No. 12-15660-F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

GEORGE CAVALLO, PAULA HORNBERGER, and JOEL STREINZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:10-cr-550-EAK-MAP, Hon. Elizabeth A. Kovachevich

APPELLANT'S BRIEF

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
George Cavallo

United States v. *Cavallo*, No. 12-15660-F

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. American Home Mortgage (ticker symbol AHMNQ) – Victim;
2. Bank of America, N.A. (ticker symbol BAC) – Victim;
3. BB&T Co. (ticker symbol BBT) – Victim;
4. Bentley, A. Lee, III – Acting United States Attorney;
5. Burns, P.A. – Appellate counsel for George Cavallo;
6. Burns, Thomas A. – Appellate counsel for George Cavallo;
7. Capital One Bank (ticker symbol COF) – Victim;
8. Cavallo, George – Defendant-Appellant;
9. Cream, Anita M. – Assistant United States Attorney;
10. Hornberger, Paula – Defendant-Appellant;
11. Iglesias, Stephen V. – Appellate counsel for Paula Hornberger;
12. JLO Properties, LLC – Victim;
13. JP Morgan Chase (ticker symbol JPM-D) – Victim;

United States v. *Cavallo*, No. 12-15660-F

14. Kovachevich, Honorable Elizabeth A. – United States District Judge;

15. Krigsman, Cherie L. – Assistant United States Attorney;

16. Law Office of Stephen V. Iglesias, P.A. – Appellate counsel for Paula Hornberger;

17. McNamara, Linda Julin – Assistant United States Attorney, Deputy Chief, Appellate Division;

18. O'Neill, Robert E. – Former United States Attorney;

19. Pizzo, Honorable Mark A. – United States Magistrate Judge;

20. PNC Bank (ticker symbol PNC) – Victim;

21. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

22. Samek, Sharon C., Esq. – Trial counsel for George Cavallo and Paula Hornberger;

23. Scheller, Fritz J. – Appellate counsel for Joel Streinz;

24. Streinz, Joel – Defendant-Appellant;

25. Tuite, Christopher P. – Assistant United States Attorney;

26. Unger, Karen L. – Trial counsel for George Cavallo and Paula Hornberger.

October 21, 2013

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant George Cavallo respectfully requests oral argument.

This appeal arises from Cavallo's convictions for one count of conspiracy and one count of false statement to an FDIC-insured institution, concurrent 5- and 10-year sentences, and $13 million restitution order after a 3-month jury trial involving a 44-count indictment, dozens of witnesses, 13,000 pages of transcripts, and 1,500 exhibits. It raises novel legal issues in a complex factual setting relating to sufficiency of the evidence, sentencing, grand jury misconduct, witness intimidation, and the Sixth Amendment right to a public trial. Oral argument will therefore assist the Court.

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS C-1

STATEMENT REGARDING ORAL ARGUMENT i

TABLE OF CITATIONS vii

TABLE OF ABBREVIATIONS xiii

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION 1

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES 1

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE 3

Course Of Proceedings 4

Statement Of Facts 5

A. Grand Jury Proceedings 5

B. The Indictment 6

C. Guilty Pleas 8

D. Three-Month Jury Trial 9

1. The Government's Case In Chief Regarding The Mortgage Fraud Scheme 10

2. The Government's Case In Chief Regarding 3350 Kenmore Drive 16

3. Cavallo's Rule 29 Motion 21

4. Hornberger's Testimony Regarding Misplaced Trust And Forgeries 22

5. Testimony Regarding Cavallo's Involvement With 1516 Ridgewood Lane And 927 Contento Drive 23

6. Sidebars Outside Defendants' And Public's Presence 24

7. Attempted Witness Intimidation 25

8. Renewal Of Cavallo's Motion To Dismiss Indictment And Rule 29 Motion 26

9. Jury Verdict And Motion For New Trial And Judgment Notwithstanding The Verdict 26

E. Sentencing, Notice Of Appeal, And Prison 26

STANDARD OF REVIEW 31

SUMMARY OF THE ARGUMENT 33

ARGUMENT AND CITATIONS OF AUTHORITY 36

I. THE EVIDENCE WAS NOT SUFFICIENT TO CONVICT CAVALLO IN COUNT 28 (3350 KENMORE DRIVE) BEYOND A REASONABLE DOUBT 36

A. Count 28 Required The Government To Prove Beyond A Reasonable Doubt That Cavallo Made A False Statement To FDIC-Insured Washington Mutual "Knowingly" And "Willfully" 37

B. Speculation Can Never Support A Jury Verdict 39

C. The Government Did Not Prove Cavallo's Guilt Of Count 28 Beyond A Reasonable Doubt 40

1. The Government Did Not Prove Cavallo Signed The Loan Application 40

2. The Government Did Not Prove Cavallo Was Present In Naples, Florida On Or About February 24, 2006 When The Loan Application Was Signed 41

3. The Government Did Not Prove Cavallo Was Aware Of Or Willfully Blind To The Loan Application's Typed Misrepresentations 42

4. The Government Did Not Prove Cavallo Made A False Statement "For The Purpose Of Influencing" FDIC-Insured Washington Mutual "Knowingly" And "Willfully" 43

II. CAVALLO'S SENTENCES ARE PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE 44

A. The District Court Discriminated Against Cavallo On The Basis Of Sex, A Forbidden Characteristic 44

B. The District Court Miscalculated "Loss" Pursuant To U.S.S.G. § 2B1.1(b)(1) 46

1. The Sentencing Guidelines Explain How To Calculate "Loss" 47

2. The District Court "Dramatically Increased" Cavallo's Sentences Without Finding Relevant Acquitted Conduct By Clear-And-Convincing Evidence 48

3. The District Court Incorrectly Included 1516 Ridgewood Lane And 927 Contento Drive In Its Loss Calculation 52

4. The District Court Used A Flawed Loss-Calculation Methodology 54

C. Cavallo's Sentences Far Exceed Those Of Equally Or More Culpable Co-Defendants And Related Defendants, Contrary To 18 U.S.C. § 3553(a)(6) 58

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING TO INVESTIGATE GRAND JURY MISCONDUCT 62

A. Perjury Constitutes Grand Jury Misconduct 62

B. Hornberger's Testimony Demonstrated That The FBI Agent's Grand Jury Testimony Was Not Merely False, But Likely Perjurious 63

C. Ordinarily, This Court Remands Possible Perjury Questions For District Courts To Investigate In The First Instance 65

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING TO INVESTIGATE ATTEMPTED WITNESS INTIMIDATION 66

A. District Courts Must Hold Evidentiary Hearings To Ascertain The Impact Of Attempted Witness Intimidation On The Fairness Of The Proceedings 66

B. This Court Must Remand For The District Court To Hold Such An Evidentiary Hearing 67

V. THE DISTRICT COURT COMMITTED A STRUCTURAL ERROR WHEN ITS REPEATED SIDEBARS DENIED CAVALLO OF THE RIGHT TO A PUBLIC TRIAL 68

A. Structural Errors Require Automatic Reversal 68

B. Denial Of The Sixth Amendment Right To A Public Trial Is A Structural Error.. 68

C. The District Court's Sidebar Practice Was A Structural Error That Deprived Cavallo Of His Sixth Amendment Right To A Public Trial And Requires Automatic Reversal............................... 69

CONCLUSION 70

CERTIFICATE OF COMPLIANCE 72

CERTIFICATE OF SERVICE 73

TABLE OF CITATIONS

Cases **Page(s)**

Apprendi v. *New Jersey*,
530 U.S. 466, 120 S. Ct. 2348 (2000) 49, 50

Arizona v. *Fulminante*,
499 U.S. 279, 111 S. Ct. 1246 (1991) 68

* *Bank of Nova Scotia* v. *United States*,
487 U.S. 250, 108 S. Ct. 2369 (1988) 64

* *Cosby* v. *Jones*,
682 F.2d 1373 (11th Cir. 1982) 40

Frank v. *Blackburn*,
646 F.2d 873 (5th Cir. 1980) 61

Harris v. *United States*,
536 U.S. 545, 122 S. Ct. 2406 (2002) 65

Johnson v. *United States*,
520 U.S. 461, 117 S. Ct. 1544 (1997) 69

Judd v. *Haley*,
250 F.3d 1308 (11th Cir. 2001) 68, 69

Klay v. *Utd. Healthgroup, Inc.*,
376 F.3d 1092 (11th Cir. 2004) 33

* *McMillan* v. *Pennsylvania*,
477 U.S. 79, 106 S. Ct. 2411 (1986) 50, 51

Morton's Mkt., Inc. v. *Gustafson's Dairy, Inc.*,
198 F.3d 823 (11th Cir. 1999) 56

Rovinsky v. *McKaskle*,
722 F.2d 197 (5th Cir. 1984) 70

* *Steiner* v. *United States*,
134 F.2d 931 (5th Cir.1943).. 70

Sullivan v. *Louisiana*,
508 U.S. 275, 113 S. Ct. 2078 (1993).. 39

United States v. *Adams*,
1 F.3d 1566 (11th Cir. 1993).. 53

United States v. *Arbolaez*,
450 F.3d 1283 (11th Cir. 2006).. 33

United States v. *Barrington*,
648 F.3d 1178 (11th Cir. 2011).. 32

United States v. *Blakely*,
543 U.S. 220, 125 S. Ct. 738 (2005)... 50

United States v. *Booker*,
543 U.S. 220, 125 S. Ct. 738 (2005)................................... 49, 50, 61

United States v. *Brewer*,
983 F.2d 181 (10th Cir. 1993).. 56

* *United States* v. *Campbell*,
491 F.3d 1306 (11th Cir. 2007).. 50, 51

* *United States* v. *Candia*,
454 F.3d 468 (5th Cir. 2006).. 60

United States v. *Clay*,
483 F.3d 739 (11th Cir. 2007).. 45

United States v. *Crisp*,
454 F.3d 1285 (11th Cir. 2006).. 62

United States v. DiBernardo,
775 F.2d 1470 (11th Cir. 1985).. 63

* *United States* v. *Duncan*,
400 F.3d 1297 (11th Cir. 2005).. 50, 51

* *United States* v. *Faust*,
456 F.3d 1342 (11th Cir. 2006)................................ 31, 39, 50, 51

United States v. *Garate-Vergara*,
942 F.2d 1543 (11th Cir. 1991).. 63, 65

United States v. *Grier*,
475 F.3d 556 (3d Cir. 2007) 51

United States v. *Hammond*,
598 F.2d 1008 (5th Cir. 1979).. 67

* *United States* v. *Hill*,
643 F.3d 807 (11th Cir. 2011).. 38

United States v. *Irey*,
612 F.3d 1160 (11th Cir. 2010) (en banc) 32, 61

United States v. *Kelly*,
888 F.2d 732 (11th Cir. 1989)... 39, 52

United States v. *Krutsinger*,
449 F.3d 827 (8th Cir. 2006).. 59

United States v. *Kuhlman*,
711 F.3d 1321 (11th Cir. 2013)... 61

United States v. *Lawrence*,
47 F.3d 1559 (11th Cir. 1995)... 49

United States v. *Livesay*,
587 F.3d 1274 (11th Cir. 2009).. 61, 62

United States v. *Martin*,
455 F.3d 1227 (11th Cir. 2006).. 58, 62

United States v. *McQueen*,
2013 U.S. App. LEXIS 17581 (11th Cir.) 61

United States v. *Medina*,
485 F.3d 1291 (11th Cir. 2007) 40

United States v. *Mercado*,
474 F.3d 654 (9th Cir. 2007) 51

United States v. *Mieres-Borges*,
919 F.2d 652 (11th Cir. 1990) 39

United States v. *Mogel*,
956 F.2d 1555 (11th Cir. 1992) 44

United States v. *Nealy*,
232 F.3d 825 (11th Cir. 2000) 33

* *United States* v. *Neufeld*,
223 Fed. App'x 887 (11th Cir. 2007) 58

United States v. *One Assortment of 89 Firearms*,
465 U.S. 354, 104 S. Ct. 1099 (1984) 50

