Appendix

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. LAWRENCE EUGENE SHAW, *Defendant-Appellant*.	No. 13-50136 D.C. No. 2:12-cr-00862-JFW-1 OPINION

Appeal from the United States District Court
for the Central District of California
John F. Walter, District Judge, Presiding

Argued and Submitted
November 17, 2014—Pasadena California

Filed March 27, 2015

Before: Mary M. Schroeder, Harry Pregerson,
and Jacqueline H. Nguyen, Circuit Judges.

Opinion by Judge Schroeder

SUMMARY*

Criminal Law

The panel affirmed a conviction for a scheme to defraud a financial institution, in violation of 18 U.S.C. § 1344(1), in a case in which the defendant used PayPal to convince banks that he was a particular bank customer and thus had authority to transfer money out of that customer's bank accounts and into a PayPal account in the defendant's control.

The panel held that for a violation of § 1344(1), the government need not prove that the defendant intended the bank to be the principal financial victim of the fraud, and that the district court therefore correctly refused jury instructions that included such a requirement.

COUNSEL

Sean Kennedy, Federal Public Defender, Koren L. Bell (argued), Deputy Federal Public Defender, Los Angeles, California, for Defendant-Appellant.

André Birotte, Jr., United States Attorney, Robert E. Dugdale, Assistant United States Attorney, Tracy L. Wilkison (argued), Assistant United States Attorney, Los Angeles, California, for Plaintiff-Appellee.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

SCHROEDER, Circuit Judge:

Congress enacted the Bank Fraud Act in 1984, and ever since, the federal courts have grappled with whether its provisions require proof of an intent to cause harm to the bank itself. The Act contains two clauses: the first criminalizes schemes "to defraud a financial institution," and the second schemes to obtain bank assets or property under its control "by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344. Last year, the Supreme Court held that the second clause does not require proof that the defendant intended to defraud the bank. *Loughrin v. United States*, 134 S. Ct. 2384, 2387 (2014). In this case, we deal with the first clause, which by its terms does require such proof. The question here is whether that means the government must prove the defendant intended the bank to be the principal financial victim of the fraud.

The principal intended victim in this case, at least according to the defendant, was a bank customer, Stanley Hsu. The defendant, Lawrence Shaw, had access to the victim's bank statements. The gist of Shaw's scheme was to use PayPal, an online payment and money transfer service, to convince the banks that he was Hsu and thus had authority to transfer money out of Hsu's bank accounts and into the PayPal account in Shaw's control.

The government charged Shaw with violating § 1344(1). Shaw sought a jury instruction that, under § 1344(1), the government had to prove not only that he intended to deceive the bank, but that he also intended to target the bank as the principal financial victim of the fraud, rather than the account holder or PayPal. The district court refused to give such an instruction, concluding that clause 1 required proof only that the defendant intended to deceive the bank, not that he also intended the bank to bear the loss.

While the circuits are divided as to the requirements of § 1344(1), our Ninth Circuit case law answers Shaw's argument. We have held that, to the extent § 1344(1) requires any intent to expose the bank to a risk of loss, the requirement is easily satisfied by the bank's having to bear some potential administrative expenses that necessarily result from being defrauded. *See United States v. Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995). We did not hold that the bank needed to be the intended financial victim of the fraud. In this case, a principal intended financial victim of the fraud was the bank customer who held the account, and our law has dealt with that specific situation. We have held that the statute is violated where the bank is the target of the deception, even if bank customers were the intended financial victims of the fraud. *See United States v. Bonallo*, 858 F.2d 1427, 1429–30, 1430 n.2 (9th Cir. 1988).

These cases help define the meaning in this circuit of § 1344(1)'s element of intent "to defraud," and establish that it does not include intent to financially victimize the bank. That result is fully consistent with the Supreme Court's decision in *Loughrin*, and indeed complements *Loughrin*'s holding that § 1344(2) of the statute does not require any intent to defraud the bank. Section 1344(1) does require intent to defraud the bank, but neither clause requires the bank to be the intended financial victim of the fraud. We therefore affirm the conviction.

