In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 14-2183

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.
No. 12 CR 190 — Rebecca R. Pallmeyer, *Judge*.

BRIEF & APPENDIX OF THE UNITED STATES

ZACHARY T. FARDON
United States Attorney
for the Northern District of Illinois
219 South Dearborn Street, 5th Floor
Chicago, Illinois 60604
(312) 353-5300

STUART D. FULLERTON
Assistant United States Attorney
Editor

YASMIN N. BEST
Assistant United States Attorney

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ISSUE PRESENTED FOR REVIEW

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STATEMENT OF THE CASE

On March 16, 2012, defendant Abidemi Ajayi was charged by criminal complaint with possessing a forged security. R. 1. [1] An arrest warrant was

[1] The designation "R." refers to citations to the district court's docket. "Tr." refers to the trial transcript. "Sent. Tr." refers to the sentencing hearing transcript. "App. Br." refers to the appellant's brief. "App. Appx." refers to the appellant's appendix. "Govt. Appx." refers to the government's appendix. Citations to the Presentence Investigation Report ("PSR") are designated "PSR" followed by the page number. Citations to the Government's Version of the Offense, as incorporated by the

issued for defendant at that time. R. 3. On June 5, 2012, a federal grand jury returned a seven-count indictment charging defendant with five counts of bank fraud in violation of 18 U.S.C. § 1344, one count of money laundering in violation of 18 U.S.C. § 1957, and one count of possessing an altered security in violation of 18 U.S.C. § 513(a). R. 7.

Defendant was arrested on January 14, 2013, at Chicago's O'Hare Airport, after defendant returned to the United States for the first time since the arrest warrant was issued. PSR at 4. Defendant was arraigned on January 15, 2013, and entered a plea of not guilty to each count of the indictment. R. 12.

On December 2, 2013, defendant proceeded to a jury trial on all seven counts against him. R. 48, 50, 52. Specifically, the indictment alleged that defendant made and possessed an altered check, which defendant deposited into a bank account at JP Morgan Chase Bank ("Chase") that defendant controlled and that was in the name of an entity called GR Icon. R. 7 at 1-3, 9. The indictment further alleged five separate executions of bank fraud scheme by which defendant used the altered check to steal money from Chase. R. 7 at 3-8. The indictment charged one execution each on December 9, December 10, and December 11, 2009, and two executions on December 12,

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Presentence Investigation Report, are designated "GV" followed by the page number.

2009, each based on checks written by defendant to himself on a business bank account. *Id.* The indictment also alleged one count of money laundering, based on a December 11, 2009 wire transfer in the amount of $53,000 from the same business bank account. R. 7 at 6.

At trial, the government presented the testimony of five witnesses. Daniel Corcoran, assistant treasurer of victim company American Building Maintenance Company ("ABM"), was the government's first witness. Tr. 21. The government then called three JP Morgan Chase employees: James O'Shea, Dawn Hardwick, and Miguel Duenas. Tr. 36-77; Tr. 83-96; Tr. 108-113. Finally, the government called Postal Inspector Brett Erickson before resting its case on December 6, 2013. Tr. 113-158; Tr. 213-220.

The evidence at trial showed that on or about November 12, 2009, ABM, a janitorial services company, issued check #43138762 (the "ABM check") on its Bank of America account to its vendor Pollock Paper Distributors in the amount of $344,657.84. Tr. 29-31. As Corcoran testified, in 2009, ABM issued its checks at its Houston office, after which an ABM employee transported the checks to the local post office. Tr. 23-24; Tr. 34-35. The ABM check was due to be mailed to Pollock Paper at a lockbox. Tr. 35. On or about December 14, 2009, Pollock Paper informed ABM that ABM's account was past due, and on or about December 15, 2009, Pollock Paper provided ABM with a written confirmation notice that Pollock Paper never

received the ABM check. Tr. 25-26; Tr. 31-32. ABM then conducted an internal investigation that revealed that the ABM check had already been endorsed and deposited. Tr. 26.

In checking its Bank of America records, ABM discovered that the front of the deposited check reflected a payee called GR Icon International ("GR Icon"). Tr. 27-29. Review of the check register, however, showed that the original payee for the ABM check was Pollock Paper. Tr. 26-27. On December 16, 2009, ABM's treasurer provided to Bank of America an affidavit, prepared by Corcoran, in which the treasurer stated that the ABM check had been altered without permission. Tr. 25-25; Tr. 31-32. As Corcoran testified, Corcoran had never heard of GR Icon International before the ABM check was altered. TR. 25-30.

On November 27, 2009, defendant deposited the ABM check into GR Icon's Chase account. Tr. 54-59. As O'Shea testified, Chase's internal documents showed that defendant opened the GR Icon business checking account on or about February 15, 2006. Tr. 40-42. Defendant deposited the ABM check at an automated teller machine at a Chase branch located at 10 South Dearborn Street in Chicago. Tr. 59; Tr. 250; Tr. 262-263. At the time the ABM check was deposited, the check contained the payment amount of $344,657.84, and the payee information reflected that the check was to be paid to GR Icon International. Tr. 55-59.

Inspector Erickson testified about the account activity in the GR Icon account, noting that before the ABM check was deposited, the highest monthly ending balance the GR Icon account had in 2009 was $331.43. Tr. 126. As O'Shea testified, Chase's Risk Operations placed a hold on the check when it was deposited, in part because the amount of the altered check far exceeded the money typically going into the GR Icon account. Tr. 63. At the time the check was deposited, the average deposit for the account was approximately $760. *Id*. In the years the account was active, the GR Icon account had never had an ending balance over $13,000, and only on six instances in the four years the account existed had the account ever had monthly deposits exceeding $5,000. *See* GV Exhibit A, introduced at trial as Government's Exhibit Summary Chart (*see* Tr. 214).

As O'Shea further testified, because Chase received no information that the ABM check had been altered or stolen, and because ABM had a legitimate account at Bank of America, the hold on the check was lifted at the end of the business day on December 7, 2009. Tr. 65. After the funds from the ABM check were made available to defendant, he engaged in a number of transactions over the course of four days. On December 9, 2009, defendant cashed check #1086, written on the GR Icon business account and made payable to defendant in the amount of $9,600, at the Chase branch located at 1603 Orrington in Evanston. Tr. 129-133. The government presented a video

surveillance photograph from the transaction showing defendant conducting the transaction, as well as an electronic journal report for the transaction obtained from Chase showing that defendant's Illinois driver's license was presented to the bank teller and entered into Chase's system during the withdrawal. *Id.* The government also presented evidence that the same day, defendant wrote check #1087 on the GR Icon account, in the amount of $15,000 and made payable to an individual named Segun Adetula. Tr. 133.

The evidence further showed that the following day, December 10, 2009, defendant cashed check #1088, made payable to defendant in the amount of $23,500, at the Chase branch located at 6650 South Stony Island Avenue in Chicago. Tr. 134-135. Later that same day, defendant cashed GR Icon check #1089, made payable to defendant in the amount of $16,500, at a Chase branch located at 10 South Dearborn, the same branch at which the ABM check was deposited on November 27. Tr. 136-137. Again, video surveillance photographs and electronic journal reports for these transactions were presented. Tr. 135; Tr. 137.

The evidence showed that the next day, December 11, 2009, defendant cashed check #1093, made payable to defendant in the amount of $17,000, at the Chase branch located at 1122 North Clark Street in Chicago. Tr. 137-139. A video surveillance photograph and electronic journal report were introduced for this transaction. *Id.* The evidence showed that immediately

after cashing check #1093, defendant met with a customer service associate and initiated a wire transfer in the amount of $53,000 from the GR Icon account to a third-party TD Bank account in Florida. Tr. 88; Tr. 90; Tr. 94; Tr. 144; Tr. 256. Approximately 40 minutes after the wire transfer, defendant cashed GR Icon check #1095, made payable to defendant in the amount of $9,500, at the Chase branch located at 6650 South Stony Island, where defendant had cashed check #1088 the day before. Tr. 139-140. A video surveillance photograph and electronic journal report were also presented for this transaction. *Id.*

The evidence showed that for a fourth consecutive day, on December 12, 2009, defendant cashed a check, #1097, made payable to defendant in the amount of $9,650, at the Chase branch located at 3714 North Broadway in Chicago. Tr. 140-142. Less than 40 minutes later, defendant cashed GR Icon check #1098, made payable to defendant in the amount of $9,800, at the Chase branch located at 1101 West Lawrence Avenue in Chicago. Tr. 142-144. Again, video surveillance photographs and electronic journal reports for these transactions were presented. Tr. 142-143.

