In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 13-2145

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GREGORY WALKER,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 11 CR 4-3 — Harry D. Leinenweber, *Judge*.

BRIEF OF THE UNITED STATES

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JURISDICTIONAL STATEMENT

Defendant-Appellant's jurisdictional statement is complete and correct.

ISSUES PRESENTED FOR REVIEW

1. Did defendant waive his appellate arguments regarding the enforcement of a trial subpoena and discovery when he withdrew his motion to enforce the trial subpoena in open court?

2. In 2006, the South Holland Police Department executed a state court search warrant of defendant's residence and seized a number of items, including computers and documents. The seized items were never in the possession of the prosecution team in this case. Did the government or the district court violate defendant's due process rights when the seized items remained outside the possession of the prosecution team and defendant knew the existence, contents and location of the seized items and failed to establish that they were exculpatory or material?

3. Did the district court err in denying defendant's request for the buyer-seller instruction in a mortgage fraud trial?

4. Did the district court abuse its discretion in adopting the PSR's uncontested calculation of actual loss in determining restitution?

STATEMENT OF THE CASE

On January 4, 2011, defendant was charged with seven counts of wire fraud. R. 1.[1] On January 14, 2013, after all the co-defendants pleaded guilty, the government proceeded to trial on just two counts of wire fraud. R. 274. On January 16, 2012, the jury returned a verdict of guilty on both counts. R. 279. On April 23, 2013, defendant was sentenced to 60 months' imprisonment and the government dismissed the remaining counts in the indictment. R. 331, 336. On May 2, 2013, defendant filed a timely notice of appeal. R. 327. On May 28, 2013, the district court entered the judgment and commitment order. R. 336.

STATEMENT OF FACTS

The Charges

On January 4, 2011, as a result of an investigation conducted by the Department of Housing and Urban Development (HUD) and the grand jury, defendant was charged in an indictment with six counts of wire fraud in violation of 18 U.S.C. § 1343. R. 1, Tr. 1/15/13 at 306. Specifically, the indictment alleged that beginning no later than January 2005, and continuing until at least July 2007, defendant participated in a scheme to

[1]The Original Electronic Record on Appeal is referred to as "R. __." Defendant's opening brief is referred to as "Br.__." Defendant's appendix is referred to as "D.A. __." The transcripts of the various proceedings are referred to as "Tr." followed by date. The pre-sentencing investigation report is referred to as "PSR __." The Government's Version of the Offense attached to the PSR is referred to as "Govt. V."

defraud mortgage lenders and successors of money and property along with Carol Simmons, Ellie Stewart, Tayna McChristion, Kaeva Powell, Brian Wade and Daniel Habeel. R. 1 at 1-2. The indictment alleged that defendant used a fraudulent loan processor named Carol Simmons to prepare and submit fraudulent loan applications to lenders on behalf of defendant in order to get approved for loans. R. 1. The indictment further alleged that as part of the scheme, after defendant purchased properties in fraudulent transactions, defendant sold those properties to McChristion and Wade in subsequent fraudulent transactions in which Simmons also prepared and submitted fraudulent loan applications on behalf of McChristion and Wade. R. 1 at 4, 14, 15-16. In total, the indictment alleged that defendant purchased and sold seven properties as part of the scheme and participated in approximately 12 fraudulent real estate transactions as a buyer or as the seller. R. 1.

In summary, the indictment alleged defendant participated in a single scheme in three capacities:

First, as a fraudulent borrower. The indictment alleged that in May and June 2005, defendant and Simmons prepared and submitted six fraudulent loan application packages on behalf of defendant as a borrower. R. 1 at 3-12. These fraudulent loan applications contained false information regarding defendant's financial condition, employment, assets, rental income,

as well as the sale price of the properties. R. 1 at 3-12. The fraudulent loan applications also included false supporting documents, such as false W-2 tax forms, false pay stubs and false leases in support of rental income. R. 1 at 3-12. As a result of these fraudulent loan applications, in May and June, 2005, defendant obtained mortgage loans in his name from Long Beach Mortgage for the properties located at 9023 S. Kingston, Chicago, Illinois ("the Kingston property"), 7140 S. Woodlawn, Chicago, Illinois ("the Woodlawn property"), 7726 S. Maryland, Chicago, Illinois ("the Maryland property"), 11922 S. Eggleston, Chicago, Illinois ("the Eggleston property"), 2344 E. 83rd Street, Chicago, Illinois[2] ("the 83rd Street property"), 5341 S. Hermitage, Chicago, Illinois ("the Hermitage property"). R. 1 at 3-12.

The indictment further alleged that at the closings for these properties, defendant obtained excess loan proceeds as the borrower by submitting false invoices to the title company on behalf of a company named RD Construction. R. 1 at 3-12. These invoices falsely represented that RD Construction had performed repairs on the properties and was entitled to loan proceeds at closing. R. 1 at 3-12. This allowed defendant to fraudulently inflate the sale price in the loan applications and pocket the excess loan proceeds. R. 1 at 3-12. Simmons also obtained excess loan proceeds at the closing in which she participated as the loan processor by submitting false invoices to the title

[2] The 83rd Street transaction was a refinance. R. 1.

company on behalf of a company named Poole Investments and Construction. R. 1 at 5-6. The indictment alleged that during the course of the scheme, Walker obtained in excess of $150,000 of excess loan proceeds from various closings. R. 1 at 6. The indictment also alleged that Simmons obtained approximately $40,000 in excess loan proceeds during the course of the scheme. R. 1 at 6.

Second, the indictment alleged that defendant participated in the scheme by using a straw purchaser named Tayna McChristion in order to obtain additional mortgages. R. 1 at 4, 13-14, 16. McChristion and defendant were in a romantic relationship at the time and shared control of a bank account in the name of RD Construction. R. 1 at 6, Tr. 1/15/13 at 447. Specifically, the indictment alleged that Walker used McChristion as a nominee to purchase the properties located at 1107 E. 173rd Place, South Holland, Illinois ("the South Holland property"), 277 Allegheny Street, Park Forest, Illinois ("the Park Forest property"). R. 1 at 4, 13-14, 16. McChristion's loan applications were also prepared with the assistance of Simmons and alleged to have contained false statements about McChristion's financial condition and the sale price of the Park Forest property, which was fraudulently inflated. R. 1 at 4, 13-14, 16. At the closing for the Park Forest property, a false invoice on behalf of RD Construction was submitted and

excess loan proceeds were deposited into defendant's bank account. R. 1 at 13.

Third, the indictment alleged that defendant also participated in the scheme as the seller of the properties that he had fraudulently purchased in subsequent fraudulent transactions. R. 1 at 4, 14-16. Specifically, in January and March of 2006, defendant sold the Kingston property to McChristion, and sold the Eggleston, Maryland and 83rd Street properties to Brian Wade in fraudulent transactions in which Simmons prepared the loan applications for McChristion and Wade and the prices of the homes were inflated. R. 1 at 4, 14-16. The loan applications for McChristion included the same false statements as in her Park Forest property application. R. 1 at 14. Similarly, the loan applications for Wade included false statements regarding Wade's financial condition and falsely stated that Wade had paid an earnest money payment to defendant and submitted a false invoice in the name of M&W Real Estate Investment to the title company in order to obtain excess loan proceeds. R. 1 at 15-16.

The interstate wirings involving defendant that were alleged in the indictment consisted of electronic funds transfers involving defendant's sale of the Kingston property to McChristion (Count Two), McChristion's purchase of the Park Forest property (Count Three), defendant's sale of the 83rd Street

property to Wade (Counts Five and Six), and McChristion's purchase of the South Holland property (Counts Seven and Eight). R. 1 at 19, 20, 22-25.

Defendant's Pretrial Motions Regarding An Unrelated State Court Search Warrant

Defendant was originally represented by appointed counsel. R. 22, 33. On January 25, 2012, appointed counsel withdrew and defendant was given leave to find new counsel. R. 154. On May 14, 2012, retained counsel filed an appearance on behalf of defendant and various pretrial motions, including motions to sever and a motion for a continuance of the trial date, which had has been set for June 2012. R. 197, 198, 199, 200, 201.

In defendant's pretrial motions, defendant informed the district court—for the first time—that defendant wanted to conduct an investigation regarding a search of defendant's residence that had been conducted in connection with unrelated state court proceedings in 2006. R. 200. Specifically, defendant's motion to continue the trial date set forth the following:

> The undersigned needs to investigate contentions made by defendant, concerning the following. Defendant believes that the information which forms the basis of this indictment was obtained pursuant to a warrantless search of defendant's home, by various Secret Service agents and others. Defendant was arrested by Secret Service and agents and others, and charged with possessing a gun.
>
> A State court held that arrest unlawful, in violation of the Fourth Amendment. In that event, Secret Service agents and others

> took defendant's house keys and entered defendant's home and seized computer records and other documents. . . . Defendant believes that the records unlawfully seized pertain to the allegations in this indictment.
>
> The undersigned needs to investigate whether the *Silverthorn* doctrine may have any applicability here. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920).
>
> The undersigned was counsel at the State court proceedings mentioned above, and the undersigned has personal knowledge of the State Court's suppression Order.
>
> The government here, per AUSA Romero, has denied any knowledge of any facts which would support a Silverthorne claim. She may not know, though. The undersigned would like to conduct his own investigation.

