intend to review the parties' motions in limine, addressing any open issues as well as clarifying any issues the parties may wish to raise. I will also address the defendant's intent to use an audio/video recording; although, that may be mooted. I will address both sides's timing of disclosure of witnesses and other materials. I will then turn to the

proposed voir dire in light of the parties' submissions, and then to the introductory and closing instructions; although, obviously, as to the latter, that may be subject to additional changes as we proceed and depending upon the evidence admitted at trial. I do want to briefly address the stipulation with regard to the Charter Communications subscriber that the parties have filed. I will also address any remaining issues that the parties may wish to raise. At the close of the hearing, I do have a number of ex parte motions and related matters that I'll need to address with the defendant and standby counsel without the government's participation, but that's roughly what I intend to cover today. I am open to other matters that don't fall into those general categories. So I'll hear from each side if there's something outside those categories you wanted to be sure to address with the Court today, beginning with the government.

MR. ELGERSMA: Not outside of those categories, Your Honor.

THE COURT: All right. And same question for you, Mr. Carter. Anything else outside those matters?

THE DEFENDANT: No, Your Honor.

THE COURT: All right. Then let's take up the motions in limine. I'm going to start with those on which I reserved with respect to the government's motions. The first of those is the motion to preclude the defendant from arguing that he acted in good faith. I've tried to address the basic standard in the Seventh Circuit and agree, as I've indicated, that a general good-faith defense is not available, including that the defendant believed he would ultimately be able to return the victim's money after his scheme succeeded, but I'm not going to preclude the defendant from arguing materiality or, consistent with the legal instructions, that he did not intend to deceive or cheat anyone, which is the burden of the government to prove. The subtleties of that become difficult, but my response in terms of the general argument is that that is something for the parties to argue, based on the actual instructions the Court will give the jury before you get up in closing arguments to make your final arguments. So I don't know how much more guidance I can provide, whether the Court thinks they're entitled to -- or the government thinks they're entitled to something more from the Court, I'll certainly hear first, and then I'll hear from the defendant.

MS. STELLJES: Good morning, Your Honor. This is Attorney Megan Stelljes. What we want clarity on is that the defendant cannot argue that he had good faith because he intended to repay the lease or because he, in fact, made some payments towards the lease. To

argue that those payments or intent to repay shows good faith would be inconsistent with the law in the Seventh Circuit.

THE COURT: And, again, if it were -- arguably, dancing on the head of a pin. I agree with you that good faith is not an element -- or a lack of good faith is not something the government has to prove nor is good faith a separate defense. But to the extent he wants to argue that he didn't intend to deceive or cheat anyone and, in part, that evidence of that lack of intent is the fact that he was proceeding to try to put together a legitimate business, then it's a matter of the jury buying whether or not that shows a lack of the specific intent required. So while I agree the defendant won't get a good-faith-defense instruction and will not be able to rely on a notion that even if he intended to deceive to obtain the trucks as long as his ultimate goals were laudable, he's not -- he can't be found guilty, that would be a misstatement of the law, but that's different than -- than my precluding him from trying to argue that his conduct suggests a lack of intent to deceive, which is something the government has to prove. So I'm really not sure what else you're asking the Court to do other than to make clear that -- and the instruction already makes clear that there is no such thing as a good-faith defense if, at the close of the evidence or even after closing argument, that has been misstated, perhaps you're entitled to a curative instruction or perhaps I will have to stop the defendant if he suggests otherwise. But that's a very different question than him arguing whether or not the government has met its burden of proof as to the elements that are set forth in the instructions on the law. So you certainly have my ruling that there is no such thing as a separate good-faith defense. But beyond that, I don't know what I can -- what I can do for you, because I'm not going to preclude arguments that go to the same -- that accurately go to the same question of intent or materiality. Do you have any -- do you need any other instruction from the Court on those subjects?

MS. STELLJES: No, Your Honor.

THE COURT: All right. Same question for you, Mr. Carter. Any further guidance you need?

THE DEFENDANT: I guess not at -- not at this point, no.

THE COURT: All right. That then takes me to materiality, which I've also tried to address whether or not the statements were material is ultimately going to be a decision for the jury, based on the applicable law. I agree that neither side may misstate the law, but I'm not sure what more the government is seeking in terms of an

-- of its motion to preclude the jury from -- or preclude the defendant from arguing that the misrepresentations were not material. Obviously, he can' make an argument that they were not material as a matter of law. That's for the Court to decide, and the Court certainly agrees that the sufficient evidence – the government has already proffered sufficient evidence -- that that materiality will go to the jury as a matter of fact, not as a matter of law. So, again, I'll ask if there's something more the government believes it is entitled to beyond confirmation that materiality will be for the jury to decide as a matter of fact.

MS. STELLJES: We were just seeking a ruling – or admonishment that the defendant can't repeat the same arguments that he's made in his pretrial motions, that because his scheme didn't succeed with respect to Nuss Truck and Equipment – that the financial statements were immaterial because the scheme didn't succeed. That would be a misstatement of the law.

THE COURT: I think it's -- it's -- his argument to the jury that they weren't material, as long as he couches it in that context, will be up to the jury to decide. The jury will have instructions on -- to what material misrepresentation is and both sides will argue what the evidence is on that point. I'm -- I'm not going to preclude him from making a general argument that the misrepresentations in which the government are relying were not, in fact, material for a reasonable person, but that's just a matter of arguing what the evidence shows. And, again, I -- the defendant can make the materiality argument. Whether the jury accepts it is a different question.

MS. STELLJES: Understood.

THE COURT: All right. Mr. Carter, do you need further guidance on that subject?

