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

BRIEF AND REQUIRED SHORT APPENDIX OF DEFENDANT-APPELLANT GREGORY WALKER

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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:

Sarah O'Rourke Schrup (attorney of record), Michelle Goyke (senior law student), Eric Hughes (senior law student), and Anthony Todd (senior law student), of the Bluhm Legal Clinic at the Northwestern University School of Law.

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Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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Jurisdictional Statement

The United States District Court for the Northern District of Illinois had jurisdiction over Appellant Gregory Walker's federal criminal prosecution pursuant to 18 U.S.C. § 3231 (2012), which states that the "district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States." This jurisdiction was based on an indictment charging Walker with violations of 18 U.S.C. § 1343 (2012).

Walker was initially indicted, along with six other co-defendants, on January 4, 2011. (R.1.)[1] Walker's trial took place between January 14, 2013, and January 16, 2013, and the jury found him guilty on both charged counts on January 16, 2013. The district court sentenced Walker on April 23, 2013, (A.22), and entered its judgment on May 24, (A.1). Walker filed his timely notice of appeal on May 2, 2013. (R.327.)

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2006), which grants jurisdiction of "all final decisions of the district courts of the United States" to their courts of appeal, and 18 U.S.C. § 3742 (2006), which provides for review of the sentence imposed.

[1] References to the sequentially paginated trial transcript shall be denoted as (Trial Tr. __), references to the sentencing hearing transcript as (Sentencing Hr'g Tr. __), and references to the pretrial status hearing held on July 18, 2012, as (Status Hr'g. Tr. __). All other references to the Record shall be denoted with the appropriate docket number as (R.__). References to the material in the appendix shall be denoted as (A.__).

Statement of the Issues

I. Whether a *Brady* violation occurred where the district court barred the defendant from retrieving his own property held in police custody in order to present his defense and where the government conducted only a superficial inquiry into the nature and status of this evidence.

II. Whether the district court erred in refusing the defendant's proposed buyer–seller jury instruction while simultaneously permitting the government to rely on conspiracy-based doctrines at trial.

III. Whether the district court erred in awarding restitution without explanation or specific findings, based solely on the government's unsubstantiated claims of loss.

Statement of the Case

On January 4, 2011, the government indicted Gregory Walker and six co-defendants for an alleged mortgage-fraud and wire-fraud scheme spanning thirteen counts and thirteen properties. (R.1.) Before trial, all but one of Walker's co-defendants pled guilty while another was found unfit to stand trial. *See, e.g.*, (R.262; R.264; R.359).

Walker moved pretrial for a subpoena to recover evidence that local police had illegally seized from his home and retained in their possession, (R.231), claiming in part that the evidence would be instrumental to his defense, (A.8–9). The district court denied Walker's motion to obtain the materials, (A.12), but ordered the government to produce a report detailing the status of the evidence, which it did on October 24, 2012, (A.38–42).

After a three-day trial that began on January 14, 2013, the jury returned a guilty verdict against Walker on both counts. At the close of evidence, Walker timely moved for acquittal based on insufficiency of the evidence. (A.16.) On January 22, 2013, Walker filed a post-trial motion based on insufficiency of the evidence and the district court's failure to give his requested buyer–seller jury instruction. (R.282.) The district court denied Walker's motion to reconsider and his written motion for acquittal. (A.18.)

The district court sentenced Walker on April 23, 2013. The court accepted the loss calculations suggested by the Corrected Pre-Sentence Investigation Report. (Sentencing Hr'g Tr. 12.) The report applied the U.S. Sentencing Guidelines Manual

§ 2B1.1, and found a base offense level of seven. Although the government did not present any evidence or witnesses related to the amount of loss at sentencing or in its version of the offense submitted to the Probation Office, (R.291, Presentence Investigation Report with attached Gov't's Version of the Offense at 5), the district court accepted—with one modification proposed by the PSR (R.291 at 8)—the government's proposed loss amount. The district court found Walker responsible for $956,300 in losses. This corresponded to an increase of 14 levels in Walker's sentence. The court ultimately determined Walker's guideline range to be 70 to 87 months.

The court sentenced Walker to 60 months of imprisonment and 3 years of supervised release. (A.2–3.) In addition, the court ordered restitution to be paid to Bank of America and the FDIC in the amount of $956,300. (A.5.) The district court entered judgment on May 24, 2013. (A.1.) Walker had previously filed his notice of appeal on May 2, 2013, (R.327), which became effective when the district court entered judgment.

Statement of the Facts

In the last decade the housing market was fraught with subprime lenders that granted mortgages at high interest rates to unlikely borrowers—borrowers who often had credit ratings too low to qualify for ordinary mortgages. Ronald Utt, *Executive Summary: The Subprime Mortgage Market Collapse: A Primer on the Causes and Possible Solutions*, Heritage Foundation (Apr. 22, 2008), http://www.heritage.org/research/reports/2008/04/executive-summary-the-subprime-mortgage-market-collapse-a-primer-on-the-causes-and-possible-solutions. The banks issuing these loans, including the bank involved here—Long Beach Mortgage Company—profited from this business, making money from high interest rates and awarding commissions to encourage underwriting loans in high volume. David Heath, *At Top Subprime Mortgage Lender, Policies Were An Invitation To Fraud*, Huffington Post, http://www.huffingtonpost.com/2009/12/21/at-long-beach-mortgage-a_n_399295.html (last updated May 25, 2011, 4:00 PM). This phenomenon created an atmosphere in which lenders issued mortgages with impunity and then transferred the high risk of default to investors through mortgage-backed securities. Utt, *supra*. Lenders did not always (or often) verify the information stated on mortgage applications, and it became common for borrowers to misstate their financial situations in order to receive loans, which they were often unable to pay back. Heath, *supra*; Utt, *supra.* Former bank employees, including a woman who authorized some of the mortgages in this case, (A.72–76), have testified that they signed thousands of mortgage assignments each day, spending only a few

seconds on each document. Susan Taylor Martin, *On video, alleged 'robo-signers' describe assembly line work*, Tampa Bay Times (Nov. 11, 2010, 6:06 PM), http://www.tampabay.com/news/on-video-alleged-robo-signers-describe-assembly-line-work/1133687. For a time, this approach was profitable for banks, but a combination of failing loans and the depressed housing market led lenders such as Long Beach Mortgage Company to collapse. Heath, *supra.* Other lenders managed to stay afloat, but are now being investigated for dubious loan practices and may be on the line for millions or billions of dollars in fines. Connor Simpson, *JPMorgan Will Pay Record Breaking $13 Billion Justice Department Fine*, Atlantic Wire (Oct. 19, 2013), http://www.theatlanticwire.com/national/2013/10/jpmorgan-agreed-pay-record-breaking-13-billion-justice-department-fine/70713/; Landon Thomas Jr., *Jury Finds Bank of America Liable in Mortgage Case*, DealBook (Oct. 23, 2013, 6:17 PM), http:// dealbook.nytimes.com/2013/10/23/jury-finds-bank-of-america-liable-in-mortgage-case-nicknamed-the-hustle/?_r=1.

As for the borrowers, scores ultimately faced prosecution and imprisonment for the alleged misrepresentations contained in the very mortgage applications that banks had accepted without question. Kevin Perkins, *Statement Before the Senate Judiciary Committee*, Federal Bureau of Investigation (Dec. 9, 2009) http:// www.fbi.gov/news/testimony/mortgage-fraud-securities-fraud-and-the-financial-meltdown-prosecuting-those-responsible.

