

UNITED STATES COURT OF APPEALS  
ELEVENTH CIRCUIT

---

No. 21-12255

---

UNITED STATES OF AMERICA  
Plaintiff-Appellee,

v.

CASEY DAVID CROWTHER  
Defendant-Appellant.

---

A DIRECT APPEAL OF A CRIMINAL CASE  
FROM THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF FLORIDA

---

BRIEF OF APPELLANT

KENT & McFARLAND  
ATTORNEYS AT LAW

WILLIAM MALLORY KENT  
Fla. Bar No. 0260738  
24 North Market Street, Suite 300  
Jacksonville, Florida 32202  
904-398-8000 Office  
904-662-4419 Mobile  
904-348-3124 Fax  
kent@williamkent.com

Counsel for Appellant Crowther

**CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

Crowther, Casey David – Defendant-Appellant

Dickerson, Brian E. – Trial Counsel for Crowther

Kent, William Mallory – Appellate Counsel for Crowther

Leeman, Michael V. – Assistant United State Attorney

McCoy, Hon. Mac – United States Magistrate Judge

Nebesky, Suzanne C. – Assistant United States Attorney

Reichling, Trenton – Assistant United States Attorney

Steele, Hon. John E. – Senior United States District Judge

Waid, Nicole Hughes – Trial Counsel for Crowther

**STATEMENT REGARDING ORAL ARGUMENT**

Crowther requests oral argument. This appeal presents a question of first impression in this Circuit concerning the proper interpretation of the loan requirements of the Paycheck Protection Program.

**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS. . . . . [C-1 of 1](#)

STATEMENT REGARDING ORAL ARGUMENT . . . . . [i](#)

TABLE OF CONTENTS . . . . . [ii](#)

TABLE OF CITATIONS . . . . . [iv](#)

STATEMENT OF JURISDICTION . . . . . [vii](#)

STATEMENT OF THE ISSUE . . . . . [1](#)

STATEMENT OF THE CASE . . . . . [2](#)

SUMMARY OF ARGUMENT . . . . . [22](#)

STANDARDS OF REVIEW . . . . . [24](#)

ARGUMENT . . . . . [26](#)

    BECAUSE MONEY IS FUNGIBLE, CROWTHER DID NOT VIOLATE HIS LOAN AGREEMENT OR HIS LOAN CERTIFICATION THAT PPP LOAN PROCEEDS WOULD BE USED TO PAY PPP AUTHORIZED EXPENSES (AND THEREBY DID NOT COMMIT BANK FRAUD OR MAKE A FALSE STATEMENT), SOLELY BECAUSE MONEY TRACEABLE TO THE PPP LOAN COULD BE SHOWN TO HAVE GONE TO NON-PPP AUTHORIZED EXPENSES WHEN CROWTHER NEVERTHELESS USED OTHERWISE FUNGIBLE MONIES TO MORE THAN SATISFY THE PPP LOAN USE REQUIREMENTS . . . . . [26](#)

CONCLUSION. . . . . [31](#)

CERTIFICATE OF COMPLIANCE . . . . . [33](#)

CERTIFICATE OF TYPE SIZE AND STYLE..... [33](#)  
CERTIFICATE OF SERVICE..... [33](#)

**TABLE OF CITATIONS**

**CASES**

*Burks v. United States*, 437 U.S. 1, 17-18, 98 S. Ct. 2141, 2150-51 (1978) . . . . . [31](#)

*Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) . . . . . [24](#)

*First Nat'l State Bank v. Commonwealth Fed. Sav. & Loan Asso.*, 610 F.2d 164, 171 (3d Cir. 1979) . . . . . [28](#)

*Holly v. Missionary Society of the Protestant Episcopal Church*, 180 U.S. 284, 293-94, 45 L. Ed. 531, 21 S. Ct. 395 (1901) . . . . . [28](#)

*In re Rubinstein's Estate*, 169 Misc. 273, 275, 7 N.Y.S.2d 311, 314-15 (Sur. Ct. 1938) . . . . . [28](#)

*Miller v. Wells Fargo Bank International Corp.*, 540 F.2d 548, 560 (2d Cir. 1976) . . . . . [28](#)

*New York State Association of Life Underwriters v. Superintendent of Insurance*, 37 A.D.2d 304, 307, 325 N.Y.S.2d 172, 175-76 (3d Dep't 1971), aff'd, 30 N.Y.2d 746, 284 N.E.2d 157, 333 N.Y.S.2d 173 (1972) . . . . . [28](#)

*Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) . . . . . [25](#)

*Thompson v. Keohane*, 116 S. Ct. 457, 464 (1995) . . . . . [25](#)

*Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 523 (2d Cir. 1990) . . . . . [26](#)

*United States v. Acosta*, 421 F.3d 1195, 1197 (11th Cir. 2005) . . . . . [24](#)

*United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158 (2d Cir. 1986) . . . . . [28](#)

*United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002) . . . . . [24](#)

*United States v. Heath*, 970 F.2d 1397, 1403-04 (5th Cir. 1992) . . . . . [28](#)

*United States v. Irej*, 612 F.3d 1160, 1165 (11<sup>th</sup> Cir. 2010) (*en banc*) . . . . . [24](#)

