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

APPELLANT'S BRIEF OF JOSEPH PASQUALE

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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.

December 1, 2016

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Joseph Pasquale requests oral argument. This bank fraud appeal arises from a five-day jury trial. It involves (1) improper closing argument during which the prosecutor called Pasquale a liar and questioned defense counsel's ethics, and (2) sufficiency of the evidence. Oral argument will assist the Court.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes **Page(s)**

Rules **Page(s)**

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Pasquale was indicted (Docs. 1, 57) for violations of federal criminal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court entered a final judgment (Doc. 106), which Pasquale timely appealed (Doc. 108).

STATEMENT OF THE ISSUES

1. Did the Government present sufficient evidence in its case-in-chief that Pasquale had contemporaneous knowledge that the mortgage broker, Gary Hughes, never disclosed the developer's promotional incentives to the mortgage lender?

2. Did the District Court commit plain error by failing to *sua sponte* strike or declare a mistrial when the prosecutor's closing argument called Pasquale a liar and questioned defense counsel's ethics?

STATEMENT OF THE CASE

This bank fraud appeal arises from a condominium conversion of an apartment complex called The Arbors during the Great Recession. The charges concern the failure to disclose a developer's promotional incentives (which the Government described as undisclosed loans to fund buyers' down payments) to a mortgage lender (Wells Fargo Bank).[1]

At trial, the Government claimed Pasquale knew those promotional incentives were not disclosed to the lender. Pasquale, however, claimed he had no such knowledge.

[1] Related defendants pled guilty in *United States* v. *Bolger*, No. 8:14-cr-326 (M.D. Fla.), *United States* v. *Torres*, No. 8:13-cr-197 (M.D. Fla.), *United States* v. *Blankenship*, No. 8:15-cr-289 (M.D. Fla.), *United States* v. *Tobel*, Nos. 1:15-cr-20281 & 9:14-cr-80067 (S.D. Fla.), and *United States* v. *Airan-Pace*, No. 1:14-cr-20910 (S.D. Fla.).

Course Of Proceedings

In a five-count superseding indictment, a grand jury charged Pasquale with five criminal offenses:

> **Count One:** Conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349;
>
> **Count Two:** Bank fraud (i.e., sale of unit 217) in violation of 18 U.S.C. § 1344;
>
> **Count Three:** Bank fraud (i.e., sale of unit 205) in violation of 18 U.S.C. § 1344;
>
> **Count Four:** Bank fraud (i.e., sale of unit 302) in violation of 18 U.S.C. § 1344;
>
> **Count Five:** Bank fraud (i.e., sale of unit 116) in violation of 18 U.S.C. § 1344;

Doc. 57 at 1-8.

The case proceeded to a five-day jury trial. Docs. 127; 129; 130; 131; 132. Pasquale orally moved for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 when the Government rested its case-in-chief, when he rested, and when the Government rested its rebuttal case. Docs. 131 at 225-26; 132 at 10, 167, 180. The District Court initially deferred ruling, then denied the motions after trial. Doc. 90. Ultimately, the jury returned guilty verdicts all counts, and the District Court adjudicated Unrein guilty. Docs. 84; 127 at 9-10.

The District Court sentenced Pasquale at the middle of his guidelines range to 57 months' imprisonment, to run concurrently on all counts and to be followed by 5 years' supervision, ordered $901,715.79 restitution to the original mortgage lender (Wells Fargo, N.A.), entered a forfeiture money judgment of $901,740.00, and imposed a mandatory $500 special assessment. Docs. 106 at 6-7; 133 at 18-20.

Pasquale now appeals his convictions, but not his sentences. Doc. 108. He is currently incarcerated.

Statement Of Facts

A. The Parties Make Opening Statements

After selecting a jury (Doc. 129), the parties presented opening statements. Doc. 130 at 15-55.

The Government explained its case involved the conversion of a large apartment complex in north Tampa (i.e., The Arbors) into condominiums. Doc. 130 at 20. The two developers of The Arbors retained Brendan Bolger to sell them. Doc. 130 at 21-22. Bolger created a real estate company, DBM, and solicited buyers and real estate professionals. Doc. 130 at 22-23.

One of those real estate professionals was Pasquale, a newly licensed real estate associate. Doc. 130 at 23. As part of the sales pitch, Bolger, Pasquale, and others offered buyers various incentives that allowed them to put little or no money down and receive cash back. Doc. 130 at 24-25. The problem was that Bolger, Pasquale, and others failed to disclose these incentives (i.e., the source of the buyers' down payments) to the mortgage lenders. Doc. 130 at 25.