One such borrower was Gregory Walker. In 2005 and 2006 Walker and his then-girlfriend, Tayna McChristion, bought and sold several properties. (A.28.) Walker

purchased five properties in Chicago; three in March 2005, one in June 2005, and one in October 2005. (A.30–33.) McChristion purchased two properties in January 2006. (A.34–35.) Walker had poor credit, so he qualified for mortgages only as a subprime borrower. (Trial Tr. 284.) Walker and McChristion nonetheless obtained several mortgages. (A.28–29.) The government's own evidence at trial demonstrated that Walker made mortgage payments on the properties he purchased, (A.68, 70), and, according to public property records, paid off several of the mortgages in full, (A.72–78).

In 2011 the government indicted Walker, alleging that he was part of a scheme to defraud, (A.35–36), that involved not only Walker and McChristion, but also a loan officer named Carol Simmons and four other individuals. The scheme as alleged by the government involved at least thirteen properties. (R.1 at 7–18.) The government alleged Walker was involved in transactions related to eight of these properties, (R.1 at 7–18), but he was formally charged on only two counts, (A.27–37). The two charged counts resulted from two wire transfers of funds in January 2006 from mortgage originators to the closing escrow accounts. (A.35–36.) Neither transfer related to a loan taken out by Walker; one of these was related to a property sale by Walker to McChristion, while the other was a purchase by McChristion. (A.34–35.)

As the case progressed towards trial, Walker's co-defendants began entering guilty pleas and one was found unfit to stand trial. (A.8; *see also, e.g.*, R.262 (plea declaration as to Simmons); R.264 (plea agreement as to McChristion); R.359

(agreement to defer prosecution as to co-defendant Habeel).) By the January 2013 trial date, Walker was the sole defendant remaining in the case.

In advance of trial Walker moved for a subpoena to recover items that the South Holland police department had illegally seized from his home in 2006. (R.231; A.12.) Walker claimed that the police had taken papers, computers and photographs, and he raised two issues related to that seizure. (A.8–11.) He argued not only that some of those documents might be subject to suppression should the government seek to use them at trial, but also that these documents would be instrumental to his defense. (A.11 (defense counsel stating his concern that the seized files "also included the history of Walker's work on all of these homes and other records that he had to dispute the—" before being interrupted by the district court).) According to the search warrant inventory, the seized material included computers, disks, "several un-cashed checks made out to Real Deal construction" and "several pieces of paperwork relating to . . . real estate transactions." (A.43.) Focusing solely on the suppression argument raised by the defendant, the government repeatedly insisted that the evidence was irrelevant because it would not be part of its case-in-chief. (A.10–11.) The district court agreed. (A.11 (stating "[i]f they agree they're not going to use them, what's the difference between that and a suppression?").) However, in its minute order denying Walker's motion to obtain the materials, (A.12), the district court ordered the government to produce a report detailing the status of the evidence, which it did on October 24, 2012, (A.38–42). In slightly more than a single page of actual analysis, the government explained that it had a conversation with a

South Holland police detective, who stated that the items in custody had no relevance—even though the detective "was not even aware that defendant had been indicated [sic] in the instant case." (A.41.) The report also mentioned that the government had received information that the Secret Service had reviewed some of the materials. (A.41.) The government co-opted these law-enforcement assertions and dismissed the notion that the 2006 search provided materials prompting this case, stating only that the federal investigation began in 2008. (A.10.) The district court did not follow up on this disclosure.

The case proceeded to trial in January 2013. (R.279.) The government presented a modified scheme, claiming that Walker and co-schemers McChristion and Simmons committed fraud when Simmons prepared seven loan applications containing false statements, five on behalf of Walker and two on behalf of McChristion, between early 2005 and mid-2007. (A.30–35.) The alleged falsified statements included the borrowers' "employment, income, financial condition, rental income, and contribution towards the purchase price or earnest money payment, and the purchase price" paid to the sellers. (A.28.) The government further claimed that as part of the scheme the three created false documents to support these applications. (A.28.) As described by the government at trial, Simmons then submitted loan applications to subprime mortgage lenders, mostly Long Beach Mortgage Company. (Trial Tr. 313–14.)

As part of its case-in-chief, the government called former Long Beach Mortgage Company underwriter Brett Hellstrom to testify about its mortgage-approval

process. (Trial Tr. 258.) He opined that "[i]f [the documents] were false, we would not be doing the loan." (Trial Tr. 285.) He also stated that loans from high-risk borrowers like Walker would be subject to extra scrutiny and that Walker's file raised "red flags." He never explained, however, what—if any—due diligence the company engaged in and he acknowledged that the company never caught the supposed false information contained on the many loan applications submitted through the alleged scheme. (Trial Tr. 276–77, 285.)

Regardless of the actual value of the properties, the settlement statements from the loan closings indicate that Walker and others, including McChristion, received cash payments from the loan proceeds. (A.46–64 at section 1300.) These excess amounts were usually paid out in checks to businesses owned by one of the defendants, including Walker's business, Real Deal Construction. (A.46–64 at section 1300.) Defense counsel tried to establish at trial that Walker had used the excess funds to improve the homes in order to sell them. He did not, however, have access to his personal and business records seized by the South Holland Police Department. Nevertheless, the defense was able to show via some of the government's witnesses that Walker told a purchaser that he was interested in repairing and reselling ("flipping") the properties. (Trial Tr. 100.) The government's own exhibits also included cleared checks written by Real Deal Construction to various construction companies and subcontractors. (*See, e.g.,* A.71 (showing payment to a subcontractor referencing one of the properties).)

Walker attempted to bring this theory of defense before the jury by proposing a jury instruction based upon a buyer–seller instruction. (A.88–89.) The district court, however, summarily dismissed the instruction without giving Walker's counsel an opportunity to explain it. (A.14.)

Walker also maintained that he did not abscond with the loan funds, a proposition supported by the government's own exhibits. (Sentencing Hr'g Tr. 18; A.68, 70 (showing mortgage payments made by Walker).) The government admitted that Walker did pay the mortgages (at least in part), but argued, without introducing evidence, that he did so in order to qualify for more loans. (Trial Tr. 89.) The government also claimed, without introducing evidence, that Walker's debt load ultimately prevented him from obtaining additional mortgages; the government concluded that, by the time of the charged wire transfers, Walker was instead purchasing properties through McChristion. (R.1 at 13; Trial Tr. 90.) The government did not establish at trial or sentencing the total amount that Walker repaid to the banks in accordance with his loan obligations.

The government also did not provide evidence at trial or sentencing that any of Walker's mortgages went into foreclosure. Nevertheless, the government claimed that Long Beach Mortgage Company lost $193,000 on the two counts of conviction, and lost another $763,300 on other related transactions. (Presentence Investigation Report at 8.) Walker, however, paid off in full at least five of the mortgages, including one of the two for which he was convicted. (A.72.) Despite this discrepancy, the government introduced no evidence at trial or sentencing

connecting Walker to the specific mortgages used for the loss calculation; its loss calculation does not specify the names of any of the parties to those mortgages, any payments made on those mortgages, the holders of those mortgages at the time of foreclosure or the dates of foreclosure. Public property records, however, reveal that for at least two of the mortgages upon which the government apparently based its loss calculation, Long Beach Mortgage Company was not the foreclosing lender. (A.79–81.)

Nevertheless, over Walker's objections, (R.307), the district court used the sum of $956,300 to calculate the guidelines range for Walker's sentence and ordered Walker to pay $956,300 in restitution to Long Beach Mortgage Company via the FDIC, (A.5).