BACKGROUND

The charges in this case arose from a scheme defendant Shaw devised to take money from bank accounts belonging to Stanley Hsu, a Taiwanese businessman. Hsu opened a Bank of America account while working in the United States. When he returned to Taiwan, he arranged for the daughter of one of his employees to receive his mail in the States and forward it to him in Taiwan. Shaw was living with the daughter and routinely checked her mail. When Hsu's Bank of America statements began to arrive, Shaw opened them and learned Hsu's account and personal information.

Shaw used the information from Hsu's statements to execute the following scheme: he opened an email account in Hsu's name, then used this email account and Hsu's personal information to open a PayPal account. Shaw "linked" the PayPal account to Hsu's account with Bank of America. He was able to circumvent PayPal's security measures because of his access to the information in Hsu's bank statements.

On June 4, 2007, Shaw opened two accounts with Washington Mutual under the name of his father, Richard Shaw, without his father's knowledge or permission. One account was a savings account ("Tier 1" account), which Shaw linked to the fake Hsu PayPal account. During the process of linking the Tier 1 account with the Hsu PayPal account, PayPal identified the request as suspicious. PayPal sent an email to the fake Hsu email account asking for additional information. In response, Shaw faxed PayPal a copy of Hsu's Bank of America account statement, and a bank statement he had altered to appear as if Hsu owned the Richard Shaw accounts. He also sent a copy of Hsu's driver's license, which he had altered to have a younger birth date. On the basis of these falsified documents, Washington Mutual and PayPal allowed the savings account in the name of Shaw's father and the PayPal account in Hsu's name to be linked.

The second account Shaw opened in his father's name was a checking account ("Tier 2" account). This account was linked to the Tier 1 savings account. Shaw's scheme ultimately siphoned the funds into a third Washington Mutual account, a joint account which Shaw had previously opened in his and the daughter's name, although without her knowledge.

Once the accounts were set up and linked, Shaw began to withdraw money from Hsu's Bank of America account through a series of online transfers and checks written to himself. He would transfer money from the Hsu Bank of America account first to the Hsu PayPal account, then transfer it from the Hsu PayPal account to the Tier 1 savings account with Washington Mutual. Then, Shaw would transfer money from the Tier 1 account to the Tier 2 checking account, which allowed him to write checks to himself, signing his father's name. Finally, he would deposit those checks into the Washington Mutual joint account that he controlled.

Using this scheme, Shaw was able to convince the banks to transfer and release approximately $307,000 of Hsu's money to Shaw between June and October 2007. Hsu's son discovered the missing money in October 2007, reported the fraud and closed the Bank of America account.

Bank of America returned approximately $131,000 to Hsu, covering the fraudulent activity that occurred within 60 days of the reported fraud. PayPal reimbursed Bank of America for this amount. In the end, PayPal bore approximately $106,000 of the loss and Hsu over $170,000, because Hsu did not notify the banks of the losses within 60 days of many of the fraudulent transactions, as the parties all agree was required by standard banking practice.

DISTRICT COURT PROCEEDINGS

The government charged Shaw with 17 counts of bank fraud in violation of § 1344(1) and in December 2012 the case went to trial before a jury. The defense theory was that a bank fraud conviction under § 1344(1) requires fraudulent intent to expose the bank itself to monetary loss, and Shaw intended only to expose PayPal and Stanley Hsu to any monetary loss. Shaw argued that "intent to defraud" means intent to deceive and cheat the bank. Shaw therefore asked for jury instructions which would require the government to prove that Shaw had intended the bank to be not only the target of the deception, but to suffer an actual loss or risk of loss as the financial victim of the fraud. His requested instructions provided:

> (1) The defendant knowingly carried out a scheme to defraud [the bank]; that is a scheme designed to victimize [the bank] by causing [the bank], not only Stanley Hsu, monetary loss;
>
> (2) The defendant actively deceived [the bank] as to a material fact; that is, a fact that had a natural tendency to influence, or was capable of influencing, [the bank] to part with money or property;

> (3) The defendant acted with the specific intent to defraud [the bank]; that is, with the intent to deceive and cheat [the bank] in order to expose [the bank], not only Stanley Hsu, to monetary loss.
>
> (4) [The bank] was federally insured by the FDIC.
>
> It is not enough for the government to prove that Mr. Shaw carried out a scheme to obtain Mr. Hsu's money by deceiving [the bank]. In order to convict Mr. Shaw, you must find that [the bank] itself was both the target of his deception and an intended victim of the fraud.