THE DEFENDANT: Not on that subject, Your Honor; but if I could go back to see if I can get guidance on the good-faith instruction for a quick second.

THE COURT: Yeah. There is no good-faith instruction. It's not present in the instructions now nor under Seventh Circuit law will it be given to the jury. There is no question as to whether you were acting in general good faith. The question is whether you made -- intentionally made material misrepresentations in order to obtain property. That's for the jury to decide. So I'm happy to try to answer your questions, but there is no such thing as a good-faith

defense to the crime of a scheme to defraud.

THE DEFENDANT: All right. So then I guess my question is if -- if I say that I -- or if I'm presenting that -- if you're saying there's no good-faith defense, are you telling me that the use of the word "good-faith" is precluded? Like, I can't say that my action -- that I took my actions in good faith?

THE COURT: You can -- you can in opening and closing argue that you acted in good faith, but you're not going to be able to say that "as long as you find I acted in good faith, then I can't be guilty," because that would be a misstatement of the law.

THE DEFENDANT: Okay. In your ruling, the first sentence you -- well, the sentence you have in there is "In fraud cases, it is irrelevant that the defendant sincerely believe that he would ultimately be able to return a victim's money after the scheme succeeded." So that's not my defense. I don't -- it's - I don't believe that, and I never did. So why would that even apply to me? It doesn't apply to me. This is a con- -- this was a contract.

THE COURT: Well, and that's -- I guess I'm -- we're talking by each other, then. If you're not going to make that argument, then we don't need to talk about it.

THE DEFENDANT: Well, I mean, I was referring to -- I -- intend to make a good-faith argument, but not because I believe that everything would work out. It was a contract. I had to pay money before they did anything.

THE COURT: And you can certainly make that argument.

THE DEFENDANT: Okay. Well, that's -- okay. Then I'm clear. Thank you.

THE COURT: All right. I'll give the government one more chance to weigh in if they have any remaining concerns as to good faith or materiality. Otherwise, I'll go on to the -- the last of the reserve rulings which had to do with the confrontation
clause.

MS. STELLJES: Yes, Your Honor. The -- the argument that Mr. Carter just articulated is an improper good-faith argument. The -- the argument we were concerned about –

THE COURT: I don't know -- wait, wait, wait, Counsel. What do you

think he just articulated? What is it -- what statement did he make? He just disavowed that he's going to be making an argument that because he thought everything would work out, that he's not liable. He's saying he's not going to make that argument.

MS. STELLJES: Right. He just tweaked it slightly and said that he acted in good faith because everything did work out to some extent. He did make some payments on the lease. And that -- for that shows a general good faith that should –

THE COURT: He didn't -- no, he didn't -- he wants to say that he lacked an intent to defraud, and evidence of that is that he intended to proceed to fulfill all his obligations. That's the intent argument. He's not going to be able to argue that even if he intended to deceive with the financial statements, because he took steps to fulfill his obligation, he's relieved from liability. That's not the law. That's not what the law that the jury's going to be instructed on. Those are two different things. But he can certainly say that evidence that he never intended to deceive is that he attempted to fulfill his obligation of the contract, and the government can argue that that's -- that's pointless, since he was attempting to try to get trucks by fraudulent representations.

MS. STELLJES: Right. So why should he be allowed to focus the jury's attention on his intent when he's making lease payments when that's legally irrelevant? What matters is his --
THE COURT: It's not his intent to make lease payments –

MS. STELLJES: Right.

THE COURT: -- it's his intent to deceive, and he's suggesting that the fact that he intended to proceed to fulfill his obligations is an indication that he did not intend to deceive. That's -- that's an argument he can make to the jury, and the jury will have to decide whether they accept that or not. This is where we're -- we're dancing on the head of a pin. I'm not going to preclude the defendant from proceeding on whatever evidence he thinks demonstrates a lack of intent to deceive, but he's not going to be able to argue nor is there a good-faith defense -- not going to be able to argue for nor is there a good-faith defense to -- if the government proves the elements of the crime.

MR. ELGERSMA: Understood. Thank you, Your Honor.

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff, **OPINION & ORDER**

v.

22-cr-124-wmc

ROBERT E. CARTER,

Defendant.

On October 12, 2022, a grand jury returned an indictment charging defendant Robert E. Carter with 17 counts of wire fraud (Counts 1–17), two counts of aggravated identity theft (Counts 18–19), and six counts of money laundering (Counts 20–25). On April 24, 2024, a grand jury returned a superseding indictment, reducing the charges to two counts of wire fraud (Counts 1 and 2, formerly Counts 15 and 16). A jury trial is set for July 15, 2024. Defendant asks the court to approve a bench trial, as well as requests for an evidentiary hearing on his pretrial motions to dismiss the remaining counts against him, all of which are addressed below.

OPINION

1. Motion to Reconsider Dismissing Former Count 15 (dkt. #201)

Defendant filed a motion to dismiss former Count 15 of the original indictment, charging him with committing wire fraud in violation of 18 U.S.C. §§ 1343 and 1349 by sending false financial statements to a truck leasing company (N.T.E.) as part of a fraudulent scheme to lease ten semi-trucks. (Dkt. #166.) The court denied that motion. (Dkt. #200, at 6.) In a motion for reconsideration, defendant raised additional arguments for dismissal based on its failure to state an offense. (Dkt. #201.) The court also denied that motion as moot after the government asserted at a status conference that it was seeking a superseding indictment. (Dkt. #206.) However, the wire-fraud charges lodged in former Count 15 were subsequently refiled as Count 2 of the superseding indictment. (Dkt. #213.)

