No. 13-2145

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America,
Plaintiff-Appellee,

v.

Gregory Walker,
Defendant-Appellant.

Appeal From The United States District Court
For the Northern District of Illinois, Eastern Division
Case No. 11-CR-00004-3
The Honorable Harry D. Leinenweber

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
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United States of America, Plaintiff-Appellee, v. Gregory Walker, Defendant-Appellant.	Appeal From The United States District Court For the Northern District of Illinois, Eastern Division Case No. 11-CR-00004-3 The Honorable Harry D. Leinenweber

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Disclosure Statement

I, the undersigned counsel for the Defendant-Appellant, Gregory Walker, furnish the following list in compliance with Fed. R. App. P. 26.1 and Cir. R. 26.1:

1. The full name of every party or amicus the attorney represents in the case: Gregory Walker

2. This party is not a corporation.

3. The names of all law firms whose partners or associates are expected to appear for the party before this Court:

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STATEMENT OF REASONS FOR REHEARING

Rehearing is warranted in this case for three reasons. First, the panel's decision misapplies *United States v. Taylor*, 72 F.3d 533 (7th.Cir. 1995) and is in direct conflict with *United States v. Schroeder*, 536 F.3d 746 (7th Cir. 2008), while simultaneously creating a new circuit split with the Tenth Circuit's decision in *United States v. James*, 592 F.3d 1109 (10th Cir. 2010). Second, the panel should have waited to issue its decision until the Supreme Court's forthcoming decision in *United States v. Robers,* 698 F.3d 937 (7th Cir. 2012), *cert. granted,* 2013 WL 775438 (Oct. 21, 2013) (No. 12-9012), which may set forth new, dispositive rules of restitution calculation that should be applied in this case. Third, the panel did not consider whether the government's heavy use of conspiracy doctrines, including a non-pattern *Pinkerton* instruction, gave Walker the right to use a conspiracy defense as his theory-of-the-defense instruction.

BACKGROUND

In the prevailing subprime lending market of the past decade, Gregory Walker applied for—and received—several subprime mortgage loans in 2005 and 2006. (A.28–29.) Walker's applications included false information. (Trial Tr. 284.) Nevertheless, Walker made mortgage payments on the properties he purchased using these loans, (A.68–70), even paying off some of the mortgages in full when properties were sold to subsequent purchasers, (A.72–78).

In 2011 Walker and six others, including his then-girlfriend Tayna McChristion, were indicted for participation in a mortgage-fraud scheme. (R.1.) Although

Walker's co-defendants entered guilty pleas, Walker went to trial in January 2013. At trial, the government's theory was that Walker, McChristion, and loan officer Carol Simmons participated in a scheme in which Simmons prepared loan applications on behalf of Walker and McChristion, whom the government contended was a straw purchaser on Walker's behalf. The fraud counts against Walker were based upon mortgage loans taken out by McChristion. At the close of the trial, the government proposed—and the district court gave—vicarious liability and joint-venture jury instructions, along with an instruction stating that a defendant need not be personally responsible for the use of interstate communications facilities. (A.92, 90, 91.) Walker sought to introduce a theory-of-defense instruction based upon the Seventh Circuit's pattern buyer–seller instruction in order to assist the jury in distinguishing Walker's role from that of his co-defendants. (A.88–89.) The district court denied the proposed instruction without discussion. (A.14.) Relying on the fact that Walker was not charged with conspiracy and stating that a buyer–seller relationship is not a defense to a wire fraud charge, the panel of this Court affirmed the district court. *See* Exhibit A, (Panel Op. 11–12.)

After trial, in calculating restitution, the government argued that lender Long Beach Mortgage Company had lost $193,000 on the properties listed in the two counts of conviction and $763,300 on related transactions.[1] (Presentence

[1] As the government conceded at oral argument (Oral Argument at 14:40, 22:11, U.S. v. Gregory Walker (No. 1302145) *available at* http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=13&casenumber=2145&listCase=List+case%28s%29), none of the calculated losses were based on the (fully-repaid) loans in Walker's name. Instead, they were based on subsequent foreclosures against later owners to whom Walker sold the properties.

