In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 09-2476

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

AZUREEIAH O'CONNOR,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 05 CR 672 — Elaine E. Bucklo, *Judge*.

BRIEF AND APPENDIX OF THE UNITED STATES

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Defendant's jurisdictional statement is complete and correct.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in denying the motion to dismiss the indictment for a Speedy Trial Act violation where: (i) the challenged ends of justice exclusion of time was supported by the record both at the time of the exclusion and at the time the motion was denied, and (ii) the record also supports alternative bases for exclusions of time during that same time period.

2. Whether arguments attacking the district court's exclusions of time from the Speedy Trial Act clock made for the first time on appeal are waived, where defendant made a pretrial motion to dismiss the indictment for violation of the Speedy Trial Act but, in that motion, never attacked the exclusions of time she now challenges on appeal; and, even if subject to review, whether plain error warranting reversal occurred where the newly challenged exclusions of time were sufficiently supported by the record so that well under seventy days elapsed and evidence of defendant's guilt was overwhelming.

3. If a violation of the Speedy Trial Act occurred, whether the only proper determination is dismissal with prejudice, where (i) defendant was charged with a massive mortgage fraud scheme; (ii) the bulk of the trial continuances were requested by defendant and her codefendants; (iii) the administration of justice

would not be hindered by a four day retrial; and (iv) defendant did not suffer prejudice.

4. Whether there was a violation of defendant's constitutional right to a speedy trial where (i) the bulk of the trial continuances were requested by defendant and her codefendants, (ii) defendant never demanded her right to a speedy trial until the eve of trial, (iii) there is no evidence the government intended to hamper her defense, and (iv) evidence supporting defendant's guilt is overwhelming.

5. Whether defendant waived her challenge to the jury instructions; and, if not, whether the district court committed plain error that probably changed the outcome of the trial by giving the Seventh Circuit's pattern joint venture and wire fraud instructions.

6. Whether the evidence of defendant's knowledge and intent to defraud, when viewed in the light most favorable to the government, was sufficient to sustain the jury verdict.

7. Whether the district court abused its discretion by submitting the wire fraud indictment to the jury without striking the list of all defendants charged from the caption, and whether the court committed plain error by providing the jury with the allegations of the wire fraud scheme with which defendant was charged.

STATEMENT OF THE CASE

On July 27, 2005, defendant and eight others were indicted in a thirteen count indictment charging violations of 18 U.S.C. §§ 1014, 1341, 1343 and 2. R1.[1]

On December 31, 2008, defendant moved to dismiss the indictment for a Speedy Trial Act violation. R389. On January 5, 2009, the district court denied the motion. R391.

On January 5, 2009, defendant's jury trial began on Count Six, and, on January 9, 2009, defendant was found guilty. R391, 400. On June 5, 2009, the court sentenced defendant to fifty months' imprisonment. R439.

STATEMENT OF FACTS

Pretrial Overview

On July 27, 2005, defendant O'Connor and eight others were indicted in a thirteen count indictment charging wire and mail fraud, filing false loan applications, and aiding and abetting, in violation of 18 U.S.C. §§ 1014, 1341,

[1]Citations to the Original Record on appeal are designated "R" followed by the document number. References to pretrial and post-trial proceedings are designated by the date of the proceeding followed by "Tr" and the page number. References to the trial transcript are designated "Tr" followed by the page number. Defendant's brief is cited as "Br" followed by the page number. Defendant's Appendix is cited as "DefAppendix" followed by the item number.

1343 and 2.[2] R1. The indictment alleged that O'Connor and her codefendants participated in a "massive mortgage loan fraud" scheme that lasted from September 2000 to January 2003, involved thirty-five fraudulent loans, and defrauded over fifteen financial institutions of over $6,000,000 in mortgage loan proceeds. *United States v. Cross*, 273 Fed.Appx. 557, 2008 WL 1723325 (C.A. 7 (Ill.)(unpublished slip op., Appendix A); R1.

Following return of the indictment, the government produced voluminous discovery to defendants, including four "very big" boxes containing over ten thousand pages of primarily financial documents and several compact discs. 9/2/05Tr4; 10/28/05Tr4; 12/14/06Tr2-4. At an early status, the government predicted trial would last two to three weeks; defense counsel estimated four weeks. 10/28/05Tr5-9. On account of the large-scale nature of the discovery and fraud alleged, defense attorneys from the outset requested additional months for filing pretrial motions, and maintained that several months would be required for trial preparation. 9/2/05Tr4; 10/28/05Tr4-9; 12/14/06Tr2-3.

During a large part of the pretrial period, the court had to juggle the trial schedules of nine attorneys, as well as address numerous motions, including motions for bond, suppression of evidence, dismissal of the indictment, and

[2]The indictment also included forfeiture allegations against defendants other than O'Connor. R1.

substitution of counsel (including substitution motions by defendant O'Connor, who had three different attorneys pretrial). R51, 54, 58-66, 80, 88-90, 110, 112, 128, 147-48, 153, 159; 10/28/05Tr6-8; 1/5/06Tr3-18; 3/7/06Tr2-5; 3/17/06Tr3-10; 5/12/06Tr3-9; 12/8/06Tr5-15; 12/14/06Tr2-7; 1/5/07Tr2-19; 1/12/07Tr2-11; 5/11//07Tr2-8; 1/15/08Tr2. In setting schedules, the court also had to accommodate the challenges presented by the illnesses of close relatives of witnesses and defense attorneys (including surgery on the father of defendant's lawyer which necessitated rescheduling trial). R323, 325; 1/15/08Tr2-9; 9/4/08Tr5-10.

Nine defendants remained in the case for trial through December 2006, when several pled guilty. R126, 136, 138, 143-44. *See also* R154, 161. The district court later described one of these guilty pleas as "perhaps the longest plea declaration I have ever heard." 12/14/06Tr3.

Thus, pared down, this remained a two-defendant case until March 6, 2008, when – after over a year of trial continuances sought by the defense – O'Connor's remaining codefendant pled guilty to a superseding information. R147-48, 153, 159, 162, 233, 323, 325, 332; 1/5/07Tr2-14; 1/12/07Tr2-11; 5/11/07Tr2-8; 1/15/08Tr2-9. Following continuances thereafter for reasons including the trial schedules of defendant O'Connor's attorney and the government, and the illness of a witness' newborn, defendant O'Connor's trial

began on January 5, 2009. R352, 369; 5/1/08Tr3-6; 5/9/08Tr21-22; 9/4/08Tr5, 9-10.

Trial

While defendant O'Connor's role in the mortgage fraud scheme was described by incorporation in every count of the indictment, she was charged in Counts Six and Nine alone, with wire fraud in violation of 18 U.S.C. §§ 1343 and 2. R1. The government dismissed Count Nine prior to trial. 3/24/08Tr2, 13. Because she alone went to trial, and the government was able to introduce its documentary evidence without witness testimony, pursuant to Federal Rule of Evidence 902(11), the trial lasted four days only. R358, 391, 392, 395, 397. The jury found defendant guilty as charged. R400.

The evidence, which consisted of financial records, "straw buyer" testimony, and defendant's own admissions, showed defendant O'Connor's participation in a large-scale mortgage fraud scheme. Tr103-579; R440. The scheme featured codefendant Shaun Cross as the mastermind; other defendants as "recruiters" who enlisted straw buyers to put mortgages fraudulently in their names; and defendant herself as an important financial institution insider who helped the fraudulent loans get approved by the victim lending institutions. Tr103-579; R440.

Specifically, Cross operated the scheme by either directly, or through his "recruiters," asking various individuals, including many who testified at trial, if they were interested in investing in real estate or simply if they were interested in making money. Tr212-14, 270-73, 340-41, 391-95, 463-64, 537-40. If they agreed and had good credit, these individuals became straw buyers in whose names Cross and his coschemers, including defendant, arranged to obtain loans (initially to purchase properties, later solely for the purpose of securing loan proceeds). Tr114-47, 212-50, 270-78, 288-93, 306-07, 310-11, 340-65, 393-416, 463-65, 470-71, 538-53; R440:9-10.

Cross offered – and paid – straw buyers $5,000, per transaction, for letting Cross use their names and social security numbers, and some were required to sign certain mortgage loan documents. Tr154-64, 212-30, 240, 248, 251-52, 256, 271-85, 293, 298-300, 311-50, 393-415, 463-69, 471-73, 538-64; R440:9-12. Cross and the recruiters told the straw buyers that Cross would take care of all the financial obligations including mortgage payments. Tr106, 212-30, 232, 272, 280, 285, 287, 341, 537-38, 543, 545-46, 550. Once a straw buyer agreed, Cross arranged the preparation of loan packages containing the application and accompanying false information indicating creditworthiness for the unqualified straw buyer. Tr230-50, 286, 293-303, 306-13, 343-64, 396-415, 419-27, 542-43, 547-48, 550-51, 553-64; R440:12-51.

At the time her codefendants were recruiting straw buyers and putting together fraudulent loan packages, defendant O'Connor was a loan officer at Express Mortgage Company and Home First Mortgage Company, licensed mortgage brokers. Tr104, 114-43. After learning from Cross that he purchased properties in the names of others and paid the mortgages on those properties, defendant began accepting the fraudulent loan packages from Cross, in return for on-the-side payments from Cross totaling at least $20,000. Tr105-47, 164-70. Defendant processed seven fraudulent loan packages and forwarded them on to lenders for funding, knowing that the identities of the borrowers and financial information in the loan packages were not those of Cross, the real purchaser. Tr105-47. Defendant also indicated on these loan packages (by her signature or simply her typed name) that she had interviewed the straw buyers face-to-face when she had not. Tr 106-12, 115, 121, 124, 127, 131, 135, 140, 232, 242, 249, 286-87, 302, 358, 560; R440:51.

Lending institutions approved and funded the loans processed by defendant O'Connor. Tr106-07, 112-47, 233, 292-93. Cross failed to make sufficient mortgage payments on the properties, and the financial institutions placed the loans in default. Tr143, 233, 288-93, 416-19, 553.