At the court's request, the government has filed a brief in response to the defendant's argument that the fraudulent financial statements were not material for purposes of supporting a conviction

for wire fraud. (Dkt. #218.)

Defendant has filed more than one response, arguing that the fraudulent financial statements were not sufficiently material because no reasonable person would have relied on them. (Dkts. ##224, 229.) He further requests an evidentiary hearing on whether the government can prove the wire fraud offense lodged in Count 2 of the superseding indictment. (Dkt. #219.)

To withstand a motion to dismiss, "an indictment must allege that the defendant performed acts which, if proven, constituted a violation of the law that he or she is charged with violating." United States v. Gimbel, 830 F.2d 621, 624 (7th Cir. 1987). When determining whether to dismiss an indictment, a court must assume that all facts in the indictment are true and "view all facts in the light most favorable to the government." United States v. Yashar, 166 F.3d 873, 880 (7th Cir. 1999). Moreover, a motion to dismiss an indictment is not intended to be "a means of testing the strength or weakness of the government's case, or the sufficiency of the government's evidence." United States v. Moore, 563 F.3d 583, 586 (7th Cir. 2009) (internal quotation marks and citation omitted)

However, an indictment may be dismissed if it is subject to a defense that may be decided solely on a question of law based on undisputed facts. See United States v. Labs of Virginia, Inc., 272 F. Supp. 2d 764, 768 (N.D. Ill. 2003). At the same time, a defense that merely raises factual disputes relating to the strength of the government's evidence is not worth pursuing in a pretrial motion to dismiss. Moore, 563 F.3d at 586.

Here, defendant is charged in the superseding indictment with two counts of wire fraud. (Dkt. #213.) The wire fraud statute "prohibits schemes to defraud or to obtain money or property by means of 'false or fraudulent pretenses, representations, or promises'" using interstate wires to execute the scheme. United States v. Weimert, 819 F.3d 351, 355 (7th Cir. 2016) (quoting 18 U.S.C. § 1343). Thus, to convict a defendant of wire fraud, the government must prove beyond a reasonable doubt that: (1) the defendant participated in a scheme to defraud; (2) the defendant had the intent to defraud; and (3) interstate wires were used in furtherance of the scheme. United States v. Domnenko, 763 F.3d 768, 772 (7th Cir. 2014).

In turn, to prove a scheme to defraud, the government must show that the defendant "made a material false statement, misrepresentation, or promise, or concealed a material fact."

Weimert, 819 F.3d at 355. However, "[c]ourts have taken an expansive approach to what counts as a material misrepresentation or concealment in a scheme to defraud." Id. "A false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." United States v. Filer, 56 F.4th 421, 434 (7th Cir. 2022) (alteration, internal quotation marks, and citations omitted); see also Neder v. United States, 527 U.S. 527 U.S. 1, 16 (1999).

In Count 2 of the superseding indictment, the government alleges that defendant sent fraudulent financial statements to N.T.E. by email in support of a lease application as part of a scheme to deprive N.T.E. of a property interest in ten semi-trucks for use in his business, Carter Transportation Group. (Dkt. #213, at 4–5.) In response, defendant notes that N.T.E. ultimately declined his lease application for the trucks after a credit check disclosed that he was in arrears to another truck leasing company and a background investigation revealed his criminal record of previous wire fraud convictions. Defendant argues, therefore, that even if his financial statements were fraudulent, they could not be found material since they were never relied upon. (Dkt. #166, at 14–15, 23–24; Dkt. #224, at 4, 7.)

Because the wire-fraud statute punishes the scheme, and not its success, however, the government correctly argues that it does not matter whether the fraudulent financial statements actually influenced N.T.E., only whether they were capable of doing so. (Dkt. #218, at 6). As the government notes, the Seventh Circuit has stated that "it is no defense that the intended victim of wire fraud was . . . too smart or sophisticated to be taken in by the deception," Weimert, 819 F.3d at 355, or that the "extravagance of the lie" made the scheme to defraud "unlikely to succeed." United States v. Coffman, 94 F.3d 330, 334– 35 (7th Cir. 1996). In addition, "there is no requirement that the statement must in fact influence the decisionmaker (that would be reliance)." United States v. Reynolds, 189 F.3d 521, 525 (7th Cir. 1999). "The relevant question," according to the United States Supreme Court, "is whether the mailing [or wire] is part of the execution of the scheme as conceived by the perpetrator at the time, regardless of whether the mailing [or wire] later, through hindsight, may prove to have been counterproductive and return to haunt the perpetrator of the fraud." Schmuck v. United States, 489 U.S. 705, 715 (1989).

The government intends to prove that defendant sent N.T.E. a trust's financial statements fraudulently showing $321 million in assets as security for the lease agreement, which a jury could

reasonably find were material to N.T.E.'s decision to lease ten semi-trucks to him. (Dkt. #218, at 5.) Defendant's argument that a jury could not find he submitted the fraudulent financial statements as part of the execution of his scheme to defraud is unpersuasive.1 See Schmuck, 489 U.S. at 715. Nor does he show that the financial statements were not capable of influencing N.T.E.'s decision to lease its trucks to him, regardless of whether N.T.E. actually relied on them. See Schmuck, 489 U.S. at 715; Reynolds, 189 F.3d at 525.

Defendant has moved for an evidentiary hearing to resolve "factual disputes" as to whether the fraudulent financial statements were material to N.T.E.'s decision-making process. (Dkt. #219, at 2-3.) To the extent defendant disputes the strength of the government's evidence, however, that is for the jury to decide, not an appropriate basis to dismiss an otherwise sufficient indictment. See Moore, 563 F.3d at 586; see also United States v. Antonucci, 663 F. Supp. 245, 246 (N.D. Ill. 1987) ("Fed. R. Crim. P. 12(b) was not intended to convert motions to dismiss into a criminal case analogy of the civil practice motion for summary judgment."). Of course, defendant is free to raise this "defense of immateriality" at trial, or for that matter otherwise deny that he engaged in fraud. Coffman, 94 F.3d at 335.

