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 Judge Harry D. Leinenweber

REPLY BRIEF OF DEFENDANT-APPELLANT GREGORY WALKER

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I. Walker's due process rights were abridged when the government and the district court impeded his efforts to access materials favorable to his defense.

Walker harbored several concerns about the evidence seized in the illegal search of his home in 2006. One concern, raised at a status hearing in July 2012, was that the evidence contained materials important to his defense. (A.43) (warrant inventory describing documents pertaining to "real estate transactions," un-cashed checks to Real Deal Construction, and several computers); (A.8–11) (arguing that the materials seized "included the history of Mr. Walker's work on all of these homes"). Another, separate concern was that the seized materials led to the federal indictment in this case, an issue he also raised in the alternative at that status hearing. (A.9–10.) Accordingly, Walker asked the district court for a subpoena to access those materials, the only realistic—and certainly the simplest—way to obtain them from the law-enforcement agency that had held them for the past six years. (A.8–11; R.231.)

Armed with this information and this request, the government had several options. It could have acknowledged Walker's legitimate concern about obtaining his own work files and computers to assist in his defense. If it had done so, it would have had even more options. It could have taken possession of the files and computers, reviewed them, and turned over that small subset of files that related to his construction company and mortgage transactions, while retaining the other subset of files that it deemed "contraband." It also could have asked the district

court for *in camera* review in order to get the appropriate documents into Walker's hands. Either avenue would have permitted Walker access to his business records. At a minimum, the government could have said nothing to oppose Walker's subpoena, and allowed Walker to sort through his materials on his own. The government did none of these things; in fact, it never reviewed the evidence. Instead it did everything it could to keep the documents out of Walker's hands by: (1) vociferously objecting to the issuance of the subpoena (A.8–10) (Prosecutor: "This is absolutely frivolous."); (2) lumping all the materials together and telling the court they were "irrelevant" or "contraband" (10/17/12 Hr'g Tr. at 2, 13); *see also* (10/17/12 Hr'g Tr. at 4) ("Prosecutor: "[W]e address this every time I'm in here. It's like Groundhog Day."); (10/17/12 Hr'g Tr. at 2) ("[H]e's essentially issued a trial subpoena for contraband."); and (3) threatening additional charges if the government took possession of the materials, (10/17/12 Hr'g Tr. at 4) ("Whether we're likely to supersede now based on this, which is a maybe, I'm not going to lie"). The district court had similar options available to it. Yet, rather than issue the federal subpoena relevant to this federal prosecution, the district court denied Walker's request on the basis that he should return to state court, re-open that closed case, and attempt to obtain relief there. (10/17/12 Hr'g Tr. at 10.)

Whether styled as a *Brady* violation or another variant of due process, these decisions unfairly impeded Walker's defense. Engaging in the very same misdirection that it used below, the government urges this Court to ignore this

fundamentally unfair predicament and instead reject Walker's claim on appeal based on narrow readings of the record and the law. (Gov't Br. 37–45.)

A. Walker did not waive his due process arguments.

First, the government claims that Walker withdrew his request for the favorable evidence (first made during a July 2012 status hearing) during a later hearing in October 2012, and thus waived the issue for this Court's review. (Gov't Br. 33.) Not so. Walker's counsel began the October hearing reiterating his desire for the materials and his expectation that the government would turn them over. (10/17/12 Hr'g Tr. at 2) ("I served a copy of the subpoena on the Government. I asked them to bring the stuff here today, and they're not here to my knowledge."). The government, however, immediately shifted the direction of the hearing, again raising its relevance objection and now, for the first time, focusing on the issue of contraband. (10/17/12 Hr'g Tr. at 2–3) (Prosecutor: "[H]e's essentially issued a trial subpoena for contraband . . . I do not think essentially Social Security numbers and state identification cards belonging to third parties . . . should be turned over to the defendant in this case."). Defense counsel's statements from that point on were directed at refuting the government's re-characterization of the evidence and at distancing himself from the government's threats to indict Walker on additional offenses. *See, e.g.,* (10/17/12 Hr'g Tr. at 4, 5, 11). Even so, defense counsel maintained that he was raising his suppression concerns "in the alternative" to his other claims (10/17/12 Hr'g Tr. at 12), including his earlier request for access to his property and any *Brady* claim (10/17/12 Hr'g Tr. at 12). Given this more fulsome