*United States v. Johns*, 984 F.2d 1162 (11<sup>th</sup> Cir. 1993). . . . . [25](#)

*United States v. Merrill*, 513 F.d 1293 (11<sup>th</sup> Cir. 2008). . . . . [25](#)

*United States v. Thompson*, 422 F.3d 1285, 1294-95 (11th Cir. 2005). . . . . [24](#)

*United States v. Voigt*, 89 F.3d 1050, 1085 (3d Cir. 1996) . . . . . [29](#)

**STATUTES**

15 U.S.C. § 636 . . . . . [3](#)

15 U.S.C. § 636(a)(36)(F) . . . . . [4](#)

18 U.S.C. § 1014 . . . . . [2](#)

18 U.S.C. § 1344 . . . . . [2](#)

18 U.S.C. § 1957 . . . . . [2](#)

28 U.S.C. § 1291 . . . . . [vii](#)

Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), P.L.  
116-136. . . . . [3](#), [13](#), [17](#), [19](#), [20](#), [22](#), [26](#), [29](#)

**REGULATIONS**

13 C.F.R. Part 120 . . . . . [3](#)

**RULES**

Rule 29, Fed. R. Crim. P. . . . . [19](#), [24](#)

Rule 33(a), Fed. R. Crim. P. . . . . [24](#)

**CONSTITUTIONAL PROVISIONS**

Double Jeopardy Clause of the Fifth Amendment. . . . . [31](#)

**OTHER AUTHORITIES**

United States Attorneys’ Manual, Civil Resource Manual, § 97 . . . . . [25](#)

## **STATEMENT OF JURISDICTION**

This court has jurisdiction over the appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court. The appeal was timely filed within fourteen days of entry of judgment.

**STATEMENT OF THE ISSUE**

**BECAUSE MONEY IS FUNGIBLE, CROWTHER DID NOT VIOLATE HIS LOAN AGREEMENT OR HIS LOAN CERTIFICATION THAT PPP LOAN PROCEEDS WOULD BE USED TO PAY PPP AUTHORIZED EXPENSES (AND THEREBY DID NOT COMMIT BANK FRAUD OR MAKE A FALSE STATEMENT), SOLELY BECAUSE MONEY TRACEABLE TO THE PPP LOAN COULD BE SHOWN TO HAVE GONE TO NON-PPP AUTHORIZED EXPENSES WHEN CROWTHER NEVERTHELESS USED OTHERWISE FUNGIBLE MONIES TO MORE THAN SATISFY THE PPP LOAN USE REQUIREMENTS.**

## STATEMENT OF THE CASE

Casey David Crowther (“Crowther”), the defendant below and appellant herein, went to trial on counts one through four of a superseding indictment charging him (1) in count one with bank fraud in violation of 18 U.S.C. § 1344 and § 2, (2) in count two with false statement to a federally insured lender in violation of 18 U.S.C. § 1014 and § 2, and (3) in counts three and four with illegal monetary transactions involving criminally derived property (the proceeds of the bank fraud in count one) in violation of 18 U.S.C. § 1957 and § 2. The conduct in count one was alleged to have occurred starting in April 2020 and continuing through the date of the superseding indictment, October 28, 2020, the false statement was alleged to have occurred on April 13, 2020, and the monetary transactions were alleged to have occurred on April 21, 2020 and April 24, 2020.

Crowther was the president of Target Roofing and Sheet Metal, Inc. (“Target Roofing”), a large and very successful commercial roofing company in Fort Myers, Florida that employed between 170-180 employees.<sup>1</sup> Crowther had a well established banking relationship with and was a valued customer of Sanibel

---

<sup>1</sup> Q Okay. And you would -- how many, at a normal time, employees does Target actually employ on the books? A About 170, 180. Q So 170 and 180 people at any given time; correct? A Yes. (Doc. 192-13)

Captiva Community Bank (“San Cap Bank”) before the events in question.

The novel coronavirus (“COVID-19”) pandemic had caused unprecedented disruptions to the way of life for the American people. In particular, many small businesses across the country had been effectively shuttered for nearly one month, with no apparent end in sight. President Trump had declared a national emergency March 13, 2020 and in response to the crisis, the federal government enacted emergency legislation, with the goal of affording some relief to American small businesses. Congress passed, and on March 27, 2020, President Trump signed, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), P.L. 116-136, “to provide emergency assistance and health care response for individuals, families, and businesses affected by the coronavirus pandemic,” Interim Final Rule, 13 C.F.R. Part 120.

Under the CARES Act, the Administrator of the Small Business Administration (the “Administrator”) had the authority “to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the COVID-19 emergency.” *Id.* at 3. Section 1102 of the CARES Act amended the Small Business Act (“SBA”), 15 U.S.C. § 636, and established the \$349 billion Paycheck Protection Program (“PPP”), under which participating lenders were authorized to make loans to eligible small businesses.

See P.L. No. 116-136, § 1102(a)(2).

Permitted uses of PPP loan proceeds were set forth in the CARES Act:

(F) Allowable uses of covered loans.

(i) In general. During the covered period, an eligible recipient may, in addition to the allowable uses of a loan made under this subsection, use the proceeds of the covered loan for—

(I) payroll costs . . .