Pasquale's opening statement, however, explained that "the most important part of the case" was that he, as a "newbie in the real estate business," did not know Hughes, the mortgage broker, never sent the disclosure forms with the incentives to Wells Fargo. Doc. 130 at 54.

B. The Government Presents Its Case-In-Chief

For two days, the Government presented its case-in-chief. Docs. 130; 131.

1. Brendan Bolger

Brendan Bolger previously pled guilty to conspiracy to commit bank fraud, wire fraud, and mortgage fraud regarding this condominium conversion. Doc. 130 at 71. After college, he became involved in the mortgage and real estate businesses. Doc. 130 at 77-78. He discussed

the mortgage process in general. Doc. 130 at 79-96. He also explained the condominium conversion for The Arbors. Doc. 130 at 98-104.

As part of that work, Bolger sent email marketing blasts to realtors, in which "the verbiage was it gave a percentage of cash back, it gave the length of time for the leaseback, three to five years, and closing costs gratis." Doc. 130 at 105. That money, however, ultimately came "from the banks that financed the purchase for the new owners." Doc. 130 at 105.

Additionally, Bolger explained that the leaseback arrangements were inconsistent with obtaining primary residence financing; instead, financing would have to be obtained as a second home or investment property. Doc. 130 at 112. Bolger did not believe the banks were notified of the leaseback program. Doc. 130 at 113.

In that regard, Bolger described a promotional incentive called design credit agreements, the purpose of which was "to kick money back to the buyers" and "to give a false sense of what it was for." Doc. 130 at 115. Bolger's company, DBM Real Estate Group, drafted the design credit agreements. Doc. 130 at 115. With respect to the upgrades to be received, Bolger explained the agreements laid out "no specifics" and

were intended not to provide upgrades, but rather to return money to the buyers. Doc. 130 at 117.

Bolger also described another promotional incentive called the buyer assistance program. Doc. 130 at 118. Under this program, "basically what they were doing is they were giving borrowers down payment money before closing and I believe they were sending it to them directly and then charging a fee to do so." Doc. 130 at 120. Again, this was not disclosed to mortgage lenders. Doc. 130 at 122.

At some point during 2007, Bolger met Pasquale and became aware of his company, JLP & Company Investments. Doc. 130 at 127. JLP operated Pasquale's "version of what we were doing with the buyer's assistance program." Doc. 130 at 127.

Bolger admitted he did not know initially that the mortgage broker, Gary Hughes, was not disclosing the promotional incentives to the lender. Doc. 130 at 223. But "it became apparent" after he reviewed settlement closing statements. Doc. 130 at 223, 225.

2. Rashmi Airan-Pace

Rashmi Airan-Pace was a former investment banker and attorney. Doc. 130 at 230. For 10 years, she worked as a settlement agent. Doc.

130 at 230-31. She never met Pasquale, but spoke with him on the phone. Doc. 130 at 232. Like Bolger, she pled guilty for her role in this condominium conversion. Doc. 130 at 232-35.

When describing Ursula Walker's settlement statement, Airan-Pace explained that the $65,354 that went to Capital Management (Bolger's company) was not the "final resting place" for those funds: "Well, I was never told specifics, but what I knew was happening and all the parties knew was happening was that money essentially was going to various parties. Ultimately it would go partially to the buyer and the partially [*sic*] usually to both Realtors that were involved." Doc. 130 at 239.

Airan-Pace also testified Pasquale received Walker's HUD-1. Doc. 130 at 242.

3. Micki Mae Carpenter

Micki Mae Carpenter purchased a unit at The Arbors through Pasquale. Doc. 131 at 14. She used all her "design credit" on mortgage payments. Doc. 131 at 22. Thereafter, her loan went into default and foreclosure. Doc. 131 at 23-24.

Carpenter's loan application checked secondary residence, but she said she "wouldn't have marked that" because to her, it was a "rental investment." Doc. 131 at 26. Her loan application also had inaccurate monthly income. Doc. 131 at 27. Over objection, she speculated that she asked Pasquale about the inaccurate monthly income. Doc. 131 at 27-28. On cross-examination, however, she clarified that she simply did not remember. Doc. 131 at 35-36.

4. Timothy Lockwood

Timothy Lockwood was a vice president of financial crimes risk management for Wells Fargo. Doc. 131 at 40. He testified that Wells Fargo was insured by the FDIC. Doc. 131 at 42; U.S. Ex. 1. While explaining the loan origination process, Lockwood explained the "purpose of the loan application is to provide information about the borrower who is requesting the loan, information about their place of residency currently, their employment, their income assets, their liabilities and then what transaction they're asking for, a purchase or a refinance of the property." Doc. 131 at 44. In that regard, he explained that employment, income, property use, and source of funds were material to Wells Fargo. Doc. 131 at 44-47, 49.