The government also presented evidence that in the days after the ABM check cleared, defendant used the GR Icon debit card to make a number of purchases, at retailers such as Apple and the Gap, totaling more than $4,600. Tr. 145-46.

As O'Shea and Inspector Erickson testified, Chase suffered a total loss of more than $172,000 in December 2009 because of defendant's conduct. Tr. 75-76. The $172,497.32 remaining in the GR Icon account at the time the fraud was detected was debited by Chase's Risk Operations and placed into its general ledger. Tr. 146-147. Chase returned the entire $344,657.84 from the ABM check to Bank of America. Tr. 75.

On December 5, 2013, after the conclusion of witness testimony for the day, the court conducted a jury instruction conference. Tr. 161-184. The government had previously tendered to the court and defense counsel a draft set of instructions.[2] Government Instruction 16 addressed the elements of bank fraud, and read as follows:

> Counts One, Two, Three, Five, and Six of the indictment charge the defendant with bank fraud. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> 1. There was a scheme to defraud a bank or to obtain moneys, funds, credits, assets, securities, or other property owned by, or in the custody or control of, a bank by means of false or fraudulent pretenses, representations or promises as charged in the indictment; and
>
> 2. The defendant knowingly executed the scheme; and
>
> 3. The defendant acted with the intent to defraud; and

[2] The government has filed in the district court a motion to supplement the record, so that a copy of the instructions as provided by the government to the court and defense counsel on November 29, 2013 may be added to the record. R. 118. The instructions as provided are included here at Govt. Appx. 17-18.

4. The scheme involved a materially false or fraudulent pretense, representation, or promise; and

5. At the time of the charged offense, the deposits of the bank were insured by the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt as to the charge 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 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.

Govt. Appx. 17. Government Instruction 17 addressed the definition of a scheme:

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 property or to cause the potential loss of money or property by the bank.

Govt. Appx. 18. Regarding the instructions on bank fraud, the following discussion was held:

THE COURT: All right. Government Number 16 is an elements instruction regarding financial institution fraud.

MR. CHERONIS: No objection.

THE COURT: That will be given. Government Number 17 is a definition of scheme from 18 United States Code, Section 1344.

MR. CHERONIS: No objection.

Tr. 165.

On December 6, 2013, at the start of the trial day and anticipating testimony by defendant, the parties debated the potential admissibility of defendant's proposed exhibits. Tr. 196-207. Defendant sought to admit three emails to show that defendant was attempting to establish a mobile MRI business shortly before the offense conduct at issue at trial. Tr. 196-197. Defendant sought to introduce three emails, from July 2009, December 2009, and January 2010, that defendant represented would show that defendant had a legitimate business interest at the time he deposited the ABM check. According to defendant, the introduction of the emails would show defendant's state of mind at the time of the offense conduct, and thus show that defendant did not intend to engage in fraud when he accepted the ABM check. Tr. 196-198; App. Appx. 29-35. The government objected to the introduction of the emails on hearsay grounds. Tr. 198. The government further noted that it was attempting to authenticate the emails, copies of which the government received just a few days before trial. Tr. 199. The government noted for the court that it had located one of the purported email recipients, who reported to the government that he had no recollection of defendant or records related to him. Tr. 199.

In determining whether the emails should be admitted, the district court inquired about the relevance of the emails to the ABM check and defendant's belief about the legitimacy of the check:

> MR. CHERONIS: In response to that, by way of proffer your Honor, first of all, I will agree that there is no connection between Mr. Ajayi and the individuals that he was e-mailing regarding the check.
>
> But what you are going to hear, by way of offer of proof, is that Mr. Ajayi met an individual on an airplane, and he showed this individual some documents. They got into a discussion regarding Mr. Ajayi's intentions to buy MRI equipment, and that this individual was, then, going to give Mr. Ajayi a loan for that reason. That's what the testimony is going to be.
>
> In other words, Mr. Ajayi is looking for money from investors to fund his MRI business in order to export those.
>
> THE COURT: Understood. Will there be testimony that when he—that he understood or believed or had a reason to believe that a $344,000 check was somehow connected to these negotiations about a loan involving his MRI business?
>
> MR. CHERONIS: Well, he certainly would testify that he—the loan that he procured was going to be for the purchase of MRI equipment.
>
> THE COURT: Did he—will he testify that he understood the loan was going forward and that was, in his mind, why suddenly $344,000 fell into his lap?
>
> MR. CHERONIS: Well, I think—I think the way the evidence is going to come in is that he would testify that he was going to procure a loan for this MRI equipment. He received a check. The purpose of getting that check—at least part of the money—was for MRI equipment. Okay? During that period of time, he is making—
>
> THE COURT: He wanted to use the money for MRI equipment. I am fine with that. I'm just saying, is there anything that links the e-mails to the check? In other words—

MR. CHERONIS: No.

Tr. 201-202. The court then sustained the government's objection to the introduction to the emails, not on hearsay grounds, but because of relevance:

> THE COURT: I don't have a hearsay problem. I have a potential relevance problem because the—I understand he is trying to get involved in an MRI business. He wants, you know, investor financing. He is hoping to meet people and that they will be interested in funding his business.
>
> He is hoping that it will be hundreds-of-thousands-dollar business. He is, you know, taking steps to make that happen.
>
> There still has to be some connection so that he could say—so that it would be reasonable for the jury or somebody to infer that when he got that check, he understood that it related in some fashion to those contacts that he had made.
>
> Remember, it's the government's position that he knew or should have known—that he knew this check was issued in error. It was improper and a forgery. He had no right to this money. He shouldn't have been depositing it, and he shouldn't have withdrawn against it.
>
> So to rebut that, he would have to show, "Well, no. I understood this check was part of my business. In fact, I even had communications with the source of the check."
>
> But you are telling me that the e-mails that you want to offer don't link—don't link in any fashion to the check itself.

Tr. 204-05. Since the source of the check, according to defendant, was not any of the email correspondents, the court determined that the emails were not relevant to showing that defendant had a reason to believe that the ABM check was a legitimate investment in his business. Tr. 206-07. The court left

open the possibility that the emails could become relevant based on defendant's testimony but ultimately noted, "From what I am hearing, it doesn't, again, make any fact more likely—the fact at issue more likely to be true than not true." Tr. 207.

Defendant then testified in his own defense. Tr. 228-287. Defendant admitted to depositing the ABM check, Tr. 250, but otherwise disputed the government's theory regarding how and why he received the check. Defendant testified that he received the check from a man he knew as Charles Brown, who sent the check to him after a single conversation aboard an international flight. Tr. 235, 239, 247-248. Defendant introduced as exhibits the presentation defendant testified that he showed to Brown during the flight in defendant's pitch for an investment in his nascent mobile MRI business. Tr. 241-245. Defendant testified that based on his conversation with Brown, Brown decided to invest $45,000 in defendant's company. Tr. 247-248.

According to defendant, the day that he returned to the United States in November 2009, he received a Federal Express envelope from Brown that contained the ABM check, though it was accompanied by no other documents. Tr. 248-249. Defendant testified that although he supposed Brown to be a successful businessman with several different companies, the check was incorrectly made out for almost $300,000 more than Brown's proposed

investment. Tr. 245-246; Tr. 249-250. According to defendant, Brown authorized defendant to deposit the check anyway. Tr. 250. Defendant further testified that he deposited the check as directed. *Id.*

Once the check cleared, according to defendant, Brown appeared in Chicago, unannounced, and began demanding that defendant withdraw excess funds in cash and present them to Brown. Tr. 254-255. Defendant testified that he did so, multiple times a day at various bank locations, as directed by Brown. Tr. 255-256. Defendant testified that Brown wanted the money as quickly as possible, but also directed defendant to make multiple withdrawals over the course of several days, rather than pay back the $300,000 balance at once. Tr. 265-268. Defendant also testified that he conducted a wire transfer to an account he believed Brown controlled, also at Brown's direction. Tr. 256-257. Defendant testified that when he told Brown that he was sending Brown a check for the balance of the money defendant owed him, Brown simply discontinued contact with him, despite defendant still owing Brown more than $100,000. Tr. 274. Defendant had no documents to corroborate his alleged payments to Brown, his contacts with Brown, or the check he purportedly mailed to Brown in December 2009. Tr. 275-278.