Sentencing

At sentencing, the government produced evidence that, while on pretrial release, defendant committed further mortgage fraud, obtaining three mortgage loans by making false representations to lenders and defaulting on those loans. R424. The court found that defendant had not been truthful with respect to these mortgages and had lied to Pretrial Services, the Probation Department, and the court. 6/5/09Tr57-61. Based on these findings, as well as its conclusion that defendant was not an "innocent" and was "absolutely part and parcel" of the fraud scheme, and its belief that if the defendant were allowed to "walk out of here [right now], . . . [she] would go out and commit more crimes," the court sentenced defendant to fifty months' imprisonment. *Id.* 60-62.

SUMMARY OF THE ARGUMENT

Placed in the context of this multi-defendant, multi-count, massive mortgage fraud case, defendant's Speedy Trial Act arguments fail. The district court properly denied defendant's motion to dismiss the indictment. The September 4, 2008 ends of justice exclusion of time was amply and timely supported by the record. Alternatively, the record further supports other bases for exclusions of time during this same period. Defendant's attacks on the court's other ends of justice exclusions of time were never made below and thus

are waived. Even if subject to appellate review, they do not give rise to plain error warranting notice on appeal.

Even if there were a Speedy Trial Act violation, dismissal of the indictment should not be with prejudice, and, at least, there should be a remand on the issue, since: defendant was charged with a massive mortgage fraud scheme; most of the continuances were requested by the defense; the administration of justice would not be hindered by a four-day retrial; defendant did not suffer prejudice; and evidence of defendant's guilt was overwhelming. These same reasons indicate that there was no violation of defendant's constitutional right to a speedy trial, much less plain error warranting notice by this Court.

Defendant's jury instruction argument also fails. First, defendant waived the argument since she agreed to the very instructions she now challenges. Second, even if reviewable, the district court did not err, much less commit plain error. The court properly gave the pattern wire fraud and joint venture instructions since this case involved nine co-schemers who played various roles. Further, the evidence of defendant's guilt was substantial, and defendant cannot show that the claimed error affected the outcome of the trial.

The evidence of defendant's knowledge and intent to defraud, when viewed in the light most favorable to the government, was more than sufficient to

sustain the verdict. Defendant's alleged belief that Cross would make the mortgage payments and lenders would suffer no losses is irrelevant. The relevant evidence – particularly evidence that she lied on the loan documents about interviewing the applicants and by submitting them in the names of straw buyers and that she received $20,000 from Cross for processing these loans – provided ample evidence of fraudulent intent.

Finally, the district court did not abuse its discretion by submitting the wire fraud indictment to the jury without striking from the caption the list of all defendants as charged. Nor did the court commit plain error by providing the jury with the complete wire fraud allegations returned by the Grand Jury. The jurors were instructed that the indictment was not evidence and that they should not speculate why persons identified in the indictment were not on trial. There is no basis on which to believe the jury failed to follow these instructions.

ARGUMENT

I. The District Court Properly Denied Defendant's Motion to Dismiss the Indictment Pursuant to the Speedy Trial Act, Made Other Exclusions of Time that are Not Subject to Review on Appeal and, Even If Reviewable, Do Not Constitute Plain Error, and, Even if A Speedy Trial Act Violation Occurred, the Indictment Should Not be Dismissed with Prejudice.

The Speedy Trial Act, 18 U.S.C. § 3161, requires that a defendant be tried within seventy days of the filing and making public of an indictment, or from the

date the defendant has appeared before the judge, "whichever date last occurs." Failure to bring a defendant to trial within seventy days results in the dismissal of the indictment on the defendant's motion. *Id.* § 3162(a)(2). Various time periods are subject to exclusion from the Act's seventy-day clock. *See id.* § 3161(h).

Defendant points out that her four-day, one-count trial occurred over three years after arraignment, and offers many arguments to show improper exclusions of time by the district court and a resulting violation of the Speedy Trial Act's seventy-day limit. However, as discussed in the Statement of Facts, and as recognized by this Court in deciding codefendant Cross' sentencing appeal, defendant's case did not start out as a one-count, single defendant trial; rather it was part of, and indicted as, a "massive mortgage loan fraud" scheme that included charges against nine defendants, and involved over six million dollars in fraudulent loans, over thirty financial transactions on seventeen properties in the names of seventeen different straw buyers, over fifteen victim financial institutions, substantial discovery including thousands of financial documents, and an anticipated trial length of at least two to three (if not four) weeks. *See United States v. Cross*, 273 Fed.Appx. 557, 2008 WL 1723325 (7th Cir. 2008)(unpublished slip op., Appendix A). The case remained one of such "massive" proportion until January 2007 (over one year after indictment) when

seven of the defendants pled guilty. R126, 136, 138, 143-44, 154, 161. Further, as defendant concedes, over one year of the continuances in the trial date that occurred after these seven codefendants had pled guilty (from January 2007 through March 24, 2008) were at the request of her and her remaining codefendant's counsel, and were properly excluded from the speedy trial clock. Br23 fn.9.

Placed in the context of this large-scale fraud case and its record, defendant's Speedy Trial Act arguments fail because (i) only one of defendant's numerous arguments was raised below and preserved for appeal, and that argument lacks merit; (ii) the remaining arguments have been waived since they were not raised in the pretrial motion to dismiss the indictment as required by the Act; and (iii) even if these arguments are reviewable, they may be reviewed for plain error only and no such error warranting reversal has been shown.

A. Standard of Review

A district court's denial of a motion to dismiss the indictment for violation of the Speedy Trial Act is reviewed *de novo*. *United States v. Pansier*, 576 F.3d 726, 732 (7th Cir. 2009). Legal conclusions are reviewed *de novo* and factual findings for clear error. *United States v. Loera*, 565 F.3d 406, 411 (7th Cir. 2009).

Speedy Trial Act arguments not raised in a motion to dismiss the indictment are waived, *see infra* Argument I.B.2, or, at most, reviewable for plain error, which requires that defendant show the existence of error, that it was plain, and that it affected the defendant's substantial rights. *United States v. Olano*, 507 U.S. 725, 732-35 (1993). Even then, the appellate court should exercise its discretion to notice plain error only if the error "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Id.* 736.

B. Analysis

1. Motion to Dismiss Indictment Was Properly Denied

The only one of defendant's Speedy Trial Act arguments properly preserved for appeal is her argument challenging the district court's denial of her motion to dismiss the indictment for an alleged Speedy Trial Act violation occurring between September 4, 2008 and January 5, 2009. Defendant's challenge to the exclusion of time between September 4, 2008 and the start of trial on January 5, 2009, and her accompanying claim that over seventy days of includable time passed during this period, fails for two reasons. First, the court's ends of justice exclusion of time between September 4, 2008 and January 5, 2009, was proper. Second, even if improper, sufficient time was nonetheless excludable so as to avoid a violation of the Act due to the unavailability of an essential witness, pursuant to 18 U.S.C.§ 3161(h)(3), and

pending motions, hearings and other proceedings, pursuant to 18 U.S.C. § 3161(h)(1).

(a) Background Facts

On September 4, 2008, the government alerted the court that witness Dana Powell, a straw buyer whose testimony was essential to the government's case, could not attend the trial scheduled for September 22, 2008, because her newborn infant was very sick and, pursuant to doctor's orders, Powell could not leave the house. 9/4/08Tr5-6,9. At the time, the government did not know when Powell would be available for trial. *Id.* 8-9.[3] The court had no trial dates available until January 2009, but planned to put the case on back-up to call it for trial as soon as a date became available during 2008. *Id.* 10. Defendant's counsel objected to a back-up schedule, explaining he had various matters requiring his attention and that he could not be available on a back-up basis.[4] *Id.* The court set trial for January 5, 2009. *Id.* The court issued a minute order on September 4, 2008, excluding time from September 4, 2008 to January 5,

[3]Later, in response to defendant's motion to dismiss the indictment, the government filed an affidavit from Powell confirming the government's representations at the status and also indicating that, under doctor's orders, she was unable to leave her home until December 11, 2008. R390:Attachment.

[4]The government explained that it would be difficult to have all its witnesses, especially those from out-of-town, available on a back-up basis, but suggested it might be possible if there was sufficient notice. 9/4/08Tr10.

2009, "in the interest of justice for trial preparation under 18:3161(h)(8)(B)(iv)." R369(now § 3161(h)(7)(B)(iv)).

On December 31, 2008, defendant moved to dismiss the indictment on Speedy Trial Act grounds. R389. Defendant claimed only that at the September 4, 2008 status, no order was issued or finding made to exclude time from September 4, 2008 through the start of trial. *Id.* Defendant argued that since more than seventy includable days had run between September 4, 2008 and the start of her trial on January 5, 2008, the indictment must be dismissed. *Id.* On January 5, 2009, before trial began, the court denied defendant's motion. Tr2-3; R391. The court reasoned that its September 4th minute order stated that time was excluded in the ends of justice for "trial preparation" and that the record of the September 4th status made clear her basis and findings:

> [I]t was pretty clear I thought from the hearing that the reason for continuing the trial was that a witness was both essential and unavailable. That at the time was on the representation of the government, but it's been supplemented by an affidavit. I could have done the trial earlier, as I think I made clear at that hearing. I'd said it would have to be on backup, and, as always happens, of course, we could have done it at some point. But you did not want a backup date, which I understand, and you readily agreed to the January 5 date.

Tr2. The court further determined that she also could put her findings on the record now:

> [T]o make sure this is very specific, the government represented and we talked about at that hearing why this witness was very important, and the government explained the importance and gave a good explanation, which is supported by the record, as to why this witness was unavailable, that she had recently had a baby, the baby's health did not allow her to leave; and therefore, that was why I granted the continuance. It's obvious that's why I granted the continuance, but for that same reason I think the time is properly excludable.

Id. 2-3.

(b) The District Court Properly Excluded Time Between September 4, 2008, and January 5, 2009, in the Ends of Justice.

