No. 12-___

IN THE

Supreme Court of the United States

KEVIN LOUGHRIN,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As the Tenth Circuit acknowledged in its decision below, the circuits are openly divided over the elements required to convict a defendant of federal bank fraud. The question presented is:

Whether the Government must prove that the defendant intended to defraud a bank and expose it to risk of loss in every prosecution under 18 U.S.C. § 1344.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Loughrin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a) is published at 710 F.3d 1111.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2013. Pet. App. 1a. The court of appeals denied a timely petition for rehearing on June 14, 2013. Pet. App. 50a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to this brief reproduces the relevant portions of 18 U.S.C. §§ 1341, 1343, 1344, and 1346.

STATEMENT OF THE CASE

This case presents a recurring question upon which the courts of appeals are in open, acknowledged conflict: whether intent to defraud a bank and expose it to risk of loss is a required element in every prosecution under the federal bank fraud statute. While acknowledging that it took the minority view in the conflict, the Tenth Circuit affirmed the trial court's refusal to instruct the jury that intent to defraud a bank was required. In addition, the court upheld petitioner's bank fraud conviction even though the Government did not oppose petitioner's argument on appeal that there

was no evidence to support a finding that he intended to defraud a bank and the district court conclusively found that there was no evidence that any bank had been put at risk of loss.

1. Petitioner Kevin Loughrin admitted to local police that he engaged in a scheme to steal merchandise and cash from a local Target store. As part of his scheme, petitioner and an accomplice stole checks from the outgoing mail in people's mailboxes, altered them, and used the altered checks to purchase food and merchandise at Target. After stealing the checks, petitioner would erase or cross out the payee and write in "Target"; frequently, the original payee was still clearly visible. He similarly altered the payment amount. R. at 118-19.[1] On one occasion, petitioner presented two different checks, signed by two different people (one male and one female) to the same cashier who accepted both without question. R. at 209-11. After purchasing the merchandise, petitioner or his accomplice would immediately return it for cash, often without even leaving the store. R. at 119-20.[2]

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[1] "R." refers to Volume IV of the Record on Appeal, electronically filed on September 6, 2011 (Document No. 01018706266).

[2] The scheme went beyond altered checks. For example, petitioner looked for discarded receipts in the Target parking lot, then took the items listed on the receipts from store shelves and "returned" them for cash without ever making a purchase. 214 R. at 245. Petitioner also attempted to shoplift a Target display item by snipping the cord that attached it to the shelf. R. at 232.

After identifying petitioner and his accomplice as using altered checks in the store, Target began watching for their return. Eventually, a Target Loss Prevention Agent spotted petitioner and his accomplice and called the local police. Officers watched the pair unsuccessfully attempt to use an altered check. When confronted, petitioner admitted to the scheme. R. at 240-45.

In all, petitioner was charged with using six altered checks totaling $1,184.58. Indictment at 2. The trial court later found (and the Government did not contest on appeal) that there was never any risk that a bank, as opposed to Target, would end up suffering any financial loss as a result of the scheme. Pet. App. 37a. Target had chosen, as a matter of policy, not to train cashiers to detect or reject fraudulent checks. R. at 214. Instead, Target Loss Prevention Agents reviewed all checks later to identify and investigate any fraudulent activity. R. at 140. Under this system, most of the altered checks were identified by Target's fraud department and never submitted to a bank. R. at 140, 170, 207-09, 229-31. Moreover, a Government witness – a loss prevention specialist from one of the banks – testified that even if the bank had honored a check, the ultimate liability for the fraudulent check would have fallen on Target, not the bank. R. at 165.

2. Petitioner was indicted by the United States and, as relevant here, was charged with six counts of violating 18 U.S.C. § 1344. The statute provides:

> **Bank fraud**
>
> Whoever knowingly executes, or attempts to execute, a scheme or artifice –

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.

18 U.S.C. § 1344.[3]

At the close of the Government's case, petitioner moved for a Rule 29 judgment of acquittal based on insufficiency of the evidence. Pet. App. 35a. The court granted the motion in part. *Id*. The court explained that under Tenth Circuit precedent, the federal bank fraud provision creates two different crimes with different elements. The first subsection of Section 1344 – which criminalizes attempts to "defraud a financial institution" – requires proof of an intent to defraud the bank, and therefore, proof that the scheme put the bank at risk of loss. Pet. App. 36a (citing *United States v. Sapp*, 53 F.3d 1100 (10th Cir. 1995)). Finding that "[t]here's simply nothing to show risk of loss or putting a bank, a financial institution, at risk" in this case, Pet. App. 37a, the court held that there was insufficient evidence for conviction under Section 1344(1), Pet. App. 35a-38a. However, the court permitted the Government to proceed under subsection (2), which, the court concluded, establishes a separate offense that

[3] Petitioner was also charged with two counts of aggravated identity theft under 18 U.S.C. § 1028A, and one count of possession of stolen mail under 18 U.S.C. § 1708.

dispenses with the risk of loss element. Pet. App. 36a.

At the close of evidence, petitioner requested a jury instruction requiring the Government prove he acted with "intent to defraud a *financial institution*," Pet. App. 43a (emphasis added), and to cause some "financial loss *to a financial institution,*" Pet. App. 45a (emphasis added). The judge refused. Pet. App. 43a, 45a-46a. Pointing to Tenth Circuit precedent and the Circuit's pattern instructions, the court held that while subsection (1) required intent to defraud a bank, "there is no intent to defraud the institution" required under subsection (2). Pet. App. 43a-46a. Therefore it would be sufficient if the prosecution proved that petitioner was "deceiving some others," even if he never intended to defraud a bank. Pet. App. 46a. Accordingly, the jury was instructed simply that petitioner must have "acted with intent to defraud." Jury Instructions No. 17.

In the Government's closing, the prosecutor elected not to contest petitioner's evidence that he never intended to defraud the bank. Instead, the prosecutor emphasized that such intent was not required under the jury instruction given:

> You might recall that he said he was hoping to take money from Target. He wanted to defraud Target, not a bank. That doesn't matter. That's also not in your instructions. The instructions say that he had to have the intent to defraud. He had to have a fraudulent intent. He did not have to intend to defraud the bank. He did not have to have a scheme to defraud the bank.

R. at 317.

The jury found petitioner guilty on all counts. Pet. App. 23a. After the verdict, petitioner renewed his motion for judgment of acquittal, R. at 169, which the court summarily denied, R. at 180.

3. On appeal petitioner challenged the trial court's denial of his proposed jury instructions on intent and his Rule 29 motions. Pet. App. 3a. The Tenth Circuit affirmed. *Id.* 2a.

The court of appeals did not question that petitioner intended only to defraud Target. Pet. App. 6a. Likewise, neither the court of appeals, nor the Government, contested the trial court's finding that there was insufficient evidence to show that petitioner intended to expose a bank to any risk of loss. Pet. App. 3a-7a. But the court ultimately held, in acknowledged conflict with other circuits, that neither was required to secure a conviction under Section 1344.

The court agreed that to convict a defendant under Section 1344(1), the government must prove intent to defraud a financial institution, and that this requires showing that a financial institution was put at risk of loss by the scheme. Pet. App. 4a. But the court reaffirmed its prior holding that Section 1344's two subsections establish "separate offenses." Pet. App. 4a (quoting *United States v. Swanson*, 360 F.3d 1155, 1162 (10th Cir. 2004)). And "a conviction under § 1344(2) requires no proof that a bank was 'at risk' because there is no explicit requirement that a particular bank be defrauded." Pet. App. 5a (quoting *Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995)). Instead "only an intent to defraud *someone* is required." Pet.

App. 6a (citing *United States v. Rackley*, 986 F.2d 1357, 1360-61 (10th Cir. 1993)). Accordingly, the court held that the jury instructions were correct as given and that there was sufficient evidence to support petitioner's conviction. Pet. App. 6a.

The court acknowledged that although its interpretation was consistent with the law of the Sixth Circuit, it was in conflict with decisions from the First, Second, and Third Circuits. Pet. App. 6a-7a n.1. The court further recognized that by dispensing with the requirement that a defendant intend to defraud a bank, its interpretation of Section 1344 "cast a wide net," *id*. 7a, that "creates bank fraud liability for any fraudulent scheme as long as a bank's assets are somehow involved," *id.* 6a. But the panel believed that its holding was required by circuit precedent absent *en banc* reconsideration or a contrary decision of this Court. Pet. App. 6a-7a.

The full court subsequently denied a petition for rehearing en banc. Pet. App. 50a.

REASONS FOR GRANTING THE WRIT

"Although § 1344 has produced much litigation in the Circuits and many separate opinions by learned appellate judges, federal courts do not agree on the mental state necessary to support a conviction under § 1344 . . . ." *United States v. Nkansah*, 699 F.3d 743, 762 (2d Cir. 2012) (Lynch, J., concurring). Given the seriousness of the offense and the frequency with which it is prosecuted, that division should not endure. This case presents an ideal vehicle for the Court to finally resolve it.

I. The Courts Of Appeals Are Openly And Intractably Divided Over Section 1344's Intent Requirement.

The conflict over the nature of the intent requirement under Section 1344 is longstanding and widely acknowledged. *See, e.g.*, *United States v. Thomas*, 315 F.3d 190, 196 (3d Cir. 2002) ("The Courts of Appeals are not of one mind as to the proper reading of the statute, including . . . the intent requirement . . . ."); *United States v. Everett*, 270 F.3d 986, 990 (6th Cir. 2001) ("The Circuits are not in accord as to the intent required to violate § 1344."); *United States v. Kenrick*, 221 F.3d 19, 27 (1st Cir. 2000) (en banc) ("There is also no consensus among the circuits on the issue."), *cert. denied*, 531 U.S. 961 (2000); *United States v. Staples*, 435 F.3d 860, 866-67 (8th Cir. 2006) (detailing the circuit conflict).

Specifically, although the circuits widely agree that under the first subsection of Section 1344, the Government must prove the defendant intended to defraud a bank and expose it to a risk of loss, they are openly divided over whether the Government can

avoid that burden by charging the defendant under Section 1344(2).

A. The Circuits Are Divided Six-To-Three.

1. Six circuits have held that Section 1344's intent element imposes upon the Government two related requirements. First, these courts hold that the Government must prove that the defendant intended to defraud a covered financial institution; it is not enough that the defendant intended to defraud a non-bank victim even if a bank was involved in the scheme in some way. Second, these circuits hold that to prove intent to defraud a bank, the Government must show that the defendant's scheme exposed the bank to a risk of loss; it is insufficient that a defendant lied in some way to a bank if he did not intend to expose the bank (as opposed to some other victim) to a risk of financial harm. Moreover, in conflict with the decision below, these courts hold that both of these elements are required whether the Government charges the defendant under subsection (1) or (2).