On December 6, 2013, the jury returned a verdict convicting defendant of five counts of bank fraud and one count of money laundering, but acquitted defendant of making or possessing an altered security. Tr. 361-62.

On April 29, 2014, defendant was sentenced. R. 86. At the outset of the sentencing hearing, the court presented its written ruling denying defendant's post-trial motions for acquittal and for a new trial. Sent. Tr. at 2; R. 82. After hearing argument from the parties, the court determined that the applicable guideline range for defendant's conduct, based on the base offense level, the loss amount, and obstruction of justice, was 46 to 57 months. Sent. Tr. 31. The court determined that the appropriate sentence for defendant was slightly below the low end of the guideline range, and stated that the court intended to impose a sentence of 44 months. *Id*. The court imposed sentences of 8 months for each of the five bank fraud counts, and 4 months for the money laundering count, each sentence to be served consecutively, for a total sentence of 44 months. *Id*. at 32.

SUMMARY OF ARGUMENT

The government's documentary and testimonial evidence was sufficient to prove beyond a reasonable doubt each element of the bank fraud and money laundering counts, and was not refuted by defendant's testimony regarding how he obtained the ABM check.

The district court did not abuse its discretion by excluding defendant's exhibits on relevance grounds, where defendant failed to show how emails to independent third parties bore on the question of defendant's participation in the bank fraud scheme.

The district court did not err in providing the pattern jury instruction for bank fraud, where the parties both agreed to the proposed instruction and the jury was instructed that it had to find a material misrepresentation in order to convict defendant.

The five bank fraud counts for which defendant was convicted were not multiplicitous, as each count charged a separate execution in the bank fraud scheme.

The indictment was not impermissibly amended by the government's evidence at trial of defendant's fraud scheme, as the government's evidence was consistent with the fraud scheme alleged in the indictment.

ARGUMENT

I. The Government's Evidence Was Sufficient to Prove Beyond a Reasonable Doubt that Defendant Was Guilty of Both Bank Fraud and Money Laundering.

A. Standard of Review

In reviewing the sufficiency of the evidence, this Court reviews the evidence in the light most favorable to the prosecution. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). This Court 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. Molton*, 743 F.3d 479, 483 (7th Cir. 2014).

B. Analysis

To convict a defendant of bank fraud in violation of 18 U.S.C. § 1344, the government must prove that: there was a scheme to defraud a bank or financial institution; defendant knowingly executed or attempted to execute the scheme; defendant acted with the intent to defraud; and the deposits of the financial institution were insured by the Federal Deposit Insurance Corporation at the time of the offense. *United States v. Parker*, 716 F.3d 999, 1007 (7th Cir. 2013). Additionally, if defendant is charged with a violation of § 1344(2), the government must prove that the scheme involved a materially false or fraudulent pretense, representation, or promise. *See* Seventh Circuit Pattern Jury Instructions (2012), p. 411.

Where a defendant is challenging the sufficiency of the evidence supporting his conviction, this Court draws all inferences from the facts of the case in the light most favorable to the government. *United States v. Domnenko*, 763 F.3d 768, 770 (7th Cir. 2014). Here, the government's evidence showed that defendant opened the GR Icon account in 2006, and had sole control over the account until the transactions at issue in December 2009. Tr. 61; Tr. 123. Review of the account statements for the account showed that the GR Icon account generally had low balances, rarely over several thousand dollars. Tr. 124-126; GV Exhibit A. Moreover, in 2009, the account was steadily losing funds, and in November 2009, the monthly

opening balance was a mere $90.08. Tr. 219. The evidence showed that defendant took a check for more than $344,000 and deposited it at an ATM rather than conduct a transaction with a teller. Tr. 59; Tr. 250; Tr. 262-263. The check then cleared on or about December 7, 2009. Tr. 78.

By December 9, defendant began engaging in multiple transactions a day from Evanston to Chicago (despite defendant living in Calumet City, a southern suburb). Specifically, defendant wrote checks on the GR Icon account to himself, which he then cashed at various Chase branches. Tr. 129-143. Photographs taken from video surveillance and the electronic records maintained by Chase for each transaction all showed conclusively that defendant conducted each transaction. *Id*. The evidence also showed that in between cashing two checks, defendant also sent a $53,000 wire transfer to another bank account. Tr. 144, 150, 156. The review of the bank statements also showed retail purchases at the Gap and the Apple store made with defendant's debit cards, but no transactions on the account that might accompany a legitimate business venture. Tr. 145. Finally, the evidence showed that defendant managed to siphon more than $172,000 from the GR Icon business account in just four days, before ABM and Bank of America became aware of the fraud. Tr. 146.

Defendant's primary argument on appeal is that the government failed to prove that defendant knew that the ABM check was altered at the time he

deposited it, and thus the government failed to meet its burden on four of the five elements of bank fraud (since defendant stipulated to the funds being insured by the Federal Deposit Insurance Corporation) as well as the knowledge element of the money laundering count. App. Br. at 14. For the reasons outlined below, defendant's claim fails as to each element, and defendant's convictions on each count should be affirmed.

Defendant contends that the government failed to prove that defendant was linked to the scheme to defraud. App. Br. at 15-16. Defendant attempts to dismiss the government's circumstantial evidence of defendant's knowledge of the fraud scheme, arguing, "Because the government alleged that Ajayi devised the scheme, it should not have needed to resort to inferences to prove his knowledge of the alteration." App. Br. at 15. This ignores the plain language of the indictment. The indictment alleges that defendant and others devised, intended to devise, and participated in the scheme. Where the scheme is alleged in the conjunctive, the government need only prove one of the acts charged. *See United States v. Kincaid*, 571 F.3d 648, 655-56 (7th Cir. 2009). Thus, even if defendant did not devise the scheme by himself or participate in every facet of the scheme, the evidence showing his participation in the scheme was sufficient for his conviction.

Defendant's dismissal of the government's evidence underscores the flaw in defendant's argument. Defendant argues that the government failed

to prove defendant initiated the fraud scheme, and thus all of the evidence showing his intent to defraud Chase bank was insufficient because it occurred after the fraudulently altered check was deposited. The government argued and presented evidence that the forgery of the check was apparent on its face. *See* Tr. 128 (testimony of Inspector Erickson about the variances in font on the check face). Beyond that, the government's evidence proved beyond a reasonable doubt that defendant was guilty of bank fraud.

The evidence, while circumstantial, was compelling that defendant knowingly and intentionally engaged in a fraud scheme. "[C]ircumstantial evidence is sufficient to prove fraudulent intent and to support a conviction." *United States v. Persfull*, 660 F.3d 286, 295 (7th Cir. 2011); see also *United States v. Ellis*, 50 F.3d 419, 422 (7th Cir. 1995)(citing *United States v. Goodstein*, 883 F.2d 1362, 1370 (7th Cir. 1989), cert. denied, 494 U.S. 1007, 108 L. Ed. 2d 481, 110 S. Ct. 1305 (1990)). Here, a reasonable trier of fact could conclude, based on financial transactions the likes of which defendant had never conducted before, that defendant participated in a scheme in which defendant presented to Chase a check he knew was altered. Not only were the transactions unusual for defendant, but the manner in which defendant systematically sought to drain the account were sufficient to establish the existence of a scheme, and defendant's knowing and intentional participation in that scheme. This is particularly true when coupled with defendant's

incredible tale of how he came into possession of the ABM check and why he decided to withdraw the money in piecemeal fashion.