On appeal, defendant challenges this exclusion of time, arguing that the district court failed to make express findings regarding the ends of justice exclusion at the time she made it on September 4th. Defendant also contends that the court's findings on January 5, 2009 (when denying defendant's motion to dismiss) were provided too late and amounted to a prohibited after-the-fact justification. Br26-28. Defendant's arguments lack merit.

A judge may grant an excludable continuance of trial upon finding that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(7)(A). The factors a judge must consider in deciding whether to grant an "ends of justice" exclusion of time include whether the failure to grant such a continuance "would unreasonably deny the defendant or the Government continuity of counsel,

or . . . the reasonable time necessary for effective preparation, taking into account the exercise of due diligence." Id. § 3161(h)(7)(B)(iv).

An "ends of justice" exclusion of time can be granted "by any judge on his own motion," but the court must make its findings on the record orally or in writing. *Id.* § 3161(h)(7)(A). While "the better practice is for the court to make the required findings at least prior to a defendant's motion to dismiss the indictment for a violation of the Act," the findings need not be made contemporaneously with the continuance and may be put on the record at the time the court rules on a defendant's motion to dismiss. *United States v. Larson*, 417 F.3d 741, 746 (7th Cir. 2005). *See also Zedner v. United States,* 547 U.S. 489, 507 (2006); *United States v. Rollins*, 544 F.3d 820, 830 (7th Cir. 2008). Here, the district court set forth its reasons for the ends of justice exclusion on September 4, 2008 (when ordering the continuance), and on January 5, 2009 (when denying defendant's motion to dismiss).

At the September 4th status, government counsel reported that an important government witness was not available for trial on September 22, 2008; defendant did not contest that representation. 9/4/08Tr5-10. The court acknowledged both defendant's and the public's interest in a speedy trial by proposing that the case go on its back-up calendar so that trial could occur before the end of the year. *Id.*10. However, defendant's counsel stated he would not be

available (and thus prepared) to go to trial on that basis, and the government indicated it would have difficulties having all its witnesses, particularly out of town witnesses, available (and thus prepared) on a standby basis. *Id.* Also, at the time, the government did not know when the health of the witness' infant would be such that the witness would be available for trial. *Id.*8-9. The court only then set trial for January 5, 2009. The court's September 4th minute order stated in writing what was supported orally at the status: that time was excluded through January 5, 2009, for "in the interest of justice for trial preparation under 18:3161(h)(8)(B)(iv)." R369 (now § 3161(h)(7)(B)(iv)).

Thus, the oral and written record of September 4th – viewed together – show that the court granted the continuance after weighing both defendant's and the public's interest in a speedy trial. The court also considered the fact that failure to grant a longer continuance would unreasonably deny the government its ability to prepare and present its witness for trial due to the illness of the witness' newborn. The court considered defendant's and the government's ability to prepare and be available for trial because of defense counsel's schedule and the government's witnesses' schedules, particularly those from out of town. As reflected by the record, after balancing these interests, the court determined that the ends of justice served by the continuance outweighed appellant's and

the public's interest in a speedy trial, and therefore, the exclusion of time was proper.

Although the court did not expressly elaborate on its reasons in the September 4th minute order, and did not expressly used the words "ends of justice" and "excludable time" at the September 4th status, the September 4th proceeding transcript and minute order read in conjunction with each other provide sufficient language and findings to support the continuance of the trial date and the accompanying exclusion of time. *See United States v. Bonilla-Filomeno*, 579 F.3d 852, 857 (8th Cir. 2009)(court's statement that continuance would permit the parties "time to pursue plea negotiations or prepare for trial" sufficiently set forth findings); *United States v. Lucas,* 499 F.3d 769, 782-83 (8th Cir. 2007)(ends of justice finding sufficient where it referenced one of the factors under § 3161(h)(7)(B) and when viewed in the context of government's stated reasons for requesting continuance). *See also United States v. Pakala*, 568 F.3d 47, 60 (1st Cir. 2009)("it is not necessary for the court to articulate the basic facts [for its exclusion of time] when they are obvious and set forth in a motion for a continuance")(citation and internal quotations omitted); *United States v. Janik*, 723 F.2d 537, 552 (7th Cir. 1983) (Flaum, J., concurring) ("The precise verbal formulation . . . necessary . . . for a district court to make the proper record to support an exclusion . . . will vary from case to case").

Further, on January 5, 2009, when ruling on defendant's motion to dismiss, the court again set forth its reasons for granting the ends of justice exclusion of time – namely, for trial preparation because a government witness was unavailable and thus could not meet with the government to prepare or be present at trial on account of her infant's illness and because defense counsel could not be prepared for or available for a trial set earlier on a stand-by basis. *See* 1/5/09Tr2-3.

Acknowledging that the district court's findings on January 5, 2009 were sufficiently detailed to support an ends of justice exclusion of time, defendant argues that these findings were based on the witness' unavailability, rather than "trial preparation," as stated in the September 4th minute order, and thus the district court applied this reasoning retroactively. Br27-28. This argument too lacks merit.

The September 4, 2008 status transcript and the September 4, 2008 minute order must be read in conjunction with each other to have a full, accurate picture of the district court's intention – especially if the court is alleged to have applied reasoning retroactively. These rulings in combination show that sufficiently detailed findings for the exclusion of time – based on the unavailability of an important government witness whom the government needed for preparation and trial, and the defense counsel's schedule and

obligations which made him unavailable for trial and trial preparation on a stand-by basis – were present "if only in the judge's mind" before granting the continuance on September 4, 2008. *See Zedner*, 547 U.S. at 506. *See also* R390:5-6 (government response specifically references trial "preparation"). *Cf. United States v. Montoya*, 827 F.2d 143, 149 (7th Cir. 1987)(observing, in different context, that "delay resulting from trial" involves not only trial itself but time used in preparation for trial).

While the records of the September 4th and January 5th proceedings do offer an additional basis for exclusion of time (namely, exclusion based on the unavailability of an essential witness under 18 U.S.C. § 3161(h)(3), *see* (c)(i) below), this does not make the court's rationale for its ends of justice exclusion of time retroactive. *Cf. United States v. Tedesco,* 726 F.2d 1216, 1222 (7th Cir. 1984)(continuance granted to obtain witness may be excluded under § 3161(h)(3) or ends of justice). The January 5th findings simply repeated – even more expressly – the court's original September 4th rationale for excluding the time.

(c) Denial of Motion to Dismiss Alternatively Supported By Exclusions of Time Pursuant to 18 U.S.C. § 3161(h)(1) and (3).

Alternatively, the court's denial of the motion to dismiss should be upheld because the record supports the exclusions of speedy trial time on the bases of both: (i) the unavailability of an essential witness, pursuant to 18 U.S.C.

§ 3161(h)(3)(A); and (ii) the existence of "other proceedings concerning the defendant," within the meaning of 18 U.S.C. §3161(h). *See United States v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *United States v. Tibboel*, 753 F.2d 608, 611 (7th Cir. 1985)(erroneous ends of justice exclusion of time not basis for reversal where time "excludable anyway" on other basis); *United States v. Garrett*, 720 F.2d 705, 710-11 (D.C. Cir. 1983) (where district court did not rely upon particular § 3161(h) provision, appellate court may do so where district court made relevant findings).

(i) Unavailability of Essential Witness

The Speedy Trial Act permits the exclusion of time for "[a]ny period of delay resulting from the unavailability of . . . an essential witness." 18 U.S.C. § 3161(h)(3)(A). This exclusion is separate from the ends of justice exclusion in § 3161(h)(7), and there is no requirement that the court make an "ends of justice" finding on the record with respect to this exclusion. *See United States v. Turner,* 203 F.3d 1010, 1017 (7th Cir. 2000); *United States v. Allen*, 235 F.3d 482, 491 (10th Cir. 2000); *United States v. Bourne*, 743 F.2d 1026, 1030-31 (4th Cir. 1984). Moreover, as this Court has acknowledged, excludable time under §3161(h)(1-6) is "automatically triggered once the existence of the . . . condition referred to in a particular subsection is established." *Montoya*, 827 F.2d at 151(citation and quotation omitted). *See also Henderson v. United States,* 476

U.S. 321, 327 (1986); *United States v. Miles*, 290 F.3d 1341, 1350 (11th Cir. 2002).

Here, the record of both the September 4th and January 5th proceedings establish that an essential witness was unavailable for trial as scheduled on September 22 (and, indeed, did not become available in the case until after December 11, 2008),[5] and thus that time was excludable under § 3161(h)(3). *See* 9/4/08Tr5-9; R390:1-6, attachment; *see also Allen*, 235 F.3d at 491; *United States v. Hamilton*, 46 F.3d 271, 276-77 (3rd Cir. 1995); *Tedesco*, 726 F.2d at 1222 (witness is essential even if government could convict defendant without his testimony).

(ii) Other Proceedings Concerning the Defendant

Most of the time between September 4, 2008 and January 5, 2009 was also excludable from the Speedy Trial clock pursuant to 18 U.S.C. § 3161(h)(1) due to "other proceedings concerning the defendant."

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[5]Defendant did not challenge below that this witness was very important to the government's case, or that she was unavailable. *See* 9/4/08Tr5-10; R389. In fact, Powell was one of the straw buyers who could prove that the mortgage packages submitted in her name were really for Cross. Because of the illness of her newborn, she was unavailable for trial. These facts – which were proffered (without defense opposition) at the time of the continuance (and on a prior occasion), corroborated by affidavit and in briefing at the time of the motion to dismiss, and born out by the witness' testimony at trial – establish that the district court's findings that she was "essential" and "unavailable" were not clearly erroneous and that the 3161(h)(3) exclusion applies, even if the court did not expressly reference that particular subsection by name and number. *See* 3/24/08Tr40-41; 9/4/08Tr5-10; R390:attachment; Tr388-427. *See also Garrett*, 720 F.2d at 710-11; *United States v. Fielding*, 645 F.2d 719 (9th Cir. 1981).