- **First Circuit**: *United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000) (en banc) (Government must prove, "under either subsection[,] an intent to deceive a bank in order to obtain from it money or other property"), *cert. denied*, 531 U.S. 961 (2000); *United States v. Ayewoh*, 627 F.3d 914, 921-22 (1st Cir. 2010) (Government must show "defendant knowingly . . . exposed a . . . bank to a risk of loss") (internal citations omitted, emphasis omitted), *cert. denied*, 132 S. Ct. 141 (2011);

- **Second Circuit:** *United States v. Nkansah*, 699 F.3d 743, 748 (2d Cir. 2013) ("Appellant is correct that the bank fraud statute is not an open-ended, catch-all statute encompassing every fraud involving a transaction with a financial institution. Rather, it is a specific intent crime requiring proof of an intent to victimize a bank by fraud."); *United States v. Rodriguez*, 140 F.3d 163, 167 n.2 (2d Cir. 1998) ("Regardless of whether a defendant is charged under 18 U.S.C. § 1344(1) or (2) . . . the government must show that the defendant engaged in a pattern of deceptive conduct designed to deceive a federally chartered or insured financial institution."); *United State v. Blackmon*, 839 F.2d 900, 906 (2d Cir. 1988) ("Where the victim is not a bank and the fraud does not threaten the financial integrity of a federally controlled or insured bank, there seems no basis in the legislative history for finding coverage under section 1344(a)(2).");
- **Third Circuit:** *United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002) ("[T]he *sine qua non* of a bank fraud violation, no matter what subdivision of the statute it is pled under, is the intent to defraud the bank."); *id*. at 200 (however charged, Government must prove that "harm or loss to the bank [was] contemplated by the wrongdoer to make out a crime of bank fraud."); *id.* at 196 (noting that a contrary interpretation would give the statute "a breadth of scope that extends well beyond what Congress intended the statute to

regulate" because it would have "only the most tenuous nexus between the scheme or artifice and the institution of banking"); *see also* United States Court of Appeals, Third Circuit, *Model Criminal Jury Instructions* § 6.18.1344 (Dec. 2012) (requiring Government to prove in every Section 1344 prosecution that that the defendant acted "with the intent to defraud (name of *financial institution*)") (emphasis added);

- **Fifth Circuit:** *United States v. Morganfield*, 501 F.3d 453, 465 (5th Cir. 2007) (in Section 1344(2) case, holding that when the defendant targets third parties, prosecution must present facts "evincing an intent to victimize the financial institution to sustain a bank fraud charge under § 1344") (citation omitted), *cert. denied*, 553 U.S. 1067 (2008); *United States v. Sprick*, 233 F.3d 845, 852 (5th Cir. 2000) (Under Section 1344(2), Government "must show not only that the money or assets in the custody or control of a financial institution were obtained by means of fraud but also that doing so placed the financial institution at risk of civil liability"); *see also* Committee on Pattern Jury Instructions, Fifth Circuit, *Pattern Jury Instructions (Criminal Cases)* § 2.61 (2012) (instruction for 18 U.S.C. § 1344(2)) (requiring jury to find that "the defendant acted with a specific intent to defraud (name *bank*)" and "[t]hat the defendant placed the financial institution at risk of civil liability or financial loss") (emphasis added);

- **Seventh Circuit:** *Bressner v. Ambroziak*, 379 F.3d 478, 482 (2004) ("An essential element of bank fraud is 'intent to deceive *a bank* in order to obtain from it money or other property.'") (quoting *United States v. Lane*, 323 F.3d 568, 583 (7th Cir. 2003) (citing *Kenrick*, 221 F.3d at 545)) (emphasis in original); *United States v. Davis*, 989 F.2d 244, 247 (7th Cir. 1993) (reversing bank fraud conviction for IRS tax refund scheme because although the defendant "may well have committed fraud against the Internal Revenue Service," he did not scheme to defraud the bank because there was "no way in which the fraud could have endangered the" bank); *id.* at 247 ("[T]he purpose of [§ 1344] is . . . the federal government's interest as an insurer of financial institutions.").

Courts relying on this rule have overturned convictions when, as in this case, a defendant intended to defraud a third party (not a bank), in a way that involved a financial institution but did not expose it to a risk of loss. In *United States v. Rodriguez*, 140 F.3d 163, 167 n.2 (2d Cir. 1998), for example, the Second Circuit vacated the bank fraud conviction of a defendant who had engaged in a scheme to defraud a publishing company by obtaining checks for services she never performed. The defendant's friend, a senior accounts clerk at the company, submitted phony invoices for the defendant. When the company paid the invoices, the defendant deposited the checks at an FDIC-insured bank. In vacating the conviction, the Second Circuit

held that it was not enough that the defendant may have intended to defraud the publishing company through a scheme that involved checks or deposits to a bank. 140 F.3d at 166-67. The court reasoned that the purpose of the statute is to "protect[] the federal government's interest" in the "financial integrity" of federally insured or federally related financial institutions. *Id.* When the target of the scheme is not a bank, and where the scheme does not expose any bank to a risk of loss, the purpose of the statute is not implicated. *Id.*

Likewise, in *United States v. Odiodio*, 244 F.3d 398 (5th Cir. 2001), the Fifth Circuit reversed the conviction of a defendant who, like petitioner, altered checks stolen from the mail and presented them to a securities brokerage (which is not considered a "financial institution" within the meaning of the bank fraud statute) to convert them into cash. The Fifth Circuit held that the scheme did not amount to federal bank fraud even if the brokerage eventually deposited the checks into a covered bank. The court reasoned that "as the entity that initially received the altered instrument," the brokerage "bore the full risk of loss in this case." *Id*. at 402.

The Eighth Circuit reached the same conclusion in *United States v. Staples*, 435 F.3d 860 (8th Cir. 2006), *cert. denied*, 549 U.S. 862 (2006). There, the defendants altered the amount on cashier's checks before passing them to title insurance companies in connection with real estate transactions. The title insurance companies would deposit the altered checks and then issue their own legitimate checks to the property sellers, who were in on the scheme. By the time the title insurance company discovered that

the checks were altered and thus not collectible, the defendants had already cashed the company's checks. 435 F.3d at 862-63. Although, as in this case, the defendants used altered checks as part of a scheme to defraud, the Eighth Circuit nonetheless reversed. Disagreeing with the interpretation of Section 1344(2) adopted by the Tenth Circuit, the Eighth Circuit held that "the evidence [was] insufficient, because there was no loss, or attempt to cause a loss, to a financial institution." *Staples*, 435 F.3d at 867.

2. The Sixth, Ninth, and Tenth Circuits disagree. Those courts have held that Section 1344(2) establishes an independent crime that dispenses with any requirement to prove intent to defraud a bank or expose it to a risk of loss. Instead, Section 1344(2) requires only intent to defraud *someone* and some nexus between the fraudulent scheme and a financial institution.

In this case, for example, the Tenth Circuit held that although Section 1344(1) requires an intent to defraud a bank, and that this requires proof of risk of loss to the bank, Section 1344(2) establishes an independent crime that does not require intent to defraud a bank and, therefore, no risk of harm either. *See* Pet. App 5a-6a ("[U]nder our precedent, an individual can violate § 1344(2) by obtaining money from a bank while intending to defraud *someone else*.") (emphasis added); *id.* 5a ("[A] conviction under § 1344(2) requires no proof that a bank was 'at risk' because there is no explicit requirement that a particular bank be defrauded."); *id.* 6a ("Proving risk of loss to a bank is sensible when the target of the fraud must be a bank; yet when no risk of loss is required, it would be incongruous to still require that

the target be a bank."). According to the Tenth Circuit, the language of Section 1344(1) focuses "on the conduct as it affects the financial institution," while Section 1344(2) "emphasizes the conduct of the defendant." Pet. App. 5a.

In so holding, the Tenth Circuit embraced the reasoning of the Sixth Circuit, which likewise views subsection (2) as establishing a separate crime requiring neither intent to defraud a bank nor risk of loss to the bank. *See United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001) ("[T]he defendant need not have put the bank at risk of loss in the usual sense or intended to do so."), *cert. denied*, 537 U.S. 828 (2002). *Everett*, like the Second Circuit's contrary decision in *Rodriguez*, involved a bookkeeper who caused valid checks to be issued without the account holder's permission. In *Everett*, the defendant was an accountant who signed checks to herself from her client without authorization. Acknowledging that the evidence indicated the defendant intended only to defraud her client but not to put the bank at any risk, the court held that "minimal involvement of the bank . . . is all that is required, if the specific intent to defraud someone is present." *Id.* at 991. Thus, in the Sixth Circuit, "the bank fraud statute is violated, even if the intended victim of the fraudulent activity is an entity other than a federally insured financial institution, when the fraudulent activity causes the bank to transfer funds." *United States v. Reaume*, 338 F.3d 577, 581 (6th Cir. 2003), *cert. denied*, 540 U.S. 1166 (2004).

The Ninth Circuit has likewise concluded that "[a]ll the statute facially seems to require in a case involving property in the custody or control of a bank,

is that there be an attempt to obtain such property from the bank by deceptive means." *United States v. McNeil*, 320 F.3d 1034, 1037 (9th Cir. 2003), *cert. denied*, 540 U.S. 842 (2003). Thus, the Ninth Circuit has rejected the claim that Congress "intend[ed] to limit the reach of § 1344(2) to cases in which a bank is put at risk of loss." *Id.* at 1038; *see also United States v. Rizk*, 660 F.3d 1125, 1135 (9th Cir. 2011) ("This circuit 'has never adopted a risk of loss analysis in bank fraud cases.'") (quoting *United States v. Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995)).

3. The differing legal standards regularly lead to opposite results in factually similar cases.

As noted above, the Second and Sixth Circuits have reached opposite outcomes in cases involving employees defrauding their employers by causing valid checks to be issued to themselves or their friends.

The Seventh and Ninth Circuits have also reached opposite outcomes in cases involving schemes to fraudulently obtain IRS tax refunds that were deposited into bank accounts opened using false information. The Seventh Circuit in *Davis* reversed the conviction, reasoning that the bank was not at risk of loss or civil liability because the IRS refund checks were valid and, therefore, held by the bank as a holder in due course. 989 F.2d at 246. While Judge Posner acknowledged that the defendant may have committed tax fraud, he wrote, "only in the most literal, hypertechnical sense could he be said to have schemed to defraud the *bank*." *Id.* Conversely, in *McNeil*, the Ninth Circuit expressly "disagree[ed] with the contrary conclusion reached by the Seventh

Circuit" in *Davis*. *McNeil*, 320 F.3d at 1037. As in *Davis*, the defendant in *McNeil* fraudulently obtained an IRS tax refund and deposited it into an account opened under another person's name. The court recognized that the two cases were "factually similar," *id.*, but affirmed the conviction because it found that Congress did not intend to limit the statute to "cases in which a bank is put at risk of loss," *id.* at 1038.

There likewise can be no question that petitioner's case would have come out differently if it had been prosecuted in one of the circuits adopting the majority position on Section 1344's intent requirement. In similar circumstances, the Fifth and Eighth Circuits have overturned convictions of defendant who, although using altered checks, passed the checks to non-bank third parties in schemes intended only to defraud the direct victim and in which the Government failed to prove any risk of loss to a financial institution. *See Odiodio*, 244 F.3d at 402; *Staples*, 435 F.3d at 867.