(V) rent (including rent under a lease agreement);

(VI) utilities;

15 U.S.C. § 636(a)(36)(F).

Crowther's Target Roofing was one of millions of small businesses affected by the pandemic. The Government called as its witness Evelyn Portinari, Director of Human Resources for Target Roofing. On cross-examination she explained the impact COVID had on Target Roofing's business and payroll and the need for the PPP loan:

Q Okay. And then COVID hit; correct?

A Yes.

Q And was the company concerned about losing some of its largest projects?

A Yes.

Q And at that time that COVID hit in March, 2020, were construction sites being shut down?

A Yes.

Q And were inspectors -- they stopped inspecting sites for a period of time?

A That's correct.

Q And was the management team at Target concerned about the financial condition of the company?

A That's correct.

Q Did the management team have a meeting about the Paycheck Protection Program?

A Yes.

Q Okay. And can you tell the jurors what was discussed at that meeting?

A It was just discussed that the Paycheck Protection Program was going to be coming out, and that we were going to be applying for it.

Q Okay. And what was the reason that you were going to be applying for that money?

A For payroll.

Q For payroll. Okay. And it was to maintain employees; correct?

A Yes.

Q And, with that payroll monies, PPP money, would you be able to rehire employees?

A Yes.

Q Did you assist in the application process?

A Yes.

Q Did you gather documentation to actually submit to the Sanibel Captiva Bank?

A Yes.

Q And, as part of that documentation, did it include payroll records?

A Yes.

Q And was the reason that it included payroll records so that you could estimate how much payroll you would need to pay over, at first, an eight-week period?

A Yes.

(Doc. 192-23-25).<sup>2</sup>

---

<sup>2</sup> The PPP loan served its Congressionally intended purpose. The forensic CPA testified at sentencing what had happened to Target Roofing's payroll in the early weeks of the COVID pandemic - a dramatic decline - and what happened to the payroll after receipt of the loan - a dramatic return of employees on the payroll:

Q. So, in your analysis, can you tell us what occurs with the Target salaries in the weeks prior to the company receiving the PPP loan?

On April 13, 2020 Crowther applied for and on April 14, 2020 received a PPP loan in the amount of \$2,098,700.00. (Doc. 192-82). In his loan application and certification given to San Cap Bank he certified that the loan would be used for permitted PPP expenses (Doc. 191-10-11; Govt. Ex. 8; Govt. Ex. 10; Govt. Ex. 149)., and indeed Crowther's Target Roofing spent well over the aggregate loan amount on permitted PPP expenses. (Doc. 192-119-120).

However, the PPP loan proceeds were not segregated and earmarked by

---

A. Yes. So, starting around February timeframe when COVID really started to impact a lot of businesses, you'll see that the gross payroll is declining at a pretty rapid rate. So, in February of 2020, you're looking, in the beginning, at about \$130,000 in payroll per week. And, by the first week in April 2020, payroll had been cut down to approximately \$80,000 per week.

Q. Okay. And what occurs with the Target salaries once the company actually receives the PPP money?

A. Immediately after the company receives the PPP money, the salaries are restored and actually start to jump above where they were prior to receiving the PPP funds.

Q. And is that consistent throughout the covered period?

A. Yes, it is.

(Doc. 179-48-49).

The intent of Congress with the PPP loan program was to keep America's employees on the payroll and that is just what Crowther and Target Roofing did.

Crowther, and during the period alleged in the indictment, Crowther spent monies traceable to the PPP loan on expenses which were not permitted PPP loan expenses. The payments included (1) \$125,145.30 to pay off a Chase credit card which had both business and personal expenses charged to it, (2) a \$100,000 payment to Steve Adkins, Crowther's former business partner in payment toward the previously contracted buy-out of Adkins' interest in Target Roofing, and (3) a \$689,417 payment to Sara Bay Marina to purchase a boat. (Doc. 192-84-89).<sup>3</sup>

But Crowther separately, out of his own operating account, spent during the covered time period, far more than the PPP loan amount on expenses which *were authorized* to be spent from the PPP loan. The total of *allowable payroll expenses alone during the applicable period added up to over \$3,000,000.00* according to the Government's own financial summary witness, Diane Knott.<sup>4</sup> (Doc. 192-119-

---

<sup>3</sup> During this same two week time period Crowther paid payroll expenses totaling \$224,400.30. (Doc. 192-105). These payroll expenses were paid from Target Roofing's operating account *without* drawing from the account in which the PPP loan proceeds had been deposited. (Doc. 192-105). Rent and utilities totaling \$14,205.55 were also paid during this two week time period, and these expenses were also *not* taken from the PPP loan account, but out of Target Roofing's operating account. (Doc. 192-105-106). These were expenses authorized by the CARES Act to be paid from a PPP loan.

<sup>4</sup> “[Government Witness Diane Knott]: It's [payroll expenses], I come up with \$3,001,287.” (Doc. 192-119-120). The PPP loan amount was only

120).