context, defense counsel's statements at the October hearing do not constitute a withdrawal or waiver; Walker never once indicated that he was abandoning his request for the favorable evidence. *See United States v. Natale*, 719 F.3d 719, 729 (7th Cir. 2013) ("[W]aiver occurs only when a defendant makes a 'knowing and intentional decision' to forgo a challenge before the district court.") (quoting *United States v. Jaimes-Jaimes*, 406 F.3d 845, 848 (7th Cir. 2005) ("The touchstone of waiver is a knowing and intentional decision.")).[1]

B. The government narrowly and unreasonably parses the *Brady* factors to justify its withholding of evidence from Walker before trial.

The government raises two primary arguments relating to the first "suppression" prong of the *Brady* test. First, the government claims that *Brady* does not apply because the evidence "has never been in the possession of the prosecutorial team in this case," (Gov't Br. 38), but rather stayed with the South Holland police department. But the government cannot willfully ignore evidence favorable to the defendant, *Crivens v. Roth*, 172 F.3d 991, 996 (7th Cir. 1999) ("[p]rosecutors may not simply claim ignorance of *Brady* material"), particularly where, as here, the government was put on notice of its existence, *Kyles v. Whitley*, 514 U.S. 419, 438 (1995) ("the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable"),

[1] The government applies plain-error review to the remainder of its discussion without ever explaining how a forfeiture could arise from defense counsel's explicit request for material relevant to his defense and his request for a trial subpoena. (Gov't Br at 36.) Walker made the requests, they were denied, and no further exception was required to preserve it for this Court's review. *See* Fed. R. Crim. P. 51(a).

and where the material is easily accessible to the government, *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991) ("the prosecution is obligated to produce certain evidence actually or constructively within its possession or accessible to it"). *See also United States v. Auten*, 632 F.2d 478, 481 (5th Cir. 1980) (stating that "[i]f disclosure were excused in instances where the prosecution has not sought out information readily available to it, [the court] would be inviting and placing a premium on conduct unworthy of representatives of the United States Government."). This is not a case where the defendant imposed an undue burden on the government to scour the earth for *Brady* material or to rifle through thousands of documents to find a proverbial needle in the haystack. *See, e.g.*, *United States v. Gray*, 648 F.3d 562, 567 (7th Cir. 2011); *United States v. Pelullo*, 399 F.3d 197, 211-12 (3d Cir. 2005) (government is not required to comb through 75,000 pounds of documents). The government had the warrant inventory, and the defense indicated the limited subset of information that was relevant to Walker's defense. *See United States v. Joseph*, 996 F.2d 36, 41 (3d Cir. 1993) (holding that a specific request for information would trigger a *Brady* obligation).

Once on notice of the specific evidence that the defense needed but could not feasibly obtain without either a federal subpoena or prosecutorial assistance,[2] the government had a duty to review it. It took just one day and one phone call for the

[2] The government's is wrong when it insists that Walker could have obtained all of this information with "reasonable diligence." It never explains how Walker could recreate computer files, construction invoices, and uncashed checks held at the South Holland police station. And the district court created unnecessary roadblocks by directing Walker to instead re-open the state court proceedings in order to access materials relevant to this federal prosecution.

government to obtain information about the material, but the government ultimately left the evidence where it was. (10/17/12 Hr'g Tr.; A.40.) And though the government claims that Walker rejected its offer to "assist" him by taking possession of the material, one can hardly fault him for not jumping at this gesture that the government itself indicated might lead to additional criminal liability. (Gov't Br. 40; 10/17/12 Hr'g Tr. at 3–4, 10.) The bottom line is that the government's own refusal to look at the evidence and its repeated mischaracterizations of it in order to defeat Walker's subpoena cannot now neutralize its *Brady* obligations.