Investigation Report at 8.) Walker raised objections to the restitution calculation below, (R.307), which the panel implicitly found insufficient to preserve an objection to either the amount of restitution or the identity of the victims as described in the PSR (Panel Op. 14). The panel then relied on this Court's decision in *Taylor* to dispose of Walker's arguments, stating that a district court may rely entirely on an uncontroverted PSR. (Panel Op. 14–15.) In his brief, Walker noted that the Supreme Court was presently reviewing this Court's calculation methodology for restitution in mortgage-fraud, and argued that the forthcoming decision might impact the restitution calculation in Walker's case. (Appellant's Br. 31 n.6) (citing *United States v. Robers,* 698 F.3d 937 (7th Cir. 2012), *cert. granted,* 2013 WL 775438 (Oct. 21, 2013) (No. 12-9012)).

DISCUSSION

I. The panel's decision conflicts with its own precedent, and creates a new circuit split.

The panel's decision turns largely on its conclusion that Walker did not object to the PSR's restitution amount or victim identification. In doing so the panel's decision misapplies this Court's prior decisions in *Taylor* and *Schroeder*, and creates a new circuit split with the Tenth Circuit in *James*, 592 F.3d at 1115, on the question of victim identity for purposes of the Mandatory Victim Restitution Act.

A. The panel misapplies *Taylor*, overlooking its prohibition on adoption of unreliable PSRs.

First, as the panel opinion notes, the significance of Walker's failure to object to the PSR stems from *Taylor*'s explicit approval of the district court's adoption of an uncontroverted PSR. (Panel Op. 14–15.) *Taylor*, however, by its own terms, only applies if the PSR is itself reliable, and includes a critical limitation: "*Provided that the facts contained in a PSR bear sufficient indicia of reliability to support their probable accuracy*, the district court may adopt them as support for its findings and conclusions." 72 F.3d at 543 (emphasis added, internal quotations omitted).

Because in Walker's case there are *no facts* in the PSR to support the restitution calculation,[2] *see* (Appellant's Br. 27–28), the district court could not simply adopt it in total, as the court did in *Taylor*. The panel's application of *Taylor* to Walker's case when the PSR here does not satisfy *Taylor*'s threshold requirement of reliability, represents an expansion of *Taylor* to include cases where the PSR is unreliable. The Court should grant the motion to reconsider so that Walker's restitution issues can be examined in light of *Taylor*'s limiting principle.

B. The panel relies on *Taylor* to avoiding reaching appellant's extent-of-the-scheme argument, in conflict with *Schroeder*.

Next, the panel implicitly relied once again on *Taylor* to dispense with Walker's claim that the district court failed to adequately determine the extent of the scheme before imposing its restitution order. (Panel Op. 14; Appellant's Br. at 28-29.) The

[2] For example, the PSR was devoid of any information about the loans used to calculate restitution, such as the identity of the originating lender (asserted, without factual basis, to be Long Beach), the identity of the current mortgage holder (again asserted, without factual basis, to be Long Beach), the outstanding balance on the loans, or even the identity of the mortgagees foreclosed on. Nor was there any documentation regarding issuance of these loans, foreclosure on these loans, or the conduct and proceeds of the foreclosure sales.

panel's approach conflicts with a prior decision of this Court, which prohibits a district court from blindly holding a defendant responsible for a restitution amount that may not be attributable to his criminal conduct (or, as relevant here, that of his alleged co-schemers). *Schroeder*, 536 F.3d at 755 ("The district court treated the underpayments [in the audit in the PSR] as frauds attributable to Schroeder without conducting any analysis as to what evidence proved that Schroeder's unlawful conduct caused the underpayments.")

Here, as the government conceded at oral argument, the loss calculation in the PSR was based on mortgages taken out by other individuals. Oral Argument at 14:40, *U.S. v. Gregory Walker* (No. 1302145) *available at* http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=13&casenumber=2145&listCase=List+case%28s%29. At a minimum, this Court should have followed *Schroeder* and considered whether the district court's failure to make any findings as to precisely what losses were attributable to Walker rose to plain error.