Summary of the Argument

Gregory Walker's sentence and conviction should be overturned for three reasons. First, the government and district court wrongfully denied Walker access to information essential to his defense, a violation of due process and *Brady*. Walker's counsel requested materials that had been seized from Walker's home in an unrelated search. These materials were important to Walker's defense, yet the government flatly insisted that the evidence was irrelevant. The district court accepted that argument, denying Walker's request and requiring the government to simply produce a status report on the evidence. Under *Brady*, however, the government should have diligently investigated whether it possessed exculpatory evidence. Because the evidence requested by Walker was materially related to his defense, the government's inquiry should have been more searching, and the district court should have recognized the inadequacies in this report. The district court's decisions denied Walker the opportunity to examine these materials, and thus deprived him of his constitutional rights and of a potential defense.

Second, the district court wrongfully rejected—without discussion—Walker's proposed jury instruction, which would have permitted the jury to distinguish Walker's participation in the alleged fraud scheme from that of the co-schemers. Walker was entitled to this theory-of-defense instruction because it accurately stated the law, was supported by the evidence, and was not already incorporated in the charge.

Finally, the district court erred in its restitution analysis. The district court failed to adequately explain its decision and did not hold the government to its burden of proof. Instead it used a methodology for calculating loss that did not adequately account for several important facts, including Walker's mortgage payments and the transfers of the loans to other lending entities and investors. These errors render improper the district court's order of restitution, so a remand for resentencing is required.

Argument

I. The government and the district court prevented Walker from accessing information essential to his defense.

In preparation for his defense, Walker requested access to his computers and paperwork that the South Holland police department had previously seized (illegally) and still retained. (A.8–9 (identifying as property seized: "multiple records and documents which are directly related to the indictment in this case.").) The warrant inventory revealed that these items included computers, hard drives, "several un-cashed checks made out to Real Deal construction" and "several pieces of paperwork relating to . . . real estate transactions." (A.43.) When Walker raised this issue, the government should have conducted an immediate *Brady* evaluation and disclosure, *Brady v. Maryland*, 373 U.S. 83 (1963), and the district court should have issued the subpoena. Yet the government not only failed to disgorge these materials under *Brady*, it actively opposed Walker's efforts to obtain them via court order. (A.10.) And the district court both summarily refused to issue a subpoena so that Walker could access the materials, (A.10; A.12), and then failed to adequately follow-up on the government's inadequate report, (A.38–42). Thus, whether viewed through the specific lens of *Brady* or as a matter of a defendant's right to present his defense, these interrelated errors require reversal.

A. The government erred by failing to adequately inquire into the exculpatory evidence, by not disclosing it and by objecting to Walker's motion to subpoena it.

The government was required to—but did not—produce Walker's seized property. This property was material to his defense but within the government's control. Evidence withheld by either the police or the prosecutor implicates the defendant's rights to due process and a fair trial, *Brady*, 373 U.S. at 87, particularly when the information remains in the exclusive possession of the government or the police*, see United States v. Mota*, 685 F.3d 644 (7th Cir. 2012) (holding that a prosecutor's failure to disclose "evidence possessed exclusively by those actors assisting him in investigating and trying his case" may create a *Brady* violation). The government's underlying motive for withholding the evidence is irrelevant, because the crux of a *Brady* violation is unfairness to the defendant, not punishment of the prosecutor. *Brady,* 373 U.S. at 87. Thus, it matters not whether the evidence is in the possession of the prosecutors or investigating officers. *See Kyles v. Whitley*, 514 U.S. 419, 437 (1995) ("[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."). The duty to disclose is expansive; a prosecutor, faced with evidence of questionable value to the defense, should err on the side of disclosure. *Id*. *See also United States v. Agurs*, 427 U.S. 97, 108 (1976) ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."). Therefore, when the government "receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." *Agurs*, 427 U.S. at 106.

In a typical case, "to establish a *Brady* violation, a defendant must demonstrate that: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defense; and (3) the evidence was material to an issue at trial." *Boss v. Pierce*, 263 F.3d 734, 740 (7th Cir. 2001). Evidence is suppressed if the government does not timely disclose it to the defendant and if the defendant could not otherwise obtain the evidence through reasonable diligence. *United States v. Todd*, 424 F.3d 525, 534 (7th Cir. 2005).

First, the government's failure to produce the evidence violated *Brady*. It not only failed to turn over the evidence voluntarily, it also actively opposed his request for a subpoena. (A.10.) Despite Walker's efforts, the evidence was not made available to him in time for trial. Although some of the information—notably bank statements—*may* have been available to Walker by other means, the records contained on his computers were not. Similarly, "un-cashed checks," identified in the warrant inventory, (A.43–45), would not appear on bank statements and would be difficult to obtain from another source. The same would be true with respect to any photographs that memorialized improvements to the properties at the time Walker owned them; they too are evidence that could not be replicated in any other way. (*See, e.g.*, Trial Tr. 8–10 (government objecting to the introduction of photos taken after Walker had sold the property that showed improvements to the house).)

Second, this evidence would have favorably affected Walker's case. Not only would these documents have supported his defense that he was simply trying to fix up these homes, (Trial Tr. 488), these documents also would have been particularly

important for an accurate determination of the amount of loss, which, as discussed below, was improperly calculated and substantiated. Furthermore, these documents would have shown that, contrary to the government's unsupported allegations during closing arguments, Walker's businesses were not "fake." (A.87.)

Finally, the simple list of documents on the inventory is enough to demonstrate their likely materiality. Documents are material when they establish a reasonable probability that their inclusion in evidence would have led to a different result, *Kyles*, 514 U.S. at 434, a principle that applies both to trial and to sentencing, *Brady*, 373 U.S. at 87. Although it is true that, generally, a defendant's burden on this prong requires some showing of the precise documents that would have changed the proceedings below, *Boss*, 263 F.3d at 744, when the government retains exclusive control over the evidence, a defendant is relieved of his obligation to specifically identify the pieces of suppressed evidence, *see United States v. Jumah*, 599 F.3d 799, 810 (7th Cir. 2010) ("We have stated that, when evidence is in the exclusive control of the Government or has been destroyed by the Government, a defendant may establish that the Government suppressed exculpatory evidence without specifically identifying the allegedly suppressed evidence."). *See also United States v. Driver*, 798 F.2d 248, 251 n.1 (7th Cir. 1986) ("In cases in which evidence is in the exclusive control of the government or has been destroyed by the government, a defendant might be able to establish that the government suppressed exculpatory evidence without specifically identifying the allegedly suppressed evidence."). Walker was hamstrung by his inability to conclusively establish the exact content of

the documents seized by the government, but that is precisely because the government refused to disclose them and because, as discussed below, the district court refused to compel their disclosure.

B. The district court likewise erred by refusing to compel the disclosure of this evidence.

Not only did the government fail to disclose the materials pursuant to *Brady*, the district court also erred in failing to allow Walker to access them via subpoena. (A.12.) In a criminal case, the basis of the right to due process is "the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). The Constitution assures defendants the right to have "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). "This group of constitutional privileges delivers exculpatory evidence into the hands of the accused, thereby protecting the innocent from erroneous conviction and ensuring the integrity of our criminal justice system." *Id.*

In the order denying the subpoena, the district court ordered the government to inquire into and file a status report regarding the evidence that was illegally seized. (A.12.) This afterthought did not remedy the harm stemming from the erroneous denial of the subpoena because neither the government nor the district court took the obligations of due process seriously. The government's status report began with two pages of background information. What followed was one page where the government reported only that it had called the South Holland police department and otherwise "received information" that the Secret Service had reviewed some of

the material. (A.41.) The government then asked law enforcement for its opinion as to whether any materials were relevant to the government's case against Walker. (A.41.) The government apparently did not also ask whether these documents might be valuable to the defense. (A.38–42.)

