No. _____

IN THE

Supreme Court of the United States

KEVIN LEBEAU,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has long recognized that juries should be formally and explicitly instructed on the concept of materiality when considering charges of bank fraud, yet no such instruction was given at trial. Thus,

1. Was the omission of the concept of materiality from the bank fraud elements instruction error requiring a new trial?

Amcore Bank, the lender at issue, was not simply negligent in issuing this loan—it was reckless. Given the Seventh Circuit's decision in *United States v. Litos*, 847 F.3d 906 (7th Cir. 2017), and the government's own concession in Mr. LeBeau's alleged co-schemer's case, *United States v. Schlyer*, 17 CR 30, which was pending in the United States District Court for the Northern District of Illinois before Judge Amy J. St. Eve, Mr. LeBeau was prejudiced by sentencing counsel's failure to challenge the $789,000 in restitution sought and ordered to Amcore Bank. As his sentencing counsel did not challenge the restitution amount at sentencing, and Seventh Circuit precedent forecloses restitution challenges in a 28 U.S.C. § 2255 petition:

2. Did the Seventh Circuit erroneously deny a *Strickland* claim to a restitution judgment brought on direct appeal?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are those listed in the caption, as well as Mr. Brian Bodie, who was Mr. LeBeau's co-defendant before the district court and had his appeal consolidated with Mr. LeBeau before the Seventh Circuit Court of Appeals.

The proceedings in federal trial and appellate courts identified below are directly related to the above-captioned case in this court:

United States v. LeBeau, No. 14 CR 488-02, United States District Court for the Northern District of Illinois, Judgment entered March 14, 2018.

United States v. LeBeau, No. 18-1656, United States Court of Appeals for the Seventh Circuit, Judgment entered February 4, 2020, petition for rehearing or reahearing *en banc* denied March 4, 2020.

United States v. Bodie, No. 14 CR 488-01, United States District Court for the Northern District of Illinois, Judgment entered October 19, 2018.

United States v. Bodie, No. 18-3366, United States Court of Appeals for the Seventh Circuit, Judgment entered February 4, 2020.

United States v. Schlyer, No. 17 CR 30, United States District Court for the Northern District of Illinois, Judgment entered on April 19, 2018.

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Kevin LeBeau respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1a) is reported at 949 F.3d 334.

JURISDICTION

The Seventh Circuit entered judgment on February 4, 2020, and denied a timely filed petition for panel rehearing or rehearing *en banc* on March 4, 2020. 18-1656 ECF 70, 76. It subsequently issued its mandate on March 19, 2020. ECF 77. On the same date, March 19, 2020, and applicable to this petition, this Court entered an order extending the time for filing petitions to 150 days from the date of the lower court judgment. It has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

"No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

"In all criminal prosecutions, the accused shall have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

INTRODUCTION

Mr. LeBeau is an individual who, sometime before the alleged scheme, took over ownership of his family's health club, the Duke LeBeau Health Club. 18-1656 ECF 25 p. 2.[1] As the economy shifted and the city of Aurora installed a multi-million-dollar state-of-the-art health club just down the road, Duke LeBeau's Health Club, which was as much a community center as it was a health club, became unviable. *Id*. Mr. LeBeau was referred by a friend to Brian Bodie and Mr. Bodie's attorney, Robert Schlyer, who proposed a plan to convert the health club and the land on which it sat into an elaborate mix-use condo development project. *Id*. at 1-2. Mr. LeBeau, a personal accountant and health club manager by trade, had no experience in such endeavors. *Id*. Under the direction of Mr. Bodie and Mr. Schlyer, the project stalled. *Id*. at 2. To keep it afloat, either Mr. Bodie, Mr. Schlyer, or both, committed fraud in order to buy time and keep their creditors at bay. Mr. LeBeau put forth nothing but an honest, albeit poorly thought out, effort to transform his family's longstanding asset. For his part, likely more of a result of his association with the other two rather than a bona fide intent to defraud, he was found guilty of all counts. ECF 109.

[1] "ECF" refers to docket filings made in the district court. Docket filings before the Seventh Circuit are noted as "18-1656 ECF" followed by the entry number.

This case presents two fundamental questions for this Court to consider. First, as it has long recognized, materiality is an element of the federal mail, wire, and bank fraud statutes. *United States v. Neder*, 527 U.S. 1, 25 (1999). As such, "district courts should include materiality in the jury instructions for section 1344." *United States v. Reynolds*, 189 F.3d 521, 525 n. 2 (7th Cir. 1999).

The district court's § 1344(1) elements instruction to the jury did not include the concept of materiality. App. 31a-32a.

On appeal, the Seventh Circuit, for the first time, acknowledged that the federal bank fraud statute requires proof of materiality:

> The better course, consistent with *Neder*, is to require the materiality instruction on all bank-fraud charges, whether brought under section 1344(1) or (2). App. 31a.

Despite recognizing that Mr. Lebeau's "point is a serious one," App. 8a, and that district courts should include the concept of materiality within their jury instructions "until such time as we receive greater clarity from the Supreme Court about what is required," App. 9a, the Seventh Circuit offered no relief for Mr. LeBeau. It offered no relief despite the fact that his jury was not instructed on materiality, nor required to find its existence proven beyond a reasonable doubt. *Id*. It reasoned that Mr. LeBeau's trial counsel waived

this objection, and even if he merely forfeited the argument, it did not affect a substantial right. App. 10a-11a.

The Seventh Circuit, respectfully, failed to recognize that in other circuits, as well as this Court, such a "harsh result" is excused only if other instructions presented to the jury adequately embrace the concept of materiality.

This Court's intervention is necessary to remedy the Seventh Circuit's legal error. Counsel and Mr. LeBeau request that it grant certiorari and reverse the decision below by: (1) expressly acknowledging that materiality is an element of both sections of the federal bank fraud statute, § 1344; (2) hold and clarify that facts such as these constitute mere forfeiture and not waiver; and (3) acknowledge the critical importance of district courts instructing juries regarding the element of materiality by holding the failure to do so here constituted plain error.

The second question concerns Mr. LeBeau's *Strickland* claim brought on direct appeal challenging the district court's judgment with respect to restitution.

Procedurally, this issue presents an important question as to how defendants can challenge restitution orders post-sentencing. The Seventh Circuit mistakenly asserted the following at the outset of its opinion:

> LeBeau has insisted, however, that he wishes to press it, and so (with the reminder that he will not be able to raise an ineffectiveness claim again in a motion under 28 U.S.C. § 2255) we will examine it. App. 15a.

This statement was incorrect—the law of the Seventh Circuit is that if not raised on direct appeal, defendants have no vehicle whatsoever in which to raise such an error. *See, e.g., United States v. Bania*, 787 F.3d 1168, 1172 (7th Cir. 2015) ("[a] 28 U.S.C. § 2255 motion, for instance, cannot be used as a vehicle for challenging the restitution component of a sentence"); *Barnickel v. United States*, 113 F.3d 704, 705 (7th Cir. 1997) ("[i]t has been well established both in this Circuit and in others for some time that a fine-only conviction is not enough of a restraint on liberty to constitute 'custody' within the meaning of the habeas corpus statutes").

As will be discussed, there is a plain and obvious basis to conclude that Mr. LeBeau made out a successful *Strickland* claim: former district court judge and current Seventh Circuit Judge Amy J. St. Eve subsequently and expressly found the identical restitution request to be improper in Mr. LeBeau's codefendants severed proceeding.

Given the increasing scrutiny 18 U.S.C. § 3663A *et seq*., The Mandatory Victim's Restitution Act, has been receiving in recent years from this Court, *see, e.g., Hester v. United States*, 139 S.Ct. 509 (2019), this Court should correct the legal error and hold that the

Seventh Circuit erroneously denied Mr. LeBeau's *Strickland* claim.

STATEMENT OF THE CASE

On June 29, 2016, Mr. LeBeau and Bodie were charged in various counts of an eight-count superseding indictment with bank fraud and making false statements effecting a financial institution, in violation of 18 U.S.C. §§ 1344 and 1014 respectively. ECF 70.

Duke LeBeau Health Club was a community health club in Aurora, located at the intersection of Indian Trail and Deerpath Road, started in 1974, and ran by Kevin LeBeau's father and his uncle, Duke LeBeau. 18-1656 ECF 25 p. 2. Kevin LeBeau had been involved in the business since its inception. *Id*. In 1991, Kevin LeBeau and a man named Anthony Geib took over ownership as 50/50 partners in the business. *Id*. Kevin LeBeau assumed full time management duties over the health club on a day-to-day basis at that time. *Id*. In order to finance the project, a mortgage loan was taken out from Old Second National Bank. *Id.* To cover this loan and operational expenses, Kevin LeBeau borrowed money from family friends and acquaintances, namely, Kurt Green, Douglas Wilson, and Mary Wagner. *Id*.

Sometime in the early 2000's, the city of Aurora built an ultra-modern, multi-million-dollar state-of-the-art health club nearby Duke LeBeau's Health Club, and membership started dwindling. *Id*. After talking it over

with a number of friends and family members, Kevin LeBeau was put in touch with Brian Bodie. *Id*. Brian Bodie, a sophisticated businessman, agreed to come into the project as a guarantor, and create a plan to redevelop the land on which the health club sat, as a condominium project. *Id*. at 1-2.

In March 2004, Mr. Bodie began to negotiate a new mortgage with Amcore Bank to refinance the property. *Id*. at 2. The loan application was submitted in May 2004. *Id*. As part of the application, Kevin LeBeau submitted a personal financial statement, and subsequently a second personal financial statement, which required him to truthfully and completely represent his current financial condition, including outstanding debts and obligations. *Id*. Brian Bodie and his two companies were also listed as guarantors. *Id*. Ultimately, Amcore agreed to issue a loan in the amount of $1.925 million on September 1, 2004. *Id*. The loan further provided that the mortgage shall not be encumbered without first obtaining the consent of the bank. *Id*.

By late 2005, Kevin LeBeau and Brian Bodie began falling behind on the loan. *Id*. After Amcore Bank representative Roger Teppen discussed the delinquent payments—primarily with Brian Bodie—Amcore issued a demand later on March 15, 2006. *Id*. Mr. Teppen testified that he continued discussions after issuing the demand letter and learned that Mr. Bodie and Mr. LeBeau were in conversations with an investor to purchase the loan. *Id*. To delay further

adverse action, the bank agreed to accept a payment of $151,000 towards the balance of the loan and received that payment on April 4, 2006. *Id*. By mid-June 2006, when it was indicated the investor would have taken over the loan but had not, Mr. Teppen received a letter from Mr. Bodie describing plans to redevelop the land and property into a mixed-use condominium project. *Id*. The letter indicated that in conjunction with Paul McCue, an Aurora developer, the rezoning process was underway, in the first stage of a three-stage process, that conversations had occurred involving the local alderman and city planner for Aurora about rezoning the property for a mixed-use 180-unit condo development with two commercial lots, and that a verbal sale was in place for one of the commercial lots. *Id*. With the hopes of completing the zoning process by the end of the year, Mr. Bodie requested that Amcore forebear on taking action on the loan in exchange for accepting interest only payments for one year as well as a lump-sum payment of $75,000 towards the principal balance on the loan. *Id*. at 3. In subsequent oral conversations, Mr. Bodie and Mr. Teppen continued to negotiate the terms of the forbearance. *Id*. Discussions continued into late 2006. *Id.*

In order to add urgency to the process, Amcore filed a foreclosure complaint in August 2006. *Id*. Ultimately, in January 2007, Amcore agreed to forebear on taking further action related to the loan for a two-month period in exchange for a payment of $150,000 towards the loan. *Id*. Brian Bodie had enlisted the aid of an attorney, Robert Schlyer, an attorney with whom he

had a relationship and who performed work out of his company's office. *Id*. Mr. Schlyer signed and delivered that agreement on behalf of the guarantors. *Id*.

The two months came to pass on March 29, 2007 without as much progress as expected. *Id*. Thus, the parties began to negotiate an amended forbearance agreement. *Id*. The government's witnesses submitted that in order to achieve an amended forbearance agreement, the defendants, through Robert Schlyer, made additional false representations. For example, on April 23, 2007, Mr. Schlyer submitted a letter to Amcore's attorney, Fred Harbecke, which contained the proposed terms for an amended forbearance agreement. *Id*. at 3-4. The letter stated that Duke LeBeau, Inc. has formulated an investment mechanism with the counsel of Ariel Weissberg to obtain investor funding through the use of property exchanges. *Id*. at 4. Through that mechanism, the project expected to have approximately $1.55 million in funds available after the closings of those properties, which was scheduled to occur on or around September 29, 2007 at the offices of Ariel Weissberg. *Id*. Through these efforts, the project expected to pay off Amcore in full. *Id*. Mr. Schlyer further represented that the zoning phase of the project would be completed by the end of June, and he also sent draft operating and subscription agreements attached to his letter. *Id*. On May 11, 2007, Amcore agreed to amend the forbearance agreement and not take further action until August 15, 2007. *Id*.