C. By determining that the originating lender was the victim despite having sold one or more of the loans, the panel creates a circuit split with the Tenth Circuit.

Finally, the panel concluded that the originator of a loan is necessarily the victim under the MVRA. (Panel Op. 14) (implying that, to call the identity of the victim into question, the defendant needs to argue that a different lender made the loan) ("Indeed, Walker does not argue that Long Beach Mortgage did not make the loans to him."). Yet in another circuit, an originating lender who sells a loan is only harmed to the extent that it loses money on the sale. *James*, 592 F.3d at 1115

("Accordingly, to the extent any original lender sustained an actual loss, that loss is the difference between the outstanding balance on the original loan and what the lender received when it sold the loan.") (citing *United States v. Smith*, 951 F.2d 1164, 1167 (10th Cir. 1991)).

The panel concluded that the collapse of Long Beach Mortgage accounts for the difference between the originating lenders and the foreclosing lenders in this case. But that is not true for at least one of the mortgages; the South Holland property records state that the foreclosure was on behalf of the holder of an asset-backed security. (App. B. 79.) Thus, at least one of the loans was sold prior to foreclosure, which, under the Tenth Circuit's approach, means that Long Beach was not the victim. Thus, the outcome would have been substantively different in another court. The panel should grant rehearing in order to avoid a new circuit split.

II. The panel should have waited to issue its decision until the Supreme Court determines the proper method governing restitution calculations.

As Walker discussed in his opening brief, (Appellant's Br. 31 n.6.), the accuracy of the district court's restitution calculation also hinges on the Supreme Court's decision in *United States v. Robers,* 698 F.3d 937 (7th Cir. 2012), *cert. granted,* 2013 WL 775438 (Oct. 21, 2013) (No. 12-9012). At issue there is this Court's approach of calculating restitution by "subtracting the sale price the lender received after it recovered possession of the property from the amount of the original loan." Panel Op. at 13 (quoting *United States v. Green*, 648 F.3d 569 (7th Cir. 2011)). But if the

Supreme Court disagrees, the district court's methodology—and this Court's approval of it—will be in error.

III. The panel did not adequately account for the government's heavy reliance on conspiracy doctrines when rejecting Walker's buyer-seller instruction on the ground that it applies only in conspiracy cases.

The district court should have given a theory-of-defense instruction that would have permitted the jury to assess Walker's defense that he sought mortgages as a part of his business repairing and flipping properties rather than as part of the scheme to defraud alleged by the government. In criminal cases, defendants have a right to a theory-of-defense instruction as long as it is supported by law and has some foundation in the evidence. *United States v. Douglas*, 818 F.2d 1317, 1320 (7th Cir. 1987). Even where a proposed instruction does not perfectly encompass the theory of defense proffered, the district court may have a duty to issue a theory-of-defense instruction that is appropriate. *See id.* at 1322 (finding under plain error review that the district court had a duty to give a theory-of-defense instruction even though the defendant's proposed instruction did not incorporate the theory of defense); *see also United States v. Bear*, 439 F.3d 565, 568 (9th Cir. 2006) ("When a defendant actually presents and relies upon a theory of defense at trial, the judge must instruct the jury on that theory even where such an instruction was not requested.").

Here, the panel rejected Walker's arguments regarding his theory-of-defense instruction, finding that buyer–seller instructions are used in the conspiracy context and Walker was not charged with conspiracy. (Panel Op. 10.) Yet the panel

