No. 14-2183

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ABIDEMI AJAYI,
Defendant-Appellant.

On Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division
The Honorable Rebecca R. Pallmeyer
Case No. 12-CR-190

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ARGUMENT

The government is obligated to investigate its case and to prove it beyond a reasonable doubt. Here, the government did not chase down investigative avenues that might have turned up evidence implicating or exonerating Ajayi. To compensate for this investigatory lapse, it cobbled together a bank fraud case founded on speculation, premised on peripheral, after-the-fact conduct like Ajayi's withdrawals and the Postal Inspector's post-hoc comparison of the original and the altered checks, and furthered by the erroneous exclusion of the defense's crucial email evidence. This Court should reject the government's attempts to cover the "gaping hole in its case" by stretching the fabric of the law. *Piaskowski v. Bett*, 256 F.3d 687, 692 (7th Cir. 2001).

I. The government defends the sufficiency of the evidence by recasting speculation as reasonable inferences and asking this Court to ignore its precedent.

The government's evidence was insufficient to prove Ajayi guilty of bank fraud for two reasons. First, it failed to tie Ajayi to the scheme or show his knowledge of the alteration before or at the time Ajayi deposited the check. Instead, the government relied on Ajayi's post-deposit acts, which it argued to the jury were suspicious enough to sustain a conviction. Second, the government improperly relied on his withdrawals, which occurred after the scheme ended, as executions of a bank fraud scheme.

A. The government attempted to prove Ajayi's knowledge of the scheme and the forgery by unreasonably speculative post-scheme conduct.

To obtain a bank fraud conviction against Ajayi, the government needed to prove that Ajayi *knew* of the scheme and the check's alteration, not just that someone in his situation should have suspected something was amiss. Although the government argues on appeal that it offered circumstantial evidence to prove Ajayi's knowledge and intent (Gov't Br. 20), it really only offered speculative inferences from Ajayi's bank account history and his withdrawal patterns after the deposit.

At trial the government failed to present anything close to the kind of circumstantial evidence that would prove Ajayi's knowledge and intent beyond a reasonable doubt. Lacking in its case the very type of front-end link between the defendant and the scheme that this Court has accepted as proof of the defendant's knowledge and intent, *see, e.g.*, *United States v. Howard*, 30 F.3d 871, 874 (7th Cir. 1994); (Appellant's Br. 18–19) (analyzing every reported Seventh Circuit bank fraud case addressing sufficiency of the evidence), the government on appeal acknowledges that its case rested on just four facts: (1) Ajayi had controlled the GR Icon account since its opening in 2006; (2) the account had relatively low balances, particularly in 2009; (3) Ajayi deposited the check for $344,000 through an ATM; and (4) he made multiple withdrawals all over Chicago in the four days after the check cleared. (Gov't Br. 17–18.) The first, second, and third facts are innocuous; they certainly do not permit any inference of fraudulent knowledge or intent. *See Piaskowski*, 256 F.3d at 693 (finding the State's "meager circumstantial

evidence . . . innocuous" and ultimately "conjecture camouflaged as evidence" because it was easily explained by other logical rationales). People open bank accounts every day; their control over the accounts opened in their names is not controversial. That the account had never seen a $344,000 deposit during the four years of its existence likewise does not prove Ajayi's guilt of bank fraud beyond a reasonable doubt. He testified that he believed $300,000 of it was sent to him by mistake and that he was in the process of returning the funds to their owner. (Trial Tr. 251–52.) But even discounting Ajayi's explanation does not leave the government's case intact. An inheritance check or a home equity line of credit transferred from another bank could also result in a spiked balance out of line with the account's prior deposit history. Like account control, a single anomalous deposit simply is not probative of Ajayi's knowledge and intent. Finally, that the check was deposited via ATM is a non-starter as well; all Chase ATMs have security cameras that record the transaction, as the bank publicizes on its website. *See Chase ATM Security*, https://www.chase.com/personal-banking/atm-security-convenience (last visited Mar. 5, 2015). Ajayi was not using the ATM to hide from these banking transactions that were undoubtedly recorded; in fact the government's own evidence at trial showed that he made many withdrawals in person, presenting his state-issued identification to a live human teller. *See, e.g.*, (Trial Tr. 131). What remains of the government's case for knowledge and intent is Ajayi's withdrawal patterns, and even in the context of the aforementioned evidence, these cannot prove Ajayi's

guilt to the requisite "state of near certitude." *See Jackson v. Virginia*, 443 U.S. 307, 315 (1979).