Delays attributable to "other proceedings concerning the defendant," including but not limited to the filing and resolution of a single pretrial motion, are excludable for up to thirty days after the motion is "under advisement," § 3161(h)(1)(D),(H), that is, after the due date of a response or receipt of all information the court deems necessary to decide the motion or after the hearing on the motion. *See Henderson,* 476 U.S. at 330-31; *United States v. Pansier*, 576 F.3d 726, 731-32 (7th Cir. 2009); *United States v. Salerno*, 108 F.3d 730, 737 (7th 1997). Further, when the motion involves a hearing, rather than a disposition on papers alone, the period of delay between the filing of the motion and the hearing on the motion is excludable regardless of whether that period of delay is reasonable. *Henderson ,* 476 U.S. at 326-30. Here, between September 4, 2008 and January 5, 2009, there were motions that were filed, pending further filings and hearings, and under consideration for a vast majority of those days, leaving only 29 days includable under the Act – well within the seventy-day limit.[6]

[6]The relevant starting date for the clock actually is September 22, 2008, since there was a pending court order, not challenged by defendant in her motion to dismiss, that excluded time in the ends of justice through September 22, 2008. *See* R352. While defendant challenges that ends of justice exclusion on appeal, her challenge is waived, and, in any event, the exclusion of time through September 22, 2008 was not plain error, as discussed further below. *See* Argument I.B.2 and I.B.3. Even if the clock started ticking on September 4, 2008, the time between September 4 and 22 was excludable for reasons discussed in the text.

These periods of excludable time are:

September 4-22, 2008: On September 2, the government filed an "Emergency Motion for Rule 15 Deposition" to depose a government witness who lived in California and whose illness prevented her travel. R367. At the September 4, 2008 status, defendant objected to the motion, questioning the need for the deposition given the availability of teleconferencing and expressing concern about the expenses involved in taking a deposition in California. 9/4/08Tr2-3. The court indicated that, while the motion was granted, there would be a "[s]tatus hearing" on September 22, 2008 on the "issue of how government would take the Rule 15 deposition." R369; 9/4/98Tr11-17. The court ordered the government to be prepared at the September 22nd hearing to address whether the government had to pay for defendant and her counsel's travel to California, and whether the court could take the witness' testimony by teleconference. R369; 9/4/08Tr11-17.

Thus, issues regarding the government's Rule 15 motion remained pending before the court (or at the very least "other proceedings concerning the defendant" were pending with respect to the Rule 15 deposition[7]) from the

[7]As to the "other proceedings" language of 18 U.S.C. § 3161(h)(1), the Seventh Circuit has stated that the proceedings listed in that section are illustrative only and not intended to be an exhaustive list and that courts have "adopted a broad interpretation of 'other proceedings.'" *Salerno,* 108 F.3d at 736-37.

September 4th status until September 22, while the court awaited the government's ordered response at the September 22nd hearing. Accordingly, this time was excludable. *See Henderson*, 476 U.S. at 330-31.

September 22-November 20, 2008: When the parties appeared on September 22, the government reported that it was possible to have the witness testify by teleconference at trial, but that this did not eliminate the need for a Rule 15 deposition since the witness' medical condition was sufficiently severe and deteriorating that the government feared she would be unable to testify at trial even via teleconference. 9/22/08Tr2-5. Thus, the government's motion to take the deposition and the manner in which it was to be taken remained to be decided, or, at the very least, the government renewed, orally, its motion for a Rule 15 deposition. *See, e.g., United States v. Pasquale*, 25 F.3d 948, 950 (10th Cir. 1994)(oral motions can toll Act).

At the September 22nd hearing, defendant continued to object to the deposition, arguing that the government had not made a sufficient showing that the witness would be unavailable for trial. 9/22/08Tr4-5, 7. The court ruled that it would require a report from the witness' doctor before ordering the deposition, and ordered the "[g]overnment . . . to *supplement* its [Rule 15 deposition] motion with appropriate medical note . . . and *renotice* the motion for hearing."

R370(emphasis added); 9/22/08Tr5-7. The government indicated it would obtain the note as soon as possible. 9/22/08Tr7.

The days following September 22 that the motion remained pending, while the court waited for the "supplement[al]" government submission and the "renotic[ing]" and holding of another "hearing," are excludable under the Speedy Trial Act. *See Henderson*, 476 U.S. at 330-31*; Pansier*, 576 F.3d at 731-32; *United States v. Hemmings*, 258 F.3d 587, 593-94 (7th Cir. 2001)(even where no hearing, two months time between government's filing of motion and court's order granting it properly excluded where court gave defendant time to respond, without setting deadline for that response, and defendant never filed a response, since court was awaiting reasonably expected defense filing during this period).[8]

The government submitted the doctor's note to the court on November 14, 2008.[9] R371:ExhA(Government's Motion for Rule 15 Deposition). On November 18, 2008, defendant filed her objections to the Rule 15 deposition. R373. On November 20, 2008, the court held a hearing on the Rule 15 deposition motion, where she heard argument, and then granted the motion. 11/20/08Tr2-9; R374.

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[8]Nor can there be any doubt that the court correctly deemed the appearances of counsel to argue the merits of the Rule 15 motion as "hearings." *See, e.g., United States v. Staula*, 80 F.3d 596, 601-02 (1st Cir. 1996).

[9]It took that long to get the doctor to respond to the government's inquiry. 11/20/08Tr2(indicating that government had to send a federal agent to the doctor's office to get a response).

Under the precedent cited above, the time between September 22, 2008 and the final decision on November 20, 2008, was excludable.

December 3 - 5, 2008: On December 3, 2008, the government filed an emergency motion regarding the taking of the Rule 15 deposition and defendant filed a response on December 4, 2008. R375, 377. On December 5, 2008, the court granted the motion. R378. The period from December 3 to December 5, 2008 was excludable. *See* R389:2.

December 10-17, 2008: The period from December 10 to December 17, 2008, during which the government filed its motion in limine (December 10) and the court granted the motion (December 17), was excludable. R384, 387. *See also* R389:2.

December 31, 2008: There is excludable time from December 31, 2008, when defendant filed his motion to dismiss the indictment, to the start of trial on January 5, 2009, when the Court considered and then denied defendant's motion and trial began. R389, 391; Tr2-3.

(d) Conclusion

For all these reasons, well under seventy days of Speedy Trial Act time ran between September 4, 2008 and January 5, 2009, and the district court properly denied defendant's motion to dismiss.

2. Defendant's Other Attacks on the District Court's Exclusions of Time are Waived.

The Speedy Trial Act provides that the "[f]ailure of the defendant to move for dismissal [of the indictment] prior to trial . . . shall constitute a waiver of the right to dismissal" under the Act. 18 U.S.C. § 3162(a)(2). Based on this language, this Court has held that a defendant's failure to file any motion to dismiss the indictment before the commencement of the trial waives defendant's Speedy Trial Act claims and they will not be reviewed on appeal. *United States v. Broadnax*, 536 F.3d 695, 698-99 (7th Cir. 2008); *United States v. Morgan*, 384 F.3d 439 (7th Cir. 2004).

Here, defendant filed a motion to dismiss the indictment under the Speedy Trial Act, but based it solely on the ends of justice exclusion of time made in the trial court's September 4, 2008 order, which excluded time between September 4, 2008 and January 5, 2009. R389. Defendant never argued below that any other period of time was includable in the speedy trial clock calculation or caused a violation of the Act. Thus, under the Act, defendant has waived the arguments with respect to these other time periods that she now makes for the first time on appeal, and that they may not be reviewed by this Court.

While there is dicta supporting the government's position, *see United States v. Oberoi*, 547 F.3d 436, 458 (2d Cir. 2008); *United States v. Taylor*, 497

F.3d 673, 675-76 n. 3 (D.C. Cir. 2007), the question of whether bases for dismissal not raised in the defendant's Speedy Trial Act motion to dismiss may be reviewed on appeal has not been squarely decided. However, both the plain language of the statute and the purposes of the Speedy Trial Act support the government's position.

The plain language of the Act indicates that bases for dismissal not raised in a motion to dismiss are waived. The Act provides a statutory framework for noncompliance with the Act that not only sets forth the remedy for noncompliance (i.e., dismissal of the indictment), but also the requirements a defendant must fulfill to obtain that remedy. Those requirements are not just to file a motion, but also to make a specific showing in that motion of the alleged violation of the Act:

> If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The *defendant shall have the burden of proof of supporting such motion* but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). . . . . Failure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal under this section.

18 U.S.C. § 3162(a)(2) (emphasis added).

Further, the purposes behind Section 3162(a)(2) are undercut if defendants are allowed to bring challenges on appeal that they did not raise in their motions

to dismiss. As the Supreme Court explained in *Zedner,* 547 U.S. at 502-03, Section 3162(a)(2) creates incentives both for compliance by the government and enforcement by defendants and thus "serves two unrelated purposes":

> First, § 3162(a)(2) assigns the role of spotting violations of the Act to defendants – for the obvious reason that they have the greatest incentive to perform this task. Second, by requiring that a defendant move before the trial starts or a guilty plea is entered, § 3162(a)(2) both limits the effects of a dismissal without prejudice (by ensuring that an expensive and time-consuming trial will not be mooted by a late-filed motion under the Act) and prevents undue defense gamesmanship.

If defendants are allowed to challenge exclusions of time on appeal that they did not challenge in their pretrial motions to dismiss, defendants can subvert the statutory scheme that places the burden on the defendant to enforce the Act by "spotting" specific violations. Further, defendants may be able to benefit from "undue . . . gamesmanship," and trials, indeed, may be "mooted."

3. Even if Defendant's Arguments are Not Waived, They may be Reviewed for Plain Error Only.

Even if defendant's arguments are not waived, they are reviewable for plain error only since they were not raised below. *See Taylor*, 497 F.3d at 676.