B. The Conflict Between The Courts Of Appeals Is Entrenched, Persistent, And Unlikely To Benefit From Further Percolation.

The circuit conflict will not be resolved without this Court's intervention, and further delay will serve no purpose.

Even though aware of other circuits' contrary decisions, the courts of appeals have persisted in their conflicting interpretations. *See United States v. Warshak*, 631 F.3d 266, 313 (6th Cir. 2010) (acknowledging contrary law of other circuits, but

concluding that "the state of the law is different in this circuit"); *Thomas*, 315 F.3d at 198-99 n.2 (expressly rejecting the Sixth Circuit's construction of Section 1344 for its "broad sweep"); *see also McNeil*, 320 F.3d at 1037; Pet. App. 6a.

Nor is there any movement toward a consensus position – to the contrary, the split has only widened as new courts have weighed in on the question. *See, e.g.*, *United States v. Laljie*, 184 F.3d 180, 189 (2d Cir. 1999) (intent to defraud a bank required); *Kenrick,* 221 F.3d at 29 (1st Cir. 2000) (same); *Everett*, 270 F.3d at 991 (6th Cir. 2001) (intent to defraud a bank not required); *Thomas*, 315 F.3d at 200 (3d Cir. 2002) (required); *McNeil*, 320 F.3d at 1039 (9th Cir. 2002) (not required).

Nor would further percolation benefit this Court. The question has been thoroughly ventilated in reasoned opinions by nine of the thirteen courts of appeals. There is little basis to expect that further decisions will meaningfully contribute to the debate.

II. The Question Presented Arises Frequently And Determines The Outcome Of Many Federal Criminal Prosecutions.

1. Certiorari is further warranted because the intent required under the bank fraud statute is a question of recurring importance to the proper disposition of a frequently prosecuted federal crime.

Bank fraud under Section 1344 is one of the most frequently prosecuted federal property crimes. Between 2006 and 2010, the Government filed nearly

3,000 cases of criminal bank fraud in the district courts – far more than either mail or wire fraud.[4] These prosecutions gave rise to more than 125 appeals in 2010 alone.[5]

It is thus unsurprising that Section 1344's intent requirement has been the subject of frequent litigation in the courts of appeals. *See, e.g., United States v. Ayewoh*, 627 F.3d 914, 921-22 (1st Cir. 2010), *cert. denied*, 132 S.Ct. 141 (2011); *United States v. Edelkind*, 467 F.3d 791, 797-98 (1st Cir. 2007), *cert. denied*, 549 U.S. 1326 (2007); *United States v. Kenrick*, 221 F.3d 19, 26-29 (1st Cir. 2000) (en banc), *cert. denied*, 531 U.S. 961 (2000); *United States v. Nkansah*, 699 F.3d 743, 747-51 (2d Cir. 2012); *United States v. Laljie*, 184 F.3d 180, 189-91 (2d Cir. 1999); *United States v. Morgenstern*, 933 F.2d 1108, 1113-14 (2d Cir. 1991), *cert. denied*, 502 U.S. 1101 (1992); *United States v. Blackmon*, 839 F.2d 900, 904-07 (2d Cir. 1988); *United States v. Thomas*, 315 F. 3d 190, 195-99 (3d Cir. 2002); *United States v. Brandon*, 298 F.3d 307, 310-12 (4th Cir. 2002); *United States v. Celesia*, 945 F.2d 756, 758-60 (4th Cir. 1991); *United States v. Orr*, 932 F.2d 330, 332 (4th Cir. 1991); *United States v. Morganfield*, 501 F.3d 453, 461-68 (5th Cir. 2007), *cert. denied*, 553 U.S. 1067 (2008); *United States v. McCauley*, 253 F.3d 815, 818-21 (5th Cir. 2001); *United States v. Odiodio*, 244 F.3d 398, 400-02 (5th Cir. 2001); *United*

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[4] James C. Duff, Admin. Office of the U.S. Courts, 2010 Annual Report of the Director: Judicial Business of the United States Courts 222 tbl.D-2 (2011).

[5] *Id*. at 125 tbl.B-7.

States v. Sprick, 233 F.3d 845, 852-53 (5th Cir. 2000); *United States v. Warshak*, 631 F.3d 266, 312-13 (6th Cir. 2010); *United States v. Reaume*, 338 F.3d 577, 580-82 (6th Cir. 2003), *cert. denied*, 540 U.S. 1166 (2004); *United States v. Everett*, 270 F.3d 986, 989-91 (6th Cir. 2001), *cert. denied*, 537 U.S. 828 (2002); *United States v. Stone*, 954 F.2d 1187, 1189-91 (6th Cir. 1992); *United States v. LeDonne*, 21 F.3d 1418, 1425-28 (7th Cir. 1994), *cert. denied*, 513 U.S. 1020 (1994); *United States v. Davis*, 989 F.2d 244, 246-47 (7th Cir. 1993); *United States v. Doherty*, 969 F.2d 425, 427-30 (7th Cir. 1992), *cert. denied*, 506 U.S. 1002 (1992); *United States v. Staples*, 435 F.3d 860, 865-68 (8th Cir. 2006), *cert. denied*, 549 U.S. 862 (2006); *United States v. Ponec*, 163 F.3d 486, 487-89 (8th Cir. 1998); *United States v. McNeil*, 320 F.3d 1034, 1037-40 (9th Cir. 2002), *cert. denied*, 540 U.S. 842 (2003); *United States v. McDonald*, 209 Fed. Appx. 748, 750-52 (10th Cir. 2006); *United States v. Sapp*, 53 F.3d 1100, 1102-03 (10th Cir. 1995), *cert. denied*, 516 U.S. 1082 (1996); *United States v. De La Mata*, 266 F.3d 1275, 1298-99 (11th Cir. 2001), *cert. denied*, 535 U.S. 989 (2002); *United States v. Hubbard*, 889 F.2d 277, 280 (D.C. Cir. 1989).[6]

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[6] The statute's intent requirement has also been the subject of frequent litigation in the trial courts. *See, e.g., United States v. Whaley*, No. 3:10-CR-169, 2012 WL 1193352, at *8-*13 (E.D. Tenn. Mar. 5, 2012); *United States v. Rice*, No. 1:11-CR-15, 2011 WL 3841973, at *1-*3 (E.D. Tenn. Aug. 30, 2011); *United States v. Hergert*, No. 4:09CR3019, 2010 WL 5644670, at *13-*15 (D. Neb. Dec. 30, 2010); *United States v. Rivera*, No. CR 209-014, 2010 WL 114881, at *2-*6 (S.D. Ga. Jan. 12, 2010); *Brewster v. McNeil*, 720 F. Supp. 2d 1369, 1371-75 (S.D. Fla.

Moreover, the frequency of bank fraud charges acquires additional importance because Section 1344 is a predicate offense for a number of other federal crimes, such as aggravated identity theft and racketeering. *See* 18 U.S.C. § 1028A; 18 U.S.C. § 1961(1). In this case, for example, bank fraud was the only predicate act for petitioner's aggravated identity theft conviction. *See* 18 U.S.C. § 1028A(c).

Such an important and consequential criminal statute should have the same meaning throughout the country. Yet, as it stands, many defendants are convicted of a serious federal felony solely because of the happenstance of the circuit in which they were prosecuted.

2. The question presented is also important because it implicates the delicate division of criminal jurisdiction between state and federal governments. As several circuits have noted, a broad construction of Section 1344 threatens to federalize a wide range of criminal conduct traditionally left to the states to regulate and punish. *See, e.g., Thomas*, 315 F.3d at 199 ("The extension proposed here by the Government offends the balance of federal and state jurisdiction and our principles of comity by imposing federal law where the federal interest is remote and attenuated.").

2009); *United States v. Royston*, 184 F. Supp. 2d 517, 519-22 (W.D. Va. 2002); *United States v. Antonelli*, No. 97 CR 194, 1997 WL 672245, at *1-*2 (N.D. Ill. Oct. 27, 1997).

III. This Case Presents The Ideal Vehicle For Resolving The Circuit Split.

This case presents the ideal vehicle for resolving the circuit conflict over Section 1344's intent requirement.

The question presented was squarely addressed by the court of appeals. *See* Pet. App. 3a-7a. Moreover, the court's answer to the question was outcome determinative. On appeal, the Government did not oppose petitioner's argument that there was no evidence to support a finding that petitioner intended to defraud a bank. *See* Petr. C.A. Br. § II.B; U.S. C.A. Br. § II (arguing only that jury was properly instructed that intent to defraud a bank was not required). Moreover, the district court conclusively found that there was no evidence that any bank had been put at risk of loss. *See id.* 19; Pet. App. 35a-38a. The Tenth Circuit upheld petitioner's conviction only because it construed Section 1344(2) to require "only an intent to defraud *someone*," Pet. App. 5a.

Consequently, this case does not present any of the vehicle problems the Solicitor General identified in opposing earlier petitions in bank fraud cases raising similar questions. *See, e.g.*, Brief for the United States in Opposition at 17, *United States v. Leahy*, 445 F.3d 634 (2006) (No. 06-71, 06-79), 2006 WL 3016309 (arguing that the case was a poor vehicle because the bank was the direct target of the fraud*);* Brief for the United States in Opposition at 5, *United States v. Sanders,* 59 Fed. Appx. 765 (6th Cir. 2003) (No. 03-304), 2003 WL 22471180 (same); Brief for the United States in Opposition at 13-14, 15,

United States v. Whitmore, 35 Fed. Appx. 307 (9th Cir. 2002) (No. 02-126), 2002 WL 32134864 (arguing that the case was a poor vehicle because issue was not preserved below and resolution of the question would not be outcome determinative).

IV. The Tenth Circuit Has Wrongly Interpreted The Federal Bank Fraud Statute.

The Tenth Circuit acknowledged that under the first subsection of Section 1344, the Government must prove the defendant intended to defraud a bank and expose it to a risk of loss. Pet. App. 4a. Nevertheless, it relieved the Government of that burden in this case because it believed that the second subsection of the provision establishes an independent crime requiring no intent to defraud a bank. That conclusion is incorrect. The majority of circuits have correctly concluded that intent to defraud a bank and expose it to a risk of loss is necessary in every bank fraud prosecution.