For similar reasons this Court should reject the government's alternate argument that no suppression occurred because Walker already knew of the existence of the items. (Gov't Br. 39–40) (citing *United States v. White*, 737 F.3d 1121 (7th Cir. 2013)). A defendant's awareness does not defeat his *Brady* claim, particularly where, as here, the government acts with willful ignorance and misdirection. *See, e.g.*, *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir. 1984) (finding that the "prosecutor's office cannot get around *Brady* by keeping itself in ignorance, or compartmentalizing information about different aspects of a case" even where defense counsel was aware of the existence of a drug deal because the prosecutor did not disclose an important detail about that deal). *White*—the case the government cites in support of its argument that a defendant's knowledge defeats a *Brady* claim—is inapposite because the information the defendant sought was not only taken from his own files but also returned or made available to him in advance of trial. 737 F.3d at 1134; *see also United States v. Lee*, 399 F.3d 864, 865 (7th Cir.

2005) (rejecting as "nonsense" defendant's *Brady* claim arising from the government's inability to produce the pair of pants holding the gun underlying his felon-in-possession charge when a local jail had given them to charity after the defendant had failed to claim them and because the defendant clearly had full knowledge of the details surrounding that single pair of pants). Here, of course, Walker's files were neither returned nor made available to him and, though he had some general knowledge of the files, the important details remained beyond his reach.

As for the two remaining *Brady* prongs, the government argues that Walker cannot establish either the favorability or materiality of the evidence. (Gov't Br. 41.) With respect to favorability, Walker repeatedly and consistently offered his theory of defense: that he took out these loans so that he could purchase, renovate, and flip the homes in distressed neighborhoods. (A.10; Trial Tr. 495.) His business records were essential to establishing that defense; though he tried to cobble together evidence from photos defense counsel took of the property shortly before trial, his efforts met with government objection. (A.82–84.) In contrast, the business records held by the South Holland police would have been timely, detailed, and thus relevant to his defense. The government protests that Walker could not specifically identify all of the documents, but this is hardly surprising given the six-year lapse since they had been taken from him. *See United States v. Jumah*, 599 F.3d 799, 810 (7th Cir. 2010) ("[W]hen 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.").

Finally, turning to the materiality prong, the government claims that Walker has not shown how these items would have "undermined the evidence presented at trial." (Gov't Br. 43.) But the materiality standard under *Brady* does not require a defendant to "demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict." *Kyles*, 514 U.S. at 434–35. Rather, evidence is material for *Brady* purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also United States v. Baker*, 453 F.3d 419, 422 (7th Cir. 2006). *Brady* itself was a case where the due process error impacted the defendant's sentence, not his conviction. *Brady v. Maryland*, 373 U.S. 83, 85 (1963). Similarly, had Walker been able to substantiate his defense with respect to any of the transactions presented at trial, then these properties might have been excluded from the restitution calculation or amount of loss at sentencing. In any event, even if acquittal is used as the measure, had Walker been able to support his theory of defense with those inaccessible materials, the jury could have more easily credited his claim that he lacked the intent to defraud. *See, e.g.*, *United States v. Phillips*, 731 F.3d 649, 656 (7th Cir. 2013) (en banc) (noting in mortgage-fraud case that had the defendants been given the opportunity to present additional evidence under their theory of defense then it would have negated the prosecutor's claim that it had

proven one of the elements of the offense). The evidence was material for *Brady* purposes.

II. The district court should have instructed the jury on Walker's theory of defense.

The district court dismissed out of hand Walker's efforts to have the jury instructed on his theory—consistently proffered before, during and after trial—that his purpose in securing these loans was to purchase distressed properties, repair and flip them. That is, he sought to give the jury a legal lens through which to filter the evidence that he owned a construction company, that he repeatedly told those from whom he purchased that he was interested in rehabbing the properties, that he performed work on the properties, and that he made mortgage payments on those properties. (Trial Tr. 100–02, 488, 495; A.68, 70, 71.) This defense sought to distance Walker from the government's alleged scheme and to distinguish his behavior from those with whom the government claimed he acted in concert, with similar intent, and in an identical way. When faced with a series of conspiracy-based government instructions that allowed the government to lump him even more closely together with these former co-defendants, Walker wanted only the opportunity to offer the jury the countervailing narrative. The district court denied him this opportunity and therefore this Court should reverse.