The district court declined to give Shaw's requested jury instructions. The district court concluded that risk of loss was an element that the bank fraud statute did not require, and that the bank need not be an intended financial victim of the fraud. Instead, the trial judge gave instructions based on a combination of model jury instructions and instructions used in previous bank fraud cases in the Ninth Circuit. The judge instructed the jury that:

> [i]n order for the defendant to be found guilty of bank fraud, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant knowingly executed a scheme to defraud a financial institution as to a material matter;

> Second, the defendant did so with the intent to defraud the financial institution; and
>
> Third, the financial institution was insured by the Federal Deposit Insurance Corporation.
>
> . . . .
>
> The phrase "scheme to defraud" means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, or deprive a financial institution of something of value. It is not necessary for the government to prove that a financial institution was the only or sole victim of the scheme to defraud. It is also not necessary for the government to prove that the defendant was actually successful in defrauding any financial institution. Finally, it is not necessary for the government to prove that any financial institution lost any money or property as a result of the scheme to defraud.
>
> . . . .
>
> An intent to defraud is an intent to deceive or cheat.

The jury convicted Shaw of 14 counts of bank fraud on December 13, 2012, and this appeal followed.

DISCUSSION

The bank fraud statute, 18 U.S.C. § 1344, provides:

> 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.

In *Loughrin v. United States*, the Supreme Court construed the second clause, and held that it does not require the government to prove that the defendant intended to defraud the bank. 134 S. Ct. 2384, 2387 (2014). Section 1344(2) targets schemes to obtain property held by the bank via misrepresentation to a third party, while § 1344(1) penalizes schemes to defraud the bank itself. *See id.* at 2389–92. The Supreme Court effectively required courts to treat the two clauses separately, holding that while they overlap substantially, the clauses are disjunctive and establish distinct offenses. *Id.* at 2390, 2390 n.4.

In holding that the two clauses create separate offenses, the Court rejected the reasoning of the Third Circuit. *See id.* at 2388–89. The Third Circuit held that clauses 1 and 2 conjunctively create only one offense, and thus all violations of the statute require both the intent to defraud the bank and that the bank be exposed to a risk of loss under the relevant law. *United States v. Thomas*, 315 F.3d 190, 199–201 (3d Cir. 2002) (holding that under both clauses, "a defendant must intend to cause a bank a loss or potential liability, whether by way of statutory law, common law, or business practice" (internal quotation marks omitted)). The Supreme Court expressly held that § 1344(2) does not require either intent to defraud a bank or a risk of loss to a bank. *Loughrin*, 134 S. Ct. at 2389–90, 2395 n.9. In doing so, it emphasized that intent to defraud a bank is the essence of § 1344(1). *Id.* at 2389–90.

Shaw's argument in this case therefore focuses on the difference between the two clauses. He points out that the second clause covers schemes intended to obtain a third party's property. He argues that the first clause, under which he was convicted, therefore must require that a defendant intend to obtain the bank's property. Thus, he asks us to conclude that a conviction under § 1344(1) requires a showing that the defendant intended to expose the bank to the principal risk of loss. Such a requirement was not satisfied since, in this case, Shaw intended his principal target to have been the bank's customer, Hsu.

Shaw thus seeks to characterize the difference between the two clauses as involving the intended financial victim of the fraud, i.e., the intended bearer of the loss. The language of neither clause of the statute, however, refers to monetary loss or to the risk of such loss. The statutory language focuses on the intended victim of the deception, not the intended bearer of the loss. Section 1344(1) requires the intent to deceive the bank. Section 1344(2) requires false or fraudulent representations or pretenses to third parties. The Supreme Court made this point in *Loughrin* when it noted that the second clause was intended to broaden the scope of bank fraud to include schemes that did not involve deception of the bank directly, such as schemes to use stolen credit cards. *See* 134 S. Ct. at 2391–92. Section 1344(1) thus covers schemes to deceive the bank directly. Neither clause requires the government to establish the defendant intended the bank to suffer a financial loss.