Defendant relies heavily on United States v. McClain, 934 F.2d 822, 835 (7th Cir. 1991), which held that a fraudulent mailing could not support a mail fraud conviction because it played no role in the alleged scheme to defraud. (Dkt. #224, at 10; Dkt. #229, at 1–2.) However, in McClain, the purpose for the mailing was abandoned and never used in furtherance of the scheme. In contrast, the government contends that defendant actually used the fraudulent financial statements as part of his attempt to lease trucks from N.T.E., making McClain distinguishable.

Accordingly, defendant's motion to reconsider dismissal of former Count 15, now Count 2, for failure to state an offense (dkt. #201) and his motion for an evidentiary hearing (dkt. #219) are both DENIED.

2. First Motion to Dismiss Count 1 (dkt. #225)

Defendant has filed two motions to dismiss Count 1 of the superseding indictment, accusing him of submitting false financial statements for Carter Industries and Carter Transportation Group when he applied to lease semi-trucks from R.T.S. as part of a scheme to defraud. (Dkt. #213, at 3–4.) In furtherance of this scheme, defendant allegedly sent an email with a fake wire transfer confirmation purporting to show that he had wired the amount of

$34,971.91 to R.T.S. in response to a demand for payment under the terms of the lease. (Id. at 4.)

In his first motion to dismiss, defendant argues that Count 1 fails to state an offense because the alleged scheme against R.T.S. had reached its fruition before he sent any fake wire transfer. (Dkt. #225, at 2-3.) Thus, defendant reasons that the fake wire transfer could not have been in furtherance of the scheme, having already possessed semi-trucks and trailers from R.T.S. for eight months before the fake wire transfer was sent. (Id. at 5.) The government points out, however, that post-fraud calls or mailings, which are intended to lull the victim into a false sense of security or to prevent detection, can be considered in furtherance of a scheme to defraud. E.g., United States v. Lane, 474 U.S. 438, 452 (1986); United States v. O'Connor, 847 F.2d 483, 486–87 (7th Cir. 1989). While defendant disputes the fake wire transfers had that effect on R.T.S. here, a jury may reasonably determine otherwise on the evidence in this case. Specifically, a jury could reasonably conclude that defendant sent a false wire transfer to lull R.T.S. into a false sense of security or to conceal defendant's fraud. As such, Count 1 of the superseding indictment sufficiently alleges the requisite elements of a wire-fraud offense. See United States v. McGowan, 590 F.3d 446, 457 (7th Cir. 2009).

Defendant also disputes that R.T.S. was induced to enter into the lease through fraudulent means and that the government cannot prove a scheme to defraud. (Dkt #225, at 8–10.) The government contends that this argument, which depends on as yet unproven facts, is not permissible in a motion to dismiss under Federal Rule of Criminal Procedure 12. (Dkt. #231, at 2.) Rule 12 allows a district court to resolve only those motions "that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Fact-finding before trial risks "trespassing on territory reserved to the jury as the ultimate finder of fact in our criminal justice system." United States v. Pope, 613 F.3d 1255, 1259 (10th Cir. 2010) (Gorsuch, J.). Again, "[c]hallenging the government's ability to prove its case cannot lead to pretrial dismissal of a charge because summary judgment does not exist in criminal cases." United States v. Douglas, No. 05-cr-21-slc, 2005 WL 1514165, at *4 (W.D. Wis. June 27, 2005) (citing United States v. Thomas, 150 F.3d 743, 747 (7th Cir. 1998)). For all these reasons, defendant's first motion to dismiss Count 1 of the superseding indictment (dkt. #225) is DENIED.

3. Second Motion to Dismiss Count 1 (dkt. #226)

Defendant separately moves to dismiss Count 1 of the

superseding indictment for "prosecutorial vindictiveness." (Dkt. #226.) Alternatively, he asks for a hearing to permit him to present evidence of vindictive prosecution as a defense at trial. (Id.)

Specifically, defendant explains that he surreptitiously recorded a meeting with the government that occurred on March 12, 2024, in which there were plea discussions. (Dkt. #226, at 2.) During that meeting, Assistant United States Attorney Chadwick Elgersma represented that the original indictment containing 25 counts would "likely" be reduced to one count. (Dkt. #226, at 2.) Instead, the superseding indictment was reduced to two counts (Counts 1 and 2), which as discussed above were formerly charged in the original indictment as Counts 15 and 16. (Dkt. #2 and Dkt. #213.) By lodging two counts instead of one, defendant argues that the government is punishing him for recording the conversation, which was lawful for him to do under Wisconsin law.2 (Dkt. #226, at 2, 3- 4.) He argues, therefore, that Count 1 should be dismissed.

More specifically, defendant's claim of prosecutorial vindictiveness turns on his allegation that AUSA Elgersma told him during the plea negotiations that he recorded on March 12, 2024, that defendant was "not the target of additional investigations." (Dkt. #226, at 2.) Defendant argues that the government then falsely told the court in a letter dated March 18, 2024 (dkt. #187), that defendant had been advised that he was the target of additional investigations. (Dkt. #226, at 2.) Defendant contends that the recorded 2 Wis. Stat. § 968.31 makes it a Class H felony to intercept and disclose wire, electronic, or oral communications, subject to certain exceptions. Defendant appears to rely on Wis. Stat. § 968.31(c), which states that it is not unlawful "[f]or a person not acting under color of law to intercept a wire, electronic or oral communication where the person is a party to the communication or where one of the parties to the communication has given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the constitution or laws of the United States or of any state or for the purpose of committing any other injurious act." Whatever its legality may have been, settlement discussions are inadmissible as evidence under Fed. R. Evid. 408 and the defendant's recording those conversations without the other side's knowledge at best smacks of bad faith. Still, there appears no obvious harm that resulted, and the court will attribute it to defendant's poor judgment and lack of experience in such matters.

