No. 16-11625-EE

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH PASQUALE,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:15-cr-71, Hon. Elizabeth A. Kovachevich

REPLY BRIEF OF
JOSEPH PASQUALE

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Court-Appointed Counsel for
Joseph Pasquale

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. 1st Magnus – Victim;
2. 4U Direct d/b/a Nations Home Lending Center – Victim;
3. Accredited Home Lenders, Inc. (LEND) – Victim;
4. Aegis Wholesale Corp. – Victim;
5. Alliance Mortgage Banking Corp. – Victim;
6. Argent Mortgage Company, LLC – Victim;
7. Aurora Loan Services, LLC – Victim;
8. BB&T (BBT) – Victim;
9. BSI Financial Services, Inc. (BSIFINP) – Victim;
10. Bank of America (BAC) – Victim;
11. Bank of New York Mellon (BK) – Victim;
12. Bentley, A. Lee, III – United States Attorney;
13. Burns, P.A. – Appellate counsel for Joseph Pasquale;
14. Burns, Thomas A. – Appellate counsel for Joseph Pasquale;
15. Capital Homes Lending, LLC – Victim;
16. Castillo, Daniel L. – Trial counsel for Joseph Pasquale;
17. Central Mortgage Co. – Victim;

18. Citibank, N.A. (C) – Victim;

19. Community Bank of Florida (acquired by BB&T Co. (BBT)) – Victim;

20. Corus Bank (CORS) – Victim;

21. Credit Suisse (CS) – Victim;

22. DB Home Lending, LLC – Victim;

23. Deutsche Bank Trust Co. (DB) – Victim;

24. Fannie Mae (FNMA) – Victim;

25. Federal National Mortgage Association (FNMA) – Victim;

26. First Financial Equities – Victim;

27. First Rate Capital Corp. – Victim;

28. Flick Mortgage Investors, Inc. – Victim;

29. Freddie Mac (FMCC) – Victim;

30. GMAC Mortgage, LLC (GMAC) – Victim;

31. GN Mortgage, LLC – Victim;

32. Gershow, Holly Lynn – Assistant United States Attorney;

33. GreenPoint Mortgage Funding, Inc. – Victim;

34. HSBC Bank USA, NA (HSBC) – Victim;

35. Hoffer, Jay Lawrence – Assistant United States Attorney;

36. Hoppmann, Karin B. – Assistant United States Attorney, Appellate Division;

37. Indy Mac Bancorp (IDMCQ) – Victim;

38. JP Morgan Chase Bank, NA (JPM) – Victim;

39. Kovachevich, Hon. Elizabeth A. – United States District Judge;
40. Krigsman, Cherie L. – Assistant United States Attorney, Appellate Division;
41. LaSalle Bank, N.A. – Victim;
42. Mills, John Dawson – Trial counsel for Joseph Pasquale;
43. Mortgage Lenders Network USA, Inc. – Victim;
44. Nate, Adam Joseph – Trial counsel for Joseph Pasquale;
45. Nationstar Mortgage, LLC (NSM) – Victim;
46. Ocwen Financial Corp. (OCN) – Victim;
47. OneWest Bank FSB (CIT) – Victim;
48. Pasquale, Joseph – Defendant-Appellant;
49. Pizzo, Hon. Mark A. – United States Magistrate Judge;
50. Poor, Christopher – Special Assistant United States Attorney;
51. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;
52. Rhodes, Yvette – Assistant United States Attorney, Appellate Division;
53. Saxon Mortgage Services, Inc. (SAXN) – Victim;
54. Select Portfolio Servicing, Inc. – Victim;
55. Silver State Financial Services – Victim;
56. TCIF REO GCM, LLC – Victim;
57. Taylor, Bean & Whitaker Mortgage Corp. – Victim;
58. U.S. Bank (USB) – Victim;
59. W AMU Bank (W AMUQ) – Victim;