Defendant levels numerous attacks on the district court's ends of justice exclusions of time, claiming that the court did not make sufficient findings on

the record or that the exclusions rest on impermissible bases.[10] These arguments fail to establish a violation of the Speedy Trial Act warranting reversal under the plain error standard.[11]

January 27, 2006 Order

Defendant attacks the January 27, 2006 minute order in which the court, on its own initiative, continued the trial from May 15 to July 17, 2006, and excluded time from January 27 to July 17, 2006 "for trial preparations under 18:3161(h)(8)(B)(iv)." R103 (now § 3161(h)(7)(B)(iv)). Defendant argues there "is nothing else on the record to show that the court engaged in the required factor balancing before excluding time." Br21. Defendant's argument ignores

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[10]Defendant also suggests that time excluded for pretrial motion preparation may be includable speedy trial time should the Supreme Court hold in *United States v. Bloate*, 534 F.3d 893 (8th Cir. 2008), *cert. granted,* 129 S.Ct. 1984 (2009), currently pending before it, that time for motion preparation is not excludable under § 3161(h)(1). Defendant's suggestion fails: (i) defendant does not develop this argument and thus the argument should not be addressed on appeal, *see United States v. Morgan*, 384 F.3d 439, 442 n. 1 (7th Cir. 2004); (ii) defendant's failure to make this argument below also results in waiver, *see, supra,* Argument I.B.2, or, at most, review under a plain error standard that cannot be met given Seventh Circuit case law, *see Tibboel*, 753 F.2d at 610; and (iii) the district court did not rely solely on § 3161(h)(1) to exclude all of the time for motion preparation, but also excluded motion preparation time based on the "ends of justice" exclusion in some of its orders. *See* R47, 72, 93; 9/2/05Tr4-6.

[11]Even if plain error were established, this Court should not notice the error because the evidence of defendant's guilt is overwhelming and thus the error does not "seriously affect[] the fairness, integrity or public reputation of these judicial proceedings." *Olano*, 507 U.S. at 736. See *Johnson v. United States,* 520 U.S. 461 (1997); *United States v. Elmardoudi*, 501 F.3d 935 (8th Cir. 2007). *See also* Statement of Facts and Argument IV.

the context in which this January 27th order occurred, particularly the October 28, 2005 order excluding much of this same time for "continuity of counsel, motions and trial preparation under 18:3161(h)(8)(B)(iv)." R72(now § 3161(h)(7)(B)(iv)).

To place the January 27, 2006 minute order in context, it is necessary to turn to the court's second status in the case, held on October 28, 2005. At that status, defense attorneys described the voluminous discovery produced by the government (including 10,000 documents plus compact discs), requested additional time for the filing of pretrial motions so they would have time to review the discovery, and notified the court that, given the large number of documents and transactions involved, they would need several months – at least until the spring – to prepare for trial. 10/28/05Tr4-9. Attorneys for two codefendants further explained they may be set for trial before another judge starting in January. *Id*. 6-7. Based on these representations and with no objection by any defendant, the court set trial for May 15, 2006, and excluded time through May 15, 2006 for continuity of counsel, motions and trial preparation under 18 U.S.C. § 3161(h)(7)(B)(iv). *See* 10/28/05Tr7-9; R72.

Thus, when the court entered its January 27, 2006 order, there was already an order from October 28, 2005 excluding time through May 15th for reasons that included trial preparation – making additional findings

unnecessary. Further, the October 28th order is fully supported by a record where the court set trial for the earliest possible date taking into account defense counsel availability and defense need for trial preparation in this large-scale fraud case. *See* 10/28/05Tr4-9. At most, the speedy trial clock would have started ticking on May 15, 2006, but, as discussed below, another order excluding time was entered on May 12, 2006 which stopped the clock again.

May 12, 2006 Order

Defendant attacks, as unsupported by the record, the May 12, 2006 order, resetting the trial to January 22, 2007 and excluding time from May 12th through January 22, 2007, in the ends of justice for "continuity of counsel and trial preparation under 18:3161(h)(8)(B)(iv)." R120 (now § 3161(h)(7)(B)(iv)). *See* Br22. This argument too lacks merit.

As explained above, the court on January 27, 2006 reset trial from May 15, 2006 to July 17, 2006 (with June 26, 2006 as a back up date). Not one defense counsel notified the court of any problem with the new trial date until March 17, 2006 when they appeared at a previously scheduled status. At that time, five defense attorneys notified the court that they were not available for trial on the June and July dates because they were on trial in other cases and, further, defense attorneys were not all available until November on account of other scheduled trials. 3/17/06Tr4-6.

The court indicated this was too long a delay and that substitution of counsel may be needed. *Id.* 6. In response, defense attorneys requested the court hold a status in May and represented that certain defendants may well plead guilty and not be in the case by then, making it possible to try the case in July or at least set an earlier trial date, since there would be fewer schedules to address. *Id.* 7-10. The court agreed to hold a status on May 12th; the court struck the June back-up date, but kept the July trial date. *Id.* 8-9; R116. The court excluded time through the May 12th status for trial preparations and plea negotiations. 3/17/06Tr8.

No defendant pled guilty by the May 12, 2006 status. 5/12/06Tr3-5. At the May 12th status, defense attorneys represented to the court that the first date they were all available to try the case was January 2007, as various of them were on trial in other cases. *Id.* 4. The court expressed concern about waiting until January but set the trial for January 22, 2007 and excluded time for "continuity of counsel and trial preparation under 18:3161(h)(8)(B)(iv)." R120 (now § 3161(h)(7)(B)(iv)); 5/12/06Tr5, 9.

The record for this May 12th exclusion of time ruling – which includes the attorneys' representations to the court regarding their trial schedules – supports the court's finding excluding time for continuity of counsel and trial preparation. Moreover, although defendant O'Connor's counsel may have been

available for trial in July 2006 or sooner than January 22, 2007, O'Connor never sought a severance (or even objected to the continuance) and the excludable delay of her codefendants is ascribed to her. *See United States v. Farmer*, 543 F.3d 363, 368 (7th Cir. 2008).

March 24, 2008 Order

Defendant challenges the March 24, 2008 order excluding time from March 24 to May 19, 2008 in the ends of justice for trial preparation. Br23-25. She claims this order is unsupported by specific findings, and that the delay impermissibly rests on the government's lack of diligent preparation. Defendant's arguments take the order out of context and ignore the full record.

By March 6, 2008, all codefendants had pled guilty and defendant alone was set for trial on March 24, 2008. R126, 136, 138, 143-44, 154, 161, 332. On March 8, 2008, over two weeks before trial, the government gave notice to defendant of its intention to admit the loan files of the victim financial institutions into evidence pursuant to the certification provisions of F.R.E. 902(11), and thereby avoid calling over twenty records custodians to testify. R343:attachment; 3/24/08Tr13, 24-26. The government provided defendant with copies of most of the Rule 902(11) certifications a week prior to trial. 3/24/08Tr9-

11, 26. Defendant did not notify the government or the court of any objection to the sufficiency of the certifications prior to March 24, 2008.[12] 3/24/08Tr5.

On March 24, before jury selection began, the government moved to admit exhibits pursuant to F.R.E 902(11). 3/24/08Tr3. Defendant objected. *Id*. She conceded that the documents sought to be admitted were authentic, *id*. 28-30, 55-56, but argued the tendered certifications provided insufficient basis for the affiants' knowledge of record-keeping practices because the affiants, while identifying their positions and titles, did not expressly state that they were "custodians of the records" or "authorized persons." *Id*. 3-4, 9-30, 55-58.

While indicating that defendant probably had sufficient time to review most of the certifications and that defendant's objection was "artificial," the court refused to "chance . . . it" and required the government to redo the certifications to state expressly the affiants' bases of knowledge and thus insure no error with respect to these certifications. *Id*. 20, 24, 26-27, 46-51, 55-58. The government explained it would take two to three weeks to have all twenty-two lenders – located all over the country – redo the certifications. *Id*. 18-19, 46-47, 58. Additionally, time was needed for defendant and the court to review the new

[12]Prior to March 24th, defendant had told the government only of her objection to certain "stranger documents" – that is, documents in the loan files that were not created by the financial institution in custody of the files – being admitted into evidence. 3/24/08Tr3-5, 30-31, 36.

certifications. *Id.* 59-61. The parties, including defense counsel, requested May 19th as the new trial date, and the court set trial for May 19, 2008, and excluded time in the ends of justice for "trial preparations under 18:3161(h)(8)(B)(iv)." 3/24/08Tr59-61; R346(now § 3161(h)(7)(B)(iv)).

As the above recitation shows, the district court properly excluded this time. The exclusion of time was demonstrably not based on the government's lack of diligent preparation. Prior to March 24th, the government contacted over twenty financial institutions located all over the country, identified personnel who could make the required certifications, obtained written certifications from the institutions, notified defendant of its intent to offer evidence by means of certifications over two weeks before trial, and provided most of the certifications to defendant a week before trial. As the government explained, this entire time-consuming process had to be repeated in order to redo the certifications. This case is thus distinguishable from *United States v. Gonzales*, 137 F.3d 1431, 1434-35 (10th Cir. 1998), where the prosecutor was granted additional time for trial preparation without the record indicating why he required additional time in the "straightforward bank robbery case" or that he was exercising due diligence in his preparation. Rather, this case is similar to *United States v. Cianciola*, 920 F.2d 1295 (6th Cir. 1990), where the government's inadvertent failure to comply with its discovery obligations (by tardily producing tapes to defendant who then

required a continuance to review them) did not constitute a "lack of diligent preparation" for purposes of the Speedy Trial Act, particularly where there was no evidence that the government committed chronic discovery abuses or acted in bad faith.[13]

Exclusion of Time from May 19 to September 22, 2008

Defendant argues that time between May 19 to September 22, 2008, was improperly excluded based on the district court's schedule. While a court's schedule is not a permissible ground for an exclusion of time, only a portion of this period (42 days between May 19 and July 1) was excluded on this basis.

On May 1, 2008, the court notified the parties that she could not try the case on May 19, 2008 because of schedule conflicts. 5/1/08Tr2. The court indicated that if defendant O'Connor wanted to proceed on May 19th, the court would either miss the scheduled judicial conference or have another judge try the case, but the alternative was to reset the trial. *Id.* 2-3. Defendant chose the latter, readily agreeing to exclude time. *Id.* 3.