1. As this Court has explained, Congress enacted the bank fraud statute in response to recent decisions from this Court that had shown gaps in laws covering frauds victimizing financial institutions.[7] The provision, thus, was designed to "provide an effective

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[7] Specifically, in *Williams v. United States*, 458 U.S. 279 (1982), the Court held that a defendant could not be prosecuted for check-kiting under 18 U.S.C. §1014 because a check was not a false statement, as required by that statute. *Id.* at 284. Earlier, in *United States v. Maze*, 414 U.S. 395 (1974), the Court held that a scheme to defraud a bank did not constitute mail fraud unless the success of the scheme depended on the use of the mails. *Id.* at 402.

vehicle for the prosecution of frauds in which the *victims are financial institutions* that are federally created, controlled or insured," S. Rep. No. 98-225, at 377 (1983) (emphasis added). That purpose of protecting the financial integrity of banks is reiterated throughout the legislative history.[8]

The statute's text thus reflects that Section 1344 was intended to federalize fraudulent schemes only to the extent they intentionally targeted a bank and put its assets at risk. Beginning with the title, Congress made clear that Section 1344 as a whole is directed at "Bank Fraud," not "obtaining money from a bank while intending to defraud someone else," Pet. App. 5a-6a. The statute then provides that the Government must prove in every Section 1344 prosecution that the defendant "*knowingly* execute[d], or attempt[ed] to execute, a scheme or artifice" to either "defraud *a financial institution*" or to obtain the property "owned by, or under the custody or control of, *a financial institution.*" 18

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[8] *See, e.g.*, *id.* at 378 ("[I]n the proposed offense, jurisdiction is based on the fact that the victim of the offense is a federally controlled or insured institution."); *see also* H.R. Rep. No. 98-901, at 4 (1984) (explaining that the proposed bill "enacts a new section to address schemes to defraud financial institutions"); *Financial Bribery and Fraud Amendments Act of 1984 and Parts E, F, and G of Title XI of S. 1762, Comprehensive Crime Control Act of 1984: Hearing on H.R. 5405 Before the Subcomm. on Criminal Justice of the H. Comm. on the Judiciary*, 98th Cong. 12 (1984) (statement of Victoria Toensing, Deputy Assistant Att'y Gen. of the United States) ("What is needed . . . is a separate Federal statute, similar to the mail and wire fraud statutes, making it an offense to defraud a federally chartered or insured financial institution.").

U.S.C. §§ 1344(1), (2) (2006) (emphasis added). The defendant must, accordingly, know that the object of his scheme is property that is either owned by, or in the custody of, a bank. *See Flores-Figueroa v. United States*, 556 U.S. 646, 650-52 (2009) (holding that the word "knowingly" applies to all subsequent elements of a criminal statute). Requiring proof of intent to defraud a bank ensures that the Government establishes, as required by the text, that the defendant knew that he was scheming to obtain the property of a bank (or property in its custody), rather than simply the property of "someone else." Pet. App. 5a-6a.

The Tenth Circuit's contrary construction gives the statute a breadth far in excess of what is necessary to accomplish Congress's purpose of protecting the financial integrity of federally related financial institutions. Furthermore, the Tenth Circuit's interpretation federalizes broad swaths of traditional state crimes, like the simple fraud and theft alleged here, simply because they have some nexus to a federally related bank. But this Court "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also, e.g.*, *Scheidler v. Nat'l Org. for Women, Inc.*, 547 U.S. 9, 20 (2006) (rejecting an interpretation because "[i]t would federalize much ordinary criminal behavior . . . that typically is the subject of state, not federal, prosecution"). If "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language

of the statute.'" *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (citations omitted). There is no such unambiguous statement in Section 1344(2).

Moreover, the Tenth Circuit's interpretation is inconsistent with this Court's repeated reliance, in construing the scope of federal fraud statutes, on the venerable principle that "when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see also Skilling v. United States*, 130 S. Ct. 2896, 2932-33 (2010) (applying rule of lenity in mail fraud case); *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (same); *Williams v. United States*, 458 U.S. 279, 290 (1982) (applying rule of lenity in alleged bank fraud case under different statute).

2. The Tenth Circuit nonetheless believed that its interpretation was necessary to ensure that subsections (1) and (2) would be given separate meaning as independent offenses. Pet. App. 4a; *see also United States v. Bonnett*, 877 F.2d 1450, 1453 (10th Cir. 1989). But that reasoning fails to account for the history of Section 1344's divided structure and this Court's decisions construing the nearly identically worded mail and wire fraud statutes upon which Section 1344 was based.

a. The language and structure of Section 1344 was borrowed nearly verbatim the pre-existing mail and wire fraud statutes. *See Neder v. United States*, 527 U.S. 1, 20-21 (1999). At the time, the mail fraud statute provided, in relevant part:

> **Frauds and swindles**
>
> Whoever, having devised or intending to devise any scheme or artifice [1] to defraud, or [2] for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . .

18 U.S.C. § 1341 (1982). The wire fraud statute had identical language. *See* 18 U.S.C. § 1343 (1982). In enacting Section 1344, Congress used the same disjunctive language, but made clear that the object of the scheme must be a bank or property in its custody:

> **Bank fraud**
>
> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice–
>
> (1) to defraud a *federally chartered or insured financial institution*; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a *federally chartered or insured financial institution* by means of false or fraudulent pretenses, representations, or promises . . . .

Comprehensive Crime Control Act of 1984, Pub. L. 98-473, Title II, § 1108(a), 98 Stat. 1976, 2147 (codified as amended at 18 U.S.C. § 1344) (emphasis added).

b. In interpreting the language common to all three fraud statutes, this Court has acknowledged that "[b]ecause the two phrases identifying the proscribed schemes" – that is, the two phrases that became subsections (1) and (2) of the bank fraud statute – "appear in the disjunctive, it is arguable

that they are to be construed independently," *McNally*, 483 U.S. at 358. On that view, the Government could avoid the intent requirements of one clause by proceeding under the other. But this Court has consistently refused to give the Government that power, instead finding that the disjunctive phrasing creates a single offense, with the second clause merely serving to clarify the scope of the first. *Id*. at 358-59.

This Court reached that conclusion based on the history of the mail and wire fraud statutes. As originally enacted in 1872, the mail fraud statute contained only the first clause, prohibiting the use of the mails in furtherance of "any scheme or artifice to defraud." *McNally*, 483 U.S. at 356. The Court interpreted that clause in *Durland v. United States*, 161 U.S. 306 (1896), as extending beyond the common law crime of false pretenses, reaching "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future." 161 U.S. at 313.[9] Congress then amended the statute to add the second clause, "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." Act of Mar. 4, 1909, ch. 321, § 215, 35 Stat. 1088, 1130.

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[9] The petitioner in *Durland* was convicted for a scheme to sell bonds by promising significant returns, a promise petitioner never intended to honor. 161 U.S. at 509. Arguing that fraud was limited to false statements about the past or present, petitioner asserted he could not be liable for promises as to the future. *Id.*

As the Tenth Circuit did here, lower courts inferred from the statutes' new disjunctive phrasing that Congress intended the two clauses to be "construed independently." *McNally*, 483 U.S. at 358.[10] But this Court rejected that reasoning. Instead, the Court found that Congress added the second clause to "codif[y] the holding of *Durland*." *McNally*, 483 U.S. at 357-58. "As we see it," the Court explained, "adding the second phrase simply made it unmistakable that the statute reached" the conduct the Court had already held encompassed by the first clause. *Id.* at 359.

Although the Court's interpretation arguably rendered the second clause surplusage, it nonetheless refused to allow the Government to rely on one clause to avoid the restrictions of the other. *McNally*, 483 U.S. at 358 (rejecting the Government's claim that the first clause permitted conviction for non-property frauds that plainly fell outside the scope of the second). The Court explained that construing the statute to create a single limited offense better respected the traditional role of states in punishing fraud and was compelled by the "often stated" rule of lenity. *Id.* at 359-60.[11]

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[10] Specifically, lower courts inferred that because the second clause clearly punishes schemes "for obtaining money or property," the first clause's bare proscription of "any scheme or artifice to defraud" must reach beyond protecting property rights to protect "intangible rights." *McNally*, 483 U.S. at 358.

[11] Congress legislatively overruled the result in *McNally* by enacting 18 U.S.C. § 1346 to recognize claims of honest services fraud. But nothing in that enactment overturned this

Undeterred, in 2000 the Government attempted again to persuade this Court that the mail fraud statute "defines two independent offenses: (1) 'any scheme or artifice to defraud' and (2) 'any scheme or artifice . . . for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.'" *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000) (alteration in original) (quoting 18 U.S.C. § 1341). The Government argued in *Cleveland* – as it has here – that the second clause is broader than the first, such that the Government could prevail under the second clause even if it could not prove the elements of the first clause.[12] The Court, however, reaffirmed that the mail fraud statute defines a single offense, explaining again that the second clause "simply modifies the first." *Cleveland* 531 U.S. at 26. It further explained that the Government's interpretation was untenable because it would "approve a sweeping expansion of federal

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Court's holding that the two clauses are to be read jointly. *See Cleveland v. United States*, 531 U.S. 12, 25-26 (2000).

[12] The primary dispute in *Cleveland* was whether the mail fraud statute reached false statements in an application for a state poker license. 531 U.S. at 15. The Court concluded it did not violate the first clause because a "scheme to defraud" requires an attempt to obtain the property of the victim and, the Court held, a state license does not count as property while in the hands of the a state government. *Id.* Nevertheless the Government argued that the license was property in the hands of the recipient. *Id.* at 25-26. And because the second clause of Section 1341 criminalizes schemes to "obtain[] . . . property," the United States argued it should be interpreted more broadly than the first, extending to schemes not otherwise covered by the first clause. *Id.*

criminal jurisdiction in the absence of a clear statement by Congress" and run counter to the rule of lenity. *Cleveland* at 24.

c. The Tenth Circuit's rationale in this case cannot be squared with this Court's decisions in *McNally* and *Cleveland*.

The Tenth Circuit reasoned that because the two subsections of Section 1344 establish separate offenses, the Government can avoid the limitations of the first subsection (*i.e.*, the requirement that it prove intent to defraud a bank) by proceeding solely under the second. But that two-clause structure of Section 1344 is carried over from the mail and wire fraud statutes, and this Court has repeatedly held that those two clauses establish a single offense, the essence of which is captured in the original, first clause prohibiting schemes to "defraud." *See Neder*, 527 U.S. at 20-21; *Cleveland* 531 U.S. at 24-26. For that reason, this Court rejected the Government's attempts to avoid the limitations of the first clause by proceeding solely under the second, the very ploy the Tenth Circuit approved in this case.

To be sure, the bank fraud statute is different from the mail and wire fraud statutes in that it requires actions against a specific target (a bank) rather than through a specific means (the mails or wires). But that difference only reinforces the error of the Tenth Circuit's interpretation. Having eliminated the jurisdictional hook of the use of instrumentalities of interstate commerce, Congress was required to establish some other basis for federalizing what would otherwise be a crime subject to the historic exclusive jurisdiction of the states. The jurisdictional justification Congress landed upon

was the risk of injury to federally related financial institutions. Interpreting the bank fraud statute to cover intrastate fraud that threatens no loss to a financial institution would eliminate the connection between the statute and the constitutional power upon which it is premised.

CONCLUSION

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

Respectfully submitted,

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APPENDIX A

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PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEVIN LOUGHRIN, Defendant-Appellant.	No. 11-4158

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. NO. 2:10-CR-00478-TC-SA-1)

Bretta Pirie, Assistant Federal Public Defender (Kathryn N. Nester, Federal Public Defender, and Scott Keith Wilson, Assistant Federal Public Defender, with her on the briefs) Office of the Federal Public Defendant, District of Utah, Salt Lake City, Utah, for Appellant.

Dave Backman, Assistant United States Attorney (David B. Barlow, United States Attorney, with him on the brief), Office of the United States Attorney, District of Utah, Salt Lake City, Utah, for Appellee.