R. 200. The motion further alleged that a document "may be missing" from the state court file, and that defense counsel had previously seen that document with "his own eyes." R. 200. The motion also incorrectly represented that the government was objecting to the motion to continue the trial date. R. 200.

Defendant's motion for a continuance was heard on May 17, 2012. R. 206. At the hearing, defense counsel said he did not "know anyone's position" regarding the motion to continue; the government stated that it did not have any objection to continuing the trial date. Tr. 5/17/12 at 3. The district court struck the trial date and took defendant's motions to sever under advisement and set a status date for June 19, 2012. *Id*. at 3; R. 206.

On June 19, 2012, defense counsel asked the district court for additional time to investigate "a court file from Markham [courthouse]." Tr. 6/19/12 at 3. Defense counsel also represented to the district court that he had filed a motion in state court in order to have the "file from Markham" produced. *Id*. Defense counsel stated that he was investigating a "possible Silverthorne Lumber Company motion" in order to suppress any evidence that may have been seized in connection with the execution of a state court search warrant in 2006. *Id*. at 4. The government responded that none of the evidence in the instant case had been obtained from any search warrants; instead it had been obtained directly from lenders and title companies and that the Secret Service was not part of the investigative team, as the sole investigating agency was HUD. *Id*. at 4. Nonetheless, the government agreed to defendant's request for additional time to investigate. *Id*. at 4. The district court granted defendant's request for additional time to investigate and indicated it would set a trial date at the next status hearing, which was scheduled for July 18, 2012. *Id*. at 5, R. 208.

On July 18, 2012, the district court held another status hearing. R. 209. At the status hearing, defense counsel stated that he was still investigating the "Silverthorn issue," and had obtained state court documents, including a state court search warrant and inventory return. Tr. 7/18/12 at 2-3. Defense counsel represented, "I forsee clearly, based on what

I've got out of the state court file, filing a motion to suppress evidence pursuant to Silverthorn" and that "a state court judge has already suppressed that evidence." *Id.* at 3-4. According to defense counsel, the items removed from defendant's residence during the execution of the search warrant included computers and electronic devices and defendant wanted the evidence in those seized items suppressed in the instant case. *Id.* at 4. Once again, the government explained that it was not in possession of any of the seized items from the 2006 state court proceedings and that the evidence in the instant case had been obtained through subpoenas directly to lenders, mortgage companies and tax records. *Id.* The government explained:

> We've never obtained a search warrant. Judge, the copy of what has 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 is 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.

Id. at 4-5. The district court asked defense counsel, "So what purpose is served by filing a motion?" *Id.* at 5. Defense counsel responded, "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 . . ." *Id.* The district court informed defense counsel that he was free to investigate further

and file any motions. *Id*. The district court set a trial date of January 14, 2013. *Id*. at 6.

On October 9, 2012, defendant filed a "motion for return of subpoena." R. 231. The motion was one sentence and read: "[Defense counsel] has motioned this case up relative to return of subpoenas (duces tecum), served upon the South Holland, Illinois, Police Department."

On October 17, 2012, the district court heard defendant's motion for return of subpoena. R. 238. At the motion hearing, defense counsel explained that it had issued a trial subpoena to the South Holland Police Department for the items seized in connection with the 2006 state court search warrant ("the seized items"). Tr. 10/17/12 at 2. The government objected to defendant's motion on two grounds: first, as had been previously stated on the record, the government was not in possession of and did not intend to use any of the seized items in the instant case, *id*. at 2, and second, because the trial subpoena was for items which included contraband, in the form of social security numbers, state identification cards and other personal identifying information for third parties. *Id*. at 2-3. As a result, the government proposed that the materials sought in defendant's trial subpoena be turned over to the government and that an appropriate protective order be entered prior to disclosure to the defendant. *Id*. at 3.

During the motion hearing, the district court asked defense counsel several questions in an attempt to understand what defense counsel intended to do with the seized items that were the subject of the subpoena, and defense counsel reiterated that it was to suppress them. *Id*. Defense counsel stressed that he intended to file a motion to suppress the seized items. *Id*. at 4-8. The district court explained that the issue was moot as the seized items were not in the government's possession. *Id*. Defense counsel then modified his request to the district court and stated, "All I'm asking for is disclosure from the police as to what they did with this stuff." *Id*. at 9. Defense counsel continued, "I thought I could subpoena it here, Judge, and ask the South Holland police what they did with it. That's what I'm asking. That's all this is." *Id*. The government then proposed the following: "So if I could just make a proposal, I'm happy to reach out to South Holland about this directly. Again, for the record, I will for the 20th time say that the evidence against the defendant [in this case] was not obtained by search warrant. It was obtained from grand jury subpoenas from lenders directly and title companies. " *Id*. at 11. Defense counsel then reassured the district court, "I want to know what they did with the stuff. That's all, what the police did with the stuff." *Id*. at 11.

During the hearing, the government and the district court clarified with defense counsel that he was no longer seeking to subpoena the seized

items, but instead simply wanted to know what the South Holland Police Department did with the seized items. *Id.* at 10-12. Defense counsel explained, "[I]t would be a little unwise for a criminal attorney to ask for evidence of crimes that he wasn't charged with," *id.* at 11, and the district court responded, "That's what you're asking me to do." *Id.* at 11. Defense counsel then reassured the district court, "No, no, I want to know what they did with the stuff. That's all, what the police did with the stuff." *Id.* at 11-12. The government then pointed out, "[t]he trial subpoena, the motion to enforce it is no good because the subpoena is actually requesting the documents that were seized." *Id.* at 12. The district court then asked defense counsel, "You're not asking for the stuff. You just want to know what happened to it." *Id.* at 12. Defense counsel answered, "Well, it's in the alternative," and then clarified, "I'm going to specifically request, pursuant to Brady versus Maryland, a disclosure as to what the Federal Government or the state authorities did with the items mentioned in that rider." *Id.* at 12. The government agreed to contact the South Holland Police Department to satisfy defendant's request and defense counsel reiterated that he intended to move to dismiss the indictment based on *Silverthorn*. *Id.* at 12-13.

On October 24, 2012, the government filed a status report with the court which set forth the information received from the South Holland Police Department and the Secret Service regarding the unrelated 2006 state court

search warrant. R. 242. As set forth in the status report, both the South Holland Police Department and the Secret Service confirmed that they had not been involved in or aware of the federal investigation conducted by HUD and that the seized items remained in the possession of the South Holland Police Department. *Id*. The South Holland Police Department also confirmed that the seized materials included Illinois state identification cards, social security numbers and credit histories of third parties. *Id*.

After the status report was filed by the government, defendant did not file any motions or issue any additional trial subpoenas relating to the state court search warrant. The case proceeded to trial in January 2013 and defendant stipulated at trial that the government exhibits consisting of loan applications and title company documents were business records obtained from lender and title company files. R. 274, Tr. 1/15/13 at 224-26.

The Trial

Defendant's jury trial began on January 14, 2013, and concluded on January 16, 2013. R.274, 278, 279. At the trial, the government presented the testimony of the seller of the Park Forest property, Frankie Scroggins, Tr. 1/14/13 at 161, the seller of the Hermitage property, Kamiah Mitchell, Tr. 1/14/13 at 98, the seller of Maryland property, Michael Chambers, Tr. 1/14/13 at 195, and the seller of the Kingston property, Ferdinand Fleury, Tr. 1/15/13 at 227. The government also called to testify a representative from the

successor of the victim lender, regarding the materiality of false statements and supporting documents in loan applications, Tr. 1/15/13 at 258-298, and the case agent from HUD, Tr. 1/15/13 at 306. In addition, the government admitted defendant and McChristion's underlying loan applications submitted for the Park Forest, Hermitage, Maryland, Kingston and Eggleston properties, as well as various documents from the title company file, including the settlement statements from the closings, copies of checks issued at the closings and false invoices presented at the time of closing. Tr. 1/14/13 at 195, Tr. 1/15/13 at 224-26. The government also admitted defendant's various bank records at trial and summaries of those records. Tr. 1/15/13 at 420-25, 431. Defendant stipulated that two interstate wire transfers had taken place in furtherance of the scheme in connection with Counts Two and Three of the indictment. Tr. 1/15/13 at 447. The government proceeded to trial on Counts Two and Three of the indictment, as all of the co-defendants had pleaded guilty. R. 272. Tr. 1/15/13 at 459.