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[13]The government, in fact, was able to prepare the certifications, submit them to defense counsel to review, present them to the court and get an evidentiary ruling from the court all by May 9, 2008 – thus, in advance of the May 19, 2008 date through which the court had excluded time in the ends of justice for the preparation of the certifications. R354, 358; 5/9/08Tr2-21. Nonetheless, the exclusion of time through May 19 remains valid. *See United States v. Carlone*, 666 F.2d 1112, 1115 (7th Cir. 1981).

The district court proposed July 1, 2008 as the next available trial date. *Id.* The government expressed concern about its availability then, and defendant and the government proposed September 22, 2008, with defense counsel in particular advocating for a date "far enough in the future that . . . it would be convenient for her [the government's] people, which I know they have some scheduling problems and it's the summer and people have planned vacations."[14] *Id.* 3-4. The court set trial for September 22, 2008, and excluded time "in the interest of justice under 18:3161(h)(8)(B)(iv),"noting, in particular on the record, the need for "continuity of counsel." R352(now § 3161(h)(7)(B)(iv)); 5/1/08Tr6. Defense counsel, who had advocated for this date, said, "[w]e have no objection to the exclusion of time." 5/1/08Tr6.

During proceedings before the court on May 9, 2008, the court attempted to reschedule the trial to a much earlier date than September. 5/9/08Tr21-22. Defense counsel requested that trial be set for September because of the parties "commitment" to other matters before then. *Id.* 21-22. Still, the court pressed for an earlier trial date and proposed August. *Id.*22. Both defendant's counsel

[14]It should be noted that, as discussed throughout the text, government witnesses had been rescheduled for trial a number of times in this case, and the most recent rescheduling had been on the morning trial was scheduled to begin, after witnesses already had traveled to Chicago from out-of-town. *See* R346; 3/24/08Tr2; 9/4/08Tr4, 6-7.

and government counsel explained that they had other trials in August and thus would not be available or prepared for trial then. *Id.*

As the above review of the record shows, exclusion of time based on the court's schedule is limited to the 42 days between May 19th and July 1st – well within the seventy day Speedy Trial Act clock. The remaining time was properly excluded, thus resulting in no Speedy Trial Act violation.

The time between July 1 and September 22 was excluded for reasons other than the court's schedule. The court had intended to set trial for July 1, 2008. That trial did not begin July 1 and instead was set for September 22, 2009, was due to the unavailability of defense counsel and the government. Thus, the record supports the ends of justice exclusion beginning July 1 and continuing to September 22, 2008 – especially since the standard of review is plain error. The court not only attempted to set the trial for July 1, but also continued to press the parties to set the trial as soon as possible. The parties, particularly defense counsel, represented they were not available for trial before September.

Because only 42 days had run on the Speedy Trial clock, there was no violation of the Speedy Trial Act, much less plain error warranting notice by this Court. *See also supra* fn. 11.

4. Even If There Were A Speedy Trial Violation, Dismissal Should Be Without Prejudice

Should this Court determine that the Speedy Trial Act was violated, then dismissal of the indictment is mandatory. However, defendant's argument for dismissal with prejudice should be rejected. Unless the record indicates only one appropriate determination, the case should be remanded to the district court to determine whether dismissal should be with or without prejudice. *United States v. Janik*, 723 F.2d 537, 546 (7th Cir. 1983).

The only appropriate determination here would be dismissal without prejudice. The factors to consider are: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of . . . [the Speedy Trial Act] and on the administration of justice." 18 U.S.C. § 3162(a)(2). The presence or absence of prejudice to the defendant resulting from the violation of the Act also should be considered. *United States v. Taylor*, 487 U.S. 326, 334 (1988).

The record does not support defendant's attempt to describe her offense as not serious. As discussed in the Statement of Facts, defendant actively participated in a large-scale wire fraud crime that since 2002 has carried a maximum penalty of twenty years' imprisonment. 18 U.S.C. § 1343. *See Janik*, 723 F.2d at 546-47 (noting defendant's gun offenses carried a combined maximum of twenty years).

Nor would the facts and circumstances leading to dismissal warrant dismissal with prejudice. As discussed further below in Argument II, most of the delays in this case were at the request of defendant and her codefendants, the government conscientiously prosecuted this massive fraud case, and defendant never objected to a single continuance.

Further, a retrial of this four-day trial would not hinder, rather than serve, the administration of justice. *See United States v. Barnes*, 159 F.3d 4, 17 (1st Cir. 1998)(administration of justice factor not call for barring reprosecution where, among other things, retrial not take over one week). Moreover, the government produced evidence at sentencing that defendant committed further mortgage fraud while on pretrial release, and the court found that she lied to Pretrial Service, Probation and the court, and was almost certain to commit further crimes. R424; 6/5/09Tr57-62.

Finally, as discussed in Argument II.B., below, defendant was not prejudiced by the delay.

II. There Was No Violation of the Speedy Trial Clause of the Constitution, Much Less One Constituting Plain Error.

A. Standard of Review

Defendant also seeks dismissal of the indictment based on the Speedy Trial Clause of the Constitution. Because defendant never raised this claim in

the district court, it is forfeited and reviewed for plain error only. *United States v. Gearhart*, 576 F.3d 459, 462-63 (7th Cir. 2009).

B. Analysis

Review of a claimed violation of the constitutional Speedy Trial Clause is a four-part inquiry: "(1) whether delay before trial was uncommonly long, (2) whether the government or the defendant is more to blame for the delay, (3) whether the defendant asserted his right to a speedy trial in due course and (4) whether the defendant suffered prejudice as a result of the delay."*Id.* 463. While the delay before trial here was uncommonly long, the other factors weigh decisively against defendant. *See United States v. Loera*, 565 F.3d 406, 412 (7th Cir. 2009). Applying this inquiry here, no plain error occurred.

First, the majority of continuances were due to defendant and her codefendants. The continuances and exclusions of time from the start of the case in September 2005 to January 2007 were the result of requests by codefendants to which defendant never objected and from whom defendant never sought a severance. *See* 10/28/05Tr4-9; 3/17/06Tr4-10; 5/12/06Tr3-9; R72, 120; *Gearhart*, 576 F.3d at 463 ("failure to object to . . . co-defendant's requested continuances weighs heavily against . . . claim that . . . resulting delay violated . . . constitutional rights"). After seven codefendants pled guilty in December 2006 and January of 2007, defendant and her remaining codefendant

sought continuances of over one year's time until March 24, 2008 for reasons including defendant O'Connor's second substitution of counsel (R147, 148; 1/5/07Tr2-19), defense attorney trial schedules (R159, 162, 233; 1/12/07Tr2-11; 5/11/07Tr2-8), and the spinal surgery of the father of the attorney for defendant O'Connor (R323; 1/15/08Tr2-12). *See also* Br23fn9.

Continuances sought by the government (periods between March 24, 2008 to January 5, 2009) total less than ten months, and defendant had a hand in some of them. For example, the court's rescheduling of the May 19, 2008 trial on account of its schedule was not the parties' fault, but the defendant readily agreed to the rescheduling of the trial and the exclusion of time to do it. 5/1/08Tr3, 6. While the court had wanted to reset the trial to July or at the latest August, both defendant's attorney and the government objected. *Id.* 3-6; 5/9/08Tr21-22. Finally, while the unavailability of government witness Powell certainly was the reason for moving the trial date from September 22, 2008, defense counsel's objection to going on a back-up trial calendar contributed to the trial being set for January 5, 2008. *See* 9/4/08Tr10.

At no time prior to the eve of her 2009 trial when she filed her motion to dismiss did defendant demand her right to a speedy trial. To the contrary, she agreed, or did not object, to exclusions of time (including virtually all of those she now challenges on appeal), and she never moved for a severance from her

codefendants when they sought continuances. As this Court has recognized, defendant's failure to assert her constitutional right to a speedy trial makes it difficult for her to prove she has been denied a speedy trial. *See United States v. Oriedo*, 498 F.3d 593, 596 (7th Cir. 2007).

Finally, defendant, who was on pretrial release prior to trial, has not shown that she was prejudiced by the delay. Specifically, she has not alleged, nor does the record support, any finding that the government intended to hamper her ability to present a defense. Nor does she explain how her defense was hampered by the passage of time that resulted in *government witnesses'* alleged inability to recall. *See* Br32. *See also Gearhart*, 576 F.3d at 463.

Even if the district court committed plain error, exercise of this Court's discretion to overturn defendant's conviction is unwarranted given the overwhelming evidence of her active participation in the charged large-scale mortgage fraud. *See United States v. Elmardoudi*, 501 F.3d 935, 944 (8th Cir. 2007). *See* Statement of Facts, *supra*, and Argument IV, *infra*.

III. Defendant Waived Her Challenge to the Jury Instructions, and, Even if Reviewable, the District Court Did Not Commit Plain Error By Giving The Seventh Circuit's Pattern Instructions.

A. Standard of Review

When a defendant intentionally relinquishes or abandons a known right, he may not later seek appellate review of a claimed deprivation of that right.

Olano, 507 U.S. at 733-34. Further, objections not raised in the district court are reviewed on appeal for plain error only. *Id.*

B. Analysis

Defendant waived her arguments regarding the jury instructions. At trial, defendant expressly agreed to the pattern wire fraud and the joint venture instructions she now challenges on appeal. At the jury instruction conference, defense counsel stated "All right," "Okay," and "No problem" with respect to the Seventh Circuit Pattern wire fraud element instructions; and expressly stated "I believe that's the standard one" and "no objection" with respect to Government Proposed Instruction 23, which was the pattern joint venture instruction. Tr511-16; R393-94. Thus, defendant did not simply fail to object, but affirmatively and intentionally abandoned any objection. She thus has waived the challenges to the jury instructions she brings on appeal and they may not be reviewed. *See Olano*, 507 U.S. at 733-34; *United States v. Griffin*, 493 F.3d 856, 864 (7th Cir. 2007).

