NO. 11-50621 USA v. Marcus Rosenberger
USDC No. 7:10-CR-135-2
Cons w/ No. 11-50632
USDC No. 7:11-CR-60-1

In the
United States Court of Appeals
for the Fifth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARCUS ROSENBERGER,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas, Midland Division
Nos. 7:10-CR-135-2 and 7:11-CR-60-1; **Hon. Robert Junell, Judge Presiding**

BRIEF OF APPELLANT MARCUS ROSENBERGER

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No. 10-10496

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MARCUS ROSENBERGER

Defendant-Appellant.

The undersigned counsel of record certifies the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate their possible recusal or disqualification.

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Rosenberger requests oral argument. Rosenberger believes that oral argument would be of material assistance to the Court in evaluating, *inter alia*, the district court's denial of Rosenberger's properly preserved Rule 29 motions when the evidence was insufficient to sustain his convictions for Conspiracy to commit mail and wire fraud.

In support of this request, Rosenberger would note that his co-defendant, Jason Morrison, pled guilty but nevertheless risked his own Acceptance of Responsibility point reduction under U.S.S.G.§3E1.1 by testifying truthfully that he alone was responsible for 'mortgage rescue fraud' at issue:

> Q: Do you have any reason to know that [Rosenberger] knew you were in any way committing a fraud?
> A: No, he did not.

R.1034.

Since Morrison (not Rosenberger) was in charge of renegotiating mortgages and every single government witness testified that their most important financial dealings were entirely with Morrison rather than Rosenberger, oral argument could assist the court in determining whether the government adduced legally sufficient evidence to sustain Rosenberger's convictions for conspiring with Morrison and for aiding and abetting conduct the perpetrator himself said Rosenberger knew nothing about.

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. §3231. The district court announced sentence on June 29, 2011 in a unified sentencing hearing, and entered separate final judgments on July 1, 2011.[12] RE.7 and 12. Rosenberger filed discreet notices of appeal for both cases on July 1. RE.2 and 10; FED. R. APP. P. 4(b)(1)(A). The Court has jurisdiction over Rosenberger's appeal under 28 U.S.C. §1291 and 18 U.S.C. §3742(a).

[1] In the 7:10-CR-135-2 matter, docket entries 1-141 comprise the "Record on Appeal"; the "Supplemental Record on Appeal" consists of Docket entry 142 (opening statements). Volume 1 is the pleadings index; Volume 1 of the "Supplemental Record on Appeal" contains the complete docket sheet inclusive of the transcript request for Opening Statements made after the briefing schedule issued. Transcript #8 is the First Day of Trial; Transcript #9 is the Second Day of Trial; Transcript # 10 is the Third Day of Trial; Transcript #11 is the Fourth Day of Trial; Transcript #2 contains the Closing Statements. Sentencing is contained in Transcript #12. The pagination of the Record begins at page USCA5 1. Documents from the Record are referred to herein as R. [bates number]. Cites to the record excerpts are in the form RE.[tab number].[bates number].

[2] In the 7:11-CR-60(1) matter, docket entries 1-70 comprise the "Record on Appeal." Re-arraignment is under separate cover. As noted in Footnote 1, *supra*, a unified sentencing hearing was held for both matters.

STATEMENT OF ISSUES FOR REVIEW

1. Whether there was legally sufficient evidence to support Rosenberger's convictions for Conspiracy to Commit Mail and Wire Fraud when Morrison denied any criminal agreement and no other witness testified on the subject.

2. Whether there was legally sufficient evidence to support Rosenberger's convictions for Aiding and Abetting Morrison's Wire and Mail Fraud when the Prosecutor put on no evidence of Rosenberger's criminal intent.

3. Whether there was legally sufficient evidence to support Rosenberger's convictions for Aiding and Abetting Morrison's Mail and Wire Fraud when the only evidence offered to suggest that Rosenberger had criminal intent was of equally inculpatory and exculpatory valence.

4. Whether there was a material variance of proof at trial when the Prosecutor introduced evidence (and emphasized such evidence during closing argument) that Rosenberger failed to make payments on two properties he assumed after separating from Morrison when there was no such allegation in the highly detailed overt acts portion of the Indictment.

5. Whether the Government engaged in repeated Prosecutorial Misconduct during Closing Arguments.

6. Whether Rosenberger's concurrent sentence in the 7:11-cr-60 matter must be vacated if both convictions in the 7:10-cr-135 matter are remanded for a judgment of acquittal.

INTRODUCTION

Marcus Rosenberger is a mentally handicapped man resulting from a brain injury. Although functionally illiterate and riddled with tic disorders, he earned a hardscrabble livelihood as a realtor in Midland and eventually developed a savant-like skill for identifying undervalued residential real estate. Like the character Lennie Small in John Steinbeck's classic novella, "Of Mice and Men", Rosenberger was a man of stature and strength in the general field of realty, but of very limited mental abilities in the tactical completion of real estate transactions.

Recognizing his limitations, Rosenberger relied on others for execution. Unfortunately, a real estate cozener named Jason Morrison was far less virtuous than Steinbeck's protagonist, George Milton. Morrison recognized and abused Rosenberger's talent in the sales arena in an elaborate scheme to defraud two discrete groups of homeowners.

Considering Rosenberger's illiteracy, it is unsurprising that every single government witness testified that their financial dealings were entirely (or at least primarily) with Morrison rather than Rosenberger. Moreover, Morrison himself testified that Rosenberger had no control over the disbursement of funds in his enterprise and did not know of his criminal machinations:

> Q: Do you have any reason to know that [Rosenberger] knew you were in any way committing a fraud?
> A: No, he did not.

R.1034.

The ineluctable conclusion is that the Government did not adduce legally sufficient evidence that Rosenberger knew of Morrison's criminal purposes, joined in any conspiracy with him, or aided and abetted Morrison's mail fraud and/or wire fraud.

STATEMENT OF THE CASE

I. Indictment in 7:10-cr-135

On May 26, 2010, Rosenberger and a co-defendant, Jason Morrison, were charged in a 16-count Indictment with real estate investment fraud. Count 1 charged attempted conspiracy in violation of 18 U.S.C. §1349 during a time period of March 2009-March 2010. RE.3.24-25. Count 2 charged aiding and abetting mail fraud in violation of 18 U.S.C. §1341 on February 16, 2009. *Id*. at 25. Counts 3-12 charged aiding and abetting wire fraud in violation of 18 U.S.C. §1343. *Id*. at 26-27. A chart on page R.27 lists seven faxes, two money transfers, and one phone call allegedly sent concerning certain listed properties and the dates on which these correspondences were transmitted. Counts 4 and 10 involved communications in early 2010; the other counts occurred in late 2009.

Counts 13, 14, and 15 concerned Morrison; Rosenberger was not named. Count 16 charged Rosenberger with aggravated identity theft in violation of 18

U.S.C. §1028A. On January 21, Morrison pled guilty pursuant to a plea agreement. Furthermore, on April 8, 2011, the Government dismissed Count 16 with prejudice. R.130-131. Rosenberger proceeded to trial on Counts 1-12.

II. TRIAL

Rosenberger began jury trial on April 11, 2011. The government called approximately 20 witnesses in addition to the case agent, Detective Rosie Rodriguez. R.520 (most witnesses being sworn). Four of these witnesses were home owners who entrusted Morrison to help them avoid a foreclosure by deeding him their house. R. 626-631; 877-889; 834; 795. Most of the remaining witnesses were home buyers who had located their houses of occupancy through Rosenberger and thereafter financed their purchases through the company Morrison owned and operated in a loose partnership with Rosenberger, Vanguard Properties. After 3 days of trial, the government rested on April 13. R.1015.

In his defense, Rosenberger called as witnesses two satisfied customers, R.1079-1084, as well as co-defendant Jason Morrison, R.1023-1034. Unfortunately for the government, Morrison's testimony was wholly exculpatory to Rosenberger:

> Q: Do you have any reason to know that he knew you were in any way committing a fraud?
> A: No, he did not.

R.1034.

Rosenberger made a Rule 29 motion after the close of the government's case, RE.4, and renewed the motion after the government closed. RE.5. The jury returned a guilty verdict on all counts. RE.6.

III. Indictment in 7:11-cr-60

On January 26, 2011, Rosenberger and a co-defendant, Patrick Cordero, were charged in a one-count Indictment alleging aiding and abetting Wire Fraud in violation of 18 U.S.C. §1343. Though charged subsequent to the 7:10-cr-135 Indictment, the events at issue in the 7:11-cr-60 prosecution occurred four years earlier, in January 2006. Rosenberger pled not guilty on February 17. R.36. However, after his conviction in the 7:10-cr-135 matter, Rosenberger was rearraigned pursuant to a (c)(1)(C) agreement on May 9. R.65.

The defining feature of this Plea Agreement was its provision that sentence would be imposed "concurrent" to that imposed in the 7:10-cr-135 matter. RE.11.131. This Plea Agreement contained no appeal waiver. *Id*. at 132 (¶6 appeal waiver deleted; see other deletions at ¶127).

IV. Sentencing

A. PSR

The PSR began with a Base Offense Level of 7 under U.S.S.G.§2B1.1(a)(1). (PSR, ¶88). Three Specific Offense Characteristics applied: 1) an intended loss

amount of $1.15 million under U.S.S.G. §2B1.1(b)(1)(I) elicited an increase of 16-levels, *Id.* at ¶89; 2) a mass-marketing enhancement under §2B1.1(b)(2)(A)(ii) added 2 additional points; and 3) sophisticated means under §2B1.1(b)(9)(C) occasioned another 2-level increase. The Total Offense Level was therefore 27 (7+16+2+2). Zero criminal history points (*id.* at ¶101) established a Guidelines range of 70-87 months.

