IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No.: 13-5931

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JEFFREY WHALEY
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE FROM THE
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

INITIAL BRIEF ON APPEAL ON BEHALF OF DEFENDANT-APPELLANT

Patrick Michael Megaro, Esq.
BROWNSTONE, P.A.
Florida Bar No. 738913
201 North New York Avenue, Suite 200
Winter Park, Florida 32789
Telephone: 407.388.1900
Facsimile: 407.622.1511
Email: Patrick@brownstonelaw.com
Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

The Circuit Court of Appeals

Constitutional Provisions

Statutes

Rules

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure Rule 34(a), Defendant-Appellant respectfully requests oral argument because the Court's consideration of the issues presented by this appeal may be assisted or advanced by the presence of counsel before the Court to comment upon the issues and respond to inquiries from the Court.

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment of conviction and sentence entered in the United States District Court for the Eastern District of Tennessee on July 1, 2013. (R. 223 Judgment in a Criminal Case, PageID# 4435-4441). An Indictment was filed against Defendant-Appellant in the District Court, charging him with various Federal offenses, conferring jurisdiction upon the District Court pursuant to 18 U.S.C. §§ 3231, 3232. A timely notice of appeal was filed on July 5, 2013. (R. 224, Notice of Appeal, Page ID# 4442). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Defendant-Appellant's fundamental Due Process right to present a defense was violated where the District Court precluded him from introducing evidence that tended to prove he was innocent of the crimes charged;

2. Whether the evidence presented by the Government was sufficient to establish each element of the charged crimes where the Government introduced no evidence that proved or tended to prove Defendant-Appellant intended to defraud any financial institutions or any individual;

3. Whether the admission of inaccurate and misleading summary charts and lay opinion testimony was erroneous and prejudicial.

STATEMENT OF THE CASE

Defendant-Appellant Jeffrey Whaley and co-defendant Jerry D. Kerley were charged in a Fifth Superseding Indictment with various offenses: Count # 1, Conspiracy to Commit Wire Fraud Affecting a Financial Institution and Bank Fraud (18 U.S.C. § 1349), Counts # 2-9, Wire Fraud Affecting a Financial Institution (18 U.S.C. §§ 1343, 1349), Counts # 10-11, Bank Fraud (18 U.S.C. §§ 1344, 1349), Counts # 12-17, Bank Fraud (18 U.S.C. §§ 1344, 1349), Counts # 18-19, False Statement to a Financial Institution (18 U.S.C. § 1014); Counts # 20-22, Money Laundering (18 U.S.C. § 1957). (R. 80, Fifth Superseding Indictment, PageID # 660-702). The counts in the Fifth Superseding Indictment were later merged as follows: Counts # 4-9 as together, and Counts # 12-17 as together. (R. 110, Order Accepting In Whole Report and Recommendations of Magistrate, PageID # 1047-1049).

Defendant-Appellant was found guilty after a jury trial of all counts contained in the Fifth Superseding Indictment – Counts # 1-11, 18-20, 22. (R. 149, Jury Verdict, PageID # 1356-1361). Defendant-Appellant was sentenced on July 1, 2013 to 60 months imprisonment on each count, followed by three years of Supervised Released, and restitution in the amount of $1,901,980.31, and a special assessment of $1,500.00. (R. 223 Judgment in a Criminal Case, PageID# 4435-4441). A timely notice of appeal was filed on July 5, 2013 (R. 224, Notice of Appeal, Page ID# 4442).

STATEMENT OF FACTS

Pre-Trial Motions

Prior to trial, Defendant-Appellant filed several motions with respect to the evidence, two of which are at issue in this appeal. Defendant-Appellant moved for severance, arguing his right to present a defense would be infringed by a joint trial. (R. 53, Motion to Join Motion to Sever, PageID# 358-359). The District Court denied that motion in a written opinion dated August 26, 2011. (R. 69, Memorandum and Order, Page ID# 523-545).

Second, Defendant-Appellant moved in limine to exclude the proposed lay expert testimony of two Government witnesses pursuant to Rules 701 and 702 of the Federal Rules of Evidence, and Rule 16(a)(1)(G) of the Federal Rules of Criminal Procedure. (R. 75, Motion to Exclude Testimony of Government's

Disclosed Witnesses Kimberly Blankenship and Ronalda Owens, PageID# 606-615, R. 81, Motion to Adopt Motion of Co-Defendant, PageID# 712-713). The District Court denied that motion in a written decision and order on March 19, 2012, finding that the proposed testimony was admissible lay opinion testimony. (R. 94, Memorandum and Order, PageID# 820-840).

The Trial

The Government's Case

Trial commenced before a jury on May 2, 2012 with opening statements by the Government. (R. 178, Transcripts, PageID# 3419-3533). After opening statements by the defense on May 3, 2012, the Government's case commenced.

SPECIAL AGENT JOELLE OLSZEWSKI of the Federal Bureau of Investigation identified several photographs of several cabins that were at issue in the case, including 1230 Bird Nest Way, 1437 Eagle Cloud Way, 1515 Firefly Trail Way, 1518 Firefly Trail Way, 1234 Bird Nest Way, 1016 Black Bear Cub Way, 1531 Trappers Ridge Way, 954 Black Bear Cub Way, 3515 Peggy Lane, all located in Sevierville, Tennessee. (R. 164, Transcript, PageID# 1463-1471).

MICHELLE TRENTHAM, an employee of Tennessee State Bank, authenticated several bank records, which were introduced into evidence by the Government. (R. 164, Transcript, PageID# 1472-1474). These records included account information for Defendant-Appellant and Patricia Huskey regarding a

business account for GBO Enterprises, LLC, records of deposits and checks issued from that account. (R. 164, Transcript, PageID# 1475-1523). On cross-examination, Trentham testified that several checks deposited into that account bore a notation "for Regency loan" or simply "loan." (R. 164, Transcript, PageID# 153-1539).

Trentham further testified that she was not employed by Tennessee State Bank during time any of the subject transactions and account activity took place. (R. 164, Transcript, PageID# 1544).

KENNETH LEE, a cooperating witness, testified next for the Government. Lee entered into a cooperation agreement with the Government in November 2010, and entered guilty pleas to money laundering and wire fraud charges with the understanding he would receive consideration for his testimony against Defendant-Appellant and the co-defendant in the form of a reduced sentence. (R. 164, Transcript, PageID# 1552-1554). Lee testified that his history in business included lies and deceit. (R. 165, Transcript, PageID# 1705). Lee formed a company in 2004, Quality Quest, in which he attempted to find straw buyers for real estate purchases. (R. 165, Transcript, PageID# 1706). This scheme failed to work out for Lee, and he and Quality Quest got into financial trouble to the point that banks refused to lend either any money to continue operations. (R. 165, Transcript, PageID# 1706). Because his name was sullied, Lee formed a new

company, Regency Development, and made Ed Smith the owner of the company on paper to conceal his ownership interest. (R. 165, Transcript, PageID# 1706-1707). Lee then continued his scheme of finding straw buyers to purchase real estate, this time using Regency Development to further his plans. (R. 165, Transcript, PageID# 1707-1708). Lee instructed these straw buyers to complete loan applications using false information. (R. 165, Transcript, PageID# 1707-1708).

Lee testified that in December 2004, he began borrowing money from Defendant-Appellant and others to finish some houses he had under construction, and that by August 2005, he was "a financial mess," borrowing money every day to keep his company alive. (R. 164, Transcript, PageID# 1554). He had already borrowed approximately $1 million from Defendant-Appellant, and owed money to a company called 21st Mortgage. (R. 164, Transcript, PageID# 1554-1557). Lee claimed that Defendant-Appellant's idea for repayment on the loans was the purchase and re-sale of cabins at the Black Bear Ride Resort that were undervalued, and use the excess equity for repayment for the money owed. (R. 164, Transcript, PageID# 1557-1559).

Lee recruited his friends, family members, and employees who had good credit, most of whom were former investors in Lee's Quality Quest and 21st Mortgage deals, to make the purchases in exchange for an up-front payment to be

made by Lee using the lending institution's funds, and a percentage of the profits when the cabins were resold. (R. 164, Transcript, PageID# 1559, R. 165, Transcript, 1753-1754). Lee promised each investor that the cabins would generate sufficient rent to pay the costs of maintenance and the mortgages on the property, and personally guaranteed the monthly mortgage payments if the rental income was not enough to cover the mortgage. (R. 164, Transcript, PageID# 1559-1561, R. 165, Transcript, PageID# 1719-1733). Lee admitted that in pitching his idea to his investors, Billy Barger, Darlene Barger, Ed Walker, Cecil Ormond, Barbara Steele, Billy Neely, and Katherine Van Allen (Lee's 81-year old grandmother), Rodney Parton, and William Haskett, he followed the same pattern of promises. (R. 165, Transcript, PageID# 1719-1733). Lee testified that each of the investors trusted him, and had made money with him in previous deals with Quality Quest. (R. 165, Transcript, PageID# 1719-1733).

Lee reneged on each promise, not paying the people as agreed, failing to cover the mortgage payments, and instead of receiving a percentage of the profits from a resale, he watched the properties go into foreclosure. (R. 165, Transcript, PageID# 1719-1733). Lee, however, profited approximately $1 million from these deals. (R. 165, Transcript, PageID# 1719-1733). Lee admitted that he even lied to his pastor about these real estate transactions, denying any involvement or

wrongdoing in these transactions when asked. (R. 165, Transcript, PageID# 1736-1738).

Lee reviewed the real estate contracts for the various properties which he received from a real estate agent; Lee then passed along the signed contracts to Mary Bevins at Gateway Mortgage; after the loan was approved by Gateway Mortgage, the HUD-1 settlement statements were sent to Lee for his final review prior to the closings. (R. 164, Transcript, PageID# 1565, 1580, 1596, R. 165, Transcript, PageID# 1658, 1663, 1740-1741). Lee testified that the closings took place at Guaranty Land Title, owned by the co-defendant. (R. 164, Transcript, PageID# 1577).