In reviewing the buyers' mortgage applications, Lockwood testified they made no disclosures about the source of their down payments, guaranteed rents, or cash back. Doc. 131 at 47, 51-54, 59-60.

On cross-examination, however, Lockwood acknowledged it is a mortgage broker who prepares the loan application. Doc. 131 at 67. He also acknowledged that if a mortgage broker does not send the lender accurate information from the buyer, that is not "the correct way to do business." Doc. 131 at 69. On redirect, Lockwood testified mortgage brokers relied on real estate brokers to provide full contracts including addendums. Doc. 131 at 70.

5. Warren Todd

Warren Todd was a licensed real estate broker and instructor with 38 years' experience. Doc. 131 at 74. He explained the difference between a real estate broker (like himself) and a real estate sales associate (like Pasquale): "A broker is essentially the employer for the sales associate." Doc. 131 at 77.

On cross-examination, Todd explained real estate contracts are "[t]ypically" prepared by a sales associate. Doc. 131 at 98. But he agreed

it would not be proper for a mortgage broker to fail to disclose all agreements to the lender. Doc. 131 at 100.

On redirect, Todd explained that if a mortgage broker failed to make those disclosures, it would not be proper for a sales associate to continue with the transaction "[i]f he's aware of a violation of the law." Doc. 131 at 100. He also stated sales associates are "[n]ot typically" involved in the mortgage origination process. Doc. 131 at 101.

6. Kristi Carpenter

Kristi Carpenter purchased a unit at The Arbors through Pasquale. Doc. 131 at 108-09. Pasquale told her about the incentives, which she used for mortgage payments. Doc. 131 at 109, 114, 117-18. Eventually, her unit ended up in foreclosure. Doc. 131 at 114.

7. Ursula Walker

Ursula Walker purchased a unit at The Arbors through Pasquale. Doc. 131 at 127-28. Pasquale told her about the incentives. Doc. 131 at 128. At closing, she received a check for $52,000 and wrote a check for the down payment of $22,900. Doc. 131 at 129. Her loan application misstated the occupancy and income. Doc. 131 at 131-32. Ultimately, Walker sold the unit in a short sale. Doc. 131 at 129.

8. Joseph Andrade

Joseph Andrade was the brother of Augusto Andrade, who had purchased a unit at The Arbors. Doc. 131 at 141. Augusto suddenly passed away just before trial. Doc. 131 at 141. Augusto had an accident in 2007 and was physically unable to work since then. Doc. 131 at 142.

9. Special Agent Edwin Bonano

Special Agent Edwin Bonano was a summary witness. Doc. 131 at 150. Before the Government called him, Pasquale objected to his summary charts as misleading under Federal Rule of Evidence 403:

> MR. MILLS: My client's objection is all the upper left-hand side on the first two where it says the bank disbursed the funds. His concern is that it doesn't accurately show the mortgage broker sending everything to the bank. It just shows the bank doing this without the proper background. So his objection is it's misleading because it doesn't show the whole transaction.

Doc. 131 at 144; *see also* U.S. Exs. 37A, 37B, 37C, 37D. The District Court overruled the objection and directed Pasquale to "raise those points on cross-examination." Doc. 131 at 145.

At any rate, Bonano described the fraud and Pasquale's role from a big picture perspective:

> Q. Could you—based on your investigation, could you describe Mr. Pasquale's role.

A. Mr. Pasquale was a licensed real estate associate. So what his role was in this case is that he was recruiting potential buyers to purchase property at The Arbors at Carrollwood. And during the process, he got involved in making private loans to these potential buyers or buyers of Carrollwood so they could meet the requirements of cash to close for—to close and fund the transactions or the purchases.

Q. And based on your investigation, what was Mr. Bolger's role in this?

A. Mr. Bolger was the person who owned DBM. He was the lead sales office for the developer at the moment or the period that involved this investigation because there was other people who were selling before him.

And Mr. Bolger was also the individual who came up with the what [*sic*] we have come to know as the Design Credit Agreement and a way of getting money back to buyers.

Q. And Mr. Hughes and Mr. Martin have been discussed in this case. What's your understanding of what their—their role was here?

A. Hughes and Martin were mortgage brokers out of [the] California area. And they received many of the loan applications from the different prospective buyers at Arbors at Carrollwood. And they processed these loans and originated the loans for the buyers.

Q. Okay. I'd like to go out to sort of a 50,000-foot level. Based on your investigation since 2014, what is your understanding of the fraud scheme at The Arbors?