Before **KELLY, TYMKOVICH** and **GORSUCH**, Circuit Judges.

TYMKOVICH, Circuit Judge.

Kevin Loughrin was convicted of bank fraud and other charges arising from a check and identity theft scheme. He now appeals his conviction on two grounds: (1) the district court's jury instructions on the bank fraud counts, 18 U.S.C. § 1344(2), were erroneous because they did not contain a requirement that Loughrin intended to defraud a bank; and (2) the delay between his indictment and trial violated his rights under the Speedy Trial Act.

We conclude the district court did not err in applying the requisite elements for bank fraud under § 1344(2) and that the subsection does not require proof that the defendant intended to defraud a bank. We also agree that Loughrin was tried within seventy days as required by the Speedy Trial Act.

Exercising our jurisdiction under 28 U.S.C. § 1291, we reject both of Loughrin's grounds for appeal and AFFIRM.

I. Background

Kevin Loughrin's charges arose from a scheme to steal checks from people's mail. After stealing the checks, he would alter them to make purchases at a local Target store. He would then return those purchases to Target for cash. The scheme came to an end when Loughrin and a codefendant, Theresa Thongsarn, were indicted on six counts of bank fraud, two counts of aggravated identity theft, and one count of possession of stolen mail.

Prior to trial, Loughrin filed a motion for dismissal based on violations of the Speedy Trial Act, which the district court denied. At trial Loughrin proposed that the jury instruction for bank fraud, 18 U.S.C. §

1344(2), specifically require the jury to find that he had an intent to defraud a financial institution in order to convict. The court, stating that the statute and Tenth Circuit law did not require such a finding, rejected Loughrin's proposed instructions. Loughrin was convicted on all six bank fraud counts, as well as on counts for stolen mail and aggravated identity theft. The court sentenced Loughrin to thirty-six months' imprisonment.

II. Analysis

Loughrin contends the district court erred in two ways: (1) the jury instructions on the bank fraud counts, 18 U.S.C. § 1344(2), failed to include a requirement that he intended to defraud a bank or financial institution; and (2) his rights under the Speedy Trial Act were violated due to unexcused delay between his indictment and trial. We disagree with both arguments.

A. Jury Instructions

Loughrin first argues the district court erred in refusing to instruct the jury that a conviction under § 1344(2) requires proof that he intended to defraud the banks on which the checks had been drawn. If the district court erred, Loughrin contends, there was insufficient evidence to sustain a conviction under § 1344(2). We review "a district court's refusal to give a requested instruction for abuse of discretion." *United States v. Crockett*, 435 F.3d 1305, 1314 (10th Cir. 2006). But we review the jury instructions de novo to determine "whether, as a whole, they accurately state the governing law." *Id.*

The Bank Fraud statute prohibits two types of conduct: "knowingly execut[ing], or attempt[ing] to execute, a scheme or artifice – (1) to defraud a financial institution; or (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. Though "largely overlapping, a scheme to defraud, and a scheme to obtain money by means of false or fraudulent pretenses, representations, or promises, are separate offenses." *United States v. Swanson*, 360 F.3d 1155, 1162 (10th Cir. 2004) (quoting *United States v. Cronic*, 900 F.2d 1511, 1513 (10th Cir. 1990)).

The two provisions have similar elements, differing only by the type of scheme each one targets. Our case law requires the government to prove: "(1) that the defendant knowingly executed or attempted to execute a scheme (i) to defraud [§ 1344(1)] *or* (ii) to obtain property by means of false or fraudulent pretenses, representations or promises [§ 1344(2)]; (2) that defendant did so with the intent to defraud; and (3) that the financial institution was then insured by the Federal Deposit Insurance Corporation." *United States v. Rackley*, 986 F.2d 1357, 1360-61 (10th Cir. 1993) (emphasis in original).

The differences in the prohibited conduct for each offense extend to the type of proof the government needs to offer. To establish that a bank was *defrauded* under § 1344(1), the government need not prove that the bank "suffered any monetary loss, only that the bank was put at potential risk by the scheme to defraud." *United States v. Young*, 952 F.2d 1252, 1257

(10th Cir. 1991). Yet a conviction under § 1344(2) requires no proof that a bank was "at risk" because there is no explicit requirement that a particular bank be defrauded. *United States v. Sapp*, 53 F.3d 1100, 1103 (10th Cir. 1995). As we explained in *Sapp*, the reason for this difference stems from the plain language of the statute: "[C]lause (1) focuses on the conduct as it affects the financial institution, while clause (2) emphasizes the conduct of the defendant." *Id.* Indeed, the latter "extends to any knowingly false representation" by the defendant. *Id.* at 1102 (quotation omitted).

Loughrin contends that a conviction under subsection § 1344(2), like one under § 1344(1), requires proof that he intended to defraud a bank. He argues that our decision in *Rackley* "suggests that the scheme to defraud and the false pretenses must equally be directed at a financial institution." Aplt. Br. at 18. But *Rackley*'s omission of "financial institution" from its listing of the elements of § 1344(1) does not change the fact that the text of § 1344(1) itself requires that the scheme be to "defraud a *financial institution*." 18 U.S.C. § 1344 (emphasis added). Under §1344(1), the scheme to defraud must necessarily be directed at a financial institution or bank – there is no way to defraud a bank without intentionally directing the fraud, in some way, at a bank. Yet under § 1344(2), there is no requirement in either *Rackley* or the text of § 1344(2) that the fraud must be intentionally directed at a bank. Unlike clause (1), clause (2) does not explicitly state who must be the object of the scheme. And *Rackley* indicates that only an intent to defraud *someone* is required. 986 F.2d at 1360-61. Thus, under our precedent, an individual can violate § 1344(2) by

obtaining money from a bank while intending to defraud someone else.

The district court's refusal to give Loughrin's proposed instruction to the jury is also correct in light of *Sapp*'s holding that § 1344(2) requires no proof that the bank was "at risk" of suffering financial loss. Loughrin's interpretation would effectively render *Sapp*'s holding superfluous: there is only a small subset of cases where a defendant would intend to defraud a bank and yet the bank would never be at any risk – *i.e.*, incompetent attempts. Proving risk of loss to a bank is sensible when the target of the fraud must be a bank; yet when no risk of loss is required, it would be incongruous to still require that the target be a bank. Accordingly, the district court did not err in refusing to instruct the jury that an intent to defraud the bank was required. And the government satisfied the fraudulent intent requirement of § 1344(2) with proof that Loughrin intended to defraud Target rather than a bank.

Loughrin counters that our interpretation of § 1344(2) creates bank fraud liability for any fraudulent scheme as long as a bank's assets are somehow involved, an outcome allegedly contrary to congressional intent and in conflict with the decisions of several circuits.[1] We recognize that our

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[1] *See United States v. Thomas*, 315 F.3d 190, 197 (3d Cir. 2002) (holding that "the *sine qua non* of bank fraud violation, no matter what subdivision of the statute it is pled under, is the intent to defraud the bank"); *United States v. Kenrick*, 221 F.3d 19, 29 (1st Cir. 2000) (holding "that the intent element of bank fraud under either subsection is an intent to deceive the bank in order to obtain from it money or other property"); *United States v. Blackmon*, 839 F.2d 900, 905-07 (2d Cir. 1988) (holding that

interpretation of § 1344(2) may cast a wide net for bank fraud liability, but it is dictated by the plain language of the statute and our prior precedent. We are bound by those cases "absent *en banc* reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000).

In sum, we reject Loughrin's invitation to revisit the elements of bank fraud as set forth in our cases. The fact that Loughrin fraudulently obtained funds using bank checks, even though the bank was not at risk of loss, is sufficient to support his conviction for bank fraud.

B. Speedy Trial Act

Loughrin next argues that the district court violated his rights under the Speedy Trial Act (STA). We review a district court's denial of a motion to dismiss for violation of the Act for an abuse of discretion. *United States v. Larson*, 627 F.3d 1198, 1203 (10th Cir. 2010). The same standard applies when reviewing grants of an ends-of-justice continuance. *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009). At the same time, we review the district court's compliance with the Act de novo and its findings of fact for clear error. *Id.*

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where victim was not a federally insured bank and there was no intent to defraud a bank, defendants' conduct of inducing victims to withdraw money from a bank could not constitute bank fraud under § 1344(a)(2) [different designation, but same statute]). *But see United States v. Everett*, 270 F.3d 986, 991 (6th Cir. 2001) (holding that "it is sufficient if the defendant in the course of committing fraud on *someone* causes a federally insured bank to transfer funds under its possession and control" (emphasis in original)).

Before discussing the legal framework applicable to Loughrin's Speedy Trial Act claims, we provide the necessary factual background.

1. Background

Loughrin and his codefendant, Thongsarn, made their first appearance in federal court on June 8, 2010. No motions were filed after the indictment, other than a *pro forma* discovery request, until July 29, when Loughrin requested a change-of-plea hearing, which was scheduled for August 16. The change-of-plea hearing on August 16 turned into a status conference, and the hearing was pushed back to August 20. On neither date, however, did Loughrin or Thongsarn plead guilty.

On August 27, the district court issued an order of continuance on the grounds that Thongsarn needed more time to understand the charges against her, tolling the time between August 16 and October 19, the then-scheduled trial date.

During this time, because of conflicts with his old counsel, Loughrin retained Emily Swenson as new counsel. Thongsarn also obtained new counsel. On October 15, the district court granted a continuance at the request of Thongsarn's new counsel, on the grounds that new counsel needed more time to familiarize himself with the case. At the time, Loughrin had not yet made a motion to sever his trial from Thongsarn's.

On November 3, Loughrin's new counsel moved to withdraw from representation due to a fee dispute. On November 16, the district court held a hearing to decide whether she could withdraw. The court continued the hearing to allow further discussions

between Loughrin and Swenson over whether her representation could continue and whether a plea deal could be worked out with the government. On November 18, the court orally granted Swenson's motion to withdraw and appointed the federal defender's office as counsel. On the same day, the court changed the trial date to January 24 and tolled the intervening time. The attorney present from the federal defender's office acquiesced to the continuance.

On December 28, Loughrin filed a motion to dismiss the aggravated identity theft charges, Counts 7 and 8. At a hearing on the motion (January 13, 2011), Loughrin's counsel stated Loughrin was ready to plead guilty to the bank fraud charges, Counts 1 through 6. The court replied it was unprepared to take Loughrin's plea that day. The court ultimately denied Loughrin's motion to dismiss Counts 7 and 8.

On January 14, the government filed a motion to continue the trial from January 24 to February 7 and to request that the sixteen days between Loughrin's motion to dismiss and the court's denial of the motion be excluded for Speedy Trial purposes. The government explained that it needed the continuance because it had been preparing for a separate trial while at the same time responding to Loughrin's motion to dismiss. The government also stated that it had been under the assumption that the motion to dismiss would result in a continuance. In its filing the government attached a proposed order, largely recapitulating the reasons set forth in its motion.