The borrowers did not provide the down payments for the real estate from their own funds; rather, the down payments were provided by Lee, and according to his testimony, by Defendant-Appellant and the co-defendant. (R. 164, Transcript, PageID# 1566, 1574). Lee testified that because of the financial mess he created with his Quality Quest deals, he was deemed not "bankable" and was unable to use his own name or bank account to draft checks because he had bounced so many checks in the past; as a result, he used GBO and Defendant-Appellant's account as his own. (R. 165, Transcript, PageID# 1742-1743).

On November 16, 2010, Lee met with agents from the FBI with respect to the allegations of mortgage fraud in the instant case. (R. 165, Transcript, PageID#

1708). During that meeting, he told the FBI agents that he did not believe it was illegal to fund the down-payments on the property purchases using the loan disbursement funds, and that he did not find out it was fraudulent until approximately two weeks prior to that interview. (R. 165, Transcript, PageID# 1708). Lee testified that in spite of his guilty pleas, he did not have the intent to defraud anyone through his involvement in the transactions at issue in the case. (R. 165, Transcript, PageID# 1710).

Significantly, Lee also testified that in December 2005 and again in March 2006, he told Defendant-Appellant that he had talked with his attorneys about the loans and the way the down-payments were being handled, and conducted his own research, both of which indicated that the manner in which they were conducting these deals were legitimate and legal, and so advised Defendant-Appellant. (R. 165, Transcript, PageID# 1747).

EDDIE SMITH, a former employee of Tennessee State Bank, testified that Defendant-Appellant was a regular customer of the bank in 2005. (R. 165, Transcript, PageID# 1765-1766). He identified checks issued from GBO's account at Defendant-Appellant's request, which were introduced into evidence by the Government. (R. 165, Transcript, PageID# 1768-1770).

MELANIE ROGERS, a former employee of Tennessee State Bank, testified that in 2005 Defendant-Appellant was a regular customer in the bank, and that she

regularly drew cashier's checks from the GBO account at his request. (R. 165, Transcript, PageID# 1778-1783). She also identified a check introduced into evidence by the Government as being drawn on Defendant-Appellant's GBO account. (R. 165, Transcript, PageID# 1779-1780).

LAURA HENRY, an employee of Tennessee State Bank, testified that in 2005 she also dealt with Defendant-Appellant, a regular customer. (R. 165, Transcript, PageID# 1785-1786). She identified several checking account transactions by Defendant-Appellant through the GBO account. (R. 165, Transcript, PageID# 1786-1788).

SHERRY COLE, an employee of Tennessee State Bank, testified in 2005 she also prepared cashier's checks for the Defendant-Appellant with funds withdrawn from the GBO Enterprises account. (R. 165, Transcript, PageID# 1794). She identified a cashier's check introduced into evidence by the Government as being drawn on Defendant-Appellant's GBO account. (R. 165, Transcript, PageID# 1796). The same day she prepared this cashier's check, Ed Walker endorsed a $92,000 check from Guaranty Land Title for deposit into the GBO Enterprises account. (R. 165, Transcript, PageID# 1801).

PATRICIA HUSKEY, an employee of Pigeon Forge Cabins & Resorts and Angel View Wedding Chapel, testified she knew Defendant-Appellant since 1991 and had been employed by him at several different businesses including GBO

Enterprises. (R. 165, Transcript, PageID# 1803-1804). Huskey and her sister purchased a lot at Black Bear Ridge Resort that was developed by the Defendant-Appellant. (R. 165, Transcript, PageID# 1805). They borrowed $315,000 from the bank to purchase the lot and build a cabin, which was built by GBO. (R. 165, Transcript, PageID# 1809, 1812). To pay the mortgage they rented the cabin through a rental management company that her sister was employed by and owned by Joyce Whaley. (R. 165, Transcript, PageID# 1810). If the cabin rental did not cover the mortgage, Joyce Whaley and Defendant-Appellant would pay the difference based on an agreement that when the property sold the profit would be split between Huskey, her sister, Defendant-Appellant and Joyce Whaley. (R. 165, Transcript, PageID# 1811, 1813).

When the property sold, the settlement statement had entries of $72,000 and $5,701.88 to GBO Enterprises and $98,000 in cash to seller. (R. 165, Transcript, PageID# 1817, 1827). Huskey testified she did not know what the $72,000 entry to GBO was for, but assumed it was for numerous pool repairs made to the property by GBO Enterprises. (R. 165, Transcript, PageID# 1817-1819). The loan on the property was paid off and the $98,000 profit was split four ways. (R. 165, Transcript, PageID# 1826-1827).

Huskey also testified when she was a bookkeeper for GBO enterprises, she did not remember if the Defendant-Appellant was depositing checks payable to

himself in to the GBO account, but there were times when the GBO account was charged for insufficient funds. (R. 165, Transcript, PageID# 1818, 1822). Her memory of the insufficient fund charges were from Kenneth Lee's loan repayment checks bouncing. (R. 165, Transcript, PageID# 1824-1825). Defendant-Appellant had loaned Lee large amounts of money, which was documented in a special ledger in QuickBooks. (R. 165, Transcript, PageID# 1824-1825).

LINDA WEAVER, Vice President of SunTrust Bank, testified throughout 2005 and 2006 the deposits, not the mortgages, of SunTrust Bank were insured by the Federal Deposit Insurance Corporation. (R. 166, Transcript, PageID# 1836-1837).

MARY BEVINS, a cooperating witness, entered into a cooperation agreement with the Government, and entered a guilty plea in exchange for her testimony against Defendant-Appellant and the co-defendant with the understanding she would receive consideration for her testimony in the form of a reduced sentence. (R. 166, Transcript, PageID# 1893, 1895, 1903). Bevins was a former employee of Gateway Mortgage, and testified that the owner of Gateway Mortgage, John Brown, directed her to inflate the income on the Stated Income/Stated Asset loans and conceal the inflated income from Citizens and SunTrust banks. (R. 166, Transcript, PageID# 1839).

Joyce Whaley and Defendant-Appellant would refer prospective borrowers to Gateway Mortgage. (R. 166, Transcript, PageID# 1839-1840). One of the Defendant-Appellant's referrals was Kenneth Lee. (R. 166, Transcript, PageID# 1839-1840). Bevins understood Lee would be paying all costs to buy homes to rent, and later re-sell. (R. 166, Transcript, PageID# 1841). Bevins testified that she and her supervisor, John Brown, met with Kenneth Lee, Rodney Parton and John Lee on several occasions and that Kenneth Lee specifically requested no documentation or stated income/stated asset loans for the prospective borrowers he referred. (R. 166, Transcript, PageID# 1892). Defendant-Appellant was not present during any of those meetings. (R. 166, Transcript, PageID# 1870).

Bevins further testified she had lied on the loan applications of the eight prospective borrowers Lee had referred to her by inflating their income and stating they would be bringing a loan-free down payment to the closing when she knew they would not. (R. 166, Transcript, PageID# 1842-1864).

She estimated from November 2005 through March 2006, she submitted 20-25 Stated Income/Stated Asset loan applications, all of which contained false information. (R. 166, Transcript, PageID# 1872-1873). Bevins further testified the reason she used the Stated Income/Stated Assets program was because it allowed her to justify the inflated income and assets, which in turn provided her

with 45-50% commissions for each loan the bank approved. (R. 166, Transcript, PageID# 1865, 1870-1872).

BARBARA DEMICHELE, Vice President and Underwriting Manager of SunTrust Mortgage, testified as an Underwriting Manager it was her responsibility to review loan applications and supporting documentation to determine loan approval. (R. 166, Transcript, PageID# 1907-1908). One of the requirements for approval was the down payment must come from borrower's own funds. (R. 166, Transcript, PageID# 1909).

DeMichele testified a Stated Income/Stated Asset loan only required the borrower to state their employment, monthly income, and current assets. (R. 166, Transcript, PageID# 1909). A No Documentation loan was approved strictly based on credit history and did not require any documents, assets or income to be verified. (R. 166, Transcript, PageID# 1910). SunTrust Mortgage had hoped when these borrowers were able to provide documentation for standard underwriting they would come back and refinance their current loans, making them a customer for life. (R. 166, Transcript, PageID# 1911-1912).

The settlement statement provided at closing allows a seller to pay a portion of the buyer's closing cost limited to three percent or actual cost, if actual cost is less than three percent. (R. 166, Transcript, PageID# 1929, 1934). The Master Closing Instructions and Supplemental Closing Instructions require the settlement

agent to notify the lender in the event the instructions are not followed and suspend the closing. (R. 166, Transcript, PageID# 1930-1932). These instructions include material misstatements by borrower, seller, real estate broker, builder, mortgage broker, title insurer, settlement agent or property. (R. 166, Transcript, PageID# 1933).

DeMichele identified four property loan files that indicated the borrowers would provide cash as a down payment. (R. 166, Transcript, PageID# 1937, 1939-1942, 1950, 1958, 1961, 1971, 1980, 1995, 2002, 2009). SunTrust Mortgage relied upon this representation made by the loan applicants that they would provide the cash down payment unless the settlement agent notified them otherwise. (R. 166, Transcript, PageID# 1995, 2009). These same four properties settlement agent was Guaranty Land Title, to which funds were wired to satisfy the loan disbursement. (R. 166, Transcript, PageID# 1937-1938, 1940-1941, 1945, 1950, 1965, 1971, 1981, 1996, 2000, 2002, 2009-2011). DeMichele testified had SunTrust Mortgage been informed a third party was providing the cash down payment and/or the borrowers had no intention of repaying the loan they would not have been approved. (R. 166, Transcript, PageID# 1940, 1959, 1981, 1996, 2010).