After entering into the amended forbearance agreement, Mr. Harbecke received additional materials from Mr. Schlyer, including a private placement memorandum, detailing the ongoing efforts to redevelop the property. *Id*. The documents described how Aurora Green Development was a new company formed for the purpose of redeveloping this property. *Id*. After providing an overview of the company and the development efforts and plans, the materials described how the company had enlisted R.C. Wegman Construction Company to help with the construction-related aspects of the property, Ariel Weissberg to help with the legal aspects, and Intech Consultants for engineering. *Id*.

Ultimately, the redevelopment efforts stalled, the loan was never paid off, and Amcore took ownership of the property in 2009 after a sheriff's sale, and subsequently transferred the assets to its successor, BMO Harris, in 2010. *Id*. at 5.

At trial, the government called a number of investors who agreed to provide funds for the redevelopment efforts in exchange for a future stake in the project. Those included Janice Pace, Elaine Brinkman and Prestman Brinkman, Joseph Sitko, Mary Wagner, Delores Palmquist, and Douglas Wilson. *Id*.

The government's case against Mr. LeBeau and Mr. Bodie also emphasized alleged misrepresentations made to Amcore and investors with respect to the zoning process. *Id*. at 7. For example, as mentioned,

Roger Teppen received a letter from Mr. Bodie indicating that the project was in the first stage of a three-stage process for rezoning the parcel of land, had formally met with city officials regarding the process, and expected to have rezoning completed by the end of 2006. *Id*. A number of government witnesses stated that this representation was false, as the zoning process was far more involved than suggested by Mr. Bodie, and further, that there were no guarantees in the process and there could not necessarily be until zoning had in fact been approved. *Id*.

The government also emphasized a number of the misrepresentations contained in the April 23, 2007 prospectus sent to Amcore by Mr. Schlyer. *Id*. at 8. Those materials were prepared by a graphic designer, Mark Oda, at the request of Mr. Bodie, with whom he was acquainted through his ex-wife. *Id*.

Finally, Mr. LeBeau was individually charged with two counts of making a false statement for the purpose of influencing the actions of a financial institution in violation of 18 U.S.C. § 1014. ECF 1 pp. 13-15. Those counts pertained to his personal financial statements submitted to Amcore on September 1, 2004, and May 27, 2005 respectively. 18-1656 ECF 25 p. 8. More specifically, the government claimed that he did not disclose his outstanding obligations to Mary Wagner, Kurt Green, and Douglas Wilson on these statements submitted to Amcore. *Id*. Mary Wagner testified that by the end of 2002, she and her husband had loaned Mr. LeBeau a total of $59,000 as a personal loan in

order to help him buy out his then-partner in the business. *Id*. at 9. Kurt Green stated that stretching back to the 90's, he had loaned Mr. LeBeau money on a couple of occasions, and by the end of 2005, was still owed approximately $50,000. *Id*. And prior to his subsequent investment in 2006, Douglas Wilson testified that he had loaned Mr. LeBeau $30,000 in July 2000, and still had not been paid back as of 2005 or the time of his testimony. *Id*. Trial counsel argued that upon closer examination of the financial statements, especially in light of Mr. LeBeau's dealing with Vice President of Amcore, Layne Burns, the financial statements were accurate, or accurate enough with respect to Mr. LeBeau's mental state, as his obligations related to the property were simply subtracted from the then-existing value of his interest in the property and the land. *Id* at 9-10.

On March 16, 2017, after an approximately week-and-a-half long jury trial, the jury returned a verdict of guilty for both defendants on all counts. ECF 109, 110. On March 13, 2018, the district court sentenced Mr. LeBeau to a total term of 36 months' incarceration. ECF 170. Mr. LeBeau timely filed his notice of appeal on March 22, 2018. ECF 175. In his appeal, Mr. LeBeau argued, *inter alia*, that the district court erred in omitting the concept of materiality from the bank fraud elements instruction, and that Mr. LeBeau was prejudiced by sentencing counsel's failure to challenge the $789,000 in restitution sought and ordered to Amcore Bank. 18-1656 ECF 25.

On February 4, 2020, Seventh Circuit filed its opinion and order denying Mr. LeBeau's appeal. App. 1a. In that opinion, the Seventh Circuit recognized, for the first time, that materiality is an element for all bank fraud related charges, and juries should be instructed accordingly. App. 9a. Even so, it found that such an omission here did not affect Mr. LeBeau's substantial rights, and in any event, he waived any argument regarding the issue. App. 14a-15a. As for Mr. LeBeau's *Strickland* claim with respect to the district court's restitution order, and *United States v. Litos*, 847 F.3d 906 (7th Cir. 2017), the Seventh Circuit found, in essence, that Mr. LeBeau had not carried his burden of establishing the elements of a *Strickland* claim. App. 16a-17a. Mr. LeBeau's timely filed petition for rehearing or rehearing *en banc* was denied on March 4, 2020. App. 34a.

REASONS FOR GRANTING THE PETITION

1. THIS COURT'S INTERVENTION IS NECESSARY TO UNIFY FEDERAL LAW CONCERNING MATERIALITY, BANK FRAUD, INSTRUCTIONS TO THE JURY, AND THE WAIVER DOCTRINE.

In *United States v. Neder*, 527 U.S. 1, 25 (1999), this Court recognized that materiality is an essential element of the federal mail, wire, and bank fraud statutes. Even so, the Seventh Circuit has not always followed *Neder*, including recently when it held that in order to prove bank fraud under § 1344(1), the

government needs to prove only four other elements—materiality not included. *United States v. Ajayi*, 808 F.3d 1113, 1119 (7th Cir. 2015). The government argued the same before the Seventh Circuit. *See* 18-1656 ECF 55 p. 30.

The First Circuit has recognized that materiality is an element of § 1344(1). *See United States v. Moran*, 393 F.3d 1, 13 (1st Cir. 2004). Nonetheless, it does not include materiality within its element instruction, although it later defines the term itself. *See* First Circuit Instruction No. 4.18.1344. In any event, it subjects the omission of the concept of materiality from a jury instruction to plain error analysis. *Moran*, 393 F.3d at 13.

The Second, Third, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuit have all held materiality to be an element of § 1344(1), and instruct juries accordingly. *See United States v. Klein*, 216 Fed. Appx. 84, 90 (2d Cir. 2007); Third Circuit Instruction No. 6.18.1344; Fifth Circuit Instruction No. 10.03A; Eighth Circuit Instruction No. 6.18.1344; *United States v. Steffen*, 687 F.3d 1104, 1109 (8th Cir. 2012); *United States v. Omer,* 395 F.3d 1087, 1088 (9th Cir. 2005) (per curiam); Tenth Circuit Instruction No. 2.58; 11th Circuit Instruction No. O52; *United States v. Williams*, 390 F.3d 1319, 1324 (11th Cir. 2004).

In the decision below, the Seventh Circuit has now joined the near-nationwide consensus. Despite this recognition, and this Court's earlier decision in *Neder*,

supra, as the Seventh Circuit recognized, clarity is still lacking from this Court. *See* App. 9a. In the first instance, then, this case presents a unique opportunity for it to expressly hold that materiality is an element of a § 1344(1) charge.

Despite the near-universal acceptance of materiality, and its importance to § 1344, the Seventh Circuit, citing Rules 30(d) and 52(b), offered no relief to Mr. LeBeau, as it found waiver.

This finding contradicted the Seventh Circuit's own prior holdings, as most recently set forth in *United States v. Natale*, 719 F.3d 719, 729 (7th Cir. 2013). In *Natale*, the Seventh Circuit noted that a defendant's affirmative approval of a proposed instruction, as opposed to passive silence, can amount to waiver instead of mere forfeiture. *Id*. It further noted that simple statements such as "no objection" or "no problem" can amount to wavier. *Id*. at 730. The Court also noted that other circuits do not apply such a rigid rule, *id*. at n. 2 (citations omitted), and further, conceded that "[t]his approach can sometimes produce especially harsh results." *Id*. at 730. This is especially true given that in virtually every criminal trial in the Northern District of Illinois, judges will hold a pretrial conference and go through each instruction individually and require an affirmative response from trial counsel. *Id*. Thus, the Court concluded that "waiver is not an absolute bar," especially in situations where "jury instructions . . . inaccurately state the law by minimizing or omitting elements required for

conviction," as such a scenario "more readily present[s] the circumstances that allow consideration of waived issues." *Id.*; *see also United States v. Groce*, 891 F.3d 260, 269 (7th Cir. 2018) (reviewing jury instruction for plain error despite arguable waiver of the issue).

In so holding, the Seventh Circuit no doubt produced a "harsh" and unjust result—one that its sister circuits do not always share. *See, e.g., United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009) ("an issue that was not objected to out of neglect is forfeited and is subject to plain error review on appeal"); *Virgin Islands v. Rosa*, 399 F.3d 283, 291 (3rd Cir. 2005) (considering whether defendant was personally aware of abandonment of a known right, and whether that decision was tactical, in determining whether to apply waiver or forfeiture doctrine); *United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (requiring the defendant to both be aware of and invite the error i.e. intentionally relinquish a known right to find waiver); *United States v. Drougas*, 746 F.2d 8, 30 (1st Cir. 1984); *United States v. Wiggins*, 530 F.3d 1018, 1020 (D.C. Cir. 1976).

Thus, this case presents the opportunity to clarify the proper standard to review erroneous but not objected to jury instructions, with all the more reason given this case concerns an essential element of the offense.

Moreover, even under its harsher standard, the Seventh Circuit failed to adequately reconcile its own precedent. In *Fernandez*, it found that even though no

materiality instruction was given with respect to an honest services fraud, the instructions, when viewed in their entirety, adequately embraced the concept of materiality. *United States v. Fernandez,* 282 F.3d 500 (7th Cir. 2002). The Seventh Circuit reached a similar conclusion in *Reynolds,* 189 F.3d 521; namely, that the instructions adequately placed the question of materiality before the jury even though the instructions did not explicitly use the term "materiality." *Id.* at n. 2; *see also United States v. Pribble*, 127 F.3d 583, 589 (7th Cir. 1997).

The relevance of these opinions is that in finding an elements instruction lacking the materiality element to have no effect on a defendant's substantial rights, they all recognized the importance of *other* instructions given to the jury sufficiently placing the concept of materiality before it. That alone is what justifies the sometimes "harsh results" under the Seventh Circuit's more exacting standard of review. But here, the Seventh Circuit made no such finding, and erroneously so. Instead, it offered only an unsupported, conclusory line that "LeBeau's stories to Amcore" would absolutely have been found to be material. App. 12a. The problem, again, is that this was solely an issue for the jury to decide, and it was precluded from doing so given that it was never informed—in any sense—that it was in fact required to make such a finding.

II. THE COURT'S INTERVENTION IS NECESSARY TO CURE INJUSTICES WORKED BY THE MVRA AND RESTRICTIVE SCOPE OF 28 U.S.C. § 2255 PETITIONS.

As will be discussed, Mr. LeBeau would not have been saddled with a $789,000 restitution judgment to a reckless lender but for his counsel's ineffective performance at sentencing. Based on the restricted grounds for bringing a *habeas* petition, and the Seventh Circuit's erroneous conclusion, that will be the precise result for Mr. LeBeau—and others to come—without this Court's intervention.

The Sixth Amendment guarantees to each criminal defendant "the Assistance of Counsel for his defence." Given counsel's critical role in the ability of our adversarial system to produce just results, "the right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970)). Defense counsel can deprive a defendant of this "firmly established" right, *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986), simply by failing to provide "adequate legal assistance." *Strickland*, 466 U.S. at 686. Under the familiar two-pronged test of *Strickland*, in order to prevail on a claim of ineffective assistance of counsel, a petitioner must show that (1) counsel's performance was deficient and (2) that the defendant was prejudiced by counsel's deficient performance. *Id.* at 687.

As mentioned, at Mr. LeBeau's sentencing hearing, his counsel did not object to the $789,000 in restitution that was ordered to Amcore Bank, the lender in this case. ECF 170. Mr. LeBeau's alleged co-schemer, Robert Jon Schlyer, the attorney for the scheme, was tried and convicted separately, in case 17 CR 30 before Judge Amy J. St. Eve and her appointment to this Court. His sentencing hearing was held on April 19, 2018. App. 35a. Relying on *United States v. Litos*, *supra*, Judge St. Eve concluded that Amcore Bank was not a "victim" within the meaning of the Mandatory Restitution to Victims of Certain Crimes Act ("MRVA"), and ordered that Mr. Schlyer owed Amcore Bank no restitution at all. *See* App. 67a. Judge Gettleman, who had previously sentenced Mr. LeBeau without the aid of the arguments advanced by Mr. Schlyer's counsel, ordered that Mr. LeBeau's restitution obligations be satisfied jointly and severally with both his co-defendant, Brian Bodie, and Mr. Schlyer. ECF 170 p. 8.