failed to adequately consider the extent to which conspiracy doctrines were employed at trial. The evidence presented at trial often did not distinguish between the actions of Walker and his co-defendants. Furthermore, the government requested and received jury instructions that relied heavily upon conspiracy doctrine, particularly its non-pattern *Pinkerton* instruction. (A.92.) In proposing that instruction, the government explicitly relied upon several cases emphasizing the role of conspiracy doctrine in fraud cases, notably *United States v. Macey*, which states that an indictment does not need to charge conspiracy for conspiracy doctrines to be used. 8 F.3d 462, 468 (7th Cir. 1993). Where the government uses conspiracy doctrines against the defendant in a non-conspiracy case, that defendant should be able to invoke a theory-of-defense instruction to combat their use, even when those instructions are usually used in the conspiracy context. This Court should grant this petition for rehearing so that it may reconsider Walker's right to a theory-of-defense instruction in the context of the conspiracy-based arguments and jury instructions levied against Walker in the district court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant rehearing or rehearing *en banc* in this case.

Respectfully Submitted,

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No. 13-2145

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

United States of America, Plaintiff-Appellee, v. Gregory Walker, Defendant-Appellant.	Appeal From The United States District Court For the Northern District of Illinois, Eastern Division Case No. 11-CR-00004-3 The Honorable Harry D. Leinenweber

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Certificate of Compliance with Federal Rules of Appellate Procedure 32(a) and 40 and Seventh Circuit Rules 32 and 40

1. This petition complies with the type-volume limitation of Fed. R. App. 40(b) and Circuit Rule 40 because: this petition contains 9 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7(B)(iii).

2. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and Circuit Rule 32 because this petition has been prepared in a proportionally-spaced typeface using Microsoft Word, in 12-point Century Schoolbook font with footnotes in 11-point Century Schoolbook font.

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Dated: April 21, 2014

Certificate of Service

I, the undersigned, counsel for the Defendant-Appellant, Gregory Walker, hereby certify that I electronically filed this brief with the clerk of the Seventh Circuit Court of Appeals on April 21, 2014, which will send the filing to the person listed below.

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EXHIBIT A
PANEL OPINION

In the

United States Court of Appeals

For the Seventh Circuit

No. 13-2145

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GREGORY WALKER,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 1:11-cr-00004-3 — **Harry D. Leinenweber**, *Judge*.

ARGUED JANUARY 23, 2014 — DECIDED MARCH 25, 2014

Before POSNER and RIPPLE, *Circuit Judges*, and GILBERT, *District Judge*.*

GILBERT, *District Judge*. On January 16, 2013, a jury found Gregory Walker guilty of two counts of wire fraud in violation of 18 U.S.C. § 1343. On appeal, Walker makes the following three arguments: (1) the failure to obtain and turn

* Of the Southern District of Illinois, sitting by designation.

over Walker's seized items from a previous unrelated state case constitutes a *Brady* violation and prevented Walker from presenting his theory of defense; (2) the district court erred when it refused to give Walker's proposed buyer-seller instruction to the jury; and (3) the district erred in ordering restitution. For the following reasons, we affirm the district court.

In sum, Walker was involved in a mortgage fraud scheme encompassing at least ten different loans and seven different properties in the Chicago area. Throughout the scheme, Walker served as both a fraudulent buyer and seller. He also used his then-girlfriend, co-defendant Tanya McChristion, as a straw purchaser in some transactions. With respect to the two wire fraud counts that went to trial, Walker fraudulently caused Long Beach Mortgage to loan money on two different occasions with properties located at 9023 South Kingston, Chicago, Illinois ("the Kingston property") and 277 Allegheny Street, Park Forest, Illinois ("the Park Forest property") serving as collateral.

In his role as a fraudulent buyer, Walker first obtained a fraudulent loan for the Kingston property on May 19, 2005, when he submitted a loan application through co-defendant Carol Simmons, a loan processor. Simmons prepared and submitted the loan application containing false information about Walker's employment, assets, and rental income. Thereafter, Walker sold the Kingston property to McChristion on January 31, 2006. This transaction, in Walker's role as a fraudulent seller, is the subject of Count Two. To obtain the January 2006 mortgage on the Kingston property, Simmons submitted loan applications on behalf of McChristion to Long Beach Mortgage. The application was replete with false

information regarding McChristion's assets, employment, income, and earnest money payments. Walker obtained control of a portion of the loan proceeds through a check made payable to Real Deal Construction, a company owned by Walker.