Indeed, Crowther did not hide the boat purchase from San Cap Bank. When the bank asked him about it he readily explained that he would balance out the use of the loan funds to purchase the boat with the use of business and personal funds to make payroll obligations as required by the terms of the PPP loan:

Q [AUSA] All right. Now, with that in mind, I'll ask you the question I asked before but stopped you. Did you actually meet with Mr. Crowther somehow to discuss his purchase of the boat?

A [San Cap Bank Vice President Kyle DeCicco] We ended up not being able to meet in person. We ended up having a phone conversation.

Q Okay. And what did you tell Mr. Crowther about the purchase of the boat?

A The conversation had multiple facets of it. But the main part of the conversation was regarding to a loan application for the purchase of a home that he had --

Q Let me stop you there before we go there. Let's go back the boat for a second. What was the discussion as it related to the purchase of the boat?

A The blunt statement that I asked him was, your loan is over \$2 million. You're going to get audited. What are you going to do when you get audited?

Q How did Mr. Crowther respond?

A He very bluntly responded that he's going to prove that

---

\$2,098,700.

he used the funds for payroll. Over the approved period of time.

(Doc. 191-40).

And in a subsequent text message exchange with the bank officer:

Q [AUSA] Mr. DeCicco, could you state what date this text message was sent and who the speakers are by identifying the color of their text bubbles?

A Sent on May 19th. Mr. Crowther is in dark blue, I'm in gray.

Q Okay. And Mr. Crowther says?

A Mr. Crowther says: "I'm going to move my personal money I had to purchase the boat over to my SanCap account." My response: "Okay. Talk to Craig and make sure you guys are on the same page. Whatever you think is best."

Q Did he explain why he would want to move his personal money over to the SanCap account if there was no problems proving how much payroll he had spent?

A In a conversation over the phone before those text messages, when we were discussing it, and I stated what are you going to do when you get audited, and he said I'm just going to show that the funds were used for payroll. He also stated do you think it would be best if I could move money over to replace those funds? Would that look better? And my response was I don't see how that could be a bad thing, but please check with your CPA and your professionals before you do that.

Q All right. So your text here, it says -- could you read that?

A "Okay. Talk to Craig." Craig is his CPA.

(Doc. 191-41-42).

Kye DeCicco, Senior Vice-President and Senior Loan Officer at Sanibel Captiva Bank testified as a Government witness that even after the indictment and the time of trial, Target Roofing was not in default, the loan was in good standing, the bank had not declared a default, the bank was not a victim, the bank had not lost any money, and *Crowther had not misrepresented anything to the bank. He answered very specifically that the loan documents the Government predicated its fraud on did not contain any misrepresentation:*

Q The bank hasn't defaulted Target Roofing on this loan; correct?

A No, we have not.

Q Do you see the bank as a victim of this loan?

A No.

Q There's been no injury to the bank from this loan.

A No.

Q Do you feel there was any misrepresentations by Target Roofing with regard to the SBA loan application?

A No.

Q No? I couldn't hear you, sir.

A No.

Q And I'm simply referring, if you can look to it, Exhibit 6 and Exhibit 8.

A The two applications?

Q Correct. Do you see -- was there any misrepresentation in those documents from Target Roofing?

A No. The client, the borrower, filled out the application just as every one of our customers did, or had to.

Q And I'm going to get to that through those documents specifically, so we'll get that in a second. Has the SBA provided any notice to Sanibel Captiva Bank that this guaranty by SBA is ineligible, or that the SBA will not guarantee this loan?

A No, they have not. Not to my knowledge.

Q And let's go to your knowledge. You said before there's one person above you at Sanibel Captiva Bank; correct?

A Correct.

Q And you're the one in charge of the loans that were disbursed based upon the CARES Act.

A (Witness nods head up and down.)

Q So if there's anybody else in the bank to know, it would be you and one other person?

A Correct.

(Doc. 191-58-59).

Crowther's defense was simple - money is fungible, neither San Cap Bank, nor the SBA nor the CARES Act required segregation or earmarking of PPP loan funds, but permitted commingling of PPP loan proceeds with other monies of the borrower. Therefore Crowther explained to the bank and argued at trial and renews his argument in this appeal, that it was not a violation of the loan agreement or loan certification or the SBA regulations or the CARES Act for Crowther to spend monies, whether traceable to the PPP loan or not, on non-authorized expenses so long as he also expended a like amount on the required PPP expenses - which he did and more. (Doc. 192-119-120).

In opening statement Crowther explained his defense to the jury:

The government wants to change the rules. They want to add more stringent requirements that are not in the regulations that you will have with you in the jury room. You are going to see that there are no regulations requiring segregation of bank accounts. There's actually no requirement for the -- whether funds can be commingled or not commingled. There's no requirements that the loan proceeds are specifically earmarked, you have to use the ten dollars in your left pocket instead of the ten dollars in your right pocket. There's no requirements in those regulations that state any of those things, but the government wants to add those requirements, after the fact, and charge somebody with a federal crime for actually not following those requirements. The government must prove, beyond a reasonable doubt, that Mr. Crowther knowingly made a false statement on his loan application, and knowingly defrauded the bank. It's the government's burden. But the evidence is going to show that

only -- not only did Mr. Crowther follow the spirit of the law by paying his employees and spending it on forgivable expenses that could possibly be forgivable by the SBA, he followed the regulations while he did it. The government can't change the regulations now because they feel they didn't put in stringent enough requirements.