Despite its attachment to conspiracy-based doctrines in its own instructions below,[3] the government now claims that Walker's proposed instruction was only a

[3] All of the cases on which the government relied to devise its own non-pattern Pinkerton-style instruction in this wire-fraud case emphasized the role of *conspiracy* doctrines in fraud cases. *See* Government Proposed Instruction 18 (A.92; R.269 at 19) (citing *United*

conspiracy instruction and thus had no place in this case charging a wire-fraud scheme. (Gov't Br. 47, 49.) The government believes that Walker's proposed instruction only goes to debunking the agreement element of a conspiracy, which is not at issue in a fraud scheme. (Gov't Br. 48–49.) The purpose of Walker's theory-of-defense instruction, however, was not to combat a conspiracy that the government did not even charge. Rather, the goal of the instruction was to tell the jury that even if there is evidence that he engaged in what were ultimately deemed illegal transactions, the jury should not ignore evidence of Walker's contrary intent.

The government concedes that Walker put forth his theory that he lacked the intent to defraud. (Gov't Br. 51, 52.) Combined with the evidence discussed above, *see supra* p. 10, the district court should have issued a theory-of-defense instruction. *United States v. Douglas*, 818 F.2d 1317, 1320 (7th Cir. 1987) ("[T]he defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence . . . .") (internal quotation marks omitted) (quoting *United States v. Boucher*, 797 F.2d 972, 975 (7th

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States v. Macey, 8 F.3d 462, 468 (7th Cir. 1993) ("[i]t is not essential that the indictment contain a separate count charging conspiracy in order to take advantage of the doctrines peculiar to conspiracy.") (internal quotation marks omitted); *United States v. Stapleton*, 293 F.3d 1111, 1117 (9th Cir. 2002) ("Because an essential element of these offenses is a fraudulent scheme, mail and wire fraud are treated like conspiracy . . . ."); *United States v. Funt*, 896 F.2d 1288, 1293–94 (11th Cir. 1990) (applying vicarious liability principles to fraud scheme); *United States v. Martino*, 648 F.2d 367, 394 (5th Cir. 1981) ("Co-schemers are jointly responsible for each other's acts when the acts are within the general scope and in furtherance of the scheme."); *United States v. Kelly*, 507 F. Supp. 495, 504 n.15 (E.D. Pa. 1981) ("Principles applicable to the law of conspiracy are frequently utilized in cases concerned with a mail fraud scheme . . .")).

Cir. 1986). The government's claim that the proposed instruction was inadequate[4] does not eliminate the need for a theory-of-defense instruction. *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."); *Douglas*, 818 F.2d at 1322 (finding under plain error review that the district court should have given an instruction on defendant's theory of defense where defendant's proposed pattern-based instruction did not incorporate the theory of defense). The government is wrong when it claims that the instruction was obviated by the fact that Walker received more money from the loan transactions than his co-defendants. (Gov't Br. 51.) That money could have just as easily been used to rehab the properties, a conclusion supported by the fact that Walker assumed the burden of making higher mortgage payments on higher loan amounts at the higher interest rates reserved for subprime borrowers. (A.68, 70; Trial Tr. 303–04.) Finally, to accept the government's argument that its recitation of the elements of the crime adequately conveyed Walker's theory of defense (Gov't Br. 51–52) would effectively eviscerate a defendant's right to an instruction on that defense. What it more, such an approach would render superfluous the requirement that the theory of defense not be part of

[4] Walker was scarcely given an opportunity to present his theory-of-defense instruction before it was summarily dismissed by the district court. (A.14.) The following colloquy comprised the entire discussion of Walker's theory-of-defense instruction:
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.

the charge, for one always assumes that the jury is instructed on the elements of the offense. *See United States v. Sotelo*, 94 F.3d 1037, 1039 (7th Cir. 1996) (reciting the factors in the theory-of-defense instruction test). In short, the district court should have instructed the jury on Walker's theory of defense.

III. The restitution order was flawed.

Nothing in the government's brief changes the fact that the record does not support the district court's award of restitution. Ignoring its own role in offering the court a restitution figure that was neither tethered to the evidence at trial nor supported by any evidence at sentencing, the government instead faults Walker for the manner and scope of his objection.[5] Yet the government simultaneously admits, for the first time, that the loans taken out by Walker to purchase the properties—the loans discussed at trial—are *not* the loans on which the restitution calculation was based. Notably, the government did not flag this discrepancy at trial, remaining silent as the district court adopted the PSR without comment or explanation. This, in turn, denied Walker a fair sentencing and prevented meaningful appellate review. *United States v. Leiskunas*, 656 F.3d 732, 738 (7th Cir. 2011).