Defendant also argues that defendant did not knowingly execute the fraud because checks he wrote from the GR Icon account to himself, which he then cashed, did not constitute executions of the fraud scheme. App. Br. at 19-20. "[T]he decision of whether an action is an execution of the criminal scheme will be fact intensive; there are several factors to consider, including, but not limited to, the ultimate goal of the scheme, the nature of the scheme, the benefits intended, the interdependence of the acts, and the number of parties involved." *United States v. Anderson*, 188 F.3d 886, 889 (7th Cir. 1999) (citing *United States v. Longfellow*, 43 F.3d 318, 323 (7th Cir. 1994)). Defendant construes the fraud scheme as ending as soon as defendant deposited the altered check, in contrast to the scheme outlined in the indictment and proven at trial. App. Br. at 14, 20. But as alleged in the indictment and as proved at trial, defendant's fraud scheme was intended to artificially inflate the GR Icon account balance so that defendant could convert the proceeds to his own use through cashed checks, a wire transfer, and retail purchases. 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. *See United States v. Peugh*, 675 F.3d 736, 740 (7th Cir. 2012), *rev'd on other grounds*, 133 S. Ct.

2072 (2013) (finding that "[c]onduct generally qualifies as an 'execution' rather than an 'act in furtherance' when it is chronologically and substantively distinct and subjects the victim to additional risk of loss."). That he did so knowingly was clear from the evidence presented at trial about his direct involvement in each transaction.

Defendant also argues that the government failed to prove his intent to defraud. App. Br. at 20-21. "[B]ecause direct evidence of a defendant's fraudulent intent is typically not available, specific intent to defraud may be established by circumstantial evidence . . . ." *United States v. Howard,* 30 F.3d 871, 874 (7th Cir. 1994) (quoting *United States v. LeDonne,* 21 F.3d 1418, 1426 (7th Cir. 1994)). The evidence at trial was uncontroverted that defendant repeatedly and intentionally engaged in transactions that converted funds from Chase's possession to defendant's own use. Based on the unusual pattern of activity, the jury could reasonably determine that defendant's actions over the course of a few days was proof beyond a reasonable doubt that defendant acted with the intent to defraud.

Defendant similarly claims that the government failed to prove a misrepresentation. App. Br. at 21-22. Identifying the altered payee line as the misrepresentation, defendant argues that the government failed to show that it was defendant's misrepresentation. App. Br. at 22. In fact, the government's evidence at trial was that defendant received the altered check

and deposited it knowing that it had been altered. In doing so, defendant adopted the misrepresentation, because he deposited it into the bank account of the phony payee. Even if defendant did not alter the face of the check himself, when he deposited into the GR Icon account the altered ABM check naming GR Icon as the rightful payee, defendant adopted the misrepresentation of the payee as his own.

Finally, defendant argues his conviction for money laundering must be reversed because the government failed to prove his knowledge that the check was altered. A conviction under 18 U.S.C. § 1957 requires that the government prove that defendant knew the transaction involved criminally derived property. *See* Seventh Circuit Pattern Jury Instructions (2012), p. 518. For the same reasons outlined above, defendant's arguments regarding defendant's knowledge must fail. The government provided more than sufficient evidence to prove beyond a reasonable doubt that at the time defendant conducted the wire transfer on December 11, 2009, he knew that the funds he was disbursing were criminally derived. Not only had defendant deposited the altered check more than two weeks before, but by the time of the wire transfer, he was on his third consecutive day of writing checks from the GR Icon account to himself. The jury reasonably determined that defendant knowingly engaged in the prohibited transaction.

"On appeal, it is a monumental task to mount a successful sufficiency claim." *Persfull*, 660 F.3d at 295. Defendant has not met that burden. Defendant's convictions on the bank fraud and money laundering counts should be affirmed.

II. The District Court Did Not Abuse Its Discretion by Excluding Defendant's Exhibits.

A. Standard of Review

This Court reviews a district court's decision to admit or exclude evidence for abuse of discretion. *United States v. Boros*, 668 F.3d 901, 907 (7th Cir. 2012). "The district court has broad discretion in evidentiary matters to determine what evidence is relevant and when relevant evidence should be excluded because of the considerations enumerated in Rule 403. On appeal this court will not substitute its judgment for that of the district court but will determine only whether the district court abused its discretion." *United States v. Harris*, 542 F.2d 1283, 1317 (7th Cir. 1976).

B. Background

As noted above, defendant sought to introduce during his direct examination three emails that defendant believed would support his defense that in 2009, defendant was trying establish a mobile MRI business. Such proof of a fledgling business would purportedly help defendant establish that he had reason to believe that the ABM check was a legitimate investment in

GR Icon, rather than evidence of defendant's participation in a fraud scheme. Tr. 196-198; App. Appx. 29-35.

The government objected to the introduction of the emails on hearsay grounds. Tr. 198. Though defendant maintained that the emails fell within the state of mind exception to the hearsay rules, the government believed that defendant sought to introduce the emails for the truth of the matter asserted—that defendant was communicating with unknown third parties in an attempt to buy mobile MRI units. Additionally, the government further noted that it was attempting to authenticate the emails, having heard from one recipient that he had no recollection of defendant or records related to him. Tr. 199.

In determining whether the emails should be admitted, the district court inquired about the relevance of the emails to the ABM check and defendant's belief about the legitimacy of the check. Tr. 200. Defendant conceded that the recipients of the emails did not have any connection to the ABM check. The court determined that the lack of connection to the ABM check meant that the emails were not relevant to whether defendant had reason to believe that the ABM check was legitimate. The court ultimately sustained the government's objection to the introduction to the emails on relevance grounds. Tr. 207.

C. Analysis

Defendant argues that the district court abused its discretion in excluding the emails at trial, because a jury could have inferred from the emails that defendant was contemplating the purchase of an MRI machine, which would then impact whether defendant knew the ABM check was altered. App. Br. at 26. Defendant further argues that such emails could have impacted the jury's impression of defendant's credibility in general. *Id.*

Federal Rule of Evidence 401 holds that "evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." As the district court correctly determined, the emails were not useful in determining whether defendant intended to engage in bank fraud at the time he deposited the ABM check. Indeed, two of the emails were dated after the ABM check was deposited into defendant's bank account.

The emails were irrelevant to the issue of defendant's intention to engage in a bank fraud scheme, 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 fraud scheme in the first instance. Even considering the email that was sent four months before the start of the scheme, there was nothing in any of the emails that demonstrated a

connection between the emails and either the ABM check or Charles Brown. After hearing argument from the parties, the court excluded the emails specifically noting: "From what I am hearing, it doesn't, again, make any fact more likely—the fact at issue more likely to be true than not true." Tr. 207. That is precisely the analysis required by Rule 401. The district court thus properly excluded the emails.

The district court did not exclude all of defendant's proposed exhibits. Defendant was allowed to introduce power point slides and a business proposal that defendant testified that he presented to Charles Brown during the flight to London. Tr. 241-244; App. Appx. 51-77. Those exhibits related directly to defendant's testimony about the business he was attempting to launch, and his conversations with Brown that led to the purported investment. In contrast to the email exhibits, the slides and proposal were directly relevant to defendant's defense—that he believed the ABM check represented Brown's investment in defendant's business.

Defendant argues that the government's closing arguments made clear the relevance of the excluded emails to his defense. App. Br. 24-25. Specifically, defendant contends that because the government argued that defendant had no legitimate business at the time of the offense conduct, defendant was prejudiced by not being able to present the emails. But defendant in fact testified to the business he claimed to be establishing, and

presented lengthy documents that purported to show what defendant showed to Brown during the flight to London. Additionally, evidence regarding the long term existence of GR Icon and its bank accounts were presented at trial, including the establishment of GR Icon with the Illinois Secretary of State in 2005, Tr. 115, its dissolution two months before the first of the excluded emails, Tr. 121, and the establishment of the GR Icon bank account at Chase in 2006. Tr. 77; 122-124. In short, the existence of defendant's business was well established at trial. The district court did not err in excluding irrelevant emails that were of no use in showing whether defendant believed the ABM check might be a legitimate investment in his company.

III. The District Court Did Not Err in Providing the Pattern Jury Instruction for Bank Fraud.

A. Standard of Review

Where no objections were made to jury instructions at trial, this Court reviews the instructions for plain error. *United States v. Peters*, 435 F.3d 746, 754 (7th Cir. 2006). Under the plain error standard, this Court reverses a district court's determination if it finds: "(1) an error or defect (2) that is clear or obvious (3) affecting the defendant's substantial rights (4) and seriously impugning the fairness, integrity, or public reputation of judicial proceedings." *United States v. Anderson*, 604 F.3d 997, 1002 (7th Cir. 2010).

Where defendant affirmatively approved of an instruction, defendant waived his objection to the jury instruction. *United States v. Courtright*, 632 F.3d 363, 371 (7th Cir. 2011).