The government was tasked with proving that Ajayi participated in the scheme with knowledge of its fraudulent nature and that he had the intent to achieve the illicit objectives. *United States v. Bailey*, 859 F.2d 1265, 1274 (7th Cir. 1988) (internal quotations and brackets omitted) (to convict, "the government [cannot] simply show that [the defendants] participated in a transaction that turned out to be part of a fraudulent scheme. [It] also had to show [their] willful participation in the scheme . . . ."). Even crediting the government's characterization of the withdrawals as suspicious does not sustain its burden of proof. *Id.* at 1274 (government must prove "specific intent to defraud and not merely knowledge of shadowy dealings"); *see also Piaskowski*, 256 F.3d at 692 (7th Cir. 2001) (stating that this Court requires more than "a strong suspicion that someone is involved in criminal activity" to sustain a conviction). Unlike *Bailey*—where this Court held insufficient the evidence of intent in a mail fraud scheme—the government did not even prove Ajayi's "knowledge of shadowy dealings." *Bailey*, 859 F.2d at 1274. Rather, Ajayi was convicted on the government's *suspicion* that he was involved in shadowy dealings. Interpreting Ajayi's subsequent acts depends on what the government proved about his knowledge of the check when he received it, not the other way around. The government needed to adduce some evidence showing Ajayi knew about the forgery before he deposited the check, but it did not.

The danger in sanctioning the government's approach is that it could surely be used to criminalize innocent conduct. One example: Tom is driving his new sedan in his small town when he is hit by Susan—an out-of-towner—and the collision totals Tom's car. Tom is upset and threatens to sue, so they engage in settlement talks without lawyers. Tom says unless he gets $30,000, he will file a lawsuit against Susan. Fearing the lawsuit, Susan misrepresents to Tom (who is not so familiar with how insurance works) that she has insurance and they will pay the settlement. A few weeks later, Tom receives a check for $80,000 from ABC Insurance Company. Unbeknownst to Tom, Susan had no insurance, but instead stole a check out of the mail and changed the payee name. Although he finds the amount a little odd, Tom cashes the check anyway. The next day he goes and spends $30,000 on a new car, and then buys a few other things that he needs. Within a week, he has spent $40,000 of that initial deposit. Under the government's theory Tom has committed bank fraud, and he could be convicted and imprisoned.

Because it presented no evidence tying Ajayi to the scheme before he deposited the altered check, the government returns once again to a theory it had retreated from at trial: that the alteration was so obvious that Ajayi must have known of the forgery. (Gov't Br. 38.) Relying on Inspector Erickson's testimony, the government now claims it "argued and presented evidence that the forgery of the check was apparent on its face." (Gov't Br. 20) (citing Trial Tr. 128). But this argument rests on a mischaracterization of its own witness's testimony. Inspector Erickson's testimony is clear that he merely compared the original check to the altered one in

order to prove that the check was actually altered. He was not discussing the font differences within the four corners of the altered check that would lead him to believe it was an easily identifiable forgery:

> Ms. Best: What else did you notice about them [the voided copy and the actually cashed check], comparing them side by side?
>
> Inspector: That the font is different.
>
> Ms. Best: The font reflected on the -- on which one?
>
> Inspector: The font reflected on the Exhibit Checks is different than on the one marked ABM Check.

(Trial Tr. 128.) In short, the Inspector testified that in comparing the check Ajayi cashed to the voided copy of the check as originally written, he noticed that the font changed. But neither Ajayi nor Chase had a copy of the check as originally written, and that is probably why Chase released the hold it had placed on the check and it is also why the government failed to prove that Ajayi knew the check was altered when he deposited it. Where trained fraud-detection professionals do not detect the forgery, a reasonable juror cannot conclude beyond a reasonable doubt that a lay defendant must have detected the forgery.

B. The government asks this Court to implicitly overrule its precedent to hold that subsequent transfers of bank fraud funds constitute executions.

A bank fraud conviction must rest on the defendant's knowing execution of a bank fraud scheme. 18 U.S.C. § 1344 (2012). This Court has held that a bank fraud scheme ends once the defendant controls the targeted funds, and no executions may occur after that point. *United States v. Anderson*, 188 F.3d 886, 891 (7th Cir. 1999).

Here, the government acknowledged that Ajayi had full control of the targeted funds by December 8, 2009, when the check cleared. (Trial Tr. 78–79.) Under *Anderson*, the scheme ended once Ajayi controlled those funds. The government, however, premised all five bank fraud counts on Ajayi's withdrawals of the funds after December 8, 2009—no count was based on his deposit. His withdrawals simply cannot serve as executions under the statute.