The following day, DeMichele's testimony continued, in which she identified two additional properties that stated on their loan application the borrowers would be providing the cash down payment at closing, SunTrust

Mortgage assumed the borrowers had provided the down payment based on lack of notification from the settlement agent, and had SunTrust Mortgage known a third party was providing the cash down payment the loans would not have been approved. (R. 167, Transcript, PageID# 2024, 2031-2032, 2043, 2050, 2060, 2062). Of the six properties' loans DeMichele identified three had been foreclosed on. (R. 167, Transcript, PageID# 2052-2054).

On cross-examination, DeMichele stated prior to being asked to testify in this case she did not have any direct involvement in any of the loans she had testified about on direct. (R. 167, Transcript, PageID# 2066). Furthermore, it was not the responsibility of SunTrust Mortgage to make sure the information on the loan applications was correct, but the responsibility fell on the person taking the application. (R. 167, Transcript, PageID# 2108-2109). Despite the requirement that a SunTrust Underwriter review the Stated Income/Stated Asset and No Documentation loan applications for ability to repay, willingness to repay, and credit history, absolutely nothing on those applications was verified and left to the mere judgment of the Underwriter. (R. 167, Transcript, PageID# 2067, 2070-2072).

PATIA THEISEN, an employee of SunTrust Mortgage, testified she monitors wire transfer details. (R. 167, Transcript, PageID# 2142-2144). She identified 11 wire transfer documents that were conditionally admitted in to

evidence pending testimony of a Sevier County bank representative. (R. 167, Transcript, PageID# 2144-2153).

STEVE BLEDSOE, an employee of SunTrust Mortgage, testified from September 2007 through March 2012 he was a Controller for SunTrust Mortgage, with the job duties of understanding the financial statements of the company. (R. 167, Transcript, PageID# 2157). He identified a collection of SunTrust Mortgage documents with mortgage losses for six properties at issue in this case that he did not personally prepare, but merely reviewed. (R. 167, Transcript, PageID# 2162-2163, 2165-2166, 2168, 2174, 2178). Bledsoe testified if fraud was discovered the mortgage insurance would not cover the mortgage loss and SunTrust Bank, the parent company, would absorb the losses. (R. 167, Transcript, PageID# 2160, 2169, 2171). One of the properties SunTrust Mortgage reported to the investment company, GMAC, there was evidence of a violation of the underwriting policy or origination requirement, which required SunTrust Mortgage to repurchase the loan. (R. 167, Transcript, PageID# 2172-2173). GMAC's requirement that SunTrust Mortgage repurchase this loan based on the appraisal being too low. (R. 167, Transcript, PageID# 2180-2181).

Before Bledsoe began his testimony, trial counsel objected to his testimony as an expert witness, renewing her pre-trial objection. (R. 167, Transcript, PageID# 2155-2156).

TOM MOORE, Director of Financial Reporting for SunTrust Bank, testified that any SunTrust Mortgage losses were absorbed by the parent company, SunTrust Bank, and would reflect in SunTrust Bank's records. (R. 167, Transcript, PageID# 2189-2191).

SHERRY HUSKEY, an employee of Sevier County Registrar of Deeds, identified a Substitute Trustee's deed and a Special Warranty deed for one of the properties at issue in this case. (R. 167, Transcript, PageID# 2193, 2197). The Substitute Trustee's deed reflected that the property had gone into foreclosure and a trustee has been appointed to auction the property. (R. 167, Transcript, PageID# 2194). This property was purchased by Residential Funding Corp for the amount due on the mortgage and re-sold to two individuals under a Special Warranty Deed for half that amount. (R. 167, Transcript, PageID# 2198).

KYLE LUCAS, Senior Litigation Analyst of GMAC Mortgage, LLC, testified to the same Substitute Trustee's deed that GMAC realized loss was $263,873.25 as a result of the foreclosure. (R. 167, Transcript, PageID# 2203).

MARK ROSSER, Vice President and Tennessee state counsel of First American Title Insurance Company, testified that he furnished to the Government information regarding eight real estate transactions related to Guaranty Land Title. (R. 167, Transcript, PageID# 2205-2206). Guaranty Land Title was an agent of First American Title Insurance Company, which sold title insurance. (R. 167,

Transcript, PageID# 2207). Title insurance insures ownership of real estate, and Guaranty Land Title retained 75 percent of the gross premium based on the dollar amount of the transaction, for a total of $7,837.07 from the eight real estate transactions. (R. 167, Transcript, PageID# 2207-2208, 2212).

RODNEY PARTON, a partner with Kenneth Lee of Quality Quest development and KJR Builders, testified he purchased one of the properties at issue in this case for $836,000, and made an agreement with Lee if he was unable to make the mortgage payments Lee would cover the expenses in exchange for a profit share when the cabin re-sold. (R. 167-168, Transcript, PageID# 2225-2226, 2241-2242). However, after approximately eight months Lee no longer made the mortgage payments and the property went into default. (R. 167, Transcript, PageID# 2234).

Lee told Parton to apply for a Stated Income/Stated Asset loan for this property, for which Bevins had purposely listed higher income and assets then Parton had. (R. 168, Transcript, PageID# 2246-2247). Parton was aware of the false information on the loan application and was not being prosecuted. (R. 168, Transcript, PageID# 2264).

Parton then identified Defendant-Appellant as a person who helped him do some surveying on the property when he first purchased it, and Defendant-Appellant told him he would be willing to lend him money if he needed it. (R.

167, Transcript, PageID# 2228). This opened the door for Lee to borrow more money from Defendant-Appellant through Parton. (R. 168, Transcript, PageID# 2250-2251).

Parton testified that Defendant-Appellant was not involved in the closing of his property. (R. 167, Transcript, PageID# 2231-2233). Parton also identified the co-defendant as the property closing agent who accepted the down payment provided to Parton by Lee. (R. 167, Transcript, PageID# 2230, 2232-2233). On the settlement agreement there was an entry to "pay debt to GBO Enterprises for $111,000", but Parton did not know if this was for the construction of the cabin. (R. 168, Transcript, PageID# 2268, 2270).

KIMBERLY MIZER, a Wholesale Account Executive for SunTrust Mortgage in 2005, testified SunTrust Mortgage had a Mortgage Broker Agreement with Gateway Mortgage, and she had answered guideline questions from Mary Bevins about specific products. (R. 168, Transcript, PageID# 2275). Mizer testified she was unaware Bevins had misrepresented income and/or assets on loan applications. (R. 168, Transcript, PageID# 2276-2277).

ROBERT MAPLES, a former employee of Defendant-Appellant, testified he helped build 20 to 30 cabins for Defendant-Appellant over a four to five year period. (R. 168, Transcript, PageID# 2288-2289). At one point, Defendant-Appellant suggested Maples build a cabin, and that the rental should cover the

mortgage until the property sold. (R. 168, Transcript, PageID# 2289-2291). Defendant-Appellant never promised to make the mortgage payments if the rental fees did not cover the loan until re-sale. (R. 168, Transcript, PageID# 2307). Since the market was good, Maples and Alford Thorton applied for and were approved for a property and construction loan. (R. 168, Transcript, PageID# 2292-2293). At the closing, Defendant-Appellant was not involved, but he and his sister were considered silent partners that received a percentage of the profit in return for funding construction cost overruns and keeping the cabin rented until sold. (R. 168, Transcript, PageID# 2291, 2297, 2300, 2308).

During construction of the cabin, Maples and Thorton worked under Defendant-Appellant's contractor's license and used Defendant-Appellant's accounts to purchase building materials and supplies. (R. 168, Transcript, PageID# 2307).

BARBARA STEELE, a former assistant of Kenneth Lee, had previously invested with Lee. (R. 168, Transcript, PageID# 2319). After she became aware some of the investors would not re-coup their investments she met with Lee to help. (R. 168, Transcript, PageID# 2320). Lee told her that if she invested all of the profits from the sale of her and her brother's cabin it would cover the previous investors funding. (R. 168, Transcript, PageID# 2320).

Lee promised that he would take care of the down payment, and that she would receive money up front for putting the property in her name. (R. 168, Transcript, PageID# 2319, 2331). Lee also told her that while the property was on the market, it would be placed on an overnight rental program and the rental income would be used to pay the mortgage. (R. 168, Transcript, PageID# 2331).

To obtain financing for the property located at 1437 Eagle Cloud Way, Steele met with Mary Bevins at Gateway Mortgage and expressed concerns that Bevins was supplying false income information on the loan application. (R. 168, Transcript, PageID# 2322). Bevins told her the false income information would not be an issue. (R. 168, Transcript, PageID# 2323). Steele also expressed her concerns at the closing that the settlement agreement did not show monies going to Lee to re-pay the investors. (R. 168, Transcript, PageID# 2325). She was concerned with the investors being re-paid because they were her family and friends. (R. 168, Transcript, PageID# 2335-2336).

Steele testified that the only thing Defendant-Appellant told her was that the property should resell within six months, that the property had a good rental history, and that the rental income should be sufficient to pay the mortgage. (R. 168, Transcript, PageID# 2343-2344).

LUCAS BOHANAN, an employee of Sevier County Bank, identified 19 wire transfers to Guaranty Land Title from the documents that were conditionally

admitted during Theisen's testimony, and 11 checks disbursed from the Guaranty Land Title escrow account. (R. 168, Transcript, PageID# 2360-2365, 2367-2368, 2370-2371, 2373, 2375-2376, 2378, 2380-2385).

MARTHA SABEAN, an employee of Sun Trust Bank, testified a letter was sent to Gateway Mortgage, which informed them SunTrust Bank would no longer do business with them based on misrepresentations found in some of the mortgage loans. (R. 168, Transcript, PageID# 2408-2409). Particularly, straw buyers were identified, in which third parties had solicited borrowers for their good credit. (R. 168, Transcript, PageID# 2410). Sabean then testified she self-reported to GMAC the investigation that revealed misrepresentations in the loan they had purchased. (R. 168, Transcript, PageID# 2412).