60. Waterfall Victoria Master Fund, Ltd. – Victim; and

61. Wells Fargo Bank (WFC) – Victim.

March 10, 2017

/s/ Thomas Burns
Thomas A. Burns

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS C-1

TABLE OF CITATIONS v

ARGUMENT AND CITATIONS OF AUTHORITY 1

I. THE EVIDENCE PRESENTED DURING THE GOVERNMENT'S CASE-IN-CHIEF WAS INSUFFICIENT 1

CONCLUSION 7

CERTIFICATE OF COMPLIANCE 9

CERTIFICATE OF SERVICE 10

TABLE OF CITATIONS

Cases **Page(s)**

Bonner v. *City of Prichard*,
661 F.2d 1206 (11th Cir. 1981) (en banc) 7

Cosby v. *Jones*,
682 F.2d 1373 (11th Cir. 1982) 5, 6

**Pinkerton* v. *United States*,
328 U.S. 640 (1946) 1, 2, 3, 4

United States v. *Hill*,
643 F.3d 807 (11th Cir. 2011) 5

United States v. *Miranda*,
425 F.3d 953 (11th Cir. 2005) 3

United States v. *Pielago*,
135 F.3d 703 (11th Cir. 1998) 5

United States v. *Rojas*,
537 F.2d 216 (5th Cir. 1976) 7

United States v. *Tomlinson*,
2017 U.S. App. LEXIS 26 (11th Cir. Jan. 3, 2017) 5

United States v. *Vernon*,
723 F.3d 1234 (11th Cir. 2013) 3

Rules **Page(s)**

Fed. R. Crim. P. 29 1

Fed. R. Evid. 410 5

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE EVIDENCE PRESENTED DURING THE GOVERNMENT'S CASE-IN-CHIEF WAS INSUFFICIENT

Pasquale and the Government agree that Rule 29(b)'s snapshot provision applies. *Compare* Pasquale Br. 19, 21-23, *with* U.S. Br. 3 n.1.[1] Yet the Government contends it presented sufficient evidence in its case-in-chief and also resorts to liability under *Pinkerton* v. *United States*, 328 U.S. 640 (1946). It is mistaken. To the contrary, the Government's case-in-chief did not establish Pasquale had contemporaneous knowledge that a mortgage broker, Gary Hughes, never disclosed the developer's incentives to the mortgage lender, and the Government misconceives the applicability of *Pinkerton* in any event.[2]

At the outset, the Government invites the Court to review Pasquale's sufficiency argument for plain error only. U.S. Br. 11-12. It is mistaken. When making his Rule 29 motions, Pasquale clearly argued "I don't think they have proved willfully and *knowingly* and that my client

[1] Pasquale also agrees with the Government that the District Court's procedure handled the Rule 29 motions awkwardly. *See* U.S. Br. 3 n.1. Perhaps the Court can address that in its opinion.

[2] The litigants have already explained their positions with respect to the impropriety of the prosecutor's closing argument (*compare* Unrein Br. 26-32, *with* U.S. Br. 20-24). That issue is now for the Court to resolve.

had any *knowledge of this alleged conspiracy*." Doc. 132 at 244 (emphases added). In rebuttal, Pasquale clarified the basis of his argument was that "he did not know that Gary Hughes did not send [the disclosures] to Wells Fargo." Doc. 132 at 244. On appeal, Pasquale advanced precisely the same argument in this Court: i.e., that the Government failed to prove the "knowingly" elements of conspiracy and the substantive bank fraud counts "because the Government's case-in-chief did not establish he had contemporaneous knowledge that Hughes never disclosed the developer's incentives to the mortgage lenders." Pasquale Br. 24-25. Nothing was abandoned in the District Court or waived in this Court, so plain error does not apply.

Nonplussed, the Government boldly proclaims it still wins under *Pinkerton*, which it again claims Pasquale abandoned below and waived in this Court. U.S. Br. 18. But it is the Government that is mistaken, because *Pinkerton* simply never comes into play here.

First of all, this Court cannot bootstrap the bank fraud convictions onto the conspiracy conviction without first establishing there was sufficient evidence of conspiracy. And that is precisely why the Govern-

ment's *Pinkerton* argument falters out of the gate, because the evidence in support of the conspiracy conviction itself was insufficient.

To avoid this result, the Government attempts to distinguish the knowingly element of conspiracy from that of substantive bank fraud. U.S. Br. 17. But that is a distinction without difference here: knowledge of the "essential nature of the conspiracy" by definition would have to include knowledge that the private loans to buyers were never going to be disclosed to Wells Fargo. *United States* v. *Miranda*, 425 F.3d 953, 959 (11th Cir. 2005); *United States* v. *Vernon*, 723 F.3d 1234, 1273 (11th Cir. 2013). Indeed, that was the essence of the conspiracy. Moreover, had the loans been disclosed to Wells Fargo, the "scheme" would have been legal.

For that reason, if the evidence in support of the conspiracy conviction was sufficient, then it was also sufficient for the substantive bank fraud counts, because Pasquale then would have had knowledge that the private loans were not being disclosed to Wells Fargo. Either way, *Pinkerton* never comes into play because the evidence of all counts is either uniformly sufficient or insufficient. Put otherwise, there is no set of circumstances in this case in which the conspiracy evidence could

be independently sufficient while the evidence in support of the substantive counts was independently insufficient and the only way for the Government to rescue the convictions on the substantive counts would be to retreat to *Pinkerton*.