B. The PSR Blended Both Actual and Intended Loss

The PSR blended intended loss from the 10-cr-135 matter with actual loss in the 11-cr-60 matter.

1. Intended Loss in the 10-cr-135 Matter

Probation's intended loss formula was two-pronged. First, Probation explained that Morrison collected $146,337 in cash from the homebuyers and paid $34,424 towards the underlying mortgages. PSR; ¶47. This yields a 'wrongful-retention of receipts' percentage of 76.5%. *Id.* Second, Probation applied this percentage to the "new sales price" of the nine home sold. 76.5% of $1.138 million is $870,570.

In turn, Rosenberger objected that loss amount in the 10-cr-135 matter should be assessed at only $111,912.96.[3] This sum was derived by subtracting the

[3] Rosenberger presented this argument in a spreadsheet, admitted as Defendant's Sentencing Exhibit #1, which is found in a folder separate from that containing the PSR and Addendum.

amounts paid to the mortgage companies to forestall foreclosure proceedings ($34,424.29) from the gross receipts the homebuyers made in their monthly payments and down payments ($146,337.25).

2. Actual Loss in the 11-CR-60 Matter

The PSR's actual loss regarding the 11-CR-60 matter is addressed in ¶62, which pegs loss at the facial amount Southwest Funding wired to Cordero. Paragraph 63 straightforwardly aggregated the $870,570 and $283,704 sums to reach a total intended/actual loss of $1,154,274.59.

C. District Court Adopted an Intended Loss Amount Lower Than That Urged by Probation

On June 29, the District Court held a unified sentencing hearing in the two matters in which Rosenberger was a defendant (10-cr-135; 11-cr-60) as well as a separate matter against Morrison individually (10-CR-212). Counsel for both Rosenberger and Morrison took turns addressing common objections as to loss amount. R.1113-1116. Although the Government did not file any written objections to the PSR's 23.5% offset, the Prosecutor changed his position at sentencing and urged, "we think that a very reasonable amount is to use the $1.1 million." R.1119. The AUSA further elaborated:

> I think the Court could certainly choose that number as well, as a reasonable decision, which is the $800,000 plus; but we also submit that we prefer obviously that the $1.1 million number be used and that that, too, is reasonable because it is easily calculated.

Id.

Nevertheless, the District Court rejected both methodologies:

> The Court on the –both Mr. Rosenberger's case and Mr. Morrison's case is—instead of using the new sales price as the price from which we start the calculations, is going to use the first mortgage or the mortgage that was in place at the time. The Court finds that's a more realistic starting point.

R.1128.

As a result, intended loss fell to $769,365.00. R.1129-1130; 1134. Moreover, the District Court decided to use only this intended loss number; the additional actual loss in the 11-CR-60 matter was excluded:

> So we don't need to tack on that that figure, then, the $283,704.59...
>
> So that will change paragraph 89 in Mr. Rosenberger's case from a 16 to a 14.

R.1147.

Rosenberger's Guidelines range shifted to 57-71 months. R.1148.

D. Competing Motions for Upward and Downward Departure

The PSR identified §2B1.1(19)(A)(ii) as a possible grounds for upward departure. *Id*. at ¶145. In a subsequent Sentencing Memorandum, the Government elaborated on the nonfinancial harms experienced by the victims it felt justified application of this upward departure. R.297-300. By contrast, Rosenberger moved for downward departure under both §5K2.13 (diminished capacity), R.295-296

(11-CR-60 matter); R.105-107 (10-CR-135 matter), and §5K2.16 (voluntary disclosure to authorities). R.107-108 (11-CR-60 matter);

E. Upward Departure Was Rejected and Downward Departure for Diminished Capacity Granted

The District Court denied the government's motion for downward departure, R.1163, but granted Rosenberger's motion for downward departure under §5K2.13 (or, alternatively, varied downward, by five levels):

> The Defendant had a head injury a few years ago. There's no question he's not faking it or anything like that. The medical reports that the Court has reviewed from psychiatrists and psychologists show that Mr. Rosenberger's condition is real.

R.1173.

> The Court is going to depart downward under the factors set forth -- or vary downward under the factors set forth in 3553(a) for the reasons that I have stated on the record by five levels.

R.1174.[4]

F. Judgments Imposed in the Respective Prosecutions

With respect to the 10-CR-135 matter, the District Court imposed a term of imprisonment of 33 months, RE.7.310, Supervised Release of 3 years, *id*. at 312, a special assessment of $1,200, *id*. at 315, and restitution in the sum of $173,495.79. *Id*.

[4] Although the District Court alluded to both departure and variance rationales at sentencing, the Statement of Reasons for both cases state that the procedural vehicle of variance, rather than departure, was utilized.

With respect to the 11-CR-60 matter, in addition to the concurrent prison term, the District Court imposed a Special Assessment of $100, RE.12.143, Restitution in the amount of $170,101.80, *id*., and Forfeiture in the amount of $282,180.55. *Id*. at 144.

STATEMENT OF FACTS: 7:10-CR-135

A. Legitimate Real Estate Arbitrage

1. Rosenberger's Longtime Work As A Realtor

Beginning in 2001, Rosenberger built a successful business as a realtor. R.205-210 (title/abstract company owner testified that Rosenberger generated 2 closings per week over a 6 year period). Before starting work for Morrison, Rosenberger had done business under the named of GML Texas Enterprises and Monumental Solutions. Gov't Ex. 72; 73.

It is striking that the prosecutor himself identified the many legitimate aspects of the work Rosenberger did absent Morrison's involvement. R.218-219. At his core, Rosenberger legitimately matched distressed home-sellers with homebuyers lacking access to affordable credit. Regardless, even when he worked for Morrison, Rosenberger's "primary role was salesperson." R.1024 (Morrison testified on direct examination that Rosenberger knew no operational details).

a. Matching Distressed Home-sellers With Homebuyers Without Access to Affordable Credit

Rosenberger's value-added process was three-fold. First, Rosenberger identified distressed homeowners by studying "courthouse records for foreclosures." R.213; see also R.756-757 (government's witness, retired man with side business as real estate investor, testifies on direct examination that like Rosenberger he also studies properties set to be auctioned beforehand). Second, having legitimately secured the house from foreclosure, Rosenberger advertised for subprime borrowers. R.216. Lastly, a mortgage banker at Wells Fargo named Mark Vetter financed "99%" of the homeowners Rosenberger brought him during the mid-2000s. R.216-217.

2. The Prosecutor Himself Asked Leading Questions on Direct Examination if this Portion of Rosenberger's Work Was "Perfectly Okay"

It is striking that the Prosecutor asked successive leading questions of Cordero on direct examination about Rosenberger's earlier work being entirely copacetic:

Q: That's perfectly okay, correct?
A: That's correct.

Q: Nothing wrong with that?
A: Nothing wrong with that.

Q: And the original homeowner avoided foreclosure, correct?
A: That's correct.

Q: And the mortgage company got paid?
A: The mortgage company got paid.

Q: The buyer got a new home?
A: The buyer got a new home.

Q: And did Mr. Rosenberger make some money?
A: And he made some money.

Q: Nothing wrong with that, right?
A: No.

R.218-219 (emphasis added).

3. The Prosecutor Also Asked Leading Questions on Direct Examination About the Legitimate Nature of Real Estate Arbitrage Involving Auctioned Distressed Properties

Similarly, the Prosecutor also presented the testimony of a self-identified 'house-flipper' named Mark Huckby and asked a series of leading questions on direct examination about the legitimate natures of real estate properties found at auction:

Q: Okay, what do you call flipping houses?
A: You buy a house to make money on it.

Q: And do you make money off your sales?
A: I try to, yes, sir.

Q: Of course, that's what any good business person would do, isn't it?
A: I'm sorry. What?

Q: Any American business person would want to make money or not be in business, right?
A: Correct, sir.

Q: So you want to buy low and sell high?
A: Yes.

Q: Okay. And that's why you go to these auctions. You might get it -- a house that's in distress might come cheaper than one that's prime time real estate, right?
A: Yes.

R.766.

4. Morrison Regarded Rosenberger As A Mere Salesman

The bottom line is that the Prosecutor himself made the point that Rosenberger had lawfully conducted real estate transactions for years before meeting Jason Morrison. Unfortunately, in 2008 Rosenberger loosely associated himself with Morrison's company, Vanguard Properties. But it was always Rosenberger's understanding that his role was limited to selling properties Morrison had lawfully acquired and which were available for resale:

Q: So once the house became the property of Vanguard or whatever you were running from there, you took control of it from there, right?
A: Yes.

Q: So, in other words, he wasn't involved in these day-to-day ongoing things regarding faxes, phone calls. That was your area?
A: Yes, it was.

R.1033-1034 (Morrison's direct examination).

B. Morrison Perpetrated What is Colloquially Known as 'Mortgage Rescue Fraud'

1. Introduction

In 'mortgage rescue fraud' a perpetrator ordinarily tells a distressed homeowner that for a fee he will negotiate a loan modification or short sale with the lender on the owner's behalf. *See Watson v. Melnikoff*, 19 Misc. 3d 1130(A), (N.Y. Sup. Ct. 2008) (quieting title in favor of plaintiff and voiding fraudulent mortgage and title transfer); *see also In Re Curriden*, No. 05-38352, 2007 WL 2669431 (Bankr. D.N.J. Sept. 6, 2007). [5]

Morrison did not charge his victims a fee, but rather convinced owner-occupants in imminent risk of foreclosure that he could keep this impending black mark off of their credit reports if the house was deeded over to him. R.628 ("[Morrison] said he would buy the house and he would see how much was owed on it and he might be able to give me some money on it, but he would stop the foreclosure and that would – it wouldn't go on my credit.").