MIKE MULLINS, an employee of Mountain National Bank, identified the records of the escrow account maintained by Guaranty Land Title, which reflected several wire transfers from SunTrust Bank regarding William Haskett. (R. 168, Transcript, PageID# 2417-221).

CECIL ORMOND, a retired law enforcement officer, testified that he entered into a contract to purchase 1230 Bird Nest Way from Debbie Perry and Patty Huskey for $519,000.00. (R. 168, Transcript, PageID# 2427-2429). He had previously worked for Quality Quest Construction, had loaned Kenneth Lee money, and purchased and sold properties to him. (R. 168, Transcript, PageID#

2444-2445). Lee promised Ormond he would pay the down payment, and that Defendant-Appellant would purchase the property back from him within 1 year. (R. 168, Transcript, PageID# 2429, 2438-2439). There was no promise that he would share any profits from the sale of the property. (R. 168, Transcript, PageID# 2447). Lee never paid Ormond anything for his participation. (R. 168, Transcript, PageID# 2451-2452).

At Lee's direction, he applied for a loan with Mary Bevins, and testified that the forms were not completed when he signed them. (R. 168, Transcript, PageID# 2431, 2452). When he attended the closing on October 20, 2005, he saw that the forms he had signed were completed with incorrect information. (R. 168, Transcript, PageID# 2433-2434). At the closing, the co-defendant asked Joyce Whaley where Defendant-Appellant was, and in response the co-defendant stated that Defendant-Appellant had already picked up a check. (R. 168, Transcript, PageID# 2435). The property went into foreclosure, forcing Ormond to file for bankruptcy protection. (R. 168, Transcript, PageID# 2442).

EDDIE MADDEN sold 954 Black Bear Cub Way in a transaction in which Joyce Whaley was the real estate broker and Regency Development, LLC was the purchaser. (R. 168, Transcript, PageID# 2455-2458, 2466). At the closing, he was supposed to receive $163,278.91 as proceeds from the sale after satisfaction of existing liens. (R. 168, Transcript, PageID# 2460). He was told, by the co-

defendant, to come back after an hour or two to pick up the check. (R. 168, Transcript, PageID# 2461-2462).

DARLENE BARGER, spouse of Bill Barger, met with Kenneth Lee in 2005 about an investment opportunity which involved the purchase of real estate. (R. 168, Transcript, PageID# 2471). One of those properties was 1531 Trappers Ridge Lane, Sevierville, Tennessee, for which Barger agreed to buy the property in exchange for a percentage of the sale price and a percentage of profits later. (R. 168, Transcript, PageID# 2473-2474). Lee personally guaranteed the mortgage payments on the property in writing. (R. 168, Transcript, PageID# 2475, 2498).

On December 9, 2005, Darlene Barger entered into a contract with Regency Development and Kenneth Lee for the purchase of 954 Black Bear Cub Way. (R. 168, Transcript, PageID# 2476). Again, Lee promised to personally guarantee the mortgage payments on the property, which were to be used as rental properties for investment purposes. (R. 168, Transcript, PageID# 2477-2478, 2496). Regency then directed Ms. Barger to go to Gateway Mortgage and meet with Mary Bevins to file the loan application. (R. 168, Transcript, PageID# 2498-2500).

At the closing, of 954 Black Bear Cub Way, Darlene Barger, Bill Barger, the co-defendant, Ed Walker, and Mary Bevins were present. (R. 168, Transcript, PageID# 2481). Co-defendant did not provide or ask Ms. Barger for the down payment cash from borrower. (R. 168, Transcript, PageID# 2482). Ms. Barger

was also unaware the seller had changed from Regency to Ed Walker, or that Ed Walker was purchasing the property from someone else. (R. 168, Transcript, PageID# 2482). The closing of 1531 Trappers Ridge Lane, Sevierville, Tennessee, was essentially the same as 954 Black Bear Cub Way, but the buyer was Bill Barger. (R. 168, Transcript, PageID# 2482).

On January 4, 2006, Ms. Barger received a partial two percent payment related to 954 Black Bear Cub Way of $7,954.07, but Lee had not made the mortgage payments as promised. (R. 168, Transcript, PageID# 2486). Ms. Barger and Mr. Barger tried to make the payments, but eventually the property went in to foreclosure. (R. 168, Transcript, PageID# 2486).

Prior to these two transactions, Ms. Barger had invested with Lee in other houses built through Quality Quest that were all successful. (R. 168, Transcript, PageID# 2487, 2489).

RONALDA OWENS, a Senior Vice President of Lending at Citizen's Bank, testified that two loans that were based upon inaccurate information were purchased by SunTrust Mortgage: one for Cecil Ormond at 1230 Bird Nest Way, and the other Barbara Steele at 1437 Eagle Cloud Way. (R. 170, Transcript, PageID# 2747, 2751-2753, 2756-2776). However, Citizen's Bank remained ultimately responsible if the loan documents were found to contain misrepresentations. (R. 170, Transcript, PageID# 2759, 2780).

Cecil Ormond's loan application for 1230 Bird Nest Way and Barbara Steele's loan application for 1437 Eagle Cloud Way were provided by Mary Bevins of Gateway Mortgage. (R. 170, Transcript, PageID# 2754, 2774-2775). The closing documents from Citizens Bank to Guaranty Land Title stipulated "No cash allowances may be provided…or credited to borrower." (R. 170, Transcript, PageID# 2761, 2782). If Citizen's Bank had been notified the borrower was not bringing the down payment, would receive a credit from a pay debt to GBO Enterprises on the closing statement, or that someone other than the borrowers would cover mortgage payments, they would not have approved the loan. (R. 170, Transcript, PageID# 2771, 2787, 2791). The loan to Barbara Steele was found by SunTrust to contain irregularities, and SunTrust demanded payment from Citizen's Bank as a result. (R. 170, Transcript, PageID# 2797-2798).

On cross-examination, Owens testified Citizen's Bank was merely a third party that collected the loan documents to turn over to SunTrust Mortgage for underwriting, and standard procedure was to list that a Citizen's Bank account executive had a face-to-face interview with the borrower even though these interviews never transpired. (R. 170, Transcript, PageID# 2806-2810). SunTrust Mortgage required a representative to be listed on the loan application for approval, and knew Citizen's Bank was inserting names of representatives who were not conducting interviews. (R. 170, Transcript, PageID# 2823). She further

confirmed that Rick Saylor, an account executive for Citizen's Bank was listed on both Cecil Ormond's and Barbara Steele's loan applications as having a face-to-face interview when he had not, and listed assets that were not verified. (R. 170, Transcript, PageID# 2810, 2814).

WILLIAM HASKETT, a former landscaper of Kenneth Lee, testified he entered into an agreement with Lee to purchase 3515 Peggy Lane. (R. 170, Transcript, PageID# 2842). Lee promised Haskett if he bought the property he would get two percent of what the property sold for after ten years. (R. 170, Transcript, PageID# 2842). During the ten years, Lee would make all of the mortgage payments and utility bills. (R. 170, Transcript, PageID# 2842). Haskett did not fill out a loan application, or pay the down payment and was unaware who had. (R. 170, Transcript, PageID# 2843, 2845). Lee did not make the mortgage payments on the property as promised and the property went into bankruptcy. (R. 170, Transcript, PageID# 2844). Prior to this agreement Haskett had invested in other properties with Mr. Lee. (R. 170, Transcript, PageID# 2848).

KATHY HOSKINS, an Operations Officer of Citizens Bank, identified four documents that reflected wire transfer details from Citizens Bank to Sevier County Bank. (R. 170, Transcript, PageID# 2851, 2853-2854).

HAYDEN ANDREW OAKLEY, a Branch Manager of Regions Bank, identified two bank statements that reflected two stop payment fees, a deposit slip

for Regency Development with an attached check with a remitter of GBO Enterprises for $30,000, a $500 deposit, a $39,000 deposit, and a check issued from GBO Enterprises to Regency Development. (R. 170, Transcript, PageID# 2857-2859). He identified two additional bank statements that reflected a deposit slip of $60,594.89 with an attached check issued from Guaranty Land Title to Regency Development. (R. 170, Transcript, PageID# 2860-2861).

GINA HURST, a former employee of Guaranty Land Title, testified she was the closing agent on six of the eight properties at issue. (R. 170, Transcript, PageID# 2865). Prior to closing, the co-defendant would review all of the completed files for errors. (R. 170, Transcript, PageID# 2898). The closing disbursement checks were generated from the HUD-1 settlement statements, and any adjustments to those checks we requested by the co-defendant, which she had to manually override the computer system to generate. (R. 170, Transcript, PageID# 2876-2877, 2891, 2903, 2913).

Hurst testified that she was first instructed to make changes to the checks when a buyer told her he did not have the down payment to close and the Defendant-Appellant was going to pay. (R. 170, Transcript, PageID# 2914). She met with the co-defendant who instructed her to net the down-payments out of the disbursements to GBO Enterprises. (R. 170, Transcript, PageID# 2914). After a meeting between the co-defendant and Defendant-Appellant, the co-defendant

instructed her that there needed to be a check or cash deposit shown on the single ledger sheet. (R. 170, Transcript, PageID# 2915). Co-defendant indicated that the checks to GBO Enterprises would be disbursed early so that Defendant-Appellant could purchase cashier's checks to bring to the closings. (R. 170, Transcript, PageID# 2915).