United States v. *Perez-Tosta*,
36 F.3d 1552 (11th Cir. 1994) 39

* *United States* v. *Phillips*,
2013 U.S. App. LEXIS 18430 (7th Cir. Sept. 4, 2013)
(Posner, J.) (en banc) 38, 43

United States v. *Pielago*,
135 F.3d 703 (11th Cir. 1998) 32

United States v. *Pisman*,
443 F.3d 912 (7th Cir. 2006) 58, 59

United States v. *Pugh*,
515 F.3d 1179 (11th Cir. 2008) 58, 62

* *United States* v. *Schlei*,
122 F.3d 944 (11th Cir. 1997) ... 33, 66, 67

United States v. *Suarez*,
601 F.3d 1202 (11th Cir. 2010) ... 32

* *United States* v. *Thomas*,
446 F.3d 1348 (11th Cir. 2006) ... 59, 60

* *United States* v. *Watts*,
519 U.S. 148, 117 S. Ct. 633 (1997) ... 49, 50, 51

United States v. *Wells*,
519 U.S. 482, 117 S. Ct. 921 (1997) ... 38

United States v. *Williams*,
456 F.3d 1353 (11th Cir. 2006) ... 32, 45, 46

United States v. *Wilson*,
355 F. Supp. 2d 1269 (D. Utah 2005) ... 44

Waller v. *Georgia*,
467 U.S. 39, 104 S. Ct. 2210 (1984) ... 69

Constitutional Provisions **Page(s)**

U.S. Const. amend. VI ... 69

Statutes **Page(s)**

18 U.S.C. § 371 ... 4, 7

18 U.S.C. § 1014 ... 4, 7, 8, 37

18 U.S.C. § 3231 ... 1

18 U.S.C. § 3553 ... 2, 35, 58-61

18 U.S.C. § 3742 1

28 U.S.C. § 994 44

28 U.S.C. § 1291 1

Rules **Page(s)**

11th Cir. R. 32-4 72

Fed. R. App. P. 32 72

Regulations **Page(s)**

U.S.S.G. § 2B1.1 .... *passim*

U.S.S.G. § 5H1.10 44

Other Authorities **Page(s)**

WAYNE LAFAVE, CRIMINAL PROCEDURE (3d ed. 2007) 65

TABLE OF ABBREVIATIONS

DE__	Docket entry number for document cited from the District Court's record.
PSR	Pre-Sentence Investigation Report.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Defendant-Appellant George Cavallo was indicted (DE1) for violations of federal criminal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) because the District Court entered a final judgment (DE819), which Cavallo timely appealed (DE887).

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Cavallo adopts Arguments I, II, and III of Defendant-Appellant Paula Hornberger's appellant's brief and Argument III of Defendant-Appellant Joel Streinz's appellant's brief.

STATEMENT OF THE ISSUES

1. Although juries may draw reasonable inferences from testimony and evidence, speculation can never sustain a conviction. The Government's case in chief regarding Count 28 introduced 3350 Kenmore Drive's loan file, but presented no other testimony or evidence that Cavallo signed this particular loan application, was present in Naples, Florida on or about February 24, 2006 when signed, was aware of or willfully blind to its misrepresentations when signed, or willfully or

knowingly influenced FDIC-insured Washington Mutual by applying for a mortgage from the mortgage broker Platinum Coast Mortgage, which was not FDIC-insured. Was the evidence sufficient?

2. Sentences must be procedurally and substantively reasonable. The District Court considered a forbidden factor (Cavallo's sex); miscalculated Cavallo's 20-level loss enhancement per U.S.S.G. § 2B1.1(b)(1) based on (i) relevant acquitted conduct that "dramatically increased" his sentence without finding it by clear-and-convincing evidence, (ii) the wrong properties, and (iii) a flawed loss-calculation methodology; and sentenced Cavallo to far more imprisonment than equally or more culpable co- and related defendants, contrary to 18 U.S.C. § 3553(a)(6). Were Cavallo's sentences unreasonable?

3. District courts must investigate whether perjured testimony substantially influenced the grand jury's decision to indict. An FBI agent falsely testified before the grand jury that the Government verified that Cavallo's signatures on loan applications, closing documents, and other papers were not forgeries. Should this Court remand for the District Court to investigate whether the FBI agent's false grand jury testimony was perjurious?

4. District courts abuse their discretion when they fail to hold an evidentiary hearing to ascertain the impact of attempted witness intimidation on the fairness of the proceedings. The morning before two defense witnesses were scheduled to testify, the FBI visited them and warned them that they faced criminal exposure and could be prosecuted. Should this Court remand for the District Court to hold an evidentiary hearing?

5. Deprivation of the Sixth Amendment right to a public trial is a structural error that so fundamentally affects the structure of judicial proceedings that it requires automatic reversal. Every day of trial, even when the jury was not present, and over defense objection, the District Court held numerous sidebars outside the defendants' and the public's presence. Was the District Court's sidebar practice a structural error that deprived Cavallo of his Sixth Amendment right to a public trial?

STATEMENT OF THE CASE

This is a mortgage fraud case. It raises important issues regarding sufficiency of the evidence, sentencing, grand jury misconduct, witness intimidation, and the Sixth Amendment right to a public trial.

Course Of Proceedings

The Indictment charged Cavallo with one count of conspiracy in violation of 18 U.S.C. § 371 to knowingly make false statements to FDIC-insured financial institutions in violation of 18 U.S.C. § 1014 and commit wire fraud to defraud FDIC-insured financial institutions and mortgage lenders in violation of 18 U.S.C. § 1343. DE1 at 1-16. The Indictment further charged Cavallo with 16 substantive counts of knowingly making false statements to an FDIC-insured financial institution in violation of 18 U.S.C. § 1014 and wire fraud in violation of 18 U.S.C. § 1343. DE1 at 18-19, 24-25, 31-36, 40-41, 59-63, 68-74, 77, 86-87.

After a three-month trial, a jury acquitted Cavallo of 15 counts of substantive mortgage-related fraud, yet found him guilty of one count of conspiracy (Count 1) and one count of making false statements to an FDIC-insured financial institution (Count 28). DE653 at 1-5. Thereafter, Cavallo was sentenced to concurrent sentences of 5 years' imprisonment and 36 months' supervised release for Count 1, 10 years' imprisonment and 60 months' supervised release for Count 28, and $13,228,861.74 in restitution. DE819 at 23, 5. Cavallo appeals from his Count 28 conviction, sentences, and restitution order. DE887.

Statement Of Facts

A. Grand Jury Proceedings

During the grand jury proceedings, the following exchange took place between a grand juror and an FBI agent:

> Grand Juror: You mentioned before about this CPA's name being forged.
>
> The Witness: In a letter, yes, sir.
>
> Grand Juror: In a letter. Has it been verified that, you know, the people who you've stated actually created the loan applications and their names were not forged, as well?
>
> The Witness: Has it been—
>
> Grand Juror: On all these—on all these documents that have been signed by these people who are named in this indictment, in each count of the indictment, has it been verified that Bobka, Cavallo, and Hornberger in Count Thirty-Seven actually signed the documents that they are alleged to have signed?
>
> I mean, their name's been verified that, yeah, that's truly that person's signature and they weren't forged by somebody else?
>
> The Witness: Right. Through the investigation, yes, sir, we've done that, either through interviews of people, and again, I'll go back, you know, sometimes—many times admissions that they, going right through it, yes, that's my signature. Yes, that's my signature.
>
> And many times through our—the total information that we have from witnesses about who the parties were in-

volved, who was at the closing, what was observed and seen in terms of signing.

Grand Juror: Okay.

The Witness: So we've done it through that way. We—that would be the way that we've done it.

Grand Juror: Okay.

DE348-1 at 111-12.

Cavallo filed a Motion To Dismiss Indictment (DE348) that alleged grand jury misconduct and attached exhibits (DE350; DE351; DE352; DE353; DE354; DE355; DE356; DE357; DE358; DE359) that showed examples of forged signatures and other potential instances of Government misconduct. The Government opposed. DE396.

Rather than holding a hearing to investigate the FBI agent's false testimony, the District Court entered an endorsed order denying the motion to dismiss and incorporating by reference the Government's opposition. DE435.

B. Indictment

The 44-count Indictment (DE1) is 90-pages long. But most of its allegations are not relevant in this appeal, because the jury ultimately acquitted Cavallo of 15 of his 17 counts. DE653 at 1-5. Specifically, the jury acquitted Cavallo of Counts 3, 7, 11, 12, 16, 27, 29, 32, 33, 34, 35,

37, 42, and 43. DE653 at 1-5. But relevant here, the jury convicted Cavallo of Count 1 (conspiracy) and Count 28 (3350 Kenmore Drive). DE653 at 1, 3.

Count 1 charged Cavallo with conspiracy in violation of 18 U.S.C. § 371 to (1) knowingly make false statements to FDIC-insured financial institutions in violation of 18 U.S.C. § 1014, and (2) commit wire fraud to defraud FDIC-insured financial institutions and mortgage lenders in violation of 18 U.S.C. § 1343. DE1 at 1-16. The conspiracy charged 14 defendants (including Cavallo, Hornberger, and Streinz) with creating a complex scheme to defraud FDIC-insured banks and mortgage lenders.[1] DE1 at 1-16. To that end, the conspiracy count included 38 overt acts and a 39th "shotgun" overt act in which "[t]he grand jury re-alleges and incorporates by reference the acts alleged in Counts Two through Forty-Four of this indictment as overt acts as though fully set forth herein." DE1 at 16.

Count 28, in turn, charged Cavallo with knowingly making false statements to an FDIC-insured financial institution in violation of 18

---

[1] Mortgage lenders are typically not FDIC-insured banks. Rather, they are creatures of state law. That is why the conspiracy count and some of the substantive counts charged wire fraud in violation of 18 U.S.C. § 1343.

U.S.C. § 1014. DE1 at 61. More specifically, it charged Cavallo with making false statements in a loan application signed "[o]n or about February 24, 2006" to obtain a $256,000 loan from Washington Mutual to purchase 3350 Kenmore Drive in Sarasota, Florida. DE1 at 61. In this regard, it alleged Cavallo misrepresented his income and intention to occupy the property as his primary residence. DE1 at 61.

C. Guilty Pleas

Before opening statements at trial, the Government obtained guilty pleas for 11 of the 14 defendants charged in this conspiracy: R. Craig Adams (DE369) (3 years); Jeffrey T. Berghorn (DE398) (1 year and 1 day); George R. Bobka, Sr. (DE164) (time served); Richard J. Bobka (DE487) (15 years); Thomas M. Brustad (DE164) (1 year and 1 day); Joseph J. Dirocco (DE360) (2 years); Jonathan L. Glucker (DE164) (1 year and 1 day); Heather L. Kabobel (DE164) (time served); Bonnie J. Katz (DE369) (3 years' probation); Derek W. Luther (DE369) (1 year and 1 day); and Lisa R. Rotolo (DE156) (1 year and 1 day). Five other defendants also pled guilty to criminal informations in separate cases: Edward Bangasser in *United States* v. *Bangasser*, No. 8:11-cr-635 (M.D. Fla. filed Dec. 28, 2011) (DE7) (15 months); Mark Leetzow in *United*

States v. *Leetzow*, No. 8:11-cr-599 (M.D. Fla. filed Nov. 23, 2011) (DE10) (1 year and 1 day); Michael Sloan in in *United States* v. *Sloan*, No. 8:11-cr-605 (M.D. Fla. filed Dec. 5, 2011) (DE22) (1 year and 1 day); Linda Sloan in *United States* v. *Sloan*, No. 8:11-cr-605 (M.D. Fla. filed Dec. 5, 2011) (DE22) (time served); and Craig Whitehead in *United States* v. *Whitehead*, No. 8:11-cr-498 (M.D. Fla. filed Sept. 26, 2011) (DE10) (time served). Only Cavallo, Hornberger, and Streinz went to trial.