The government disputes defendant's version of the events and provides a transcript of the recording, which reflects that defendant

was told during plea discussions on March 12, 2024, that he was "now the target of additional investigations." (Dkt. #230-2, at 2.) The government argues further that the decision to include former Count 16 as Count 1 in the superseding indictment was not made until after it obtained a "native copy" of the email that defendant sent to R.T.S., confirming that defendant sent the email from his home in Eau Claire, Wisconsin, which was needed to establish venue with respect to the alleged scheme to defraud. (Dkt. #230, at 4.) The government states that it did not receive the metadata until April 10, 2024, well after it had held plea discussions with defendant on March 12. (Id.) The government argues, therefore, that defendant does not meet his burden to show that prosecutorial vindictiveness was a factor in its charging decision.

"[A] pretrial claim of vindictive prosecution is extraordinarily difficult to prove." United States v. Segal, 495 F.3d 826, 833 (7th Cir. 2007). "In the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" United States v. Armstrong, 517 U.S. 456, 464 (1996) (quoting Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978)). In assessing a claim of vindictive prosecution, "courts must begin from a presumption that the government has properly exercised its constitutional responsibilities to enforce the nation's laws." United States v. Jarrett, 447 F.3d 520, 525 (7th Cir. 2006) (citation omitted). "This 'presumption of regularity' in prosecutorial decision making can only be overcome by 'clear evidence to the contrary.'" Id. (quoting United States v. Armstrong, 517 U.S. 456, 463-64 (1996)).

Indeed, to prevail on a claim of prosecutorial vindictiveness, "a defendant must affirmatively show that the prosecutor was motivated by animus, such as a personal stake in the outcome of the case or an attempt to seek self-vindication." Jarrett, 447 F.3d at 525 (internal quotation marks and citation omitted). A defendant may do this by showing the decision to pursue an indictment was not based on the "usual determinative factors" that a responsible prosecutor would consider before bringing charges. Id. To make this showing, a court must be persuaded that the defendant would not have been prosecuted but for the government's animus or desire to penalize him. Id. It is only after the defendant meets this demanding standard that the burden shifts to the government to prove that the motivation behind the prosecutorial decision was proper. See United States v. Pittman, 642 F.3d 583, 586 (7th Cir. 2011).

Moreover, the government notes that it did not increase the

charges against defendant, but that it reduced the charges from 25 counts to only two. (Dkt. #230, at 7.) Since defendant has not begun to make a persuasive showing that he would not have been charged in Count 1, but for animus on the government's part, he has not established prosecutorial vindictiveness and further fails to show that a hearing is necessary. Accordingly, defendant's second motion to dismiss Count 1 of the superseding indictment (dkt. #226) is DENIED.

4. Request for a Bench Trial (dkt. #234)

Defendant has submitted a written waiver of a trial by jury, and he asks the court to approve the waiver under Federal Rule of Criminal Procedure 23(a) and hold a bench trial instead. (Dkt. #238.) The government opposes the defendant's request for a bench trial. (Dkt. #239.) Defendant asks the court to overrule the government's opposition because a bench trial is both in the defendant's best interests and would also serve the interests of judicial economy. (Dkt. 240, at 1.) Defendant emphasizes that his waiver is voluntarily made as part of his trial strategy, and he argues further that the government has no right to a jury trial, which belongs to defendant alone. (Id. at 2, 4.) While sympathetic to his arguments, defendant is mistaken on the law.

There is no constitutional right to a bench trial in a criminal proceeding. See Singer v. United States, 380 U.S. 24, 34 (1965) ("[T]here is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can . . . in some instances waive his right to a trial by jury."). Instead, a criminal defendant is entitled to a bench trial only if three criteria are met: "(1) the defendant waives a jury trial in writing; (2) the government consents; and (3) the court approves." Fed. R. Crim. P. 23(a). Although defendant has voluntarily waived his right to a jury trial in writing, and the court would have approved, the government plainly does not consent. As a result, this court cannot approve defendant's request for a bench trial. See Singer, 380 U.S. at 36 ("We find no constitutional impediment to conditioning a waiver of [the right to a jury trial] on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury — the very thing that the Constitution guarantees him.").

Accordingly, defendant's request to overrule the government's opposition and approve a bench trial (dkt. #240) is DENIED.

ORDER

IT IS ORDERED that defendant Robert Carter's pretrial motions (include dkt. #201, #219, #225, #226, and #240) are DENIED as set forth in this Opinion and Order.

Entered this 7th day of June, 2024

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge

APPENDIX M

Activity in Case 3:22-cr-00124-wmc USA v. Carter, Robert Text Only Order

From wiwd_ecf@wiwd.uscourts.gov <wiwd_ecf@wiwd.uscourts.gov>
Date Tue 4/30/2024 2:23 PM
To wiwd_nef@wiwd.uscourts.gov <wiwd_nef@wiwd.uscourts.gov>

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mailbox is unattended.