The loan for the Park Forest property, the subject of Count Three, was obtained through Walker's use of McChristion as a straw buyer. This loan was obtained in a similar manner as the Kingston property loan, wherein Simmons prepared and submitted fraudulent loan documents in McChristion's name. In addition to listing McChristion's fraudulent income information, the loan application stated the sale price was $137,000; however, at trial the seller testified the negotiated sale price was $86,000. Eventually, the loans went into default and the properties were foreclosed on. In sum, Walker's conduct relating to the ten fraudulent transactions caused an estimated $956,300 in loss to Long Beach Mortgage.

Walker's trial counsel entered his appearance in the instant case just a few weeks prior to trial. Counsel filed a motion to continue citing his need to conduct an investigation of the evidence to determine whether Walker had a *Silverthorne* claim.[1] Specifically, counsel was concerned that illegally seized material from an unrelated state case, in the possession of the South Holland Police Department, may

[1] In *Silverthorne*, the Supreme Court explained that "a grand jury must be denied access to plainly relevant but illegally seized papers." *United States v. Calandra*, 414 U.S. 338, 361 (1974) (citing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)).

have been used to form the basis of the instant federal case. That evidence stems from Walker's 2006 arrest by Secret Service and others for possession of a gun. During that arrest, law enforcement seized property from Walker's home, including third parties' state identification cards, social security numbers, and credit histories; electronic storage devices; and documents and ledgers. The state court held that the search was in violation of Walker's Fourth Amendment rights and suppressed the evidence in his state case.

Throughout the district court proceedings, the government maintained that its evidence for the instant case came from lenders, title companies, financial institutions and eyewitness testimony, not from the 2006 state search. It further maintained that the only investigating agency was Housing and Urban Development, not the Secret Service.

During an October 17, 2012, hearing on Walker's motion for return of a subpoena directed at the South Holland Police Department, the district court clarified the information sought by Walker. Specifically, defense counsel said, "All I'm asking for is disclosure from the police as to what they did with this stuff," and "I want to know what they did with the stuff. That's all, what the police did with the stuff." Defense counsel further explained that he was no longer seeking production of the seized property because "it would be a little unwise for a criminal attorney to ask for evidence of crimes that he wasn't charged with." Defense counsel then clarified that his request was in the alternative, and he was alternatively requesting, pursuant to *Brady*, "a disclosure as to what the Federal Government or the state authorities" did with the seized property.

The district court directed the government to inquire as to the status and location of the seized 2006 property. As such, the government filed a status report on October 24, 2012, detailing its contact with the South Holland Police Department. Specifically, the government found that the seized property was still in the South Holland Police Department's possession and no one had made a claim to the seized property since the 2006 seizure. The government further informed the district court that the South Holland Police Department affirmed it had no connection with or knowledge of the instant federal case. Thereafter, Walker did not attempt to obtain the evidence in the custody of the South Holland Police Department and proceeded to trial.

At the jury instruction conference, Walker proposed the following buyer-seller instruction:

> The existence of a simpler buyer-seller relationship between a defendant and another person, without more, is not sufficient to establish a criminal enterprise, even where the buyer intends to resell the property. The fact that a defendant may have bought property from another person is not sufficient without more to establish that the defendant was a member of the charged criminal enterprise.
>
> In considering whether a criminal enterprise or a simple buyer-seller relationship existed, you should consider all of the evidence, including the following factors:
>
> (1) Whether the transactions involved large quantities of property or properties;

> (2) Whether the parties had a standardized way of doing business over time;
>
> (3) Whether the sales were on credit or on consignment;
>
> (4) Whether the parties had a continuing relationship;
>
> (5) Whether the seller had a financial stake in a resale by the buyer;
>
> (6) Whether the parties had an understanding that the property or properties would be resold.
>
> No single factor necessarily indicates by itself that a defendant was or was not engaged in a simple buyer-seller relationship.

The district court rejected Walker's proposed buyer-seller instruction.