As a threshold matter, it is not clear how those entities—the South Holland police department and the Secret Service—were qualified to comment on whether the materials contained relevant evidence to Walker's federal prosecution, about which they admitted to having no knowledge. (A.41.) Here, the government not only failed to review the material, it relied on unsupported third-hand reports that the information was irrelevant. In any event, the government asked the wrong question: the proper inquiry is whether Walker's property might be exculpatory or affect his defense. *See Kyles*, 514 U.S. at 437 (prosecutors cannot simply avoid knowing about potentially exculpatory information in the possession of the police, as they have a duty to review the material to find out whether it is relevant to the case).

That question was never answered, and the district court not only failed to recognize the inadequacy of the government's response, it also took no steps to invoke its discretion to review the materials *in camera* to determine their worth. *See, e.g.*, *United States v. Phillips*, 854 F.2d 273, 276 (7th Cir. 1988) (A trial court may review questionable materials *in camera* to determine their relevance to the defense.). While "mere speculation that a government file might contain *Brady* material is not sufficient" to require *in camera* review*, United States v. Bland*, 517

F.3d 930, 935 (7th Cir. 2008), here Walker had specifically requested access to the evidence and the government had attached to its report a warrant inventory listing the evidence seized. Thus, the district court was on notice that the material might implicate *Brady*. This collection of errors violated Walker's due process rights and this Court should reverse.

II. The district court erred in denying Walker's proposed theory-of-defense instruction.

This Court should reverse Walker's conviction because the district court refused to instruct the jury on his theory of defense: that even if he engaged in conduct that could be deemed illegal, he was merely buying and selling these properties on his own terms rather than participating in some scheme to defraud. The Fifth Amendment guarantees criminal defendants the "right to have the jury consider their theory of defense," *United States v. Douglas*, 818 F.2d 1317, 1319 (7th Cir. 1987), a right that district courts vindicate by allowing appropriate theory-of-defense instructions. Although district courts have discretion in determining which instructions to give, as well as the precise wording of those instructions, *see United States v. Young*, 997 F.2d 1204, 1208 (7th Cir. 1993), this Court "review[s] the district court's decision that a defendant has failed to present sufficient evidence to become entitled to a jury instruction on a theory of defense de novo," *United States v. Meyer*, 157 F.3d 1067, 1074 (7th Cir. 1998); *see also United States v. Prude*, 489 F.3d 873, 882 (7th Cir. 2007).

A trial court should instruct the jury on the defendant's theory of defense when: "(1) the proposed instruction is a correct statement of the law; (2) the evidence in the case supports the theory of defense; (3) the theory of defense is not already part of the charge; and (4) failure to include the proposed instruction would deny the defendant a fair trial." *United States v. Sotelo*, 94 F.3d 1037, 1039 (7th Cir. 1996) (citing *United States v. Toney*, 27 F.3d 1245, 1249 (7th Cir. 1994)). Walker satisfied each of these prongs and, therefore, the district court erred in refusing his instruction.

First, Walker proposed a modified application of this Court's former pattern buyer–seller instruction,[2] a correct statement of this Court's law. (A.88–89); *see also* Comm. on Fed. Criminal Jury Instructions for the Seventh Circuit, *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* § 6.12 (1998), *included as* (A.94). The proposed instruction identified a particular set of factual circumstances under which the jury could reject the government's version of the case involving a multi-member scheme to defraud. Because this Court allows the government to invoke conspiracy doctrines even when the defendant is not charged with a conspiracy, such an instruction is an appropriate and fair counter-balancing narrative. *United States v. Wormick*, 709 F.2d 454, 461 (7th Cir. 1983)

[2] The main differences between these instructions is that the revised instruction omits the list of specific factors, but requires the government to prove a joint criminal objective. Comm. on Fed. Criminal Jury Instructions for the Seventh Circuit, *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* § 6.12 (1998), *included as* (A.94). Even though the factors are not explicitly mentioned in the new pattern, however, this Court has recognized their continued relevance. *See United States v. Brown*, 726 F.3d 993, 999 (7th Cir. 2013).

("[C]onspiracy doctrines apply to a multi-member . . . fraud scheme even if the indictment does not formally charge conspiracy."); *but cf. United States v. Nakai*, 413 F.3d 1019, 1023 (9th Cir. 2005) (holding as error application of *Pinkerton* liability where conspiracy was not charged). That is, if *Pinkerton* liability may be applied to a wire-fraud scheme, then traditional conspiracy defenses also should be available to a defendant. *See United States v. Gee*, 226 F.3d 885, 895 (7th Cir. 2000) (noting that district court judges have a duty to inform juries of the difference between merely conducting repeated transactions and being an actual member in a criminal enterprise). Because the proposed instruction incorporated factors that this Court deems relevant to determining liability, *see supra* note 2, and because the instruction responds to this Court's practice of allowing conspiracy doctrines to be used by the government in the absence of a charged conspiracy, the proposed instruction fairly stated the law.

The second prong of the test requires that a theory-of-defense instruction be supported by the evidence. *See Douglas*, 818 F.2d at 1321. Therefore, the evidence needed to demonstrate that regardless of Walker's participation in these transactions, he was not criminally participating in the alleged scheme. *See Gee*, 226 F.3d at 894–95 (finding a buyer–seller instruction necessary where the defense was not offered at trial but was supported by the evidence). Evidence in the case supports this defense, even though Walker was denied access to his own records that might have strengthened it. *See supra* Section I. Walker consistently maintained that he purchased these properties with the purpose of repairing or

improving them for resale, rather than as part of the fraudulent scheme alleged by the government. (Trial Tr. 488 (defense counsel's closing statement that the government had not met its burden because "[Walker only] had an intent to buy some junk houses and try to fix them up and sell them.").) One of the government's own witnesses testified both that Walker expressed an interest in "flipping" the property he purchased from her and that he performed multiple building inspections and inquired about necessary repairs. (Trial Tr. 100–02.) The government's exhibits likewise demonstrated that Walker actually engaged in repairing the properties he purchased, (*e.g.* A.71 (showing payment to a subcontractor referencing one of the properties)), and made mortgage payments while he owned them, (A.68, 70), which sets him apart from the vast majority of mortgage fraudsters, *United States v. Green*, 648 F.3d 569, 584 (7th Cir. 2011) (noting that fraudsters typically disappear after receiving loan proceeds). In short, Walker's theory that he was not a part of the alleged scheme was supported by evidence; therefore the second prong of the test is satisfied.

Under the third prong this Court must determine whether, even without the proposed instruction, the defense theory was incorporated into the jury instructions actually given; that is, "whether the instructions as a whole adequately informed the jury of the theory of defense." *Prude*, 489 F.3d at 882. The proposed theory of defense distinguished the defendant from the charged multi-member criminal scheme, and the remaining jury instructions gave little if any guidance on this point. In fact, the jury instructions veered sharply in the other direction by

including the government's non-pattern *Pinkerton*-liability instruction, an instruction that did not even conform to this Court's pattern instruction[3] (A.92), which actually expanded *Pinkerton* liability beyond what this Court's pattern instruction allows.