A. Well, the way we see it is that they were offering—it was what we call a builder bailout type of case for us which is the builder cannot any longer sell the properties through the conventional ways of selling a property which is you

come in, you buy because you have the money to buy and you purchase the property because you really want to live there or you really think it's a good investment or you really think it's—it's just a good investment.

So once you have run out of those type of buyers and the market is kind of like already starting to change, then the builder needs a bailout. He needs to keep paying for the mortgage that he got to build the place.

So in these cases what we see is that they start giving out incentives to buyers so they can sweet[en] up the deal and people start buying. But people buy not necessarily because they want to live there or it's a good investment. They just want to get money back after the closing. And that's really how they portrayed these different transactions for the prospective buyers.

So this case became a builder bailout for us in the matter of the builder was providing a bunch of kickbacks to the buyers and offering no money down, a stream of income through rental agreements or rental guarantees and cash back to do whatever you wanted to do with the money.

Q. And based on your investigation, could you describe your understanding of the Design Credit Agreement and its function.

A. The Design Credit Agreement is what they called it, but—and they came up with some forms to show the banks and all the people involved in the—and their approval of the loans.

The design credit was a package to upgrade the apartment and put granite and put upgraded cabinets and nice floors. But the reality is it was a term used and forms and addendums created just to basically obscure the reality of the transaction which was to pretty much give money back to buyers.

Doc. 131 at 160-63. In that regard, Bonano walked through all of the transactions using his summary charts. Doc. 131 at 165-67, 175-77, 180-83, 185-87; U.S. Exs. 37A, 37B, 37C, 37D. During Bonano's testimony, Pasquale expressly withdrew his objections to the summary charts.[2] Doc. 131 at 164, 173, 180.

Additionally, Bonano testified that no buyers at The Arbors ever used their design credits toward upgrades; instead, they all just asked for the money back. Doc. 131 at 167.

10. Richard Higgins

Richard Higgins had been a special agent with the FBI. Doc. 131 at 191. During his investigation, Higgins interrogated Pasquale for about an hour. Doc. 131 at 195. While interrogating Pasquale, Higgins took contemporaneous notes, but did not make an audio or video recording. Doc. 131 at 196. Pasquale described the developer's incentives as "undisclosed loans to his purchasers or borrowers." Doc. 131 at 201. Pasquale also told Higgins, "To his understanding, those loans were not

[2] By withdrawing his objections, Pasquale rendered these evidentiary rulings unreviewable on direct appeal under the invited error doctrine. *E.g.*, *United States* v. *Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009) ("doctrine of invited error is implicated when a party induces or invites the district court into making an error").

disclosed to the lenders." Doc. 131 at 202. But Pasquale did not state whether he gained that knowledge before or after the transactions had closed. *See* Doc. 131 at 202. At the end of his direct testimony, Higgins testified as follows:

> Q. Okay. One or two other things. You mentioned a bit earlier in your testimony that he acknowledged that he had done these loans through JLP & Company Investments. Did he characterize or in any way describe to you how he viewed that at that point as far as what he did, whether it was correct or wrong or not wrong?
>
> A. He admitted to myself and Agent Aponte that he believed that he conducted fraud.
>
> Q. And finally, sir, you mentioned that there was a discussion in the interview about whether specific parties knew about these private loans, and I want to just make sure I crystallize it and ask you specifically. In the words of the defendant when he spoke with you on that day, April 1, what did he tell you as to whether Wells Fargo or the other banks that may have been involved knew about those loans, if anything?
>
> A. He said that these loans were undisclosed to the buyer's mortgage lender, so they were not disclosed. They were not aware of the—
>
> Q. Let me ask you specifically did he tell you that he was aware of that at the time?
>
> A. Yes.

Doc. 131 at 212; *see also* Doc. 131 at 214, 216.

The Government then rested its case. Doc. 132 at 10.

C. Joseph Pasquale Testifies In His Own Defense

In the defense case, Pasquale testified in his own defense. Doc. 132 at 12. He explained that when lenders tightened their requirements for condominium loans, he spoke to Hughes to ensure his buyers could obtain financing. Doc. 132 at 26-27. After that conversation, Hughes sent Pasquale a disclosure form for private equity loans: i.e., a disclosure to a lender that the buyer was obtaining a private equity loan to fund his or her down payment. Doc. 132 at 127. When Pasquale received these forms, he had his buyers execute them. Doc. 132 at 127. But, critically, Pasquale said he never knew Hughes never sent these forms to the lenders. Doc. 132 at 29, 31.