As to the substance of the argument, this case fell squarely within the bounds of *Litos*. In *Litos*, the defendants were convicted of conspiring to commit wire fraud and bank fraud in violation of 18 U.S.C. §§ 1343 and 1349. *Id.* at 907. The only question before the Seventh Circuit on appeal was the propriety of a restitution order compensating Bank of America for the loss it suffered in issuing the loan. *Id.* Judge Posner began his opinion by noting that although Bank of America was not a co-conspirator, the bank "did not

have clean hands." *Id.* More specifically, the loan at issue was a "joke" on its face, the bank ignored clear signs that the loan was phony, and "[h]ad the bank done *any* investigating at all, rather than accept at face value obviously questionable claims that the mortgagors were solvent, it would have discovered that none of them could make the required down payments, let alone pay back the mortgages." In short, the Seventh Circuit found that the bank was not simply negligent but acted recklessly in issuing the loan. *Id.* at 908. And because it was "knowing[ly] involve[d] in potentially harmful activity," it was not entitled to restitution under the relevant provisions of the MVRA. *Id.*

In his matter, Amcore Bank was no less reckless than Bank of America was in *Litos*. The alleged scheme was never devised to end in foreclosure. Before making the loan, Amcore Bank knew full well that Mr. LeBeau was deep in debt at the time he applied for the loan. They knew that in 2003, Mr. Bodie had paid only $843 in income taxes, and in 2004, he reported a net loss of $400,000. App. 173. Moving forward, in 2005 and 2006, the bank knew about Mr. LeBeau and Mr. Bodie's income and debts—that they were in significantly worse financial shape than the government claimed was represented on the mortgage agreement and the loan application. *Id.* They knew this based on communications with their lawyer, and they knew there was $700,000 in liens and a huge increase in interest expenses were reported prior to issuing the

loan. App. 37a. The bank continued negotiating nonetheless.

When the loan fell behind and continued to fall behind, the bank ignored the advice of its own lawyers, allowed forbearance, and accepted large payments. *See* App. 4a. The bank knew that Mr. LeBeau was going through bankruptcy. App 38a. It knew that Mr. Bodie had incurred $183,000 in debt. *Id*. The bank continually agreed to forebear on the loan and delay a sheriff's sale. App. 41a. The bank even ignored an offer to buy the collateral for $600,000 from Carl Santangelo in 2008. *Id*. Instead, the bank held onto the collateral, and after the bottom fell out of the real estate market, only then did the bank sell the collateral for $375,000 at a sheriff's sale. And Amcore Bank's behavior generally, as revealed by the government's own 2011 Department of Treasury Audit, caused the taxpayers of this country a loss of $163 million. App. 36a.

Importantly, when questioned by Judge St. Eve, the government conceded, "[we] do not think, given the government's report, that you can dispute that Amcore Bank, at a minimum, had its head in the sand," and that the government "[has] never said that Amcore Bank is blameless . . . [or] that there should be no consideration to other factors which you may take as mitigating." App. 58a. Then, after Judge St. Eve brought up *Litos*, *supra*, the government further conceded that "it is a difficult decision to reconcile," noting however that "restitution is different from loss." *Id*.

Before pronouncing her sentence, Judge St. Eve also stated that she was "troubled by the role of the bank here." App. 47a. She further noted that Mr. Schlyer's arguments were "really not contested." *Id.* "[T]he bank here, as . . . said before, had at least its head in the sand. They had clear signs that fraud was going on here and did not do anything about it. Part of it may have been the time. It does not matter. The bank's role here is problematic to the Court." *Id.* Judge St. Eve ultimately found that no restitution should be ordered to Amcore Bank. App. 67a.

There can be little question that Mr. LeBeau was prejudiced by counsel's deficient performance. Had his counsel raised the same argument as his co-defendant who was charged in a separate case with defrauding the same lender in the same scheme and the exact same loan at issue, then the result would have been the same—following *Litos*, we can be near certain that the district court would not have ordered Mr. LeBeau to pay restitution to this reckless lender. Of course, we need not be "near certain," but find only that there is a "reasonable probability" that the result would have been different to satisfy *Strickland's* prejudice prong. *See, e.g., Allen v. Chandler*, 555 F.3d 596, 600 (7th Cir. 2009).

The Seventh Circuit's opinion denying this challenge was flawed and in need of redress in a number of important respects. At the outset, the panel observed that:

> LeBeau has insisted, however, that he wishes to press it, and so (with the reminder that he will not be able to raise an ineffectiveness claim again in a motion under 28 U.S.C. § 2255) we will examine it. App. 15a.

This statement was, respectfully, incorrect—the law of the Seventh Circuit is well-settled that if not raised on direct appeal, Mr. LeBeau had no vehicle whatsoever in which to raise such an error. *See,* e.g., *United States v. Bania*, 787 F.3d 1168, 1172 (7th Cir. 2015) ("[a] 28 U.S.C. § 2255 motion, for instance, cannot be used as a vehicle for challenging the restitution component of a sentence"); *Barnickel v. United States*, 113 F.3d 704, 705 (7th Cir. 1997) ("[i]t has been well established both in this Circuit and in others for some time that a fine-only conviction is not enough of a restraint on liberty to constitute 'custody' within the meaning of the habeas corpus statutes").

Even on direct appeal, the Seventh Circuit's consideration of the substantive argument was erroneous. Counsel respectfully has significant disagreements with the panel's finding that this transcript and its related context is insufficient to establish the prejudice prong of a *Strickland* claim; specifically, the panel's argument that "one district court's conclusion is not binding on another. LeBeau provides no support for his assumption that additional argument would have prompted the district court here

to follow the example of its colleague in *Schlyer*." App. 38.

On the contrary, there is practically no better evidence than another district court's decision of the exact same mixed question of law and fact—Mr. Schlyer's sentencing hearing was practically a petri dish for this issue—and no doubt established, at a minimum, a reasonable probability that the result would have been different.

Even so, the Seventh Circuit should have given more careful scrutiny to the issue given the fact that under its precedent, that as cited above, it misunderstood, he was forced to press the issue on direct appeal.

All other circuits are essentially in universal agreement on the fact that collateral attacks on restitution orders are not cognizable in a § 2255 petition. *See, e.g., Bartelho v. United States*, 2016 WL 9584199, * 1 (1st Cir. 2016) (citing *Smullen v. United States*, 94 F.3d 20, 25-26 (1st Cir. 1996); *United States v. Rutigilano*, 887 F.3d 98, 104-05 (2d Cir. 2018) (citing *Kaminski v. United States*, 339 F.3d 84, 86 (2d Cir. 2003); *Obado v. New Jersey*, 328 F.3d 716, 718 (3rd Cir. 2003); *Coleman v. Brooks*, 133 Fed. Appx. 51, 53 (4th Cir. 2005); *Campbell v. United States*, 330 Fed. Appx. 482, 482 (5th Cir. 2009) (per curiam); *Ferguson v. United States*, 2017 WL 5500919, * 3 (S.D. Ohio 2017); *United States v. Bernard*, 351 F.3d 360, 361 (8th Cir. 2003); *Bailey v. Hill*, 599 F.3d 976, 978 (9th Cir. 2010); *Brooks v. Hanson*, 763 Fed. Appx. 750, 752 (10th Cir.

2019); *Arnaiz v. Warden*, 594 F.3d 1326, 1328 (11th Cir 2010).

Now, as the law stands, Mr. LeBeau is left without recourse, despite the increasing scrutiny the MVRA has faced in producing unjust results and exorbitant restitution orders.

For example, in *Paroline v. United States*, 572 U.S. 434 (2014), this Court alluded to the fact that the MVRA, at least in the context of child pornography offenses, was "unworkable." And more recently, Justices Gorsuch and Sotomayor authored a compelling dissent to the denial of a petition requesting consideration of whether the restitution component of a sentence needs to be considered by a jury, as opposed to a judge. *Hester v. United States*, 139 S.Ct. 509 (2019). As they noted, "[r]estitution plays an increasing role in federal criminal sentencing today." *Id.* at 510. Prior to the passage of the MVRA in 1996, restitution orders were comparatively rare. *Id.* But as the studies they cited show, "from 2014 to 2016 alone, federal courts sentenced 33,158 defendants to pay $33.9 billion in restitution," and more widely, "1996 and 2016, the amount of unpaid federal criminal restitution rose from less than $6 billion to more than $110 billion." *Id.* As was also noted, "the effects of restitution orders . . . can be profound. Failure or inability to pay restitution can result in suspension of the right to vote, continued court supervision, or even reincarceration." *Id.*

Here, Mr. LeBeau was expressly ordered to pay restitution not just as a standalone component of its judgement, but as a condition of his supervised release. ECF 170. Failure to do so could subject him to spend the remaining term of supervised release, or one additional year, incarcerated in the Bureau of Prisons. *See* 18 U.S.C. § 3585. The case thus presents a much needed opportunity to cure an injustice worked by the MVRA, particularly in light of the restrictive scope of § 2255 petitions, and to safeguard the right to the effective assistance of counsel.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, DATED FEBRUARY 4, 2020

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 18-1656 & 18-3366

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEVIN LEBEAU and BRIAN BODIE,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 14 CR 488 — Robert W. Gettleman, *Judge.*

September 10, 2019, Argued
February 4, 2020, Decided

Before WOOD, *Chief Judge*, and KANNE and BRENNAN, *Circuit Judges.*

WOOD, *Chief Judge.* Intending to transform a failing health club into a mixed-use condominium development, Kevin LeBeau and Brian Bodie obtained a $1,925,000 loan from Amcore Bank in 2004. By the next year,

unfortunately, the loan had fallen into default, and so the pair sought and obtained a forbearance agreement (later amended) from Amcore. These measures did not help either. Ultimately the two men were indicted in 2014 on multiple counts of bank fraud and making false statements to the bank in connection with the loan and forbearance agreements. The case went to trial in 2017, and the jury convicted both LeBeau and Bodie on all counts. The court sentenced each one to 36 months' imprisonment and restitution of more than a million dollars; both have appealed.

LeBeau raises three arguments in this court: first, that the district court erred by failing to give the jury an instruction on materiality for the bank-fraud offenses; second, that the court should not have admitted evidence related to certain victims' losses in the scheme and their status as prior victims of fraud; and finally, that he received ineffective assistance of counsel at the sentencing stage, where his lawyer failed to challenge the amount of restitution. Bodie contends that his conviction must be thrown out because the superseding indictment was time-barred. He also disputes the sufficiency of the evidence to convict him. Finding no prejudicial error in any of these respects, we affirm the district court's final judgments.

I

A

At trial, the jury learned that Kevin LeBeau owned and operated a health club located on approximately ten

acres of land he owned in Aurora, Illinois. Around 2004, the business ran into difficulties, prompting LeBeau to team up with Brian Bodie to redevelop the land as a condominium project. Bodie was an attractive partner because he ran two mortgage companies, PreStar Financial Corp. and Mortgage Desk. The two submitted a loan application to Amcore Bank, a federally insured financial institution, in May 2004, and the bank gave them a $1,925,000 mortgage loan in September 2004. LeBeau and Bodie executed full personal guarantees on the loan and listed Bodie's two companies as guarantors.

As the borrower, LeBeau was required to submit truthful and complete personal financial statements to the bank. But from the start, he did not do so. LeBeau failed to disclose more than $130,000 in outstanding personal loans in his initial personal financial statement, which he submitted in September 2004; he repeated the omission in a second statement submitted in May 2005.

It did not take long for LeBeau and Bodie to fall behind on the Amcore loan. By late 2005 they were in discussions with a bank representative about how to proceed. Raising the stakes, the bank issued a demand letter in March 2006. In response, LeBeau and Bodie paid $151,000 toward the balance of the loan—a step that convinced the bank to delay further action at that time. In July 2006 Bodie sent a letter to Amcore requesting a forbearance agreement for the defaulted loan. In that letter, Bodie represented that he and LeBeau had begun the formal process to obtain rezoning and development permissions from the city. This was false: in fact, they had only informally discussed this possibility with city officials.

Amcore filed a foreclosure complaint in state court in August 2006. For the next several months, discussions among the defendants, along with their attorney, Robert Schlyer, about a possible forbearance agreement took place. LeBeau and Bodie offered to make payments toward the loan principal and interest, and they represented that they had external investors committed to the project.

In January 2007 Amcore agreed to enter into a two-month forbearance agreement on the condition that LeBeau and Bodie make a $150,000 payment. LeBeau obtained the money for the payment by securing a $300,000 investment in the development project from Delores and Kenneth Palmquist. He represented to the Palmquists that the condominium development would be worth at least $6 million and that they would receive 14% annual interest on the principal as well as an interest in the underlying land. But he did not inform the Palmquists that he and Bodie were in default on the project loan and that Amcore had initiated foreclosure proceedings. Nor did he disclose to Amcore that he obtained the money for the forbearance fee by granting the Palmquists an interest in the mortgaged property without the bank's authorization.

Matters were no better for LeBeau and Bodie by March 2007: they were still unable to fulfill their obligations under the loan, and so they sought an amended forbearance agreement from the bank. In April, Schlyer sent materials to Amcore indicating that the defendants had assembled a development team, the zoning phase of the project would be completed by June 2007, development

was underway on the parcel, and there were three subscribers ready to invest $1.5 million in the development company. None of these representations was true. They had the desired effect, however, when Amcore agreed to enter an amended forbearance agreement in May 2007.