Hurst testified the original file for the property located at 1531 Trappers Ridge Lane, had a handwritten note from the co-defendant that read "Need cashier's ck to Guaranty Land Title for $38,755.11 remitter: Billy Barger." (R. 170, Transcript, PageID# 2934). The property located at 954 Black Bear Cub Way, had line 303 highlighted, circled, and there was a handwritten note from the co-defendant at the bottom of the page of the original HUD-1 settlement statement, that read "Darlene B. Barger, remitter." (R. 170, Transcript, PageID# 2941). The property located at 3515 Peggy Lane, had a single ledger balance sheet that reflected a check from the buyer. (R. 171, Transcript, PageID# 3054). Hurst verified the check for the down-payment and the deposit prior to the closing. (R. 171, Transcript, PageID# 3054).

On cross-examination, Hurst contradicted previous testimony that she knew Kenneth Lee through his business dealings with Guaranty Land Title, and admitted that she met Lee when she worked at Covenant Title. (R. 171, Transcript, PageID#

3058). She also testified that she sent faxes to Lee regarding transactions with Defendant-Appellant and Joyce Whaley. (R. 170, Transcript, PageID# 2882).

AGENT DUKE SPEED of the Federal Bureau of Investigation was the next witness to testify for the Government. After he was sworn, trial counsel again objected to the admission of Defendant-Appellant's partial statement. (R. 171, Transcript, PageID# 3077-3078). On November 16, 2010, he, Agent Lucado and Agent McCord interviewed Defendant-Appellant in person in a parking lot. (R. 171, Transcript, PageID# 3079-3080). In response to questions posed by the agents, Defendant-Appellant said that he received checks from Guaranty Land Title and deposited them into his GBO account, created checks from that account with the name of the borrower as the remitter on the checks made payable to Guaranty Land Title. (R. 171, Transcript, PageID# 30080). According to Agent Speed, Defendant-Appellant said he would then take these checks back to Guaranty Land Title to "get the deal done." (R. 171, Transcript, PageID# 3081). With respect to the sale of his personal residence, 1531 Trappers Ridge Lane, Defendant-Appellant purportedly stated that the purchase price was artificially increased to accommodate for the down payment of the borrower. (R. 171, Transcript, PageID# 3081).

On cross-examination, Agent Speed admitted that Defendant-Appellant told him that he considered the checks to be loans to the purchasers, and believed the

transactions to be legal. (R. 171, Transcript, PageID# 3081-3082). Agent Speed further admitted on cross-examination that Defendant-Appellant told him that he had sold his personal residence to Kenneth Lee, not Bill Barger, and that Lee had then sold the property to Bill Barger. (R. 171, Transcript, PageID# 3082).

The Government objected to trial counsel's continued cross-examination about other statements made by Defendant-Appellant to Agent Speed that were not the subject of the pre-trial order, and the District Court sustained the objection, ruling "you cannot get in your client's testimony through cross-examining this witness." (R. 171, Transcript, PageID# 3083). This effectively ended the cross-examination and any further testimony from Agent Speed. (R. 171, Transcript, PageID# 3085).

SUSAN GERBER, a former employee of the co-defendant and Title Closer for Guaranty Land Title, established that the co-defendant and SunTrust Mortgage approved the HUD settlement statement and the disbursement of loan funds at the closing of 1531 Trappers Ridge Lane. (R. 171, Transcript, PageID# 3086-3087, 3092-3094). That closing took place either December 20, 2005 or December 21, 2005. (R. 171, Transcript, PageID# 3101). The loan funds for that closing were disbursed early and were authorized by the co-defendant. (R. 171, Transcript, PageID# 3102).

AGENT KEVIN MCCORD of the Internal Revenue Service's Criminal Investigations Division was called to testify as a summary witness over the defense's objection. (R. 172, Transcript, PageID # 3146-3149). He testified that subpoenas were issued to Citizens Bank and SunTrust Mortgage to provide the loan files for the subject real estate transactions. (R. 172, Transcript, PageID # 3148-3150). He prepared summary charts which were introduced into evidence by the Government, showing a timeline of events related to the eight properties referenced in the indictment, the loans, and the dates on which they closed and disbursed funds, over objection. (R. 172, Transcript, PageID # 33150-3183).

The Motion for a Judgment of Acquittal

At the close of the Government's case, Defendant-Appellant unsuccessfully moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, arguing that there was insufficient evidence that Defendant-Appellant conspired to defraud the banks at issue; lacked knowledge or intent to defraud; there was insufficient evidence that the banks relied upon any such false statements to their detriment; and pointed to a lack of evidence that Defendant-Appellant was present at the real estate closings, was not a party to the preparation of the HUD settlement statements or loan applications, or any proof that Defendant-Appellant made the deposits that related to the money laundering count. (R. 172, Transcript, PageID # 3197-3215).

The Defense Case

SHARON BUXTON, an employee of the Tennessee State Bank, authenticated bank records related to an account owned by GBO Enterprises, LLC, which indicated several checks returned for insufficient funds, and numerous transactions in that account involving Regency Development. (R. 172, Transcript, PageID# 3220-3224).

EDWARD WALKER, an employee of Kenneth Lee, testified that Lee incorporated Regency Development, LLC and made Walker the named owner of the company. (R. 172, Transcript, PageID# 3224-3227). He appeared at between 10-15 closings at Kenneth Lee's direction. (R. 172, Transcript, PageID# 3230-3231). Walker had no idea what the real estate closings were about, and did not understand the transactions; he simply did what he was ordered to do by Lee, and all of the proceeds went to Regency Development. (R. 172, Transcript, PageID# 3237-3238). Walker never had any business dealings with Defendant-Appellant. (R. 172, Transcript, PageID# 3234).

MICHELLE CHANDLER, a former employee of Kenneth Lee at Quality Quest Construction from 2004-2006. (R. 172, Transcript, PageID# 3241). Lee frequently borrowed money from Defendant-Appellant to cover operating costs for Lee's business. (R. 172, Transcript, PageID# 3241-3242). She in turn would go to Tennessee State Bank to pick up cashier's checks or make deposits for these loans.

(R. 172, Transcript, PageID# 3243). Defendant-Appellant's bank refused to accept any checks from Lee unless they were certified. (R. 172, Transcript, PageID# 3244-3245). Defendant-Appellant never asked Chandler to pick up checks or conduct any transactions; any such instructions came directly from Lee. (R. 172, Transcript, PageID# 3247).

JOYCE WHALEY MCCARTER, Defendant-Appellant's sister, had years of experience in the real estate and rental industry. (R. 172, Transcript, PageID# 3253-3256). In 2002, she and her brother began purchasing and developing investment real estate in Black Bear Ridge as rental cabins. (R. 172, Transcript, PageID# 3257-3258). Defendant-Appellant constructed the cabins, and invested a lot of his personal money in the construction of the cabins and the infrastructure of the resort. (R. 172, Transcript, PageID# 3263-3264). She testified that many of the cabins were sold to investors, and Defendant-Appellant received funds at the closing that were intended, in part, to reimburse him for construction costs. (R. 172, Transcript, PageID# 3267). Ms. Whaley testified she used Guaranty Land Title as the title company for most of the closings at Black Bear Ridge because the co-defendant was familiar with the Homeowner's Association deed restrictions and the particulars for those parcels of real estate. (R. 172, Transcript, PageID# 3267-3268). In 2005, the cabin rentals were generating up to $105,000.00 annually in rental income. (R. 172, Transcript, PageID# 3272).

Ms. Whaley knew Kenneth Lee though Defendant-Appellant, and had loaned him money in the past before one of his former partners advised her not to make any more loans to him. (R. 172, Transcript, PageID# 3273). Lee contacted Ms. Whaley in 2005 and expressed interest in investing in real estate at Black Bear Ridge. (R. 172, Transcript, PageID# 3273, 3275).

DEFENDANT-APPELLANT was the final witness to testify for the defense. (R. 169, Transcript, PageID# 2537). After graduating from the University of Tennessee with a degree in electrical engineering, he worked as an engineer before opening his own construction business, concentrating on commercial construction and construction of rental cabins. (R. 169, Transcript, PageID# 2573-2538). In 2002 he and his sister began developing rental properties at the Black Bear Ridge Resort, eventually building between 60 and 70 cabins. (R. 169, Transcript, PageID# 2538-2539). The cabins were placed in a rental program and on the market for sale. (R. 169, Transcript, PageID# 2540).

Defendant-Appellant met Kenneth Lee in 1994, and began to loan him money; by 2005, Lee owed Defendant-Appellant approximately $800,000.00. (R. 169, Transcript, PageID# 2542). Defendant-Appellant knew Lee was in financial trouble, and suggested that he start flipping properties at Black Bear Ridge Resort to turn a profit so that he could repay his debts and have money to live on. (R. 169, Transcript, PageID# 2544). Lee contacted Joyce Whaley, on his own account,

and made inquiries as to which properties were available for sale. (R. 169, Transcript, PageID# 2546). Defendant-Appellant denied orchestrating the sales, completing paperwork to effect the sales, or having any knowledge of any promises made by Lee to the buyers. (R. 169, Transcript, PageID# 2548-2550). He denied ever talking to the co-defendant or Lee about the down payments on the properties. (R. 169, Transcript, PageID# 2551). He further denied asking either Lee, the buyers, or the co-defendants to pay him out of the proceeds from the sale. (R. 169, Transcript, PageID# 2551-2552). However, Lee asked Defendant-Appellant to purchase several cashier's checks with instructions as to the amounts and whose name to list as the remitter: Rodney Parton, Bill Barger, Darlene Barger and William Haskett. (R. 169, Transcript, PageID# 2567-2573, 2592, 2594). The bank never told Defendant-Appellant he could not list a remitter other than himself on these checks. (R. 169, Transcript, PageID# 2591-2592).

On cross-examination by the Government, Defendant-Appellant was asked the following questions and gave the following answers:

> Q. You do recall being interviewed by the FBI and IRS on November 16th, 2010, right?
> A. Yes, sir.
> Q. At that time didn't you tell the FBI that the price of your cabin had been increased to cover the down payment for the borrower, for the new borrower. Didn't you tell him that?
> A. I don't think so. I think they must have misunderstood me.
> Q. I see. The FBI and the IRS misunderstood you when you talked to them, that is what you are saying?
> A. That is very likely.