(Doc. 190-39-40).

The Government's own witnesses established that there was no requirement of segregation of PPP loan funds and no prohibition on commingling PPP loan funds with the borrower's other accounts. For example, John Miller, Deputy Associate Administrator in the SBA's Office of Capital Access testified:

Q [Defense Counsel] So when the lender then provided the funds to the borrower, was it required to be in a segregated account?

A [SBA Administrator Miller] The Act -- I don't recall anything requiring that.

Q And so if the borrower commingled it by not having a separated account, but just went directly to the operating account, that was permissible.

A I don't know about when you say commingling, but the --

Q Well, let me define it. Commingling is I have \$500,000 in my account right now. The bank then deposits the PPP money into that \$500,000 account. Now I have -- let's say it's a million-dollar loan -- a \$1.5 million balance.

A That would be permissible.

Q So there's no requirement to have a standalone account,

and it can be commingled with the other bank account.

A If your definition of commingling, yes, is that it's deposited into an account with other funds, then yes.

Q Okay. And then, for the loan, the borrower had, at first, eight weeks to use the loan proceeds for the eligible purposes if they wanted forgiveness.

A That's correct.

Q And then it extended to 24 weeks.

A Yes. Under the Flexibility Act, it was extended.

Q So if that money from the bank is deposited in the account, and they use all the money within the first 30 days, it's done. They don't go again. Right?

A That's correct.

Q If they hold onto that money, and they don't spend those proceeds until week 20 through 24, that's still eligible for forgiveness.

A Yes.

Q But if a company doesn't file for forgiveness, they just repay that loan; correct?

A That's correct.

(Doc. 190-186-187).

Similarly the San Cap Bank manager testified:

Q [Defense Counsel] The PPP regulations don't require segregation of

funds, do they?

A [Kristen DiIorio, San Cap Bank Manager] No.

(Doc. 191-153-154).

However, it was undisputed that Crowther spent far in excess of the PPP loan amount on permitted PPP expenses. The Government presented Diane Knott, a former IRS criminal agent, whom the Government employed to review and summarize Target Roofing's financial documents and expenditures. Knott testified:

Q [Defense Counsel on Cross Examination] And that's Exhibit 164 [Government Exhibit 164]. And what -- and again, is this exhibit --

A [Government Witness Diane Knott] What is the exhibit? The exhibit is a . . . just a reflection of the withdrawals to Workforce Business Services and the date that the transaction was made.

Q And Workforce Business Services is the payroll; correct?

A Correct.

Q So this is -- I'm just trying to clear the -- if we look at 4/20, that is the day that the payroll was paid, or processed? Do you know? For your summary?

A Since that has a column with check numbers in it, that means that they wrote a check to Workforce Business Services. [the payroll service company used by Target Roofing to do payroll] So you'd have to look at the actual check to see the date they wrote the check. That would be the date that the check

actually cleared the bank.

Q So the date is just the date of the check; correct?

A No. The date is the date that it cleared the bank.

Q All right. So, on your report here, summary, the date is when it cleared, the check number, but you don't have the date of the check.

A I could look at the actual check and look at the date of the check.

Q Okay. So you could make a review and make that determination.

A Sure.

Q Can you do this? Do you have the ability to total up any numbers on your summary report? I doubt you have a calculator or anything; correct?

A No, I don't.

Q Okay. What if you were to take from April 24th, 2020, the top of the chart, down to 8/13/2020,<sup>5</sup> what would be -- and I know you can't do it in your head. Do you know what the sum of those payroll expenses would be?

A Can I have a calculator?

Q I can give you my iPhone if you would like to use it.

---

<sup>5</sup> The time period permitted under the CARES Act to account for forgivable PPP loan expenses.

MR. REICHLING [AUSA]: I'm going to object. This is a waste of time. To use it to do calculations? What point is the defense trying to make here? I'm trying to figure it out.

THE COURT: Well, the objection is overruled. To the extent you've got a calculator and want to give it to her, or an iPhone with a calculator, you may do so

MR. DICKERSON [Defense Counsel]: Thank you, Your Honor.

(Mr. Dickerson provided an iPhone to the Courtroom Deputy, who cleaned it and provided it to the witness, who uses the iPhone to make mathematical calculations.)

THE WITNESS: Okay. It's a rough calculation. I didn't put in the pennies.

MR. DICKERSON: I accept that.

THE WITNESS: It's, I come up with \$3,001,287.<sup>6</sup>

---

<sup>6</sup> At sentencing the exact number was arrived at using total PPP authorized categories of expenditures during the 24 week window period, not just payroll, but also rent, utilities, etc. *The total of PPP authorized expenses Crowther and Target Roofing paid out was \$3,496,000 - \$1,397,300 dollars more than Crowther borrowed under the PPP loan.*

A. [Jessica Hollobaugh, CPA, Withum Smith & Brown] The covered period was a 24-week covered period. It started on the date that Target received the PPP loan, which was on April 14th, and so it ran through September 28th of 2020.

Q. [Defense Counsel] Okay. And what is the number of total forgivable or allowable expenses pursuant to your summary report?

(Doc. 192-118-120).