In some instances, Morrison paid the existing homeowner a small sum for his property, R.879 (Morrison paid homeowner Michael Jones $3,000). In other instances, Morrison the homeowners were so eager to avoid foreclosure proceedings that they effected a deed transfer for no money in return. R.630

[5] For a helpful taxonomy of the various different types of real estate frauds most frequently prosecuted, see Shayna A. Hutchins, *Flip That Prosecution Strategy*: *An Argument for Using RICO to Prosecute Large-Scale Mortgage Fraud*, 59 BUFF. L. REV. 293, 298 (2011)

(homeowner Jaime Galvan testifies he deeded the property to Morrison without asking for reciprocal payment).

After a home had been transferred to him, Morrison told Rosenberger to find new tenants. Nine separate homes were used in this way:

Address:	Seller/Owner	Buyer
4403 Hawlowe	Benjamin Hall	Mary Mosley
4510 Amigo Drive	Jaime Galvan	Hector Arrieta
4826 West Illinois Avenue	Daniel Murphee	Tasha Perez
1207 E. Golf Course Road	Brandy Pipkin	Consepsion Trecero
4322 Cedar Spring Drive	Mario Deleon	Heather Hernandez
2714 Mariana Avenue	Paul Valle	Kenneth Rodriguez
707 Devonian Drive	Michael Jones	Bobbie Black
112 South Dewberry	Lori Martinez	Gilbert Villa
705 Godfrey Street	Aaron Ellison	Cheryl Howard

2. The Seller/Owner Victims Were Always Approached by Morrison, Sold Their Homes to Morrison, and Expected Morrison to Absolve Their Foreclosure Problems

Five of the government's witnesses (Michael Jones, Ben Hall, Jaime Galvan, Paul Valles, and Mario Deleon) were victims of Morrison's mortgage rescue fraud. Each witness testified that they were approached by Morrison in the first instance, transferred their homes to Morrison with the hope that he would sell the house or otherwise obviate the need for foreclosure proceedings, and thereafter sent Morrison various personal financial documents he claimed were needed for his best-efforts in securing a modification from the note's holder.

However, it is striking that these witnesses either never met, interacted with, or even knew of Rosenberger; the ones who did regarded Rosenberger as a mere errand runner for Morrison:

a. Michael Jones

Michael Jones testified that he was preparing to abandon his home on Devonian Drive in anticipation of impending foreclosure proceedings when he was approached by Morrison. R.878. Gov't Exhibit 13 contains the "Agreement to Sell Real Estate, Addendum, and various authorizations entered into by Jones and his wife (on the one hand) and Morrison (on the other). The sales agreement contained an important provision on its first page:

> Seller expressly agrees and understand that Buyer is taking title subject to the existing financing described above, **and is not expressly assuming responsibility for the underlying loans.**

Exhibit 12, p. 1 (emphasis added).

Similarly, the Addendum stated:

> Buyer has made no promises to Seller that the loans will be assumed or paid off by future buyer and that **the loan will still appear on Seller's credit report.**

Id. p. 5 (emphasis added).

After lengthy direct testimony about Morrison's proposed sale and the financial data turned over to him, R.877-889, Jones was asked two simple questions on cross-examination:

Q: Have you ever met a guy named Marcus Rosenberger?
A: No.

Q: You don't know who he is?
A: No.

R.890.

b. Benjamin Hall

Benjamin Hall explained how Morrison promised to negotiate a modification from the financial institution holding the home note if, and only if, a new buyer could not be ascertained:

> [H]e was going to help me out, do repairs on the house, try to get a buyer for the house. ***If*** he couldn't do that, he was going to sell the house, keep payments current on my mortgage and get it out of my name and notify Wells Fargo.

R.539 (emphasis added).

The sales contract between Morrison and Hall memorialized the conditional nature of Morrison's expected efforts on Hall's behalf:

> Seller expressly agrees and understand that Buyer is taking title subject to the existing financing described above, **and is not expressly assuming responsibility for the underlying loans.**

Gov't Ex. 54, p. 1 (emphasis added).

Similarly, the Addendum stated:

> Buyer has made no promises to Seller that the loans will be assumed or paid off by future buyer and that **the loan will still appear on Seller's credit report.**

Id. p. 5 (emphasis added).

c. Jamie Galvan

Jaime Galvan gave similarly detailed direct examination testimony about how Morrison approached him and convinced him to sign over his property, R.626-631, but then subsequently realized that Morrison had left the house in his name where it was susceptible to foreclosure. R.633. By contrast, Rosenberger's cross-examination was succinct:

> Q: Mr. Galvan, have you ever met Marcus Rosenberger?
> A: No, sir.
>
> Q: Never seen him before?
> A: No.
>
> **Q: You didn't have any dealings with him on this transaction, did you?**
> **A: No.**

R.640-641 (emphasis added).

> Q: And whenever these things happened with these – getting your house back and stuff, you still hadn't met Marcus Rosenberger, correct?
> A: That's correct.
>
> **Q: No dealings with him?**
> **A: No, sir.**

R.641 (emphasis added).

d. Paul Valles

The testimony of Paul Valles was substantively identical to that of Galvan and Jones insofar as was approached by Morrison and persuaded to deed his house to him so as to avoid foreclosure. R.834. On cross-examination, Rosenberger asked only two question:

Q: Have you ever met a man named Marcus Rosenberger?
A: No, sir.

Q: Have you ever had any dealings with that guy?
A: No, sir.

R.847.

e. Mario Deleon

Mario Deleon testified that after Coldwell-Banker initiated foreclosure proceedings against him, Morrison sold him on the concept of deeding over the home. R.795. Sometime after Deleon made the transfer to Morrison, Rosenberger was sent on an errand to retrieve some papers from Deleon at Morrison's instruction. On direct examination, Deleon explained that it was obvious that Rosenberger was a mere errand runner:

Q: And did he indicate what his relationship was with Jason Morrison?
A: Just employees, I guess.

R.800.

3. Morrison Did Attempt to Negotiate Modifications with the Financial Institution Note-holders

Morrison only partially, but not entirely, abandoned his sellers once the transfer had been affected:

a. Morrison Did Not Instruct His Sellers to Skirt the "Due on Sale" Clause

Most American mortgages contain a "due on sale" clause, which usually states if a borrower sells the property without the Lender's permission, then the Lender may declare the full amount of the loan. *See, e.g., Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1548 (5th Cir. 1996).

The government's theory of Morrison's unalloyed fraudulent intent *ab initio* is undermined by the fact that Morrison did not instruct Jones, Hall, Galvan, Valle, or Deleon to hide the transfer to him from their respective banks. To the contrary, the sales agreements specifically stated:

> Sellers hereby acknowledge that because their existing loan(s) on this property may have due on sales clauses the existing lender(s) can and may well demand that the existing loan(s) be paid in full merely as a result of this transaction.

See, e.g., Gov't Exs. 12;54, p. 5.

b. Morrison's Modification Efforts

Nor did Morrison completely mislead the homeowners that he would try to negotiate modifications on the underlying mortgages. To the contrary, the record

was replete with examples of Morrison sending such requests to loan servicers such as Bayview Loan Servicing and Litton Loan Servicing. *See* Gov't Exs. 7,8, and 9 (Jamie Galvan's property); 36, 37, 38, and 39 (Paul Valles' property) . Without a doubt, Morrison falsified signatures and misrepresented himself as the erstwhile homeowner when he dealt with Bayview and Litton. R.639 (Galvan notes that Morrison misspelled his first name as "Jamie" rather than "Jaime" on the correspondence to Bayview). However, Rosenberger was apparently so unconnected to this identity theft by Morrison that the government dismissed Count 16 on the eve of trial. R.130-131.

c. Payments Made on Mortgages

Nor did Morrison fail to make any payments whatsoever on the properties. Of the nine properties involved, partial payments were made on five totaling $34, 424.29. The vast majority of this sum ($28,286.23) was made on the property at 707 Devonian Drive.

C. When Properly Structured, Owner-Financed Sales of Existing Homes Is Inherently Legitimate

1. Rosenberger Marketed Self-Financing By Morrison As Part of the Sales Product

Aspiring homeowners who do not qualify for subprime loans often look for owner financing to facilitate their purchases. As a realtor, Rosenberger advertised

home purchases with this type of low-cost financing as a selling point. R.214; 646. However, ashamed of his illiteracy, Rosenberger asked prospective homebuyers to write out the terms of their earnest money agreements under the understandable excuse that he was without his glasses. R.647-648; 649-650; 680; 930; Gov't Ex. 2 (agreement written by the hand of homebuyer Daniel Arrieta); Gov't Ex. 3 (similar agreement written by the hand of homebuyer Lupe Martinez).

2. Each Notarized Promissory Note Identified That Payments Must Be Made to Morrison; Rosenberger's Name Was Nowhere on the Documents

Although the interest rate varied somewhat for each particular homebuyer, the financing period was always for three years with an understanding that the balloon payment could be rolled-over or the homebuyer could progress into a mortgage from a traditional financial institution. R.685.