In the end, LeBeau and Bodie made no further payments on the Amcore loan and development never commenced on the parcel. Amcore took ownership of the property in 2009 after a sheriff's sale, and it was ultimately sold by Amcore's successor, BMO Harris, for $375,000. None of the individual investors recouped their investment principal.

B

On August 28, 2014, a grand jury returned a nine-count indictment charging LeBeau and Bodie with bank fraud in violation of 18 U.S.C. § 1344(1) and (2), and making false statements in violation of 18 U.S.C. § 1014. (Schlyer was separately charged and tried by a jury in the Northern District of Illinois for his role in the scheme. He was convicted on two counts of wire fraud affecting a financial institution, 18 U.S.C. § 1343, and one count of bank fraud, 18 U.S.C. § 1344. 17-CR-30 (N.D. Ill.)). On June 29, 2016, the grand jury returned an eight-count superseding indictment. The superseding indictment eliminated two of the false-statement counts and associated allegations against Bodie, reorganized some of the counts, added more recent conduct that indisputably fell within the statute of limitations, and amended the section 1344 counts to allege violations of only section 1344(1). It charged LeBeau with

three counts of bank fraud, in violation of section 1344(1), and four counts of making false statements to the bank, in violation of section 1014; Bodie was charged with three counts of bank fraud and three false-statement counts.

In March 2017, after a week-and-a-half long trial, the case was submitted to a jury. The district court instructed the jury that in order to carry its burden on the section 1344(1) counts, the government had to establish that (1) there was a scheme to defraud a bank, (2) the defendants knowingly executed or attempted to execute the scheme, (3) the defendants acted with the intent to defraud, and (4) at the time of the charged offense the deposits of the bank were insured by the Federal Deposit Insurance Corporation. The instruction did not state that the government was required to prove the "scheme involved a materially false or fraudulent pretense, representation, or promise ...," as recommended in the Seventh Circuit Pattern Criminal Jury Instructions. See Pattern Criminal Jury Instructions of the Seventh Circuit (2012 Ed.) (plus 2015-2017 and 2018 changes), http://www.ca7.uscourts.gov/pattern-jury-instructions/7th_criminal_jury_instr.pdf ("Pattern Instr."), at 447. As noted earlier, the jury convicted both defendants on all counts, and both received sentences of 36 months in prison, two years of supervised release, and restitution in the amount of $1,016,000.

II

A

We begin with LeBeau's challenge to the jury instructions for the bank-fraud counts. The statute

prohibiting bank fraud, 18 U.S.C. § 1344, has two parts. Section 1344(1) states that "Whoever knowingly executes, or attempts to execute, a scheme or artifice—(1) to defraud a financial institution ... shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both." Subpart (2) prohibits a scheme or artifice "to obtain any of the moneys, ... or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." § 1344(2). Counts One, Two, and Three of the superseding indictment (the only ones that referred to section 1344) all accused the defendants of offenses under section 1344(1): "knowingly participat[ing] in a scheme to defraud a financial institution," Count One, ¶¶ 2, 11, or "knowingly execut[ing] and attempting to execute the above-described scheme," Count Two, ¶ 2, Count Three, ¶ 2. The only false statements charged in the indictment appear in Counts Four through Eight, all of which refer only to 18 U.S.C. § 1014.

When discussing the proposed jury instruction for the section 1344 counts prior to trial, the government stated that because it had not brought charges under section 1344(2), materiality was not an element and there was no need for an instruction on it. The district court said, "I assume the defendants agree to that?" Bodie's counsel responded, "I agree to it," and LeBeau's counsel responded, "Yes, Judge."

The district court instructed the jury on the elements of section 1344 as follows:

> 1) There was a scheme to defraud a bank, as described in Counts One, Two, and Three of the indictment; and
>
> 2) The defendant knowingly executed or attempted to execute the scheme; and
>
> 3) The defendant acted with the intent to defraud; and
>
> 4) At the time of the charged offense the deposits of the bank were insured by the Federal Deposit Insurance Corporation.

This instruction mirrors the Pattern Instructions, with the key exception that it does not ask the jury to decide whether "the scheme involved a materially false or fraudulent pre-tense, representation, or promise." See Pattern Instr. at 447. LeBeau asserts that this omission impermissibly relieved the government of part of its evidentiary burden and prejudiced him.

LeBeau's point is a serious one, supported by Supreme Court precedent and some of our decisions. In *United States v. Neder*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), the Supreme Court held that "materiality of falsehood is an element of the federal ... bank fraud statute[]." *Id.* at 25. It did not limit that holding to section 1344(2). Rather, it determined that "fraud" itself requires the element of materiality. *Id.* at 23. We have since said that *Neder* requires "district courts [to] include materiality in the jury instructions for section

1344." *United States v. Reynolds*, 189 F.3d 521, 525 n.2 (7th Cir. 1999). The Committee Comment to the Pattern Instruction for section 1344 is even more explicit:

> Although the Seventh Circuit has not yet addressed the application of *Neder* to § 1344(1) specifically, the Ninth Circuit, in *United States v. Omer*, 395 F.3d 1087 (9th Cir. 2005), held that materiality is an element of a § 1344(1) violation under *Neder*. In light of the general admonitions in *Neder* and *Reynolds*, this instruction has been modified to reflect this requirement.

Pattern Instr. at 448.

On the other hand, we have not consistently followed this guidance. Recently we stated that to prove bank fraud under section 1344(1), the government needs to prove only the four elements contained in the jury instruction in this case. *United States v. Ajayi*, 808 F.3d 1113, 1119 (7th Cir. 2015). The additional materiality element, we said, was required only when section 1344(2) was charged. *Id.*

The better course, consistent with *Neder*, is to require the materiality instruction on all bank-fraud charges, whether brought under section 1344(1) or (2). The government has informed us that this is its current practice, and we encourage that practice to continue until such time as we receive greater clarity from the Supreme Court about what is required.

The question whether the court's omission of the materiality element in LeBeau's case requires reversal does not, however, turn on whether the court erred in this respect. It turns instead on the fact that LeBeau's counsel affirmatively consented before trial to the instruction without the materiality element, and counsel never withdrew that position.

If a defendant negligently bypasses an opportunity to challenge a jury instruction—*i.e.* he forfeits it—he may nevertheless later attack that instruction for plain error. FED. R. CRIM. P. 30(d) and 52(b). "However, a defendant who waives—rather than forfeits—his objection cannot avail himself of even the demanding plain error standard of review." *United States v. Natale*, 719 F.3d 719, 729 (7th Cir. 2013). "Although passive silence with regard to a jury instruction permits plain error review ... a defendant's affirmative approval of a proposed instruction results in waiver." *Id.* We have "strictly applied this rule to affirmative expressions of approval without examining whether the statements were a 'knowing and intentional decision' or resulted from 'negligently bypassing a valid argument.'" *Id.* "As a result, affirmative statements as simple as 'no objection' or 'no problem' when asked about the acceptability of a proposed instruction have resulted in waiver." *Id.* at 730.

LeBeau argues that his counsel did not affirmatively approve the court's instructions and that the interests of justice require us to overlook any waiver that occurred. The first point finds no support in the record. The judge could not have been more direct. After the government

explained why it was not proposing a materiality instruction, the judge said "I assume the defendants agree to" an elements instruction that omitted materiality, and LeBeau's counsel said "Yes, Judge." That can only be read as direct acquiescence in the proposed instruction. Moreover, because this discussion took place in pretrial proceedings, counsel had the opportunity to confirm what the government said and to raise a later objection to the instruction at any time before the case went to the jury. But he did not. He therefore waived the argument.

LeBeau's second argument—that we can overlook a genuine waiver—fails to grapple with the nature of a true waiver. In *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993), the Supreme Court said that when a defendant has waived a right (that is, has intentionally relinquished or abandoned a known right, see *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)), that right has been extinguished. 507 U.S. at 733. See *United States v. Waldrip*, 859 F.3d 446, 449 (7th Cir. 2017). This is not to say that the *characterization* of the defendant's action is not critical. At times, there may be some ambiguity in the defendant's statement, and so the court must decide whether it is looking at waiver or the type of negligent oversight that triggers plain-error review. See *Natale*, 719 F.3d at 729-30. In this case, however, we see no such ambiguity. We note as well that we speculated in *Natale* that waiver might not be "an absolute bar on our consideration of issues not preserved below" and that "[w]hen the 'interests of justice' so require, we may reach the merits of a waived issue." *Id.* at 731 (citing *Fleishman v. Cont'l Cas. Co.*, 698 F.3d 598, 608 (7th Cir. 2012)). But this was *dicta*.

Such an exception to the ban on review of waived issues would be difficult to square with the Supreme Court's teachings, but we need not pursue this possibility any further in LeBeau's case. First, the waiver is clear. Second, even if we thought it was ambiguous enough to support plain-error review, the omission of the materiality element from LeBeau's jury instruction did not affect his substantial rights, *Olano*, 507 U.S. at 732; in fact, it is hard to imagine a jury that would not have found LeBeau's stories to Amcore to be material, meaning "capable of influencing the decision of the person to whom it was addressed." See Pattern Instr., 18 U.S.C. §§ 1341 & 1343 Definition of Material, at 431 (cross-referenced in Comment to § 1344(1) at 448). LeBeau candidly acknowledges that the jury instructions given in *Neder* and *Reynolds* were found to be sufficient or at worst harmless error despite omitting a required element. The same is true here. The district court could reasonably have determined that the term 'fraud' "embodies the concept of materiality," and that the instructions as given "adequately place[d] the question of materiality before the jury." *United States v. Pribble*, 127 F.3d 583, 589 (7th Cir. 1997); see also *United States v. Fernandez*, 282 F.3d 500, 509 (7th Cir. 2002) (finding in the health-services fraud context that omission of an explicit reference to materiality in the jury instruction was not plain error because the instructions viewed in their entirety adequately embraced the concept of materiality).

LeBeau waived any argument he might have presented about the need to include a separate materiality instruction on the charges under section 1344(1) when he

affirmatively consented to proposed language. Moreover, even if he merely forfeited this point, any possible error did not affect his substantial rights.

B

We next consider LeBeau's assertion that the district court erred by allowing the government to introduce evidence of Amcore's and various investors' losses as a result of the fraudulent scheme. LeBeau did not object to this evidence at trial, and so our review is only for plain error. See *United States v. Thomas*, 933 F.3d 685, 690 (7th Cir. 2019); FED. R. CRIM. P. 52(b). "On plain-error review, we may reverse if: (1) an error occurred, (2) the error was plain, (3) it affected the defendant's substantial rights, and (4) it seriously affected the fairness, integrity, or public reputation of the proceedings." *Thomas*, 933 F.3d at 690. "Plain error will be found only when the exclusion of the erroneously admitted evidence probably would have resulted in an acquittal." *United States v. Rangel*, 350 F.3d 648, 650 (7th Cir. 2003).

At trial, the government introduced evidence showing that Amcore's successor eventually foreclosed on the property and recouped only $375,000—far less than the remaining balance on the loan—in a sheriff's sale. The jury also heard evidence that individual investors lost the principal they had ploughed into the supposed condominium project. Others who had made personal loans to LeBeau were never repaid. One investor, Janice Pace, testified about having previously been a victim of an unrelated investment fraud and about how the defendants

pitched investment in their development as a way for the Paces to recover from their previous losses.

LeBeau argues that "pecuniary loss is not an element of a fraud charge that the government is required to prove in order to sustain a conviction." This evidence, he says, amounts to "victim impact testimony" that should have been excluded under Federal Rule of Evidence 403, as it has little or no probative value and is highly prejudicial. The government responds that the evidence was relevant because it showed the scope and methods of the fraudulent scheme and helped to "establish defendants' *mens rea*, including knowledge that their efforts to avoid payment and delay foreclosure could cause substantial risk of loss." The government also argues that the evidence of LeBeau's outstanding debt was admissible for the purpose of supporting the charge that the personal financial statements he filed with Amcore in order to obtain the development loan were false.

Because LeBeau did not object at trial to introduction of any of this evidence, the district court did not have a chance to exercise its discretion. As a result, LeBeau "must essentially show that the evidence was so obviously and egregiously prejudicial that the trial court should have excluded it even without any request from the defense, and that no reasonable person could argue for its admissibility." *United States v. LeShore*, 543 F.3d 935, 939 (7th Cir. 2008).

LeBeau has not met this demanding standard. Even if evidence of pecuniary losses was unnecessary given the

amount of other evidence produced at trial supporting the jury's verdict, we cannot say that LeBeau probably would have been acquitted but for this contested evidence.

C

Finally, LeBeau argues that the court erred in calculating restitution. Once again, this is a new argument on appeal. This time he asserts that his sentencing counsel's failure to make a proper objection amounted to ineffective assistance of counsel in violation of his Sixth Amendment rights. We generally discourage raising this argument on direct appeal, since the record so often sheds no light on counsel's thinking. LeBeau has insisted, however, that he wishes to press it, and so (with the reminder that he will not be able to raise an ineffectiveness claim again in a motion under 28 U.S.C. § 2255) we will examine it.