The Evidence of Defendant's Fraudulent Purchases of the Kingston, Eggleston, Maryland, 83rd Street, Woodlawn and Hermitage Properties in 2005

The government's evidence at trial established that defendant, with the assistance of Simmons, purchased seven properties in the summer of 2005 by submitting at least seven different loan applications containing a variety of materially false statements. Tr. 1/15/13 at 313-431. In summary, the

government admitted the various loan applications signed by defendant, as the borrower, for the Kingston, Eggleston, Maryland, 83rd Street, Woodlawn and Hermitage properties. Tr. 1/15/13 at 224-26. The loan applications for the Kingston, Eggleston, Maryland and 83rd Street properties were dated May 19, 2005, the loan application for the Woodlawn property was dated June 2, 2005, and the loan application for the Hermitage property was dated October 6, 2005. Tr. 1/15/13 at 319, 352, 362, 372, 381, 393. The case agent testified that all of these applications stated, in pertinent part, that defendant was employed by Real Deal T-Shirt as a Silk Screen Manager and earning $3,840 per month from his employment. Tr. 1/15/13 at 313-18, 347-51, 357-61, 367-71, 377-81, 388-93. In support of these statements, defendant's loan applications included W-2s and pay stubs from Real Deal T-Shirts. Tr. 1/15/13 at 322-24, 326-27, 354, 362-63, 373, 383, 395. In addition, the loan application represented that defendant had rental income from various properties, including the Kingston, Maryland and Hermitage properties (pursuant to purported existing rental leases at the time of purchase). Tr. 1/15/13 at 313-18, 347-51, 357-61, 367-71, 377-81, 388-93. Defendant's loan applications for the Kingston, Eggleston, Maryland, 83rd Street and Woodlawn properties also stated that he had $4,800 in savings in a Citibank account at the time the loan applications were submitted. Tr. 1/15/13 at 315, 349, 359, 369, 380. The loan application for the Hermitage

property stated that defendant had $28,750 in savings in the Citibank account. Tr. 1/15/13 at 391. Summaries of the false statements in defendant's loan applications and the false supporting documents submitted to lenders were admitted at trial as Government Exhibit App. Summary, Tr. 1/15/13 at 412, and Government Exhibit Loan Summary, Tr. 1/15/13 at 416. Copies of these summary exhibits were attached to the government's version of the offense included in the PSR. Gov. V. at Ex.1-2.

The evidence that the statements regarding defendant's financial condition and income in his loan applications were false consisted of the case agent's testimony, defendant's own bank records and a stipulation. The case agent testified that she had reviewed defendant's various bank records, including Citibank, Guaranty Bank and LaSalle Bank records, which established that defendant did not have the income or savings reported in the loan applications and, in fact, defendant did not even have a Citibank account at the time the loan applications were signed. Tr. 1/15/13 at 422-24. Defendant's bank accounts showed no monthly rental payments in the amounts listed in defendant's loan applications. Tr. 1/15/13 at 422-30. Summaries of the account activity of defendant's Guaranty Bank account records were admitted at trial as Government Exhibit Guaranty Bank Summary, Tr. 1/15/13 at 310, 425, and summaries of the account activity of defendant's LaSalle Bank account records were admitted at trial as

Government Exhibit LaSalle Bank Summary, Tr. 1/15/13 at 310, 431. Copies of these summary exhibits are included in defendant's appendix. D.A. at a66-70.

Defendant also stipulated at trial that defendant and Real Deal T-Shirts failed to file federal income tax returns from 2004-2007 and that defendant had not paid federal income tax from 2004-2007. Tr. 1/15/13 at 448. Defendant also stipulated that no federal income tax was withheld from defendant's earnings from 2004-2007. Tr. 1/15/13 at 448. These stipulations established the W-2 and paystubs in defendant's loan applications were false.

The government also presented evidence that defendant's loan applications included false leases in support of the purported rental income reported in the loan applications. Tr. 1/14/13 at 108-09, 203-04, 235-36. The sellers of the Kingston, Maryland and Hermitage properties all testified that the leases submitted in defendant's loan application—in the name of the sellers of the properties and fictional renters—were false and that their signatures had been forged on the leases submitted to the lenders. Tr. 1/14/13 at 108-09, 203-04, Tr. 1/15/13 at 235-36.

In addition, the government presented evidence that defendant had misrepresented the purchase price of the properties in order to profit from the scheme. Specifically, defendant's loan applications represented the purchase price of the properties as follows: $165,000 for the Kingston

property, $165,000 for the Eggleston property, $155,000 for the Maryland property, $140,000 for the Woodlawn property, $225,000 for the Hermitage property. Tr. 1/15/13 at 331, 355, 364, 384, 396, 412-416, Gov. V. at Ex. App. Summary, D.A. at a46-65. The sellers for the Kingston and Hermitage properties testified that the actual purchase price of these properties was tens of thousands of dollars less than the amounts listed in the settlement statements. Tr. 1/14/13 at 117, Tr. 1/15/13 at 256. Moreover, the seller for the Hermitage property testified that the sale contracts submitted in support of defendant's loan application for the Hermitage property was fraudulent because the document she originally signed did not list the inflated purchase price at the time that she signed it. Tr. 1/14/13 at 117. The seller of the Hermitage property testified that she had personally negotiated the purchase price of $135,000 for the Hermitage property with defendant. Tr. 1/14/13 at 396. Defendant's loan application indicated the purchase price of the Hermitage property was $225,000. Tr. 1/15/16 at 412-416. The sellers of Hermitage, Maryland and Kingston properties all testified that they had not received earnest money from defendant in those transactions, even though defendant's loan applications indicated that he had made earnest money payments to the sellers. Tr. 1/14/13 at 103, 110-11, 150, Tr. 1/15/13 at 201, 255, Tr. 1/15/13 at 412-16.

Defendant used RD Construction to obtain the excess loan proceeds at closings and conceal from the lenders that the purchase price had been fraudulently inflated and that defendant was making money at the closings as the borrower. At the closings for the Hermitage, Maryland, Woodlawn and Kingston[3] properties, invoices in the name of RD Construction were submitted to the title companies in order for excess loan proceeds to be disbursed to RD Construction. Tr. 1/15/13 at 332-33, 365, 386-87, 398-400. The checks disbursed to RD Construction were cashed by defendant or deposited into bank accounts controlled by defendant. *Id.*, D.A. a66. The sellers of the Kingston and Hermitage properties testified those invoices were false, that they had never hired RD Construction or any other company to conduct any construction projects on the property, and that they had never received the invoices. Tr. 1/14/13 at 111-14, Tr. 1/15/13 at 231.

The Evidence of Defendant's Participation In the 2006 Fraudulent Sale of the Kingston Property to McChristion and the Purchase of the Park Forest Property by McChristion

The government also presented evidence regarding defendant's fraudulent sale of the Kingston property to McChristion on January 31, 2006, and his use of McChristion as a straw buyer in connection with the purchase of the Park Forest property also on January 31, 2006. The government

[3] The 83rd Street transaction was a refinance of an existing loan, therefore, no invoices were submitted. Tr. 1/15/13 at 367-77.

admitted the loan applications submitted on behalf of McChristion in connection with the Kingston and Park Forest properties, which had also been prepared by Simmons. Tr. 1/15/13 at 224-26. McChristion's loan applications regarding her financial condition, including her purported employment at Aveak Incorporated, monthly employment income, and child support income were contradicted by McChristion's Chicago Housing Authority applications for Section VIII housing dated May 1, 2005 and January 9, 2006, in which McChristion stated she was unemployed and had no assets or child support income. Tr. 1/15/13 at 311-12, 436-39. Defendant also stipulated the McChristion had never been employed by Aveak Incorporated and did not receive child support payments. Tr. 1/15/13 at 419-20, 447-48. The case agent testified that the address identified on McChristion's Section VIII housing application was the same address identified for Real Deal T-Shirts in defendant's fraudulent W-2s. Tr. 1/15/13 at 439-41.

In summary, the government's evidence at trial showed that defendant sold the Kingston property—at a $36,000 profit—to his own girlfriend within six months of purchasing it at an inflated price with a fraudulently obtained mortgage loan, and that McChristion submitted fraudulent loan applications in order to purchase that property from defendant. Tr. 1/15/13 at 333-347, 425-26, 436-43, 447-48. The evidence also showed that the proceeds from the

sale went into the Guaranty Bank account controlled by defendant. Tr. 1/15/13 at 333-47, D.A. at a69.

With respect to the Park Forest transaction, the seller of the Park Forest property testified that she had personally negotiated the purchase price of her property with defendant and that defendant said that he was going to purchase the house for McChristion. Tr. 1/14/13 at 164-65. Defendant negotiated the sale price as $86,000, *id*. at 169, but nonetheless the loan application submitted on behalf of McChristion stated the sale price was $137,000. Tr. 1/15/13 at 406, 412, Gov. V. at 9. The excess loan proceeds were disbursed at the closing to RD Construction pursuant to a false invoice. Tr. 1/14/13 at 174-75, Tr. 1/15/13 at 407.

The case agent also testified that the mortgage payments made on behalf of McChristion for the Kingston and Park Forest properties were personally made by defendant in the form of checks signed by defendant from the LaSalle Bank account and the Guaranty Bank account. Tr. 1/15/13 at 433-34, D.A. at a66-70. Over $266,000 of excess loan proceeds in the form of checks to RD Construction were deposited into one or more of defendant's bank accounts during the course of the scheme. Tr. 1/15/13 at 435. Meanwhile, approximately $31,000 in excess loan proceeds in the form of checks to Poole Investment were deposited into Simmons' bank account during the course of the scheme. Tr. 1/15/13 at 435.