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U.S. District Court Western District of Wisconsin
Notice of Electronic Filing

The following transaction was entered on 4/30/2024 at 2:21 PM CDT and filed on 4/30/2024

Case Name: Case Number: Filer:

USA v. Carter, Robert 3:22-cr-00124-wmc

Document Number: 221(No document attached)

Docket Text:
** TEXT ONLY ORDER**

As discussed at today's Zoom status conference, the claims of the original indictment are DISMISSED WITHOUT PREJUDICE, and defendant's motion for discovery (dkt. # [217]) is DENIED WITHOUT PREJUDICE. Defendant may have until May 6, 2024, to file a brief responding to the government's position on materiality (dkt. #[218]), and the government may have until May 8 to file a reply brief. Defendant may have until May 6 to file any motions challenging Count 1 of the superseding indictment (former

Count 16), and the government may have until May 13 to file a response. Finally, the government may have until May 8 to file a response to defendant's request for an evidentiary hearing (dkt. #[219]). Signed by District Judge William M. Conley on 4/30/2024. (nln)

3:22-cr-00124-wmc-1 Notice has been electronically mailed to:

Megan Renee Stelljes megan.stelljes@usdoj.gov, CaseView.ECF@usdoj.gov, USAWIW.EFILE@usdoj.gov, andrea.erickson@usdoj.gov, bridget.fitzgerald@usdoj.gov,

gwen.mcgillivray@usdoj.gov, sharolyn.heiser@usdoj.gov Peter R. Moyerspeter@moyerslawfirm.com Chadwick Michael Elgersmachadwick.elgersma@usdoj.gov, CaseView.ECF@usdoj.gov, USAWIW.EFILE@usdoj.gov, jamie.frisch@usdoj.gov, jennifer.frank@usdoj.gov, sharolyn.heiser@usdoj.gov

Robert E. Carter robert.e.carter@outlook.com

3:22-cr-00124-wmc-1 Notice will be delivered by other means to::

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN
UNITED STATES OF AMERICA,

Plaintiff, **OPINION & ORDER**

v. 22-cr-124-wmc

ROBERT E. CARTER,

Defendant.

On October 12, 2022, a grand jury returned an indictment charging defendant Robert Carter with 17 counts of wire fraud (Counts 1–17), two counts of aggravated identity theft (Counts 18–19), and six counts of money laundering (Counts 20–25). Trial is scheduled for July 15, 2024. Carter has filed 12 pretrial motions that are before the court and resolved as set forth below. Accordingly, the hearing scheduled for March 28, 2024, will be converted to a status conference.

OPINION

1. Motion to Dismiss for Pre- and Post-Indictment Delay (dkt. #161)

Defendant moves to dismiss the indictment based on both pre- and post-indictment delays that he argues were caused intentionally and maliciously by the government, and specifically by former-Assistant U.S. Attorney Daniel Graber. With respect to pre- indictment delay, defendant argues that most of the conduct charged in the indictment occurred in 2018, and the government had all of the information it needed to pursue charges by 2019 at the latest. Nonetheless, the government waited until 2022 to file charges. In the interim, defendant argues, witnesses' memories faded, evidence was lost, and he was incarcerated for a time. With respect to post-indictment delay, defendant argues that the government's request for a protective order and restrictions on discovery have delayed his trial unreasonably.

As an initial matter, "the statute of limitations for a particular crime generally serves as a safeguard for defendants against unreasonable prosecutorial delay." United States v. Henderson, 337 F.3d 914, 919 (7th Cir. 2003). "So long as the indictment is sought

within the applicable time frame, and notwithstanding the possible loss of evidence or faded memories, the defendant will normally be able to defend himself adequately." Id. Here, the government brought charges within the applicable statutes of limitations.

That said, notwithstanding the government proceeding within the statutes of limitations, a defendant may establish a due process violation if prosecutorial delay caused actual and substantial prejudice to the defendant's right to a fair trial. Id. However, to prevail on such a motion, a defendant must show more than mere speculative harm and must establish prejudice with facts that are "specific, concrete, and supported by evidence." Id. at 920. "If a defendant makes the proper showing, the burden then shifts to the government to demonstrate that the purpose of the delay was not to gain a tactical advantage over the defendant or for some other impermissible reason." Id. (citations omitted). At that point, the government's reasons for any arguable delay are then balanced against the prejudice to a defendant to determine whether a due process violation occurred.

Here, defendant has failed to even make an initial showing of actual, much less substantial, prejudice from any pre-indictment delay. Rather, he offers vague allegations of faded memory and lost evidence, which fall far short of demonstrating a due process violation. Id. (loss of physical evidence not sufficient to show prejudice); see also Aleman v. Honorable Judges of the Circuit Court of Cook County, 138 F.3d 302, 310 (7th Cir. 1998) ("It is not enough simply to speculate ... that witnesses' memories might have faded because of the passage of time.") Defendant has not shown that any particular witness would have given materially different statements had they been interviewed earlier. Neither has he submitted evidence of what those statements would have been, nor explained why any gaps in memory or evidence would harm him, rather than the government. While he may certainly argue to the jury that the staleness of the evidence weakens its weight, the court will not intervene in its presentation to a jury.

As for post-indictment delay and defendant's speedy-trial arguments, the court considers: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) any prejudice the defendant suffered by the delay. United States v. Bell, 925 F.3d 362, 376 (7th Cir. 2019). As defendant points out, the first and third factors favor him, as a delay of more than one year is presumptively prejudicial, id., and he has asserted his speedy trial rights. This leaves the second factor (reasons for the delay) and fourth factor (prejudice).