B. Background

As noted above, the government drafted and provided to the district court and defense counsel the government's proposed jury instructions. Included in the proposed instructions was a definition of the term scheme, which was based on this Court's pattern jury instruction. The pattern instruction provides bracketed language that may be omitted or altered depending on the facts of the case at issue:

> A scheme is a plan or course of action formed with the intent to accomplish some purpose.
>
> [In considering whether the government has proven a scheme to obtain moneys, funds, credits, assets, securities, or other property from a [bank] [financial institution] by means of false pretenses, representations or promises, 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. However, the government is not required to prove all of them.]
>
> [A scheme to defraud a [bank] [financial institution] means a plan or course of action intended to deceive or cheat that [bank] [financial institution] or [to obtain money or property or to cause the [potential] loss of money or property by the [bank] [financial institution]. [A scheme to defraud need not involve any false statement or misrepresentation of fact.]]

Seventh Circuit Pattern Jury Instructions (2012), p. 413. The instruction proposed by the government included the first and third paragraphs above,

but omitted the second paragraph. See Govt. Appx. at 18. When the court conducted its first jury instruction conference on December 5, 2013, the court specifically asked defendant's position regarding the scheme instruction as proposed. Counsel for defendant stated affirmatively that he had no objection to the instruction. Tr. 165. The instruction was given to the jury as proposed. Tr. 350.

C. Analysis

Defendant argues that the district court's failure to provide all of the language of the scheme definition pattern jury instruction constituted plain error, because the jury was not aware that it had to find proof of a misrepresentation in order to convict defendant. App. Br. at 27-28.

Because defendant affirmatively agreed to the jury instruction as proposed by the government, defendant has waived his objection to the instruction.

> A defendant waives an objection to jury instructions if the record illustrates that the defendant approved of the instructions at issue. The touchstone of the waiver inquiry is whether and to what extent the defendant ha[s] actually approved of the jury instructions assigned as error on appeal. Waiver extinguishes any error and precludes appellate review.

United States v. Disantis, 565 F.3d 354, 361 (7th Cir. 2009) (citations and internal quotations omitted). When asked about defendant's position regarding the scheme instruction, defendant affirmatively stated that he had

no objection to the instruction. In doing so, he approved of the instruction, there was no error in the instruction provided by the court, and defendant thus has waived any argument regarding the instruction on appeal.

Defendant argues that he has merely forfeited the argument by failing to raise an objection in the district court. App. Br. at 28. "In contrast to waiver, forfeiture occurs where a defendant fails to object to a proposed jury instruction by stating distinctly the matter to which the [defendant] objects and the grounds of the objection. . . Although forfeiture does not preclude appellate review as does waiver, we review forfeited objections only for plain error." *Disantis*, 565 F.3d at 361 (citations and internal quotations omitted).

For the reasons outlined above, waiver rather than forfeiture applies to defendant's affirmative acceptance of the proposed jury instruction. Even if the defendant had forfeited rather than waived his objection, the form of the instruction still does not warrant reversal. Contrary to defendant's claim that "[t]he bracketed language, had it been given, would have told the jury that it could not convict Ajayi absent proof of the sole misrepresentation alleged in the indictment," App. Br. at 28, the bank fraud elements instruction addressed this same issue. As noted above, the elements of the bank fraud instruction informed the jury that in order to convict defendant, the government must prove both that defendant knowingly executed the scheme *and* that the scheme involved a materially false or fraudulent pretense,

representation, or promise. *See* Govt. Appx. 17. In contrast, the omitted bracketed language serves to inform the jury that it must find at least one of the false representations charged in the indictment, but that the government is not required to prove all of them. Where only one misrepresentation was alleged in the indictment, then, the jury could not convict defendant if it did not find that the government proved beyond a reasonable doubt that there was a material misrepresentation. There is no reason to believe that the jury was unable to follow and employ these instructions. *See United States v. Keskes*, 703 F.3d 1078, 1086 (7th Cir. 2013) ("We presume that the jury followed the court's instructions."). As the materiality of the misrepresentation was explicitly addressed in the elements instruction for bank fraud, there is no plain error.

Additionally, the omission of the bracketed language did not affect defendant's substantial rights. "[This Court's] plain error review is particularly light-handed in the context of jury instructions. It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in trial court. The error [must] be of such a great magnitude that it probably changed the outcome of the trial. This determination requires us to view the submitted instructions in light of the facts of the case and the evidence presented." *Peters*, 435 F.3d at 754 (citations and quotations omitted). As outlined above, the evidence

presented at trial made clear defendant's participation in a scheme that involved a material misrepresentation to the victim bank. The evidence included an exhibit showing the face of the check, the testimony of ABM employee Daniel Corcoran and Inspector Erickson about the appearance of the check, and the evidence of defendant's course of conduct as soon as the ABM check cleared at Chase. When viewed in conjunction with the language of the elements and scheme instructions, it is clear that there was no error in the instructions provided, and that defendant was not prejudiced in any way.

IV. The Five Bank Fraud Counts Were Not Multiplicitous.

A. Standard of Review

"It is the well-established law of this circuit that forfeiture of a multiplicity claim will result in plain-error review." *United States v. Parker*, 508 F.3d 434, 440 n.5 (7th Cir. 2007) (citing *United States v. McCarter*, 406 F.3d 460, 464 (7th Cir. 2005)).

B. Analysis

Defendant argues that the five counts of bank fraud alleged in the indictment are multiplicitous because they were not independent executions of the fraud scheme, and because defendant had full control of the funds in his bank account at the time it was deposited, the fraud scheme ended at that point. App. Br. at 29-30. Defendant's argument misapprehends the fraud scheme as alleged in the indictment. As defendant concedes, at no point

before trial did defendant object to the multiple counts of bank fraud as alleged in the indictment. *See* App. Br. at 29. Defendant's failure to raise an objection to the multiple bank fraud counts means that defendant has forfeited his objection, subjecting it to plain error review. There was no error here, much less plain error.

As noted above, the inquiry as to what constitutes a fraud scheme is fact intensive. The indictment alleged a scheme in which defendant,

> knowing the check had been altered, deposited and caused the altered check to be deposited into the GR Icon International bank account at JP Morgan Chase for the purpose of creating a falsely inflated balance designed to deceive JP Morgan Chase into honoring and paying checks and other debits drawn on the GR Icon International bank account.

R. 7 at 2. The indictment charged defendant with five separate counts of bank fraud, one for each of five checks written by defendant to himself from the GR Icon account. Each of the checks was for a different dollar amount and cashed by defendant at a different Chase bank branch on December 9, December 10, December 11, and December 12, 2009.

The checks that defendant wrote and then cashed constitute executions of this scheme. Chase, the victim of the fraud scheme, lost money with each execution—as made evident by the fact that Chase's total loss was approximately half of the ABM check's value, as it was able to freeze and recover approximately $172,000 from the GR Icon account once the scheme

was detected. *See Peugh*, 675 F.3d at 740. Where defendant engaged in multiple, discrete transactions over a period of days, where each transaction increased the loss suffered by the victim, the transactions were properly characterized as executions of the scheme, rather than mere actions defendant took in furtherance of the scheme.

"[T]he plain error standard allows appellate courts to correct only particularly egregious errors for the purpose of preventing a miscarriage of justice." *United States v. Conley*, 291 F.3d 464, 470 (7th Cir. 2002) (citation omitted). No such error took place here. Defendant's sentence was significantly below the statutory maximum, and being sentenced on five counts of bank fraud neither increased his term of incarceration nor his guideline range. The district court made clear that it intended to impose a sentence of 44 months, which it then divided amongst the six counts of conviction:

> I think, under the circumstances, that a sentence at the bottom of the guideline range is appropriate. And in fact, I am going to make it a little bit shorter than that. It's 46 to 57 months as I recalculated it, and I am going to impose a sentence of 44 months.
>
> Note that Mr. Ajayi has been convicted on a number of counts, but I want to observe, as well, that all of them really arise from the same—the same episode, let's call it. In other words, although there are a number of charges and a number of convictions, a number of counts of conviction, they really all relate to the same incident in November of 2009.