Additionally, Pasquale denied telling Higgins that he committed fraud. Doc. 132 at 34-35. Instead, Pasquale claimed he had said, using the subjunctive voice, that if there were no disclosures to the lenders, and if he had known about it, then he would have committed fraud. Doc. 132 at 34-35. Finally, Pasquale claimed he was innocent. Doc. 132 at 36.

On cross-examination, Pasquale agreed that incentives are legal when they are disclosed to mortgage lenders. Doc. 132 at 82-83. Pasquale said he learned about the private equity loans sometime in October

2007. Doc. 132 at 89-90. Pasquale also acknowledged that if a buyer exercised his or her right to put the design credit toward upgrades, JPL would not be repaid. Doc. 132 at 163-64.

D. The Government Recalls Richard Higgins To Testify In Rebuttal

Higgins testified in rebuttal. Doc. 132 at 169. In relevant part, he testified as follows:

> Q. In the conversation at some point I think you testified yesterday that the defendant said to you that he basically had committed fraudulent conduct back in 2007?
>
> A. That's correct.
>
> Q. Did he at any point say to you that the conduct he did might have been fraud, but he didn't know it was fraudulent at the time or had no knowledge that it really was fraudulent?
>
> A. No, he never made any such statement.
>
> Q. How did he characterize it as best you can recollect?
>
> A. As best as I can recollect as well as what's reported in my report is he acknowledged that he committed fraud at the time he provided the clients of his the [*sic*] undisclosed loans.
>
> Q. And with respect to the knowledge of the mortgage lenders, Wells Fargo, et cetera, he said what specifically again as best you recollect?
>
> A. He said that these loans were not disclosed to his clients' mortgage lenders.

> Q. And did he say at what point he was aware of that or knew that?
>
> A. He was aware of it at the time the loans were being made.

Doc. 132 at 172-73.

E. The Parties Present Closing Arguments, And The Jury Returns Guilty Verdicts

The parties presented closing arguments. Doc. 132 at 186-217. At the outset, the prosecutor argued in pertinent part:

> First of all, I would like to just to dispense with a quick issue. In the defense's opening you heard a number of things that the prosecution was not going to tell you.
>
> One of those was that Brendan Bolger owned the developments. I believe you heard through testimony here that two corporations owned the developments and Mr. Bolger did not. I believe you were told Mr. Bolger made millions and millions of dollars. I think if you go back, you can recall that Brendan Bolger stated he made about $650,000.
>
> The reason you didn't hear any of this from us is because it didn't happen or it's factually inaccurate. *The lawyers have an obligation—what we say is not evidence, but we have an obligation not to make stuff up either.*

Doc. 132 at 187 (emphasis added). Then, during rebuttal argument, the prosecutor essentially called Pasquale a liar when he contended Pasquale "to save himself has every reason to lie." Doc. 132 at 212-13.

After hearing closing arguments and being instructed, the jury returned guilty verdicts on all counts. Docs. 84; 127 at 4.

F. The District Court Reserves Then Denies Motions For Judgment Of Acquittal

During trial, the District Court repeatedly reserved Pasquale's oral motions for judgment of acquittal (Docs. 131 at 225-26; 132 at 10, 167, 180), then denied them after trial (Doc. 90).

Standard Of Review

1. "We review de novo a District Court's denial of judgment of acquittal on sufficiency of evidence grounds, considering the evidence in the light most favorable to the Government, and drawing all reasonable inferences and credibility choices in the Government's favor." *United States* v. *Capers*, 708 F.3d 1286, 1296-97 (11th Cir. 2013). Under Federal Rule of Criminal Procedure 29(b)'s snapshot provision, when a district court reserves ruling on a motion for judgment of acquittal at the close of the Government's case-in-chief, a defendant is entitled to appellate review of the sufficiency of evidence at the time the motion was reserved. *United States* v. *Moore*, 504 F.3d 1345, 1346-47 (11th Cir. 2007).

2. The denial of a motion for a mistrial based on a prosecutor's statements during closing argument is reviewed for abuse of discretion."

United States v. *Thompson*, 422 F.3d 1285, 1297 (11th Cir. 2005). Absent a contemporaneous objection, the district court's failure to correct improper closing argument is reviewed for plain error.[3] *United States* v. *Pendergraft*, 297 F.3d 1198, 1204 (11th Cir. 2002). "Absent a motion, the trial court should not declare a mistrial absent manifest necessity."[4] *United States* v. *Valdez*, 880 F.2d 1230, 1233 (11th Cir. 1989).

SUMMARY OF THE ARGUMENT

1. The Government's case-in-chief did not present sufficient evidence that Pasquale had contemporaneous knowledge that a mortgage broker, Gary Hughes, did not disclose the developer's incentives to the mortgage lender.