(R. 169, Transcript, PageID# 2582).

> Q. And so you told him that you wanted $730,000 out of it. But what you are saying is you did not tell the agents that you increased, that you made an adjustment to the sales price to account for the down payment that was loaned to the buyer. You did not tell the agents that?
> A. I do not recall telling the agents that.
> Q. Do you not recall it or did you not say it? Would you defer to their recollection of it?
> A. Would I admit that is what I said because you tell me they said that? Is that what you are asking me?
> Q. Would you disagree with the agents about that was their recollection of it?
> A. Yes, I would.
> Q. You would disagree with it?
> A. Yes, I would.
> Q. You would say the agents inaccurately recorded what you said?
> A. Yes, I would.

(R. 169, Transcript, PageID# 2584).

> Q. Right. And isn't it true that you told the agents at that time that a representative from Guaranty Land Title gave you instructions on what name was supposed to be listed as the remitter on the checks used for the cabin real estate closing. Didn't you tell the agents that?
> A. I don't remember tell them that.
> Q. You have no recollection of that?
> A. No, sir. I think I told them specifically that Kenny Lee told me what to put on there.
> Q. You did? Is that what you are saying?
> A. I think so.

(R. 169, Transcript, PageID# 2588).

> Q. Your testimony today is that that was instructed by Kenny Lee?

A. Yes, sir.
Q. Back in November didn't you tell the agents that that was approved by Mr. Kerley?
A. It was from Guaranty Land Title. I assume that Mr. Kerley approved it.
Q. You didn't tell the agents that Mr. Kerley had approved it and instructions had been given to you to do this?
A. No.
Q. Let's look at a few of those items. I just want to be clear though, you are saying that you told the agents that Kenny Lee told you to do this? Is that your testimony, that you told the case agents in November of 2010 that Kenny Lee told you what to do at the bank?
A. Yes.

(R. 169, Transcript, PageID# 2588).

The Government's Rebuttal Case and
Renewed Motion for a Judgment of Acquittal

After the co-defendant presented evidence, the Government recalled Agent Duke Speed to testify. Agent Speed's testimony essentially repeated his earlier testimony. (R. 173, Transcript, PageID# 3397-3399). Likewise, Darlene Barger was recalled to essentially reiterate her earlier testimony. (R. 173, Transcript, PageID# 3340-3402).

At the close of all the evidence, trial counsel renewed her motion for a judgment of acquittal, which was denied. (R. 173, Transcript, PageID# 3340-3406-3407).

The Verdict

On May 18, 2012, the jury reached a verdict, finding Defendant-Appellant guilty of all counts. (R. 149, Verdict, PageID# 1356-1361, R. 234, Transcript, PageID# 4820-4822).

Post-Trial Motions and Sentencing

After the verdict, Defendant-Appellant unsuccessfully moved for a new trial pursuant to Rule 33(b)(2), Federal Rules of Criminal Procedure, and renewed his motion for a judgment of acquittal pursuant to Rule 29(c), Federal Rules of Criminal Procedure. (R. 153, Motion for New Trial, PageID# 1409-1411, R. 154, Renewed Motion for Judgment of Acquittal, PageID# 1412-1413, R. 180, Memorandum in Support of Motion for Judgment of Acquittal, PageID# 3559-3565, R. 191, Memorandum and Order, PageID# 3728-3735). Sentence was imposed on July 1, 2013. Defendant-Appellant was sentenced to 60 months imprisonment on each count, followed by three years of Supervised Released, restitution in the amount of $1,901,980.31, and a special assessment of $1,500.00. (R. 223 Judgment in a Criminal Case, PageID# 4435-4441).

SUMMARY OF ARGUMENT

Here, the District Court denied Defendant-Appellant the right to present a defense by precluding him from introducing evidence that negated a key element of the charged offenses – intent. The evidence Defendant-Appellant sought to introduce were favorable statements made by him to Federal law enforcement agents before he was given notice that he was the target of a criminal investigation. The Government was permitted to select and introduce portions of his statements taken out of context and left the jury with the impression that Defendant-Appellant made only incriminating statements, when in fact those statements were qualified by exculpatory statements. The exculpatory portion of the statements was corroborated by the Government's main cooperating witness.

The District Court ruled that since Defendant-Appellant had no right to introduce this exculpatory evidence, he was not entitled to severance because his statements would inculpate the co-defendant. The District Court further ruled that the co-defendant's right to confrontation and the Government's economical interest in a joint trial trumped Defendant-Appellant's right to present his defense. As a result, Defendant-Appellant was precluded from introducing this evidence, and took the stand in his own defense, subjecting himself to an unfairly prejudicial cross-examination by the Government.

The District Court also erred in denying Defendant-Appellant's motions for a judgment of acquittal where there was a complete lack of evidence as to the same key element of the charged offenses – intent to defraud. Here, the evidence presented by the Government itself negated knowledge or intent on Defendant-Appellant's part. The evidence presented by both sides established that Defendant-Appellant had nothing to do with filing false loan applications, and believed that he was legitimately loaning people money to assist them with making legal purchases of real estate. The evidence presented by the Government further established that their key cooperating witness was the primary party responsible for committing many acts of fraud which he himself testified he did not believe were fraudulent. Since there was an utter lack of evidence as to this key element of the charged crimes, the District Court should have dismissed the counts contained in the Fifth Superseding Indictment as against Defendant-Appellant.

The District Court further erred in permitting lay opinion testimony and summary charts that were inaccurate and misleading. The lay witnesses who testified gave opinions based upon facts for which they had no personal knowledge, and their testimony was based upon specialized knowledge beyond the ken of the average person. Their testimony should have been subjected to expert witness analysis, as opposed to lay witness opinion testimony. Additionally, the summary charts were inaccurate and misleading where they unfairly sought to

portray Defendant-Appellant as responsible for transactions that were neither fraudulent nor ones in which he had any involvement whatsoever. The charts admissions were further erroneous because the exhibits introduced into evidence were not so voluminous as to prevent the jury from review.

For the foregoing reasons, this Court should reverse the judgment of conviction and remand for a new trial.

ARGUMENT

POINT I – DEFENDANT-APPELLANT'S DUE PROCESS RIGHT TO PRESENT A DEFENSE WAS VIOLATED WHERE THE DISTRICT COURT PRECLUDED HIM FROM INTRODUCING EVIDENCE THAT TENDED TO PROVE HE WAS INNOCENT OF THE CRIMES CHARGED

> A court's discretion in making evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense. 'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.'

Mason v. Mitchell, 320 F.3d 604, 633 (6th Cir. 2003), quoting Washington v. Texas, 388 U.S. 14, 19 (1967) (internal citations omitted).

In November 2010, Defendant-Appellant was interviewed by federal law enforcement agents and made several statements inculpating himself, but explained

that he took those actions upon the advice of the co-defendant, who was a practicing attorney, and further implicated the co-defendant as the primary party responsible for the criminal conduct charged. (R. 53, Motion to Join Motion to Sever, PageID# 358). Defendant-Appellant complained that the Government's redaction of the favorable portions of his statement, made to protect the co-defendant's Confrontation Clause rights at a joint trial, deprived him of his right to present a defense by introducing evidence favorable to him that tended to explain or mitigate the statements at issue, citing the "doctrine of completeness" set forth in Rule 106 of the Federal Rules of Evidence. (R. 53, Motion to Join Motion to Sever, PageID# 358). As a result, Defendant-Appellant moved to sever his case from the co-defendant, arguing that his right to present a defense would be infringed at a joint trial because introduction of his statement would be precluded by Bruton v. United States, 391 U.S. 123 (1968). (R. 53, Motion to Join Motion to Sever, PageID# 358-359).

The District Court conceded that Defendant-Appellant and the co-defendant had competing interests in introducing the Defendant-Appellant's unredacted statements. (R. 69, Memorandum and Order, Page ID# 538). However, the District Court skirted the issue by holding that Defendant-Appellant had no right to introduce his unredacted statements, either as part of his right to present a defense or under the doctrine of completeness. (R. 69, Memorandum and Order, Page ID#

538). The District Court then held that "the interests of the judicial economy of a joint trial and Defendant Kerley's Sixth Amendment right to confront the witnesses against him **take precedence**." (R. 69, Memorandum and Order, Page ID# 538)(emphasis added).

A. The District Court's Rigid Application of Evidentiary Rules Deprived Defendant-Appellant His Fundamental Right to Present a Defense

> The right to present a defense is one of the "minimum essentials of a fair trial." Chambers v. Mississippi, 410 U.S. 284, 294 (1973), citing In re Oliver, 333 U.S. 257, 273 (1948). It is a right which derives not only from the general fairness requirements of the due process clause of the fourteenth amendment but also, and more directly, from the compulsory process clause of the sixth amendment. It is a right which comprehends more than the right to present the direct testimony of live witnesses, and includes the right under certain circumstances, to place before the jury secondary forms of evidence, such as hearsay or, as here, prior testimony. Rosario v. Kuhlman, 839 F.2d 918, 924 (2d. Cir. 1989).

The United States Supreme Court has repeatedly held that criminal defendants have the right to put before a jury evidence that might influence the determination of guilt, and "to contradict or explain the opponent's case." Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987); see also Taylor v. Illinois, 484 U.S. 400, 410-11 (1988); United States v. Nixon, 418 U.S. 683, 709 (1974); Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

Further, the right to present a defense "is a right which comprehends more than the right to present the direct testimony of live witnesses, and includes, under certain circumstances, the right to place before the jury secondary forms of

evidence such as hearsay..." Rosario v. Kuhlman, 839 F.2d 918, 924 n.4 (2d Cir. 1989).