To avoid waiver, defendant casts her argument on appeal as an attack on the "series of [wire fraud and joint venture instructions] as a whole" that she

failed to raise below and thus only forfeited on appeal. Br33. This attempt to avoid waiver puts form over substance and should be rejected by the Court.

Even on defendant's terms, though, her arguments face a high hurdle. Where a defendant fails to object to a jury instruction at trial, this Court reviews defendant's arguments on appeal for plain error only. *United States v. Noel*, 581 F.3d 490, 499 (7th Cir. 2009). This standard "is particularly limited in the context of jury instructions," where to warrant reversal "the error [must] be of such a great magnitude that it probably changed the outcome of the trial." *Id.* (internal quotations and citations omitted). Here, the district court committed no such error.

The district court gave the Seventh Circuit pattern wire fraud instructions, along with the following pattern joint venture instruction:

> An offense may be committed by more than one person. The defendant's guilt may be established without proof that the defendant personally performed every act constituting the crime charged.

Seventh Circuit Committee (1999) 5.05; R398. Defendant's arguments that this instruction constructively amended the indictment to include an uncharged conspiracy and lowered the government's burden of proof lack merit. Br32-37.

A constructive amendment of the indictment "can occur when . . . the court (usually through its instructions to the jury) . . . broadens the possible bases for

conviction beyond those presented by the grand jury.'" *United States v. Jones*, 418 F.3d 726, 729 (7th Cir. 2005)(internal quotations and citation omitted). But that did not happen here, where the joint venture instruction was not offered as "a theory of guilt or its elements," as defendant suggests (Br34), but simply as a correct statement of the law in the context of this wire fraud case. The crime of wire fraud may indeed be committed by more than one person, and to be convicted of wire fraud, defendant herself need not have personally performed every act constituting the crime. *See, e.g., United States v. Jackson*, 546 F.3d 801, 815-16 (7th Cir. 2008)(in mail fraud, defendant liable for acts of his coschemers even if conspiracy not charged); *United States v. Macey*, 8 F.3d 462, 468 (7th Cir. 1993)(conspiracy doctrines apply to multi-member mail fraud schemes even if conspiracy not charged).

Here, the joint venture instruction was necessary to avoid confusion since the indictment alleged a large-scale scheme committed by nine people who played different roles. R1. For example, defendant was a lending officer who helped to process fraudulent loans. *Id.* But there were others with major roles in the scheme, including Shaun Cross who was the mastermind and others who recruited the straw buyers. *Id.* This instruction correctly informed the jury that it was not necessary for defendant herself to have overseen the entire scheme (as

Cross did) or recruit the straw buyers (as the recruiters did).[15] *See United States v. Bailey*, 763 F.2d 862, 864-65 (7th Cir. 1985)(joint venture instruction appropriately given where defendant's activities and role in fraudulent scheme differed from that of his coconspirators).

This Court can be confident there was no error here (much less plain error probably changing the outcome of the trial) because the district court instructed the jury that defendant was charged solely with one count of wire fraud and that, to convict defendant, the jury needed to find the government met its burden of proof beyond a reasonable doubt on each of the elements of wire fraud. R398. *See United States v. Cusimano*, 148 F.3d 824, 830-31 (7th Cir. 1998); *Bailey*, 763 F.2d at 865. The court also gave the jury a copy of the indictment which charged only wire fraud. R399. *See Cusimano*, 148 F.3d at 830-31. Further, there was overwhelming evidence of defendant's guilt, including defendant's own admissions, testimony of the straw buyers, and financial records showing her illicit receipt of at least $20,000 from Cross during the time period she was processing the straw buyer loans. *See* Statement of Facts, and Argument IV.

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[15] *United States v. Woods*, 148 F.3d 843 (7th Cir. 1998) and the two 1961 case, relied upon by defendant (Br34), are inapposite as they involve different fact scenarios and legal issues. They do not establish that joint venture instructions, such as the one given in this case, are to be used only with respect to the admission of coconspirator hearsay statements. Here, the joint venture instruction was properly given.

Finally, because the jury was correctly instructed on the elements of wire fraud, and because the joint venture instruction specifically refers to the "performance" of "acts," there is no danger that the jury convicted defendant based on a coschemer's fraudulent intent and not her own. R398. This is especially so since no such suggestion was ever made to the jury (*see* Tr588-642, 644-52), and, as discussed in Argument IV below, evidence of defendant's fraudulent intent was firmly established by the evidence.

IV. Viewed in the Light Most Favorable to the Government, the Evidence of Defendant's Knowledge and Intent to Defraud was More Than Sufficient

A. Standard of Review

This Court will reverse for sufficiency of the evidence, only if, "viewing all evidence in the light most favorable to the government, no rational trier of fact could have found defendant guilty of the charges beyond a reasonable doubt." *United States v. Radziszewski,* 474 F.3d 480, 484 (7th Cir. 2007).

B. Analysis

The evidence, including defendant's own statements and bank records, showed that, in return for at least $20,000 in on-the-side payments from Shaun Cross, defendant processed seven mortgage loan applications that falsely indicated that persons other than Cross were buying properties when she knew Cross to be the real purchaser. Tr105-47, 164-70. *See also* Statement of Facts.

Nonetheless, defendant argues that the evidence was insufficient to prove she had the requisite intent to defraud because the evidence also showed her belief that Cross would make the mortgage payments and the lenders would suffer no losses. Defendant's argument misconceives the crime of wire fraud and its intent to defraud requirement.

This Court defines intent to defraud "as acting willfully and with specific intent to deceive or cheat, usually for the purpose of getting financial gain for one's self or causing financial loss to another." *United States v. Davuluri*, 239 F.3d 902, 906 (7th Cir. 2001)(internal quotations and citation omitted). Proof of contemplated harm to the victim or any loss is not required. *United States v. Leahy*, 464 F.3d 773, 786-87 (7th Cir. 2006). Further, "a defendant's honest belief that his actions will ultimately result in a profit and not a loss is irrelevant . . . ." *Id*. 787. Thus, defendant's alleged belief that Cross would pay the mortgages and lenders would not suffer losses does not matter.

Because "direct evidence of a defendant's fraudulent intent is typically unavailable," specific intent "may be established by circumstantial evidence and by inferences drawn from examining the scheme itself that demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension." *United States v. Owens*, 301 F.3d 521, 528 (7th Cir. 2002)(internal quotation and citation omitted). Here, defendant admitted to law

enforcement that Cross recruited her to process mortgage loans in the names of various people when in fact the properties were not being bought for those people, but rather for Cross himself, whose name did not appear on these applications. Tr104-47, 164-70. *See also* Def.Appendix A217-241. Additionally, the mortgage records, combined with the straw buyer testimony, established that defendant falsely represented on the loan forms that she had interviewed the loan applicants when she had not. Tr106-12, 115, 121, 124, 127, 131, 135, 140, 232, 238, 242, 249, 286-87, 302, 358, 560; R440:51; *see also* Def.Appendix A217-241. Finally, bank records showed payments totaling $20,000 from Cross to defendant during the same period defendant processed the fraudulent loans, and defendant admitted receiving these monies from Cross.[16] Tr104-47, 164-70. All this evidence – especially these substantial payments from Cross in return for processing these loans in the names of straw buyers – provides more than sufficient evidence of fraudulent intent. *See Owens*, 301 F.3d at 528 (intent to defraud supported by evidence defendant received "kickbacks"); *United States v. Britton*, 289 F.3d 976, 982 (7th Cir. 2002)(finding intent to defraud when

[16]Defendant told law enforcement that Cross had given her the $20,000 as repayment of two $5,000 loans she had given him (Tr164-65), but the jury had every reason to reject this self-serving, incredible explanation for the payments defendant received from Cross, and to instead conclude that the $20,000 was payment for processing of the fraudulent loans (just as Cross had paid monies to the straw buyers), and further to find her false statement to law enforcement provided even more proof of her fraudulent intent. *See* Tr.609.

misdeeds were contemporaneous with financial benefits received by defendant).

Relying on *United States v. Bailey*, 859 F.2d 1265 (7th Cir. 1988), defendant further argues that she lacked sufficient knowledge and intent because she lacked skill and experience, relied on Cross, and played a minor role in the scheme. However, *Bailey* "do[es] not supply an unsophisticated defendant with an automatic defense to a fraud . . . indictment." *United States v. Johnson*, 927 F.2d 999, 1005 (7th Cir. 1991). Moreover, the trial evidence showed that defendant had been a loan officer since 1999 and had obtained over $20,000 from Cross for processing seven straw buyer loans. Tr104-05, 164-70. She was not an unsophisticated innocent. 6/5/09Tr60-62 (district court, at sentencing, rejecting defendant's claim that her role was "minor," and she was an "innocent"). In this respect, defendant's sufficiency argument amounts to an attempt to recast the evidence in a "light most favorable" to the defendant, which is not the standard of review and which was an interpretation of the evidence rejected by the jury.

V. District Court did Not Abuse Its Discretion By Submitting The Indictment to the Jury without Striking the List of All Defendants Charged from the Caption, and Did Not Commit Plain Error by Providing the Jury with the Wire Fraud Charge Against Her as Brought by the Grand Jury.

A. Standard of Review

Decisions to strike alleged surplusage from an indictment are in the trial court's discretion and are reviewed on appeal for abuse of discretion. *See United States v. Marshall*, 985 F.2d 901, 905 (7th 1993). However, as some of defendant's arguments attacking alleged surplusage were not made below, they are reviewed on appeal for "plain error" only. *Id.*

B. Analysis

Defendant went to trial on the wire fraud charge in Count Six, which realleged and incorporated by reference the wire fraud scheme described in Count One (paragraphs 1-18) of the Indictment. R1. The court submitted to the jury the incorporated portions of Count One, including the caption of the case listing O'Connor's codefendants, along with Count Six. R399; Tr504-05. At trial, defendant objected to including the indictment's caption listing the eight other defendants who had been indicted. Tr504-09, 530-33, 572-73. The court's refusal to strike the caption was not an abuse of discretion. Tr572-73.