2. The District Court committed plain error when it failed to *sua sponte* strike or declare a mistrial when the prosecutor's closing argument called Pasquale a liar and questioned defense counsel's ethics.

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[3] Plain error occurs when "(1) there is an error; (2) that is plain or obvious; (3) affecting [his] substantial rights in that it was prejudicial and not harmless; and (4) that seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *United States* v. *Beckles*, 565 F.3d 832, 842 (11th Cir. 2009).

[4] "While 'manifest necessity' is not subject to precise formulation, it is described as a 'high degree of necessity.'" *United States* v. *Hoa Quoc Ta*, 221 Fed. App'x 938, 943 (11th Cir. 2007).

ARGUMENT AND CITATIONS OF AUTHORITY

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

The Government did not present sufficient evidence during its case-in-chief that Pasquale had contemporaneous knowledge that a mortgage broker, Gary Hughes, never disclosed the developer's incentives to the mortgage lender.

A. Because The District Court Reserved Ruling On Motions For Judgment Of Acquittal, This Court Should Review The Sufficiency Of Evidence Presented In The Government's Case-In-Chief Only

Once upon a time, this Court applied the waiver doctrine whenever a criminal defendant presented a case. *E.g.*, *United States* v. *White*, 611 F.2d 531, 536 (5th Cir. 1980).[5] Under that doctrine, "a defendant's decision to present evidence in his behalf following denial of his motion for a judgment of acquittal made at the conclusion of the Government's evidence operates as a waiver of his objection to the denial of his motion." *Id.* As such, it used to be the case that when a defendant renewed his or her motion for judgment of acquittal at the close of all evidence,

[5] 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).

an appellate court would have to "examine all the evidence rather than . . . restrict its examination to the evidence presented in the Government's case-in-chief." *Id.* But the waiver doctrine's scope changed substantially when Federal Rule of Criminal Procedure 29(b) was amended in 1994.[6]

"Before the amendment a defendant deprived of an immediate ruling on the sufficiency of the evidence had to decide between freezing the evidence at that point in order to preserve the issue, or presenting additional evidence in his own case and risk filling any holes in the government's case that had existed up until then." *United States* v. *Moore*, 504 F.3d 1345, 1347 (11th Cir. 2007). But Rule 29(b) now provides that "If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b).

This sentence of Rule 29(b) is now called the "snapshot provision." *Moore*, 504 F.3d at 1347. "The amendment to Rule 29, by entitling the

[6] "Reserving a ruling on a motion made at the end of the government's case does pose problems, however, where the defense decides to present evidence and run the risk that such evidence will support the government's case. To address that problem, the amendment provides that the trial court is to consider only the evidence submitted at the time of the motion in making its ruling, whenever made. And in reviewing a trial court's ruling, the appellate court would be similarly limited." Fed. R. Crim. P. 29 cmt. (1994 amend.).

defendant to a snapshot of the evidence at the point that the court reserves its ruling, frees the defendant to present additional evidence without fear of doing himself harm on the sufficiency issue." *Id.*

Here, the District Court repeatedly reserved ruling, then denied Pasquale's motions for judgment of acquittal after trial. Accordingly, Rule 29(b)'s snapshot provision applies, and the only evidence relevant for sufficiency-of-the-evidence purposes is that presented during the Government's case-in-chief.

B. Evidence Is Insufficient Unless Reasonable Jurors Could Have Reached A Conclusion Of Guilt Beyond A Reasonable Doubt

It does "not satisfy the [Constitution] to have a jury determine that the defendant is *probably* guilty." *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993) (emphasis in original). Rather, the question is "whether a reasonable juror could have reached a conclusion of guilt beyond a reasonable doubt." *United States* v. *Faust*, 456 F.3d 1342, 1345 (11th Cir. 2006). By definition, "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 support to

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

C. The Government's Case-In-Chief Did Not Establish Pasquale Knew Hughes Had Not Disclosed The Developer's Incentives To The Lender When The Loans Originated

Under the *Cosby* test, insufficient evidence supported Pasquale's convictions 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.

"To sustain a conviction for bank fraud conspiracy under 18 U.S.C. § 1349, the government must prove beyond a reasonable doubt that (1) two or more persons agreed to a common and unlawful plan to commit bank and wire fraud, as alleged in the indictment; (2) the defendant knew of the unlawful plan; and (3) the defendant knowingly and voluntarily joined the plan." *United States* v. *Gutierrez-Acanda*, 628 Fed. App'x 642, 644 (11th Cir. 2015).[7] "A conviction for bank fraud under 18 U.S.C. § 1344 requires proof beyond a reasonable doubt that (1) a scheme existed to obtain money in the custody of a federally insured

[7] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

bank by fraud; (2) the defendant participated in the scheme by means of material false pretenses, representations or promises; and (3) the defendant acted knowingly." *Id.*

Because "knowingly" was an element of both crimes, the Government was required to prove Pasquale had contemporaneous knowledge that Hughes never provided the disclosures to Wells Fargo. The Government failed to do so in its case-in-chief.