It was undisputed that permitted payroll expenses alone far exceeded the PPP loan amount. Because there was also no dispute that neither the bank, nor the SBA, nor the CARES Act and associated regulations required segregated accounts and earmarking of loan funds to permitted loan uses, Crowther argued that he satisfied the loan agreement and loan certification by fulfilling the authorized expense obligation during the term of the loan forgiveness provisions under the CARES Act.

Crowther filed a written motion for judgment of acquittal under Rule 29, Fed. R. Crim. P. (Doc. 123)., which the trial court summarily denied without

---

A. So I was able to quantify \$3,496,000 of expenses, which were expended on forgivable expenses. I will caution you, and we'll get into it a bit later, there are likely more, but I just couldn't quantify the full dollar amount based on the documents that had already been submitted at trial.

Q. Okay. And what was the PPP loan amount?

A. \$2,098,700.

Q. Okay. And could you tell us what the forgivable expenses paid in excess of that loan amount were?

A. \$1,397,300.

(Doc. 179-41)

elaboration. (Doc. 193-5).

The jury returned a guilty verdict on all counts. (Doc. 127).

Crowther renewed his motion for judgment of acquittal in a post-trial motion for new trial. (Doc. 140).

The District Court rather summarily denied relief.

Defendant now raises several arguments as to why a judgment of acquittal should be granted (Doc. #140, pp. 1-2), the majority of which involve the CARES Act. Defendant argues for acquittal on all four counts because (1) he and his company complied with the requirements of the CARES Act, (2) the CARES Act and the related interpreting rules are ambiguous, and therefore the rule of lenity applies, and (3) the ambiguity means defendant could not knowingly engage in criminal conduct. (Doc. #140, pp. 14-21, 27-28.). Similarly, defendant argues that the bank fraud and false statement convictions should be overturned because the ambiguous and confusing nature of the CARES Act and related requirements dictate that the government cannot prove the falsity of defendant's representations. (*Id.* p. 21-24.).

None of these arguments are persuasive. Defendant was not charged with violating the CARES Act. The four offenses relate to defendant's misrepresentations to secure a loan, and then the use of the loan proceeds for various monetary transactions. While the CARES Act and PPP were obviously relevant to the facts of the case, defendant's reliance on them for acquittal is misplaced.

(Doc. 155-2-3).

Crowther was sentenced to 27 months imprisonment on Counts I-IV to run concurrent to each other and to a sentence of 37 months imprisonment on Counts

V and VI,<sup>7</sup> followed by 36 months supervised release, restitution in the amount of \$2,068,700, and a forfeiture judgment in the amount of \$2,739,081.21. (Doc. 164).

This appeal followed in a timely manner thereafter both as to the criminal judgment and forfeiture. (Doc. 167).

---

<sup>7</sup> Crowther pled guilty to Counts V and VI, which charged a completely separate and unrelated bank fraud and false statement in connection with a home mortgage loan transaction. (Doc. 117).

## SUMMARY OF ARGUMENT

**BECAUSE MONEY IS FUNGIBLE, CROWTHER DID NOT VIOLATE HIS LOAN AGREEMENT OR HIS LOAN CERTIFICATION THAT PPP LOAN PROCEEDS WOULD BE USED TO PAY PPP AUTHORIZED EXPENSES (AND THEREBY DID NOT COMMIT BANK FRAUD OR MAKE A FALSE STATEMENT), SOLELY BECAUSE MONEY TRACEABLE TO THE PPP LOAN COULD BE SHOWN TO HAVE GONE TO NON-PPP AUTHORIZED EXPENSES WHEN CROWTHER NEVERTHELESS USED OTHERWISE FUNGIBLE MONIES TO MORE THAN SATISFY THE PPP LOAN USE REQUIREMENTS.**

The district court reversibly erred when it denied Crowther's motions for judgment of acquittal and motion for new trial. The Government's theory of prosecution was fundamentally flawed and the evidence was legally insufficient to support the verdicts.

Crowther borrowed approximately \$2 million under an SBA guaranteed PPP loan agreement. He represented and certified that he would use the loan for PPP permitted expenses which included payroll, rent and utilities. The PPP loan program permitted these expenditures to be made over a 24 week period. There was no restriction in the loan documents or under governing SBA regulations or the CARES Act that PPP loan funds be segregated and earmarked to PPP permitted expenses. Instead borrowers were permitted to commingle PPP loan funds with their own monies.

Crowther spent well over \$3 million on payroll alone, a PPP permitted loan expense, during the 24 week period covered by the PPP loan agreement.

That he paid personal expenses, including the purchase of a boat, from the account in which the PPP loan proceeds were deposited did not violate either his loan agreement or any certification he made in connection with the loan agreement.

The Government's theory of the case upon which Crowther was prosecuted was that because money traceable to the PPP loan proceeds was used for personal expenses, Crowther had violated his loan agreement and loan certification. This theory was fundamentally flawed because money is fungible, and barring any legal requirement that the PPP loan proceeds be segregated and earmarked in their use, and there was no such requirement, tracing PPP loan proceeds to personal expenses does not constitute a criminal violation of Crowther's loan agreement or certification given that Crowther indisputably expended almost a million dollars more than was borrowed on PPP permitted expenses, thereby fulfilling his obligation under the loan agreement and loan certification.