The question then becomes simply whether any testimony or evidence established Pasquale had contemporaneous knowledge that Hughes was not disclosing the private loans to Wells Fargo. To that end, the Government points to several things: Agent Higgins's testimony (Doc. 131 at 211-212); Pasquale's email to Bolger (U.S. Ex. 17 at 2); the loans from Pasquale's company, JLP & Company Investments, "because those loans could have had no purpose other than to defraud the banks" (U.S. Br. 18); that Pasquale was a licensed real estate professional who failed to recognize and withdraw from fraud (Doc. 131 at 85); and Pasquale's receipt of HUD statements that listed his loans as "CASH" from the buyers (Doc. 130 at 183; U.S. Ex. 23).

With respect to Agent Higgins's testimony,[3] Pasquale already explained he "never specified during the Government's case-in-chief that

[3] The Government describes Pasquale's conversation with Agent Higgins as a "voluntary interview" (U.S. Br. 15), but presumably it was actually a proffer session pursuant to a so-called proffer agreement or

Pasquale had such knowledge when the loans were originated or the transactions closed." Pasquale Br. 25. The Government retorts that the jury could reasonably infer that Agent Higgins's statement that Pasquale gained his knowledge "at the time" meant he learned it before the loans were originated or the transactions closed. U.S. Br. 16. But that train of thought misconceives the significance of this Court's decision in *Cosby* v. *Jones*, which held, "a reasonable jury must necessarily entertain a reasonable doubt" "if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial

---

"queen for a day" letter. Customarily, proffer sessions take place with the express or implied understanding that the conversation will not be used as evidence in the Government's case-in-chief. *See* Fed. R. Evid. 410(a)(4) (excluding any "statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea"); *United States* v. *Hill*, 643 F.3d 807, 874 (11th Cir. 2011) ("'Due process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes.'" (citation omitted)); *United States* v. *Pielago*, 135 F.3d 703, 709-10 (11th Cir. 1998) ("Any ambiguities in the terms of a proffer agreement should be resolved in favor of the criminal defendant."). *But see United States* v. *Tomlinson*, 2017 U.S. App. LEXIS 26, at *8-9 (11th Cir. Jan. 3, 2017) (prosecutor did not breach proffer agreement or violate Rule 410). Here, however, no proffer agreement was made part of the record, and it is therefore unclear why Pasquale's trial counsel never moved in limine to exclude, contemporaneously objected to, or requested to voir dire Agent Higgins regarding his conversation with Pasquale.

support to a theory of guilt and a theory of innocence of the crime charged." 682 F.2d 1373, 1383 (11th Cir. 1982).

Pasquale's statement to Bolger that "lenders are not sourcing down payments" (U.S. Ex. 17 at 2) can only be understood as an inquiry into how Bolger's funding program worked. In fact, that interpretation is made clear by Bolger's brusque response the next day that "we are not adjusting the structure" and "[i]f you have other means of obtaining those down payments then you can do that." U.S. Ex. 17 at 1.

The Government's assertion that the loans from JLP & Company Investments independently established Pasquale's knowledge "because those loans could have had no purpose other than to defraud the banks" (U.S. Br. 18) reflects confusion about how real estate transactions work. There is nothing illegal about lending (or gifting) a buyer funds for his or her down payment so long as the loan (or gift) is disclosed to the primary lender. In fact, lenders did this all the time before the real estate crash when they extended a mortgage for 80% of the purchase price and a second lender extended a second mortgage for some or all of the down payment (say, 5%-20%). Accordingly, they quite obviously had a pur-

pose other than to defraud the banks: i.e., to help legitimate buyers purchase real estate.

Finally, Pasquale's status as a licensed real estate professional and his receipt of HUD statements also did not prove anything. The Government's contention that Pasquale was strictly liable for the criminal of actions of others because he did not recognize their fraud sounds an awful lot like an incorrect contention that his "mere presence" was sufficient to sustain a conviction. *E.g.*, *United States* v. *Rojas*, 537 F.2d 216, 219-20 (5th Cir. 1976) ("a defendant's mere presence in an area where narcotics are discovered is insufficient evidence to support a conviction for possession").[4] And Pasquale's receipt of HUD statements also did not prove anything in light of his inexperience and his limited role as a buyer's referring agent.[5]

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment or vacate it and remand for further proceedings.

---

[4] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[5] It bears emphasis that Pasquale was not a seller's agent and did not work for Bolger. Instead, he was a buyer's referring agent.

Respectfully submitted,

/s/ Thomas Burns

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Court-Appointed Counsel for Joseph Pasquale

CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 1,515 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century Schoolbook font.

March 10, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 10th day of March, 2017, to:

David J. Smith, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 10th day of March, 2017, to:

United States

AUSA Karin B. Hoppman

I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via regular mail on this 10th day of March, 2017, to:

Joseph Pasquale (33802-018)
USP Lewisburg – Satellite Camp
P.O. Box 2000
Lewisburg, PA 17837

March 10, 2017

/s/ Thomas Burns
Thomas A. Burns