Defendant did not testify or call any witnesses. Tr. 1/15/13 at 449, 451.

Prior to closing arguments, the district court held the jury instruction conference. Tr. 1/15/13 at 451-59. Defendant did not object to any of the government's proposed instructions. Tr. 1/15/13 at 451, 451-56. Defendant proposed four instructions, including a modified buyer seller instruction. R. 275; Tr. 1/15/13 at 458. The district court denied defendant's request for the modified buyer seller instruction. Tr. 1/15/13 at 458. The remaining defense proposed instructions were withdrawn as moot or agreed to, in a modified form, by the government. Tr. 1/15/13 at 457-59. The government also submitted a redacted indictment which excluded references to the grand jury and the counts and defendants that were not at issue at trial. R. 272. Tr. 1/15/13 at 459.

During the closing arguments, the government argued that defendant's participation in eight different fraudulent real estate transactions from 2005-2006, as well as his dealings with some of the sellers, the nature of the misrepresentations in the loan applications (which included some accurate personal identifying information), and the volume of false documents submitted in support of the loan applications and false invoices, proved that defendant was a knowing participant in the scheme and had acted with the intent to defraud. Tr. 1/16/13 at 463-83. The government also highlighted defendant's profits from the scheme, in the form of $266,000 in excess loan

proceeds paid to RD Construction and the value of the $1.2 million in mortgages obtained by defendant. Tr. 1/16/13 at 463-83. The government argued that defendant's profits proved that he was a knowing participant in the scheme and acted with intent to defraud, in particular because he profited more from the scheme than Simmons. Tr. 1/16/13 at 463-83. Defendant argued to the jury that he had not acted with the intent to defraud. Tr. 1/16/13 at 484-03.

The jury found the defendant guilty of both counts of the redacted indictment on January 16, 2013. R. 272, R. 285, 335.

Defendant's Post-Trial Motion

Defendant filed a post-trial motion on January 22, 2013, arguing that the evidence at trial was insufficient to establish defendant's guilt and that the district court should have granted defendant's motion for the buyer-seller instruction. R. 282. The district court denied defendant's post-trial motions at the sentencing hearing. Tr. 4/23/13 at 2.

The PSR's Actual Loss and Restitution Calculations

The Presentence Investigation Report calculated defendant's adjusted offense level as 23 as follows: base offense level 7 pursuant to Guideline § 2B1.1(a)(1), a 14 level enhancement pursuant to Guideline 2B1.1(b)(1)(H) because the actual loss amount was $956,300, and a 2 level enhancement

pursuant to Guideline §2B1.1(b)(10)(C) because the offense involved sophisticated means. PSR at 8.

The probation officer's actual loss calculation was based on the information contained in the Government's Version of the offense, which was attached to the PSR. PSR at 5-8. In the Government's Version, the government itemized its loss and restitution calculation and identified its loss calculation methodology. Gov. V. at 4-5, 6-7. As stated in the Government's Version, the government calculated defendant's loss amount using the formula identified in *United States v. Green*, 648 F.3d 569, 584 (7th Cir. 2011), *United States v. Serfling*, 504 F.3d 672, 679 (7th Cir. 2007) and *United States v. Radziszewiski*, 474 F.3d 480, 486 (7th Cir. 2007) and subtracted the sale price the victim lender received after it recovered possession of the property from the amount of the loans issued in the fraudulent transactions in which defendant participated as seller. [4] Gov. V. at 4. Therefore, the loans issued in connection with the fraudulent transactions in which defendant sold the properties to co-schemers and others were the loan amounts used to calculate actual loss and restitution. PSR at 24, Gov. V. at 4, 6. The basis for

[4] To be clear, the victim lender (Long Beach Mortgage or its successors, R. 1 at 1-2) was the same in all of the transactions for which defendant was held accountable in connection with the calculation of actual loss. Specifically, Long Beach Mortgage was the lender in the fraudulent transactions in which defendant participated as the borrower and as the seller, as calculated by the PSR (which did not include the South Holland property). PSR at 24, see also Gov. V. at 6.

the figures identified in the PSR were public documents from the Cook County Recorder of Deeds Office, which recorded the value of the sale price in foreclosure, and the loan and title company documents that had been produced to defendant as part of discovery.[5]

In addition to the transactions at issue at trial, the government's version of the offense also set forth that defendant sold the 83rd Street, Eggleston and Maryland properties to Wade in three fraudulent transactions that took place on March 17, 2006. Gov. V. at 3. In those transactions, Wade used Simmons as the loan processor and knowingly purchased the properties from defendant at inflated prices, which allowed Wade and defendant to profit from the fraudulent transactions. Gov. V. at 3. The government's version also set forth that Simmons and defendant worked together to sell the properties to Wade. Gov. V. at 3.

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[5] Defendant filed a motion to supplement the record on appeal with a small subset of documents from the Cook County Recorder of Deeds office, which confirm that, in 2006, defendant sold certain properties to co-schemers, as alleged in the indictment and as set forth in the PSR, and to others, including a fictional person, as set forth in the PSR. R. 1, PSR at 7. Defendant's motion to supplement the record on appeal was denied by this Court and defendant alternatively asks this Court to take judicial notice of those public records in separate filings. Ultimately, the Court is free to take judicial notice of these types of documents, which are publicly filed and not disputed. *See Ennega v. Starns*, 677 F.3d 766 (7th Cir. 2012). Nonetheless, the government's position remains that these documents are inconsequential to the determination of any of the issues on appeal because (1) they were never presented to the district court during the course of the proceedings; (2) they are consistent with the calculation of actual loss adopted by the probation officer and, ultimately, the district court, and (3) they also confirm the allegation in the indictment regarding Long Beach Mortgage's successors. R. 1.

The government's version also identified two additional fraudulent transactions in which defendant acted as a fraudulent seller which were not part of the indictment. Gov. V. at 3. Specifically, on August 31, 2006, defendant sold the Hermitage property to a non-existent individual in a transaction where fraudulent identification documents were submitted on behalf of the fictitious borrower; defendant profited $29,694 from that transaction. Gov. V. at 3, PSR at 7. Moreover, on May 7, 2006, defendant sold the Woodlawn property to an incapacitated elderly man who was residing in an assisted living facility at the time of the closing. Gov. V. at 3, PSR at 7. Defendant profited $45,930 from this transaction alone. Gov. V. at 3.

Defendant did not submit a defendant's version of the offense.

The probation officer calculated defendant's criminal history category as IV, based on four prior convictions and for committing the instant offense while on parole. PSR at 10-12. Accordingly, the probation officer calculated defendant's Guidelines range as 70-87 months. PSR at 23. In addition, the probation officer found the amount of restitution due by defendant, pursuant to 18 U.S.C. § 3663A and Guideline § 5E1.1, was $956,300. PSR at 24.

The Parties' Sentencing Submissions Regarding Loss and Restitution

Prior to sentencing, the defendant filed a series of written objections to the PSR. R. 300-311. Defendant did not object to the calculation of actual

loss contained in the PSR, the probation officer's determination of relevant conduct, or the application of the 14 level enhancement pursuant to Guideline § 2B1.1(b)(1)(H). R. 300-311. Defendant filed objections regarding a series of purported factual corrections to the PSR, R. 300, 301, 302, 310, the applicability of the minor role reduction to defendant, R. 306, the application of the sophisticated means enhancement, R. 308, and arguing there was insufficient evidence regarding the fraudulent nature of the May 7, 2007 transaction involving the sale of the Woodlawn property to an incapacitated elderly man. R. 303, 309. The defendant attached documents, including the settlement statement, for that transaction to his sentencing memorandum. *Id*. Those documents establish defendant's profits from the transaction as the seller. *Id*.

The defendant also objected to the paragraph in the PSR which stated: "The provisions of the Mandatory Victim Restitution Act of 1996 apply to this Title 18 offense. The defendant's conduct caused an actual loss to Long Beach Mortgage of $956,300." PSR at 7. Defendant's objection stated that "[i]t is unfair to assess defendant entirely, for losses caused by others," R. 307, and argued that the evidence at trial established that defendant "paid all mortgage payments for each property purchased" and that defendant had argued to the jury that "no one lost any money via defendant's conduct." R. 307. The defendant did not present any evidence regarding any purported

repairs or improvements to any of the properties identified in the PSR or any documents undermining the actual loss calculation in the PSR. R. 307.