## STANDARDS OF REVIEW

We review the district court's denial of a motion for judgment of acquittal de novo, viewing the facts and drawing all inferences in the light most favorable to the government. *United States v. Descent*, 292 F.3d 703, 706 (11th Cir. 2002). To affirm the denial of a Rule 29 motion, we look to the evidence to determine whether it was sufficient to establish the defendant's guilt beyond a reasonable doubt. *Id.*

*United States v. Acosta*, 421 F.3d 1195, 1197 (11th Cir. 2005).

Ordinarily this Court reviews a district court's ruling on a motion for a new trial for abuse of discretion. *United States v. Thompson*, 422 F.3d 1285, 1294-95 (11th Cir. 2005). Rule 33(a), Fed. R. Crim. P., provides that "the court may vacate any judgment and grant a new trial if the interest of justice so requires."

But as Judge Carnes wrote for the majority *en banc* in *United States v. Irely*, 612 F.3d 1160, 1165 (11<sup>th</sup> Cir. 2010) (*en banc*), the deferential abuse of discretion standard does not mean that deference amounts to an abdication of appellate review nor does it mean discretion is unbridled.

Indeed, it is *per se* an abuse of discretion if a district court misapplies the law, as was done in this case. "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law . . ." *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

*Cooter & Gell* noted the difficulty in separating legal from factual

conclusions. “The Court has long noted the difficulty of distinguishing between legal and factual issues. See *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (“Rule 52(a) does not furnish particular guidance with respect to distinguishing law from fact. Nor do we yet know of any other rule or principle that will unerringly distinguish a factual finding from a legal conclusion”).” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990). This is especially so in this case in which the district court made what it styled findings of fact but which were legal assumptions, based on an incorrect application of the controlling law. See *Thompson v. Keohane*, 116 S. Ct. 457, 464 (1995). Cited in United States Attorneys’ Manual, Civil Resource Manual, § 97.

Conclusions of law are reviewed *de novo*. *United States v. Johns*, 984 F.2d 1162 (11<sup>th</sup> Cir. 1993). Mixed questions of law and fact are also reviewed *de novo*. *United States v. Merrill*, 513 F.d 1293 (11<sup>th</sup> Cir. 2008).

## ARGUMENT

**BECAUSE MONEY IS FUNGIBLE, CROWTHER DID NOT VIOLATE HIS LOAN AGREEMENT OR HIS LOAN CERTIFICATION THAT PPP LOAN PROCEEDS WOULD BE USED TO PAY PPP AUTHORIZED EXPENSES (AND THEREBY DID NOT COMMIT BANK FRAUD OR MAKE A FALSE STATEMENT), SOLELY BECAUSE MONEY TRACEABLE TO THE PPP LOAN COULD BE SHOWN TO HAVE GONE TO NON-PPP AUTHORIZED EXPENSES WHEN CROWTHER NEVERTHELESS USED OTHERWISE FUNGIBLE MONIES TO MORE THAN SATISFY THE PPP LOAN USE REQUIREMENTS.**

“The loan commitment agreement required . . . money, and money is the quintessential fungible.”

*Towers Charter & Marine Corp. v. Cadillac Ins. Co.*, 894 F.2d 516, 523 (2d Cir. 1990).

The Government’s theory of prosecution upon which Crowther was convicted was that because Crowther did not segregate the PPP loan proceeds in a separate account and earmark the proceeds to authorized PPP purposes, he had violated the terms of his loan agreement and loan certification by spending monies traceable to the PPP loan on expenses not authorized under the CARES Act. However, the most basic principle in economics is that money is fungible, and barring a requirement that the PPP loan proceeds be earmarked and segregated, which the Government and all of its witnesses agreed was not the case, Crowther

violated no law in spending funds traceable to the PPP loan for non-authorized expenses so long as he spent an equivalent sum of other monies for authorized purposes. The Government does not dispute that Crowther expended far more than the total PPP loan amount during the 24 week PPP loan forgiveness window period on PPP authorized expenses. Therefore, Crowther complied with the loan agreement and loan certification with respect to the required use of loan proceeds.

Counsel has been unable to find any case, including but not limited to any PPP loan case, which has held a borrower criminally liable for misuse of loan proceeds when the borrower spent the amount borrowed for the purpose set forth in the borrower's loan agreement. It defies reason to think that this could be a crime.<sup>8</sup> It certainly defies basic economic theory. Cases are legion which explain the fungibility of money:

Traditionally, courts have been reluctant to grant specific performance of agreements to lend or borrow money, inasmuch as money is intrinsically fungible.<sup>15</sup>

15 See Mehr & Kilgore, *Supra* note 1, at 1026 (footnotes omitted) ("Since money is considered as a commodity, there is a strong presumption against the uniqueness of

---

<sup>8</sup> Bad optics should not be permitted to make bad law. That a wealthy business owner buys himself a nice boat at the same time he takes out a PPP loan may not look good but it is not a crime, not so long as the business owner spends fungibly equivalent money - and more - for the purpose of the PPP loan.

the loan commitment, and the availability of substitute performance ordinarily is assumed.")