In his sentencing memorandum, LeBeau agreed to a total loss figure of $1,016,000—$789,000 to Amcore and $227,000 to the Palmquists. This is the precise amount that the district court ordered as restitution. The question for us is whether counsel's failure to, or decision not to, object to that amount fell below the minimum acceptable performance level and was so prejudicial to LeBeau that his Sixth Amendment rights were violated. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). For counsel's performance to be deficient, he must have "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.*

LeBeau argues that his counsel should have objected to the inclusion of Amcore's losses because Amcore was not properly categorized as a victim entitled to restitution under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A. This is so, LeBeau asserts, because Amcore was reckless in loaning money to the defendants and entering into a forbearance agreement with them. He reasons that the bank's loss should therefore be deemed the result of its own recklessness rather than the defendants' misconduct. For support he turns to our decision in *United States v. Litos*, 847 F.3d 906 (7th Cir. 2017). In *Litos*, we reversed an order of restitution to Bank of America because the bank did not "have clean hands" and acted recklessly by "clos[ing] its eyes" to phony loan applications and questionable claims about the solvency of the mortgagors involved. *Id.* at 907-10.

LeBeau contends that Amcore was equally reckless here because it knew that LeBeau and Bodie were in dire financial straits and ignored the advice of its own lawyers when it entered into the forbearance agreements. He also notes that the district court in Schlyer's trial was troubled by Amcore's lack of diligence and accordingly declined to order restitution to the bank. LeBeau presumes that if his sentencing counsel had raised the same argument Schlyer's counsel made, the district court in his case would have reached the same conclusion.

But one district court's conclusion is not binding on another. LeBeau provides no support for his assumption that additional argument would have prompted the district court here to follow the example of its colleague in *Schlyer*. We add that *Litos* is readily distinguishable. There we

found that the loan applications were "a joke on their face" and showed clear signs of being phony. That was not the case here. There were certainly indications that the defendants were struggling—that was why they needed a forbearance agreement. But part of the defendants' fraudulent scheme involved raising significant funds to pay the bank in exchange for the forbearance agreements. Those payments misled Amcore into believing that the risk was manageable. Each time the defendants paid what the bank demanded, even though they did so by committing fraud on others. Whether the bank was reckless is debatable and it is not certain what the district court would have decided had the defendants timely raised the argument.

Nothing on this record raises a reasonable probability that LeBeau's counsel would have succeeded with an attack on the restitution order. We see neither deficient performance nor prejudice, and so we find no violation of his Sixth Amendment right to counsel.

III

We now move on to the two claims Bodie raises on appeal: (1) the timeliness and validity of the superseding indictment, and (2) the sufficiency of the evidence to convict him on all counts.

A

Bodie did not raise a statute of limitations defense in the district court. While this omission does not result in waiver, see FED. R. CRIM. P. 12(b), it does result in

forfeiture, see *United States v. Ross*, 77 F.3d 1525, 1536 (7th Cir. 1996). Accordingly, we review whether the superseding indictment is time-barred only for plain error. FED. R. CRIM. P. 52(b).

The superseding indictment, which is the one on which Bodie focuses, was filed on June 29, 2016. The limitations period for the crimes charged is ten years. 18 U.S.C. § 3293(1). The superseding indictment charged Bodie with violations of section 1344 stemming from conduct in January and May 2007, and with violations of section 1014 stemming from conduct in July 2006 and April 2007. All conduct charged occurred within the ten-year period extending backward from June 29, 2016. On its face, therefore, the superseding indictment against Bodie was not untimely.

Bodie argues nonetheless that the superseding indictment materially broadened the original charges, preventing it from 'relating back' to the original indictment (which had been returned on August 28, 2014) and leaving it time-barred. But the relation-back doctrine merely allows a superseding indictment charging conduct now outside the statute of limitations to supplant a "still-pending original indictment ... so long as it neither materially broadens nor substantially amends the charges initially brought against the defendant." *Ross*, 77 F.3d at 1537. The doctrine does not bar the government from charging new conduct that is independently within the limitations period set by the new indictment. Because all charges against Bodie in the superseding indictment were timely, it does not matter if they were materially different from those in the original indictment.

The only conduct charged in the superseding indictment that fell outside of the ten-year period was *LeBeau*'s submission of false personal financial statements. This conduct was also charged in the original indictment, however, and so there is no relation-back problem. In any event, LeBeau did not challenge the superseding indictment. Accordingly, Bodie's challenge to the timeliness of the superseding indictment is without merit.

B

Last, Bodie contests the sufficiency of the evidence to convict him. Bodie's charges stem from the defendants' efforts to obtain the original and amended forbearance agreements from Amcore Bank in January and May 2007.

"In reviewing the sufficiency of the evidence, we review the evidence in the light most favorable to the government, and we will overturn a jury verdict only if no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Garten*, 777 F.3d 392, 400 (7th Cir. 2015). This is a "heavy burden" for the defendant. *United States v. Brandt*, 546 F.3d 912, 915 (7th Cir. 2008). We will not re-weigh the evidence or "second-guess the jury's credibility determinations." *United States v. Coscia*, 866 F.3d 782, 795 (7th Cir. 2017).

Recall that Counts 1-3 are for bank fraud under 18 U.S.C. § 1344(1), which criminalizes "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice—(1) to defraud a financial institution... ." Count 1

charges a scheme to defraud with the original forbearance agreement as the execution. The false statements discussed in Count 6, along with other evidence, support this charge. Count 2 charges a scheme to defraud with the deposit of the Palmquists' money as the execution. The record shows that the defendants fraudulently obtained a $300,000 investment from Delores and Kenneth Palmquist in exchange for a purported interest in the property, and they used $150,000 of it as consideration for the original forbearance agreement with the bank. Personnel from the bank testified that this payment was a critical factor in the bank's willingness to enter into a forbearance agreement and that they did not know where the money came from. Count 3 charges a scheme to defraud with the amended forbearance agreement as the execution. The false statements discussed in Counts 6 and 7 support this charge.

Counts 6-8 are for false statements in violation of section 1014, which criminalizes "knowingly mak[ing] any false statement or report ... for the purpose of influencing in any way the action of ... any institution the accounts of which are insured by the Federal Deposit Insurance Corporation... ."

On Count 6, the government introduced into evidence a letter Bodie sent to Amcore Bank on July 21, 2006, requesting a forbearance agreement on the defaulted loan he and LeBeau previously obtained from the bank. In the letter, Bodie indicated that he and LeBeau, working with a local developer, had begun the formal re-zoning process with the city:

> We are in the first phase of a three-stage process and have had conversation [*sic*] with the aldermen and the city planner for the City of Aurora. ... We expect to have zoning approval by year end, at which time we will refinance the loan with another financial institution. I hope these terms meet with your approval, as we are confident our zoning request will meet with approval by the City of Aurora.

At trial the city's director of economic development and its director of zoning each testified that this letter misrepresented what was happening. They stated that the formal process for requesting re-zoning had not begun as of the time Bodie and LeBeau obtained the forbearance agreement.

On Count 7, the government introduced evidence that on April 4, 2007, LeBeau and Bodie's lawyer, Schlyer, sent the bank materials falsely purporting to show that development was underway on the health club site and that LeBeau and Bodie had secured subscription agreements from three investors totaling $1.5 million. Bodie hired someone to produce these documents. The evidence at the trial, however, indicated that LeBeau and Bodie knew that the materials were misleading, yet they either told Schlyer to send them to the bank, or at least they knew he was doing so.

Evidence before the jury also supported the charges in Count 8. It learned that on April 23, 2007, Schlyer sent the bank a letter and other materials representing that the

defendants had formalized an investment mechanism for the development, that the subscription agreements were genuine, that they had assembled a development team, and that they expected zoning to be complete by June 2007. These materials supported the defendants' request for an amended forbearance agreement, which the bank granted on May 8, 2007. Bodie signed this agreement.

Bodie disputes his knowledge of both of Schlyer's April 2007 communications with the bank and asserts that he was not involved in the negotiation of the original and amended forbearance agreements after July 2006. But the jury was not obliged to believe his testimony, and in fact did not.

It was rational for the jury to conclude that the evidence established beyond a reasonable doubt that Bodie knowingly and intentionally made, and caused others to make, false representations to Amcore about the status of the development in order to obtain the forbearance agreements. We therefore reject his contention that the evidence was insufficient to support the jury's verdict.

IV

We AFFIRM the district court's final judgments in both of these appeals.

APPENDIX B — EXCERPT OF TRANSCRIPT IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED MARCH 13, 2018

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEVIN LEBEAU,

Defendant.

No. 14 CR 488-1

Chicago, Illinois
March 13, 2018
2:03 p.m.

TRANSCRIPT OF PROCEEDINGS - Sentencing

BEFORE THE HONORABLE
ROBERT W. GETTLEMAN

[page 60] There will be a period of two years' supervised release. I'm going to go through those conditions in a second. There's no money to pay a fine here.

The restitution amount that I have is a million 466. Is that still the amount we're talking about, Mr. Raman?

MR. RAMAN: If that amount includes the bank loss of 789, plus the Palmquists' $227,000, plus what Your Honor had ordered with respect to the Paces, that sounds right. We did --

THE COURT: And Wilson.

MR. RAMAN: Oh, and then Mr. Wilson, I think it would actually be a little higher.

MS. STERN: Excuse me, Your Honor. May I speak with the parties about restitution?

THE COURT: Sure. (Discussion off the record.)

MR. RAMAN: Your Honor, we're going to -- we just had a conference, and we think that the restitution should actually be slightly less. It should be 1,016,000, which includes the loss to the bank, plus the loss to the Palmquists.

THE COURT: Well, if everybody agrees on that figure, I'm not good at math, so I'll go along with you. Will you give Claire just a breakdown of that, Mr. Raman --

MR. RAMAN: Yes, sir.

[page 61] THE COURT: -- so we can put it in the J&C? I'd like to get the J&C finished tomorrow.

All right. There's a $700 special assessment. Yes, I think I said eight counts before. I meant seven. There were eight counts altogether.

All right. Let's go through the supervised release conditions. They begin on page 23 of the PSR. Let me go through them, because we're asked to do that by our Court of Appeals these days.

If there's anything you disagree with, counsel and Mr. LeBeau, please tell me as I go through them. Some of them are mandatory, and some of them are discretionary.

First of all, you can't commit another crime. You can't possess a controlled substance. You have to cooperate in a DNA sample, which is standard.

You have to make the restitution that we've already mentioned. This is while you're on supervised release for those two years.

Seek employment, which I know you're going to. That's No. 4.

Refrain from meeting with anybody who is a -- well, refrain from meeting anybody involved in criminal activity, particularly Bodie and Schlyer.

Has he been sentenced, Schlyer?

MR. RAMAN: He's being -- Schlyer. Mr. Schlyer is [page 62] being sentenced next Tuesday, Your Honor.

THE COURT: Okay. All right.

Also refrain from excessive use of -- well, it says any use of alcohol. Is there a reason for that?

MS. STERN: One moment, Your Honor.

THE COURT: Usually we put excessive use of alcohol.

MS. STERN: No, Your Honor, excessive would be fine.

THE COURT: All right. We'll put excessive then. Okay. That's the legal limit for driving. Any use of narcotics.

Refrain -- you cannot possess a firearm, destructive device, or weapon.

You have to remain in the jurisdiction where you're being supervised unless allowed to leave it.

Report to probation as directed. Allow them to visit you at any reasonable time. I usually exclude work. I don't know what kind of work Mr. LeBeau may be getting, but I don't think that's appropriate, so we're going to take that out.

MS. STERN: Excuse me, Your Honor. I believe he works out of his home.

THE COURT: Well, it says "at home." If he were to get a job -- if he were to get a job, I just think it's not a good idea --

MS. STERN: Okay.

THE COURT: -- to do that, so that's why I usually [page 63] take that out of there.

Notify your probation officer if there's any change in your -- you know, major change in your life, like your address or workplace, that sort of thing.

Notify if you have any -- within 72 hours, notify a probation officer if you have any contact with law enforcement for any reason at all, even minor things, just to make sure that we don't get a report when we don't need one.

On the special conditions, I don't think we need No. 3, very frankly. Given Mr. LeBeau's history and everything, I think we can omit that.

Because this was a financial crime, don't incur any credit charges or lines of credit without approval.

You've got to give the probation officer any requested financial information.

Notify the Court of any material change in your circumstances, No. 7.

No. 8, provide the documentation to the IRS as required. We all have to do it anyway.

Don't -- and finally, No. 11 is just sort of a -- we see it all the time. I don't know why it's there, but anyway, it's not to act as an informer or special agent without permission of the Court.

Any objection to any of those?

MR. WEISBROD: No, sir.

[page 64] MR. RAMAN: No, Your Honor.

THE COURT: Did I miss one?

MS. STERN: No. 10, Your Honor.

THE COURT: Oh, No. 10? Okay. I missed one, which is not uncommon.

What page is it on, Ms. Stern?

MS. STERN: Let me look.

MR. WEISBROD: Which No. 10?

MR. RAMAN: No. 10 is on page 29 at the top of the page.

THE COURT: Oh, that's why I missed it, because of the fold in the page.