The government filed a written response to defendant's objections and filed an objection to the loss calculation in the PSR. R. 315. The government's position was that the actual loss amount was $1,125,000 because defendant had participated in an additional fraudulent transaction with McChristion involving the South Holland property which the probation officer did not include as part of her loss calculation. Gov. V. at 4. The government sought a Guidelines range sentence. R. 315. The government also responded to each of defendant's objections to the PSR and attached memoranda of interviews regarding the May 7, 2007 transaction, which established that the purported buyer of that transaction was an incapacitated elderly man incapable of participating in the transaction due to his advanced age and health issues. R. 315. With respect to defendant's objection to restitution, the government responded that the restitution figure was based on the actual losses caused as a result of defendant's own conduct as the seller in fraudulent transactions and that the losses were also reasonably foreseeable to him. R. 315.

The Sentencing

Defendant's sentencing hearing was held on April 23, 2013. R. 331. At the sentencing hearing, the district court heard argument on all of defendant's objections and ruled regarding each of the objections. Tr. 4/23/13 at 5-12. With respect to the objection regarding the May 7, 2007 transaction, the district court found that the government established by a preponderance of the evidence that the May 7, 2007 transaction was "part and parcel of the underlying activity." Tr. 4/23/13 at 8. With respect to defendant's restitution objection, the district court explained that "restitution is based on the entire scheme" and was joint and several. Tr. 4/23/13 at 9-10. The defendant did not object when the district court adopted the actual loss calculations in the PSR. Tr. 4/23/12 at 12. To the contrary, defense counsel explicitly argued that the district court should adopt the calculation of actual loss contained in the PSR over the government's objection regarding the conduct involving the South Holland property. Tr. 4/23/12 at 12. Specifically, defense counsel stated, "Judge, you have a rather exhaustive and excellent PSR prepared by Ms. Broth, and I think you should rely on the ability of the federal probation authorities to assess what should be scored." Tr. 4/23/12 at 12. Accordingly, the district court adopted the PSR's calculation of actual loss. Tr. 4/23/12 at 12. After adopting the PSR's loss calculation, the district court calculated defendant's Guideline range as 70-87 months. Tr. 4/23/12 at 13.

The district court then heard argument from the parties on the 3553(a) factors. The government argued for a guidelines range sentence based on the nature and circumstances of the offense, defendant's criminal history and violations of pretrial release, and the need to specifically deter defendant from committing further offenses. Tr. 4/23/13 at 13-15. Defendant made arguments in mitigation based on defendant's family circumstances and argued that defendant intended to improve the properties after he purchased them at inflated prices. Tr. 4/23/13 at 15-17.

The district court imposed a below Guidelines range sentence of 60 months imprisonment, three years of supervised release, $200 in special assessments, and restitution in the amount of $956,300. Tr. 4/23/13 at 20. The district court pointed out defendant's criminal history and a pending identity theft charge in determining defendant's sentence. Tr. 4/23/13 at 19-20. Nonetheless, the district court took into account defendant's family circumstances and imposed a sentence 10 months below the Guidelines range. *Id*. at 20.

SUMMARY OF THE ARGUMENT

Defendant's conviction and sentence should be affirmed because defendant's arguments on appeal were either waived before the district court or are based on misrepresentations of the record. With respect to defendant's due process claims, the record plainly establishes that defendant withdrew

his motion to enforce the trial subpoena for the seized items. Any claims on appeal pertaining to the enforcement of the subpoena of the seized items are therefore waived. Even if they were not waived, defendant cannot make the requisite showings to establish any due process violations by the government or the district court. Nor can defendant establish that any purported error was plain.

Defendant's argument that he was entitled to a modified buyer-seller jury instruction in a mortgage fraud trial must also fail. In particular, defendant's proposed instruction was not an accurate statement of the law and contradicted the allegations in the indictment.

Finally, with respect to restitution, although defense counsel urged the district court to adopt the PSR's actual loss calculation, defendant now argues it was error for the district court to do so when calculating restitution. Actual loss is a correct measure of restitution in mortgage fraud cases and the district court did not err in adopting the PSR's uncontested actual loss calculation in calculating and imposing restitution. Accordingly, defendant's conviction and sentence should be affirmed.

ARGUMENT

I. Defendant Waived His Arguments Regarding the Enforcement of the Trial Subpoena for the Seized Items Because Defendant Withdrew His Motion To Enforce the Subpoena Before the District Court.

A. Standard of Review

Waiver is an intentional abandonment of a known right and precludes all appellate review on that issue. *United States v. Vasquez,* 673 F.3d 680, 684 (7th Cir. 2012); *see also United States v. Natale*, 719 F.3d 719, 729-30 (7th Cir. 2013) (discussing waiver in the context of jury instructions). This Court does "not require the defendant to expressly state on the record his intent to waive a challenge" in order to find waiver, rather the court must "divine from the record an intent to forego an argument." *Id.* Waiver is to be construed liberally in defendant's favor. *Id*.

B. Analysis

Defendant knowingly and intentionally waived the arguments that he now raises on appeal regarding the government and district court's purported obligations to enforce the trial subpoena for the production of the seized items because he intentionally withdrew his motion to enforce the trial subpoena before the district court. *See Vasquez,* 673 F.3d at 684 (7th Cir. 2012); *United States v. Garcia*, 580 F.3d 528, 542 (7th Cir. 2009).

In the district court, defendant filed a motion to enforce a trial subpoena for the production of the seized items and then explicitly withdrew that motion in open court. Tr. 10/17/17 at 4-12. Accordingly, the motion was moot and the district court denied it. R. 238.

In withdrawing his motion, defendant repeatedly reassured the district court that he wanted only a disclosure from the South Holland Police Department about what it did with the seized items and was no longer seeking the production of the seized items. Tr. 10/17/12 at 4 ("I want to know what happened to the stuff they took out of his house. That's what this subpoena is."); *id*. at 6 (after the district court asked, "Isn't that what you wanted to know, what they took?" Defense counsel responded, "Yes. What happened to the stuff? Where is it? That's all."); *id*. at 8 ("I want to know what the South Holland police did with the things they seized. . . That's what this subpoena is. What did they do with the stuff?"); *id*. at 9 ("All I'm asking for is disclosure from the police as to what they did with this stuff."); *id*. ("I thought I could subpoena it here, Judge, and ask the South Holland police what they did with it. That's what I'm asking. That's all this is. There's a search warrant inventory as Exhibit A. What did they do with this stuff?"); *id*. at 11-12 (after the district court clarified again that defense counsel was asking the district court for an order to have the seized items produced, defense counsel responded, "No, no, I want to know what they did

with the stuff. That's all, what the police did with the stuff."); *id*. at 12 (the district court asked, "You're not asking for the stuff. You just want to know what happened to it," and defense counsel responded, "Well, it's in the alternative . . . Judge, I'm going to specifically request, pursuant to Brady versus Maryland, a disclosure as to what the federal government or the state authorities did with the items mentioned in that rider.") In this case, defendant expressly stated on the record his intent to withdraw his motion for the production of the trial subpoena; therefore, at a minimum, he expressed an intent to forgo enforcement of the subpoena and has waived the claim that the district court erred in failing to enforce the trial subpoena.

The record here also makes clear that defendant's decision to withdraw the motion was strategic. *Garcia*, 580 F.3d at 542. Specifically, defense counsel told the district court, "Well, Judge, it would be a little unwise for a criminal attorney to ask for evidence of crimes that he wasn't charged with." Tr. 10/17/13 at 11. Indeed, during the status hearing the government indicated that if the contents of the seized items were produced in response to the trial subpoena, the government would evaluate whether to supersede the charges in the indictment. *Id*. at 4. The district court clarified with defense counsel, "You are not asking for the stuff. You just want to know what happened to it." *Id*. at 12. Defense counsel answered, "Well, it's in the alternative . . . Judge, I'm going to specifically request, pursuant to Brady

versus Maryland, a disclosure as to what the Federal Government or the state authorities did with the items mentioned in that rider." *Id.* Defense counsel then stated that after the disclosure he was going to move to dismiss the indictment because he believed disclosure would establish that the seized items were used to obtain the federal indictment. *Id.* at 12-13. After the government filed the status report, defendant did not file any motion or make any other discovery requests. Accordingly, the record makes clear that defendant knowingly and intentionally waived his argument regarding the enforcement of the trial subpoena and did not seek the production of the seized items.

II. Defendant's Due Process Rights Were Not Violated When Items Seized During the Execution of An Unrelated State Court Search Warrant Were Never In the Possession of the Prosecution Team And When Defendant Knew Of The Existence of the Seized Items and Did Not Established They Were Exculpatory Or Material.

A. Standard of Review

Plain error review applies to arguments that were forfeited before the district court. *United States v. Mota*, 685 F.3d 644, 648 (7th Cir. 2012). Under plain error review, this Court must determine: (1) that error occurred; (2) that the error was plain; and (3) that the error affected the defendant's substantial rights. *Id.* If these criteria are met, the Court may exercise its discretion and reverse only if it determines that the error "seriously affects

the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. 732, 734-35 (1993) (citations omitted).