D. Three-Month Jury Trial

The three-month jury trial involved dozens of witnesses, 13,000 pages of transcripts, and 1,500 exhibits. The central issue at trial was whether Cavallo simply misplaced his trust in his brother and other real estate professionals or truly intended to defraud banks. DE1096 at 242-47; DE1186 at 207. To that end, the testimony and evidence regarding how the mortgage fraud conspiracy (Count 1) worked, the conspiracy's other overt acts, other substantive counts of mortgage fraud (Counts 3, 7, 11, 12, 16, 27, 29, 32, 33, 34, 35, 37, 42, 43), tax returns, the real estate industry, the mortgage lending industry, and even inte-

rior decorating was extensive. The testimony and evidence pertaining to 3350 Kenmore Drive (Count 28), however, was quite limited.

1. The Government's Case In Chief Regarding The Mortgage Fraud Scheme

R. Craig Adams was the undisputed mastermind of this mortgage fraud scheme. Born in Cincinnati, Adams went to high school in Sarasota. DE1103 at 11-12. While in high school, Adams became acquainted with Rich Bobka,[2] DE1103 at 56, Adams's undisputed henchman in this scheme, DE1096 at 191. Like many proper villains, Adams took the time to obtain his credentials first: Adams obtained a Master's degree from Florida State University's finance program and was an alumnus of PricewaterhouseCoopers's consulting division in Atlanta. DE1103 at 13. While working for PricewaterhouseCoopers, Adams met his now ex-wife in Clearwater, Florida; he then moved back to Sarasota to find a new job. DE1103 at 14.

In Sarasota, Adams began working in real estate, first with a Century 21 affiliate, then with RE/MAX. DE1103 at 16-17. While working

[2] Bobka was initially a fugitive from justice, then pled guilty before opening statements. DE1095 at 24. He did not testify at trial.

for RE/MAX, Adams became reacquainted with Bobka. DE1103 at 18-19. Thereafter, Bobka joined Adams at RE/MAX. DE1103 at 56-59.

Adams then left RE/MAX and opened his own real estate company, Paradigm Properties. DE1103 at 19. At this point, Adams "was doing very well": he earned between $700,000 and $800,000 per year; he owned condominiums in Park City, Utah, Key West, Florida, and Siesta Key, Florida; he owned a waterfront home in Sarasota; he owned a 48-foot boat; he owned an air ambulance service that owned a jet; and he owned a car dealership that specialized in luxury sports cars. DE1103 at 21-23.

Adams called his method for doing real estate "real estate backwards." DE1103 at 26. "In other words, I would go find a house that was a good value and then I would shop that house to buyers." DE1103 at 26. To this end, Adams focused on waterfront properties and negotiated directly with sellers or their agents. DE1103 at 26. Using a baseball analogy, the point of Adams's business model was "to hit singles and doubles" rather than go for "home runs all the time." DE1103 at 27. In other words, "we decided that in my business model that I would like to do transactions and make a little bit on a lot of transactions than a lot

on a little" in order to "generat[e] as many commissions as possible." DE1103 at 27.

There was nothing untoward about this portion of Adams's business model or success. But early in his real estate career, Adams had learned a technique for engaging in fraudulent transactions. DE1105 at 136-41. This "[g]reed" "[s]adly" "became a way of life" for Adams and Bobka. DE1105 at 141; DE1108 at 130.

At any rate, Adams and Bobka later came to call this technique "Craigonomics": "they would inflate the sales price and borrow as much money from the banks as they could," then "they would get a second mortgage after the closing to basically come up with what they called carry costs to cover your mortgage payments and expenses on the property for the time that you owned it." DE1098 at 96-97. Under certain circumstances, there was nothing illegal about "Craigonomics." DE1098 at 298-99. Nevertheless, Adams thereafter "became involved in the fraudulent purchase and sale of residential real estate in Sarasota, Florida, and the surrounding area." DE1103 at 28. Adams's fraud was extensive: by his own estimation, "somewhere around 20 to 30 percent

of my deals during the 1997 to 2007 time frame were—had lies in them at one point or another." DE1103 at 28.

Adams's and Bobka's mortgage fraud scheme exploited loan programs that offered to "self-employed borrowers" what the lending industry called "stated income products," which now have come to be colloquially called liar's loans. DE1103 at 29. Back then, money in the lending industry was "free flowing more so than today"; indeed, it was "[a]bsolute insanity." DE1089 at 301; DE1109 at 122-23.

Given this real estate and lending framework, the fraud incorporated "friendly" buyers and/or sellers (wittingly or unwittingly), along with corrupt loan officers and title agents or closing officers. DE1103 at 32. Basically, Adams and Bobka would "manipulate the price somewhere between 10 and 20 percent" and disguise the information in closing documents, or even prepare two sets of closing documents, to prevent lenders from understanding where money was coming from or going to. DE1103 at 32-40. In essence, these price manipulations would cause lenders to unwittingly fund their own down payments, the buyers to walk away with the property, and the sellers to walk away with extra cash. *See* DE1103 at 33. From Adams's and Bobka's perspective, the

fraud's objective "was to earn a commission," but "from the client's prospective the goal was to have the client put as little or no money down in order to buy a property." DE1103 at 29.

This extensive mortgage fraud had many moving parts. *See, e.g.*, DE1107 at 157-59. It was important to have friendly sellers so only one set of closing documents had to be prepared and to prevent the lender from understanding where the money came from or went. DE1103 at 36-40. It was important to have friendly buyers who were self-employed and had good credit scores in order to obtain the stated-income loan products. DE1103 at 34. It was important to have corrupt title agents or closing officers (such as Lisa Rotolo, Monica Ischinger, and Bonnie Katz) because they could rush buyers and sellers through point-and-sign closings and "manipulate the prices and the numbers and the payments." DE1103 at 44; DE1109 at 218-19, 224. It was important to have corrupt loan officers (such as Craig Whitehead, Edward Bangasser, Jonathan Glucker, and Mark Leetzow) because they could input or fabricate inflated incomes and other inaccurate data that would qualify self-employed borrowers for stated-income products. DE1103 at 49, 54; DE1115 at 77-80, 82-85. It was important have salesmen (such as Ad-

ams himself and Bobka) to bring friendly sellers and friendly buyers to the table (wittingly or unwittingly) and ultimately to execute the fraudulent transactions.[3] DE1103 at 42-43, 55-56, 59-62. And it was important to target older waterfront properties, because then Adams and Bobka would be "able to manipulate the price in a larger dollar amount." DE1103 at 94.

Starting in mid-2002, Adams testified he "became involved in this fraudulent scheme with George Cavallo and Paula Hornberger." DE1103 at 67. In this regard, Adams came to view Bobka, Cavallo, and Hornberger as "one entity" "from a business perspective." DE1103 at 83-84. In other words, Adams "viewed them to be the same, that when Rich was buying something, he would place it in either Paula's name or George's name and that they were working as a team." DE1103 at 208.

Importantly, however, Adams never testified that Cavallo was privy to the fraud. Indeed, Adams managed to conceal the fraud from

---

[3] For example, Adams recruited his own now ex-wife, mother, and 85-year-old aunt as unwitting friendly buyers and sellers. DE1103 at 65; DE1105 at 188; DE1108 at 124-26. The Government did not prosecute Adams's relatives and ex-wife. Bobka likewise recruited his own mother and father. *See* DE1103 at 67; DE1088 at 50-52, 238. The Government prosecuted George Bobka, Sr., but did not prosecute Sylvia Bobka.

his own business partner and had very little personal interaction with Cavallo at all. DE1108 at 106-09, 125. Rather, Adams clarified that Cavallo's involvement was limited to "property management of all the properties that he and Rich—George and Rich owned together as well as doing the day-to-day bookkeeping and accounting of the rents and the bills." DE1103 at 75; DE1103 at 259. In this regard, Adams testified he never assisted Cavallo by facilitating any conversations with loan officers, filling out any loan applications, or signing any closing documents or mortgages. DE1105 at 99.

Ultimately, Adams's fraudulent scheme worked as long as real estate values were appreciating. But the fraudulent scheme "collapsed" as soon as "the real estate market collapsed." DE1103 at 44. When Adams was confronted by David Oriente, a defrauded client, Adams realized his ruse was up and confessed to the Government. DE1105 at 94-95.

2. The Government's Case In Chief Regarding 3350 Kenmore Drive

The Government presented very little testimony and evidence with respect to 3350 Kenmore Drive. Recall that Count 28 (3350 Kenmore Drive) did not charge Cavallo with any "Craigonomics" price manipulation. Nor was 3350 Kenmore Drive a waterfront property.

DE1153 at 201-02. Rather, Count 28 charged Cavallo with simple misrepresentations in a loan application. DE1 at 61.

Perhaps unsurprisingly, the Government's case in chief regarding 3350 Kenmore Drive therefore spanned fewer than 20 pages of transcripts. In short, the Government introduced into evidence a Washington Mutual loan file pertaining to 3350 Kenmore Drive through a lay witness, former Washington Mutual employee James McDiarmid, and called it a day. *See* DE1102 at 96 (Exs. 390 & 390A-J). During the time he was employed by Washington Mutual (formerly an FDIC-insured institution), Mr. McDiarmid had not personally reviewed this loan file and was not present at any step of this transaction. DE1102 at 165. As such, he could not and did not authenticate any of the signatures[4] or information on the forms.[5]

[4] The Government did not call any handwriting expert to testify at trial or obtain a handwriting exemplar from Cavallo.

[5] The loan application itself indicates Kenneth Brand was the loan officer for Platinum Coast Mortgage, and that he conducted a face-to-face interview with Cavallo on February 24, 2006 in Naples, Florida. Ex. 390B1 at 7. The Government did not call Mr. Brand as a witness at trial, nor did it elicit any testimony that Cavallo visited Naples on or about February 24, 2006. The Government introduced no testimony or evidence that Platinum Coast Mortgage was an FDIC-insured institution. Rather, it was merely a mortgage broker. Ex. 390 at 66-72, 333, 444-46, 459, 465-68.

At any rate, Mr. McDiarmid's testimony regarding the loan file was as follows: Cavallo was listed on the purchase and sale agreement as the buyer. DE1102 at 97 (Ex. 390A). The purchase price was $320,000, and the transaction was scheduled to close on March 1, 2006. DE1102 at 97 (Ex. 390A). Cavallo's current address was listed as 6962 Belgrave Drive in Sarasota, Florida, whereas his former address was listed as 411 Greenfield Drive in Mandeville, Louisiana. DE1102 at 99. The Government elicited no testimony that verified Cavallo's signature on the purchase and sale agreement.

On the loan application, Cavallo was listed as the borrower. DE1102 at 97-98 (Ex. 390B1 at 1). The loan application had a signature for the borrower, and the amount of the loan was $256,000. DE1102 at 98 (Ex. 390B1 at 1, 7).[6] The loan application indicated the borrower intended to occupy the property as a primary residence and that the borrower's total income was $26,118.99 per month as a U.S. Coast Guard marine inspector and real estate investor.[7] DE1102 at 98-99 (Ex. 390B1

[6] Mr. McDiarmid testified $258,000, but the Indictment (DE1 at 61), Pre-Sentence Investigation Report (PSR ¶ 214), and loan application (Ex. 390B1 at 1, 7) all say $256,000.

[7] Mr. McDiarmid testified $28,118.99, but once again he misread the loan application. *See* Ex. 390B1 at 2.

at 1, 2). The Government elicited no testimony that verified Cavallo's signature on the loan application, that confirmed the loan application had already been filled out when signed, or that Cavallo read or was willfully blind to the loan application's contents before signed.