For all of the homebuyers at issue, a Promissory Note was executed for 35 additional monthly payments. *See* Gov't Ex. 15 ($119,000 mortgage financed in installments of $894.01 per month at 8.25% interest); Gov't Ex. 26 ($105,000 mortgage financed for 35 monthly payments of $734.18 at 7.5% interest); Gov't Ex. 31 ($114,000 mortgage financed for 35 monthly payments of $836.49 at 8% interest); Gov't Ex. 42 ($158,000 mortgage financed for 35 monthly payments of $1,271.30 at 9% interest); Gov't Ex. 46 ($159,000 mortgage financed for 35 monthly payments of $1,222.57 at 8.5% interest); Gov't Ex. 56 ($110,000

mortgage financed at 35 monthly payments of $857.53 at 8.65% interest); Gov't Ex. 61 ($130,000 mortgage financed at 35 monthly payments of $940.34 per month at 7.85% interest).

It is striking that on each and every one of these promissory notes, payments were directed to be made to: "**JASON MORRISON, TRUSTEE**…" (emphasis in original). Even more striking is that Rosenberger's name does not appear a single time on these documents.

Nor did the homebuyers regard Rosenberger as some sort of appendage to Morrison with regards to payments, as checks were paid to the order of "Jason Morrison." *See, e.g*., Gov't Ex. 17 (check from Bobbie Black to "Jason Morrison" in the amount of $1,126.07). However, even when the check was paid to Vanguard Properties, Morrison "took the check… went and deposited it in the bank…". R.1025-1026 (Morrison testimony on direct examination).

3. The Flaw In This Business Model Arose Only As A Result of Morrison's Omissions

In a vicious feedback loop, the home buyers learned that the payments they had made to Morrison were lost because Morrison had not undertaken the needed steps to secure valid title to that which he had already sold them. However, no witness testified that Rosenberger *knew* that Morrison had failed to secure valid title. Nor did the government offer circumstantial evidence that Rosenberger had

such knowledge, since Morrison "always drew up the documents", R.1030, Morrison took "whatever moneys came in", R.1025, Morrison had complete "control of the bank account", *id*. and R.1030; 1031, and "handled the paperwork" because Rosenberger was illiterate, R.1026.

4. Morrison Fails to Pay Rosenberger Any Commissions, and Rosenberger Separates

Morrison explained that he failed to pay Rosenberger for his work:

> [O]nce the negotiations got through and everything was settled with the mortgage company, then he would get paid. During this period of time, there were several months without getting paid,…

R.1041.

In other words, even though Morrison was collecting thousands of dollars a month in purported mortgage payments, Rosenberger had no palpable claim to these funds, no access to these funds, and was not paid commissions he thought he deserved. Indeed, it appears that the only compensation Morrison paid Rosenberger was some gas money, R.1047, after a promise to pay Rosenberger's electric bill went unfulfilled and the power was turned off. R.1040.

To the contrary, when Rosenberger discovered that Morrison had engaged in financial legerdemain he separated from Morrison's employ. R.1028; 1031 ("that's what made us split apart, when he found out.").

> Q: Okay. So you're saying he found out things weren't on the up-and-up on the bank account, and he requested a separation?

A: Yes.

R.1031; *see also* Defendant's Ex. 5 (separation agreement dated October 1, 2009).

In the separation, Rosenberger assumed the right to service the mortgage on two properties, Harlowe Street and Amigo Street. R.1028. Rosenberger and Morrison had no ongoing business relationship after that. R.1032.

STATEMENT OF FACTS: 7:11-CR-60

A. Cordero and Rosenberger

Patrick Cordero is a Midland-based real estate attorney with a title company. Rosenberger generated more home purchases for Cordero's firm than any other realtor. However, the 7:11-cr-60 prosecution focused on the interactions between Cordero/Rosenberger and a local real estate investor named Angel Nabarrette. In January 2006, Rosenberger refinanced his house through Southwest Funding in the amount of $382,568. Southwest Funding wired this sum to the escrow account of Cordero, a real estate lawyer. Rosenberger's original mortgage was held by Ameriquest in the amount of $282,180.55. Instead of paying off Ameriquest, Cordero issued a check directly to Rosenberger.

B. Rosenberger Refinanced His House to Cover Cordero's Overdraft on Three Properties For Which the Sellers Had Been Paid but the Investor Withdrew Financing

In September 2005, Rosenberger negotiated the purchase of two properties, one in Odessa and one in Abilene. The properties were sold and the escrow closed

in October 2005. Nabarrette had initially provided the funds for the purchase of these properties via cashier's checks. R.126. Nabarrette also financed the purchase of a property in Temple, Texas, which closed in December 2005. R.126-127.

Despite the fact that the three properties (Odessa, Abilene, and Temple) were sold, the escrow had closed, and the sellers had been issued checks from Cordero's escrow account, the buyer's funds for all three of these properties were not yet deposited. That is, the cashier's checks from Nabarrette were given to Cordero, but not yet deposited in his escrow account. R.127.

Before the deposit of Nabarrette's checks occurred, he came to think that Rosenberger had failed to pay his condign share of the profits. As a result, Nabarrette went to Cordero and demanded the return of his cashier's checks for the three properties. As a result, Cordero's escrow account went into overdraft because funds had already been disbursed to the respective sellers of the three properties. *Id*.

C. Rosenberger Refinances

On or about November 8, 2005, Old Republic National Title Company issued a title commitment for a refinance of Rosenberger's residence. The new lender, Southwest Funding, LP, agreed to a loan amount of $394,000. The loan required that $282,180.55 be paid to Ameriquest Mortgage, the original lien holder on Rosenberger's residence. *Id*.

On January 4, 2006, Cordero closed the escrow on Rosenberger's residence. On the same date, both Cordero and Rosenberger signed the HUD-1 closing statement, which obligated both Cordero and Rosenberger to pay Ameriquest Mortgage $282,180.55. Rosenberger's remaining equity, which he was supposed to receive, was approximately $93,233.90. On or about January 9, 2006, Southwest Funding, LP wired $382,568 to Cordero's escrow account to fund Rosenberger's new loan on his residence. On or about January 11, 2006, Cordero, instead of disbursing the funds as required, issued a check in the amount of $282,180.55 directly to Rosenberger. On the same day, Rosenberger deposited the check in his bank account. Also on or about January 11, 2006, Rosenberger obtained three cashier's checks payable to Cordero's company in the amounts equal to the amounts owed on the three properties. R.128.

The three checks totaled $220,278.20. Rosenberger retained the excess amount, approximately $62,000, for his own use. On or about January 12, 2006, Cordero deposited the three checks in his escrow account to cover the disbursements already made on the three properties. *Id.*

D. The Requisite Payment Was Not Made to Ameriquest

At no time did Cordero or Rosenberger pay Ameriquest Mortgage the amount they had promised to pay when they signed the HUD-1 that was submitted to the new lender, Southwest Funding, LP. *Id.*

SUMMARY OF THE ARGUMENT

Sufficiency of the Evidence

The evidence in this case falls far short of that required in order for this Court to find the evidence legally sufficient on any count of conviction. In fact, the only thing proven by the government was the uncontested fact that Rosenberger worked for Morrison selling homes for which Morrison failed to secure valid title.

With regards to the conspiracy count, there is no evidence that Rosenberger agreed with Morrison to commit mail and/or wire fraud. To the contrary, Morrison gave detailed testimony that he kept Rosenberger totally in the dark concerning his real estate fraud. No other witness who interacted with both Morrison and Rosenberger in their professional capacities had any knowledge concerning agreement between these two people:

> Q: And you don't know the details of their business arrangement, do you?
> A: Personally, no.

R.760 (Prosecutor asks question of government's witness on direct examination).

For this reason, any evidence of agreement would necessarily have been circumstantial (rather than direct). However, the Government's circumstantial evidence is not legally sufficient to sustain Rosenberger's convictions. With

regards to both conspiracy count and the aiding and abetting counts, there is no evidence that Rosenberger shared Morrison's requisite criminal intent to defraud.

Material Variance

In his separation agreement from Morrison in October 2009, Rosenberger assumed responsibility for servicing mortgages on a house at 4510 Amigo Street and another at 4403 Harlowe Street. Even though the Conspiracy's timeline was alleged to have occurred from March 2009-March 2010, Rosenberger's servicing of these two properties after his October 2009 separation date is not listed as an overt act in any count of the Indictment. However, during closing argument, the prosecutor seized Rosenberger's post-separation assumption of these two properties as *ex post* evidence of an *ex ante* conspiratorial agreement between Morrison and Rosenberger:

> He knew that the mortgages were not being paid, because he continued to not pay them when he took over those properties, so he knew they weren't being paid on any of them.

R.245.

This unalloyed litigation by ambush allowed the jury to convict based on a factual/legal theory about which Rosenberger was not made aware by the Indictment and which unfairly surprised him at trial.

Prosecutorial Misconduct

Because the prosecutor's numerous improper arguments during closing statements deprived Rosenberger of a fair trial, this Court should reverse his convictions and remand for a new trial. Whether singly or cumulatively considered, these instances were not only improper, but reversible plain error.

Reversal of All Convictions in the 10-cr-135 Requires Re-sentencing in the 11-CR-60 Matter

If all the convictions in the 10-cr-135 matter are vacated and the sentences reversed, this Court should also reverse and remand the concurrent sentence imposed in the 11-CR-60 matter.

The PSR was clear that the actual loss germane to the 11-CR-60 matter was the $283,704 wired from Southwest Funding to Cordero. PSR; ¶62. This loss amount corresponds to a 12-level increase under 2B1.1(b)(1)(G) rather than the adjusted 14-level increase assessed in the 10-cr-135 matter. ¶¶47; 89. Rosenberger's Guidelines range would have shifted from 53-71 months to 46-57 months.