Okay. You have to pay the penalty that we -- the restitution basically that we talked about, in the amount

of at least 10 percent of your net monthly income.

All right. Now, are those conditions agreeable?

MR. WEISBROD: Yes, sir.

THE COURT: Okay. All right. Now as far as reporting --

MR. WEISBROD: We would request voluntary surrender.

MR. RAMAN: That's fine, Your Honor.

THE COURT: Okay. I've been giving it at least six weeks to get designated. I would -- do you have a recommendation of an institution?

I would recommend Oxford Camp, frankly.

APPENDIX C — EXCERPT OF TRANSCRIPT OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED MARCH 15, 2017

[1138]UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 14 CR 488

UNITED STATES OF AMERICA,

Plaintiff,

vs.

KEVIN LEBEAU AND BRIAN BODIE,

Defendants.

VOLUME NO. 7 AM
TRANSCRIPT OF PROCEEDINGS - TRIAL
BEFORE THE HONORABLE ROBERT W. GETTLEMAN AND A JURY

Chicago, Illinois
March 15, 2017
9:52 a.m.

* * *

[1288]happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence.

Appendix C

All of you should rely on your independent recollection of the evidence, and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impressions of each juror.

Now, the defendants have been accused of more than one crime. The number of charges is not evidence of guilt and shouldn't influence your decision.

You must consider each charge and the evidence concerning each charge separately. Your decision on one charge, whether it's guilty or not guilty, should not influence your decision on any other charge.

Now, Counts 1, 2, and 3 of the superseding indictment charge each defendant with bank fraud. And in order to find a defendant guilty of these charges, the government must prove each of the following elements beyond a reasonable doubt:

First, that there was a scheme to defraud a bank as described in Counts 1, 2, and 3 of the indictment -- of the superseding indictment; two, that the defendant knowingly executed or attempted to execute the scheme; and three, that the defendant acted with the intent to defraud; and four, at the time of the charged offense, the deposits of the bank were insured by the Federal Deposit Insurance Corporation.

Now, if you find from your consideration of all the [1289]evidence that the government has proved each of these elements beyond a reasonable doubt as to the

charge that you are considering, then you should find the defendant guilty of that charge.

If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt as to the charge you are considering, then you should find the defendant not guilty of that charge.

Now, for purposes of Counts 1, 2, and 3, a scheme is a plan or course of action formed with the intent to accomplish some purpose.

A scheme to defraud a bank means a plan or course of action intended to deceive or cheat that bank or to obtain money or to cause the potential loss of money by the bank. A scheme to defraud need not involve any false statement or misrepresentation of fact.

A person acts with intent to defraud if he acts knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or property to the defendant or another or the potential loss of money or property to another.

A participant in a scheme to defraud may be guilty even if all the benefits of the fraud accrue to others.

For purposes of Counts 1, 2, and 3, the bank fraud statute can be violated whether or not there is any loss or

* * * *

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MARCH 4, 2020

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

No. 18-1656

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

KEVIN LEBEAU,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 14 CR 488

Robert W. Gettleman, *Judge.*

ORDER

Defendant-appellant filed a petition for rehearing and rehearing *en banc* on February 14, 2020. No judge[1] in

1. Judge Amy J. St. Eve did not participate in the consideration of this matter.

regular active service has requested a vote on the petition for rehearing *en banc*, and all members of the original panel have voted to deny panel rehearing. The petition for rehearing *en banc* is therefore DENIED.

APPENDIX E — EXCERPT OF TRANSCRIPT OF PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, DATED APRIL 19, 2018 (*UNITED STATES V. SCHLYER*, 17 CR 30)

[1]IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Docket No. 17 CR 30

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROBERT JON SCHLYER,

Defendant.

Chicago, Illinois
April 19, 2018
9:37 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS – SENTENCING BEFORE THE HONORABLE AMY J. ST. EVE

* * *

[42]MR. RAMAN: No, no proposed additional conditions, Judge.

THE COURT: Okay.

So, let's turn then to the 3553 factors.

Mr. Bischoff.

MR. BISCHOFF: Judge, I'll start with the bank and why I don't think the bank's loss -- and I'll put those in air quotes -- should be attributed to Mr. Schlyer in this particular case.

I've looked at all of the cases involving banks where arguments have been made that the bank was complicit in a scheme, and almost in every single case where it was close, the deciding factor was that the employee of the bank's behavior was found to be outside the scope of their employment; and, therefore, the bank was able to maintain its victim status.

This case is different. The bank has known for years what Bodie and LeBeau were up to. It's not a question of just they were negligent or even reckless in failing to discover certain things. They knew exactly what LeBeau and Bodie were doing.

In 2004, 2005 -- especially 2004 -- they knew that Bodie had lied to them about a million-dollar asset that he had in Wachovia Bank. He lied to them; they noted it in their records; and, they don't even follow up with him. They just [43]dismiss it. One of the things I was struck by -- and I know the Court has had an opportunity to read Mr. Zacharias' statement, as well as the Department of Treasury report, which slams Amcore Bank.

I might point out that Amcore Bank's behavior cost the taxpayers $163 million in losses because of their behavior. And this loan was a perfect example of why they were chastised by the government.

And this is the government that's chastising, admonishing Amcore Bank. So, I find it kind of ironic that the government wouldn't agree with me that these things happened.

But they also knew, with regard to Mr. LeBeau, that he was deep in debt when he was applying for these -- the loan. They knew that Bodie had paid only $843 in income taxes in 2002. In 2003 -- or 2002, he paid nothing. In 2003, he paid $843. And in 2004 -- and they have his income tax return -- he reported a net loss of $400,000 and they give him a loan.

Well, okay. I'm not going to hold that against them. That's 2004. But it really becomes egregious and unforgivable in 2005 and 2006, when they learn that Mr. Bodie and Mr. LeBeau are lying to them. Lying to them about their assets, lying to them about their income, and lying to them about the debt that they incurred, in direct violation of the [44]mortgage agreement and the loan application.

Then they learned about it in the most unseemly way, when they were communicating with LeBeau and Bodie's lawyer behind their back and they learned there was $700,000 in liens accrued in that short period of time.

You know, Mr. Zacharias wrote that -- he noted that in 2004, borrower reported a $315,000 net loss -- this is LeBeau -- on revenues of $697,000. Interest expense in 2004 was 439,000 compared to 2003 interest expense of 178,000.

The bank provided no explanation for the huge increase in interest expenses, and he asks where did the money go and why was it so disproportionate to the interest expense of 2003? A huge red flag had been raised indicating fraud.

Well, what does Amcore Bank do? Well, they don't foreclose. They negotiate further with Mr. LeBeau and Mr. Bodie. All this is happening long before Mr. Schlyer becomes involved.

I'm appalled by the January through February through April negotiations that took place between the bank and Mr. Bodie and Mr. LeBeau. Now, note, these guys negotiate very well on their own behalf. This is not involving Mr. Schlyer.

And they learn, again, that Mr. LeBeau is in bankruptcy. They learn that Bodie's incurred $183,000 more in debt. And they learn that they're lying to them about the [45]debt. And they're planning to solve their problem by using a shill to purchase the property and then to enter into a lease-back agreement.

And it's so funny because I was asking the witnesses in cross-examination, you know, what this meant. I mean,

I know what it meant. I didn't just step off the boat. And this person who is in the industry pretended he didn't know what I was talking about. And I'm offended by it. He knew -- he knows what a shill is. He knows exactly what they were doing, which is to really perpetrate a fraud.

But it didn't trouble them. And they entered into a forbearance agreement on the foreclosure itself.

And knowing all of these things, Judge, I think, takes them -- the bank -- to the next level of not just being reckless or negligent, which is forgivable. You maintain your victim status in that case. But as the case law says and as the Guidelines say, a person who knowingly participates in the charged scheme does not qualify as a victim.

And the only time they ever -- if you know anything about banking, you know the last thing they want to do is go to foreclosure and end up with a sale, because it hurts their credit rating. It limits the amount of money they have to loan out. And that's how banks make their money, through their loans.

So, obviously, their strategy was to forbear. And [46] it's written down in the problem loan status reports what the strategy is. It's not to go to sale. Even though their own lawyer is saying go to sale, they ignore them -- ignore Mr. Harbecke -- because their strategy is to delay.

And they've got a lot of money from that strategy. That was obviously the goal. You know, Mr. Schlyer raised

$250,000 for them. And, of course, they put their head in the sand and never asked where that money came from. And after Mr. Schlyer was out of the picture, they raised another 300,000, $400,000 in investments -- or, I should say, in paybacks.

Knowing this, they move forward. And that makes them complicit. That makes them co-schemers to my way of thinking. And I know that's very strong language, but this is not like the case law has seen, and it's not like the other situations I've seen. This was egregious, and the federal government said so in their own findings.

So, I think for that particular reason, the bank is not a victim. But there's other reasons the bank can't be considered a victim in this case. It really comes down to how you construe loss -- actual loss.

The government has the burden of proving that the scheme caused the loss; and, of course, you're looking at whether or not it was temporally and factually not too attenuated. In this case, I really just can't wrap my brain [47]around how this five-month period of time, this five-month scheme, during which the bank entered into two forbearances, that the bank could now turn around for their loss, which occurred in 2011 arguably -- I don't know how you can say that loss was caused by these two delays, which they were looking to do anyway. It's temporally attenuated, and it's factually attenuated.

And you can't forget the fact that after Mr. Schlyer is long gone, he's out of the picture, they're still forbearing

with Mr. Santangelo, with Mr. LeBeau and Mr. Bodie. And they don't rush to sheriff sale. Even when they had a chance to get some money back -- Mr. Santangelo offered him $600,000 at one point, which they rejected. Some duty to mitigate your losses. Long after this, they're just delaying, delaying, delaying, because they're getting payments back.

I don't know how you attribute that to Mr. Schlyer, even when you're talking about intended loss. I think it's a very weak argument in this case. Because if you're looking at that five-month period during which Mr. Schlyer raises $250,000, along with Bodie and LeBeau, what's the intent? I mean, the intent isn't to cause the bank a loss during that five-month period. That's exactly the opposite of what it was intended. The intent is to pay back. And that's exactly what the bank wanted.

So, to say that this scheme, the intent was to cause [48]the bank to lose a penny, it just doesn't hold up.

I think it would be disgraceful if the bank were to receive a penny in restitution, which, of course, we can talk about later. But I think it would be disgraceful. I think it sends a terrible message that a bank can behave in this manner and still be considered to be a victim. The bank is not a victim.

I'll move on to talk about my 3553(a) argument with regard to abuse of trust. I want the Court to know that Mr. Schlyer's involvement with Mrs. Palmquist was wrong. I can't defend that. He helped her -- he helped these guys, and his actions certainly caused her to lose money.

But I also want the Court to understand that his interaction with Ms. Palmquist was very brief. And he's not the one who sold the Aurora development to her. He's not the one who pocketed the money. And he's not the one who really had anything to gain or, in their case, to lose in this case.

When you look at what -- the fact that the government didn't even ask for an abuse-of-trust enhancement against Kevin LeBeau or Brian Bodie, it almost feels -- with all due respect, it feels slightly vindictive and it's troubling to me. Because in the Guideline itself, when it talks about the type of activity that is the basis for abuse of trust, it lists accountants. That's who Mr. LeBeau was. He was Ms. Palmquist's accountant for 30 years. And she testified [49] that but for her trust in Mr. LeBeau, she wouldn't have invested in this particular development.

And with regard to Mr. Bodie, this is a guy whose name in Aurora was gold. His father was her doctor. Now, he was a mortgage broker, also listed in the Application Notes to 3B313.

So, I'm baffled by the fact that this is only being asked of Mr. Schlyer. And I'd ask, based on the disparity argument, that the Court not apply abuse of trust, not apply those two levels.

I'm also troubled by certain things, Judge. I have to comment on these things because they're troubling, with regard to some of the actions -- or some of the arguments put forth by the government in this case.

I am troubled by the fact that they asked the Court to consider relevant conduct in relation to the Paces, Rick and Janice Pace. Mr. Schlyer had next to nothing to do with their investment in the Aurora development, which wasn't even an investment in the Aurora development. It turned out to be an investment in Mortgage Desk, which is one of Brian Bodie's fly-by-night companies, one of his scams. And as the FBI agent stated in his own 302s, all of that money went into fund Mr. Bodie's companies. None of it ever went into Mr. Schlyer's pocket. None of it was ever mentioned in connection with this particular scheme.

[50]But I just don't know how the government thinks about these things. I wouldn't have put this forward because it would have been embarrassing when I see what the Paces did in order to get their money. I mean, these are grown people.

And what they did was they took out loans on two of their properties in Florida. And what I have learned by digging through the extensive discovery in this case -- and it took me a while to find it -- and they knew it -- is that the Paces inflated their income on their loan application. Mr. Pace inflated it from $4,000 a month to $9,000 a month. Janice Pace inflated her income from $2500 a month -- these are the actual numbers -- to four thou- -- or to $6,000 a month, for a total income of 15,000, when, in fact, their total income was 6500.