Ultimately, the jury found Walker guilty on both Counts Two and Three of the indictment. Walker filed a motion for a new trial or judgment N.O.V. arguing there was insufficient evidence and that the court's refusal to give his buyer-seller instruction was reversible error. The district court denied the motion.

Based on an offense level of twenty-three and a criminal history category of four, Walker's sentencing guidelines range was seventy to eight-seven months' imprisonment. The district court imposed a below-guideline sentence of sixty months on each count to run concurrently. The Court further imposed a three-year term of supervised release and a $200 special assessment.

The presentence report ("PSR") recommended the Court impose restitution in the amount of $956,300 to compensate Long Beach mortgage for its losses. The Government's Version of the Offense put forth the methodology by which the government calculated the loss amount. The loss amounts for the various properties were obtained by subtracting the sale price the victim-lender received after recovering possession of the property from the amount of the fraudulent loan. Walker objected to the PSR's restitution amount only to the extent that he stated it was unfair to impose restitution in an amount representing losses caused by others in the scheme and that the evidence showed that Walker had made payments on the mortgages for properties he purchased. Walker did not, however, object to or present evidence contrary to the loss calculations contained in the PSR. The district court adopted the PSR's actual loss calculation of $956,300 and ordered restitution joint and several with Walker's co-defendants.

We will now consider each of Walker's arguments in turn.

1. *Brady* Violation

First, Walker argues a *Brady* violation stemming from the government's failure to provide him with the South Holland Police Department evidence. He further argues this alleged *Brady* violation prevented him from presenting his theory of defense because the evidence in question contained evidence relevant to his defense. We review a district court's denial of a motion for a new trial based on a *Brady* violation for abuse of discretion. *United States v. Wilson*, 237 F.3d 827, 831–32 (7th Cir. 2001). Where a defendant fails to preserve a *Brady* violation claim before the district court, we review for plain

error. *United States v. Mota*, 685 F.3d 644, 648 (7th Cir. 2012). "That means that 'the alleged *Brady* violation must be an obvious error that affected [the defendant's] substantial rights and created a substantial risk of convicting an innocent person." *Id.* (quoting *United States v. Daniel*, 576 F.3d 772, 774 (7th Cir. 2009)) (internal quotations omitted).

Here, Walker made it clear to the district court that he simply wanted to know "what the police did with the stuff" and the government satisfied that request when it found that the evidence was still at the South Holland Police Department. After receipt of that information, Walker no longer pursued the evidence at issue. Accordingly, it is appropriate to review Walker's *Brady* claim for plain error. However, Walker's claim fails under either plain-error or abuse-of-discretion review.

Brady explained that failure to disclose favorable evidence upon a defendant's request "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). To succeed on a *Brady* claim, Walker bears the burden of proving that the evidence is "(1) favorable, (2) suppressed, and (3) material to the defense." *United States v. Wilson*, 237 F.3d 827, 832 (7th Cir. 2001). The government's duty to disclose favorable evidence extends beyond evidence in its immediate possession to evidence in the possession of other actors assisting the government in its investigation. *Fields v. Wharrie*, 672 F.3d 505, 513 (7th Cir. 2012). However, even if the government failed to disclose material evidence, the evidence is not "suppressed" if the defendant knew of the evidence and could have obtained it through the exercise of reasonable

diligence. *United States v. Dimas*, 3 F.3d 1015, 1018–19 (7th Cir. 1993).

Walker fails to establish a *Brady* violation for two reasons. First, the evidence suppressed in the state case was not in the control of the government or any actors assisting the government in its federal investigation. While Walker has repeatedly contended that the suppressed evidence was in some way connected to the instant federal prosecution, Walker has failed to show that the government or any actors assisting the government in its investigation had any access to or knowledge of the suppressed evidence. To the contrary, the government repeatedly denied any knowledge of the suppressed evidence. The government further explained that the sole investigating agency involved in the instant investigation was Housing and Urban Development, and the South Holland Police Department reported it had no knowledge of the instant case. As such, Walker fails to establish that the government suppressed any evidence in violation of *Brady*.