The government offers three flawed reasons why this Court should ignore *Anderson* and hold that Ajayi's withdrawals may be executions of a bank fraud scheme. First, the government isolates this Court's general language about the factors it considers in defining a bank fraud execution in order to suggest that Ajayi's post-deposit conduct qualifies. (Gov't Br. 21.) By excising the rule from its application in *Anderson,* the government ignores that for these purposes the conduct of the *Anderson* defendant and Ajayi are virtually indistinguishable. *Anderson*, 188 F.3d at 891 (applying the general factors to funds already controlled in a bank account and concluding that they create no additional risk to the bank regardless whether the defendant "used [it] to buy groceries" or moved it to a different account).[1]

Second, the government tries to factually distinguish the scheme in *Anderson* on the ground that this "defendant's fraud scheme was intended to artificially inflate the GR Icon account balance so that defendant could convert the proceeds to

[1] That is not to say that the general considerations outlined in *Anderson* might not lead to different results in more complex cases. This Court in *Anderson* discussed just such a case. *Anderson*, 188 F.3d at 889–90 (citing *United States v. Longfellow*, 43 F.3d 318, 323 (7th Cir. 1994) (considering whether refinancing of a loan that was part of a complex series of fraudulent, unrecorded loans could constitute an execution)).

his own use through cashed checks, a wire transfer, and retail purchases." (Gov't Br. 21.) But in that sense Ajayi's case is no different from *Anderson*. Just like Ajayi is alleged to have done, the defendant in *Anderson* fraudulently directed money intended for someone else into her bank account, and she personally drew checks on the account shortly after the money was deposited.[2] In any event, distinguishing *Anderson* on ground that the defendant wished to convert proceeds for his own use would implicitly overrule it, because nearly every bank fraud schemer wishes to convert some proceeds for his own benefit.

Third, the government cites *United States v. Peugh*, 675 F.3d 736 (7th Cir. 2012) *rev'd on other grounds*, 133 S. Ct. 2072 (2013), and argues, "Chase was exposed to increasing loss with each outgoing GR Icon check and withdrawal, making clear that defendant repeatedly executed the scheme to Chase's detriment." (Gov't Br. 21.) In fact, *Peugh* supports Ajayi because it makes clear that whether an execution of bank fraud occurred depends on the risk of loss rather than actual loss. In *Peugh*, the defendant argued that three of his convictions for fraudulently obtaining multiple loans were multiplicitous because the same bank made all three loans. *Peugh*, 675 F.3d at 740. This Court rejected that argument because each separate loan "put the bank at additional *risk of loss*." *Id.* at 741 (emphasis added).

[2] The government erroneously borrows the "falsely inflate" language from check-kiting cases, in which defendants take advantage of the "float" to create the appearance of funds that do not actually exist. In this case, Ajayi's account contained only real funds. The float is created when the bank credits a customer's account as soon as a check is deposited, but before the funds are received from the payer's bank. Until the check clears the payer's bank, the amount of the check appears in the accounts of both the recipient and the payer.

Here, unlike *Peugh*, the bank's risk of loss remained constant after the deposit—the risk of loss was always the amount of the deposit.

Finally, the government's approach would lead to absurd results. Under its reading of § 1344, the post-control transactions such as the withdrawals, rather than the deposit, are the executions. If that is the case, then any debit-card transaction after the deposit—even purchasing a pack of gum—could serve as the basis for a bank fraud conviction. *Compare* 18 U.S.C. § 1957 (2012) (money laundering statute requiring the transaction involve more than $10,000 of criminally derived property), *with id.* § 1344 (imposing no statutory minimum). Congress could not have intended for prosecutorial discretion to be the only thing standing between a defendant and potentially hundreds of bank fraud convictions following the deposit of a single altered check.

II. The email evidence demonstrating the existence of Ajayi's business and his state of mind during the relevant time period should have been admitted to counter the government's repeated claim that his business did not exist and that his intent was fraudulent.