In a filing to the court on January 19, Loughrin's counsel, citing another trial he had scheduled for February 7, opposed the continuance. He also stated

that Loughrin no longer planned on pleading guilty to the bank fraud charges and would proceed to trial on all counts. The same day, the government filed a response and supplement to its earlier motion to continue, seeking an additional two-week continuance (for a total of four weeks) now that Loughrin no longer planned to plead guilty to the fraud counts for the purpose of locating six additional witnesses for trial. The government attached a new proposed order reflecting Loughrin's change-of-plea decision and the government's need to locate more witnesses.

On January 20, the district court issued an order of continuance, but adopted the proposed order submitted by the government on January 14, not the updated proposed order from January 19. Thus, the order filed by the court reflected the old facts: that Loughrin intended to plead to the fraud counts. The court also granted a two-month continuance, rather than the four-week continuance requested by the government, setting the trial date at March 21.

On January 25, the government filed a "Motion to Amend Order" informing the court that the court's January 20 order reflected facts that were no longer true. The government also requested an additional two-week continuance because the March 21 trial date would come three days after the likely end of a two-week trial with which the government's attorneys would be fully occupied. The government cited continuity-of-counsel reasons as the basis for its request for a continuance.

On February 2, the court held a hearing on the government's motion. The government explained that it would need additional witnesses now that Loughrin

was no longer going to plead guilty to any counts or stipulate to any facts. Loughrin's counsel responded that the government knew from the beginning that it had a nine-count trial, and, to the extent that Loughrin's intention to plea changed the government's planning, it was only for six days. Loughrin's counsel suggested that the government ask another prosecutor in its office to step in.

On February 7, the court issued an order of continuance moving the trial date from March 21 to April 4. The court amended its January 20 order to reflect the fact that the earlier continuance from January 24 to March 21 was justified on the grounds that the government needed additional time to prepare for trial given the defendant's decision to no longer plead guilty. The court explained that the further two-week continuance was justified on continuity of counsel grounds, given the conflicts imposed by the government's upcoming two-week trial.

On February 23, Loughrin filed a motion to dismiss the indictment due to violations of the Speedy Trial Act. In particular, Loughrin challenged the court's orders on January 20 and February 7, on the grounds that they were not in the interests of justice. On March 2, the court denied Loughrin's motion. One month later, the case proceeded to trial.

2. Speedy Trial Act Requirements

The Speedy Trial Act requires that a criminal trial begin no more than seventy days after the filing of an indictment or the defendant's first appearance in court. 18 U.S.C. § 3161(c)(1). The purpose of the Act is to "to protect a criminal defendant's constitutional right to a speedy trial and serve the public interest in

ringing prompt criminal proceedings." *United States v. Toombs*, 574 F.3d 1262, 1268 (10th Cir. 2009) (quoting *United States v. Thompson*, 524 F.3d 1126, 1131 (10th Cir. 2008)). But not every day counts towards the seventy-day limit because of a multitude of statutory exclusions, 18 U.S.C. § 3161(g), including, for example, (1) any "delay resulting from any pretrial motion," from the day of its filing to the day of disposition, *id.* § 3161(h)(1)(D), and (2) any "delay resulting from consideration by the court of a proposed plea agreement," *id.* § 3161(h)(1)(G).

If a delay does not fit within an explicit exclusion, the court may still exclude days from the seventy-day tally as long as it makes "findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." *Id.* § 3161(h)(7)(A). The court is required to make explicit findings in support of the exclusion, including, among others, whether any delay would result in a miscarriage of justice, the complexity of the case, and the need for adequate preparation. *Id.* § 3161(h)(7)(B). Importantly, if the court does not "set[] forth, in the record of the case, either orally or in writing, its reasons" for granting a continuance, then the delay resulting from that continuance will not be excluded from the seventy-day tally. *Id.* § 3161(h)(7)(A). At the same time, the court need not "articulate facts which are obvious and set forth in the motion for the continuance itself." *Toombs*, 574 F.3d at 1269 (quotation omitted). In determining whether the district court relied on sufficient facts in granting an ends-of-justice continuance, we can look to "the oral and written statements of both the district court and the moving party." *Id.* at 1271.

We have imposed a variety of requirements to police the district courts' use of ends-of-justice continuances. The district court must "consider[] the proper factors at the time such a continuance [is] granted." *United States v. Larson*, 627 F.3d 1198, 1204 (10th Cir. 2010) (quoting *Toombs*, 574 F.3d at 1269). The findings cannot consist of "short, conclusory statements lacking in detail." *Id.* (quoting *Toombs*, 574 F.3d at 1271). "While the preferred practice is for the district court to make its findings on the record at the time the continuance is granted, findings made contemporaneously with the granting of the continuance may be entered on the record after the fact if done before the court rules on a defendant's motion to dismiss." *Toombs*, 574 F.3d at 1269 (citing *Zedner v. United States*, 547 U.S. 489, 506-08 & n.7 (2006)).

With this legal framework in mind, we review the district court's calculation of excludable days under the Act.

3. Excludable Days

The parties agree forty-nine days are not excludable and count towards Loughrin's seventy-day tally. To determine whether there are more than twenty-one additional nonexcludable days, we must evaluate the effect of Loughrin's change-of-plea hearing and three ends-of-justice continuances granted by the district court. We consider each in turn.

a. Change-of-Plea Hearing

Loughrin first contends the district court erred in its calculation of the period from July 29, the day Loughrin's change-of-plea hearing was set, to August 15, the day before the hearing. While under §

3161(h)(1)(D) a pretrial motion tolls the clock – from the time it is filed until after the hearing – we have yet to determine whether a change-of-plea hearing qualifies as such a motion. Loughrin argues that it should not count as a pretrial motion because there is no briefing or argument associated with the proceeding. The government, by contrast, argues that a change of plea should count as a motion because it requires a hearing.

We have held that a motion under § 3161(h)(1)(D) need not cause "actual delay" in order to exclude the period after its filing, and before its disposition, from the seventy-day tally. *United States v. Williams*, 511 F.3d 1044, 1050 (10th Cir. 2007) (citation omitted). The focus of the subsection is whether the court's intervention is required or whether a hearing must be held. It is obvious that a change of plea triggers judicial action and even though it may not require formal briefing it will require a hearing addressing the merits with the defendant's participation.

At least two circuits have concluded that this judicial action qualifies a change-of-plea notice as a pretrial motion. *See United States v. Santiago-Becerril*, 130 F.3d 11, 20 (1st Cir. 1997); *United States v. Jenkins*, 92 F.3d 430, 440 (6th Cir. 1996). We agree with those cases. While a change-of-plea notice does not necessarily create extra work in the form of briefs to be filed or arguments to be made, it unsettles the parties' expectations and consumes time in the same way that a pretrial motion does.

> A change of plea hearing is essential to establish the knowing and voluntary nature of the defendant's guilty plea, and to determine

> the sufficiency of its factual basis. Until these factors are established, the court may not rule definitively on whether or not to accept the motion for change of plea.

Santiago-Becerril, 130 F.3d at 20. In sum, a "defendant's request to change his plea clearly constitutes a pretrial motion, a motion which automatically triggers an exclusion of time." *Id.* (citation omitted). A contrary conclusion, moreover, would create an incentive for defendants to file notices of disposition and later change their minds at the hearing – meanwhile, the seventy-day clock would continue to run.

We therefore conclude the days between a notice of a change of plea and the change-of-plea hearing are excludable under the STA. Accordingly, the eighteen days in dispute here do not count toward Loughrin's seventy-day tally.

b. November 18 Order of Continuance

The next question centers on the district court's November 18 order of continuance, which changed the trial date from December 13, 2010 to January 24, 2011 and prospectively tolled the period between the date of the order and the new trial date. Loughrin concedes that, due to other pretrial motions, only thirteen days in that period are in dispute.

The government raises a threshold argument that Loughrin waived the issue for appeal because he never specifically challenged the November 18

order in his motion to dismiss. The STA provides, "Failure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal under this section." 18 U.S.C. § 3162(a)(2). The government contends this provision mandates waiver when a defendant raises an STA objection before trial but fails to challenge a particular order of continuance in that objection.

In support of this argument, the government points to an unpublished decision, *United States v. Seals*, 450 F. App'x 769 (10th Cir. 2011). We find its reasoning persuasive. There, the defendant filed a pretrial motion to dismiss the indictment based on a violation of the Speedy Trial Act. *Id.* at 770. On appeal, the defendant tried to raise an entirely different argument. The court noted, "We have interpreted this language [in 18 U.S.C. § 3162(a)(2)] to mean that we may not conduct any review of Speedy Trial Act arguments unraised below, not even for plain error." *Id.* at 771 (citing *United States v. Gomez*, 67 F.3d 1515, 1519-20 (10th Cir. 1995)). The court concluded that "not only must the defendant seek dismissal prior to trial, but he must do so *for the reasons* he seeks to press on appeal." *Id.* (emphasis in original) (citing *United States v. O'Connor*, 656 F.3d 630, 637-38 (7th Cir. 2011)). The court accepted the following reasoning:

> As the Seventh Circuit has aptly put it, "[i]f filing a motion to dismiss were enough to preserve all violations of the Act – whether identified in the motion or not – then the district court or the government, rather than

> the defendant, would effectively bear the burden of 'spotting violations,'" contrary to the statutory scheme.

Id. (quoting *O'Connor*, 656 F.3d at 638); *accord Zedner*, 547 U.S. at 502-03.

We agree. As the Supreme Court in *Zedner* noted, § 3162(a)(2) "assigns the role of spotting violations of the Act to defendants – for the obvious reason that they have the greatest incentive to perform this task." *Id.* By forcing defendants to raise all their arguments in the district court, we ensure that the arguments are adequately developed below and give the district court the opportunity to further explain its reasoning for granting a continuance. *Cf. Toombs*, 574 F.3d at 1269 ("[F]indings made contemporaneously with the granting of the continuance may be entered on the record *after the fact* if done before the court rules on a defendant's motion to dismiss." (emphasis added)). The alternative would force the court on a motion to dismiss for STA violation to consider every conceivable basis for challenging its orders of continuance and exclusions of time, for fear that the defendant would raise new arguments on appeal.

We therefore conclude that a defendant seeking to challenge on appeal a district court's order of continuance must do the same in his motion to dismiss to the district court. Because Loughrin did not object to the November 18 order, he cannot do so now. Accordingly, the thirteen days at issue here do not count toward Loughrin's seventy-day tally.

c. January 20 Order of Continuance

The next challenged period stems from the January 20 order of continuance. That order is

actually comprised of two orders: the original order on January 20, and the order as amended *nunc pro tunc* on February 7. We have stated that "although the ends-of-justice findings mandated by the Act 'may be *entered* on the record after the fact, they may not be *made* after the fact.'" *Williams*, 511 F.3d at 1055 (emphasis added) (quoting *United States v. Apperson*, 441 F.3d 1162, 1180 (10th Cir. 2006)). This means that continuances and the exclusion of days from the STA clock must be granted prospectively. Here, the January 20 Order moved the trial date from January 24 to March 21, while the February 7 Order, issued after a continuance hearing on February 2, amended the old one with new facts. *Williams* prohibits the new findings from being used to justify the old order for the period from January 24 to February 7. Those findings were not merely being *entered* on the record, but were being *made* in the first instance after a hearing. As such, they cannot be given retroactive effect. The January 20 order must survive on the record available at the time. *Cf. Toombs*, 574 F.3d at 1271 (noting that, when determining compliance with the Speedy Trial Act, the record includes "the oral and written statements of both the district court and the moving party").