They knew that. And what they did when they were being interviewed by Agent Palumbo was say, "Well, I was told to do it." Well, that's not an excuse last I checked.

They also took out three loans on two properties from three different lenders. You know what that means. Now, I don't have their whole loan packets, but I can add two plus two. It's pretty obvious what they were doing, which was to commit mortgage fraud in Bodie's scheme.

I mean, look, they had a minor role in that scheme, but what they did was wrong. It's fraud. They don't qualify as victims. I know they lost their money. I have sympathy [51]for them for getting caught up with Brian Bodie. But Brian Bodie was the driving force behind all this and he ripped off a lot of people. He was a charismatic individual who misled and stole from a lot of people.

And talk about abuse of trust. I mean, this is a guy who really dragged a lot of people down with him. I talked to two people who used to work in that office. Barb Mizones lost $70,000 of her own money because of him -- because of Bodie.

And I don't understand why the government can't see that you can be involved in a scheme without knowing every aspect of the scheme or being involved in the full scope of a scheme. That's just the law.

I'm troubled by the fact that the Court was given a letter from Janice Whelan. How could they not see that this woman has absolutely no credibility whatsoever? She lied in two places I can identify in the letter itself where she says she sued these guys.

She never brought an action. I checked every Clerk's Office from around the state. I couldn't find this action that she alleges she brought. She certainly never sued Mr. Schlyer.

Then she said she was financially ruined because of this particular event. And I'm unclear what Mr. Schlyer allegedly did; but, in any event, financially ruined.

And, then, she sends an e-mail to Agent Palumbo [52]saying, "Well, I exaggerated about being financially ruined. My husband had a fantastic life insurance policy." Palumbo calls her and she says, according to his 302, "Hey, you're the greatest FBI agent ever. Didn't want to look like a total loser. Turns out I actually am financially ruined."

And, then, you look at her record with the ARDC. She was disbarred in 2005; claims her husband was too sick; around the year 2000 he's at the Mayo Clinic; he's just completely disabled. And it turns out she enlists her husband to help her perpetrate a fraud after she lost her law license.

I mean, it's an incredible story. If I brought this to Hollywood as a movie script, they'd reject it. No one's going to believe it. And her husband loses his law license in 2009.

How do you submit something like that to the Court in aggravation? It's embarrassing.

Appendix E

I'm also extremely troubled by something that happened at the trial, that I didn't catch until the government started making certain statements in their sentencing memorandums; and, that had to do with the subscription agreements that, quote, according to the government, Mr. Schlyer had marked in numerous places.

Where? I still don't know. And it was reckless, and it was wrong to make that statement.

And, you know, that was a very strong piece of [53] evidence with regard at least to the bank, because the jury had no evidence that Mr. Schlyer had drafted any of these documents or marked on any of these documents or forged any of these documents but for the evidence that he had marked number "9." It looked like a "9" that he had done on another particular document for comparison's sake.

Well, the government has every right to make that comparison. That's the law. I couldn't rebut it. I couldn't have -- I didn't have any writing samples to rebut it. Even if I had found the writing samples I later dug out of the massive discovery, I couldn't have authenticated it. Had I known or known this was coming, I could have gotten my own expert. I wish I put it in my motion for a new trial. I didn't think of it then. The Court -- you may do with it what you want. I would certainly have raised it.

But back to sentencing. I found writing samples. And I'm not a writing expert, and neither is he, though. And I found samples that clearly indicate that this was written by LeBeau or Bodie and not him, just by the slant of

the writing, just by the unique nature in which certain numerals were made. And the number "9" -- write "9," Judge. "9" probably looks exactly like the "9" they were using as evidence against Mr. Schlyer. Almost everybody's loops and goes down. I should have caught it.

But I'm troubled by that. This effort to make [54]Mr. Schlyer look so much worse than he is.

But I'll tell you something, I misjudged Mr. Schlyer, too. I just thought he was some privileged guy who just was out there taking advantage of the people. And what I have learned about my client is that he had a very troubling life and had no privilege. And I've learned about his acts of charity and his respect and his love in the community. And I'm blown away by it. I've never seen so much mitigation in my 30 years of practicing law.

You heard Mr. Schlyer's father come in here and speak on his behalf, but it was a troubled childhood and the marriage did not work out. And Mr. Schlyer, even though they've managed to develop a relationship now, it wasn't -- it didn't exist when Mr. Schlyer was growing up.

His mother raised him alone. They grew up in public housing. They were on food stamps. And he was dealing with a mother who was extremely troubled, undiagnosed mental illness. Schizophrenia, bipolar disorder. And she was, as you might expect, volatile. And yet Mr. Schlyer held it together. He really was the man of the house growing up. And he was always working whenever he could.

And he stayed in school when a lot of people wouldn't have. And he got his degree. And he was a tremendous athlete. He received scholarships to go swim in college, and he went on to law school.

[55]And, of course, you met Penny Schlyer, his wife. And you saw -- you heard Ms. Schlyer who gave a very eloquent speech. And nothing I can say could be as eloquent as what Penny Schlyer said before this Court.

They've raised three wonderful children. His oldest boy Ryan has Asperger's Syndrome, and I just shudder to think of how incarceration is going to impact on that boy. And I'm not just saying it. I mean, there are times I hear things and I just -- I could repeat it and that's the argument. But here I've actually seen it.

I've seen letters written by the principal of the school. I've seen so many people who have spoken up on his behalf and talked about his son. I've seen effort he's made to learn all about the disease and be the rock of that family and make sure that his son, who really wouldn't have had any friends in a different environment and wouldn't have been able to function, has really functioned quite well in school. He's on the swim team.

One of the things that I pointed out was how his situation -- Ryan's Asperger's -- it really just made it where he could never relax, never sit still. And Rob figured out as a swimmer that they shared this particular hobby, and that when Ryan was in the pool, he could think and he --

(Brief pause.)

MR. BISCHOFF: So, all of the boys have done very [56]well. Christian service awards, they've all won that.

Rob's a community leader, active in his church. He's been a mentor, a coach, an athlete. He's a national Level 3 swim official. That's not something that you can just sign up for. You have to be qualified for that. He runs a charity for the last 13 years. He's raised $1.3 million for prostate research.

The collateral consequences of incarceration are astounding in this case. I think it's a very strong factor in this particular case.

He's already lost his law license. He's voluntarily surrendered that. He will never practice law again. His reputation has been destroyed. He's resigned as president of the Ogden Dunes Home Association. He resigned his national swim official license. He resigned as a precinct captain of the Republican Party in Indiana. He's likely -- if he's incarcerated, likely -- to lose his job. His boss has indicated he can stay on in his employment if he's not and he can financially contribute to his family, as well as restitution.

I think that something I neglected to note was the delay in charging here, which I'm not going to publicly get into that. I think my arguments are clear. I think in a situation like this, there's something very shameful about it. But here's a guy who waited ten years and has lived his life [57]and built his family and built his career when

this could have -- and there's documented proof that this could have been brought much sooner.

Retribution as a policy in this case is not as strong. Most studies show that people feel we focus too much on policy of retribution. But I believe that in this case, you're asking, you know, what does society think? How do we appease society by meting out a just punishment? And there are times when the only answer is incarceration, and sometimes the only answer is a lengthy period of incarceration.

I mean, here you have the community speaking out. His whole community knows what he did here, and none of them wants Rob to go to jail. So, the policy of retribution, I would submit, is very weak in this case.

If you're talking about deterrence, naturally you're talking about two different types of deterrence. There's specific and general deterrence. Specific deterrence is very weak in this case because he's never going to commit another crime again as long as he lives. We all know that. You know that from the character evidence that's been put forth.

But with regard to the issue of general deterrence, I mean, I've cited case law that would indicate that when you delay ten years, it certainly weakens that as a policy. And I would also submit for someone like Rob, who is -- you know, he's a different case than most people that come before you. [58]A felony conviction, along with probation and restitution, has a tremendous deterrent effect to somebody like Rob.

The things that have happened to him, the collateral consequences have a tremendous deterrent effect to any lawyer. I would be, as a lawyer -- and I'll speak for Mr. Howard; I'm sure Mr. Kartik feels the same. This is terrifying. And no lawyer in his right mind seeing even probation and a felony conviction being meted out as the punishment in this case would not think twice before committing a similar act. So, I think that general deterrence is satisfied.

Incapacitation is non-existent in this case. There's no -- we don't -- he's not a threat to society. There's one instance that we're talking about. In the last ten years, he's been a model citizen. So, is there a need to lock him up, to remove him from society? It doesn't exist here.

Is rehabilitation a strong policy in this case? Absolutely.

Judge, I'm going to wrap it up because I know this has been a lengthy sentencing. It's been fought -- very hard fight, both sides.

I would note that Kevin LeBeau was sentenced to 36 months in front of Judge Gettleman. I would remind the Court that he's far guiltier than Mr. Schlyer is. And Mr. Schlyer can actually do some good and actually is of the character who would want to and carry out some good. I don't believe that's [59]true of the co-schemers in this case.

I would ask the Court to sentence Mr. Schlyer to a period of probation with appropriate conditions of release.

And I would suggest that Mr. Schlyer be required to make restitution to Mrs. Palmquist in a way that's financially doable and, also, because I think it would actually accomplish some real good here.

THE COURT: Thank you, Mr. Bischoff.

Mr. Raman?

MR. RAMAN: Yes, your Honor.

I'd be remiss if I didn't at least address the attacks that have come here. I don't mean to spend time on it. I just wish to say that there's some suggestions of misconduct in the investigation and prosecution. Nothing could be further from the truth. The only person who has committed misconduct is Robert Schlyer, as far as this courtroom is concerned.

And his crimes are impactful and they are incorrigible. And because he was an attorney when he committed them and because he used his status as an attorney to scheme and defraud the victims in this case, he should be sentenced to prison.

At the trial, your Honor and the jury heard about the fraud, and you heard how serious it was. There were many victims, including the FDIC-insured bank. And I will address [60]the bank a little later in my presentation, but what stands out to me and what make this case unique -- and I've been doing this 25 years, mostly federal -- what made it stand out to me were the real people who were affected here.

They were gravely harmed in their financial security by the actions of this defendant and the people that he schemed with. And as I had indicated earlier, we had planned to call Mrs. Palmquist. It was sort of part of her healing process to want to come and read her letter to the Court. But, unfortunately, her husband's hospitalization made that not possible.

But she did write the letter. And your Honor had seen the letter. She did deliver the letter to Judge Gettleman. Mr. Bischoff was there. I think there was not a dry eye in the house when she read her letter. It was very difficult, even for someone of my age and experience in the criminal justice system, to hear.

When I read the letter, I turned to the definition of "fiduciary." And that is what the defendant purported to be when he met Mrs. Palmquist and her husband. He purported to be a fiduciary. And the word "fiduciary" has been defined as follows: A fiduciary is someone who has undertaken to act for and on behalf of another in a particular matter which gives rise to a relationship of trust and confidence.

When Robert Schlyer met the Palmquists, he told them [61]that he was a lawyer and he agreed to safeguard their money. He agreed to serve as a fiduciary to trust and act on behalf of them. That did not, unfortunately, happen. And to put it very simply, very humble people were defrauded by the defendant and his co-schemers, and the only justice for that victimization is to punish him for what happened.

And your Honor will recall that there was a specific reason for this transaction. In order to acquire funds to pay the bank -- the FDIC bank -- the defendant and the co-schemers engaged in this devastating fraud on Kenneth and Dolores Palmquist. And she wrote the letter that ends with a very simple call for justice. She asks the Court to punish these men fairly but sternly.

So, we're in a position here today, your Honor, where there has to be some punishment for what Mr. Schlyer did, and it has to be severe. He and his cohorts caused immeasurable pain, grief, suffering, and other hardships when they victimized Mrs. Palmquist and her husband.

They took money from a couple who are great grandparents and caused a loss of approximately $227,000, which represented their nest egg. And at the age of 88 and 86, they have been caused to live on modest means, which for them means only Social Security.

And having lived with this case for a number of years, I went to their home a number of times. They had a [62] modest home in a modest suburb. And I've gone to their new home, which is the one-bedroom apartment mentioned in her letter. Mrs. Palmquist talked about being forced to sell the family cottage that they had and the home of 58 years. The home that I visited. The toll to these people has been significant monetarily, has been devastating; but, it goes beyond that.

You have heard how this fraud caused Mrs. Palmquist to think about causing harm to herself. Thankfully, she

did not hurt herself. But that is something you can take into account when you think about the aggravation that was caused by this conduct.

The Palmquists deserve justice. And you should punish Mr. Schlyer fairly but sternly, as Mrs. Palmquist asks.

Now I will point out some facts that I think are very important here when you address the aggravation in this case.

First and foremost, as a lawyer, it was Mr. Schlyer who personally took the $300,000 cashier's check from Mrs. Palmquist. And your Honor will remember that the check was written out to him as attorney at law, trustee. He represented to them that he was serving as their trustee or, to use the word I mentioned before, as their fiduciary. And he then gave them documents that were false, fraudulent and worthless, because he knew that he had just appeared as an attorney in the foreclosure lawsuit earlier that month and he [63]was negotiating with the bank about the fate of the loan.