No witness testified Pasquale had such knowledge. Indeed, the only witness who came close was Higgins. *See* Doc. Doc. 131 at 212. Higgins, however, never specified during the Government's case-in-chief that Pasquale had such knowledge when the loans were originated or the transactions closed. Instead, he merely stated Pasquale gained such knowledge "at the time," which could mean almost anything. Finally, under Rule 29(b)'s snapshot provision, the Government cannot remedy this deficiency by pointing to Pasquale's testimony or Higgins's rebuttal testimony.

Accordingly, because the circumstantial support for guilt or innocence presented in the Government's case-in-chief was in equipoise, un-

der *Cosby*, the Government necessarily did not submit sufficient proof of guilt beyond a reasonable doubt.

II. THE DISTRICT COURT COMMITTED PLAIN ERROR WHEN IT FAILED TO STRIKE OR DECLARE A MISTRIAL *SUA SPONTE* WHEN THE PROSECUTOR ARGUED PASQUALE WAS A LIAR AND QUESTIONED HIS COUNSEL'S ETHICS

The District Court committed plain error when it failed to strike or declare a mistrial *sua sponte* when the prosecutor's closing argument called Pasquale a liar and questioned defense counsel's ethics.

"Remarks made in the course of a prosecutor's closing argument will warrant reversal if the challenged remarks are (1) improper and (2) prejudicial to a substantial right of the defendant." *United States* v. *Boyd*, 131 F.3d 951, 955 (11th Cir. 1997) (citing *United States* v. *Blakey*, 14 F.3d 1557, 1560 (11th Cir. 1994)); *accord Lopez*, 590 F.3d at 1256 (citing *United States* v. *Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006)). "'A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different.'" *Lopez*, 590 F.3d at 1256 (quoting *Eckhardt*, 466 F.3d at 947). If "'the record contains sufficient independent evidence of guilt,'" however, "'any error is harmless.'" *Id.* (quoting *Eckhardt*, 466 F.3d at 947).

A. Closing Argument Is Improper When It Offers Personal Opinions Or Personally Attacks The Defendant's Lawyer

Generally, a prosecutor's closing argument is improper when it offers personal opinions as to a defendant's guilt or personally attacks the defendant's lawyer.

For example, "statements by the prosecutor" that "[offer] the prosecutor's personal opinion as to the defendant's guilt [are] improper." *United States* v. *Robinson*, 485 U.S. 25, 33 n.5 (1988) (citing *Darden* v. *Wainwright*, 477 U.S. 168 (1986), and *United States* v. *Young*, 470 U.S. 1 (1985)).

"A personal attack on an opposing lawyer may [also] constitute prosecutorial misconduct," *United States* v. *Miranda*, 279 Fed. App'x 950, 952 (11th Cir. 2008) (citing *Young*, 470 U.S. 1 (1985)), and "'subsequent jury instructions aimed at rectifying this error may not ensure that these disparaging remarks have not already deprived the defendant of a fair trial,'" *United States* v. *De La Vega*, 913 F.2d 861, 867 (11th Cir. 1990) (quoting *Unites States* v. *McClain*, 823 F.2d 1457, 1462 (11th Cir. 1987), *overruled on other grounds by United States* v. *Wat-*

son, 866 F.2d 381, 385 n.3 (11th Cir. 1989)); *accord United States* v. *Martinez*, 146 Fed. App'x 450, 458 (11th Cir. 2005).[8]

B. The Prosecutor's Closing Argument Was Improper

Judged by those metrics, the prosecutor's closing argument was improper.

It is improper for a prosecutor to call a defendant a liar during closing argument unless "that is an inference supported by the evidence at trial." *United States* v. *Schmitz*, 634 F.3d 1247, 1270 (11th Cir. 2011). Here, the inference that Pasquale was a liar was not supported by the evidence at trial.[9] Instead, there was simply a conflict in testimony in which the prosecutor could not vouch for one witness's testimony over another's. *Robinson*, 485 U.S. at 33 n.5 ("statements by the prosecutor which [vouch] for the credibility of witnesses [are] improper").