B. Analysis

Defendant alleges that the government deliberately failed to search materials outside of the government's possession for purported exculpatory evidence and that the district court failed to order the production of those materials. Br. at 16. However, defendant never made such a request or argument in the lower court, never challenged the completeness of the status report filed by the government regarding the seized items, or otherwise filed any motions for additional disclosures under *Brady*. Instead, defendant simply made numerous pre-trial references to his general belief that the government had used the items seized during the execution of the unrelated state court search warrant as the basis for the federal indictment—and that defendant intended to suppress the evidence he now claims is exculpatory—and that defendant wanted to know the whereabouts of the seized items. Tr. 10/17/13 2-15. Indeed, defense counsel deliberately withdrew his motion for a subpoena of the seized items and instead told the district court that he only wanted to know what happened to the seized items. *Id.* Once the government filed the status report regarding the location of the seized items, defendant did not make any other requests pursuant to *Brady* or pertaining to discovery. Accordingly, he has forfeited this issue. *See United States v.*

Roberts, 534 F.3d 560, 572 (7th Cir. 2008) (citing *United States v. Payne*, 102 F.3d 289, 293 (7th Cir. 1996)); *see also United States v. White*, - - F.3d - -, 2013 WL 6512922, *8 (7th Cir. Dec. 13, 2013).

1. The Government Did Not Commit A *Brady* Violation

Defendant cannot establish a *Brady* violation in this case. "Under *Brady*, the government has the obligation to disclose any evidence in its possession that is both material and favorable to a defendant." *Roberts*, 534 F.3d at 572 (citations omitted). In order for the evidence to be considered in the government's possession, it must be "possessed exclusively by those actors assisting him [or her] in investigating and trying his [or her] case." *Mota*, 685 F.3d at 648 (quoting *Fields v. Wharrie*, 672 F.3d 505, 513 (7th Cir. 2012)); *United States v. Gray*, 648 F.3d 562, 566 (7th Cir. 2011) (*Brady* applies only to members of the "prosecutorial team"). Defendant bears the burden of proving a *Brady* violation. *United States v. Wilson*, 237 F.3d 827, 832 (7th Cir. 2001). To establish a *Brady* violation, the defendant must prove that (1) the evidence at issue is favorable to the defendant; (2) the government suppressed the evidence; and (3) the suppression prejudiced the defendant. *Roberts*, 534 F.3d at 572.

As a threshold matter, the evidence that defendant now claims is exculpatory has never been in the possession of the prosecutorial team in this case. *Gray*, 648 F.3d at 566. It is unconsented that the items seized by the

South Holland Police Department and inspected by the Secret Service in 2006 remained in the possession of the South Holland Police Department. R. 242. The South Holland Police Department and the Secret Service were never members of the prosecution team in this case. Tr. 6/19/12 at 4-5, Tr. 7/18/12 at 4-5, Tr. 10/17/12 at 4-5. Defendant's own brief concedes as much. Br. at 20 ("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.") Moreover, the government made clear at the various court hearings that it had been unaware of the existence of the seized items until defendant brought it to the district court's attention and that it was not in possession of the seized items. Tr. 6/19/12 at 4-5, Tr. 7/18/12 at 4-5, Tr. 10/17/12 at 4-5.

Because the seized items were not in the government's possession, defendant cannot show that the government suppressed the evidence. *Mota*, 685 F.3d at 648; *Gray*, 648 F.3d at 566; R. 242, Tr. 6/19/12 at 4-5, Tr. 7/18/12 at 4-5, Tr. 10/17/12 at 4-5. Moreover, defendant himself knew of the seized items' existence, as they were his personal items, had a copy of the search warrant and inventory return, and was even represented by the same defense counsel who had represented defendant in the state proceedings in which the seized items were suppressed. Tr. 10/17/12 at 4-5. Therefore, defendant was

in a position to directly investigate the seized items in state court and the district court and the government gave defendant ample time to do so. "This is not a situation where the government knew something that he did not." *White*, -- F.3d --, 2013 WL 6512922, *8 (citing *United States v. Lee*, 399 F.3d 864, 865 (7th Cir. 2005)) (evidence is not "suppressed" within the meaning of *Brady* when defendant knew of its existence); *see also Gray*, 648 F.3d at 566-67. Further, the evidence was otherwise available to the defendant through the exercise of reasonable diligence, *United States v. Kimoto*, 588 F.3d 464, 492 (7th Cir. 2009), because defendant generally claims the evidence consists of certain financial records regarding purported construction and repairs done on the property. Br. at 17.

Not only did the government not suppress the seized items within the meaning of *Brady*, it openly offered to assist defendant in his investigation regarding the seized items. The government offered to take possession of the seized items on defendant's behalf and obtain a protective order in order to make them available to defendant, as the seized items included contraband in the form of stolen social security numbers, identification cards and credit reports of third parties. Tr. 10/17/12 at 2-3, 10. After defendant withdrew his motion to enforce the trial subpoena and indicated that he only sought information regarding the whereabouts of the seized items, the government agreed to assist defendant and contacted the South Holland Police

Department and Secret Service regarding the matter and filed the status report in response to defendant's request. Tr. 10/17/12 at 10-11. In addition, the government agreed to defendant's earlier requests for a continuance in order to investigate the seized items. Tr. 5/17/12 at 3, Tr. 6/19/12 at 5, Tr. 7/18/12 at 4-5. Accordingly, defendant's *Brady* claim fails because he cannot establish that the government withheld or suppressed any evidence.

Nor can defendant make any of the other showings required under *Brady*. Indeed, defendant has never made any showing—in the district court or otherwise—establishing that the seized items contained favorable and material evidence. *Roberts*, 534 F.3d at 572; *see also United States v. Naranjo*, 634 F.3d 1198 (11th Cir. 2011) (after finding that government did not possess certain report prepared by former Alabama state investigator who had conducted an investigation of defendant, the court held that because defendant only speculated it contained favorable information, it was not *Brady* material).

Indeed, the district court asked defense counsel countless times what the importance of the seized items was to the defense and defense counsel could not articulate a coherent answer. Tr. 7/18/12 at 5, Tr. 10/17/12 at 6-12. To the contrary, defense counsel repeatedly represented that he intended to file a motion to suppress the seized items from being used in defendant's federal prosecution. Tr. 7/18/12 at 5, Tr. 10/17/12 at 6-12. At one point,

defense counsel (who had represented defendant in the state proceedings where the evidence was suppressed) even conceded that the seized items were "evidence of crimes that he wasn't charged with." Tr. 10/17/12 at 11. In other words, the evidence that defendant now claims is favorable and material in this Court, Br. at 15, 17, is the same evidence defendant sought to suppress before the district court because it was incriminating. Tr. 7/18/12 at 5, Tr. 10/17/12 at 6-12. Defendant cannot credibly have it both ways and is required to make a showing of what the favorable and material evidence actually is. *Roberts*, 534 F.3d at 572 (citing *United States v. Mitchell*, 178 F.3d 904, 907 (7th Cir. 1999) and *United States v. Morris*, 957 F.2d 1391, 1402-03 (7th Cir. 1992)); *see also United States v. Jumah*, 599 F.3d 799, 810-11 (7th Cir. 2010). The fact that the seized items consist of defendant's own records and defendant was aware of the existence and location of the seized items as detailed in the government status report, defendant's failure to pinpoint the exculpatory and material nature of the seized items fatally undermines his claim. *See White*, -- F.3d --, 2013 WL 6512922 at *8.

Defendant's brief includes certain vague and speculative assertions regarding the evidentiary value of the seized items. Br. at 15-18. As best can be discerned, defendant argues that "computers and paperwork" and certain "un-cashed checks," Br. at 15, were favorable and material evidence to the defendant because, first, "they would have supported his defense that he was

simply trying to fix up these homes," and, second, "for an accurate determination of the amount of loss." Br. at 17-18. Both arguments are insufficient.

Defendant fails to address how any of the items identified in defendant's brief would have undermined the evidence presented at trial regarding defendant's knowing participation in the scheme and intent to defraud the lenders. The evidence at trial—in the form of the testimony of the sellers, the defendant's own bank records and the stipulations—that defendant knowingly signed at least seven different loan applications containing materially false statements remains uncontested. The testimony of the seller of the Park Forest property regarding defendant's use of McChristion as a nominee is also unaffected by any of the purportedly favorable evidence identified in defendant's brief. Similarly, the evidence that defendant sold the Kingston property in a fraudulent transaction to McChristion, his co-schemer, as established by lender and title company documents and defendant's own bank records, is also unaffected. Evidence that defendant intended to "fix up these homes," Br. at 17, after he fraudulently purchased or sold them in fraudulent transactions, would only serve to confirm defendant's knowing participation in the scheme and intent to defraud the lenders because he knowingly purchased and sold properties at inflated prices.

Similarly, the seized items are not favorable or material to defendant's loss calculation. Again, as defendant concedes in his brief, Br. at 17, defendant is able to subpoena lenders and banks directly in order to determine his payment history and defendant was in possession of the government's discovery. Indeed, government exhibits at trial established that defendant made mortgage payments for a short period of time in order to further the scheme. D.A. at a66-70. At no stage of the proceedings did defendant subpoena financial documents, such as bank records, construction permits or contracts, or any witnesses, such as workers, contractors, construction supply companies or subsequent tenants and owners, to show that defendant legitimately increased the value of the homes from the time of purchase. Accordingly, defendant has not and cannot establish that the seized items contain favorable and material evidence regarding his loss calculations.