Relevance is a very low bar, and the emails Ajayi sought to admit in support of his defense easily surpassed it.[3] *Smith v. Texas*, 543 U.S. 37, 44 (2004); *United States v. Boswell*, 772 F.3d 469, 475 (7th Cir. 2014). With the emails, Ajayi's defense that he had a legitimate MRI business for which he believed the check was an

[3] The government engages in classic question begging to undercut the emails' clear relevance to Ajayi's defense. (Gov't Br. 26.) The government claims that the post-deposit emails cannot be used to prove an innocent state of mind because Ajayi's state of mind was fraudulent. (Gov't Br. 26) (asserting the emails were irrelevant in large part because "defendant had already begun the scheme at the time the last two emails were sent: defendant's desire to launch a business after engaging in the fraudulent transactions would not undercut his intention to commit the fraudulent scheme in the first instance").

investment would be much more believable in the eyes of the jury. That he sent emails asking about MRI equipment months before the altered check even existed bolstered his testimony about his business, which the government claimed in rebuttal never existed:

> The defendant doesn't have this legitimate business. He doesn't have any reason to believe that anyone would invest $45,000, much less $344,000, into his business.

(Trial Tr. 337.) Similarly, that Ajayi renewed his communications with suppliers, expressing a stronger interest in purchasing MRI equipment the day after the check cleared, lent credence to his testimony that he believed the check was a legitimate investment in his MRI business.

Now, contrary to its position at trial, the government argues that even if the emails were relevant, Ajayi suffered no prejudice by their exclusion because "the existence of defendant's business was well established at trial." (Gov't Br. 28.) But as the government made clear in rebuttal, that fact was heavily disputed at trial. Because these emails would have been primary evidence supporting Ajayi's position, this Court should reverse and remand for a new trial. *United States v. Leonard-Allen*, 739 F.3d 948, 955 (7th Cir. 2013) (stating that reversal is required for an erroneous exclusion unless the Court can be confident the jury would have reached the same verdict).[4]

[4] The government makes a passing reference to hearsay, but because it does not develop the argument it is waived. *Williams v. REP Corp.*, 302 F.3d 660, 666 (7th Cir. 2002) ("A party waives any argument that it . . . fails to develop on appeal.").

III. When the government proffers as a pattern instruction one that did not contain all requisite language and that did not alert the parties or the court to its alteration, plain error occurs.

Ajayi did not waive his right to challenge the "scheme" definition because he reasonably relied on the government's representation that it was the pattern instruction. This Court ordinarily treats the statement "no objection" as waiver without considering whether it was a "knowing and intentional decision" because of the "difficulty in teasing out the subjective motivations behind the 'no objection' statement." *United States v. Natale*, 719 F.3d 719, 729–30 (7th Cir. 2013). But there is no such difficulty here. The government represented that the instruction was pattern and it did not note that it had modified it by omitting required language, both in the instruction conference and on the proposed instructions it submitted to the court. (Trial Tr. 165; Gov't App'x at 18.) Significantly, the government did indicate its proposed alterations or provisional language in some of its other instructions. (Gov't App'x 10, 14, 15) (instructions retaining bracketed material). The government also clearly indicated when its instructions were not pattern. (Gov't App'x 30); *see also* (Trial Tr. 176–79) (government informing the court that its proposed instruction 24 was based on the Eleventh Circuit's pattern instruction and noting that the Seventh Circuit had no such pattern instruction). In this narrow circumstance where the defendant reasonably relies on the government's incorrect representation that an instruction is pattern, it cannot be said that the defendant knowingly and intentionally relinquished any objection he may have had to those unknown alterations, and this Court should review for plain error. *See United*

States v. Olano, 507 U.S. 725, 733 (1993) (internal quotation marks omitted) ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment of a known right."). At minimum, when the "interests of justice so require" this Court may reach the merits of a waived issue, and the instruction at issue here rises to that level: this Court in *Natale* recognized that "[p]erhaps erroneous jury instructions—especially jury instructions that inaccurately state the law by minimizing or omitting elements required for conviction—would more readily present the circumstance that allows consideration of waived issues . . . ." *Natale*, 719 F.3d at 731. As shown below, the instruction was inaccurate, and it minimized or omitted required language in the definition of the scheme.

The pattern instruction and its commentary explicitly require language that "should be given" when the government charges bank fraud under § 1344(2), as it did here. The Comm. on Fed. Criminal Jury Instructions of the Seventh Circuit, *Pattern Criminal Jury Instructions of the Seventh Circuit* 413 (2012 ed.), *available at* https://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_criminal_jury_instr.pdf. The requisite, but omitted, definition here would have told the jury that in order to garner a conviction, "the government must prove at least one of the [false pretenses, representations, promises, or] acts charged in the portion of the indictment describing the scheme." *Id.* at 413. Instead, the definition of scheme actually given said that to prove a "scheme to defraud a bank" the government needed to prove no more than "a . . . course of action intended . . . to obtain money." (A.23.) Ajayi was

prejudiced because the instruction as given minimized or perhaps even omitted the requirement that Ajayi know of the misrepresentation—here, the check's alteration. In place of this requisite finding, the government was able to substitute a generalized "course of action intended . . . to obtain money." (A.23.) Because the evidence of knowledge and intent was, if not insufficient,[5] very closely balanced, this missing language from the pattern instruction could have been determinative in how the jury assessed the government's burden.