*First Nat'l State Bank v. Commonwealth Fed. Sav. & Loan Asso.*, 610 F.2d 164, 171 (3d Cir. 1979). *See also United States v. Heath*, 970 F.2d 1397, 1403-04 (5th Cir. 1992):

It defies logic to require that the Government trace these tainted funds through each transfer. Such proof is impossible because money is fungible.

*See also United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158 (2d Cir. 1986):

Appellants rely on the realities of banking practice and the law that has developed as a result. When a customer deposits funds into a bank account, his bank credits the account in an amount equal to the deposit. At any given moment, the credit balance of an account is the cumulative result of all transactions affecting the account. Banks are not bailees of their depositors' money, and a depositor may not replevy his money as a specific *res* or follow it into the hands of another bank customer, *see Holly v. Missionary Society of the Protestant Episcopal Church*, 180 U.S. 284, 293-94, 45 L. Ed. 531, 21 S. Ct. 395 (1901); *Miller v. Wells Fargo Bank International Corp.*, 540 F.2d 548, 560 (2d Cir. 1976); *New York State Association of Life Underwriters v. Superintendent of Insurance*, 37 A.D.2d 304, 307, 325 N.Y.S.2d 172, 175-76 (3d Dep't 1971), *aff'd*, 30 N.Y.2d 746, 284 N.E.2d 157, 333 N.Y.S.2d 173 (1972); *In re Rubinstein's Estate*, 169 Misc. 273, 275, 7 N.Y.S.2d 311, 314-15 (Sur. Ct. 1938).

For years in the context of criminal forfeiture, the Government has argued that because money is fungible, it is not required to trace and differentiate between

tainted and untainted money in bank accounts. *See e.g., United States v. Voigt*, 89 F.3d 1050, 1085 (3d Cir. 1996):

The government's principal contention is that money is fungible, making it impossible to differentiate between "tainted" and "untainted" dollars in a bank account. The government also advances what is clearly a policy argument, contending that interpreting the term "traceable to" to require even some tracing "would perversely permit money launderers to escape with all of their proceeds intact simply by commingling such tainted proceeds with untainted sums--a result Congress could not have intended." Government's Br. at 53.

Crowther's loan application and agreement and his loan certification stated that the loan would be used for permitted PPP loan purposes, which included payroll, rent and utilities. The governing loan agreement, SBA regulations and the CARES Act gave Crowther 24 weeks to obtain complete loan forgiveness for all amounts he spent toward authorized expenses. Nothing in the loan agreement, loan documents, SBA regulations, or the CARES Act itself required Crowther to segregate the PPP loan and trace all such expenditures to a segregated account. It was lawful and consistent with his loan agreement and loan certification to treat the PPP loan proceeds as if they were commingled with his personal and business accounts, and to pay personal expenses from funds traceable to the PPP loan and pay forgivable PPP authorized expenses from his personal or business account, as he did. By insuring that he spent the full amount and more on PPP authorized

expenses during the 24 week forgiveness period, Crowther complied with this loan agreement and loan certification. His actions did not amount to even a breach of contract with the bank much less rise to the level of a criminal fraud. Accordingly, the evidence was legally insufficient to support the verdicts.

## CONCLUSION

This Court should grant a judgment of acquittal on Counts I and II based on the arguments above and vacate the convictions on Counts I and II; once acquittal is granted on Counts I and II then Counts III and IV must be vacated because they were predicated on proof of criminal conduct in Counts I and II. The restitution order and forfeiture judgment was predicated on the criminal conviction therefore they too must be vacated.

Because the convictions must be set aside because the evidence was legally insufficient, retrial is barred by the Double Jeopardy Clause of the Fifth Amendment.

In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person "waives" his right to a judgment of acquittal by moving for a new trial. See *Green v. United States*, 355 U.S., at 191-198. Moreover, as *Forman*, 361 U.S., at 425, has indicated, an appellate court is authorized by § 2106 to "go beyond the particular relief sought" in order to provide that relief which would be "just under the circumstances." Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal. To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.

*Burks v. United States*, 437 U.S. 1, 17-18, 98 S. Ct. 2141, 2150-51 (1978).

Although Crowther has not challenged his *convictions* on Counts V and VI in this appeal (unrelated conduct for which he pled guilty prior to trial on Counts I-IV), the case must be remanded for resentencing on Counts V and VI because the guideline range upon which Crowther was sentenced on Counts V and VI was based on the loss amount under Counts I and II. A corrected guideline range would or could result in a time served sentence.

Respectfully submitted,

KENT & McFARLAND  
ATTORNEYS AT LAW

s/ William Mallory Kent  
WILLIAM MALLORY KENT  
Florida Bar Number 260738  
24 North Market Street, Suite 300  
Jacksonville, Florida 32202  
904-398-8000  
904-348-3124 Fax  
kent@williamkent.com

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains ca. 7,296 words.

**CERTIFICATE OF TYPE SIZE AND STYLE**

Counsel for Appellant certifies that the size and style of type used in this brief is 14 point Times New Roman.

**CERTIFICATE OF SERVICE**

I hereby certify that on February 22, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/ William Mallory Kent

William Mallory Kent