Nor can defendant establish that this error was plain. "The alleged *Brady* violation must be an obvious error that affected [defendant's] substantial rights and created a substantial risk of convicting an innocent person." *Mota*, 685 F.3d at 648 (citations omitted). In light of the evidence at trial, the fact that defendant withdrew his motion to enforce the trial subpoena and the speculative nature of defendant's claim, defendant cannot establish the error was plain.

Accordingly, defendant has failed to show a violation of *Brady* and his claim must be denied.

2. The District Court Did Not Deny Defendant's Motion for A Trial Subpoena And Did Not Otherwise Err.

Defendant incorrectly argues that the district court erred in denying defendant's request for a trial subpoena of the seized items and that the district court should have, *sua sponte*, inspected the seized items *in camera*. Br. at 19-21. This argument is both factually and legally unsupported and should be denied.

As a factual matter, the district court denied defendant's motion to enforce the trial subpoena because it was moot as established during the October 17, 2012 hearing. Tr. 10/17/12 at 12. During the hearing, the district court informed defense counsel several times that he was free to seek the production of the seized items in the Circuit Court of Cook County, which had suppressed the search. *Id*. at 8-12. Defendant filed no subsequent motions. Thus, there is no factual basis for the argument that the district court precluded defendant from accessing the seized items.

From a legal standpoint, even if defendant had not withdrawn his motion, his subpoena was unreasonably broad, as it sought the production of contraband in the form of stolen identification information of third parties, but also did not even seek evidence that the defense considered admissible.

Rule 17 is not a broad discovery device and reaches only admissible evidence. *United States v. Tokash*, 282 F.3d 962, 971 (7th Cir. 2002) ("Rule 17(c) is not a discovery device to allow criminal defendants to blindly comb though government records in a futile effort to find a defense to a criminal charge."); *United States v. Ashman*, 979 F.2d 469, 495 (7th Cir. 1992).

With respect to defendant's argument regarding the district court's failure to conduct an *in camera* review of the seized items, this argument must be rejected on several grounds. First, defendant did not request an *in camera* review of the seized items and the district court is under no independent duty to review government files for potential *Brady* material. *Jumah*, 599 F.3d at 810 n. 7 (citing *United States v. Bland*, 517 F.3d 930, 935 (7th Cir. 2008)). Second, defendant never made any showing in the district court that the evidence was favorable or material, much less with any degree of specificity. *Id.* at 810 n. 6. Therefore, the record does not support the argument that defendant was somehow entitled to an *in camera* inspection of the seized items.

Defendant cannot establish that the district court erred, much less plainly erred, when it allowed defendant to withdraw his motion to enforce the trial subpoena and did not otherwise compel the production of contraband to defendant.

III. The District Court Did Not Err in Denying Defendant's Request for the Buyer-Seller Instruction In A Mortgage Fraud Trial

A. Standard of Review

This Court reviews the district court's refusal to instruct the jury on a theory of defense *de novo*. *United States v. Martin*, 618 F.3d 705, 735 (7th Cir. 2010) (citations omitted).

B. Analysis

"A defendant is entitled to an instruction on his theory of defense only if '(1) the instruction provides a correct statement of the law; (2) the theory of defense is supported by the evidence; (3) the theory of the defense is not part of the government's charge; and (4) the failure to include the instruction would deprive the defendant of a fair trial.'" *Martin,* 618 F.3d at 735 (quoting *United States v. Campos*, 541 F.3d 735, 744 (7th Cir. 2008)). Defendant cannot establish any of these requirements, therefore, the district court properly denied defendant's proposed buyer-seller instruction.[6]

First, defendant's proposed buyer-seller instruction did not accurately summarize the law regarding wire fraud, the only offense charged in this case. R. 1, 272. A scheme to defraud and conspiracy embrace some analogous concepts, but the elements of the offenses are different. *United States v. Read*, 658 F.2d 1225, 1239-40 (7th Cir. 1980). The elements of wire

[6] The defense did not object to any of the government's proposed jury instructions.

fraud under 18 U.S.C. § 1343 are: (1) that the defendant knowingly devised or participated in a scheme to defraud, as described in the indictment; (2) that the defendant did so with intent to defraud; (3) the scheme to defraud involved a materially false or fraudulent pretense, representation, or promise; and (4) that for the purpose of carrying out the scheme, the defendant used or caused interstate wire communications to take place. Seventh Circuit Pattern Criminal Jury Instructions, 18 U.S.C. §§ 1341 and 1343 (p.490).

Unlike a conspiracy, a mail or wire fraud scheme requires no agreement. *Read*, 658 F.2d at 1240; *see also United States v. Brown*, 726 F.3d 993, 997 (7th Cir. 2013) ("Conspiracy is the extra act of agreeing to commit a crime."). In a fraud scheme, a defendant may be liable as a principal or as an aider and abettor, not as a conspirator. *Read,* 658 F.2d at 1240. "As an aider and abettor, [a defendant] need not agree to the scheme. He need only associate himself with the criminal venture and participate in it." *Id.* Thus, a defendant can "properly be found to be jointly responsible . . . for setting the scheme in motion" and thus causing the mailings or wirings. *Id.; see also White,* -- F.3d --, 2013 WL 6512922, at *7.

Unlike the law of conspiracy, which criminalizes the agreement to engage in wrongdoing, the law of mail and wire fraud punishes the defendant's "association and participation" in the charged activity. *Read*, 658

F.3d at 1240*; see also White,* -- F.3d --, 2013 WL 6512922, at *7. Accordingly, an individual's status as a buyer or seller in a fraudulent real estate transaction does not undermine the existence of a scheme to defraud mortgage lenders and is direct evidence of their participation in a scheme. Moreover, the indictment specifically identified defendant as a fraudulent buyer and seller in the scheme, therefore, the instruction not only failed to accurately state the law regarding wire fraud, but was inconsistent with the allegations contained in the indictment. R. 1, 272.

The buyer-seller instruction is intended to apply in conspiracy cases involving narcotics trafficking and not mortgage fraud cases. *See, e.g.*, *Brown*, 726 F.3d at 997-98. This is clear from the plain language of the 1998 and 2012 pattern instructions, which explicitly refer to "conspiracy" in the instruction, as well as the committee notes for both versions. Similarly, this Court in *Brown* examined the history of the buyer-seller instructions and case law in the context of narcotics trafficking cases charged as conspiracies. *Id*. at 997-1002. Accordingly, the buyer-seller instruction, even as modified

by defendant in this case, was not an accurate statement of the law of wire fraud.[7]

Second, the theory of the defense was not supported by the evidence. *See United States v. Kokenis*, 662 F.3d 919, 929 (7th Cir. 2011) (good faith instruction was properly denied when defendant offered "nothing but speculation" to suggest defendant acted in good faith). The theory of the defense was that defendant fraudulently purchased the properties, but not as a knowing participant in a scheme or with the intent to defraud. Br. at 21, 25. However, the evidence established that defendant had an ongoing relationship with his co-schemers, Simmons and McChristion, a high volume of transactions involving defendant, Simmons and McChristion and the evidence regarding defendant's profits from the scheme. For example, the

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[7] Defendant's proposed modified buyer-seller instruction read as follows:
The existence of a simply buyer-seller relationship between a defendant and another person, without more, is not sufficient to establish a criminal enterprise, even where the buyer intends to resell the property. The fact that a defendant may have bought property from another person is not sufficient without more to establish that the defendant was a member of the charged criminal enterprise.
In considering whether a criminal enterprise or a simple buyer-seller relationship existed, you should consider all of the evidence, including the following factors:
Whether the transactions involved large quantities of property or properties;
Whether the parties had a standardized way of doing business over time;
Whether the sales were on credit or consignment;
Whether the parties had a continuing relationship;
Whether the seller had a financial stake in the resale by the buyer;
Whether the parties had an understanding that the property or properties would be resold.
No single factor necessarily indicates by itself that a defendant was or was not engaged in a simply buyer-seller relationship.
R. 275.

case agent testified that defendant profited more from the scheme than Simmons and McChristion because he obtained over $1.2 million in mortgage loans, in connection with eight real estate transactions, either as a borrower or by using McChrsition as a nominee. Tr. 1/15/13 at 435. Defendant obtained approximately $266,561 in excess loan proceeds from those closings. Tr. 1/15/13 at 435. In contrast, Simmons made approximately $31,090 in excess loan proceeds in connection with these transactions. Tr. 1/15/13 at 435. Accordingly, the theory of the defense as described in the proposed buyer seller instruction was simply not supported by the evidence.