Analysis of our circuit's law before *Loughrin* counsels the same result. In *United States v. Bonallo*, 858 F.2d 1427 (9th Cir. 1988), we recognized that under § 1344(1) the bank itself need not be the sole or primary victim of the scheme. Rather, the bank is defrauded within the meaning of § 1344(1) when it is the target of the deceit, even if the scheme targeted the bank's customer accounts as the source of the money. *See id.* at 1434 n.9.

In *Bonallo*, a bank employee withdrew funds from his own account via the ATM, then manipulated the bank's computer system to charge the withdrawals against other customers' accounts. *Id.* at 1429–30. The defendant argued that the other customers were the intended victims of his scheme and therefore the bank was not defrauded within the meaning of the statute. We rejected this argument, finding that the bank was the target of his misrepresentation, even if the customers' accounts were the source of the funds. *See id.* at 1434 n.9. In short, the defendant was guilty of bank fraud because he intended to deceive the bank.

In *United States v. Wolfswinkel*, 44 F.3d 782 (9th Cir. 1995), we considered whether a risk of financial loss to a bank was as an element of § 1344(1). We held that even if there were such a requirement of financial loss to the bank, it was easily satisfied. The defendant was convicted of bank fraud under § 1344(1) after he engaged in a check-kiting scheme, during which he convinced a bank officer to sell him cashier's checks paid for with insufficiently-backed checks. *Id.* at 784. On appeal, Wolfswinkel argued that the government had to show he exposed the bank to a risk of loss under § 1344(1), and he had not, because he provided collateral to the bank to secure any losses for the bounced checks. *Id.* at 785–86.

In affirming Wolfswinkel's conviction, we recognized a circuit split as to whether § 1344(1) requires proof of risk of loss to the bank to establish the defendant's intent to defraud. *Id.* at 786. We held, however, that even assuming there were such a requirement, Wolfswinkel's scheme satisfied it. *See id.* Although he had provided security for potential losses, Wolfswinkel exposed the bank to a risk of loss in the form of administrative costs and the threat of competing creditor claims if it were forced to liquidate the collateral. *Id.* The defendant need not have intended the bank to bear the risk of losing the amount involved in the financial scheme itself.

The Supreme Court's decision in *Loughrin* does not affect the validity of our precedent, or undermine it in any way. If anything, it lends credence to our reluctance to impose any risk of loss requirement in a prosecution under the bank fraud statute. *Loughrin* confirms our conclusion that the difference between the two clauses is which entity the defendant intended to deceive, not which entity the defendant intended to bear the financial loss. *See* 134 S. Ct. at 2389–90 (emphasizing that nothing in § 1344(2) requires specific intent to deceive a bank, which § 1344(1) already covers).

Shaw stresses that under the applicable law, the bank, in the end, did not actually lose anything. The losses ultimately fell on Hsu for failing to spot much of the fraud within the legally required 60 days, and on PayPal, which had to reimburse the bank for the rest. Shaw therefore asks us to conclude that he could not have intended to defraud the bank. A similar argument with respect to clause 2 was dismissed summarily in *Loughrin* on the ground that the federal statute was intended to avoid having cases turn on the technical ramifications of banking law. *Id.* at 2395 n.9. In characterizing § 1344(2), the Court said that the language "appears calculated to avoid entangling courts in technical issues of banking law about whether the financial institution or, alternatively, a depositor would suffer the loss from a successful fraud." *Id.* We conclude that the same legislative intent must be ascribed to § 1344(1). There is no reason to believe Congress wanted courts to become more entangled in such technical issues under the first clause than under the second clause.