The remaining relevant instructions also did not achieve what a buyer–seller instruction would have: that Walker could have acted criminally on his own terms without having criminally participated in the scheme. In fact, like the government's non-pattern *Pinkerton* instruction, some of these instructions expanded Walker's liability within the scheme. (*See* A.90 (joint venture instruction, which told the jury that an act could be committed by more than one person and that the defendant did not need to commit every element of a crime); (A.91 (instruction that a defendant need not be personally responsible for the use of interstate communications facilities).) Other instructions merely recited the government's burden of proving

[3] Although this Court has a pattern instruction to address *Pinkerton* liability when conspiracy is not charged—as was the case here—the government did not use that instruction. And the government's version differed in significant ways from the pattern. *Compare,* Comm. on Fed. Criminal Jury Instructions for the Seventh Circuit, *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* § 5.12 (2012), *included as* (A.97-98), *with* (A.92). Specifically, the government's instruction required only that the defendant participated in the scheme before being held liable for co-schemers' actions, provided those actions were reasonably foreseeable and in furtherance of the scheme. The pattern instruction, by contrast, requires much more specificity. It identifies which crime another person committed and demands that a defendant must have knowingly joined a conspiracy. The government must also prove that another member of that scheme committed the acts for which the defendant is held liable during the defendant's membership in the criminal enterprise. The Committee noted in its comment to Pattern 5.12 that this instruction is rarely given and should be given in conjunction with instructions defining a conspiracy and membership in a conspiracy. (A.97.) The district court failed to follow the Committee's advice: a *Pinkerton* instruction was presented to the jury without the companion instructions on conspiracy and membership.

every element of the offense. (*See* A.93 (instruction that the government had to prove the defendant had knowledge a crime was being committed, not just that his acts advanced the crime).) Walker's proposed buyer–seller instruction would have played a role not covered by any other instruction, thus giving the jury better guidance in making its findings.

The final prong requires that a defendant be prejudiced by the omission of a proposed jury instruction, resulting in an unfair trial. *Douglas*, 818 F.2d at 1322. Because the district court refused Walker's proposed buyer–seller instruction, the jury was not able to evaluate "the adequacy of [the defendant's] theory of defense." *United States v. Prieskorn,* 658 F.2d 631, 636 (8th Cir. 1981). Aside from the inherent prejudice arising from this Fifth Amendment violation, prejudice also accrued because the jury held Walker accountable for the acts of others (such as the wiring of funds), which factored not only into his conviction but also into his sentence and restitution amount; losses caused by others represented the vast majority of the calculated loss.

III. The district court's restitution order was erroneous.

The district court imposed an erroneous and unsubstantiated restitution order over defense counsel's objection. (R.307; A.20.) A district court's restitution methodology is reviewed *de novo* and its actual restitution calculation is reviewed for an abuse of discretion. *United States v. Robers*, 698 F.3d 937, 941 (7th Cir. 2012), *cert. granted*, 2013 WL 775438 (Oct. 21, 2013) (No. 12-9012). The district court accepted and applied, without explanation, the government's incorrect and

incomplete methodology, and it did so without evidence from the government and based on no findings of its own. As a result, the district court calculated an incorrect and unsubstantiated restitution amount.

The Mandatory Victims Restitution Act (MVRA) applied here requires that the amount of restitution equal the actual amount of loss. 18 U.S.C. § 3663A(b)(1)(B) (2012) (specifying that the court shall require the defendant to pay the greater of "the value of the property on the date of damage, loss, or destruction" or "the value of the property on the date of sentencing" less "the value (as of the date the property is returned) of any part of the property that is returned"). Furthermore, it awards restitution only to "victims," who are defined in the act as "person[s] directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered." 18 U.S.C. § 3663A (a)(1–2). The methodology employed by the district court could not accurately determine either the amount of actual loss or the actual identity of the victims.

A. The district court failed to hold the government to its burden of proof and failed to make or explain the necessary findings to support its restitution order.

As a threshold matter, the district court is obligated to properly determine whether the government proved its restitution calculation by a preponderance of the evidence and to explain that determination. *See United States v. Allen*, 529 F.3d 390, 396 (7th Cir. 2008) ("The government bears the burden of demonstrating the losses suffered."). Failure to do so is reversible error. *See United States v. Schroeder*, 536 F.3d 746, 753 (7th Cir. 2008). In a typical fraud sentencing, the government

presents victim testimony, financial records, and/or affidavits to support its amount-of-loss calculations. *See, e.g.*, *United States v. Engelmann*, 720 F.3d 1005, 1015 (8th Cir. 2013) (government presented testimony from federal agent who had spoken with the victims about their losses); *Robers*, 698 F.3d at 940 (government presenting testimony of two witnesses); *United States v. Singletary*, 649 F.3d 1212, 1216–18 (11th Cir. 2011) (government presenting testimony of four witnesses detailing specific facts regarding each of 56 mortgages relating to loss calculation for sentencing, and another two witnesses specifically to address restitution); *United States v. Pickett*, 387 F. App'x 32, 36 (2d Cir. 2010) (finding burden satisfied by testimony of a case agent); *United States v. Radziszewski*, 474 F.3d 480, 486 (7th Cir. 2007) (government presenting victimized bank's loss representation); *United States v. Vaknin*, 112 F.3d 579, 587 (1st Cir. 1997) (stating that a restitution award "cannot be woven solely from the gossamer strands of speculation and surmise") (abrogation on other grounds recognized by *United States v. Anonymous Defendant*, 629 F.3d 68 (1st Cir. 2010)). *Cf. United States v. Kieffer*, 681 F.3d 1143, 1171 (10th Cir. 2012) (government presenting victim testimony). What is more, the government's loss calculations must be properly itemized so that the defendant can meaningfully dispute them. *See Radziszewski*, 474 F.3d at 487 n.3 (remanding the restitution award when, in part, non-itemized loss report apparently included attorney's fees in the total). Courts have remanded in the absence of reliable evidence supporting the restitution amount. *E.g., United States v. Adetiloye*, 716 F.3d 1030, 1039 (8th Cir. 2013) ("General invoices which purport to indicate the

amount of loss but do not provide further explanation are an insufficient method of proof."); *United States v. Swanson*, 394 F.3d 520, 527 (7th Cir. 2005) (finding the government's proffer of evidence insufficient to meet its burden of proof, even when defendant failed to make a specific argument or provide evidence).

Here, however, the government offered not one piece of testimony, analysis, itemization or any other proof in support of its restitution award. The government offered only its version of events attached to the PSR, which simply identified the properties by address, the original loan amount, the foreclosure sale price and—subtracting these two numbers—the ultimate amount of loss. (R.291, Presentence Investigation Report with attached Gov't's Version of the Offense at 4–5.) The government did not attach copies of the property records underlying its conclusory analysis. (R.381 (Walker's motion to supplement the record on appeal with these records).) Yet the district court accepted the government's purported loss amount without any testimony, corroborating proof, or explanation of its decision.

Second, even if the government's proffered calculation could somehow be deemed evidence, the district court further erred when it failed to weigh it:

> [T]he presumed accuracy of information that has "sufficient indicia of reliability" does not relieve the court of its responsibility to weigh the proffered evidence and determine whether the government has proven that the existence of a disputed fact is more probable than not.

Schroeder, 536 F.3d at 753. Here the district court engaged in no weighing whatsoever, and instead simply accepted the government's loss calculation over the defense's objection. The district court had an obligation to at the very least

determine whether the burden of proof had been met, and it abused its discretion by failing to do so.