Additionally, the loan file contained an Occupancy Misrepresentation And Nondisclosure Affidavit And Agreement that states the borrower will be occupying the property within 60 days. DE1102 at 108-11 (Ex. 390G). This form was notarized by Lisa Rotolo's employee, Bonnie Katz—both of whom pled guilty in this case. Ex. 390G at 4. Once again, the Government elicited no testimony that verified Cavallo's signature on the Affidavit And Agreement.

The loan file also contained a mortgage for the property with signatures for the borrowers. DE1102 at 111-12 (Ex. 390D). The Government elicited no testimony that verified Cavallo's signature on the mortgage. *See* DE1111 at 223 (Ex. 390D).[8]

Finally, the loan file contained a verbal verification of employment from Commanding Officer Terry Blais, DE1102 at 112-13 (Ex. 390F),

[8] Defendant-Appellant Paula Hornberger subsequently testified during the defense's case in chief that she "would have" signed the 3350 Kenmore Drive mortgage along with Cavallo. DE1178 at 45.

and a CPA letter from Sandra Mason, DE1102 at 113-14 (Ex. 390J). The Government elicited no testimony that Cavallo had anything to do with this verbal verification or CPA letter.

The only other pertinent testimony or evidence in the Government's case in chief that even tangentially related to 3350 Kenmore Drive was this: Bobka told Adams that Bobka, Cavallo, Hornberger, and the Berghorns "were going to try to buy as many properties in Gulf Gate as possible for the future redevelopment of the area."[9] DE1108 at 60; DE1103 at 80. Adams also testified that Berghorn and Cavallo were very close friends. DE1108 at 60. Nevertheless, Whitehead testified that there was no fraud "to my knowledge" as to 3349 Kenmore Drive, the property across the street. DE1116 at 42.

The Government elicited no other pertinent testimony relative to 3350 Kenmore Drive during its case in chief until it called its summary witness, an FBI agent. DE1120 at 106-07, 174-75, 178-79, 185. The FBI agent merely prepared charts that calculated loan amounts and losses

[9] 3350 Kenmore Drive was a property in Sarasota's Gulf Gate neighborhood. DE1153 at 201-02.

and summarized prior testimony. DE1120 at 151-52. As such, the FBI agent's testimony by definition did not add anything substantive.[10]

3. Cavallo's Rule 29 Motion

Cavallo made an oral motion pursuant to Federal Rule of Criminal Procedure 29 at the close of the Government's case in chief. In pertinent part, Cavallo argued:

> The next one is Count XXVIII. And this has to do with the property at 3350 Kenmore Drive. Again, there was no testimony that Mr. Cavallo knowingly executed this document believing that there was fraudulent activity.
>
> This particular count did not involve price manipulation. The allegation here is that he had—that he exaggerated his income and that this was going to be his primary residence. This property, there was no testimony about the manner in which these documents were executed.
>
> And again, this is consistent with the point and sign closings that Miss Rotolo described in her statement to Mr. Adams while she was being secretly recorded.

DE1121 at 93-94.

In response, the Government argued:

> The next count I have is Count XXVIII. I believe that is the Kenmore property. [Cavallo's counsel] I think on both

[10] During the defense's case, Dr. Gary Lacefield testified that Washington Mutual should not have funded the loan for 3350 Kenmore Drive. DE1174 at 117-31. But he did not authenticate any signatures. DE1174 at 117-31.

> Kenmore and Markridge mentioned that there's no price manipulation.
>
> There was none alleged. It was simply a case where it was alleged that Mr. Cavallo had declared it as his primary residence and had misrepresented his monthly income.
>
> Those counts are obviously pretty straightforward since Mr. Cavallo is himself the borrower in those cases. The $15,000 that was put in escrow came from the 2510 account. That was shown during the course of the trial.
>
> Mr. Cavallo signed an occupancy affidavit assuring the lender that he would treat it as his primary residence. And the proof is that he and Miss Hornberger before Southpointe was built lived at 6962 Belgrave. So that was obviously false.
>
> We've presented more than enough evidence to substantiate that his income was falsely represented on the loan application.

DE1121 at 111-12.[11]

The District Court ultimately denied Cavallo's Rule 29 motion. DE1121 at 118-19.

4. Hornberger's Testimony Regarding Misplaced Trust And Forgeries

During the defense's case, Hornberger testified that she and Cavallo misplaced their trust in Bobka, whom they believed to be an

[11] Despite the Government's argument, counsel has been unable to locate any trial testimony or evidence that showed 3350 Kenmore Drive's $15,000 escrow came from the 2510 account.

honest and successful real estate professional.[12] DE1150 at 204, 212, 216, 224-25; DE1153 at 100-01; DE1175 at 35-37, 54-55; DE1178 at 247. In that vein, Hornberger testified extensively about the great number of falsified documents and forged signatures present throughout this document-intensive case. DE1150 at 235, 243-67; DE1153 at 9-109, 118-47, 153-76, 185-88, 192-201, 203; DE1175 at 27-31, 54; DE1178 at 216-17. Coincidentally, Hornberger also testified that Bobka had access to Cavallo's home office. DE1153 at 109.

5. Testimony Regarding Cavallo's Involvement With 1516 Ridgewood Lane And 927 Contento Drive

No trial testimony connected Cavallo to 1516 Ridgewood Lane. Rather, that price manipulation was between Adams on one hand and Jeff and Cindy Berghorn on the other. *E.g.*, DE1099 at 214; DE1103 at 238-39; DE1105 at 235-41.

As to 927 Contento Drive, the trial testimony merely showed that Cavallo collected rents in partnership with Bobka, not that Cavallo was in cahoots with Adams and Bobka on that particular manipulation. *See* DE1103 at 74-75; DE1105 at 58, 91, 93; DE1108 at 102. Instead, 927

---

[12] Cavallo did not testify at trial.

Contento Drive was Adams's and Bobka's price manipulation that victimized David Oriente, the man who ultimately confronted Adams, reported him to the police, and led Adams to confess and turn himself in to law enforcement. *E.g.*, DE1150 at 118-28; DE1105 at 94-95.

6. Sidebars Outside Defendants' And Public's Presence

Throughout trial, the District Court held numerous sidebars every day, even when the jury was not present, to discuss legal matters and jury developments with the lawyers. These sidebars were held outside the defendants' presence and were not for contemporaneous public consumption. Near the beginning of the defense's case, Streinz objected to this sidebar practice:[13]

> Ms. Borghetti: My client has an issue with the issues being at sidebar and not in open court. He thinks that should be in open court.
>
> The Court: That's fine. Tell him I decide those things, not him. That's what you tell him, and that's on the record. I'll make a decision what's at sidebar and what's in open court for public consumption.

DE1153 at 4.

[13] The defendants had an automatic opt-in rule by which an objection by one defendant was automatically considered an objection by all. DE1095 at 106-07.

7. Attempted Witness Intimidation

During the defense case, Cavallo complained to the District Court that the FBI had attempted to intimidate two defense witnesses, John Coleman and Stacy Healy Self, the day before they were scheduled to testify. DE1121 at 4-24. Specifically, the FBI visited both witnesses the morning before they were scheduled to testify and warned them that they "didn't have to speak to the defense," "didn't have to testify," "had criminal exposure," and "could be prosecuted."[14] DE1121 at 7-8. The FBI had spoken with these witnesses several years before, and this was the first time the FBI warned them that they had criminal exposure or could be prosecuted. DE1121 at 7-8. For instance, Ms. Healy had spoken with the FBI "for a period of over 12 hours over two separate periods of time" in January 2011 and October 2011, after which they "had specifically told her each time that she was not in any trouble." DE1121 at 9.

[14] There is no indication in the record that the trial AUSAs had anything to do with the FBI's warnings to Mr. Coleman and Ms. Healy. Rather, the trial AUSAs had asked the FBI to assist with their preparation for cross-examination by visiting these witnesses (1) to clarify some supposed inconsistencies between their prior statements to the FBI and some documents that were already in evidence, and (2) to see if they could obtain some documents. DE1121 at 11-12. In fact, the FBI's warnings to Mr. Coleman and Ms. Healy appear to be contrary to the Government's "standing orders to the agents." DE1121 at 13, 23-24.

Mr. Coleman and Ms. Healy called Cavallo's trial counsel to complain that they felt intimidated by the FBI's warnings. DE1121 at 7-8. Nevertheless, they testified proceeded to testify how Adams's and Bobka's scheme victimized them. DE1121 at 183-87, 216, 218, 244-46.

8. Renewal Of Cavallo's Motion To Dismiss Indictment And Rule 29 Motion

At the close of evidence, Cavallo renewed his motion to dismiss the indictment for grand jury misconduct and his Rule 29 motion. DE1185 at 138. The District Court denied all motions. DE1185 at 142-43.

9. Jury Verdict And Motion For New Trial And Judgment Notwithstanding The Verdict

After 8 days of deliberations, the jury returned a verdict that acquitted Cavallo of 15 counts. DE653 at 1-5. Nevertheless, the jury found Cavallo guilty of Count 1 (conspiracy) and Count 28 (3350 Kenmore Drive). DE653 at 1, 3. Cavallo timely filed, pursuant to Federal Rules of Criminal Procedure 29 and 33, a motion for new trial and judgment notwithstanding the verdict. DE665. The Government opposed (DE695), and the District Court denied it (DE696).

E. Sentencing, Notice Of Appeal, And Prison

Probation prepared an extensive Pre-Sentence Investigation Report ("PSR"). At great length, it described the Indictment's charges, the

verdicts, the mortgage fraud scheme, the conspirators' roles and relationships, and the losses for specific properties. PSR ¶¶ 1-6, 8-222.

Notably, the PSR held Cavallo accountable for the losses on 927 Contento Drive $433,750) and 1516 Ridgewood Lane ($1,356,461.74). PSR. ¶ 215. Remarkably, however, the PSR's only basis for holding Cavallo accountable for 927 Contento Drive was not that he was somehow involved with Adams's and Bobka's price manipulation, but rather that "Cavallo was responsible for managing the property and collecting rent from the tenants." PSR ¶ 180. Similarly, the PSR's only basis for holding Cavallo accountable for 1516 Ridgewood Lane was again not that Cavallo was involved with Bobka's and Berghorn's price manipulation, but rather that Cavallo had "claimed rental income and expenses for this property on their 2006 and 2007 tax returns." PSR ¶ 109. Coincidentally, inclusion of 927 Contento Drive and 1516 Ridgewood Lane in Cavallo's loss calculation had the effect of just barely nudging Cavallo above U.S.S.G. § 2B1.1(d)(1)'s $7 million loss threshold to $7,454,210.74, thereby increasing his loss enhancement from 18 levels to 20 levels. PSR ¶ 215.

Additionally, the PSR did not take account of the loss-calculation implications that lenders had sold the loans on the secondary market as mortgage-backed securities and that several lenders (including Washington Mutual) had ceased to exist. *See* PSR ¶¶ 215, 225. Nor did the PSR attempt to calculate loss based on the properties' values (DE716-3 at 1-12) when Cavallo left Sarasota in August 2007 and withdrew from the conspiracy. *See* PSR ¶¶ 7, 215; DE716 at 22.

Ultimately, the PSR grouped the multiple conspiracy charges in Count 1[15] with Count 28 and calculated Cavallo's total offense level at 34 (151-188 months). PSR ¶¶ 227-38. In response, Cavallo filed a sentencing memorandum that disputed the PSR's findings and calculations. DE716. The Government's sentencing memorandum opposed Cavallo's arguments. DE737. At the sentencing hearing, the District Court overruled all objections to the PSR and adopted Probation's rendition of the facts, loss calculations, and Guidelines calculations in full. DE963 at 49-50.

[15] Although Count 1 ostensibly pled one overarching conspiracy, in reality it pled multiple conspiracies to commit multiple instances of mortgage fraud (i.e., conspiracies *A*, *B*, *C*, etc.). *See* U.S.S.G. § 3D1.2 cmt. 8.