IV. The multiplicitous convictions must be remedied because unauthorized convictions are plain error.

As discussed above in Section I.B, this Court should vacate all five bank fraud counts. But even if this Court disagrees, it should at least find four convictions multiplicitous of the fifth, vacate those four and remand for resentencing and for a refund of the additional special assessments. *See United States v. Hord*, 6 F.3d 276, 281–83 (5th Cir. 1993) (vacating bank-fraud convictions based on withdrawals but allowing convictions based on deposits to stand because the "deposits, without more," satisfy § 1344 and "it is the deposits, not [the defendant's] withdrawal attempts, that constitute executions of the scheme"); *see also Rutledge v. United States*, 517 U.S. 292, 307 (1996) ("[T]he collateral consequences of a second conviction make it as presumptively impermissible to impose as it would be to impose any other unauthorized cumulative sentence.").

The government addresses neither *Hord* nor *Rutledge*. Rather, it first argues there is no error because the withdrawals may constitute executions. For the

[5] *See* Section I.A, *supra*.

reasons stated in Section I.B and in light of *Hord*, this is incorrect. The government then argues this error need not be corrected because the "sentence was significantly below the statutory maximum" and the guideline range for one conviction would be the same as for five. (Gov't Br. 35.) In *Rutledge*, however, the Supreme Court held that the mere existence of an additional conviction (without additional imprisonment term) and a $50 special assessment fee warranted reversal under plain error review. *See United States v. Parker*, 508 F.3d 434, 441 (7th Cir. 2007) (describing and applying *Rutledge*). Resentencing is necessary because the district court might have imposed a lower sentence had it known there was only one bank fraud conviction. *See, e.g.*, *McFarland v. Pickett*, 469 F.2d 1277, 1279 (7th Cir. 1972) (remanding for resentencing because it was possible that the trial judge's mistaken belief as to the number of committed offenses influenced his sentence).

V. The government inhibited Ajayi's defense by changing the scheme from one in which he played an integral role to one where he knew of the forgery merely from looking at it.

Nothing in the government's indictment indicated to Ajayi that the scheme rose and fell on the theory that the check was so obviously forged that he must have known of the alteration when he deposited it. The indictment actually indicates the opposite: that there was a well-planned, multi-person scheme devised in advance where someone altered the check and Ajayi knew it. (A.12 ¶¶ 2–4.) He learned for the first time at trial that the government's new theory was based on the "obviousness" of the alteration. Had he been apprised that this was the basis of its case, he likely would have moved for a bill of particulars, to dismiss the indictment,

or at a minimum, bolstered his defense with expert testimony establishing that when a bank, which is trained to spot forgeries, does not detect one, then a layperson could not have been expected to do so.

CONCLUSION

For the foregoing reasons, Ajayi first respectfully requests that this Court vacate his six convictions which are not supported by sufficient evidence. Second, and in the alternative, Ajayi requests that this Court grant him a new trial on his six convictions because the district court erroneously excluded emails central to his defense. Third, and in the alternative, Ajayi asks this Court to grant him a new trial on the five bank fraud counts because the jury instructions' omission of pattern language may have misled the jury as to whether the government must prove that Ajayi knew the check was altered. Fourth, and in the alternative, Ajayi requests that this Court reverse with instructions for the district court to vacate four of his bank fraud convictions, refund $400 of special assessment fees, and resentence him on a single count of bank fraud because the convictions were multiplicitous. Fifth, and in the alternative, Ajayi asks this Court to vacate his convictions because the indictment suffered from a fatal variance or constructive amendment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(a)(7)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(b) because this brief contains 4,153 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(b)(iii).

2. This brief complies with the typeface requirements of Circuit Rule 32 and FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2011 with a 12-point Century Schoolbook font and footnotes in 11-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I, the undersigned, counsel for the Defendant-Appellant, Abidemi Ajayi, hereby certify that I electronically filed this reply brief with the clerk of the Seventh Circuit Court of Appeals on March 5, 2015, which will send the filing to counsel of record in the case.

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