Third, the theory of the defense was part of the government's charge. *See Kokenis*, 662 F.3d at 930. Specifically, the government was required to prove that defendant knowingly participated in the scheme to defraud and that he did so with the intent to defraud. Seventh Circuit Pattern Criminal Jury Instructions, 18 U.S.C. §§ 1341 and 1343 (p.490); Tr. 1/16/13 at 513. The theory of the defense as articulated during his closing argument was defendant did not have the intent to defraud. Tr. 1/16/13 at 484, 488, Defendant's brief sets forth that his theory of the defense was that defendant "acted criminally on his own terms without having criminally participated in the scheme." Br. at 25. Both of these theories essentially dispute defendant's knowing participation in the scheme or intent, which were elements of the

charge offense. Tr. 1/16/13 at 513. Therefore, the theory of the defense was part of the government's charge.

Fourth, failure to include the instruction did not deprive the defendant of a fair trial because defendant was able to argue his defense theories: that the government did not prove knowing participation in the scheme or intent to defraud. The district court instructed the jury pursuant to Pattern Instruction 5.07(b) ("acts that advance criminal activity") that, "If a defendant performed acts that advanced the crime but he had no knowledge that the crime was being committed or was about to be committed, those acts are not sufficient by themselves to establish defendant's guilty." Tr. 1/16/13 at 516; R. 280 at 26. This instruction allowed defendant to make the same argument as his proposed buyer-seller instruction, namely, that his mere participation in the fraudulent transactions was not sufficient to establish his guilt, but was a correct statement of the law and did not contradict the allegations in the indictment. *Id*.

Accordingly, the district court did not err in denying defendant's request for the buyer-seller instruction and this claim should be denied.

IV. The District Court's Restitution Order Was Properly Based On The Uncontested Actual Loss Calculation in the PSR.

A. Standard of Review

A district court's authority to order restitution is reviewed *de novo*. *United States v. Robers*, 698 F.3d 937, 941 (7th Cir. 2012). A district court's imposition of restitution is reviewed for abuse of discretion, and the evidence is viewed in the light most favorable to the government. *United States v. Hassebrock*, 663 F.3d 906, 925 (7th Cir. 2011). Factual findings underlying calculation of the restitution amount are reviewed for clear error and will be reversed "only if the district court used inappropriate factors or did not exercise discretion at all." *United States v. Dong*, 675 F.3d 698, 701 (7th Cir. 2012) (*quoting United States v. Frith*, 461 F.3d 914, 919 (7th Cir. 2006)).

Defendant failed to object to the restitution amount at sentencing on some of the specific grounds he now raises in this appeal. For the first time on appeal, defendant argues that the district court failed to inquire in to the identity of the actual victims, Br. at 32, that none of the underlying property records underlying the government's loss calculation (which were possessed by defendant at the time of sentencing and public records) were attached to the Government's Version of the offense, Br. at 29, and that the actual loss caused by defendant was not a result of his participation in the scheme, Br. at 30. None of these arguments were raised before the district court. To the

contrary, defense counsel asked the district court to adopt the actual loss calculation contained in the PSR. Therefore, these particular arguments are subject to plain error review.

At a minimum, because defendant's failure to raise some of the arguments he now presses here deprived the district court of the opportunity to address his objections and develop a factual record, plain error review should apply. *United States v. Breshers*, 684 F.3d 699, 702 (7th Cir. 2012); *United States v. Arenal*, 500 F.3d 634, 639 (7th Cir. 2007) (noting that the plain error standard of review is "well served" to prevent a defendant who remains silent regarding claimed error from "sandbagging" the district court). *See also United States v. Locke*, 643 F.3d 235, 246 (7th Cir. 2011) (defendant who objected to the loss amount, but did not contest the restitution amount, forfeited the objection).

B. Analysis

The probation officer found that a preponderance of the evidence established that defendant sold all of the properties that he fraudulently purchased in subsequent fraudulent transactions as part of the same scheme.[8] PSR at 6-8. Accordingly, the probation officer calculated defendant's actual loss amount by subtracting the value of the property at the

[8] Defendant does not appeal the district court's adoption of the actual loss calculation in the PSR for purposes of determining defendant's guidelines range.

time of foreclosure from the value of the loans issued at the times that defendant *sold* the properties in fraudulent transactions to his co-schemers, Brian Wade and McChristion, and to purported buyers who were in fact deceased or incapacitated. PSR at 6-8; *see also* Gov. V. 4. Defendant did not object to the probation officer's calculation of actual loss in his sentencing memoranda or at the sentencing hearing. To the contrary, defense counsel urged the district court to adopt the PSR's loss calculation. Tr. 4/23/13 at 12 ("Judge, you have a rather exhaustive and excellent PSR prepared by Ms. Groth, and I think you should rely on the ability of the federal probation authorities to assess what should be scored.") Accordingly, the district court adopted the PSR's calculation of actual loss, which was $932,300. PSR at 8. Consistent with this figure, the district court imposed joint and several restitution in the amount of $932,000 for the loss caused by defendant's participation in the scheme. Tr. 4/23/13 at 9-10, 20.

Actual loss is a correct measure for calculating restitution. *See, e.g., United States v. Berkowitz,* 732 F.3d 850, 854 (7th Cir. 2013); *United States v. Kenney*, 726 F.3d 968, 973 (7th Cir. 2013); *Hasselbrock*, 663 F.3d 906, 925-26 (7th Cir. 2011). It is proper for the district court to adopt the PSR's actual loss calculation in imposing restitution. *See, e.g., Berkowitz*, 732 F.3d at 853-54, *Hasselbrock*, 663 F.3d at 925-26. "When the court relies on information contained in the PSR at sentencing, it is the defendant's burden to show that

the PSR is inaccurate or unreliable. When a defendant has failed to produce any evidence calling the report's accuracy into question, a district court may rely entirely on the PSR." *Hasselbrock*, 663 F.3d at 925 (quoting *United States v. Artley*, 489 F.3d 813, 821 (7th Cir. 2007).

In this case, the district court properly relied on the PSR's uncontested calculation of actual loss in determining restitution. Tr. 4/23/13 at 9-10. Defendant's objection to the restitution figure was limited to the equitable argument that "[i]t is unfair to assess defendant entirely, for losses caused by others," R. 307, and the factual argument that "the evidence at trial was that defendant paid all mortgage payments for each property purchased." R. 307. These arguments were inapposite because joint and several restitution was mandatory under the MVRA and because the loan amount used to calculate the actual loss consisted of the loans obtained in the fraudulent *sale* of defendant's properties—not the loan obtained by defendant at the time that he purchased the properties and on which defendant made payments. PSR at 7-8, Gov V. at 4, 6.

The fact that defendant was not the borrower in the fraudulent transactions in which defendant sold the properties to his co-schemers and fictitious and incapacitated individuals does not insulate him from restitution based on the loans issued as a result of those transactions. This Court has held that "while restitution awards typically require a direct causal

relationship between the defendant's personal conduct and a victim's loss, we have recognized that in the case of mail fraud, a crime that 'involves as an element a scheme, conspiracy, or pattern of criminal activity,' the MVRA imposes joint liability on all defendants for loss caused by others participating in the scheme." *United States v. Dokich*, 614 F.3d 314, 318 (7th Cir. 2010); *United States v. Rand,* 403 F.3d 489, 495 (7th Cir. 2005); *United States v. Martin*, 195 F.3d 961, 968 (7th Cir. 1999). As the Court explained in *Martin*, in cases in which defendant was a participant in the scheme, he is jointly and severally liable for the harm caused by the scheme, "consistent with the general common law rule making joint tortfeasors jointly as well as severally liable for the harm caused by the tort." 195 F.3d at 965. Further, the Court noted that since the enactment of 18 U.S.C. § 3663A in 1996, joint liability for restitution is imposed on all participants in a scheme, conspiracy, or pattern. *Id.* at 969. In *Martin*, the Court found that because defendant had assisted the ringleader in obtaining a fraudulent contract, he was jointly and severally liable for the loss, if any, caused as a result. *Id.* This is essentially what happened in this case.

Moreover, defendant urged the district court to adopt the PSR's actual loss calculation, failed to present any evidence regarding any of the purported improvements on the properties that would call into question any of the PSR's findings and did not contest that Long Beach Mortgage and its

successor were correctly identified as the victim. *See United States v. Love,* 680 F.3d 994, 999 (7th Cir. 2012); *Hasselbrock*, 663 F.3d at 925. Accordingly, the fact that the district court did not make additional findings regarding the appropriateness of the restitution amount is understandable given the context of the sentencing hearing. *Id.* (district courts are encouraged, but not required, to make detailed findings in support of restitution orders). Certainly, this was not plain error. Defendant cannot remain silent regarding these specific issues, prevent a full record from being made in the district court, and then come before this Court to complain that the district court erred.

Accordingly, the district court acted well within its discretion in calculating restitution based on the PSR's uncontested estimate of actual loss and the district court's restitution order was supported by a sufficient factual basis set forth in the PSR and evidence attached to the parties' sentencing memoranda, collectively establishing the actual losses incurred as a result of the fraudulent scheme.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court affirm the defendant's conviction and sentence.

Respectfully submitted.

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RULE 32 CERTIFICATION

I hereby certify that:

1. This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 13,071 words.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2013, I electronically filed the foregoing BRIEF OF THE UNITED STATES with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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