> Each one, as I understand it, carries a maximum sentence of 30 years. Obviously, I think that's more than necessary.
>
> Given that there are five counts of bank fraud and one count of money laundering, what I am going to do is impose eight months on each of the bank fraud counts, to run consecutively, and then four months on the Count IV, the laundering count, also to run consecutively.

Sent. Tr. 31-32. There is no miscarriage of justice in defendant's convictions on multiple counts of bank fraud, and the case need not be remanded for resentencing.

V. The Indictment Was Not Impermissibly Amended by the Government's Evidence at Trial.

A. Standard of Review

Where a defendant fails to raise a timely objection regarding constructive amendment of the indictment, this Court reviews for plain error. *United States v. Presbitero*, 569 F.3d 691, 698 (7th Cir. 2009). "When the argument is that a constructive amendment of the indictment occurred, plain error occurs if the amendment constitutes a mistake so serious that the defendant probably would have been acquitted had there not been a mistake." *Id*. (citation omitted).

B. Analysis

Defendant contends that the scheme presented at trial was "not only categorically different, but also broader" than the scheme alleged in the indictment, App. Br. at 32, because the scheme presented at trial changed

from one in which defendant was instrumental in initiating the scheme to one in which defendant only played a role after the fact. App. Br. at 33. In doing so, defendant argues that the government has amended impermissibly the scheme as charged, and his convictions should be reversed. App. Br. at 33-34.

"Constructive amendment of an indictment occurs where the permissible bases for conviction are broadened beyond those presented to the grand jury." *United States v. Blanchard*, 542 F.3d 1133, 1143 (7th Cir. 2008) (citations omitted). To avoid a claim of constructive amendment, the evidence presented at trial must match the allegations in the indictment. *Id*. Where, as here, a defendant fails to make a claim of constructive amendment in the district court, such a claim is reviewed here for plain error. *Presbitero*, 569 F.3d at 698; *see also* App. Br. at 32.

The indictment in this case alleged that defendant, along with others known and unknown, "devised, intended to devise, and participated in a scheme." R. 7 at 2. The scheme as alleged in the indictment is that defendant obtained a check issued by Company A (ABM), drawn on Company A's account at Bank of America, and originally made payable to Company B (Pollock Paper) in the amount of $344,657.84. The indictment further alleged that as part of the scheme, the check was altered to change the name of the payee on the check's face to reflect defendant's company, and that defendant

deposited and caused deposited a check he knew to be altered into his business's bank account in order to create a falsely inflated balance and thus deceive Chase into honoring and paying debits drawn on the bank account. R. 7 at 2-3. The indictment further alleged that as part of the scheme, once the altered check cleared Bank of America on or about December 8, 2009, defendant converted the proceeds of check to his own use and benefit. *Id.* Finally, the indictment alleged that as part of the scheme defendant misrepresented, concealed and hid and caused to be misrepresented, concealed and hidden acts done in furtherance of the scheme. R. 7 at 2-3.

Consistent with the indictment, at trial the government argued that the forgery of the check was obvious to defendant at the time he deposited the check. Tr. 29; Tr. 128; Tr. 313; Tr. 339-340. The government based its argument on the appearance of the check, which Inspector Erickson testified appeared to have several inconsistent fonts. Tr. 128. The government further based its argument on defendant's actions upon receiving the check—namely, defendant's decision to double-park his car on a busy downtown Chicago street and use an automated teller machine to deposit a check for more than $344,000, almost immediately after defendant testified he received the check. Tr. 262; Tr. 335. Because it was unclear how the ABM check was diverted from ABM or Pollock Paper to defendant, the government's evidence and argument at trial was limited to defendant's participation in a larger scheme.

Such evidence and argument is consistent with the allegations in the indictment.

Defendant, however, argues that "[w]hereas the indictment alleged that Ajayi himself was instrumental in initiating and devising the scheme—obtaining the check and effecting its forgery—the government relied on the existence of some amorphous and anonymous scheme within which Ajayi played no role in the forgery—the key fact constituting the scheme—and argued that Ajayi knew that the check was altered by looking at it." App. Br. at 32-33. Such argument mischaracterizes not only the government's proof and argument at trial, but the plain language of the indictment itself. The indictment made clear that defendant was but one participant in a scheme, defendant's specific conduct (depositing a check he knew to be altered, and then engaging in multiple transactions intended to defraud a financial institution) was outlined in the indictment, and the government presented evidence as to that conduct at trial.

Defendant fails to explain how, without the alleged constructive amendment, he would have been acquitted. Defendant argues that he "could not have anticipated that the government would present to the jury this pre-packaged scheme where the essential elements and facts—the diverting of the check and its forgery—were no longer committed by Ajayi personally." App. Br. at 34. But in fact the indictment put defendant on notice about the

government's theory of the case, charging defendant with making and possessing an altered check, R. 7 at 9, and also alleging that defendant and others were part of a scheme to defraud and to obtain money by materially false and fraudulent pretenses, representations, and promises. R. 7 at 2. The government then introduced evidence, both through the appearance of the check itself and defendant's actions upon receiving the check, to support the allegations outlined in the indictment.

Because defendant has not shown how he was prejudiced by the purported constructive amendment, defendant's contention that the indictment was impermissibly amended must fail. *See United States v. Ackley*, 296 F.3d 603, 606 (7th Cir. 2002) (where defendant "provides no specific support for his assertion that he would have been acquitted but for the alleged constructive amendment, and given the strength of the evidence against him, he could not. His claim of error fails.")

CONCLUSION

For these reasons, the United States respectfully requests that this Court affirm the conviction and sentence of appellant Abidemi Ajayi.

Respectfully submitted,

ZACHARY T. FARDON
United States Attorney

STUART FULLERTON
Assistant United States Attorney
Editor

By: /s/ *Yasmin N. Best*
YASMIN N. BEST
Assistant United States Attorney
219 South Dearborn Street, 5th Floor
Chicago, Illinois 60604
(312) 469-6024

RULE 32 CERTIFICATION

I hereby certify that:

1. This brief complies with the type volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) because it contains 10,356 words.

2. This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5), 32(a)(6), and Circuit Rule 32(b), because it has been prepared using the Microsoft Office Word proportionally-spaced typeface of Century Schoolbook with 13-point font in the text and 12-point font in the footnotes.

Respectfully submitted.

ZACHARY T. FARDON
United States Attorney

By: /s/ *Yasmin N. Best*

YASMIN N. BEST
Assistant United States Attorney
219 South Dearborn Street, 5th Floor
Chicago, Illinois 60604
(312) 469-6024

APPENDIX

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	12 CR 190
v.	)	
	)	Judge Rebecca R. Pallmeyer
ABIDEMI AJAYI	)	
	)	

GOVERNMENT'S PROPOSED JURY INSTRUCTIONS

The UNITED STATES OF AMERICA, by ZACHARY T. FARDON, United States Attorney for the Northern District of Illinois, respectfully submits the attached Government's Proposed Jury Instructions.

Respectfully submitted,

ZACHARY T. FARDON
United States Attorney

By: /s/ Yasmin N. Best
YASMIN N. BEST
NICOLE KIM
Assistant United States Attorneys
219 South Dearborn, 5th Floor
Chicago, Illinois 60604
(312) 353-5300

Dated: November 29, 2013

Members of the jury, I will now instruct you on the law that you must follow in deciding this case. You must follow all of my instructions about the law, even if you disagree with them. This includes the instructions I gave you before the trial, any instructions I gave you during the trial, and the instructions I am giving you now.

As jurors, you have two duties. Your first duty is to decide the facts from the evidence that you saw and heard here in court. This is your job, not my job or anyone else's job.

Your second duty is to take the law as I give it to you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt.

You must perform these duties fairly and impartially. Do not let sympathy, prejudice, fear, or public opinion influence you.

You must not take anything I said or did during the trial as indicating that I have an opinion about the evidence or about what I think your verdict should be.

GOVERNMENT INSTRUCTION NO. 1
Seventh Circuit Committee (2012) 1.01.

The charges against the defendant are in a document called an indictment. You will have a copy of the indictment during your deliberations.

The indictment in this case charges that the defendant committed the crimes of bank fraud, money laundering, and possessing or using an altered check. The defendant has pled not guilty to the charges.

The indictment is simply the formal way of telling the defendant what crimes he is accused of committing. It is not evidence that the defendant is guilty. It does not even raise a suspicion of guilt.