Moreover, Rosenberger would likely have a strong argument for a downward variance under § 3553(a)(6) to avoid sentencing disparities, as his co-defendant in the 11-CR-60 matter, Cordero, received no jail time but rather one year of home confinement.

STANDARDS OF REVIEW

Sufficiency of the Evidence

Challenges to the sufficiency of the evidence are reviewed de novo. *United States v. Wise*, 221 F.3d 140, 154 (5th Cir. 2000). In reviewing the sufficiency of the evidence, the Court examines whether "a rational trier of fact could have found that the evidence established the essential elements of the offense beyond a reasonable doubt." *United States v. Klein*, 543 F.3d 206, 212 (5th Cir. 2008). In undertaking this review, "all reasonable inferences are drawn in the light most favorable to the prosecution." *Id*.

Prosecutorial Misconduct

Rosenberger's trial counsel did not object to the prosecutor's comments, so this Court reviews for plain error. *United States v. Gracia*, 522 F.3d 597, 599-600 (5th Cir. 2008). Rosenberger must therefore show that (1) there was error, i.e., the prosecutor's remarks were improper, (2) the error was plain and obvious, and (3) the error affected his substantial rights. *Id.* at 600. Even if Rosenberger "meet[s] that burden, we still would have [the] discretion to decide whether to reverse, which we generally will not do unless the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceeding." *Id*. at 600.

Material Variance

"A variance is material if it prejudices the defendant's substantial rights, either by surprising the defendant at trial or by placing the defendant at risk of double jeopardy." *United States v. Valencia*, 600 F.3d 389, 433 (5th Cir. 2010).

Sentencing

"We review a district court's interpretation or application of the Guidelines de novo and its factual findings for clear error." *United States v. Conner*, 537 F.3d 480, 489 (5th Cir. 2008). In reviewing a sentence, this Court utilizes a two-step approach, first asking "whether the district court committed a procedural error." *United States v. Valencia,* 600 F.3d 389, 433 (5th Cir. 2010). Such errors include "miscalculating or failing to calculate the sentencing range under the Guidelines, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." *United States v. Mondragon-Santiago*, 564 F.3d 357, 360 (5th Cir. 2009).

ARGUMENT

I. EVIDENCE WAS INSUFFICIENT AS TO THE CONSPIRACY COUNT AND AIDING AND ABETTING COUNTS

The evidence in this case falls far short of that required in order for this Court to hold the evidence legally sufficient on any count of conviction. In fact, the only thing proven by the government was the uncontested fact that Rosenberger worked for Morrison selling homes for which Morrison failed to secure valid title. With regards to the conspiracy count, there is no evidence that Rosenberger agreed with Morrison to commit mail and/or wire fraud. With regards to both the conspiracy count and the aiding and abetting counts, there is no evidence that Rosenberger had the requisite criminal intent to defraud.

A. Elements of the Offenses

1. Conspiracy

To convict Rosenberger of the conspiracy charge, the Government was required to prove beyond a reasonable doubt: (1) an agreement between Rosenberger and Morrison (2) to commit the crime of mail and wire fraud, and (3) an overt act by one of the conspirators in furtherance of that agreement. *United States v. Ingles*, 445 F.3d 830, 838 (5th Cir. 2006). The Government must also demonstrate that Rosenberger acted with the intent to defraud. *Id*.

2. Aiding and Abetting Mail and Wire Fraud

In order to establish wire fraud, the government must prove beyond a reasonable doubt that Rosenberger: (1) engaged in a scheme to defraud and (2) used, or caused the use of, wire communications in furtherance of that scheme. 18 U.S.C.§ 1343. In order to obtain a conviction for aiding and abetting wire fraud, however, the government does not have to establish that Rosenberger actually completed each specific act charged in the indictment. *United States v. Ismoila*, 100 F.3d 380, 387 (5th Cir. 1996). Instead, the government must establish that Rosenberger assisted Morrison in the perpetration of the mail and wire fraud crimes while sharing the requisite criminal intent. *United States v. Rivera*, 295 F.3d 461, 466 (5th Cir. 2002).

For over a century, the Supreme Court has held that a good faith belief by the defendant that his representation or promises are true negates fraudulent intent. *Durland v. United States*, 161 U.S. 306, 314 (1896). "The prosecution must prove that the defendant possessed the ***specific intent*** to deceive or defraud in order to convict him." *United States v. Brown*, 147 F.3d 477, 484 (6th Cir. 1998) (emphasis in original); *United States v. Keller*, 14 F.3d 1051, 1056 (5th Cir. 1994) (same).

B. With Regards to the Conspiracy Count, No Evidence That Rosenberger Agreed With Morrison to Commit A Crime of Mail or Wire Fraud

1. No Direct Evidence of Agreement

Rosenberger recognizes that this Court will not disturb a jury verdict when different witnesses have testified differently about a contested fact. *United States v. Doke*, 171 F.3d 240, 243 (5th Cir. 1999) ("[T]his was largely a swearing contest between Bass's and Karel's versions of events.").

a. Morrison Testified That He Kept Rosenberger In the Dark About His Fraud

However, unlike the situation in *Doke*, the government did not present any direct evidence of agreement between Morrison and Rosenberger. To the contrary, Morrison's testimony was unequivocal that he had no agreement with Rosenberger to accomplish any criminal objective:

> Q: Do you have any reason to know that [Rosenberger] knew you were in any way committing a fraud?
> A: No, he did not.

R.1034.

b. Cordero Did Not Testify About Morrison In Any Way, Much Less So About Any Alleged Agreement with Rosenberger

The only other witness who interacted with Rosenberger in a purely professional capacity was Cordero. However, Cordero apparently did not interact

with Rosenberger during the time period in which he was involved with Morrison. Moreover, Cordero only testified to Rosenberger's aptitude in realty. Cordero could not know (and did not testify) as to what his agreements were with Morrison. Indeed, Cordero did not say Morrison's name a single time during his entire testimony.

For these reasons, if the guilty verdict on the Conspiracy count is to be sustained, the government must have adduced legally sufficient evidence of a circumstantial nature.

c. The Foreclosure Auction Habitué Was Clear That He Did Not Know If Morrison and Rosenberger Had Any Agreement Whatsoever

The government presented the testimony of Mark Huckby, a self-identified 'house flipper' who had observed Rosenberger and Morrison at county foreclosure auctions. R.755. However, the prosecutor himself elicited testimony from Huckby that he had no indication as to what the relationship (much less agreement) was between these two:

> Q: And you don't know the details of their business arrangement, do you?
> A: Personally, no.
>
> Q: That's fine. That's all I need to – that's all I asked for.

R.760.

2. Circumstantial Evidence Was Far From Legally Sufficient

Since the home-sellers never met or barely knew Rosenberger, the only witnesses who could testify as to agreement between Rosenberger and Morrison were the homebuyers who interacted with them both. However, none of these witnesses testified about any perceived agreement. For example, Daniela Armendariz was asked about the relationship between Morrison and Rosenberger:

> Q: Did you want to talk to Mr. Morrison only or both of them, or what was you and your husband's feeling at that time?
> A: Yeah, we kind of mainly wanted to deal with the calm one.
>
> Q: And that was who?
> A. That was Jason.
>
> Q: Okay. Mr. Rosenberger was not calm?
> A: No.

R.776.

This line of testimony was not probative of any agreement. At most, it establishes the unremarkable facts that 1) the two were working together and 2) Rosenberger exhibited anxiety as part of his mental handicap.

Nor was Rosenberger's occupation selling homes (and interacting with people desiring to buy homes) procured by Morrison inherently nefarious. "There is nothing unusual about people, who can economically benefit each other, getting together and constructing a mutually beneficial bargain." *United States v. Beuttenmuller*, 29 F.3d 973, 983 (5th Cir. 1994) (reversing convictions for

conspiracy and aiding and abetting bank fraud on grounds of insufficient evidence).

C. With Regards to Both the Conspiracy Count and the Aiding and Abetting Counts, The Evidence Was Legally Insufficient to Establish That Rosenberger Had the Criminal Intent to Defraud

In his closing statement, the Prosecutor inculcated his theory that Rosenberger's criminal intent arose from a desire to continue his profitable realty practice from the salad days before the liquidity crises began in Fall 2008 into the new business paradigm of tighter lending practices:

> You heard Mr. Cordero get up there and explain how Mr. Rosenberger had done 300 to 500 transactions when there was still a subprime market out there. You get a lender to give the buyer the money to pay off the first lien. He knows the right way. He knows it. But that market evaporated, and he still wanted to make money. Nothing wrong wanting to make money, as Mr. Low says. But you've got to do it the right way. And here he didn't.

R.286-287.

In *United States v. Beuttenmuller*, this Court explained, "no criminality can be attached to [real estate purchasers or lending institutions] because the bottom dropped out of the real estate markets. The decline of any market is part and parcel of the risks of investing. *Id*.

Even assuming *arguendo* the Prosecutor was correct that Rosenberger needed a new source of financing for homebuyers to continue his realty practice, it

does not follow that Rosenberger intended to turn to a fraudulent source of such financing. More to the point, the Government adduced no evidence at trial that Rosenberger knew Morrison was not a legitimate source of financing. This reality is accentuated by the fact that Morrison was a new entrant into the foreclosure/auction and subprime-financing market segment; for this reason Rosenberger could have no way of knowing Morrison's intentions before he perpetrated the frauds.