Before the District Court rendered Cavallo's specific sentence, however, Cavallo addressed the District Court:

> THE DEFENDANT: [My mother-in-law and father-in-law] have always welcomed me in their hearts and treated me like a son for a childhood I never had. And so, Your Honor, I don't know what your plan is, but, please, I want my wife to be at home with her son. This is a mistake. This is awful. And do what you want to me, but please, she's amazing and I love her.
>
> Yes, our marriage has some problems, but you know what, we are family. We are best friends and we are standing tall, Your Honor.
>
> I'm sorry that the Court had to do all this. But a lot of things were wrong in this case. A lot of things were wrong in Florida. And a lot of things were wrong with my family, Your Honor. And I apologize. But I'm owning up. I'm taking responsibility. And, please, please, whatever you do, our ten-year old son is amazing. And he needs his Mom. Thank you, Your Honor.

DE963 at 73.

Although Probation calculated Cavallo's Guidelines range at 151-188 months, the Government recommended a downward variance to 10 years. DE963 at 81-82. The District Court adopted this recommendation, sentenced Cavallo to 10 years for Count 28 (3350 Kenmore Drive) and 5 years for Count 1 (conspiracy), and ordered him to pay $13,228,861.74 in restitution. DE963 at 92, 94. In giving this sentence, however, the District Court stated:

> I also recognize that you come from the old school. I've been a Federal Judge for over 30 years. And I would say I don't see it as much in the last 10 15 years, but I certainly saw it in the first 15 years where the man took the hit so that the lady in his life did not.

DE963 at 91.

Later that same day, the District Court also sentenced Cavallo's wife, Hornberger. Her Guidelines score was 33 (135-168 months). DE965 at 38. The Government recommended a downward variance to 8 years. DE965 at 38-39. Instead, the District Court sentenced Hornberger to 1 year and 1 day in prison:[16]

> Miss Hornberger, I have no doubt that George Cavallo wishes that he had never gotten together with his brother, Richard, and allowed his brother, Richard, to influence him in any way. What motivating factors there were by you toward your husband, George, or George towards you, only the two of you know best of all.
>
> If you don't know it, I will tell you that the brother, Rich Bobka, on a guideline sentence—and he has yet to be sentenced—scores out 262 months to 327 months. I still have more people to sentence in this case. And you need to realize that your brother-in-law for enticing you and George Cavallo to become involved in these events may be well very costly to Mr. Bobka.
>
> I realize that you look at the sentences that have been provided to people who cooperated and you do not know all of those circumstances. Your sentence is a very difficult one for this Court. I already expressed to your husband, George

[16] The Government did not appeal Hornberger's sentence.

> Cavallo, that he com[es] from the old school that I used to see 15 years ago, the men took the hit for the women. And he got ten years. But for the fact that he is concerned about his son, as you are your son, I might have done a reverse.
>
> He certainly has a record of service, et cetera.
>
> Who is more naive than the other between the two of you or who is more skilled only you two know. All things being equal, I think you need to get a taste of prison. But I think that this is fair considering what I've given George. The Court's going to grant a variance. I'm denying your variance . . . for a 12-month home detention. I am granting a variance pursuant to the government's motion, but it's not to impose upon you eight years or 96 months. I'm going to impose upon you 12 months and one day. You will go to jail. But you need to go visit George.
>
> The Defendant: Of course I will.
>
> The Court: And you need to take the boy. You hear me? 12 months and one day.

DE965 at 45-47.

Cavallo timely appealed. DE887. Before reporting to prison, Cavallo had retired after 20 years in the U.S. Coast Guard and worked with veterans. PSR ¶ 272, 274-75. He is currently incarcerated.

STANDARD OF REVIEW

1. Sufficiency of the evidence claims are reviewed de novo. *United States* v. *Faust*, 456 F.3d 1342, 1345 (11th Cir. 2006).

2. This Court reviews sentences for abuse of discretion. *United States* v. *Irey*, 612 F.3d 1160, 1189 (11th Cir. 2010) (en banc). In that regard, this Court "review[s] for clear error a district court's factual findings [regarding sentencing], and review[s] *de novo* the application of the law to those facts." *United States* v. *Suarez*, 601 F.3d 1202, 1220-21 (11th Cir. 2010). "Whether a factor is impermissible is a question of law [reviewed] de novo." *United States* v. *Williams*, 456 F.3d 1353, 1361 (11th Cir. 2006). Ordinarily, a "district court's determination of loss is reviewed for clear error." *United States* v. *Barrington*, 648 F.3d 1178, 1197 (11th Cir. 2011). But the "methodology the district court used to calculate loss" is a pure "legal question" that is "review[ed] de novo." *United States* v. *James*, 592 F.3d 1109, 1114 (10th Cir. 2010). "A district court abuses its discretion when it (1) fails to afford consideration to relevant factors that were due significant weight, (2) gives significant weight to an improper or irrelevant factor, or (3) commits a clear error of judgment in considering the proper factors." *Irey*, 612 F.3d at 1189.

3. The decision not to hold an evidentiary hearing to investigate grand jury misconduct is reviewed for abuse of discretion. *See United States* v. *Pielago*, 135 F.3d 703, 707 (11th Cir. 1998); *United*

States v. *Arbolaez*, 450 F.3d 1283, 1293 (11th Cir. 2006). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination," "makes findings of fact that are clearly erroneous," or "appl[ies] the law in an unreasonable or incorrect manner." *Klay* v. *Utd. Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004).

4. The decision not to hold an evidentiary hearing to investigate attempted witness intimidation is reviewed for abuse of discretion. *United States* v. *Schlei*, 122 F.3d 944, 990 (11th Cir. 1997).

5. Structural error claims are reviewed de novo. *See United States* v. *Nealy*, 232 F.3d 825, 829 (11th Cir. 2000) (structural error "require[s] per se reversal").

SUMMARY OF THE ARGUMENT

1. The District Court erred when it denied Cavallo's Rule 29 and Rule 33 motions. Although juries may draw reasonable inferences from testimony and evidence, speculation can never sustain a conviction. The trial evidence with respect to Count 28 (3350 Kenmore Drive) introduced the Washington Mutual loan file, but presented no other testimony or evidence that Cavallo signed this particular loan application,

was present in Naples, Florida on or about February 24, 2006 when the application was signed, was aware of or willfully blind to its typed misrepresentations about his income and intention to occupy it as a primary residence, or knowingly or willfully influenced the FDIC-insured bank Washington Mutual when the loan application was with Platinum Coast Mortgage, a mere broker. This paucity of evidence left the jury to speculate as to these facts, and the evidence was therefore insufficient.

2. This Court must vacate Cavallo's procedurally and substantively unreasonable sentences for three reasons. First, the District Court discriminated against Cavallo on the basis of sex, a forbidden characteristic. Second, the District Court mistakenly enhanced Cavallo's offender score by 20 levels when it miscalculated loss pursuant to U.S.S.G. § 2B1.1(b)(1). Instead, the District Court (1) "dramatically increased" Cavallo's sentence based on relevant acquitted conduct it found by mere preponderance instead of by clear-and-convincing evidence, (2) included the wrong properties, and (3) utilized a flawed loss-calculation methodology. Third, Cavallo's sentences are also substantively unreasonable because they created "unwarranted sentence dis-

parities" in violation of 18 U.S.C. § 3553(a)(6) by far exceeding those of equally or more culpable co-defendants and related defendants.

3. The District Court abused its discretion when it failed to hold an evidentiary hearing about grand jury misconduct. District courts must investigate whether false testimony substantially influenced the grand jury's decision to indict or created grave doubt that the decision to indict was free from the substantial influence of perjury. During grand jury proceedings, an FBI agent falsely testified that the Government had verified that Cavallo's signatures on mortgage applications, closing documents, and other papers were not forgeries. At trial, Hornberger testified extensively about numerous forged documents and signatures. Cavallo expressly renewed his motion to dismiss the indictment for grand jury misconduct at the close of evidence, but the District Court once again denied it. The District Court's denial of Cavallo's motion to dismiss the indictment both before and after trial without investigating the grand jury misconduct allegations was therefore an abuse of discretion.

4. The District Court abused its discretion when it failed to hold an evidentiary hearing about attempted witness intimidation. The

FBI visited two defense witnesses and warned them that they faced criminal exposure and could be prosecuted. This attempted witness intimidation triggered the District Court's obligation to hold an evidentiary hearing.

5. The District Court deprived Cavallo of his Sixth Amendment right to a public trial. Repeatedly, the District Court held sidebars every day, even when the jury was not present, outside the defendants' and the public's presence, despite defense objection to this practice. This structural error requires automatic reversal.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE EVIDENCE WAS NOT SUFFICIENT TO CONVICT CAVALLO IN COUNT 28 (3350 KENMORE DRIVE) BEYOND A REASONABLE DOUBT

The evidence was insufficient to convict Cavallo for mortgage fraud in Count 28 (3350 Kenmore Drive) beyond reasonable doubt for four reasons. First, the Government never proved Cavallo signed the loan application. Second, the Government never proved Cavallo was present in Naples, Florida on or about February 24, 2006, when the loan application was signed. Third, the Government never proved Cavallo was aware of or willfully blind to the loan applications' typed

misrepresentations relating to income and intention to occupy as a primary residence. Fourth, the Government never proved Cavallo willfully influenced an FDIC-insured institution, because the loan application was filled out with Platinum Coast Mortgage (a mere mortgage broker) rather than Washington Mutual (the FDIC-insured institution).

A. Count 28 Required The Government To Prove Beyond A Reasonable Doubt That Cavallo Made A False Statement To FDIC-Insured Washington Mutual "Knowingly" And "Willfully"

To convict Cavallo, Count 28 required the Government to prove beyond a reasonable doubt that Cavallo made a false statement "for the purpose of influencing" FDIC-insured Washington Mutual "knowingly" and "willfully."

In relevant part, 18 U.S.C. § 1014 provides: "Whoever knowingly makes any false statement . . . for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years or both." 18 U.S.C. § 1014. As such, there are three elements to a § 1014 offense: (1) "the defendant knowingly made a false statement or report to the financial institution"; (2) "the deposits of the institution were insured by

the Federal Deposit Insurance Corporation"; and (3) "the defendant made the false statement or report willfully and with intent to influence the action of the institution." *United States* v. *Hill*, 643 F.3d 807, 853 (11th Cir. 2011). The false statement need not, however, be material to the bank. *United States* v. *Wells*, 519 U.S. 482, 484, 117 S. Ct. 921, 924 (1997). All three *Hill* elements are at issue in this appeal.

The Seventh Circuit recently clarified what it means to "knowingly" make a false statement "for the purpose of influencing" an FDIC-insured institution in *United States* v. *Phillips*, 2013 U.S. App. LEXIS 18430 (7th Cir. Sept. 4, 2013) (Posner, J.) (en banc). Specifically, *Phillips* rejected the notion that "making a[ny] statement that is false and influences a bank is a crime." *Id.* at *7. Rather, the "statement must be *knowingly* false." *Id.* (emphasis in original). Accordingly, if a defendant signs a document without reading it, she cannot be said to have "adopted the false statements in it that she was unaware of." *Id.* at *19. Although it is "careless to sign a document without reading it," it is nevertheless "a knowing adoption of its contents only if the signer is playing the ostrich game ('willful blindness'), that is, not reading it *because* of what she knows or suspects is in it." *Id.* (emphasis in original).

B. Speculation Can Never Support A Jury Verdict

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, 113 S. Ct. 2078, 2081 (1993) (emphasis in original). Rather, this Court "must view the evidence in the light most favorable to the Government" and "decide 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).