The government's approach undermines the established rule that the burden of proving restitution rests with the government, *see United States v. Schroeder*, 536 F.3d 746, 753 (7th Cir. 2008), undermining the statutory scheme of the MVRA and this Court's precedent. Finally, this approach leads to judicial-administration

[5] The government presented no evidence substantiating its proposed loss amount, so it cannot now fault the defendant for failing to introduce specific evidence to rebut it. (Gov't Br. 55–56.)

problems and doubts about the transparency of a sentencing mechanism that saddles many defendants with lifelong financial hardship. Walker objected, the government offered no evidence, and yet the district court accepted this unsubstantiated calculation. Nothing further is required to vacate the restitution order.

As a threshold matter, Walker adequately preserved his objection to the restitution imposed in this case. His Sentencing Objection Number Six encompassed all of the pertinent points raised on appeal: (1) counsel raised the question of the victims' identity when he pointed out that no one lost money from Walker's conduct; (2) counsel raised the question of loss calculation and restitution amount when he noted that the "evidence at trial was that defendant paid all mortgage payments for each property purchased"; and (3) counsel challenged the extent of the scheme and Walker's liability within it, stating that it was "unfair to assess defendant entirely, for losses caused by others." (R.307.) Thus, Walker's is not a case where the restitution arguments on appeal are of a "different flavor" from ones raised below. *United States v. Berkowitz*, 732 F.3d 850, 852 (7th Cir. 2013) (applying plain-error review when the defendant switched his restitution objections from a foreseeability argument to an attributable-conduct argument).[6] Despite bearing the burden of

[6] Nor should this Court accept the government's suggestion that Walker somehow waived his objections by encouraging the district court to adopt the Probation Office's suggested loss calculation excluding a property where the government's version had provided "no information" as to Walker's involvement in that transaction. (R.291 ¶ 16.) Defense counsel's statements, taken out of context, occurred *after* the district court had denied Walker's restitution objection, and were plainly offered in the alternative to challenge the government's attempt to have the restitution calculation include yet another factually-unsupported property. (Sentencing Hr'g Tr. 11–12.)

proof, *see United States v. Allen*, 529 F.3d 390, 396 (7th Cir. 2008), the government offered virtually no substantiating evidence to support the loss amount that it provided to the probation office (R. 291, PSR with Gov't Version at 4), who then accepted it, as did the district court. This Court recently addressed the problems with such an approach: "District courts can get into trouble if they rely unquestioningly on these [PSR] figures" because, unlike at sentencing, loss calculations for restitution "are not so permissive. They are rigidly compartmentalized to the actual losses resulting from the conduct of the convicted offenses." *Berkowitz*, 732 F.3d at 854 n.3 (internal citations omitted).

The three issues flagged by defense counsel are, in any event, issues that the district court is required by law to find prior to imposing any restitution order. Therefore, even if Walker had completely failed to mention them, it would not have relieved the government of its burden of proof or the district court of its obligation to make adequate findings based on reliable evidence. *See* 18 U.S.C. § 3663A(b)(1)(B), § 3663A(a)(1–2) (2012) (permitting restitution only in the amount of actual loss to the actual victims); 18 U.S.C.A. § 3663A(c)(1)(B) ("This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense—in which *an identifiable victim or victims has suffered a physical injury or pecuniary loss.*") (emphasis added); *United States v. Locke*, 643 F.3d 235, 247 (7th Cir. 2011) (requiring court to determine the extent of the scheme in order to calculate actual loss); *United States v. Swanson*, 394 F.3d 520, 527 (7th Cir. 2005) (finding the government's failure to meet its burden of proffering loss evidence with

adequate detail and explanation outweighed the defendant's non-specific objection and required a remand).