D. At Most, The Evidence is in Equipoise Because There Was No Evidence That Rosenberger Turned to Fraudulent Realty Practice After Years of Successful and Fully Lawful Realty Practice

1. Doctrine of Equipoise

"When the evidence is in equipoise, as a matter of law it cannot serve as the basis of a finding of knowledge." *United States v. Reveles*, 190 F.3d 678, 686 (5th Cir. 1999)(reversing conviction for conspiracy); *United States v. Mackay*, 33 F.3d 489 (5th Cir. 1994) (If the evidence gives equal or near equal support to a theory of guilt and a theory of innocence, the conviction should be reversed.).

2. Cordero's Testimony Is Equally Susceptible to Inculpatory and Exculpatory Interpretations

The Government presented the direct examination testimony of Patrick Cordero that Rosenberger had engaged in the lawful and upstanding practice of realty for several years before meeting Morrison. During his closing statement, the

Prosecutor argued that Rosenberger's long-term history of "know[ing] the right way to do things", R.286, demonstrated nascent criminal intent by way of contrast due to his brief association with Morrison. R.286-287.

To the contrary, Cordero's testimony is equally susceptible to two different interpretations. In the Prosecutor's view, Rosenberger's traditional lender at Wells Fargo became unavailable because of macroeconomic factors and for that reason he turned to the criminal financing source of Morrison. On the other hand, it is just as logical to conclude that Rosenberger did the same realty work after he met Morrison as he did before. But while it is true that Rosenberger needed a new financing source when the traditional lenders became illiquid, there is no evidence that Rosenberger knew that Morrison was an illegitimate lender.

3. *United States v. Grossman*

The hallmark Fifth Circuit case on sufficiency of the evidence in the context of conspiracy to commit wire fraud is *United States v. Grossman*, 117 F.3d 255 (5th Cir. 1997). An Oklahoma thrift lost a large amount of money on a failed luxury real estate development; a Dallas-based real estate investor named Michael Grossman agreed to a series of funding transactions whereby he would remove this sinkhole from the bank's books. *Id*. at 256-258. Each of the loans contained the following clause:

> Borrower represents and warrants lender that the loan will be used by borrower for its business and commercial purposes and not for personal, family, household, or agricultural use.

Id. at 259.

Grossman was convicted of submitting false and fraudulent documents in violation of this clause when he used loan proceeds "for business purposes unrelated to the business of the specific entity who is named as the borrower on the particular loan in question." *Id*. This Court reversed, explaining:

> The Grossman's reading of the clause -- that it allowed use of the loan proceeds for business purposes related to any of their holdings -- while not the only possible interpretation of the language, was reasonable. Because everyone involved accepted this interpretation and openly acted in accordance with this understanding the alleged breach of this clause does not support a finding of fraudulent intent on the part of Michael Grossman.

Id. at 260.

This holding applies straightforwardly to Rosenberger's situation; while Rosenberger may have arguably breached a duty to his homebuyers to locate for them a solid mortgagor, this shortcoming does not rise to the level of establishing fraudulent intent to abet Morrison's scheme.

4. No Concealment of the "Due on Sales" Clauses

Moreover, the only reason that Morrison's scheme remained undetected for even a short period of time is because he skirted the "due on sale" clauses in the

existing mortgages by failing to record the conveyances from the sellers. However, there was no evidence that Rosenberger was aware that Morrison was failing to do this; to the contrary, the sales agreements specifically acknowledged the "due on sales" clauses. *See* Statement of Facts, Part B.3.a, *supra* (listing the "due on sales" clauses in each Sales Agreement). This lack of concealment by Morrison (to say nothing of Rosenberger one step removed) renders the evidence insufficient to support the *mens rea* element of conspiracy or wire fraud. *United States v. Pipkin*, 114 F.3d 528, 533 (5th Cir. 1997).

II. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT A NEW TRIAL

Even if the Court finds the evidence barely sufficient to sustain the convictions, this Court should, pursuant to the broad remedial powers vested in it by 28 U.S.C. §2106, grant Rosenberger a new trial on the ground that the verdict is against the weight of the evidence. Under FED. R. CRIM. P. 33, a district court is authorized to grant a new trial on this ground even where the evidence is sufficient. *See, e.g., United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997) (upholding a district court's grant of a new trial on this ground). Moreover, "[i]f the complete record, testimonial and physical, leaves a strong doubt as to the defendant's guilt, even though not so strong as to require a judgment of acquittal, the district judge may be obliged to grant a new trial." *United States v. Morales*,

910 F.2d 467, 468 (7th Cir. 1990), amending opinion originally reported at 902 F.2d 604 (7th Cir. 1990).

III. MATERIAL VARIANCE

A. Legal Standards

"A variance is material if it prejudices the defendant's substantial rights, either by surprising the defendant at trial or by placing the defendant at risk of double jeopardy." *United States v. Valencia*, 600 F.3d 389, 433 (5th Cir. 2010). Rosenberger did not raise this objection at trial, so plain error review applies. *Id*.

B. The Indictment Tied the Conspiracy Count to Specific Overt Acts Listed in the Aiding and Abetting Counts

Paragraph 32 identifies the timeline for the alleged conspiracy as March 2009-March 2010. RE.3.24. Paragraph 33 references overt acts "as set forth in Counts Two through Twelve." *Id*. at 25. Count two trains on a mailing dated February 16, 2009. *Id*. A chart presents the overt acts alleged for Counts 3-12. *Id*. at 27.

The house on Harlowe Street is not listed at all; the only references to the house on Amigo Street are found at Counts 11 and 12 for internet faxes to Bayview on July 30 and September 11, 2009, respectively. Obviously, both of these dates precede the October 1 separation date. It is tautological that neither fax concerned an unmade payment after October 1.

C. The Prosecutor Trained on Properties And Timelines Not Identified As Overt Acts In the Indictment

1. Rosenberger Assumed Two Properties After the Separation with Morrison

In his separation agreement from Morrison in October 2009, Rosenberger assumed responsibility for servicing mortgages on a house at 4510 Amigo Street and another at 4403 Harlowe Street. R.1053; 1077. Even though the Conspiracy's timeline was alleged to have occurred from March 2009-March 2010, Rosenberger's servicing of these two properties after his October 2009 separation date is not listed as an overt act in any count of the Indictment.

2. Prosecutor Emphasized Non-payments on The Harlowe and Amigo Properties During Closing Argument

a. Jury Is Urged to Consider *Ex Post* Evidence of An *Ex Ante* Agreement

During closing argument, the prosecutor seized Rosenberger's post-separation assumption of these two properties as *ex post* evidence of an *ex ante* conspiratorial agreement between Morrison and Rosenberger:

> He knew that the mortgages were not being paid, because he continued to not pay them when he took over those properties, so he knew they weren't being paid on any of them.

R.245.

b. Prosecutor Identifies Rosenberger's Post-Separation Conduct Towards the Harlowe and Amigo Properties As the Linchpin of his Conspiracy Theory

During closing argument, the Prosecutor summarized his conspiracy theory vis-à-vis Rosenberger as follows:

> [T]he timeline shows a conspiracy. He knew that the mortgages were not being paid, because he continued to not pay them when he took over those properties, so he knew they weren't being paid on any of them.

R.245.

D. This Variance is Not Harmless

Rosenberger recognizes that a harmless variance might have been demonstrated had the prosecutor simply offered evidence of additional faxes during the period when Rosenberger was working for Morrison. *See United States v. Arlt*, 567 F.2d 1295, 1298 (5th Cir. 1978) (no prejudice, and thus no material variance, when an indictment alleged that defendant made false statements on a W-4 form, but defendant actually used a different form). To the contrary, this material variance represented a courtroom shift in the Government's theory of its case.

The additional evidence adduced at Rosenberger's trial concerning non-payments on the Harlowe and Amigo properties subsequent to the separation was nefarious in its purpose and deleterious in its effect. The jury was encouraged to convict based on a factual/legal theory about which Rosenberger was not made

aware through the Indictment; the Prosecutor's statement during closing argument accentuates the unfair surprise at trial.

IV. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS

A. Legal Standards

A prosecutor's remarks constitute impermissible comment on a defendant's right not to testify if the prosecutor's manifest intent was to comment on the defendant's silence or if the character of the remark was such that the jury would naturally and necessarily construe it as a comment on the defendant's silence. *United States v. Martinez*, 151 F.3d 384 (citing *United States v. Mackay*, 33 F.3d 489, 495 (5th Cir. 1994)). Intent is not considered "manifest" if there is an equally plausible explanation of the prosecutor's remark. *See United States v. Johnston*, 127 F.3d 380, 396 (5th Cir. 1997) (citing *United States v. Collins*, 972 F.2d 1385, 1406 (5th Cir. 1992)). Also, the challenged remarks must be considered in the context of the case in which they are made. *See id*. (citing *United States v. Montoya-Ortiz*, 7 F.3d 1171, 1179 (5th Cir. 1993)). Reversal is warranted if the improper comment had "a clear effect on the jury." *United States v. Rocha*, 916 F.2d 219, 232 (5th Cir. 1990).

B. Explicit Comment on Rosenberger's Decision Not to Testify

1. Statement Made During Rebuttal

In rebuttal, the Prosecutor stated:

> You heard recordings of Mr. Rosenberger. He does not have to take the stand. It's not his burden. It's my burden. **But you had an opportunity to listen to him on the recordings**, and you can make that judgment for yourself.

R.289(emphasis added).

Not only did the Prosecutor make a direct comment on Rosenberger's decision not to testify, he immediately accentuated this point by contrasting this silence with the voice heard on the recordings.