Third, the district court erred when it failed to determine the extent to which the scheme was responsible for the purported loss. *United States v. Locke*, 643 F.3d 235, 247 (7th Cir. 2011) (holding that determination of whether defendant's conduct was one scheme or multiple schemes was critical in determining actual loss where only one scheme was presented to the jury). *See also United States v. Schaefer*, 291 F.3d 932, 937 (7th Cir. 2002) (requiring the district court to make findings clearly identifying relevant conduct and explaining how that conduct leads to the sentence). Here, the same property records the government purportedly relied on for its loss calculation include releases explicitly stating that Walker paid off in full many of the loans discussed at trial. (A.72–78 (describing as "fully paid" Walker's mortgages on five of the properties).) Nevertheless, the government's loss calculation includes losses from later mortgages on these properties, mortgages for which there is no evidence that Walker was a party. To include in its restitution calculation these subsequent foreclosures on other owners, the district court must first have determined that the scheme was indeed responsible for those losses, but it failed to do so.

Fourth, the district court erred when it failed to adequately explain its rejection of Walker's challenge to the restitution amount. District courts are prohibited from simply adopting the PSR without addressing or explaining defense claims of error. *United States v. Leiskunas*, 656 F.3d 732, 738 (7th Cir. 2011) (remanding because

the district court's silent adoption of the PSR prevented meaningful review). Nevertheless, that is exactly what the district court did in this case, brushing aside Walker's objection with just a cursory reference to joint and several liability arising from the scheme:

> Oh, there was a huge amount of restitution. The restitution is joint and several . . . . So whatever they can collect from somebody else he doesn't have to pay and vice versa. So that objection is overruled. I mean, restitution is based upon the entire scheme, so that objection is overruled.

(A.20–21.) The district court failed to address Walker's objections that: (1) the amount of loss was too high; (2) the victims suffered no losses; and (3) any losses were caused by others. (R.307.) The district court was required to address these issues, and to not merely assume that the extent of the scheme and loss amount as described in the PSR were correct. Like *Leiskunas*, this Court should vacate the restitution order.

B. The district court's restitution methodology did not meet the requirements of the MVRA.

Compounding these errors, the district court employed an incorrect methodology that excluded several potential and significant offsets to the actual amount of loss and failed to confirm the actual victim. First, to calculate the amount of loss, the government and the district court merely subtracted from the original face value of the loan the amount recouped at foreclosure. This method may be appropriate for a typical case where a defendant absconds with the loan proceeds, *Green*, 648 F.3d at 584, but it is insufficient in cases like this one where the foreclosed property was

not the only property returned. *See also United States v. Berheide*, 421 F.3d 538, 541 (7th Cir. 2005) (holding that a calculation method that is easy is not necessarily correct). Specifically, the district court's methodology neglected to account for Walker's mortgage payments,[4] (A.68, 70; Trial Tr. 89), which should have been included in the property returned, *United States v. James*, 592 F.3d 1109, 1114 (10th Cir. 2010) (including principal repayment among property returned for purposes of loss determination for sentencing).[5] Nor does the government's calculation account for any improvements made on the property, which could affect its value for restitution purposes. *See United States v. Shepard*, 269 F.3d 884, 887 (7th Cir. 2001) ("[T]o the extent improvements increased the market value of [the victim's] house, and thus were (or could have been) realized by [the victim's] estate in selling the property, the funds were 'returned' for statutory purposes.").[6]

Second, the court's methodology improperly failed to include any inquiry into the identity of the actual victims. The court accepted the government's claim that Long Beach Mortgage was the victim, even though the property records on which that

---

[4] Or, in the case of loans not in Walker's name, payments made by the mortgagees.

[5] Arguably, for restitution purposes, interest payments should additionally offset the amount of loss, as the MVRA requires subtraction of "any part of the property that is returned." 18 U.S.C. § 3663A (b)(1)(B)(ii). The MVRA makes no distinction between repayments made up front (reducing primarily the principal balance) and repayments made according to the normal payment schedule (reducing a combination of principal and interest).

[6] The question of how to properly value returned property is currently pending in the Supreme Court. *See United States v. Robers,* 698 F.3d 937 (7th Cir. 2012), *cert. granted,* 2013 WL 775438 (Oct. 21, 2013) (No. 12-9012). Should the Supreme Court reject this Court's approach of using the foreclosure sale price in lieu of the market value on the date the home is turned over to the bank, then an additional basis for recalculating the restitution arises in this case.

claim was based show that at least two of the loans were foreclosed on by lenders other than Long Beach Mortgage Company. (A.79–81.) Because these records indicate the loans were sold prior to foreclosure to third parties acting as trustees for asset-backed securities, the broad-brush methodology employed by the government and the district court was inadequate to account for these complexities. If Long Beach Mortgage Company was paid for these loans, then it was not a victim under the MVRA. *Cf. James*, 592 F.3d at 1115 (explaining that when calculating actual loss the original lender was only harmed to the extent that it lost money selling the loan).

These many variables lay bare the inadequacies of the loss-calculation method employed by the district court. A remand is required so that these mitigating factors and any others may be considered in fashioning a restitution order in the actual amount of loss to the actual victims, in compliance with 18 U.S.C. § 3663A.

Conclusion

For the foregoing reasons, Walker respectfully requests that this Court vacate his conviction and remand for a new trial or, at a minimum, remand for re-sentencing.

Respectfully Submitted,

Gregory Walker
Defendant-Appellant

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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 Rule of Appellate Procedure 32(a)(7)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(b) because this brief contains 8088 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Circuit Rule 32 and Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12 point Century Schoolbook font with footnotes in 11 point Century Schoolbook font.

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Dated: November 13, 2013

Certificate Of Service

I, the undersigned, counsel for the Defendant-Appellant, Gregory Walker, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 13, 2013, which will send the filing to the person listed below.

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Circuit Rule 30(d) Statement

I, the undersigned, counsel for the Defendant-Appellant, Gregory Walker, hereby state that all of the materials required by Circuit Rules 30(a) and 30(b) are included in the Appendix to this brief.

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Dated: November 13, 2013

No. 13-2145

IN THE 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
Presiding Judge

RULE 30(a) APPENDIX OF DEFENDANT-APPELLANT GREGORY WALKER

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RULE 30(A) APPENDIX TABLE OF CONTENTS

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

For the Northern District of Illinois Eastern Division

UNITED STATES OF AMERICA
v.
Gregory Walker

JUDGMENT IN A CRIMINAL CASE

Case Number: 11 CR 4-3

USM Number: 42945-424

Dennis Michael Doherty
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) Two and Three of the Indictment. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C §1343	Wire Fraud	1/31/2006	Two and Three

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

X Count(s) all remaining counts ☐ is X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 23, 2013
Date of Imposition of Judgment

Signature of Judge

Judge Harry D. Leinenweber
Name and Title of Judge

May 24, 2013
Date

DEFENDANT: Gregory Walker
CASE NUMBER: 11 CR 4-3

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

SIXTY (60) MONTHS on Count Two of the Indictment
SIXTY (60) MONTHS on Count Three of the Indictment.

Said sentence on Counts two and three to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Gregory Walker
CASE NUMBER: 11 CR 4-3

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
THREE (3) YEARS on Counts Two and Three of the Indictment. Said term of Supervised Release on Counts Two and Three to run concurrently with each other.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and random drug tests thereafter, conducted by the U.S. Probation Office, not to exceed 104 tests per year.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Gregory Walker
CASE NUMBER: 11 CR 4-3

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall pay any financial penalty at a rate of at least 10% of net monthly income.