We recognize that some circuits have held that risk of financial loss to the bank is an element that must be proven under § 1344(1). *See, e.g.*, *United States v. Staples*, 435 F.3d 860, 866–67 (8th Cir. 2006) (discussing difference of opinion among circuits on whether intent to harm or cause the bank a risk of loss is required). The reason given is that the purpose of the statute is protection of the federal fisc, and that purpose is not served if the bank faces no financial risk. *See, e.g.*, *Thomas*, 315 F.3d at 201. Circuits adopting the requirement cite to the legislative history of the bank fraud statute, which shows that Congress enacted it because of the "strong federal interest in protecting the financial integrity of [federally insured financial] institutions." *See, e.g.*, *id.* (quoting S. Rep. No. 98-225, at 377 (1984), *reprinted in* 1984

U.S.C.C.A.N. 3182, 3517.); *United States v. Nkansah*, 699 F.3d 743, 759 (2d Cir. 2012) (same). But requiring proof of intent that a bank bear a risk of loss does not serve this end. The entity that bears the risk of loss does not necessarily depend upon the entity (i.e., the federally insured financial institution) that the defendant intends to harm. It depends on the operation of banking laws that, as this case demonstrates, may result in having the instruments of the fraud, like the bank's customers or entities like PayPal, ultimately bear the loss. A scheme that is intended to harm third parties may, in fact, end up hurting the bank, and vice versa. Few criminals have any knowledge of the rules of law that govern which entity bears the risk of loss. Requiring intent to harm the bank only makes it more difficult to prosecute bank fraud. *Nkansah*, 699 F.3d at 759 (Lynch, J., concurring); *see also Loughrin*, 134 S. Ct. at 2395 n.9 (citing *Nkansah* concurrence with approval).

The Court in *Loughrin* held that § 1344(2) does not require intent to defraud a bank because the plain language of that section includes no such requirement. 134 S. Ct. at 2389–2390. We similarly decline to read an additional element into § 1344(1) that Congress did not include; that does not serve the Congressional purpose; and that could needlessly entangle judges and juries in the intricacies of banking law. The district court correctly refused instructions that included such a requirement.

AFFIRMED.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

SHAW *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15–5991. Argued October 4, 2016—Decided December 12, 2016

Petitioner Shaw used identifying numbers of a bank account belonging to bank customer Hsu in a scheme to transfer funds from that account to accounts at other institutions from which Shaw was able to obtain Hsu's funds. Shaw was convicted of violating 18 U. S. C. §1344(1), which makes it a crime to "knowingly execut[e] a scheme . . . to defraud a financial institution." The Ninth Circuit affirmed.

Held:

1. Subsection (1) of the bank fraud statute covers schemes to deprive a bank of money in a customer's deposit account. Shaw's arguments in favor of his claim that subsection (1) does not apply to him because he intended to cheat only a bank depositor, not a bank, are unpersuasive.

First, the bank did have property rights in Hsu's bank deposits: When a customer deposits funds, the bank ordinarily becomes the owner of the funds, which the bank has a right to use as a source of loans that help the bank earn profits. Sometimes, the contract between the customer and the bank provides that the customer retains ownership of the funds and the bank only assumes possession; even then, the bank has a property interest in the funds because its role is akin to that of a bailee. Hence, for purposes of the bank fraud statute, a scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a "financial institution," at least where, as here, the defendant knew that the bank held the deposits, the funds obtained came from the deposit account, and the defendant misled the bank in order to obtain those funds.

Second, Shaw may not have intended to cause the bank financial harm, but the statute, while insisting upon "a scheme to defraud," demands neither a showing that the bank suffered ultimate financial loss nor a showing that the defendant intended to cause such loss. This Court has found no case that interprets the statute as Shaw does. Cf. *Carpenter* v. *United States*, 484 U. S. 19, 26.

Third, that Shaw may have been ignorant of relevant bank-related property law is no defense to criminal prosecution for bank fraud. Shaw knew that the bank possessed Hsu's account, Shaw made false statements to the bank, Shaw believed that those false statements would lead the bank to release from that account funds that ultimately and wrongfully ended up with Shaw, and the bank in fact possessed a property interest in the account. These facts are sufficient to show that Shaw knew that he was entering into a scheme to defraud the bank even if he was not aware of the niceties of bank-related property law. Cf. *Pasquantino* v. *United States*, 544 U. S. 349, 355–356.