As Magistrate Judge Crocker already explained in an earlier

order, the reasons for the delay in this case are "the extraordinary high volume of discovery, the government's legitimate need to redact sensitive information from its documents, the complexity of the evidence and the charges, and Carter's choice to defend himself pro se." (Dkt. #58.) In other words, the government is not wholly responsible for the delays. As for prejudice, the court generally considers whether defendant's Sixth Amendment interests have been prejudiced, including avoiding oppressive pretrial incarceration, minimizing anxiety and concern of the accused, and limiting the possibility that the defense will be impaired. *United States v. Harmon*, 721 F.3d 877, 883 (7th Cir. 2013). Here, defendant again fails to develop a persuasive argument as to how he has been prejudiced with respect to these interests. To the contrary, he merely recycles his vague argument about faded memory and his detention, but he was detained only for a short time and has now had more than a year since his release to prepare for trial.

Accordingly, the defendant has failed to show that the indictment should be dismissed due to pre- or post-indictment delay by the government and this motion is DENIED.

2. Motion for Grand Jury Transcript Production (dkt. #162)

In this motion, defendant requests discovery of grand jury transcripts regarding Counts 4, 6, 8, 9, 1214, 16, 18, 10, and 20–25. The government has now provided transcripts of the only witness [Eric Kopp] who testified before the grand jury (dkt. #178), so this motion is DENIED as moot.

3. Motion to Strike Prejudicial Surplusage (dkt. #163)

Defendant moves to strike certain statements from the indictment as "surplusage" on the ground that the language is immaterial, irrelevant and prejudicial. Because the government has notified the court that it intends to file a superseding indictment sometime in April 2024 that would moot this motion (dkt. #187), the court will RESERVE ruling on this motion and address it at the March 28 status conference.

4. Motion to Suppress Pre-Arrest Statements (dkt. #164)

Defendant moves for an order suppressing his pre-arrest statements under Miranda v. Arizona and the Fifth Amendment of the U.S. Constitution. The government has responded that it does not intend to use defendant's pre-arrest statements during its case- in-chief, so the motion to suppress will be GRANTED as unopposed, with the caveat that the government may be able to use defendant's pre-arrest statements for impeachment purposes only under Harris v. New York, 401 U.S. 222 (1971).

5. Motion for Substitution of Government Counsel Pursuant to Witness- Advocate Rule (dkt. #165)

Defendant's motion to substitute government counsel is DENIED as moot in light of Daniel Graber's retirement and withdrawal as counsel for the government. (Dkt. #183.)

6. Motion to Dismiss Commercial Negotiation Wire Fraud Counts (dkt. #166)

Defendant moves to dismiss Counts 4, 6, 8, 9 and 15 for failure to state an offense. Because the government has indicated an intent to file a superseding indictment that includes only Count 15 from among this list, the court will RESERVE as to defendant's arguments about Counts 4, 6, 8, and 9. As for Count 15, which charges a violation of the wire fraud statute, 18 U.S.C. § 1343, the defendant is alleged to have attempted to deprive Victim 4 of the possession and exclusive use of 10 semi-trucks by deceit regarding his negotiating position and by sending Victim 4 false financial statements.

The federal wire fraud statute criminalizes the use of interstate wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. To convict under the wire fraud statute, the government must prove not only that a wire fraud defendant "engaged in deception," but also that money or property was "an object of their fraud." *Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020). Here, defendant argues that the government is unable to show that "money or property" was the object of his alleged fraud. Rather, he asserts the evidence at trial would merely support finding his having deceived Victim 4 of valuable economic information, which is not a traditional property right "actionable" as wire fraud. Specifically, relying on the Supreme Court's ruling in *Ciminelli v. United States*, 598 U.S. 306 (2023), he points out that the federal wire fraud statute criminalizes "only schemes to deprive people of traditional property interests," and depriving someone of "potentially valuable economic information necessary to make discretionary decisions" is not a "traditional property interest." Id. at 309. Thus, defendant argues that his alleged action of deceiving Victim 4 regarding his finances resulted in, at most, a deprivation of "valuable economic information" that is insufficient to sustain a wire fraud conviction.

Defendant's argument misunderstands *Ciminelli* and the basis for Count 15 in this case, at least as the court currently understands it. In Ciminelli, the government was pursuing a theory that "mere information" was a protected property interest sufficient to sustain a wire fraud conviction. Id. at 316. However, the government is not

pursuing that theory here, nor would it be allowed to do so. Rather, Count 15 of the indictment charges the defendant of using false information in an attempt to deprive Victim 4 of a traditional property right: possessing and exclusively using 10 semi-trucks for 42 months. The other cases on which defendant relies are distinguishable for similar reasons.

Accordingly, defendant's motion to dismiss Count 15 will be DENIED.

7. Motion to Dismiss Wire Fraud Counts for Failure to State an Offense and Lack of Jurisdiction (Dkt. #167)

Defendant's next motion to dismiss Counts 12, 13, 14, 16, and 17 will be GRANTED as unopposed by the government (dkt. #194).

8. Motion to Dismiss the Money Laundering Counts for Failure to State an Offense (dkt. #168)

Defendant's motion to dismiss Counts 20–25 will also be GRANTED as unopposed by the government (dkt. #195).

9. Motion to Dismiss for Vindictive Prosecution (dkt. #169)

Defendant further moves to dismiss the indictment for vindictive prosecution or, in the alternative, for a hearing to permit him to present the vindictive prosecution defense at trial. He also requests an evidentiary hearing on the motion. In particular, defendant contends that former AUSA Daniel Graber targeted him for prosecution out of personal ill will and malice, as well as presented false information and omitted material information for the purpose of deceiving the grand jury. This motion will be DENIED.