GOVERNMENT INSTRUCTION NO. 2
Seventh Circuit Committee (2012) 1.02.

The defendant is presumed innocent of each and every one of the charges. This presumption continues throughout the case, including during your deliberations. It is not overcome unless, from all the evidence in the case, you are convinced beyond a reasonable doubt that the defendant is guilty as charged.

The government has the burden of proving the defendant's guilt beyond a reasonable doubt. This burden of proof stays with the government throughout the case.

The defendant is never required to prove his innocence. He is not required to produce any evidence at all.

GOVERNMENT INSTRUCTION NO. 3
Seventh Circuit Committee (2012) 1.03.

You must make your decision based only on the evidence that you saw and heard here in court. Do not consider anything you may have seen or heard outside of court, including anything from the newspaper, television, radio, the Internet, or any other source.

The evidence includes only what the witnesses said when they were testifying under oath, the exhibits that I allowed into evidence, and the stipulations that the lawyers agreed to. A stipulation is an agreement that certain facts are true or that a witness would have given certain testimony.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. If what a lawyer said is different from the evidence as you remember it, the evidence is what counts. The lawyers' questions and objections likewise are not evidence.

A lawyer has a duty to object if he thinks a question is improper. If I sustained objections to questions the lawyers asked, you must not speculate on what the answers might have been.

If, during the trial, I struck testimony or exhibits from the record, or told you to disregard something, you must not consider it.

GOVERNMENT INSTRUCTION NO. 4
Seventh Circuit Committee (2012) 2.01.

Give the evidence whatever weight you decide it deserves. Use your common sense in weighing the evidence, and consider the evidence in light of your own everyday experience.

People sometimes look at one fact and conclude from it that another fact exists. This is called an inference. You are allowed to make reasonable inferences, so long as they are based on the evidence.

GOVERNMENT INSTRUCTION NO. 5
Seventh Circuit Committee (2012) 2.02.

You may have heard the terms "direct evidence" and "circumstantial evidence." Direct evidence is evidence that directly proves a fact. Circumstantial evidence is evidence that indirectly proves a fact.

You are to consider both direct and circumstantial evidence. The law does not say that one is better than the other. It is up to you to decide how much weight to give to any evidence, whether direct or circumstantial.

GOVERNMENT INSTRUCTION NO. 6
Seventh Circuit Committee (2012) 2.03.

Do not make any decisions simply by counting the number of witnesses who testified about a certain point.

What is important is how truthful and accurate the witnesses were and how much weight you think their testimony deserves.

GOVERNMENT INSTRUCTION NO. 7
Seventh Circuit Committee (2012) 2.04.

A defendant has an absolute right not to testify or present evidence. You may not consider in any way the fact that the defendant did not testify or present evidence. You should not even discuss it in your deliberations.

GOVERNMENT INSTRUCTION NO. 8
Seventh Circuit Committee (2012) 2.05.

Part of your job as jurors is to decide how believable each witness was, and how much weight to give each witness' testimony [, including that of the defendant]. You may accept all of what a witness says, or part of it, or none of it.

Some factors you may consider include:

- the intelligence of the witness;
- the witness' ability and opportunity to see, hear, or know the things the witness testified about;
- the witness' memory;
- the witness' demeanor;
- whether the witness had any bias, prejudice, or other reason to lie or slant the testimony;
- the truthfulness and accuracy of the witness' testimony in light of the other evidence presented; and
- inconsistent [or consistent] statements or conduct by the witness.

GOVERNMENT INSTRUCTION NO. 9
Seventh Circuit Committee (2012) 3.01.

It is proper for an attorney to interview any witness in preparation for trial.

GOVERNMENT INSTRUCTION NO. 10
Seventh Circuit Committee (2012) 3.02.

You have heard evidence that before the trial, the defendant made a statement that may be inconsistent with his testimony here in court. You may consider an inconsistent statement by the defendant made before the trial to help you decide how believable the defendant's testimony was here in court, and also as evidence of the truth of whatever the defendant said in the earlier statement.

GOVERNMENT INSTRUCTION NO. 11
Seventh Circuit Committee (2012) 3.04.

You have heard testimony that the defendant made a statement to agents from the United States Postal Inspection Service. You must decide whether the defendant actually made the statement and, if so, how much weight to give to the statement. In making these decisions, you should consider all of the evidence, including the defendant's personal characteristics and circumstances under which the statement may have been made.

GOVERNMENT INSTRUCTION NO. 12
Seventh Circuit Committee (2012) 3.09.

Certain summaries and charts were admitted in evidence. [You may use those [summaries; charts] as evidence [even though the underlying [documents; evidence] are not here].] [The accuracy of the [summaries; charts] has been challenged. [The underlying documents have also been admitted so that you may determine whether the summaries are accurate.] It is up to you to decide how much weight to give to the summaries.

GOVERNMENT INSTRUCTION NO. 13
Seventh Circuit Committee (2012) 3.16.

Certain [summaries; charts; etc.] were shown to you to help explain other evidence that was admitted, [specifically, identify the demonstrative exhibit, if appropriate]. These [summaries; charts] are not themselves evidence or proof of any facts, [so you will not have these particular [summaries; charts] during your deliberations]. [If they do not correctly reflect the facts shown by the evidence, you should disregard the [summaries; charts] and determine the facts from the underlying evidence.]

GOVERNMENT INSTRUCTION NO. 14
Seventh Circuit Committee (2012) 3.17.

If you have taken notes during the trial, you may use them during deliberations to help you remember what happened during the trial. You should use your notes only as aids to your memory. The notes are not evidence. 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.

GOVERNMENT INSTRUCTION NO. 15
Seventh Circuit Committee (2012) 3.18.

Counts One, Two, Three, Five, and Six of the indictment charge the defendant with bank fraud. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. There was a scheme to defraud a bank or to obtain moneys, funds, credits, assets, securities, or other property owned by, or in the custody or control of, a bank by means of false or fraudulent pretenses, representations or promises as charged in the indictment; and

2. The defendant knowingly executed the scheme; and

3. The defendant acted with the intent to defraud; and

4. The scheme involved a materially false or fraudulent pretense, representation, or promise; and

5. At the time of the charged offense, the deposits of the bank were insured by the Federal Deposit Insurance Corporation.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt as to the charge 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 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.

GOVERNMENT INSTRUCTION NO. 16
Seventh Circuit Committee (2012) 18 U.S.C. § 1344 (Financial institution fraud – elements)

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 property or to cause the potential loss of money or property by the bank.

GOVERNMENT INSTRUCTION NO. 17
Seventh Circuit Committee (2012) 18 U.S.C. § 1344 (Scheme - definition)

A person acts knowingly if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that she had a strong suspicion that the check was altered or forged and that he deliberately avoided the truth. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth, or if he failed to make an effort to discover the truth.

GOVERNMENT INSTRUCTION NO. 18
Seventh Circuit Committee (2012) 4.10

Any person who knowingly aids, counsels, commands, induces, or procures the commission of an offense may be found guilty of that offense if he knowingly participated in the criminal activity and tried to make it succeed.

OR

If a defendant knowingly causes the acts of another, then the defendant is responsible for those acts as though he personally committed them.

GOVERNMENT INSTRUCTION NO. 19
Seventh Circuit Committee (2012) 5.06 (Aiding and abetting/acting through another)

A statement is false or fictitious if it was untrue when made.

GOVERNMENT INSTRUCTION NO. 20
Seventh Circuit Committee (2012) 18 U.S.C. § 1001 (Definition of false, fictitious)

A statement or representation is fraudulent if it is made or caused to be made with intent to deceive.

GOVERNMENT INSTRUCTION NO. 21
Seventh Circuit Committee (2012) 18 U.S.C. § 1001 (Definition of fraudulent)

Count Four of the indictment charge the defendant with money laundering. In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. The defendant engaged or attempted to engage in a monetary transaction; and

2. That defendant knew the transaction involved criminally derived property; and

3. The property had a value greater than $10,000; and

4. The property was derived from bank fraud; and

4. The transaction occurred in the United States.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt as to Count Four, then you should find the defendant guilty of Count Four.

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 Count Four, then you should find the defendant not guilty of Count Four.