2. *Griffin v. California*

The Supreme Court has long held that allowing a prosecutor to comment on the defendant's failure to testify violated the Fifth Amendment's privilege against self-incrimination. *Griffin v. California*, 380 U.S. 609 (1965). The remarks in *Griffin* directly alluded to the defendant's silence:

> These things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know.

Id. at 611.

AUSA Berry's comment about Rosenberger is far more egregious than that found to require reversal in *Griffin*, because not only did the prosecutor bring attention to the decision not to testify but also compared and contrasted that silence with the voice heard on the tape recordings.

3. Rosenberger's Closing Argument Did Not Invite the Prosecutor's Argument During Rebuttal

Nor was the Prosecutor's statement an invited response, *United States v. Young*, 470 U.S. 1 (1985), as Defense Counsel made no statement about these tape recordings during closing argument.

B. After Acknowledging Rosenberger's Illiteracy And Calling Him A "Fourth Grader", the Prosecutor Immediately Made The Counterfactual Statement, "He's A PhD in Math"

> Yes, he has difficulty reading and writing, but he knows the real estate game.

R.288.

> **He's a Ph.D. in math.** He does these calculations in his head. He is sophisticated when it comes to this type of transaction. This is his game. This is what he has been doing. He knows real estate. Don't be misled. Don't be fooled by this notion that, 'Gee, I just don't know'; he's just a fourth grader; he doesn't know.

R.289 (emphasis added).

1. No Record Evidence About Rosenberger Being "Just A Fourth Grader"

The Prosecutor made a gross misstatement of the record evidence through his argument that Rosenberger was "just a fourth grader" or had the mentality of a fourth grader. To the contrary, when Rosenberger cross-examined Cordero about his demonstrating the mentality of a fourth grader, the Prosecutor strenuously objected:

> MR. LOW: And your having known him, it's your -- I think I remember hearing this somewhere -- you said this before. But he basically functions like a fourth grader?
>
> MR. BERRY: Objection, Your Honor. **There was no testimony from Mr. Cordero about some fourth grader.** That's Mr. Low's speculation.
>
> THE COURT: Okay. Well, let's ask the question.
>
> BY MR. LOW:
>
> Q: Does he?
> A: **No. I have never mentioned that.**

R.711 (emphasis added).

In other words, at closing argument the Prosecutor commented on evidence he not only knew was not in the record, but had actually objected to its absence when Rosenberger attempted to question a witness about it.

2. No Record Evidence Remotely Touched on A PhD

This Court has long recognized that an attorney may state to the jury inferences and conclusions he wishes them to draw from the evidence, but these inferences must be based on the evidence. *United States v. Garza*, 608 F.2d 659, 662 (5th Cir. 1979); *accord United States v. Gallardo-Trapero*, 185 F.3d 307, 320 (5th Cir. 1999) ([While] "a prosecutor can argue that the fair inference from the facts presented is that a witness has no reason to lie,… a prosecutor's closing argument cannot roam beyond the evidence presented during trial."). Similarly, the ABA Standards specifically prohibits a prosecutor from referencing facts

outside the record. ABA Standards for Criminal Justice Prosecution Function §3-5.9 (3d ed. 1993).

As a literal matter, the Prosecutor's comment "[h]e's a PhD in math" impermissibly went outside of the record since no evidence was introduced about Rosenberger having been awarded a PhD. As an ethical matter, it is truly offensive that a prosecutor would insult an illiterate man who only went as far as the 11th grade by claiming that in reality he had completed an advanced post-graduate degree.

In *People v. Walters*, a defendant was on trial for sexual abuse of minors and for smoking drugs with his minor son at home. 148 P.3d 331 (Colo. App. 2006). The defendant testified that he had seen "firsthand" young people using drugs in elementary schools. *Id*. at 336. At closing argument, the Prosecutor asked rhetorically, "Why is this defendant lurking around at elementary schools?" *Id*. The Colorado appeals court reversed:

> Nothing in defendant's testimony or other evidence supported the prosecutor's statement that defendant was 'lurking around at elementary schools.' Moreover, the word 'lurking' implied that defendant learned about the use of marijuana by children while lingering near schools for a sinister purpose, as would a sexual predator or drug dealer. **Not only was this argument without basis in the record, but it was also a flagrant attempt to inflame the jurors' passions and to appeal to their prejudices.** Thus, it was egregiously improper.

Id. at 337 (emphasis added).

The logic of *Walters* applies even more straightforwardly to Rosenberger's situation. Since there was no record evidence about Rosenberger having been awarded a "PhD in math", the only possible reason for this statement was at attempt by the Prosecutor to inflate the juror's passions by insinuating that Rosenberger was faking his brain injury and illiteracy.

3. Personal Belief or Opinion About Rosenberger's Doing Math "In His Head"

The ABA Standards also prohibit a prosecutor from making statements of personal belief or opinion during closing argument. ABA Standards for Criminal Justice Prosecution Function §3-5.8 (3d ed. 1993). Unfortunately, the Prosecutor's statement, "[h]e does these calculations in his head" necessarily conveyed a personal belief or opinion about Rosenberger's mentality. At one level of analysis, all human thought (such as mathematical calculations) occur 'in the head.' But in the absence of any expert testimony such as a neurologist or brain surgeon, the only possible inference to be drawn from the argument that Rosenberger (a man with brain damage) performed calculations "in his head" was that there existed evidence not presented to the jury, but known to the Prosecutor.

In a recent opinion, the New Jersey Supreme Court took special exception to a prosecutor's closing argument that a witness with the physical handicap of deafness necessarily compensated with heightened alternative sensory perceptions.

State v. Bradshaw, 195 N.J. 493, 510 (N.J. 2008) (reversing where prosecutor stated "people with handicaps have stronger sensory perception," and about the witness commented "[h]er whole world is about her ability to recognize things,"). Similarly, this court should reverse because the Prosecutor declared that the disability affecting one part of Rosenberger's brain was necessarily compensated for by a heightened facility with math. Not only would such have assertion been susceptible to a serious *Daubert* challenge by any expert who so opined (no such expert was produced) but this contention is unsupported by trial testimony. Numerous witnesses testified that Rosenberger knew many esoteric ***facts*** about real estate transactions; however, no witness testified that Rosenberger was doing mathematical computations (such as constructing algorithms) on these facts.

C. The Prosecutor Argued Evidence He Acknowledged Was Not Adduced

> Again, the split was for one reason: Rosenberger wanted more money. It was not because he had some sort of moral awakening, folks. **There's just no evidence of that.** He wanted more money, and he continued to do what they had been doing together.

R.246 (emphasis added).

It is fairly tautological that a prosecutor references facts outside the record when he himself qualifies the statement that "there's just no evidence of that." Even more alarmingly, this statement suggested to the jury that it was Rosenberger's burden to adduce such evidence to disprove the government's

theory of his guilt. *People v. Handwerker*, 816 N.Y.S.2d 824 (N.Y. Sup. 2006) (prosecutor improperly suggested defendant carried the burden of proving himself innocent when during closing argument he asked, "If he is innocent, then why doesn't he want to take the test to prove that?"). Rosenberger's situation is more egregious than that found to require reversal in *Handwerker*, where the defendant was cross-examined about this "test." Contrariwise, the non-evidence of "moral awakening" was a stark rhetorical straw-man argument invented by the Prosecutor to cloak a misleading legal standard.

D. The Prosecutor Repeatedly Bolstered A Victim/Witness By Elaborating on His Military Service in Afghanistan

1. *Viereck v. United States*

The hallmark case on prosecutorial misconduct through an appeal to patriotism is *Viereck v. United States*, 318 U.S. 236 (1943). The prosecutor argued in summation, "The American people are relying on you ladies and gentlemen for their protection against this sort of crime, just as much as they are relying on the protection of the men who mans the guns in the Bataan Peninsula, and everywhere else." The Supreme Court reversed, finding these remarks, "wholly irrelevant to any facts or issues in the case, the purpose and effect of which could only have been to arouse passion and prejudice." *Id*. at 247-248 n.3.

2. Hall's Service in Afghanistan is Wholly Irrelevant to Rosenberger's Connection to Morrison's Financial Crimes in Midland

On two occasions, the Prosecutor asked the jury to remember the first witness called, Benjamin Hall, not by the primacy of his testimony, but rather by the personal characteristic of his military service:

> You will recall you saw evidence that showed that Benjamin Hall, the Afghanistan war vet, sold his house on June 29, 2009.

R.241.

> Benjamin Hall. Friends and family call him Jake, specialist in the U.S. Army, just spent the last year in Afghanistan, trying to get the house out of his name. He got into trouble, financial trouble. He decided, **'You know what? The Army is a good thing for me. I'm going to go back into it, let the house go.'**

R.253-254 (emphasis added).

As this Court recently observed in *United States v. Gracia*, 522 F.3d 597, 605 (5th Cir. 2008), "[t]he caselaw is replete with examples of improper witness bolstering by prosecutors found to be reversible error." This principle is challenged most often in the context of bolstering case agents' testimony. *See, e.g.*, *United States v. Raney*, 633 F.3d 385, 395 (5th Cir. 2011) (per curiam); *United States v. McCann*, 613 F.3d 486, 496 (5th Cir. 2010) (finding it improper to make an emotional appeal to credit officers' testimony because they are officers). But undergirding these cases is a larger concern with assigning "the aegis of a

government imprimatur", *United-States v. Gallardo-Trapero*, 185 F.3D 307, 319-21 (5th Cir. 1999), to bolster the credibility of witnesses who happen to be employed by the same government of which a separate arm is seeking the conviction of the accused.

This logic applies even more strongly when the witness sought to be bolstered is not a police office, but an American soldier. Moreover, the Prosecutor went beyond a simple identification of Hall as a soldier, and insinuated that he went back into harm's way on the battlefield because Rosenberger caused his "financial trouble."