The doctrine of completeness, partially codified in Federal Rule of Evidence 106, "allows a party who is prejudiced by an opponent's introduction of part of a document, or a correspondence, or a conversation, to enter so much of the remainder as necessary to explain or rebut a misleading impression caused by the incomplete character of that evidence." United States v. Cosgrove, 637 F.3d 646, 661 (6th Cir. 2011), quoting United States v. Howard, 216 Fed. App'x 463, 472–73 (6th Cir. 2007) (internal citations and quotations omitted).

Here, the District Court rigidly and unfairly applied evidentiary rules that prejudiced Defendant-Appellant. By ruling that the Government had the right to cherry-pick portions of the statements and introduce them to the jury without other statements which would place them in context, and that Defendant-Appellant had no right to introduce this evidence, the scales were tipped in the Government's favor.

This was not harmless error. "It is the materiality of the excluded evidence to the presentation of the defense that determines whether a defendant has been deprived of a fundamentally fair trial." United States v. Burge, 990 F.2d 244, 248 (6th Cir. 1992), quoting Rosario v. Kuhlman, supra at 925. Omitted evidence is material if it creates a reasonable doubt that did not otherwise exist. United States

v. Burge, 990 F.2d 244, 248 (6th Cir. 1992), United States v. Agurs, 427 U.S. 97, 112-13 (1976). These statements were certainly material to the issue of whether Defendant-Appellant had knowledge or intent to defraud – the heart of the case.

Not only were the statements material, they had indicia of reliability where Defendant-Appellant spoke with the agents prior to receiving a letter notifying him that he was a target of a criminal investigation. (R. 173, Transcript, PageID# 3399). Any motive to fabricate was ameliorated by the fact that at the time he gave the statement, Defendant-Appellant did not know that he was a target of a criminal investigation, and therefore had no motive to lie.

The net effect of this ruling was to subject Defendant-Appellant to make a Hobson's choice – sacrifice one Constitutional right for another. However, Defendant-Appellant was still not permitted to testify that he made the subject statements at the time. The prejudice is clear from the tenor of the cross-examination, where the Government repeatedly asked Defendant-Appellant whether the agents were lying, and left the jury with the impression that Defendant-Appellant's testimony was recently fabricated.

B. The District Court's Ruling that Defendant-Appellant's Right to Present a Defense Was Trumped by the Co-Defendant's Confrontation Rights and the Government's Economical Interest in a Joint Trial Was Clearly Erroneous

This Court reviews a denial of a motion to sever for abuse of discretion. United States v. Nguyen, 493 F.3d 613, 625 (5th Cir. 2007).

This Court has held a single joint trial is impermissible if it violates a defendant's right to a fundamentally fair trial. United States v. Moore, 917 F.2d 215 (6th Cir. 1990), United States v. Licavoli, 725 F.2d 1040, 1051 (6th Cir. 1984). As indicated above, Defendant-Appellant's fundamental right to present a defense was infringed by a joint trial.

Here, the District Court employed a rigid application of a rule of evidence against Defendant-Appellant that directly conflicted with his Due Process right to present a defense in a two-step process. First, the District Court ruled that the Government was permitted to cherry-pick portions of the Defendant-Appellant's statement to law enforcement and introduce those portions out of context. In so ruling, the District Court ruled that Defendant-Appellant had no right to introduce the remainder of his statement to law enforcement which explained the context in which they were made and which directly disproved intent to defraud.

Using that ruling to bootstrap the denial of Defendant-Appellant's motion to sever his case from the co-defendant, the District Court then ruled that the co-defendant's right to preclude Defendant-Appellant's statements implicating him, and the Government's interest in holding a joint trial, trumped Defendant-Appellant's right to present a defense. This was clearly erroneous.

Where there are two countervailing interests – a Governmental interest of economy versus a criminal defendant's individual Constitutional right, the

collective interest must yield to the individual right. This is a basic tenet of the philosophy enshrined within the Constitution and the Bill of Rights.

In this case, the District Court ruled otherwise. The net effect of this deprivation forced Defendant-Appellant to choose between Constitutional rights – he could exercise his right to remain silent, but that would leave his cherry-picked statements to be presented to the jury out of context to his detriment. At that point he had no choice but to testify, and subject himself to a cross-examination that unfairly pitted his credibility against Federal agents.

Based upon the foregoing reasons, this Court should reverse and remand for a new trial.

POINT II –THE GOVERNMENT FAILED TO ESTABLISH DEFENDANT-APPELLANT'S INTENT TO DEFRAUD, AN INDISPENSIBLE ELEMENT OF THE CHARGED CRIMES, THE EVIDENCE WAS LEGALLY INSUFFICIENT, AND THE DISTRICT COURT FAILURE TO GRANT DEFENDANT-APPELLANT'S MOTION FOR A JUDGMENT OF ACQUITTAL WAS ERRONEOUS

This Court reviews a trial court's denial of a motion for judgment of acquittal de novo. United States v. Kuehne, 547 F.3d 667 (6th Cir. 2008), citing United States v. Zidell, 323 F.3d 412, 420–21 (6th Cir. 2003). The standard of review on appeal for a challenge to the sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a

reasonable doubt." United States v. Kennedy, 714 F.3d 951, 957 (6th Cir. 2013) citing Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original).

To support a guilty verdict for wire fraud, the Government must prove beyond all reasonable doubt that the defendant knowingly participated in a scheme to obtain money by false or fraudulent pretenses, representations or promises, that the scheme included a material misrepresentation or concealment of a material fact, that the defendant had the intent to defraud, and that the defendant caused another to use wire communications in furtherance of the scheme. Pattern Jury Instructions 6th Circuit 10.02.

To support a guilty verdict for bank fraud, the Government must prove beyond all reasonable doubt that the defendant knowingly participated in a scheme to obtain money in the control of a financial institution by means of false or fraudulent pretenses, representations or promises, that the scheme included a material misrepresentation or concealment of a material fact, that the defendant had the intent to defraud, and that the financial institution was federally insured. Pattern Jury Instructions 6th Circuit 10.03.

Knowingly and intent to defraud are essential elements of both crimes. "An act is 'knowingly' done if done voluntary and intentionally, and not because of mistake or some other innocent reason." Pattern Jury Instructions 6th Circuit 10.02, 10.03. "To act with 'intent to defraud' means to act with an intent to

deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself." Pattern Jury Instructions 6th Circuit 10.02, 10.03.

If a scheme to defraud is established, a knowing participant is liable for wire communications that previously or subsequently transpire. United States v. Izydore, 167 F.3d 213, 219 (5th Cir. 1999). Sufficiency of evidence requires direct or circumstantial evidence, viewed in light most favorable of the Government's evidence, that a reasonably minded jury could find evidence inconsistent with every reasonable hypothesis of the Defendant's innocence. United States v. Rousseau, 534 F.2d 582 (5th Cir. 1976).

Intent to defraud requires more than false or fraudulent pretenses or representations. There must be intent to deceive or cheat. See, e.g., United States v. Wynn, 684 F.3d 473, 478 (4th Cir. 2012). The evidence must show that the defendant intended to cause "actual harm." Id. "Misrepresentations amounting only to a deceit are insufficient . . . [A] Defendant must specifically intend to lie or cheat or misrepresent with the design of depriving the victim of something of value." United States v. D'Amato, 39 F.3d 1249 (2nd Cir. 1994); United States v. Guadagna, 183 F.3d 122, 129 (2nd Cir. 1999); United States v. Starr, 816 F.2d 94, 98 (2d Cir.1987) ("Misrepresentations amounting only to a deceit are insufficient," as "the deceit must be coupled with a contemplated harm to the victim.").

The Government lacked any hypothesis that the evidence supports Defendant-Appellant knew or was a knowing participant in any wire or bank fraud scheme. Defendant-Appellant did not voluntarily or intentionally participate in any of the wire transfers that were conducted between SunTrust Mortgage, Citizen's Bank and Guaranty Land Title, or provide false information to Gateway Mortgage for investors to secure Stated Income/Stated Asset loans.

Kenneth Lee testified he was the individual who approved the HUD-1 settlement statements prior to the closing of the properties at issue, and he specifically informed Defendant-Appellant that he spoke with his attorneys about how the down payments of the loans were being handled, and advised Defendant-Appellant that it was legitimate and legal. Mary Bevins testified the owner of Gateway Mortgage, John Brown, was the individual who had instructed her to falsify the loan information on the properties at issue, and she and Brown had met Kenneth Lee, Rodney Parton, and John Lee on several occasions, but Defendant-Appellant was never present. Rodney Parton confirmed Bevins testimony that Defendant-Appellant was never involved with his closing. Barbara Steele testified Defendant-Appellant never made her any promises in regards to her purchase either.

No witness testified that Defendant-Appellant had anything to do with any of the wire transfers or the loan applications provided to SunTrust Mortgage or

Citizens Bank. At worst, the evidence established Defendant-Appellant was merely a silent partner, ill-advised by Kenneth Lee that his loans to the purchasers were legal, who lacked knowledge that the actions taken by Lee and others were fraudulent.

The Government also failed to present any direct evidence that Defendant-Appellant intended to defraud SunTrust Mortgage or Citizens Bank. Defendant-Appellant, Jorge Amet, Barbara Steele, Stephanie Whaley, and Bill Barger all certified the HUD-1 settlement statements for 1437 Eagle Cloud Way and 1531 Trappers Ridge Lane which falsely indicated that the buyers of the properties had provided Guaranty Land Title with the money for the down payment. Again, Defendant-Appellant did so at the instruction and assurances of Kenneth Lee these were legal and legitimate loans.

Although, Defendant-Appellant purchased the cashier's checks which listed the buyers, Rodney Parton, Bill Barger, Darlene Barger and William Haskett, as the remitters, this was done at the direction of Kenneth Lee.