In its efforts to blame Walker for the absence of a factual record (Gov't Br. 54, 58), the government effectively concedes that the district court's decision was unsubstantiated. And when it does finally turn to the merits of the argument, the government further concedes that it did not meet its burden of proving restitution. That is, in the opening brief Walker offered several hypothetical examples of the unanswered questions arising from the government's decision to offer a cursory chart as its *only* proof of loss. (R.291, Gov't Version at 4.) Walker pointed out—analyzing the very transactions that the government introduced at trial to secure a conviction—that the chart did not necessarily identify the proper victims (because underlying documentation reflected intervening sales) (Br. 30); did not necessarily include the proper offsets required by statute (because the evidence showed the Walker made mortgage payments and perhaps improved the buildings) (Br. 32); and did not necessarily reflect the extent of the scheme (because the district court never made the requisite findings) (Br. 30).

Rather than address head-on these potential problems with its approach and methodology, however, the government once again engages in misdirection by saying that none of Walker's hypotheticals could come to pass because it based its restitution calculation not on the transactions discussed at trial (where Walker bought the properties), but rather on his later sale of properties to others. (Gov't Br. 55.) Yet the lack of proof is just as problematic on the sale side as it was on the buy

side. Once again, the government's cursory chart of the purported sales does not identify the proper victims (because the originator of the loans discussed at trial, Long Beach Mortgage, would have been paid in full at any such sales, and the originators of the new loans remain undocumented);[7] did not include any payments or other offsets made by the holders of the new loans (because the stated methodology of the chart reflect only the original loan amount); and did not reflect the extent of the scheme (because no evidence was presented at trial or sentencing linking the charged scheme to the sale of the 83rd St., Eggleston, Hermitage, Maryland, or Park Forest or Woodlawn properties). For example, the government alleges on appeal that Brian Wade, the purported purchaser of three of these four properties, is a co-schemer. (Gov't Br. 55.) Wade, however, does not appear in the scheme presented to the jury, (R.272), was never discussed at trial, and no evidence pertaining to him was introduced at trial or sentencing. Similarly, there is no evidence identifying any illegal conduct on the part of the scheme relating to these transactions.

Indeed, the nearly complete lack of proof sets this case apart from and makes it more egregious than nearly all others in which the government has offered (or the court has reversed due to the absence of) some independent testimony, affidavits or other proof of its calculations. (*See* Br. 27–28) (collecting cases). Here, however, the government used an entirely different set of transactions than those charged at trial

[7] Walker has moved this Court to take judicial notice of several Cook County property records conclusively showing that the ostensible victim, Long Beach Mortgage, was indeed paid in full for five of the mortgages discussed at trial. *See* (A.72–78.)

and instead merely invoked the existence of a scheme as the sole basis for its restitution amount. (Gov't Br. at 57.)

The implications arising from the government's deficient approach—one the district court unquestioningly accepted—are not mere technical or procedural quibbles. This Court has put in place rules regarding proper proof and fact-finding at sentencing for important reasons. First, failing to substantiate a sentencing decision or to make proper findings impedes this Court's review. *Leiskunas*, 656 F.3d at 738. Second, in the specific context of the restitution awards under the MVRA, Congress has required particularity, not only about the identity of the victims, but also the precise amount of loss. 18 U.S.C. § 3663A(b)(1)(B) (2012); *see also Berkowitz*, 732 F.3d at 854 n.3. These statutory mandates cannot be vindicated when the government offers no proof to support its proposed calculation, as this Court has acknowledged. *See, e.g., Swanson*, 394 F.3d at 527 ("[T]he government's proffer of evidence of loss lacked any specific detail or explanation and . . . [c]onsequently, it was not sufficient to bear the burden of proof."). Third, as Walker's case illustrates, the government currently has little incentive to prove its restitution claims at trial. Because the MVRA requires restitution awards if there is a loss, the government will get a second bite at the apple on remand, no matter how deficient its original evidence, resulting in unnecessary expenditures of judicial time and resources. In the end, it is simply not apparent from the record that anyone, let alone Long Beach Mortgage, incurred $956,300 in losses. The district court's award of restitution was improper.

CONCLUSION

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

Dated: January 13, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I, the undersigned, counsel for the Defendant-Appellant, Gregory Walker, hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 12-point Century Schoolbook font with the footnotes in Century Schoolbook 11-point font.

The length of this brief is 4,954 words.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Gregory Walker, hereby certify that I electronically filed the foregoing with the clerk of the Seventh Circuit Court of Appeals on January 13, 2014, which will send notification of such filing to counsel of record.

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