Although trial evidence need not "exclude every reasonable hypothesis of innocence" or "be wholly inconsistent with every conclusion except that of guilt," *id.*, jury verdicts can never be based on speculation or conjecture. Instead, juries are permitted to draw only "reasonable inferences" based on "reasonable constructions of the evidence"—"not mere speculation." *United States* v. *Mieres-Borges*, 919 F.2d 652, 657 (11th Cir. 1990); *United States* v. *Kelly*, 888 F.2d 732, 740 (11th Cir. 1989); *United States* v. *Perez-Tosta*, 36 F.3d 1552, 1557 (11th Cir. 1994). As such, there is insufficient evidence "where little more than conjecture supports the hypothesis of guilt." *Kelly*, 888 F.2d at 740. By definition, therefore, "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). For example, when false or forged documents are at issue, the "mere fact that [defendants] submitted [documents] with forged signatures . . . is insufficient to establish fraud without some evidence that [they] knew of the forgeries or forged the [documents] themselves." *United States* v. *Medina*, 485 F.3d 1291, 1299 (11th Cir. 2007).

C. The Government Did Not Prove Cavallo's Guilt Of Count 28 Beyond A Reasonable Doubt

Given this sufficiency-of-the-evidence framework, the Government did not carry its burden of proving Cavallo's guilt of Count 28 beyond a reasonable doubt.

1. The Government Did Not Prove Cavallo Signed The Loan Application

The Government failed to prove beyond a reasonable doubt that Cavallo signed the loan application.

The Government did not call a handwriting expert or introduce an exemplar of Cavallo's signature into evidence. Nor did the Government

call Kenneth Brand, the Platinum Coast Mortgage loan officer in question, to the stand. Rather, the Government simply introduced the loan file into evidence. But this left the jury to its own devices to speculate whether Cavallo had indeed signed the loan application. This was inadequate, however, because per *Cosby* there was equal or nearly equal circumstantial support that Cavallo was innocent of the crime charged. Specifically, there was ample testimony that Bobka had forged Cavallo's and Hornberger's signatures. And that is probably what happened here.

Without such evidence, the jury had to speculate whether Cavallo committed the offense "knowingly" and "willfully" by signing the loan application.

2. The Government Did Not Prove Cavallo Was Present In Naples, Florida On Or About February 24, 2006 When The Loan Application Was Signed

Additionally, the Government failed to prove beyond a reasonable doubt that Cavallo was present in Naples, Florida on or about February 24, 2006.

The loan application indicates it was filled out during a face-to-face interview. But the Government introduced no evidence that Cavallo was in Naples, Florida on or about February 24, 2006. Again, this left

the jury to its own devices to speculate as to Cavallo's whereabouts. And once again, there was equal or nearly equal circumstantial support per *Cosby* that Cavallo was not in Naples on or about February 24, 2006, because he (unlike Hornberger) continued to live in New Orleans and visit Hornberger in Sarasota on weekends until he retired from the U.S. Coast Guard in June 2006. DE1150 at 178-80; PSR ¶ 272.

Without such evidence, the jury had to speculate whether Cavallo committed the offense or somebody else committed the offense, if any.

3. The Government Did Not Prove Cavallo Was Aware Of Or Willfully Blind To The Loan Application's Typed Misrepresentations

Furthermore, the Government did not prove beyond a reasonable doubt that Cavallo was aware of the loan application's typed misrepresentations.

Even assuming Cavallo was present in Naples and signed the loan application, it was still the Government's burden to prove that Cavallo "knowingly" and "willfully" made a false statement. To do so, the Government needed to establish beyond a reasonable doubt per *Phillips* that the loan application was already filled out when it was signed and that Cavallo signed it either with full knowledge of with willful blind-

ness to its falsehoods. But the Government elicited no such testimony or evidence, perhaps because it did not call Mr. Brand as a witness.

Without such evidence, the jury had to speculate whether Cavallo committed the offense "knowingly" and "willfully" by being aware of or willfully blind to the loan application's misrepresentations when it was signed.

4. The Government Did Not Prove Cavallo Made A False Statement "For The Purpose Of Influencing" FDIC-Insured Washington Mutual "Knowingly" And "Willfully"

Finally, the Government did not prove beyond a reasonable doubt that Cavallo "knowingly" and "willfully" made a false statement "for the purpose of influencing" FDIC-insured Washington Mutual.

Before its failure, Washington Mutual was indeed an FDIC-insured bank. But the loan application was made with Platinum Coast Mortgage, not Washington Mutual. Ex. 390B1 at 7. Platinum Coast Mortgage was merely a mortgage broker, not an FDIC-insured bank. Critically, the Government elicited no testimony or evidence that Cavallo was aware or willfully blind per *Phillips*, when the loan application was signed, that Platinum Coast Mortgage was going to broker the mortgage to FDIC-insured Washington Mutual.

Without such evidence, the jury had to speculate whether Cavallo "knowingly" and "willfully" made a false statement "for the purpose of influencing" FDIC-insured Washington Mutual.

II. CAVALLO'S SENTENCES ARE PROCEDURALLY AND SUBSTANTIVELY UNREASONABLE

This Court must vacate and remand because Cavallo's 5- and 10-year sentences are procedurally and substantively unreasonable.

A. The District Court Discriminated Against Cavallo On The Basis Of Sex, A Forbidden Characteristic

Cavallo's 5- and 10-year sentences are procedurally unreasonable because they were substantially affected by consideration of his sex, a forbidden characteristic.

An offender's "sex" is "not relevant in the determination of a sentence." U.S.S.G. § 5H1.10; *accord United States* v. *Mogel*, 956 F.2d 1555, 1562 (11th Cir. 1992). In the Sentencing Reform Act, Congress itself gave this explicit command to the Sentencing Commission: "the Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders." 28 U.S.C. § 994(e); *accord United States* v. *Wilson*, 355 F. Supp. 2d 1269, 1277 (D. Utah 2005). Given this statutory

and regulatory framework, a sentence "can be unreasonable, regardless of length, if it was substantially affected by the consideration of impermissible factors." *United States* v. *Clay*, 483 F.3d 739, 745 (11th Cir. 2007); *accord United States* v. *Williams*, 456 F.3d 1353, 1361 (11th Cir. 2006).

In this regard, Cavallo "bears the initial burden of establishing that the district court considered an impermissible factor at sentencing." *Williams*, 456 F.3d at 1361. The burden then "shifts to the [Government] to show, based on the record as a whole, that the error is harmless, *i.e.*, that the error did not substantially affect the court's choice of sentence." *Id.* at 1362. "If the error is not harmless," this Court must "vacate the sentence as unreasonable." *Id.*

The District Court considered Cavallo's sex at sentencing. To the District Court's credit, it was quite candid about its sentencing rationale. During Cavallo's and Hornberger's sentence proceedings, the District Court twice noted that Cavallo came from the "old school" "where the man took the hit so that the lady in his life did not." DE963 at 91; DE965 at 46. The District Court also reinforced traditional gender roles also by wanting to ensure that Cavallo's young son would be

cared for by his mother, Hornberger. DE965 at 47 ("you need to take the boy"). Finally, even though Cavallo and Hornberger had virtually identical Guidelines scores (34 and 33, respectively), the District Court entered strikingly disparate sentences: 5 and 10 years for Cavallo and 1 year and 1 day for Hornberger. Cavallo's sentences were therefore substantially affected by consideration of his sex, a forbidden characteristic.

Per *Williams*, the burden then shifts to the Government. But the Government cannot carry its burden of showing that the District Court's consideration of Cavallo's sex was harmless because of the disparate sentences themselves. As such, this Court must vacate Cavallo's sentence as unreasonable, regardless of its length.

B. The District Court Miscalculated "Loss" Pursuant To U.S.S.G. § 2B1.1(b)(1)

The District Court also miscalculated Cavallo's Guidelines sentence. Specifically, when it calculated Cavallo's "loss" pursuant to U.S.S.G. § 2B1.1(b)(1), the District Court applied the wrong evidentiary standard, incorrectly included two properties, and used a flawed loss-calculation methodology. These errors led the District Court to mistakenly enhance Cavallo's offender score by 20 levels.

1. The Sentencing Guidelines Explain How To Calculate "Loss"

Loss can be calculated three ways: (1) actual loss; (2) intended loss; or (3) gain. U.S.S.G. § 2B1.1(b)(1) cmt. 3(A)-(C). Typically, "loss is the greater of actual loss or intended loss." U.S.S.G. § 2B1.1(b)(1) cmt. 3(A). "'Actual loss'" means the reasonably foreseeable pecuniary harm that resulted from the offense." *Id.* cmt. 3(A)(i). "'[R]easonably foreseeable pecuniary harm' means pecuniary harm that the defendant knew or, under the circumstances, reasonably should have known, was a potential result of the offense." *Id.* cmt. 3(A)(iv). "'Intended loss' (I) means the pecuniary harm that was intended to result from the offense; and (II) includes intended pecuniary harm that would have been impossible or unlikely to occur (e.g., as in a government sting operation, or an insurance fraud in which the claim exceeded the insured value)." *Id.* cmt. 3(A)(ii). "[I]f there is a loss but it reasonably cannot be determined," district courts "shall use the gain that resulted from the offense as an alternative measure of loss." *Id.* cmt. 3(B). Whatever loss-calculation methodology is employed, district courts "need only make a reasonable estimate of the loss." *Id.* cmt. 3(C).

After the initial loss figure is calculated, it can be reduced by the value of collateral. Relevant here, "[i]n a case involving collateral pledged or otherwise provided by the defendant," "[l]oss shall be reduced by" "the amount the victim has recovered at the time of sentencing from disposition of the collateral, or if the collateral has not been disposed of by that time, the fair market value of the collateral at the time of sentencing." *Id.* cmt. 3(E).

2. The District Court "Dramatically Increased" Cavallo's Sentences Without Finding Relevant Acquitted Conduct By Clear-And-Convincing Evidence

The District Court applied the wrong evidentiary standard when it concluded that Cavallo committed relevant acquitted conduct by a preponderance of the evidence. Instead, it should have measured Cavallo's relevant acquitted conduct by the clear-and-convincing evidence standard. The District Court's application of the wrong evidentiary standard "dramatically increased" Cavallo's loss-calculation enhancement for Count 28 from 12 levels ($245,849 for 3350 Kenmore Drive) to 20 levels ($7,454,449 for all properties), contrary to Supreme Court and persuasive precedent. This mistake dramatically increased Cavallo's

Count 28 offender score from 28 (78-97 months) to 34 (151-188 months).[17]

Typically, "[w]hen a defendant challenges one of the factual bases of his sentence as set forth in the PSR, the Government has the burden of establishing the disputed fact by a preponderance of the evidence." *United States* v. *Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995). For that reason, ordinarily "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *United States* v. *Watts*, 519 U.S. 148, 156, 117 S. Ct. 633, 637 (1997). This evidentiary standard usually suffices because "an acquittal on criminal charges does not prove that the defendant is inno-

[17] The District Court's failure to group and calculate Cavallo's offender score for Count 1's numerous conspiracy charges separately from his offender score for Count 28 and the other substantive counts, *see* U.S.S.G. § 3D1.2 cmt. 8, led it to commit a *Booker* error. By punishing Cavallo in Count 28's substantive mortgage fraud box for conduct he was found guilty of in Count 1's conspiracy box without instead finding his relevant acquitted conduct by the appropriate clear-and-convincing evidentiary standard, the District Court effectively evaded Count 1's 5-year statutory maximum. *See United States* v. *Booker*, 543 U.S. 220, 232, 125 S. Ct. 738, 749 (2005) ("the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (emphasis in original)).

cent; it merely proves the existence of a reasonable doubt as to his guilt." *United States* v. *One Assortment of 89 Firearms*, 465 U.S. 354, 361, 104 S. Ct. 1099, 1104 (1984).

Nevertheless, due process forbids judicial factfinding at sentencing from serving as a "tail which wags the dog of the substantive offense." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 88, 106 S. Ct. 2411, 2417 (1986). As such, the Supreme Court has long acknowledged a circuit split "whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence." *Watts*, 519 U.S. at 156 & n.2, 117 S. Ct. at 637 & n.2.