Yet the only days that are in dispute – based exclusively on the court's January 20 order – are those between January 24, the previous trial date, and February 7, the day the order was amended. And of those days only one of them, January 24, is at stake for purposes of Loughrin's seventy-day tally. This is because Loughrin concedes that the rest of the period is tolled due to the government's motion to amend the district court's order. Because excluding or including

this one day will not be dispositive of Loughrin's STA claim, in the end we need not address the merits of the January 20 order.

d. February 7 Order of Continuance

Loughrin's final argument is that the court abused its discretion in entering the February 7 amended order of continuance. Upon recognizing that the district court's January 20 order was based on an erroneous fact – that Loughrin intended to plead guilty – the government made a motion on January 25 to amend the order. The district court held a hearing on the matter on February 2. At the hearing, the government explained that, while Loughrin no longer planned to plead guilty, his change of plea necessitated extra preparation by the government. The district court in its amended order on February 7 noted that, because Loughrin no longer intended to plead guilty to the bank fraud counts, the government would have to schedule and prepare fourteen to seventeen additional witnesses.

The district court concluded this additional preparation for the government justified the court's grant of a two-month continuance. Loughrin contends this additional work cannot justify the continuance because the government relied for only six days on Loughrin's representation that he would plead guilty – the time between Loughrin's January 13 statement in court that he would plead guilty to the bank fraud counts and his disavowal of that intention in his January 19 court filing. Yet as the government explains, Loughrin's change of plea was far more disrupting than it appears at first blush: Once Loughrin indicated that he wished to plead guilty, the

government had to call off most of its witnesses. Then when Loughrin changed his mind – only five days before the scheduled trial – the government had to resubpoena and reschedule those same witnesses. We agree that coordinating all those witnesses would require much more additional time than six days, the time that elapsed while Loughrin contemplated a plea of guilty.

Loughrin argues that, his change-of-plea notwithstanding, the government should have been prepared to go to trial because the evidence against him was duplicative of the evidence against Thongsarn, his codefendant, and that Thongsarn did not indicate she would plead guilty prior to the court's January order. This argument might have had some traction for the time period between January 24 and February 7, but as noted above, only one day is at stake and we need not consider it.

By February 7, the facts had changed. At the February 2 hearing, Thongsarn's counsel had indicated that his client would plead guilty before trial and would cooperate with the government. Before that, Thongsarn planned to go to trial and then give truthful incriminating testimony against Loughrin in order to obtain a more lenient sentence. At the hearing, Thongsarn's counsel indicated Thongsarn could provide additional evidence against Loughrin that could result in a superseding indictment. This proposed cooperation necessitated extra time so that the government could debrief Thongsarn and prepare her testimony for trial. We find these facts compelling.

Given the need for additional witness preparation, we cannot say that the district court abused its

discretion in amending its order to justify the two-month continuance. While perhaps the government did not need the full two months by the time of the February 2 hearing – indeed, it originally requested only one month – the facts do not indicate that the district court acted arbitrarily or capriciously in excluding those days from the STA clock.

Loughrin also argues that the district court legally erred in its February 7 order by not making adequate factual findings relating to the government's need for more time. In support of his argument, Louhgrin relies on *United States v. Gonzales*, 137 F.3d 1431 (10th Cir. 1998). In *Gonzales*, the prosecutor had asked for a later trial date because he was going to be out of town and needed sufficient time to prepare his witnesses. *Id.* at 1434. The court in *Gonzales* found that the district court erred in granting an ends-of-justice continuance without inquiring into the complexity of the case, into whether the case could be tried by someone else in the government's office, or into why the prosecutor had to be out of town in the first place. *Id.* at 1434-35.

Yet the record here is not nearly as sparse as that in *Gonzales*. The district court here inquired into the number of witnesses the government needed once Loughrin no longer intended to plead guilty and the effect Thongsarn's cooperation with the government would have on Loughrin's defense. This is far more substantial than the summary order the district court in *Gonzales* issued. The questioning the district court here engaged in was also far more probing. The court explicitly examined the basis of the government's need for more time. "Although a more thorough and explicit articulation might have better facilitated our review of

the district court's decision, the order did list the reasons supporting the finding." *United States v. Occhipinti*, 998 F.2d 791, 798 (10th Cir. 1993). We therefore conclude that the district court made no legal error. Accordingly, the thirty-three days that are in dispute between February 7 and March 21 do not count toward Loughrin's seventy-day tally.

As part of its February 7 order, the district court also granted an additional two-week continuance due to the government's conflict with another trial, moving the trial from March 21 to April 4. Only six days are at issue here (between March 21 and March 23, and between February 1 and February 3). Because these six days (and the one day we declined to address above), when added to the forty-nine undisputed days, do not push Loughrin's tally over seventy, we need not decide whether the two-week continuance was appropriate.

* * *

In sum, we conclude there was no violation of Loughrin's rights under the Speedy Trial Act.

III. Conclusion

Because the district court did not err in giving the jury instruction on 18 U.S.C. § 1344(2), and because the total number of nonexcludable days for purposes of the Speedy Trial Act was less than seventy, we AFFIRM the district court.

APPENDIX B

UNITED STATES DISTRICT COURT

[FILE STAMP]

Central District of Utah

JUDGMENT IN A CRIMINAL CASE

United States of America, v. Kevin Loughrin	Case Number: DUTX 2:10CR00478-001 TC USM Number: 17098-081

Benjamin McMurray
Defendant's Attorney

THE DEFENDANT:

__pleaded guilty to count(s)

__pleaded nolo contendere to count(s) which was accepted by the court.

√ was found guilty on count(s) 1, 2, 3, 4, 5, 6, 7, 8, 9 of the Indictment

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1344	Bank Fraud		1-6
18 USC § 1028A	Aggravated Identify Theft		7 & 8
18 USC §§ 1708 and 2	Possession of Stolen Mail and Aiding and Abetting		9

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___The defendant has been found not guilty on count(s)

___Count(s)_____ (is)_____(are) dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

07/26/2011
Date of Imposition of Judgment

/s/ Tena Cambell
Signature of Judge

Tena Campbell United States District Court Judge
Name and Title of Judge

8-3-2011
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of

36 months custody total – 24 month term for count 7, 24 month term for count 8, which shall run concurrently with count 7 sentence, 12 month term for counts 1-6, 9, which will run consecutive to sentence imposed in count 7.

_√_ The court makes the following recommendations to the Bureau of Prisons:

The Court strongly recommends the defendant participate in RDAP or any other drug treatment, while incarcerated. The Court also recommends the defendant serve his sentence at a facility as close to Pennsylvania as possible, specifically Schuylkill, PA or Fort Dix, NJ.

_√_ The defendant is remanded to the custody of the United States Marshal.

____ The defendant shall surrender to the United States Marshal for this district.

__ at a.m./p.m. on _____.

__ as notified by the United States Marshal.

____ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

__ before 2 p.m. on _____.

__ as notified by the United States Marshal.

__ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on____ to _____at_____, with a certified copy of this judgment.

_____
United States Marshal

By: _____
Deputy United States Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

60 Months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

____The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable).

__√__ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

__√__ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

____ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

____ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law

enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant will submit to drug/alcohol testing under a copayment plan as directed by the probation office.

2. The defendant shall participate in a substance-abuse evaluation and/or treatment under a copayment plan as directed by the probation office. During the course of treatment, the defendant shall not consume alcohol nor frequent any establishment where alcohol is the primary item of order.

3. The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

4. The defendant shall not have contact with his codefendant in this case.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Total Restitution
TOTALS	$900.00	$	$ 1,184.58

____The determination of restitution is deferred until_. *An Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

√___The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Target AP Recovery 1000 Nicolle Mall TPS-2084 Minneapolis, MN 55403	1184.58	1184.58	
TOTALS	$ 1184.58	$ 1184.58	

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for the offenses committed on or after September 13, 1994, but before April 23, 1996

___Restitution amount ordered pursuant to plea agreement $_____.

____The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

√___The court determined that the defendant does not have the ability to pay interest and it is ordered that:

√___the interest requirement is waived for the ___fine__√_restitution.

____the interest requirement for the ___fine ___ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. __√___Lump sum payment of $__900.00__ due immediately, balance due

___not later than___, or

___in accordance___C,___D,__E or__F below; or

B. _____Payment to begin immediately (may be combined with___C,___D, or___F below); or

C. _____Payment in equal__ (e.g., weekly, monthly, quarterly) installments of $_ over a period of__ (e.g., months or years), to commence __ days (e.g., 30 or 60 days) after the date of

this judgment; or

D. _____ Payment in equal__ (e.g., weekly, monthly, quarterly) installments of $__ over a period of___, (e.g., months or years) to commence __ _ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. _____ Payment during the term of supervised release will commence within__ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time, or

F. √____ Special instructions regarding the payment of criminal monetary penalties:

The Court orders restitution in the amount of $1,184.58, which is due immediately, and shall be payable at a minimum rate of $25 per month while incarcerated and a minimum of $100 per month upon release from incarceration, or as otherwise determined by the USPO. The Court waives the accrual of interest.

Unless the court has expressly ordered otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

√ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

Restitution of $1,184.58 is ordered joint and several with co-defendant, Theresa C. Thongsarn, 2:10CR00478-002 TC.

___ The defendant shall pay the cost of prosecution.

___ The defendant shall pay the following court cost(s):

___ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

[83] (968D)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KEVIN LOUGHRIN, Defendant.	Case No. 2:10-CR-478TC SALT LAKE CITY, UTAH April 5, 2011

JURY TRIAL

BEFORE THE HONORABLE TENA CAMPBELL
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:

United States Attorney's Office
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Michael Thorpe, Esq.
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For the Defendant:

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Court Reporter:

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* * * *

[205:10]

THE COURT: Do you have a motion?

MR. McMURRAY: We would move pursuant to Rule 29 that the evidence presented against Mr. Loughrin is insufficient to support a conviction beyond a reasonable doubt.

THE COURT: All right. I'm going to deny it, but I'm going to tell you, parties and counsel, that my research has shown that in the Tenth Circuit, under 1344(1), which you seem to have tailored your jury instruction, or somebody, there has to be a risk of loss to the bank, but that that is not so for Subsection Two. Subsection Two is simply by false pretenses and representations to obtain money that is in the custody – care, custody and control of the bank or credit union.

I didn't hear anything that would fit Subsection One. I am wondering – although you didn't specify in the [206] indictment which it is, I am wondering if you believe on that, because I'm not hearing anything that would cause a loss, whether the only part of the bank fraud counts that could go to the jury would be Subsection Two.