The Attorney General and United States Attorneys retain "broad discretion" as to whom they prosecute, *Wayte v. United States*, 470 U.S. 598, 607 (1985), but the "Constitution prohibits the government from undertaking a prosecution based solely on a vindictive motive." *United States v. Jarrett*, 447 F.3d 520, 524 (7th Cir. 2006). Nevertheless, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely on his discretion." *Wayte,* 470 U.S. at 607 (emphasis added). As a result, prosecutorial decision making is entitled to "[t]he presumption of regularity," meaning that "in the absence of clear evidence to the contrary, courts presume that they have properly

discharged their official duties." *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Under this "rigorous standard," id. at 468, a claim of vindictive prosecution is "extremely difficult to prove." Jarrett, 447 F.3d at 526.

Even so, a prosecution may be considered vindictive where it "was pursued in retaliation for the exercise of a protected statutory or constitutional right," such as where a defendant succeeds in obtaining a reversal on appeal and the government brings more serious charges. *United States v. Cooper*, 461 F.3d 850, 856 (7th Cir. 2006). Otherwise, to succeed on a claim of prosecutorial vindictiveness, a defendant "must affirmatively show through objective evidence that the prosecutorial conduct at issue was motivated by some form of prosecutorial animus, such as a personal stake in the outcome of the case or an attempt to seek self-vindication." *Jarrett*, 447 F.3d at 525 (citations omitted). A defendant may do this by showing: (1) the decision to pursue an indictment was not based on the "usual determinative factors" that a responsible prosecutor would consider before bringing charges; and (2) the defendant would not have been prosecuted but for the government's animus or desire to penalize him. Id.

Although he may make a formal proffer at Thursday's status conference, defendant has made no such showing so far. Specifically, he does not allege that Graber brought this case, or increased the severity of the charges, because defendant exercised a constitutionally or statutorily protected right, such as filing a successful motion or appeal. Nor does he allege that Graber had a personal motivation or charged this case to vindicate an error or adverse outcome from an earlier proceeding. Instead, defendant alleges that Graber brought this case "to imprison the defendant for as long as possible." (Dft.'s mtn. (dkt. #169) at 2, 10.) However, "presence of a punitive motivation" does not make a prosecution vindictive. To the contrary, "[t]he imposition of punishment is the very purpose of virtually all criminal proceedings." *United States v. Goodwin*, 457 U.S. 368, 372–73 (1982).

The defendant's additional arguments related to the grand jury proceedings in this case are similarly insufficient to show vindictive prosecution. As the Seventh Circuit has explained, criminal defendants are not entitled to "a sort of mini-trial in front of the grand jury." *Jarrett*, 447 F.3d at 530. Again, to the contrary, so long as the indictment was "legally valid," the court will not "consider what was not presented to the grand jury as clear and objective evidence of vindictiveness by the prosecution." Id.

Finally, defendant's arguments about statements Graber made during hearings or in court filings do not show vindictiveness. Although Graber may have been "aggressive" in his prosecution of this case, at

least by the standards of this court, it nowhere approached any actionable misconduct under the ethics rules or expectation of professionalism established by the Seventh Circuit. Nor will this court police the way in which the government presents legitimate charges and evidence before the grand jury or this court.

For these reasons, defendant's motion will be DENIED, as will his request for an evidentiary hearing on the issue.

10. Motion for Bill of Particulars (dkt. #170)

Defendant also moves for a "bill or particulars," identifying 14 items that he says he needs in order to prepare an adequate defense.The purpose of a bill of particulars is to provide defendant with sufficient information about the charges to prepare an adequate defense and to protect the defendants against double jeopardy. Fed. R. Crim. P. 7; *United States v. Glecier*, 923 F.2d 496, 502 (7th Cir. 1991); see also *United States v. Vaughn*, 722 F.3d 918, 927 (7th Cir. 2013). However, "a bill of particulars is unnecessary where the indictment sets forth the elements of the charged offenses and provides sufficient notice of the charges to enable the defendant to prepare his defense." Id. at 927 (citation omitted).

Defendant's motion for a bill of particulars will be DENIED for at least two, additional reasons. First, most of the items requested by defendant appear related to counts that will be dismissed by the superseding indictment and, therefore, are unnecessary. Second, defendant has failed to explain why the indictment itself is insufficient, particular with regard to Count 15, which includes each of the elements of the charged offense and the time and place of defendant's alleged criminal conduct. To the extent defendant wants access to specific evidence, he already sought and obtained that through discovery, or should have done so. Indeed, given the volume of production by the government, the latter is very unlikely.

11. Request for additional discovery (Miranda and vindictive prosecution) (dkt. #177)

Still, defendant has filed a request for additional discovery relating to his motion to suppress under Miranda and his motion to dismiss for vindictive prosecution. As explained above, the government does not intend to use defendant's pre-arrest statements during its case-in-chief, and defendant's vindication prosecution motion is meritless for the reasons explained above. Therefore, defendant has not shown that he is entitled to additional discovery on these issues, nor why after a full year of preparation, he has not long since requested and obtained it to

the extent reasonable. Thus, this motion is also DENIED.

12. Defendant's Request for additional discovery (grand jury testimony) (dkt. #182)

Defendant's motion for additional discovery regarding those who testified before the grand jury is DENIED as well. As discussed above, the government has confirmed that Eric Kipp was the only witness to testify before the grand jury and produced Kopp's testimony already. Accordingly, defendant's motion seeking additional transcripts or evidence on grand jury testimony is DENIED as moot.

ORDER

IT IS ORDERED that defendant Robert Carter's pretrial motions are GRANTED, DENIED and RESERVED as set forth in this Opinion and Order.

Entered this 26th day of March, 2024
BY THE COURT:
/s/
WILLIAM M. CONLEY
District Judge