Lee requested that Defendant-Appellant authorize Tennessee State Bank to issue a cashier's check for the property located at 1016 Black Bear Cub Way nine days after the closing. The cashier's check was a replacement check for the check from Regency Development that was provided to Guaranty Land Title at the closing. Lee also requested, Defendant-Appellant, authorize Tennessee State Bank

to issue a cashier's check for the property located at 3515 Peggy Lane. This cashier's check was provided to Guaranty Land Title prior to the closing.

Again pursuant to Lee's direction, Defendant-Appellant purchased the cashier's checks for the properties located at 1531 Trappers Ridge Lane and 954 Black Bear Cub Way, which listed Bill Barger and Darlene Barger as the remitters. Kenneth Lee and Gina Hurst both testified that the original file from Guaranty Land Title for the property located at 1531 Trappers Ridge Lane contained a handwritten note on Guaranty Land Title stationary that read "Need cashiers ck to Guaranty Land Title for $38,755.11 remitter Billy Barger." (R. 170, Transcript, PageID# 2934)

Lee and Hurst testified that the original HUD-1 settlement statement for the property located at 954 Black Bear Cub Way contained a handwritten note which read "Darlene B. Barger, remitter." (R. 170, Transcript, PageID# 2941). Lee testified that he interpreted the note to mean that when they returned the check for the down-payment, it needed to list Darlene Barger as the remitter. The fact that the notes regarding the cashier's checks were in the original file from Guaranty Land Title and/or Lee's file are consistent with Defendant-Appellant's testimony that he purchased the cashier's check at Lee's request rather than his own direction.

Defendant-Appellant further admitted that the addition of the remitter's name made it appear that the checks were coming from the remitter. He also testified that no one at Tennessee State Bank ever told him that he could not or should not list someone else as the remitter and that he never intended to deceive or cheat anyone. This again is consistent with Defendant-Appellant's statements to the FBI that he considered the cashier's check to be loans to the buyers and he thought it was okay to lend money to the buyers. This is also consistent with Lee's testimony that he did not think it was illegal to fund the down payment from the disbursement check.

For the foregoing reasons, the judgment of acquittal should have been granted on the ground that no rational trier of fact could have found beyond a reasonable doubt that Defendant-Appellant knowingly participated in a wire or bank fraud scheme, or intended to defraud SunTrust Mortgage or Citizen's Bank.

POINT III – THE ADMISSION OF SUMMARY CHARTS AND LAY OPINION TESTIMONY WITHOUT A PROPER FOUNDATION WAS ERRONEOUS AND PREJUDICIAL

This Court reviews a District Court's evidentiary rulings for an abuse of discretion, and reverses where the erroneous admission affects a substantial right of a party. United States v. White, 492 F.3d 380, 398 (6th Cir. 2007).

A. Where the Witnesses Were Permitted to Give Lay Opinions That Were Based Upon Specialized or Technical Knowledge, and Were Not Based Upon Personal Knowledge, the District Court Erred in Permitting Their Testimony

Lay testimony "'results from a process of reasoning familiar in everyday life, whereas an expert's testimony results from a process of reasoning which can be mastered only by specialists in the field.'" United States v. Faulkenberry, 614 F.3d 573, 588 (6th Cir. 2010), quoting United States v. White, 492 F.3d 380, 401 (6th Cir. 2007).

Opinion testimony of lay witnesses is strictly limited under Rule 701 of the Federal Rules of Evidence. If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [(the rule on expert testimony)]. Fed. R. Evid. 701; United States v. Nixon, 694 F.3d 623, 627 (6th Cir. 2012).

Barbara DeMichele and Ronalda Owens, both witnesses with specialized or technical knowledge in an area beyond the ken of the average person, testified at trial that SunTrust Mortgage, Inc. would not have approved the loans in questions if the true nature of the down payment had been known. Steven Bledsoe likewise offered an opinion based upon his specialized knowledge as a result of his

employment in the mortgage industry. The witnesses testified based on their knowledge of the mortgage company's underwriting guidelines, funding guidelines, and lending practices and internal policies – all matters of fact, not opinion. Thus, their testimony was based upon the type of specialized knowledge contemplated by Rule 702 of the Federal Rules of Evidence.

In addition, neither witness was involved with the loan transactions at issue in this appeal. Thus, their "opinion" was based upon unsupported speculation as to what their financial institution might have done had the true nature of the down payments been known.

B. The Summary Charts Admitted by the Government Were Inaccurate and Misleading, and Because the Underlying Documents Were Not Too Voluminous, the Admission of the Summary Charts Was Erroneous

Rule 1006 of the Federal Rules of Evidence allows the admission of charts or summaries if the underlying documents are so "voluminous" that they "cannot conveniently be examined in court" by the trier of fact. The summary documents "must be accurate and nonprejudicial." United States v. Bray, 139 F.3d 1104, 1110 (6th Cir. 1998) quoting Gomez v. Great Lakes Steel Div., Nat'l Steel Corp., 803 F.2d 250, 257 (6th Cir. 1986). The information on the document must accurately summarize the information contained in the underlying documents in a non-misleading manner. In addition, the information on the summary must not be "embellished by or annotated with the conclusions of or inferences drawn by the

proponent, whether in the form of labels, captions, highlighting techniques or otherwise." United States v. Bray, 139 F.3d at 1110.

The Government's summary charts failed to satisfy the prerequisites for admissibility under Rule 1006 of the Federal Rules of Evidence. Although the underlying documents are voluminous, they were not so voluminous that they could not be examined in court by the jury – a point not seriously contested by the Government at trial.

In addition, the charts themselves were misleading because they placed Defendant-Appellant's name next to the term "related parties," including Defendant-Appellant's sister, her real estate company, and the Black Bear Ridge Homeowner's Association. (R. 172, Transcript, PageID# 3187-3188). This was inaccurate and misleading because the evidence at trial established Defendant-Appellant had no interest in his sister's properties, her real estate company or the homeowner's association, leaving the jury with the impression that Defendant-Appellant was involved in additional fraudulent transactions when there was no evidence that any of the transactions involving Joyce Whaley or her interests were anything but completely legitimate.

Since the underlying documents had been admitted in evidence and were examined in court by the jury, the use of the summary charts should have been

determined by reference to Rule 611 (a) of the Federal Rules of Evidence, not Rule 1006.

CONCLUSION

Based upon the foregoing, the judgment and sentence entered by the District Court should be vacated and the matter remanded for new trial.

Dated: January 16, 2014

Respectfully Submitted,

/s/ Patrick Michael Megaro, Esq.
Patrick Michael Megaro, Esq.
New York Bar ID # 4094983
New Jersey Bar ID # 3634-2002
Florida Bar ID # 738913
BROWNSTONE, P.A.
Attorneys for Defendant-Appellant
201 North New York Avenue, Suite 200
Winter Park, Florida 32789
(o) 407-388-1900
(f) 407-622-1511
Patrick@brownstonelaw.com

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(c), the undersigned certifies that this brief complies with the type-volume limitations of said rule. Exclusive of the exempted portions in said rule, the brief, which was prepared using Microsoft Word, contains 12,889 words.

/s/ Patrick Michael Megaro, Esq.
Patrick Michael Megaro, Esq.

.

CERTIFICATE OF SERVICE

It is hereby certified that a copy of the foregoing was filed electronically on January 16, 2014, and that a copy was made upon opposing counsel through the Court's CM/ECF system.

/s/ Patrick Michael Megaro, Esq.
Patrick Michael Megaro, Esq.

DEFENDANT-APPELLANT'S DESIGNATION OF RECORD FROM THE DISTRICT COURT

Defendant-Appellant, pursuant to Sixth Circuit Rule 30(g)(1)(A), hereby designates the following filings in the district court's record as items relevant to the disposition of this appeal.

Pleadings

Docket Entry No.	Document Description	Date	Page ID #
R. 53	Motion to Join Motion to Sever	6/4/2011	358-359
R. 69	Memorandum and Order	8/26/2011	523-545
R. 75	Motion to Exclude Testimony of Government's Disclosed Witness Kimberly Blankenship and Ronalda Owens	9/16/2011	606-615
R. 80	Fifth Superseding Indictment	10/18/2011	660-702
R. 81	Motion to Adopt Motion of Co-Defendant	11/1/2011	712-713
R. 94	Memorandum and Order	3/19/2012	820-840
R. 110	Order Accepting In Whole Report and Recommendation of Magistrate	4/9/2012	1047-1049
R. 149	Jury Verdict	5/18/2012	1356-1361
R. 153	Motion for New Trial	6/1/2012	1409-1411
R. 154	Motion for Acquittal	6/1/2012	1412-1413
R. 180	Memorandum in Support of Motion for Judgment of Acquittal	10/8/2012	3559-3565
R. 191	Memorandum and Order Denying Motion for New Trial and Motion for Acquittal	11/8/2012	3728-3735
R. 223	Judgment in a Criminal Case	7/2/2013	4435-4441
R. 224	Notice of Appeal	7/5/2013	4442

Transcripts of Hearings

Docket Entry No.	Document Description	Date	Page ID #
R. 164	Trial Transcript	5/3/2012	1451-1626
R. 165	Trial Transcript	5/4/2012	1627-1830
R. 166	Trial Transcript	5/7/2012	1831-2020
R. 167	Trial Transcript	5/8/2012	2021-2236
R. 168	Trial Transcript	5/9/2012	2237-2502
R. 169	Trial Transcript	5/15/2012	2503-2736
R. 170	Trial Transcript	5/10/2012	2737-2946
R. 171	Trial Transcript	5/11/2012	2947-3132
R. 172	Trial Transcript	5/14/2012	3133-3300
R .173	Trial Transcript	5/16/2012	3301-3412
R. 178	Trial Transcript	5/2/2012 - 5/3/2012	3419-3534