Second, Walker failed to exercise reasonable diligence in obtaining the suppressed evidence from the South Holland Police Department. As was made clear at oral argument, Walker never even asked the South Department Police Department to provide him with the evidence. At a minimum, Walker would have to ask for law enforcement to turn over his property before he can claim he has made a reasonably diligent effort to obtain it. Accordingly, the South Holland Police Department evidence was not suppressed within the meaning of *Brady*.

To the extent Walker argues he was denied due process when the district court failed to issue a subpoena for the South Holland Police Department evidence, his claim fails.

Walker's counsel ultimately withdrew his request to obtain the evidence. Instead, he sought simply to learn the location of the evidence. This move was indeed a strategic move by counsel as he acknowledged before the district court "it would be a little unwise for a criminal attorney to ask for evidence of crimes that he wasn't charged with." As such, Walker waived any due process claim involving the district court's failure to issue a subpoena for the South Holland Police Department evidence.

2. Proposed Buyer-Seller Instruction

Next, Walker argues he was denied an opportunity to present his theory of defense when the district court refused to give his proposed buyer-seller jury instruction. While Walker did not go to trial on the conspiracy charge, the government still argued Walker was involved in a scheme to defraud. Walker contends he was entitled to his proposed buyer-seller instruction, an instruction given in a conspiracy context, because the scheme theory relies on conspiracy concepts. We review a district court's refusal to give a requested theory-of-defense jury instruction *de novo*. *United States v. Choiniere*, 517 F.3d 967, 970 (7th Cir. 2008).

Defendants are not automatically entitled to any particular theory-of-defense jury instruction. *Id*. A defendant is only entitled to a jury instruction that encompasses his theory of defense if "(1) the instruction represents an accurate statement of the law; (2) the instruction reflects a theory that is supported by the evidence; (3) the instruction reflects a theory which is not already part of the charge; and (4) the failure to include the instruction would deny the [defendant] a fair trial." *United States v. Swanquist*, 161 F.3d 1064, 1075 (7th Cir. 1998).

As indicated in the Committee Comment to the buyer-seller instruction contained in the Seventh Circuit Pattern Jury Instruction, "[t]his instruction should be used only in cases in which a jury reasonably could find that there was only a buyer-seller relationship rather than a conspiracy." This makes sense. To prove a conspiracy, the government must prove more than a buyer-seller agreement. *United States v. Gee*, 226 F.3d 885, 893–94 (7th Cir. 2000). Specifically, a conspiracy "is an agreement with a particular kind of object—an agreement to commit a crime … . What is required for conspiracy in such a case is an agreement to commit some other crime beyond the crime constituted by the agreement itself." *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1993). Accordingly, a mere buyer-seller relationship provides a defense to a conspiracy charge because it negates an essential element, the agreement to commit a crime, of a conspiracy. *See United States v. Turner*, 93 F.3d 276, 285 (7th Cir. 1996) (In the context of a drug conspiracy charge, "[t]he purpose of the 'mere buyer-seller instruction' is to ensure that the jury understands that an agreement to purchase the contraband, without any other agreement to achieve another criminal objective, is not a conspiracy.")

The buyer-seller instruction, however, does not provide a defense to an element contained in a charge for wire fraud. The government must prove the following elements to convict a defendant of wire fraud: "(1) the defendant participated in a scheme to defraud; (2) the defendant intended to defraud; and (3) a use of an interstate wire in furtherance of the fraudulent scheme." *United States v. Turner*, 551 F.3d 657, 664 (7th Cir. 2008). Walker argues that the buyer-seller instruction encompasses his defense to the scheme-to-defraud element. However, "a scheme to defraud is conduct intended

or reasonably calculated to deceive a person of ordinary prudence or comprehension." *United States v. Hanson*, 41 F.3d 580, 583 (10th Cir. 1994). It does not involve an agreement with another to commit a crime. Accordingly, the existence of a mere buyer-seller relationship is not a defense to the scheme-to-defraud element of wire fraud. As such, the failure to include Walker's buyer-seller instruction did not deny Walker a fair trial and it was not error for the district court to reject that instruction.