E. The Prosecutor Injected A Broader Issue of the Subprime Market In Both Opening and Closing Statements

1. Invidious Argument During Closing Argument

> You heard Mr. Cordero get up there and explain how Mr. Rosenberger had done 300 to 500 transactions **when there was still a subprime market out there.**

R.286 (emphasis added).

The Prosecutor immediately added, **"**[b]ut that market **evaporated**,…". *Id.* at 287 (emphasis added).

2. Invidious Argument During Opening Argument

In opening statements, the Prosecutor similarly sought to inflame the jury's passions with an appeal to pseudo-populist emotions:

> victims being the buyers who were trying to just become homeowners and **live the American dream** in that regard.

Supplemental Record on Appeal, R.24.

3. Substantial Caselaw Has Reversed When The Prosecutor Appealed to Class/Socio-Economic Based Emotions

It is obvious that Rosenberger's alleged wrongdoing dovetailed with the collapse of the housing market and the financial crises of 2008-09. However, the law has long held that a prosecutor may not inject into closing argument issues "broader than the guilt or innocence of the accused." *Hunter v. State*, 684 So2d 625 (Miss. 1996). In *United States v. Payne*, a postal worker from Jackson, Michigan was convicted of conditioning receipt of mail on the payment of money by the recipients. 2 F.3d 706 (6th Cir. 1993). During closing argument, the prosecutor mentioned a then-recent announcement by General Motors of a 75,000-person layoff. *Id*. at 711. Reversing, the Sixth Circuit explained:

> we find that the comments had the ability to mislead the jury as well as ignite strong sympathetic passions for the victims and against Payne. Occurrences like Christmas and major employee layoffs, because they affect or potentially affect such a broad scale of people, are going to invoke emotions which may cloud the jury's determination of Payne's guilt.
>
> In particular, the comment about GM probably would have tremendous emotional impact on a jury sitting in Michigan because GM employs so many Michigan residents.

Id. at 712; *accord United States v. Stahl*, 616 F.2d 30, 31-33 (2d Cir. 1980) (prosecutor equated wealth with wrongdoing and appealed to the potential bias of not-so-wealthy jurors against a wealthy defendant).

The logic of *Payne* and *Stahl* apply straightforwardly to the Prosecutor's statement about the "evaporation" of the subprime market. The 2008-09 recession was led by a deterioration of the housing sector. However, Midland was especially hard-hit during this time because of the concomitant collapse in the price of oil.[6] The ineluctable conclusion is that the Prosecutor mentioned the 'evaporation of subprime' to inflame the jury's anger about a broader macroeconomic issue. *Sizemore v. Fletcher*, 921 F.2d 667, 669 (6th Cir. 1990) (unanimous overturning of state murder conviction on habeas where prosecutor's argument appealed to class biases against defendant's wealth).

F. The Prosecutor Conveyed His Personal Beliefs About Rosenberger's Facility with Real Estate Transactions

The ABA Standards also prohibit a prosecutor from making statements of personal belief or opinion during closing argument. ABA Standards for Criminal Justice Prosecution Function §3-5.8(b) (3d ed. 1993). In parallel, the Fifth Circuit has repeatedly instructed prosecutors not to attempt to bolster witness credibility

[6] Oil prices fell from $140/barrel in June 2008 to $45/barrel in January, 2009. Mohsin S. Kahn, *The 2008 Oil Price "Bubble"*, Peterson Institute for International Economics Policy Brief, available at: http://www.iie.com/publications/pb/pb09-19.pdf (last visited March 3, 2012).

through personal vouching. *United States v. McCann*, 613 F.3d 486 (5th Cir. 2010) (prosecutor improperly vouches for credibility of police officers); *United States v. Gallardo-Trapero*, 185 F.3d 307 (5th Cir. 1999) (same); *United States v. Garza*, 608 F.2d 659 (5th Cir. 1979).

In contravention of this principle, the prosecutor stated, "***I*** have no doubt that Mr. Rosenberger knows the right way to do things." R.286.

G. Appeal to Juror's Passion About Victim Anguish

The ABA Standards also prohibit a prosecutor from "making arguments calculated to appeal to the prejudices of the jury." ABA Standards for Criminal Justice Prosecution Function §3-5.8(c) (3d ed. 1993); *see State v. Taylor*, 944 S.W.2d 925 (Mo. 1997) (improper for prosecutor to ask jury to "show your outrage" and "get mad at this man"); *Hines v. State*, 425 So.2d 589 (Fla. App. 1982) (urging the jury to "tell the community you won't tolerate violence" is improper);

Unfortunately, the Prosecutor traduced this principle both in his initial closing statement and in rebuttal. Concluding his remarks before Rosenberger's closing statement, the Prosecutor urged the jury to convict not based on the evidence, but to get "a little bit of justice for these [victims]":

> Ladies and gentlemen, I submit to you that it's not all a little joke. These people lost $190,000.00 collectively because of the actions of Jason

> Morrison and Marcus Rosenberger. And that money, poof, it's not coming back.
>
> **We don't expect to get that money back, but what we can get is a little bit of justice for these people**, for what Rosenberger and Morrison did to them. And that's your opportunity today, is to provide that justice by returning a verdict of guilty on all counts.
>
> Thank you.

R.255 (emphasis added).

In rebuttal, the Prosecutor argued that Rosenberger should be found guilty because, unlike Morrison, he had failed to accept responsibility by exercising his trial rights. Furthermore, the Prosecutor urged the jury to think of the victims' need to "clean up the wreckage of what [Rosenberger] left behind**:**

> It was his responsibility, just as it was Morrison's. And Morrison has accepted responsibility. This is your opportunity to hold Mr. Rosenberger accountable for his actions, too. It's not Jason's problem, it's also -- in fact, it's not even Rosenberger's problem anymore, is it? It's all these victims' problems. They're the ones that have to sort out the mess and clean up the wreckage of what he's left behind**.**

R.291.

In *United States v. Weatherspoon*, the prosecutor argued, "finding this man guilty is gonna protect other individuals in this community." 410 F.3d 1142, 1149 (9th Cir. 2005). The Ninth Circuit reversed, noting that the "evil lurking in such prosecutorial appeals is that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence… the amelioration of society's woes is far

too heavy a burden for the individual criminal defendant to bear." *Id*. at 1149 (quoting *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984)).

By first focusing on the victims' "mess" and "wreckage", and then arguing that Rosenberger must necessarily be as culpable for this "mess" as Morrison, the Prosecutor sought to cleave the jurors' empathy for victims from the simple factual determination of Rosenberger's guilt or innocence based on the evidence adduced.

VI. SENTENCING: 11-CR-60

If all twelve convictions in the 10-cr-135 matter are vacated and the sentences reversed, this Court should also reverse and remand the concurrent sentence imposed in the 11-cr-60 matter. The PSR was clear that the actual loss germane to the 11-CR-60 matter was the $283,704 wired from Southwest Funding to Cordero. PSR; ¶62.

This loss amount corresponds to a 12-level increase under 2B1.1(b)(1)(G) rather than the adjusted 14-level increase assessed in the 10-cr-135 matter. Rosenberger's Guidelines range would have shifted from 53-71 months to 46-57 months. *See United States v. Jordan*, 2011 U.S. App. LEXIS 21831, *11 (5th Cir. 2011) ("The magnitude of the district court's departure from this advisory sentence, along with its parallel length to Jordan's money-laundering sentence,

suggest that the district court might not have sentenced Jordan to 120 months for a level 12 offense had it not calculated the money-laundering offense level at 30.").

Moreover, on resentencing, Rosenberger would likely be able to make a strong argument that he should receive a downward variance under §3553(a)(6) to alleviate a sentencing disparity between himself and Cordero, who received a sentence of no jail time but only 1 year of home confinement and 300 hours of community service. (7:11-CR-60; Doc. No. 75). *See State of Fla. Bd. of Tr. of the Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc.*, 514 F.2d 700, 704 (5th Cir. 1975) (holding that it is not error "for a court to take judicial notice of related proceedings and records in cases before that court"); *Aloe Creme Labs. v. Francine Co.*, 425 F.2d 1295, 1296 (5th Cir. 1970) (per curiam) ("The District Court clearly had the right to take notice of its own files and records and it had no duty to grind the same corn a second time.").

CONCLUSION

Rosenberger's twelve convictions in the 10-cr-135 matter must be vacated, the sentences reversed, and remanded to the District Court for entry of a judgment of acquittal. In addition, this Court should also reverse and remand the concurrent sentence imposed in the 11-cr-60 matter for resentencing with an intended loss amount encompassing only the relevant conduct germane to the Ameriquest/Southwest Housing loans.

In the alternative that this Court finds the evidence sufficient to sustain Rosenberger's convictions, the gross material variance and/or prosecutorial misconduct requires reversal and remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,444 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2003 in 14-Point Times New Roman font.

/s/ Seth Kretzer

Date: March 6, 2012 Seth H. Kretzer

CERTIFICATE OF SERVICE

I certify that seven (7) copies of the Brief of Appellant were filed with the Court by U.S. Mail, and in electronic format via the ECF system, on the 6th day of March, 2012. I further certify that an electronic copy of the brief was served on all counsel of record by filing on the ECF System on the same date.

/s/ Seth Kretzer

Seth Kretzer

CERTIFICATE OF SERVICE

I certify that one copy of the Brief of Appellant was served on Marcus Rosenberger, Register Number 61510-280, on the 6th day of March, 2011:

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