DEFENDANT: Gregory Walker
CASE NUMBER: 11 CR 4-3

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 200.00	$	$ 956,300

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
FDIC, Restitution Payments P.O. Box 971774 Dallas, TX 75397-1774 RE: Long Beach Mortgage		$956,300.00	

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: Gregory Walker
CASE NUMBER: 11 CR 4-3

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A X Lump sum payment of $ 956,500.00 due immediately, balance due

☐ not later than _____ , or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

X Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Carol Simmons 11 CR 4 - 1 $956,300; Ellie Stewart 11 CR 4-2, $956,300; Tanya McChristion 11 CR 4-4 $956,300; Kaeva Powell 11 CR 4-5 $956,300; Brian Wade 11 CR 4-5 $956,300; Daniel Habeel 11 CR 4-7 $956,300.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Transcript of Status Hearing,
July 18, 2012

THE CLERK: 11 CR 4, United States versus Simmons, Walker, and McChristion.

MS. ROMERO: Good morning. Jessica Romero for the United States.

MR. DOHERTY: Good morning, Your Honor. My name is Dennis Doherty, D-o-h-e-r-t-y, on behalf of Gregory Walker, who is before Your Honor.

MR. BEAL: Good morning, Your Honor. John Beal on behalf of Carol Simmons, who's present in court.

MR. MIRAGLIA: John Miraglia, M-i-r-a-g-l-i-a, on behalf of Tayna McChristion, who's present as well.

MS. ROMERO: Your Honor, the status is we're here to set a trial date. The earliest the Government would be available would be November. I talked to Wanda, and she indicated the Court's schedule might be better in December or January. At this time, because there's three outstanding defendants, I would ask for two weeks, even though I anticipate realistically there's only one defendant going to trial. It will probably be only a one-week trial, but at this time I think it makes sense to block out two weeks.

MR. DOHERTY: May I address the Court?

THE COURT: Yes.

MR. DOHERTY: Judge, I am still investigating my Silverthorn issue. I did obtain state court documents, a search warrant, and a search warrant inventory return. I've

given copies of those documents to the Government.

MS. ROMERO: Actually, Your Honor, I have not received them. Just for the record, I have not received them.

MR. MIRAGLIA: Judge, I have copies that I can tender today, if counsel needs them.

MR. DOHERTY: I'm sorry. I faxed them to the Government Sunday. If they didn't get it, I'll give you an extra copy.

MS. ROMERO: That's fine. Thank you.

MR. DOHERTY: If the Government didn't know anything about this, I do apologize. I didn't get the documents until last week. I obtained subpoenas duces tecum forms, and I was going to request a date for the return of the subpoenas I wish to issue, or I'll just select a date. I don't know what Your Honor's preference would be.

If the Court and the Government must set a trial date, I think I can complete what I have to do in that period of time. But I foresee clearly, based on what I've got out of the state court file, filing a motion to suppress evidence pursuant to Silverthorn.

I do think there's a good-faith basis to believe that federal agents seized from Mr. Walker's house multiple records and documents which are directly related to the indictment in this case. I don't know the extent of that, and I need to go and look if that really occurred, but I want to subpoena stuff.

There are computer serial numbers listed in the search warrant inventory, so I think I can track that down.

All through the indictment, it talks about Real Deal Construction, Real Deal T-Shirts. That stuff was taken, and the search warrant inventory says the same. So I'd request a status, Judge, and I can make my subpoenas returnable on that date. I think co-counsel wanted to join in my motion because his client resided at the home, also, where the agents went in without a search warrant. A state court judge has already suppressed that evidence.

MS. ROMERO: Your Honor, we've addressed this before. This is absolutely frivolous.

THE COURT: This is stuff you're not using.

MS. ROMERO: That's correct. We've obtained all the evidence in this case through subpoenas directly from the lendors, mortgage companies, and tax records. We've never obtained a search warrant. Judge, the copy of what's just been tendered to me is a state court search warrant, and the date on it is from 2006. This investigation, this federal investigation didn't get started until 2008.

I have no idea what he's talking about. We don't plan on using any of it. All the evidence that we have in the case we've turned over to him with the exception of certain grand jury materials pending trial. So this is just completely frivolous. He's free to investigate it as he wishes, but in

terms of filing a motion to suppress, there's nothing to suppress, Judge.

MR. MIRAGLIA: Respectfully, there's nothing about a search warrant inventory that indicates there are documents that are germane to this investigation.

THE COURT: So what? If we suppress them, it doesn't make any difference, right?

MR. MIRAGLIA: But if they're related --

THE COURT: If they agree that they're not going to use them, what's the difference between that and a suppression?

MR. DOHERTY: Judge, there's case law on inevitable discovery, and there's standards set.

THE COURT: Two years later?

MR. DOHERTY: The federal agents took this evidence, and there's a secondary concern I have. It also included the history of Mr. Walker's work on all of these homes and other records that he had to dispute the --

THE COURT: But the point is you're going to file a motion to suppress, and they'll agree to have them suppressed because they don't intend to use them. So what purpose is served by filing a motion?

MR. DOHERTY: If they break into somebody's home, Judge, respectfully, there's law on it, and I'd rather not argue it on the merits right now without knowing the --

THE COURT: You can file anything you want.

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Harry D. Leinenweber	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	11 CR 4-3	DATE	10/17/2012
CASE TITLE	United States vs. Walker		

DOCKET ENTRY TEXT

Status hearing held on 10/17/12. Defendant's motion for discovery return of subpoena is denied. The Court instructs the Government to inquire what happened with the evidence which was illegally obtained and later suppressed by the Circuit Court in Cook County. The Court further instructs the Government to provide Defendant a written response detailing the information the Government obtains after such inquiries by 10/24/12. Defendant's oral motion for an extension of time to file pretrial motions is granted. The parties now have until 11/7/12 to file pretrial motions.

■[For further details see text below.]

Docketing to mail notices.

STATEMENT

Courtroom Deputy Initials:	WAP

Trial Transcript, Denial of Proposed Jury Instruction
January 15, 2013

THE COURT: All right. That was not tendered by the Government?

MS. ROMERO: Correct. So we'll include it at the defendant's request.

THE COURT: Okay. You'll include that one. Okay. We'll make it Defendant's Instruction No. 3, which will be the pattern for what?

MS. ROMERO: It's 5.07(b).

THE COURT: 5.07, that will be Defendant's No. 3. No. 4, I think we have that, don't we?

MR. DOHERTY: Judge, those are old patterns prior to the committee's new instructions. I think I can withdraw 4 and 5 because they're covered in Government's 15.

THE COURT: All right. That leaves --

MR. DOHERTY: They appear to be covered.

THE COURT: What about No. 6?

MR. DOHERTY: Judge, I'm going to offer that. That's a buyer-seller instruction usually for narcotics cases, of course. However, the committee in the 2012 committee's buyer-seller instruction --

THE COURT: Is the Government objecting to this?

MS. ROMERO: Yes.

THE COURT: I'm going to refuse it.

MR. DOHERTY: That's my point on appeal.

THE COURT: I've got to give you something.

MR. DOHERTY: Exactly.

THE COURT: Is that it? We'll see you at 10:00 o'clock tomorrow to start the final arguments.

MS. ROMERO: One more matter, Judge. We submitted a proposed redacted indictment which took out a lot of the information regarding the defendants that are not scheduled to go to trial.

THE COURT: All right. Did you show it to them?

MS. ROMERO: I electronically filed it. I wanted to make sure with the Court and with counsel.

THE COURT: The other thing I want you to do --

MR. DOHERTY: Is that how you guys do it? You give them the indictment?

MS. ROMERO: A redacted form.