"Surplusage should not be stricken unless it is clear that the allegations are not relevant to the charge and are inflammatory and prejudicial." *United States v. Peters*, 435 F.3d 746, 753 (7th Cir. 2006)(internal quotations and citations omitted). Here, defendant asserts that "the indictment linked her to eight con men whose guilt was assumed" and the inclusion of these codefendants in the caption of the case "implied a greater relationship and cohesion of will

than actually existed." Br50. But the district court instructed jurors that the indictment was not evidence and that they should "not speculate why any other person whose names you may have heard during trial or who was named in the indictment of this case as a defendant is not currently on trial before you." R398:9, 15. Jurors also were instructed that "[a] defendant's association with persons involved in a criminal enterprise is not by itself sufficient to prove his/her participation or membership in a criminal enterprise." R398:25. These instructions were sound, and the jury is presumed to follow the court's instructions. *See Yates v. Evatt,* 500 U.S. 391, 403 (1991)(acknowledging the "sound presumption of appellate practice" that jurors follow the instructions given); *United States v. Williams*, 445 F.3d 724, 733-34 (4th Cir. 2006); *United States v. Vega*, 72 F.3d 507, 517 (7th Cir. 1995); *Marshall,* 985 F.2d at 906.

Defendant's remaining objections to the indictment are brought for the first time on appeal, and establish no error, much less the requisite plain error.

Defendant argues that the indictment's references to certain coschemers and their acts, as well as the total amount of the fraud, were irrelevant, since she was not personally involved with every alleged coschemer or did not personally participate in every fraudulent loan alleged. Br49. But defendant was charged with a wire fraud scheme and that scheme, in its entirety, was incorporated by reference (and thus part of) the charge in Count Six on which

she was tried. While the government might not have proven every allegation in the scheme, the scheme and its charges were relevant to the defendant. *See Marshall*, 985 F.2d at 906. Further, jurors were carefully instructed that: the indictment was not evidence; they should not speculate why persons whose names they might have heard or who were identified in the indictment were not on trial before them; and the guilt or innocence of the defendant had to be determined only upon the evidence presented at trial. R398:2, 3, 9, 15. In such circumstances, the court did not commit plain error by not redacting the indictment. *See, e.g., United States v. Schuler*, 458 F.3d 1148, 1153-54 (10th Cir. 2006); *Peters*, 435 F.3d at 753; *Marshall*, 985 F.2d at 906.

CONCLUSION

For these reasons, the government respectfully requests that this Court affirm defendant's conviction and sentence.

RESPECTFULLY SUBMITTED,

Respectfully submitted,

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CIRCUIT RULE 31(e) CERTIFICATION

Pursuant to Circuit Rule 31(e), I hereby certify that I have filed electronically versions of our brief and all available appendix items in nonscanned PDF format.

HELENE B. GREENWALD
Assistant United States Attorney

RULE 32 CERTIFICATION

I hereby certify that:

1. This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 13,639 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the WordPerfect X3 proportionally-spaced typeface of Century Schoolbook with 13-point font in the text and 12-point font in the footnotes.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 09-2476
	)	
Plaintiff-Appellee,	)	Appeal from the United States
	)	District Court for the
v.	)	Northern District of Illinois,
	)	Eastern Division
AZUREEIAH O'CONNOR	)	05 CR 672
	)	
Defendant-Appellant.	)	Honorable Elaine E. Bucklo

CERTIFICATE OF SERVICE

I, HELENE B. GREENWALD, hereby certify that on January 29, 2010, I caused two copies and a digital version of the foregoing BRIEF AND APPENDIX OF THE UNITED STATES, to be served upon the following by first-class, postage-paid mail:

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273 Fed.Appx. 557, 2008 WL 1723325 (C.A.7 (Ill.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 273 Fed.Appx. 557, 2008 WL 1723325 (C.A.7 (Ill.)))

C

United States Court of Appeals,
Seventh Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Shaun CROSS, Defendant-Appellant.
No. 07-1779.

Argued April 2, 2008.
Decided April 15, 2008.

Background: Defendant was convicted in the United States District Court for the Northern District of Illinois, Elaine E. Bucklo, J., of mail fraud, wire fraud, and making false statements on loan applications, and he appealed his 140-month sentence.

Holding: The Court of Appeals held that offense level increase for use of sophisticated means was warranted.
Affirmed.

West Headnotes

Sentencing and Punishment 350H ⚿727

350H Sentencing and Punishment
350HIV Sentencing Guidelines
350HIV(B) Offense Levels
350HIV(B)3 Factors Applicable to Several Offenses
350Hk727 k. Sophistication in Commission or Concealment. Most Cited Cases
In defendant's sentencing for mail fraud, wire fraud, and making false statements on loan applications, sentencing guidelines offense level increase for use of sophisticated means was warranted; defendant and others perpetrated a massive mortgage loan fraud involving more than six million dollars in loans, the fraud involved 35 mortgage loans on 17 residential properties in the names of 17 different "straw buyers," the loans were provided by 23 banks and residential lenders, and the straw buyers were paid $5,000 for the use of their names and social security numbers, and some were required to sign mortgage loan documents. U.S.S.G. § 2B1.1(b)(8), 18 U.S.C.A.

***557** Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 05 CR 672, Elaine E. Bucklo, Judge.Lela D. Johnson, Office of the United States Attorney, Chicago, IL, for Plaintiff-Appellee.

Standish E. Willis, Chicago, IL, for Defendant-Appellant.

ORDER

****1** Shaun Cross entered a guilty plea to a 13-count indictment charging mail fraud, wire fraud, and making false statements on loan applications, in violation of 18 U.S.C. §§ 1341, 1343, and 1014. He was sentenced to 140 months in prison and ordered to pay restitution in the amount of $4,350,058. He appeals the sentence.

From September 2000 to January 2003, Cross and others perpetrated a massive mortgage loan fraud involving more than $6 million in loans. The fraud involved 35 mortgage loans on 17 residential properties in the names of some 17 different "straw buyers." The loans were provided by 23 banks and residential lenders. The straw buyers were paid $5,000 for the use ***558** of their names and social security numbers, and some were required to sign mortgage loan documents.

A codefendant worked for TCF bank and provided

Cross with false verifications of deposit for various of the straw buyers. At first Cross arranged for the closings at licensed title companies. But beginning in August 2001, he arranged for the closings to be held at two fraudulent title companies he created-Title First and Illinois Title and Trust.

Prior to sentencing, Cross filed objections to the calculation of his sentencing range under the United States Sentencing Guidelines as set out in the presentence investigation report. He said he did not plead to "any sentencing allegations and made no admissions regarding Sentencing allegations." Rather than offense level 31, as the probation department calculated, he said his offense level should be 28.

Cross argues first that the district judge is prohibited from making factual determinations by a preponderance of the evidence at sentencing because doing so violates his Sixth Amendment right to a jury trial, his Fifth Amendment right to due process, and the Ex Post Facto Clause of the United States Constitution. Wisely seeing that the argument might fail, he also argues that, even if the judge is allowed to make findings, the finding that the crime was committed by sophisticated means was in error. He also says that his sentence shows an unwarranted disparity between him and other similarly situated defendants and is unreasonable in light of the factors in 18 U.S.C. § 3553(a).

The constitutional arguments cannot succeed. In effect, Cross would have us overturn *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), something which is, of course, outside the pale. *See United States v. Santiago*, 495 F.3d 820 (7th Cir.2007); *United States v. Hawkins*, 480 F.3d 476 (7th Cir.2007); *United States v. White*, 472 F.3d 458 (7th Cir.2006). *Booker* states as clearly as possible that we must apply its holding "to all cases on direct review." At 268, 125 S.Ct. 738. More recently, in *Rita v. United States*, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007), the Court specifically looked at a Sixth Amendment challenge to judge-made findings which increase a guideline range. The Court determined that because the guidelines are not mandatory, nothing forbids a judge from imposing a sentence higher than the "Guidelines provide for the jury-determined facts standing alone." At 2466.

****2** Similarly we are guided by *Rita* in our evaluation of whether the sentence is reasonable. The Court determined that "a court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Sentencing Guidelines." At 2462. Cross was sentenced within the guidelines (properly, as we shall see). But, he says, his sentence is longer than comparable sentences nationwide and thus created unwarranted disparity. He also claims the sentencing judge did not consider the § 3553(a) factors; particularly that the sentence should be no longer than necessary to comply with the purposes of sentencing set out in the statute. We disagree.

The record shows that the judge considered the relevant § 3553(a) factors. As to disparity, a major factor in the Court's decision in *Rita* to allow appellate courts to apply a presumption of reasonableness to sentences which fall within the guidelines is that the goal of the guidelines (though perhaps not perfectly attained) is to eliminate disparity. In establishing a guidelines system, Congress sought to "bring about greater fairness." At 2467. ***559** The Court determined that those goals are most often met by guidelines sentences.

As to the guidelines calculations, Cross objects to the finding that his activity involved "sophisticated means." On appeal for the first time, he says there is nothing especially complex or intricate about the means by which he committed the crime. He objected to the enhancement in the district court, but only as to the constitutional grounds we have just discussed. He did not object to the factual basis of the finding. Our review, then, is for plain error: error that is plain and which affects substantial rights. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). Because there is no error in the first instance, he cannot prevail.

Guideline § 2B1.1(b)(8) provides that a defendant's offense level may be increased by two levels if the "offense otherwise involved sophisticated means." The Application Note says that

> [f]or purposes of subsection (b)(8)(C), "sophisticated means" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense....
>
> Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells ... ordinarily indicates sophisticated means.

What Cross was charged with doing and pled guilty to is exactly what the Note describes. He does not give us any reason to think the finding is erroneous.

Accordingly the judgment is AFFIRMED.

C.A.7 (Ill.),2008.
U.S. v. Cross
273 Fed.Appx. 557, 2008 WL 1723325 (C.A.7 (Ill.))

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