He gave them the documents, which were fabricated. They offered an interest as security for this investment that he knew could not happen. And, then, he deposited -- he personally deposited -- their money into his checking account the very same day that he took it. And, then, he spent the money on himself. Certainly, he didn't spend all of it. He spent a portion of it. But what's ironic and sad is he even spent some of it on his ARDC dues. His dues for the

Attorney Registration and Disciplinary Commission that we all have to pay in January before our licenses continue.

And, then, he did the more significant thing of diverting the money to his co-schemer. He opened the bank account as a signatory with Brian Bodie. And your Honor will recall that the evidence showed that that bank account at Park National Bank had Brian Bodie listed as the president of the Aurora Development Trust and Robert Schlyer listed as the vice president. And he opened this account, and then he wrote a check to Amcore Bank using the Palmquist money. And, then, he continued to negotiate the forbearance when he knew that no plans had been approved for rezoning the land.

So, what was the consequence of that? Well, we know the consequence to the Palmquists. There was consequence, though, to the bank, as well. And your Honor's in the unenviable position of determining how much loss there was to [64]the bank.

And I've heard your Honor's thoughtful comments from earlier that, certainly, Mr. Schlyer may not necessarily be responsible for the full amount of the restitution here or the full amount of the loss. But I will say this: As an attorney, as somebody who should know better, as somebody who has been trained in the law and is expected to adhere to more higher ethical and, frankly, moral standards, the same standards that all of these character witnesses talk about, he should not have negotiated and passed along the false documents to the bank. It caused a loss.

THE COURT: What about Mr. Bischoff's argument about the role of the bank itself?

I do not think, given the government's report, that you can dispute that Amcore Bank, at a minimum, had its head in the sand --

MR. RAMAN: It may well --

THE COURT: -- and their conduct --

MR. RAMAN: And, your Honor, I --

THE COURT: -- their conduct certainly contributed to this.

MR. RAMAN: Their conduct -- and I'll let your Honor be the judge of that. I will say that we have never said that Amcore Bank is blameless. We have never suggested that there should be no consideration to other factors which you may take [65]as mitigating.

But I will say this: It's a form of blaming the victim. The victim can certainly have some role, but to suggest that that excuses Mr. Schlyer's conduct from passing along documents that were false and doing the other fraudulent activities, that would not be right.

THE COURT: What about in terms of restitution under U.S. vs. Litos, the 2017 Seventh Circuit opinion that talks about -- not in terms of loss, which is why I found the amount of loss that I did; but, it talks about in

terms of restitution and what the Court should consider in ordering restitution where the defendant bank is not blameless, as we'll say.

MR. RAMAN: Yes, your Honor. And I recall that decision. I think it was Judge Posner --

THE COURT: It was.

MR. RAMAN: -- who wrote that opinion. And it is a difficult decision to reconcile.

But I will say that that -- I believe I cited other precedent. Your Honor can -- I think your Honor was looking at it in the right framework. Restitution is different from loss.

THE COURT: Absolutely.

MR. RAMAN: And, so, your Honor can certainly consider that when determining what the restitution is that [66]would be appropriate for this defendant's actions.

We didn't hear from the Paces at trial, but Mrs. Pace felt compelled to write a letter to the Court. Your Honor has received that. I will simply say that, you know, it would be incorrect of us, the government, to not pass on victim impact letters, whether we believe the victim or not. And in this case, I believed Mrs. Pace.

THE COURT: Do you dispute that they inflated the income on their loan applications?

MR. RAMAN: No. And, in fact, I mean, as much as I respect Mr. Bischoff's efforts in this case, I believe it was in our discovery; and, I believe it was in our 302s.

There was never any hiding or concealment, as has been suggested. If anything, we have provided more here than meets the eye and have never withheld anything, as was suggested.

The reality here is they suffered a loss; they wanted to address the Court as victims; and, they felt, as your Honor saw from the trial testimony of Ms. Janice Pace, that they were victimized by this defendant, as well as Mr. Bodie and Mr. LeBeau.

Now, I will get back, though, to the most affected victim here, is the story of the Palmquists when I ask your Honor to sentence this defendant. Because they're the very real people that I said, at least in my experience, jumped out . . .

* * * *

[70] . . . that situation is one of them.

I thank the Court for their time in dealing with this situation the way you have and as fairly as possible. And I put my faith in God and to the bench and what's going to happen next. So --

THE COURT: Thank you, Mr. Schlyer.

Appendix E

In sentencing you, the Court looks to the factors in Section 3553(a); and, the sentence the Court is going to impose will be sufficient, but not greater than necessary, to comply with the purposes behind those factors.

This is a unique case that has factors on both sides. So, I am going to take my time going through those.

The first factor: The nature and circumstances of the offense. This is a serious offense with a significant impact on a vulnerable victim and older couple whose life savings were taken away, and they are still today feeling the impact of that. And I am going to order restitution to the Palmquists as part of my order.

And, Mr. Schlyer, I certainly hope you come through with that, because your conduct contributed to their financial ruins.

I understand that your co-schemers, LeBeau and Bodie, are the ones who brought them in and had the relationship. And restitution has been ordered at least as to Mr. Bodie -- or Mr. LeBeau, who has been sentenced. And I am sure Judge [71]Gettleman will order it as to Mr. Bodie, as well. But your conduct had a significant, real impact on their lives.

I am troubled that you were an attorney at the time, and that you used your role as an attorney to carry out the fraud. It is offensive, and it is offensive to the profession.

Having said that, I am also troubled that this conduct is over a decade old, and that the indictment was not

brought until almost a decade after it happened, for whatever reason. I am not -- I do not know why. It does not matter why. But the fact that it was brought almost a decade later, a little over a decade after the conduct happened, is concerning to the Court. And I will touch on how that impacts the 3553 factors in a moment.

I am also troubled by the role of the bank here. I have read Mr. Zacharias' report and am putting weight into that. It was really not contested.

I have read the government's report that you mentioned, that you have submitted to the Court, and I -- it is clear that the bank here, as I said before, had at least its head in the sand. They had clear signs that fraud was going on here and did not do anything about it. Part of it may have been the time. It does not matter. The bank's role here is problematic to the Court, and the reports certainly support that.

[72]I do note that, as you have indicated, Mr. Bischoff, that Mr. Schlyer's role in this over a decade ago was rather limited. Significant. And he did take the $300,000 check from the Palmquists and kept some of the money for himself. But it was, in terms of the scheme itself, limited.

The history and characteristics of Mr. Schlyer.

This is your first offense. It is a non-violent offense. You have no criminal history. And I am well aware that it took place over a decade ago.

Appendix E

I do note your community support here in the courtroom, and I am taking at face value and certainly considering the comments of the individuals who came up here and spoke on your behalf.

It is clear to me from what has been submitted that you had a challenging childhood. You were able to overcome those challenges. What is very telling to the Court, and what separates you from many defendants who come before the Court, Mr. Schlyer, and what is very reflective of your character and significant to the Court in imposing sentence today, is the acts that you have undertaken as an adult.

Mr. Johnson's comments. I see what happens to youth who are arrested at an early stage and do not get on the right track. When Mr. Johnson says that you saved his life -- while possibly physically you did, but you certainly saved the quality of his life in a manner and through actions that are [73]telling about your character because, as Mr. Johnson indicated, you did this without having any benefit to yourself, without expecting anything in return.

The charity that you have run and the money that you have raised for charity, the acts that you have done for your friends, what is telling to the Court and, as I said, what really distinguishes you from many defendants who come before the Court, is I see good acts that are done once defendants are caught; and, they know they are going to be in this position some day and, so, they start on the good acts.

You have been engaging in these good acts, which are reflective of your character, throughout your adult life, before knowing that you would be facing the Court some day, which is telling to the Court about your character and, also, very relevant and tells me that the public does not need further protection from you, and that you do not need further deterrence from the Court.

Also significant to the Court is your close bond with your child who has learning disabilities and the impact of any long period of imprisonment that that would have on him, and a very serious impact.

The Paces. I agree with Mr. Bischoff's assessment in his supplemental position paper on sentencing that their conduct would not qualify as relevant conduct based on what is before the Court. And it is not within the scope of the [74]criminal activity that the defendant jointly undertook in this case.

I am also troubled by the fact that the Paces inflated their income on the loan application and engaged in fraud themselves. But I am not considering that in imposing sentence here, because I do not think it is appropriate.

I know you did not address this, Mr. Raman, but I am troubled and disappointed that the government is relying on a statement from Mrs. Whelan to enhance the defendant's sentence. What troubles me is -- and it is not disputed and the defendant has submitted the records from the ARDC -- that in 1997, she was suspended for 18 months for essentially stealing from clients; and, then,

in 2005, she was disbarred for collecting Social Security payments that were meant for her mother after her mom had passed away. Two issues that go directly to the credibility and truthfulness of an individual.

I am not putting any weight on the submission and the comments of Ms. Whelan in imposing sentence today.

I do note that a consequence to Mr. Schlyer has also been that he has lost his law license, and that will have an impact.

The sentence the Court is going to impose will reflect the serious nature of this offense. The real significance here is the impact this has had on the Palmquists, and the sentence is going to help address that and [75]hopefully get some of the money back to them.

Promote respect for the law, for all of the factors that I have indicated. And part of promoting respect for the law is sentencing somebody who comes before the Court after a decade of engaging in the criminal conduct.

Justly punishing the defendant. Affording adequate deterrence. As I have indicated, I am not worried about deterring Mr. Schlyer from future crimes, for all of the reasons I have indicated.

And I agree with you, Mr. Bischoff, that I think -- and the case law that you have provided to the Court -- that an over-ten-year delay weakens the impact of general deterrence of imposing any kind of a harsh sentence.

Protecting the public from further crimes by you is not a relevant fact here, nor is providing you with educational or vocational training.

Mr. Bischoff, have I addressed all of your arguments, or is there anything else before I impose sentence that you would like me to either address or elaborate on?

MR. BISCHOFF: No, your Honor.

THE COURT: I asked you two questions there. So, just so the record is clear, have I addressed all of your arguments?

MR. BISCHOFF: You have.

THE COURT: Okay.

[76]Is there anything else you would like me to elaborate on?

MR. BISCHOFF: No, your Honor.

THE COURT: One other factor. Your disparity argument.

I am not convinced by your disparity argument in imposing an abuse of a position of trust in the Guidelines. The defendant was a lawyer at the time he did that. That is a classic case for imposition of abuse of a position of trust. Whether the government argued it or what Judge Gettleman did with respect to the co-schemer are separate arguments.

But what is a disparity argument is the sentence that Mr. LeBeau received before Judge Gettleman. His Guidelines were higher than Mr. Schlyer's; he also got obstruction of justice, which is a significant factor; and, he only received 36 months. So, I am considering that in imposing sentence here.

I am also -- the final factor, under history and characteristics -- considering, and that has an impact on the Court, is that, again, unlike many defendants who come before the Court, Mr. Schlyer actually does seem remorseful for what he did and what happened to the Palmquists here.

For all of those reasons, and pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court, Mr. Schlyer, that you are hereby sentenced to one day [77]considered time served for the time you spent with the marshals being processed, with a two-year term of supervised release -- and the one day is on Counts 1 through 3, to run concurrent -- with a two-year time of supervised release, to run concurrent on each of those counts, with a special condition of six months of home detention with electronic monitoring, where you must pay for the electronic monitoring and you must have the phone as is directed and required by Probation.

Within 72 hours of today, you must report in person to the Probation Office in this district.

I am also ordering that you pay restitution to the Palmquists in the amount of $227,000. You are jointly and severally liable for that restitution payment with

your co-schemers, LeBeau and Bodie, from Docket No. 14 CR 488. And I am ordering you a year from today, Mr. Schlyer -- because I hope that you are serious -- or your lawyers are serious -- that you are going to find a way to make this restitution or start paying back this restitution.

As part of your sentence and a condition of your supervised release, I am ordering that you send a letter to the Court a year from today, April 19th of 2019, telling me what you have paid back to them. Whether I am in this position or a different position, I will still be in this building. So, that letter is a condition of your supervised [78]release.

Under U.S. vs. Litos, 847 F.3d 906, a Seventh Circuit 2017 opinion, for the reasons I indicated a moment ago, I am not ordering restitution against -- as to Amcore Bank from Mr. Schlyer.

I am not making any comment on what Judge Gettleman should do with respect to the co-schemers. This is just based on the evidence that is presented here, what the Court has seen, what I have put in. If he chooses to impose restitution on Amcore Bank, that is up to Judge Gettleman. I am only basing it on what is before this Court.

You must pay a special assessment of a hundred dollars on each count of conviction, for a total of $300, that is due immediately.

While on supervised release, you shall not commit another federal, state or local crime; you shall not

unlawfully possess a controlled substance; and, you shall submit to the collection of a DNA sample to the extent one is required by the law.

In addition, you must make restitution under Section 3556, as I have just indicated, to the Palmquists.

And, Mr. Raman, if you would, please, provide Katie with the address for that.

You shall seek and work conscientiously at lawful employment, or pursue conscientiously a course of study or

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