THE COURT: What I want you to do actually before you leave tonight is go over the exhibits so that you have them ready to submit to the jury as soon as we conclude the final arguments and the instructions. So just make sure Mr. Doherty knows what's in, you know, and what's not in.

MS. ROMERO: Yes, Judge.

THE COURT: Get them ready to go.

MS. ROMERO: For the record, it will be the binder that we've already provided.

THE COURT: The entire binder?

MS. ROMERO: The entire binder of exhibits.

Transcript of Sentencing Hearing,
Denial of Motion for Judgment of Acquittal, April 23, 2013

THE DEFENDANT: Yes, Your Honor.
THE COURT: Have you discussed it with your attorney?
THE DEFENDANT: Yes, Your Honor.
THE COURT: Now, you've filed a series of objections, some of which relate factually and some of them to guideline calculations. I think we should probably start by running through those. Let me get them in the right order. The Government has responded to them all.
MS. ROMERO: That's correct, Your Honor, and we have our own objections to the PSR as well.
THE COURT: All right. The first one is the 2012 conviction for theft in Will County Circuit Court. It was a misdemeanor, and he was not incarcerated.
MR. DOHERTY: May I interject something, Your Honor?
THE COURT: Yes.
MR. DOHERTY: I filed a motion for new trial or a judgment NOV within 14 days of the judgment, and I really just want to stand on that motion, but I think I need to request a ruling.
THE COURT: Wait a minute. I don't recall seeing that.
MR. DOHERTY: I know it's on the Internet.
THE COURT: Obviously, he needs to get a ruling on it.
MR. DOHERTY: It only raises sufficiency of the

evidence, point 1, and then point 2 is the buyer-seller instruction that the Court rejected. I wanted to offer it here, even though it was a narcotics-type instruction. Judge, I think --

THE COURT: Has the Government seen this?

MR. DOHERTY: I will not orally argue it. I'd just ask for a ruling.

MS. ROMERO: Judge, I don't know that it was electronically filed, but I can answer both of those today.

THE COURT: All right.

MR. DOHERTY: Judge, I have an extra copy, showing a date stamp of January 22, 2013.

THE COURT: Let me see it.

MR. DOHERTY: And I have no oral argument on it.

THE COURT: All right. The Court, as far as the motion under Federal Rule of Criminal Procedure 33 for a judgment NOV, the Court believes there was sufficiency of evidence. As regarding the second matter, reversible error for not allowing defendant's proposed buyer-seller jury instruction, the instruction just was not applicable. So the motion is denied. Okay?

MR. DOHERTY: Thank you very much, Your Honor.

THE COURT: All right.

THE CLERK: Do you want to take this as the original? I don't see it on the docket, if you can sign it.

Transcript of Sentencing Hearing,
Denial of Objection to Restitution Amount, April 23, 2013

MS. ROMERO: I think, Judge, the Government's immediate response is that he made more money than the other individuals as part of this scheme. He definitely made more money than Carol Simmons in connection with all of the transactions that he was involved with. More generally, the volume of transactions that he was involved in indicate he was not a minor participant or somehow on the fringe.

THE COURT: Well, is the Government seeking an increase?

MS. ROMERO: No, Judge. We just oppose minor role.

THE COURT: Yes, I don't think it's a minor role, so the objection is overruled.

MR. DOHERTY: Thank you.

THE COURT: Number 7 is paragraph 25.

MS. ROMERO: I think it's number 6 first, Judge. We skipped that.

THE COURT: Wasn't that 6?

MR. DOHERTY: Do you have 6?

MS. ROMERO: Regarding the amount of restitution?

THE COURT: Oh, there was a huge amount of restitution. The restitution is joint and several.

MS. ROMERO: Correct.

THE COURT: So whatever they can collect from somebody else he doesn't have to pay and vice versa. So that objection is overruled. I mean, restitution is based upon the

entire scheme, so that objection is overruled.

Number 7, enhancement for sophisticated means, I think the Government has demonstrated that while the definition of "sophistication" -- well, I think because of the number of activities involved in the scheme that, therefore, that's appropriate. So the Court will go along with the two-level increase.

Number 8?

MS. ROMERO: This is the same as number 5.

THE COURT: That's the same, yes. So that's denied.

Number 9 is to number 64.

MR. DOHERTY: Well, he was acquitted. Is this number 9?

THE COURT: Yes, number 64.

MR. DOHERTY: They say he was tried for murder and found not guilty and the police say he shot someone in the head. Well, actually, I was the trial lawyer in that, and they said a lot more than that. This PSR is going to follow him around to every prison as security classification. I've attached my objection which kind of elaborates here. So if you can't add my language, can you attach my objection to the PSR? Then if they ask what's this about a murder in the Bureau of Prisons, he can say the guy that accused him actually did the murder.

THE COURT: All right. I'll grant that one, and I'll

Transcript of Sentencing Hearing,
Determination of Sentence, April 23, 2013

Everything escalated. It is, indeed, a great responsibility of mine, and I do acknowledge that.

I ask you that you be lenient towards my sentence because I do have a family, and I am apologetic to the judicial system. I apologize to the Government for taking their time to be faced with this matter today. I apologize to you, Your Honor, to be faced with this matter today, and also my attorney as well. Nothing further.

THE COURT: All right. Your record isn't good. That's part of your problem. Because your record is not good, you've got a higher guideline range because your criminal history is 4. That's because of the fact that you've got, I think, four or five convictions. Over and above that, I just counted them. There's 24 different arrests which did not result in a conviction, which aren't considered as far as the guidelines are concerned. But to be arrested 24 times, granted, the police are not always fair in how they deal with people but, still, 24 arrests is a lot.

One other thing that's sort of troubling is the fact that you've got a pending charge again which is coming up. I think the next court date is in May, which sort of has -- you know, it's based on kind of a fraudulent activity. That's not considered because there's no conviction. But again, while this case is going on, identity theft was the charge, and that's still in court. So that's disturbing, which goes to

show that although we have a lot of letters from people who say what a great guy you are, nevertheless, you can't seem to stay out of trouble.

Now, another thing that comes out, I mean, in just observing you and from the facts of this case, you can't be stupid because what you did, while you got caught and you lost in a jury trial, nevertheless, there was relatively sophisticated means. Now, if you had used your talents in a correct way, legally, maybe you could have made something of yourself, but you didn't.

Whatever abilities you have -- and again, I'm also impressed by the fact that you didn't have the great start in life. Your father was murdered and so on. So you grew up without a father, which those of us who have had the luxury of having a father realize how important it is to have a father. So there are certain mitigating factors in your case.

As a result, I'm going to give you a small break. I'm going to sentence you below the guideline range of 70 to 87. I'm going to give you 60 months in custody. That's a 10-month break, to be followed by three years of supervised release. The term of supervised release would include the restitution in the amount of $956,300 to be paid off at, I believe, 10 percent of the take-home pay.

Was that in the terms of supervised release?

MS. RICE: Yes, Your Honor.

No. 13-2145

IN THE 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 Presiding Judge

CIRCUIT RULE 30(d) Statement

I, the undersigned, counsel for the Defendant-Appellant, Gregory Walker, hereby state that all of the materials required by Circuit Rules 30(a), 30(b), and 30(d) are included in the appendix to this brief.

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Dated: November 13, 2013

CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant Gregory Walker, hereby certify that I electronically filed this brief and appendix with the clerk of the Seventh Circuit Court of Appeals on November 13, 2013, which will send notice of the filing to counsel of record.

/s/ SARAH O'ROURKE SCHRUP
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