GOVERNMENT INSTRUCTION NO. 22
Seventh Circuit Committee (2012) 18 U.S.C. § 1957 (Unlawful monetary transactions in criminally derived property – elements)

The term "monetary transaction" means the deposit, withdrawal, transfer or exchange, in or affecting interstate commerce, of funds or a monetary instrument, by, through, or to a financial institution.

The alleged monetary transaction need not involve "all" criminally derived property, only over $10,000 in criminally derived property.

"Interstate commerce" means trade, transactions, transportation or communication between any point in a state and any place outside that state or between two points within a state through a place outside the state.

The term "financial institution" includes commercial banks.

The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense.

GOVERNMENT INSTRUCTION NO. 23
Seventh Circuit Committee (2012) 18 U.S.C. § 1957 (Definitions)

Count Seven of the indictment charges the defendant with knowing making and possessing an altered security of an organization.

In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

1. That defendant made, passed or attempted to pass, or possessed a counterfeit or forged security;

2. That the counterfeit or forged security was of an organization; and

3. That defendant possessed the counterfeit or forged security with intent to deceive another person or organization.

The term "counterfeit" means a document that has been falsely made or manufactured so as to appear to be a genuine security. To be counterfeit, the fraudulent security does not have appear to be a genuine security of an organization that in fact exists, but rather, it must look so much like a genuine security that it is calculated to deceive an honest, unsuspecting person who uses ordinary observation and care.

The term "forged" means a document that purports to be genuine but has been fraudulently altered, completed, signed, or endorsed.

An "organization" is a nongovernmental legal entity. It includes, but is not limited to, a corporation, company, association, firm, partnership, joint-stock company, foundation, institution, society, union, or any other association of persons that operates in or the activities of which affect interstate or foreign commerce.

The term "security" includes checks.

If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt as to Count Seven, then you should find the defendant guilty of Count Seven.

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

GOVERNMENT INSTRUCTION NO. 24
United States v. Chapman, 692 F.3d 822 (7th Cir.2012)
18 U.S.C. § 513(c)(4)

A person possesses an object if he has the ability and intention to exercise direction or control over the object, either directly or through others. [A person may possess an object even if he is not in physical contact with it [and even if he does not own it].]

GOVERNMENT INSTRUCTION NO. 25
Seventh Circuit Committee (2012) 4.13.

The indictment charges that offenses happened "on or about" certain dates. The government must prove that each offense happened reasonably close to those dates. The government is not required to prove that the alleged offenses happened on those exact dates.

GOVERNMENT INSTRUCTION NO. 26
Seventh Circuit Committee (2012) 4.05.

The defendant has been accused of more than one crime. The number of charges is not evidence of guilt and should not influence your decision.

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

GOVERNMENT INSTRUCTION NO. 27
Seventh Circuit Committee (2012) 4.06.

In deciding your verdict, you should not consider the possible punishment for the defendant. If you decide that the government has proved the defendant guilty beyond a reasonable doubt, then it will be my job to decide on the appropriate punishment.

GOVERNMENT INSTRUCTION NO. 28
Seventh Circuit Committee (2012) 4.08.

You should not speculate why any other person whose name you may have heard during the trial is not currently on trial before you.

GOVERNMENT INSTRUCTION NO. 29
United States v. Longstreet, 05 CR 471 (Kennelly, J.).
United States v. Young, 20 F.3d 758, 765 (7th Cir. 1994).
United States v. Kuykendoll, 99 CR 928 & *United States v. Davis*, 99 CR 928 (Kennelly, J.)
United States v. Gajo, 98 CR 100 (Gottschall, J.)
United States v. Iwese, 99 CR 80 (Zagel, J.) (district court opinion not published in westlaw).
United States v. Richardson, 94 CR 187 (Holderman, J.) (district court opinion not published in Westlaw).

Once you are all in the jury room, the first thing you should do is choose a foreperson. The foreperson should see to it that your discussions are carried on in an organized way and that everyone has a fair chance to be heard. You may discuss the case only when all jurors are present.

Once you start deliberating, do not communicate about the case or your deliberations with anyone except other members of your jury. You may not communicate with others about the case or your deliberations by any means. This includes oral or written communication, as well as any electronic method of communication, such as telephone, cell phone, smart phone, iPhone, Blackberry, computer, text messaging, instant messaging, the Internet, chat rooms, blogs, websites, or services like Facebook, MySpace, LinkedIn, YouTube, Twitter, or any other method of communication.

If you need to communicate with me while you are deliberating, send a note through the court security officer. The note should be signed by the foreperson, or by one or more members of the jury. To have a complete record of this trial, it is important that you do not communicate with me except by a written note. I may have to talk to the lawyers about your message, so it may take me some time to get back to you. You may continue your deliberations while you wait for my answer.

Please be advised that transcripts of trial testimony are not available to you. You must rely on your collective memory of the testimony.

If you send me a message, do not include the breakdown of any votes you may

have conducted. In other words, do not tell me that you are split 6–6, or 8–4, or whatever your vote happens to be.

GOVERNMENT INSTRUCTION NO. 30
Seventh Circuit Committee (2012) 7.01

A verdict form has been prepared for you. You will take this form with you to the jury room.

[Read the verdict form.]

When you have reached unanimous agreement, your foreperson will fill in, date, and sign the verdict form. Each of you will sign it. Advise the court security officer once you have reached a verdict. When you come back to the courtroom, I will read the verdicts aloud.

GOVERNMENT INSTRUCTION NO. 31
Seventh Circuit Committee (2012) 7.02

The verdict must represent the considered judgment of each juror. Your verdict, whether it is guilty or not guilty, must be unanimous. You should make every reasonable effort to reach a verdict. In doing so, you should consult with each other, express your own views, and listen to your fellow jurors' opinions. Discuss your differences with an open mind. Do not hesitate to re- examine your own view and change your opinion if you come to believe it is wrong. But you should not surrender your honest beliefs about the weight or effect of evidence just because of the opinions of your fellow jurors or just so that there can be a unanimous verdict.

The twelve of you should give fair and equal consideration to all the evidence. You should deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror.

You are impartial judges of the facts. Your sole interest is to determine whether the government has proved its case beyond a reasonable doubt.

GOVERNMENT INSTRUCTION NO. 32
Seventh Circuit Committee (2012) 7.03

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	12 CR 190
v.	)	
	)	Judge Rebecca R. Pallmeyer
ABIDEMI AJAYI	)	
	)	

COUNT ONE

With respect to Count One of the indictment, in which ABIDEMI AJAYI is charged with bank fraud;

we, the jury, find the defendant, ABIDEMI AJAYI:

GUILTY ☐	NOT GUILTY ☐

COUNT TWO

With respect to Count Two of the indictment, in which ABIDEMI AJAYI is charged with bank fraud;

we, the jury, find the defendant, ABIDEMI AJAYI:

GUILTY ☐	NOT GUILTY ☐

COUNT THREE

With respect to Count Three of the indictment, in which ABIDEMI AJAYI is charged with bank fraud;

we, the jury, find the defendant, ABIDEMI AJAYI:

GUILTY ☐	NOT GUILTY ☐

COUNT FOUR

With respect to Count Four of the indictment, in which ABIDEMI AJAYI is charged with money laundering.

we, the jury, find the defendant, ABIDEMI AJAYI:

GUILTY ☐	NOT GUILTY ☐

COUNT FIVE

With respect to Count Five of the indictment, in which ABIDEMI AJAYI is charged with bank fraud;

we, the jury, find the defendant, ABIDEMI AJAYI:

GUILTY ☐	NOT GUILTY ☐

COUNT SIX

With respect to Count Six of the indictment, in which ABIDEMI AJAYI is charged with bank fraud;

we, the jury, find the defendant, ABIDEMI AJAYI:

GUILTY ☐	NOT GUILTY ☐

COUNT SEVEN

With respect to Count Seven of the indictment, in which ABIDEMI AJAYI is charged with possession or use of an altered security.

we, the jury, find the defendant, ABIDEMI AJAYI:

GUILTY ☐	NOT GUILTY ☐

_____

FOREPERSON

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2015, I electronically filed the foregoing Brief and Appendix of the United States with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted.

ZACHARY T. FARDON
United States Attorney

By: /s/ *Yasmin N. Best*
YASMIN N. BEST
Assistant United States Attorney
219 South Dearborn Street, 5th Floor
Chicago, Illinois 60604
(312) 469-6024