MR. ELGGREN: And, Your Honor, the indictment is pled in the conjunctive. Both of those do appear, and if the mistake was –

THE COURT: That's not the issue. The issue is I'm not seeing any evidence that would cause – and the case law is pretty clear – that would cause a possible risk to the bank. That's Subsection One. And the leading case that's been followed in the Tenth Circuit, although it's an older case, it's clear up to date, is the *Sapp* case, 53 Fed.3d 1100. You have to have a risk of loss for Number One but not Number Two. And then in later cases the Tenth Circuit makes it very clear that they are quote distinct offenses.

What do you have that would support evidence-wise risk of loss to the bank, the financial institution? I've heard nothing.

MR. ELGGREN: Your Honor, well, I would disagree. I think that these checks, if they had gone through, and we've heard testimony that occasionally a fraudulent check makes it through and is honored by the bank, and that the bank can be – that the account holder is indemnified if they –

THE COURT: Who told us that?

[207]

MR. ELGGREN: That was Ms. Nelson I believe.

THE COURT: From?

MR. ELGGREN: Wells Fargo.

THE COURT: She said – I thought she said that they were not going – that they would not – that it was Target that was going to take the hit.

MR. ELGGREN: I think that was Ms. Gove. But Ms. Nelson did say that on occasion a fraudulent check is honored by her bank.

THE COURT: Sure, they go through.

MR. ELGGREN: And she said that the account holder has one year to notify the bank if they discover this.

THE COURT: And then if so, the question was asked would the bank take the loss? No, it would be Target.

MR. ELGGREN: It would go back to the store?

THE COURT: Uh-huh.

MR. ELGGREN: Okay, if that's what she said, and I may have not fully grasped that. The jury instructions that we provided do have both. And if we don't have loss to a bank, if that's not been shown in the evidence, we are okay with just going on the second prong of that.

THE COURT: Then that's what I'm going to do, and I'm going to tailor the jury instructions to only cover the second portion, which is to obtain property in the control, Subsection Two. And I would suggest that during the break you [208] look at the *Sapp* case that I gave you, and that there is a – there's some new cases, and I'll leave them up here and you can look at them.

Yes, Mr. McMurray.

MR. McMURRAY: I have resolved my own concern in my mind.

THE COURT: That's gratifying. Okay. So look at them, and it will also simplify. But there's simply nothing to show risk of loss or putting a bank, a financial institution, at risk.

MR. McMURRAY: So maybe just to make sure that I'm clear, even though the government in the indictment raised – or brought – filed under language that would implicate both subsections, as we move to closing arguments we're only going to be concerned with whether or not they have established the elements under Subsection Two?

THE COURT: That is correct. That is absolutely correct. And the jury instructions will be tailored during our instruction conference. And after we look at those cases, I think you'll see that.

MR. ELGGREN: Okay. Thank you, Your Honor.

THE COURT: All right. Do you have anything more to put on?

MR. McMURRAY: Can we take just a minute to confer, Your Honor?

[209]

THE COURT: Yes.

THE COURT: And I'm going to leave these cases up here.

MR. McMURRAY: Do you have a copy of the code by chance up there that I could borrow for just a minute?

THE COURT: The code? Sure. Well, it's in the cases, and you can see my book.

MR. McMURRAY: If I could just borrow your book for just a minute.

THE COURT: And I'm going to take about a 10 minute break, and then you all can get the names.

Ms. Cepernich, if you would come and sort of be the referee and make sure I get all my cases back. What I'm proposing to do is after the break come out, and then let's say at quarter of 1:00 let's do jury instructions so we don't have to do it tonight and you can get on to your class. We'll be in recess for about 10.

(RECESS FROM 12:05 P.M. UNTIL 12:20 P.M.)

THE COURT: Okay. So where are we now, counsel?

MR. McMURRAY: We do not intend to call any witnesses, Your Honor.

THE COURT: All right. United States, do you have any – did you see those cases?

MR. ELGGREN: We did, Your Honor.

THE COURT: All right. And do you agree with me, [210] not perhaps that the – and I've spoken with Ms. Cepernich, and she recalls the testimony of the Wells Fargo – or that witness who said if it was discovered within a year, then Target would take the hit, more than a year the customer takes the hit. So I heard no evidence of loss, possible loss, to the bank.

MR. McMURRAY: And that was my recollection of the testimony too, Your Honor.

THE COURT: Yeah, I thought so.

MR. ELGGREN: And that's my recollection too. I think I was just taken aback a little bit I think. But we're just fine proceeding on Subsection Two.

THE COURT: Okay. So I'm going to alter the jury instructions. So here is what I'm proposing. Everybody likes to get home at night, and you've got a

closing argument to make. Do you want to come back at quarter of 1:00 and do jury instruction conference?

MR. ELGGREN: That's fine with us, Your Honor.

THE COURT: And that will get it over with so you have this evening free.

MR. McMURRAY: That will be fine, Your Honor.

THE COURT: Okay. Shall I call them back in and just tell them that the case is over, the evidence has concluded and come back tomorrow for argument?

MR. McMURRAY: Yes. I think that's appropriate.

[211]

THE COURT: Does that work?

MR. ELGGREN: Yeah.

THE COURT: Let's do it. In fact would you all like lunch and start at 1:00 or do you want to start at quarter of 1:00?

MR. ELGGREN: 1:00 I think would be better, if that's okay, for us.

MR. McMURRAY: Yes, later, 1:00 o'clock would be good.

THE COURT: 1:00 o'clock so you can have the luxury of eating.

(JURY PRESENT)

THE COURT: Members of the jury, I've been informed that this closes the evidence part of the trial. What that means is what is left are I'm going to

instruct you on the law, and then the attorneys will argue, and sometime mid or late morning you will go out to reach your verdict. Do you want to come in and have things start at 8:30, 15 minutes earlier, or at 8:45? All in favor of 8:30 raise your hands. That's 15 minutes earlier. 8:45? 8:30, okay.

Are you all ready to start at 8:30?

MR. McMURRAY: Yes, Your Honor.

APPENDIX D

[1] (968E)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KEVIN LOUGHRIN, Defendant.	Case No. 2:10-CR-478TC SALT LAKE CITY, UTAH April 5, 2011

JURY INSTRUCTION CONFERENCE

BEFORE THE HONORABLE TENA CAMPBELL
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

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* * * *

[5:14]

McMURRAY: Your Honor, one addition that we would request, and this was also submitted in our proposed instructions, but on the third element where it says Mr. Loughrin acted with intent to defraud, we would like the Court to add specifically intent to defraud a financial institution. I think that this is consistent with the jurisdictional element of the case, the fact that it's specifically bank fraud as opposed to some other fraud.

And I think particularly in a case like this where, you know, there is clear evidence of general intent to defraud, I think that in order to make clear to the jury the jurisdictional aspect of the case, that has to be added [6] here.

THE COURT: All right. I'm going to deny that. I don't believe that's necessary, particularly since we took out Number 1, the first subsection, he acted with intent to defraud. The jurisdictional subhook comes in two places, that is the first element Mr. Loughrin has to execute or attempt – pay attention to the attempt. That's why I'm not proposing using your attempt – attempt to execute a scheme or artifice to obtain money or property from the particular bank or credit union and, fourth, that it would be capable of influencing the decision of a particular bank or credit

union. That is what gives us federal jurisdiction, and that goes in with the second part of Subsection of 1344 [sic] being separate from first, but your objection is noted.

MS. OBERG: Your Honor, I'm sorry, if I could just follow up with one thing.

THE COURT: Sure.

MS. OBERG: Just for clarification purposes, it's our understanding that he does have to intend to defraud a financial institution.

THE COURT: No.

MS. OBERG: It seems that otherwise it could be – he could intend to defraud his neighbor, and the result could be that the financial institution – you know, his neighbor goes and gets $40,000 from his bank account and because of [7] that he ends up being convicted of bank fraud. The concept of bank fraud would seem to include –

THE COURT: But, however, how would that render – and we're off.

(OFF THE RECORD)

Back on the record. We've got the case, the *Rackley* case, out of the Tenth Circuit. Ms. Cepernich has a copy for each of you, page five. The instruction is exactly as I gave it. Take a look at it. And that is what is found in the Pattern Jury Instructions for the Tenth Circuit for 2011 Number 2.58. The Defendant – Third Element, The Defendant Acted With Intent To Defraud.

MR. McMURRAY: Are we on the record?

THE COURT: Uh-huh.

MR. McMURRAY: And I remember reading this case, Your Honor, and recognize both what's in the case and also what's in the Tenth Circuit Pattern Instruction. One thing I would maybe point out with this regard is – two things.

Number one, I think on the facts of this case the Pattern Instruction may be inadequate or is inadequate in light of the facts. But more to the point, there's another component of the Tenth Circuit's pattern that's incorporated here in what you've provided, which is on the second page of your instruction number 18, which talks about what intent to defraud means. And this language does not come from *Rackley*. [8] It does come from the Tenth Circuit Pattern Instruction. And, again, I think this clarification could be misleading on the facts of this case.

It states that – specifically that the cause – it has to be intended to cause financial loss to another. And so I think that as this expansion of the definition is stated, that could be misleading. And so perhaps what we should do is rather than alter the – if the Court is disinclined to alter Element Three, perhaps we could state in this second to last paragraph financial loss to a financial institution.

THE COURT: Well, no, look.

MR. ELGGREN: We would object to that.

THE COURT: What I have now completely tracks for the one that we're needing, because we don't put the Fifth Element in from the pattern. But a scheme or artifice to defraud in the pattern, and I've got it here exactly, intended to deceive others in order to obtain something of value, such as money, from the

institution to be deceived. That's exactly what the law says and that's all I'm putting in. There is no intent to defraud the institution and so please do not argue that.

Okay. 18 is as it is.

MR. McMURRAY: Let me just make one – sorry, one clarification. You just said we can't argue intent to defraud the institution, but clearly we can still argue that there has [9] to be a scheme to obtain money or property from the bank.

THE COURT: Absolutely. Sure, you want to get the money from the bank. It just doesn't have to be – I mean you can – let me just put it this way. You can deceive the bank, but your purpose doesn't have to be to deceive the bank. It has to be – it can be perhaps to get it – maybe it's like this. Stick to the elements. But you deceive the bank because you want them to give you money, but you don't care if it puts them at any risk of loss or anything like that. You're not there to deceive the financial institution. You're just there to get money from them.

MR. McMURRAY: Thank you, Your Honor.

THE COURT: You're deceiving some others. Okay. 19, you've got problems, so let's go off the record.

* * * *

APPENDIX E

TITLE 18 – CRIMES AND CRIMINAL PROCEDURE

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

* * * *

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

* * * *

§ 1344. Bank fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

* * * *

§ 1346. Definition of "scheme or artifice to defraud"

For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

* * * *

APPENDIX F

FILED
United States Court of Appeals
Tenth Circuit
June 14, 2013
Elisabeth A. Shumaker
Clerk of Court

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. KEVIN LOUGHRIN, Defendant-Appellant.	No. 11-4158

ORDER

Before **KELLY**, **TYMKOVICH**, and **GORSUCH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/

ELISABETH A. SHUMAKER, Clerk