This Court has held district courts ordinarily may consider relevant acquitted conduct. *United States* v. *Campbell*, 491 F.3d 1306, 1314-15 (11th Cir. 2007); *United States* v. *Faust*, 456 F.3d 1342, 1347-48 (11th Cir. 2006); *United States* v. *Duncan*, 400 F.3d 1297, 1304-05 (11th Cir. 2005).[18] Nevertheless, this Court has not yet been called on to pick sides in the particular circuit split recognized in *Watts*.

---

[18] *Campbell*, *Faust*, and *Duncan* cannot be reconciled with *Apprendi* v. *New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), *United States* v. *Blakely*, 543 U.S. 220, 125 S. Ct. 738 (2005), and *Booker*. In *Apprendi*, *Blakely*, and *Booker*, the Supreme Court prohibited sentencing courts from punishing defendants except based on facts reflected in

This Court should hold that relevant acquitted conduct that "dramatically increase[s]" a defendant's sentence, as here, must be found by clear-and-convincing evidence. Upholding the constitutionality of sentences enhanced with relevant acquitted conduct by mere preponderance of the evidence in the mine run of cases is exceptionally controversial, as demonstrated by numerous concurrences and dissents.[19] These concerns are magnified whenever relevant acquitted conduct might wag the dog of the substantive offense or dramatically increase the sentence. As such, the sounder rule under *McMillan* and *Watts* is at least to re-

---

the jury verdict or admitted by the defendant. In contrast, *Campbell*, *Faust*, and *Duncan* permit sentencing courts to punish defendants based on facts they did not admit and of which they were acquitted.

[19] *E.g.*, *Faust*, 456 F.3d at 1349 (11th Cir. 2006) (Barkett, J., concurring) (its "most pernicious effect" is "its implicit and often hopeless demand that, in order to avoid punishment for charged conduct, criminal defendants must prove their innocence under two drastically different standards at once"); *see also United States* v. *Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., dissenting) (it is "uniquely malevolent" and "violates [defendants'] due process right to notice and usurps the jury's Sixth Amendment fact-finding role"); *United States* v. *Grier*, 475 F.3d 556, 574 (3d Cir. 2007) (Ambro, J., concurring) (it is "a shadow criminal code" in which defendants "receive[] few of the trial protections mandated by the Constitution"); *United States* v. *Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting) (it "diminishes the jury's role and dramatically undermines the protections enshrined in the Sixth Amendment").

quire that relevant acquitted conduct to be proved by clear-and-convincing evidence.

Here, it dramatically increased Cavallo's punishment when the District Court included his relevant acquitted conduct by mere preponderance of the evidence. As such, this Court must vacate and remand for resentencing in light of the proper evidentiary standard: clear-and-convincing evidence.

3. The District Court Incorrectly Included 1516 Ridgewood Lane And 927 Contento Drive In Its Loss Calculation

In calculating Cavallo's loss, the District Court incorrectly included 1516 Ridgewood Lane and 927 Contento Drive. This mistake caused the District Court to enhance Cavallo's offender score by 20 levels instead of 18.

No trial testimony, PSR statements, or sentencing testimony connected Cavallo to 1516 Ridgewood Lane and 927 Contento Drive other than improper guilt by association. *Cf. United States* v. *Kelly*, 888 F.2d 732, 740 (11th Cir. 1989) ("mere association cannot sustain a conspiracy conviction"). As to 1516 Ridgewood Lane, no trial testimony connects Cavallo. Rather, it was a deal between Adams and the Berghorns. As to

927 Contento Drive, the trial testimony merely showed that Cavallo collected rents in partnership with Bobka, not that Cavallo was in cahoots with Adams and Bobka on that particular manipulation. *See* DE1103 at 74-75; DE1105 at 58, 91, 93; DE1108 at 102.

The Government's sentencing memorandum argues 1516 Ridgewood Lane and 927 Contento Drive were properly included in Cavallo's loss calculation because Cavallo was in partnership with Bobka and Adams on those deals. DE737 at 6 & n.2. But the Government misconceives the nature of Cavallo's involvement. The trial testimony does not show what the Government asserts; rather, it merely shows Cavallo was involved with rent collection. Moreover, the Government made no contrary evidentiary showing at sentencing. "A sentencing court may not speculate on the extent of a defendant's involvement in a conspiracy; instead, such a finding must be supported by a preponderance of the evidence, just as any other factfinding during sentencing." *United States* v. *Adams*, 1 F.3d 1566, 1581 (11th Cir. 1993).

The inclusion of 1516 Ridgewood Lane and 927 Contento Drive had significant implications for Cavallo's loss calculation. Those properties just barely nudged Cavallo over U.S.S.G. §2B1.1(b)(1)'s critical $7

million threshold and caused Cavallo to receive a 20-level enhancement instead of an 18-level enhancement. Had the District Court correctly calculated Cavallo's loss without these properties, his ultimate offender score and guidelines range would have been 32 (121-151 months) instead of 34 (151-188 months). Remand is necessary to correct this miscalculation.

4. The District Court Used A Flawed Loss-Calculation Methodology

The District Court's methodology for calculating Cavallo's loss was flawed.

As a threshold matter, the PSR does not explain whether it intended to calculate Cavallo's loss based on actual loss, intended loss, or gain. *See* PSR ¶ 214. Nor did the District Court explain Probation's omission at sentencing and adopt one loss methodology or the other.

Nevertheless, it appears the District Court's methodology did not rely on intended loss. That is because the charged mortgage fraud scheme intended that the banks would suffer no "pecuniary harm." Instead, the scheme envisioned that real estate values would continue to increase and that the banks would have their mortgages paid off. As such, no "pecuniary harm" was "intended to result from the offense."

U.S.S.G. § 2B1.1(b)(1) cmt. 3(A)(ii). If anything, the "intended loss[es]" envisioned by this scheme were at most the additional loan values that were obtained from the banks by each manipulation of loan application forms and HUDs less the value of the collateral, not the entire principal loan balances themselves less the collateral. Had the District Court relied on intended loss, therefore, its loss calculation for Cavallo would have approximated $0.

Nor did the District Court appear to use gain as a substitute for intended loss or actual loss. In reality, Cavallo gained very little from his involvement with Bobka. *See* PSR ¶ 278 (summarizing Cavallo's meager finances and assets). Once again, had the District Court relied on gain, its loss calculation would have approached $0.

That leaves actual loss as the only remaining possible methodology. But the District Court miscalculated actual loss when it simply subtracted fair market value at the time of sentencing from the loans' original principal values,[20] because Cavallo never "knew or, under the circumstances, reasonably should have known" that the Great Recession's

[20] It is not clear from the PSR whether, and if so why, Probation utilized the loans' original principal values instead of loan values after the principal had been paid down.

collapse in real estate values "was a potential result of the offense." U.S.S.G. § 2B1.1(b)(1) cmt. 3(A)(iv).

As an initial matter, Cavallo withdrew from the conspiracy when he left Sarasota, turned over all records to his father, and declared bankruptcy in August 2007. Although "mere cessation of activity is not sufficient to establish withdrawal," nevertheless a "conspirator may avoid further liability for his actions if he affirmatively and completely disassociates himself from the continued operation of the conspiracy." *Morton's Mkt., Inc.* v. *Gustafson's Dairy, Inc.*, 198 F.3d 823, 838 (11th Cir. 1999) (citation omitted). Moreover, in calculating loss, a "conspiracy participant is obligated for the acts of his or her coconspirators until the conspiracy accomplishes its goals or that conspirator withdraws." *United States* v. *Brewer*, 983 F.2d 181, 185 (10th Cir. 1993). For those reasons, Probation therefore should have calculated Cavallo's loss at the time of his withdrawal in August 2007. Had Probation calculated loss based on August 2007 property values, Cavallo's loss would have been quite a bit less. DE716-3 at 1-12.

Moreover, even if Cavallo had a crystal ball to divine the future and "reasonably should have known"—unlike the vast majority of pro-

fessional investors—that the Great Recession would ensue, the PSR leaves much to be desired because it leaves undefined too many variables. When were the loans' principal balances measured? When was fair market value or sale price measured? Who were the victims and what were their actual losses?

This last question is perhaps most important, as illustrated by *United States* v. *James*, 592 F.3d 1109 (10th Cir. 2010). In *James*, the Tenth Circuit held actual loss in mortgage fraud cases cannot be calculated by simply subtracting fair market value or foreclosure sales price from original loan values where the original lenders sold the mortgages to subsequent lenders. *Id.* at 1115. Instead, actual loss to the original lenders is the original loan value minus the sales price to the subsequent lender, whereas actual loss to the subsequent lenders is that sales price minus the ultimate fair market value or foreclosure sales price. *Id.* Needless to say, the District Court made no finding of fact whether Cavallo "knew or, under the circumstances, reasonably should have known" about potential losses to subsequent lenders. U.S.S.G. § 2B1.1(b)(1) cmt. 3(A)(iv).

C. Cavallo's Sentences Far Exceed Those Of Equally Or More Culpable Co-Defendants And Related Defendants, Contrary To 18 U.S.C. § 3553(a)(6)

Cavallo's 5- and 10-year sentences are also substantively unreasonable because they far exceed those of equally or more culpable co-defendants and related defendants, contrary to 18 U.S.C. § 3553(a)(6).

At sentencing, district courts "shall consider" the "need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). A sentence is "substantively unreasonable if it does 'not achieve the purposes of sentencing stated in § 3553(a).'" *United States* v. *Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008) (quoting *United States* v. *Martin*, 455 F.3d 1227, 1237 (11th Cir. 2006)).

For several years, this Court has recognized a circuit split "whether section 3553(a)(6) permits consideration of sentence disparity among codefendants." *United States* v. *Neufeld*, 223 Fed. App'x 887, 889 (11th Cir. 2007). To wit, the Seventh Circuit held "the § 3553(a) concern with sentence disparity is not one that focuses on differences among defendants in an individual case, but rather is concerned with unjustified difference across judges or districts." *United States* v. *Pisman*, 443 F.3d

912, 916 (7th Cir. 2006). In contrast, however, the Eighth Circuit held a district court did not abuse its discretion "in fashioning a sentence that attempted to address the disparity in sentences between two nearly identically situated individuals who committed the same crime in the same conspiracy." *United States* v. *Krutsinger*, 449 F.3d 827, 830 (8th Cir. 2006).

The closest this Court has come to weighing in on this circuit split regarding § 3553(a)(6) was when it held it was "hard-pressed to find that imposing a longer sentence on [the defendant], when compared to his co-conspirators, was unreasonable." *United States* v. *Thomas*, 446 F.3d 1348, 1357 (11th Cir. 2006). But *Thomas* turned on specific facts in which the defendant "*alone* coordinated the robbery": unlike his coconspirators, the defendant "determin[ed] the [crime's] manner" and "level of violence," "recruit[ed]" others, and "obtain[ed] four firearms." *Id.* (emphasis in original). For those reasons, "it was well within the bounds of reasonableness for the district court to find that [the defendant] was an organizer or leader of the conspiracy to obstruct commerce by robbery, and therefore to impose a lengthier sentence on him than on the others." *Id.* Accordingly, *Thomas* was much like the Fifth Circuit's fact-

bound decision in *United States* v. *Candia*, in which the defendant did not argue or prove "he is similarly situated to the two co-defendants." 454 F.3d 468, 476 (5th Cir. 2006). Importantly, decisions like *Thomas* and *Candia* are inapposite to this circuit split because they turn on the minor premise (whether defendants are similarly situated) rather than the major premise (whether § 3553(a)(6) permits consideration of sentence disparity among similarly situated codefendants).

The better rule is that § 3553(a)(6) requires district courts to avoid disparities both at the national level and in particular cases among co-defendants and related defendants, so long as the defendants truly are similarly situated. Cavallo and Hornberger could hardly be more similarly situated. They were husband and wife and had virtually identical Guidelines scores. And it was actually Hornberger who took out more loans in her name. DE965 at 10. Yet their conspiracy sentences varied by 4 years, and their false-statement sentences varied by 9 years.