For those reasons, the prosecutor's comment that Pasquale "to save himself has every reason to lie" (Doc. 132 at 212-13) was improper. *Schmitz*, 634 F.3d at 1270. Moreover, that comment was an error that

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[8] *See supra* note 7.

[9] For that reason, *United States* v. *Rivera*, 780 F.3d 1084, 1100-01 (11th Cir. 2015) (distinguishing *Schmitz*), is inapposite.

was plain under *Schmitz*. Accordingly, the only questions are whether the comment substantially affected Pasquale's rights and seriously affected the fairness of the judicial proceedings. *See id.* at 1268.

During his closing argument, the prosecutor also suggested Pasquale's counsel was unethical. The Fifth, Sixth, Eighth, and Ninth circuits have held that such personal attacks on defense counsel's representations and veracity are improper and affect a defendant's substantial rights.[10] In this Circuit, however, accusing defense counsel of misstating the evidence, making a "ficti[tious]" closing argument, and "impugn[ing] the integrity of" government witnesses by calling them liars with no factual basis, ordinarily does "not rise to the level of mis-

[10] *E.g.*, *United States* v. *Rodriguez-Lopez*, 756 F.3d 422, 434 (5th Cir. 2014) (prosecutor who "[d]isparag[ed] defense counsel's motives for representing a criminal defendant" acted improperly); *United States* v. *Carter*, 236 F.3d 777, 785-86 (6th Cir. 2001) ("prosecutor's misstatement of [a witness's] testimony and personal attacks on defense counsel's truthfulness were likely to mislead the jury and cause prejudice"); *United States* v. *Wadlington*, 233 F.3d 1067, 1080 (8th Cir. 2000) (prosecutor's accusations that defense counsel misstated evidence were improper "[t]o the extent that [they] [could have been] construed as personal attacks"); *United States* v. *Frederick*, 78 F.3d 1370, 1380 (9th Cir. 1990) (prosecutor who sarcastically "sought to compliment the defense lawyer on 'confusing'" the witness acted improperly because she implied defense counsel's tactics were underhanded).

conduct." *United States* v. *Calderon*, 127 F.3d 1314, 1333, 1336 (11th Cir. 1997).

Nevertheless, *Calderon* is distinguishable because it involved a three-week trial, whereas Pasquale's trial was only five days long. When the improper statements regarding defense counsel are coupled with those concerning Pasquale, there exists "'a reasonable probability . . . that, but for the remarks, the outcome of the trial would have been different.'" *Lopez*, 590 F.3d at 1256 (quoting *Eckhardt*, 466 F.3d at 947). Therefore, the prosecutor's remarks about defense counsel were both "improper" and "prejudicial." *Boyd*, 131 F.3d at 955 (citing *Blakey*, 14 F.3d at 1560).

C. The Failure To Strike Or Declare A Mistrial *Sua Sponte* Was Plain Error Because There Existed A Manifest Necessity For A Mistrial

Taken together, the cumulative effect of the prosecutor's improper comments during closing argument prejudiced Pasquale and deprived him of a fair trial. *See Blakey*, 14 F.3d at 1561 ("[s]tanding alone none of the comments in this case would require reversal, but taken together, their cumulative effect presents a different problem"). Accordingly, this Court should vacate Pasquale's conviction and grant a new trial. *See,*

e.g., *Blakey*, 14 F.3d at 1559, 1562 (vacating conviction and ordering new trial because prosecutor called defendant "'professional criminal'").

Moreover, the comments substantially affected Pasquale's rights and seriously affected the fairness of the judicial proceedings. The centerpiece of Pasquale's defense was his own testimony. But the prosecutor's response was to call Pasquale a liar and to question his counsel's ethics. This substantially affected Pasquale's rights because there was a reasonable probability that a different outcome would have resulted absent the comments. *See United States* v. *Charniak*, 607 Fed. App'x 936, 943 (11th Cir. 2015) ("To show that an error affected a defendant's substantial rights, the defendant must establish a reasonable probability that the result would have been different but for the error."); *accord United States* v. *Hall*, 314 F.3d 565, 566 (11th Cir. 2002) ("In most cases, a determination of whether error affects a substantial right turns upon whether it affected the outcome of the proceedings.").[11]

And it seriously affected the fairness of the judicial proceedings because the comments were "'particularly egregious,' and, if left uncorrected, would result in a miscarriage of justice." *Charniak*, 607 Fed.

[11] *See supra* note 7.

App'x at 943. Few things are more prejudicial for a prosecutor to do than to call a defendant a liar and question his lawyer's ethics.

CONCLUSION

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

Respectfully submitted,

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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 6,458 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 font.

December 1, 2016

/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 1st day of December, 2016, to:

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