3. Restitution

Finally, Walker contends the district court's restitution order was erroneous. Specifically, he alleges that the methodology employed by the district in determining restitution failed to accurately determine the amount of actual loss or the identity of the victims. We review the legality of an award of restitution *de novo* and the district court's restitution calculation for abuse of discretion. *United States v. Robers*, 698 F.3d 937, 941 (7th Cir. 2012). However, where a defendant fails to raise specific arguments regarding a restitution award in the district court, we employee plain-error review. *United States v. Berkowitz*, 732 F.3d 850, 852 (7th Cir. 2013). Under plain-error review, we will overturn the district court's restitution order only if the district court committed an error that would deprive a defendant of his substantial rights. *Id*. at 852–53.

The Mandatory Victims Restitution Act ("MVRA") provides that a district court "shall order" defendants convicted of specified offenses to "make restitution to the victim of the offense." 18 U.S.C. § 3663A(a)(1). The purpose of the MVRA is to "ensure that victims recover the full amount of their losses, but nothing more." *United States v. Newman*, 144 F.3d

531, 542 (7th Cir. 1998). Where the crime involves "damage to or loss or destruction of property of a victim of the offense" the restitution order must order the defendant to

> (A) return the property to the owner of the property or someone designated by the owner; or
>
> (B) if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to —
>
> (i) the greater of —
>
> (I) the value of the property on the date of the damage, loss, or destruction; or
>
> (II) the value of the property on the date of sentencing, less
>
> (ii) the value (as of the date the property is returned) of any part of the property that is returned.

18 U.S.C. § 3663A(b)(1). Loss in mortgage fraud cases is determined by "subtract[ing] the sale price the lender received after it recovered possession of the property from the amount of its original loan … ." *United States v. Green*, 648 F.3d 569 (7th Cir. 2011).

The district court may adopt the actual loss amount contained in the PSR. *United States v. Berkowitz*, 732 F.3d 850, 853–54 (7th Cir. 2013). When the district court opts to adopt the PSR's restitution calculation, the burden then falls on the defendant to demonstrate the amount is unreliable. *Id*. "When a defendant has failed to produce any evidence call-

ing the report's accuracy into question a district court may rely entirely on the PSR." *United States v. Taylor*, 72 F.3d 533, 543 (7th Cir. 1995).

Here, Walker failed to object at sentencing to the PSR's restitution amount or victim identification. As such, the district court's restitution order is subject to plain-error review. Walker failed to produce any evidence contradicting either the PSR's restitution amount or methodology. Rather, it appears that the government's proposed loss amount used the appropriate calculation by subtracting the sale price after Long Beach Mortgage recovered the property from the amount of the loan. As such, the district court did not commit plain error in relying entirely on the restitution amounts contained in the PSR to which Walker did not object.

Finally, Walker argues the court improperly failed to inquire into the identity of the victims. Specifically, Walker argues that the district court improperly relied on the government's identification of the victim as Long Beach Mortgage when property records reflect that at least two of the properties were foreclosed on by lenders other than Long Beach Mortgage. Walker, however, failed to make any objection to the identification of the victim at trial and fails to provide any indication that Long Beach Mortgage was not the victim. Indeed, Walker does not argue that Long Beach Mortgage did not make the loans to him. Rather, he simply argues that Long Beach Mortgage did not initiate the foreclosure process.[2] As such, the court did not err in adopting the identifi-

[2] It does not surprise us that Long Beach Mortgage did not initiate the foreclosure process. Long Beach Mortgage and its owner, Washington Mutual, collapsed prior to the referenced foreclosure proceedings. *See*

cation of the victim contained in the PSR to which Walker did not object.

The judgment of the district court is AFFIRMED.

Huffington Post, http://www.huffingtonpost.com/2009/12/21/at-long-beach-mortgage-a_n_399295.html (last visited March 13, 2014).