Similarly, Cavallo's sentences varied a great deal from other co-defendants and related defendants. Virtually every other co-defendant and related defendant who pled guilty received sentences of 1 year and 1 day, time served, or probation. The only exceptions were the two de-

fendants at the top of the pyramid: Adams (3 years) and Bobka (15 years). And most if not all of those defendants were equally or more culpable, such as Rotolo, Katz, Whitehead, and Bangasser. The only other difference between Cavallo and these defendants is that he went to trial. But at sentencing, a "defendant cannot be punished simply for exercising his constitutional right to stand trial." *Frank* v. *Blackburn*, 646 F.2d 873, 882 (5th Cir. 1980).

The District Court therefore violated § 3553(a)(6)'s prohibition against disparate sentences when it sentenced Cavallo to 10 years and virtually every other defendant, including Hornberger, to 1 year and 1 day or less. It follows, then, that Cavallo's sentence is substantively unreasonable.

Since *Booker*, this Court has vacated sentences as substantively unreasonable on several occasions. *United States* v. *McQueen*, 2013 U.S. App. LEXIS 17581, at *43 (11th Cir.) (12 months and 1 month for conspiracy against civil rights and obstruction of justice); *United States* v. *Kuhlman*, 711 F.3d 1321, 1330 (11th Cir. 2013) (time served for $3 million fraud); *United States* v. *Irey*, 612 F.3d 1160, 1225 (11th Cir. 2010) (en banc) (17-1/2-year sentence for sexual crimes); *United States*

v. *Livesay*, 587 F.3d 1274, 1278-79 (11th Cir. 2009) (probation for billion-dollar fraud scheme); *Pugh*, 515 F.3d at 1188-94 (probation for child pornography); *United States* v. *Martin*, 455 F.3d 1227, 1238-39 (11th Cir. 2006) (7-day sentence for billion-dollar securities fraud); *United States* v. *Crisp*, 454 F.3d 1285, 1290 (11th Cir. 2006) (5 hours' imprisonment for bank fraud). The Court should do the same here and hold Cavallo's 5- and 10-year sentences are substantively unreasonable.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING TO INVESTIGATE GRAND JURY MISCONDUCT

It was an abuse of discretion when the District Court failed to investigate grand jury misconduct at an evidentiary hearing.[21]

A. Perjury Constitutes Grand Jury Misconduct

Ordinarily, "the possibility that a witness may have given false testimony before the grand jury does not automatically vitiate an indictment based on that testimony; to dismiss an indictment the district

[21] Reputations are important. In this regard, Cavallo wishes to emphasize two points. First, the AUSA who conducted the grand jury proceedings is different from the AUSAs who litigated the trial and the AUSA who is defending this appeal. Second, throughout his appellant's brief, Cavallo has deliberately avoided referring to the grand jury AUSA and FBI agent by name. No matter how Cavallo's argument regarding grand jury misconduct is resolved, this Court should extend to the grand jury AUSA and FBI agent the same courtesy.

court must also find an abuse of the grand jury process such as perjury or government misconduct." *United States* v. *Garate-Vergara*, 942 F.2d 1543, 1550 (11th Cir. 1991) (quoting *United States v. DiBernardo*, 775 F.2d 1470, 1475 (11th Cir. 1985)). As such, even where a witness's "grand jury statement was false," dismissal of an indictment is not warranted where "it was neither intentionally false nor sufficiently prejudicial." *Garate-Vergara*, 942 F.2d at 1550.

B. Hornberger's Testimony Demonstrated That The FBI Agent's Grand Jury Testimony Was Not Merely False, But Likely Perjurious

After Hornberger testified extensively about the great number of falsified documents and forged signatures present throughout this document-intensive case (DE1150 at 235, 243-67; DE1153 at 9-109, 118-47, 153-76, 185-88, 192-201, 203; DE1175 at 27-31, 54; DE1178 at 216-17), Cavallo renewed his motion to dismiss the indictment for grand jury misconduct (DE348). The District Court denied that motion without further investigating Cavallo's allegation of grand jury misconduct. But Hornberger's document-intensive testimony demonstrated that the FBI agent's grand jury was more than just false; it was likely perjurious.

The sworn question and answer reveals this. The grand juror's question asks whether the Government verified Cavallo's signatures "in each count of the indictment." It then provides a concrete example for its general question: "in Count Thirty-Seven." The FBI agent's response to the grand juror's question, however, was false. Specifically, the FBI agent responded "yes, sir, we've done that, either through interviews of people" or "the total information that we have from witnesses about who the parties were involved, who was at the closing, what was observed and seen in terms of signing."

This false testimony "'substantially influenced the grand jury's decision to indict'" and created "'grave doubt' that the decision to indict was free from the substantial influence of" perjury. *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 256, 108 S. Ct. 2369, 2374 (1988). The grand juror asked the FBI agent to provide comfort that the Government had performed its due diligence with respect to each count of the indictment. In providing this comfort, the FBI agent testified falsely that it had. But there were an extraordinary number of false and forged documents, as Hornberger's testimony revealed. This false testimony prevented the grand jury from performing its critical function of ensur-

ing "symmetry between grand jury and petit jury factfinding," WAYNE LAFAVE, CRIMINAL PROCEDURE § 19.3(a) at 253 (3d ed. 2007), such that "grand and petit juries form a 'strong and two-fold barrier between the liberties of the people and the prerogative of the government.'" *Harris* v. *United States*, 536 U.S. 545, 564, 122 S. Ct. 2406, 2418 (2002).

C. Ordinarily, This Court Remands Possible Perjury Questions For District Courts To Investigate In The First Instance

Ordinarily, this Court remands questions regarding possible perjury to district courts; after all, a "district court, after an inquiry into the question, [is] in the best position to determine whether [a] grand jury statement was perjurious." *Garate-Vergara*, 942 F.2d at 1550. Importantly, this is not a situation in which the District Court, on remand, would look only to the same cold record currently before this Court. Rather, the District Court heard all the trial testimony and would be in the best position, after holding an evidentiary hearing, to determine whether the FBI agent committed perjury. Accordingly, remand for further proceedings, including evidentiary hearings, is appropriate.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FAILED TO HOLD AN EVIDENTIARY HEARING TO INVESTIGATE ATTEMPTED WITNESS INTIMIDATION

It was an abuse of discretion when the District Court failed to hold an evidentiary hearing regarding attempted witness intimidation.

A. District Courts Must Hold Evidentiary Hearings To Ascertain The Impact Of Attempted Witness Intimidation On The Fairness Of The Proceedings

When there is an allegation of attempted witness intimidation, district courts must hold evidentiary hearings to ascertain its impact on the fairness of the proceedings.

"'[S]ubstantial [government] interference with a defense witness' free and unhampered choice to testify violates due process rights of the defendant. If such a due process violation occurs, the court must reverse without regard to prejudice to the defendants.'" *United States* v. *Schlei*, 122 F.3d 944, 991 (11th Cir. 1997) (citations omitted). Indeed, witness intimidation claims are not subject to harmless error analysis because such a "due process violation will almost always be harmful, and it will be very difficult for a court to determine when it is not." *United States* v. *Hammond*, 598 F.2d 1008, 1013 (5th Cir. 1979).

When defense witnesses nevertheless testify despite “attempted intimidation” by the Government, “an evidentiary hearing is required to ascertain the impact, if any, of the Government’s alleged misconduct on the fairness of the proceedings.” *Schlei*, 122 F.3d at 992-93. Absent such a hearing, this Court must remand for the district court to hold one. *See id.* at 993.

B. This Court Must Remand For The District Court To Hold Such An Evidentiary Hearing

Remand is necessary for the District Court to hold an evidentiary hearing to ascertain the attempted witness intimidation’s impact on the fairness of the proceedings.

Here, the FBI visited Mr. Coleman and Ms. Healy the morning before they were scheduled to testify and warned them that they “didn't have to speak to the defense,” “didn't have to testify,” “had criminal exposure,” and “could be prosecuted.” DE1121 at 7-8. Per *Schlei*, this was “attempted intimidation.” 122 F.3d at 992. Accordingly, this Court must remand for the District Court to hold an evidentiary hearing to “ascertain the impact” on the “fairness of the proceedings.” *Id.* at 993.

V. THE DISTRICT COURT COMMITTED A STRUCTURAL ERROR WHEN ITS REPEATED SIDEBARS DENIED CAVALLO OF THE RIGHT TO A PUBLIC TRIAL

A structural error is one that so fundamentally affects the structure of judicial proceedings that it requires automatic reversal. The District Court's practice of repeatedly holding sidebars outside the defendants' and public's presence was a structural error that denied Cavallo's right to a public trial. This error requires automatic reversal.

A. Structural Errors Require Automatic Reversal

Structural errors, as opposed to mere trial errors, require automatic reversal without regard to harmless error analysis.

Structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Arizona* v. *Fulminante*, 499 U.S. 279, 310, 111 S. Ct. 1246, 1265 (1991). As such, structural errors are not subject to harmless error analysis. *See id.* at 309, 111 S. Ct. at 1265. Rather, they require automatic reversal. *Judd* v. *Haley*, 250 F.3d 1308, 1315 (11th Cir. 2001).

B. Denial Of The Sixth Amendment Right To A Public Trial Is A Structural Error

The denial of the Sixth Amendment's public trial right is one example of a structural error.

Structural errors exist "only in a very limited class of cases." *Johnson* v. *United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 1549-50 (1997) (citations omitted). One such class is the Sixth Amendment guarantee of a public trial. *Waller* v. *Georgia*, 467 U.S. 39, 44-49, 104 S. Ct. 2210, 2214-17 (1984); *accord Judd*, 250 F.3d at 1314-15. Specifically, the Public Trial Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI.

Accordingly, "once a petitioner demonstrates a violation of his Sixth Amendment right to a public trial, he need not show that the violation prejudiced him in any way." *Judd*, 250 F.3d at 1315. Rather, the "mere demonstration that his right to a public trial was violated entitles a petitioner to relief." *Id.*

C. The District Court's Sidebar Practice Was A Structural Error That Deprived Cavallo Of His Sixth Amendment Right To A Public Trial And Requires Automatic Reversal

The District Court violated Cavallo's Sixth Amendment public trial right by repeatedly holding sidebars, over objection, outside his and the public's presence.

Ordinarily, "[s]idebar conferences in which the defendant's counsel participates without objection do not violate the right to a public trial." *Rovinsky* v. *McKaskle*, 722 F.2d 197, 201 (5th Cir. 1984) (citing *Steiner* v. *United States*, 134 F.2d 931 (5th Cir.1943)). That is because a defendant is "in no wise prejudiced" when "[n]either he nor his counsel complained or made objection at any time to the practice." *Steiner*, 134 F.2d at 935.

Here, however, Cavallo did object to the District Court's unnecessary sidebar practice. Cavallo and the public were therefore denied the public trial right to contemporaneously listen to evidentiary objections, hear legal argument, and learn about developments with the jury. And the District Court exacerbated this problem by holding sidebars even when the jury was not present. Accordingly, Cavallo's Sixth Amendment public trial right was violated, and this Court must automatically reverse.

CONCLUSION

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

October 21, 2013

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 George Cavallo

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 13,987 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.

October 21, 2013

/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 regular mail on this 21st day of October, 2013, to:

John Ley, 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 regular mail on this 21st day of October, 2013, to:

U.S. Attorney's Office

AUSA Linda Julin McNamara
U.S. ATTORNEY'S OFFICE
400 N. Tampa Street, Ste. 3200
Tampa, FL 33602-4798

Counsel for Joel Streinz

Fritz J. Scheller
FRITZ SCHELLER P.L.
200 E. Robinson Street, Ste. 1150
Orlando, FL 32801

Counsel for Paula Hornberger

Stephen V. Iglesias
LAW OFFICE OF STEPHEN V. IGLESIAS, P.A.
P.O. Box 172658
Tampa, FL 33672-2658

October 21, 2013

/s/ Thomas Burns
Thomas A. Burns