Fourth, Shaw mistakenly contends that the statute requires the Government to prove not just that he acted with the *knowledge* that he would likely harm the bank's property interest but also that such was his *purpose.* This Court has found no relevant authority supporting the view that a statute making criminal the "*knowin[g]* execut[ion of] a scheme . . . to defraud" requires something more than knowledge. *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U. S. 662, 665–668; *Tanner* v. *United States*, 483 U. S. 107, 110–112; *United States* v. *Cohn*, 270 U. S. 339, 343; and *Bridges* v. *United States*, 346 U. S. 209, 221–222, distinguished.

Fifth, subsection (2) of the bank fraud statute, which makes criminal the use of "false or fraudulent pretenses" to obtain "property . . . under the custody or control of" a bank, may overlap with subsection (1), but it does not do so completely. Thus, it should not be read as excluding from subsection (1) applications that would otherwise fall within the scope of subsection (1), such as the conduct at issue in this case. See *Loughrin* v. *United States*, 573 U. S. ___, ___, n. 4.

Finally, because the bank fraud statute is clear enough, the rule of lenity is not implicated. Pp. 2–8.

2. With regard to the parties' dispute over whether the District Court improperly instructed the jury that a scheme to defraud a bank must be one to deceive the bank *or* deprive it of something of value, instead of one to deceive *and* deprive, the Ninth Circuit is left to determine whether that question was properly presented and if so, whether the instruction given is lawful, and, if not, whether any error was harmless in this case. Pp. 8–9.

781 F. 3d 1130, vacated and remanded.

BREYER, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 15–5991

LAWRENCE EUGENE SHAW, PETITIONER *v.* UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[December 12, 2016]

JUSTICE BREYER delivered the opinion of the Court.

A federal statute makes it a crime "knowingly [to] execut[e] a scheme . . . to defraud a financial institution," 18 U. S. C. §1344(1), for example, a federally insured bank, 18 U. S. C. §20. The petitioner, Lawrence Shaw, was convicted of violating this provision. He argues here that the provision does not apply to him because he intended to cheat only a bank depositor, not a bank. We do not accept his arguments.

I

The relevant criminal statute makes it a crime:

> "knowingly [to] execut[e] a scheme . . .
>
> "(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." §1344.

Shaw obtained the identifying numbers of a Bank of America account belonging to a bank customer, Stanley

Hsu. Shaw used those numbers (and other related information) to transfer funds from Hsu's account to other accounts at other institutions from which Shaw could obtain (and eventually did obtain) Hsu's funds. Shaw was convicted of violating the first clause of the statute, namely, the prohibition against "defraud[ing] a financial institution." The Ninth Circuit affirmed his conviction. 781 F. 3d 1130 (2015). Shaw then filed a petition for certiorari arguing that the words "scheme to defraud a financial institution" require the Government to prove that the defendant had "a specific intent not only to deceive, but also to cheat, a *bank*," rather than "a *non-bank* third party." Pet. for Cert. i. We granted review.

II

Shaw makes several related arguments in favor of his basic claim, namely, that the statute does not cover schemes to deprive a bank of customer deposits. First, he says that subsection (1) requires "an intent to wrong a victim bank [a 'financial institution'] *in its property rights* . . . ." Brief for Petitioner 23. He adds that the property he took, money in Hsu's bank account, belonged to Hsu, the bank's customer, and that Hsu is not a "financial institution." *Id.,* at 25, 45. Hence Shaw's was a scheme "designed" to obtain only "a bank *customer's* property," not "a bank's *own* property." *Id.,* at 24–25.

The basic flaw in this argument lies in the fact that the bank, too, had property rights in Hsu's bank account. When a customer deposits funds, the bank ordinarily becomes the owner of the funds and consequently has the right to use the funds as a source of loans that help the bank earn profits (though the customer retains the right, for example, to withdraw funds). 5A Michie, Banks and Banking, ch. 9, §1, pp. 1–7 (2014) (Michie); *id.*, §4b, at 54–58; *id.*, §38, at 162; *Phoenix Bank* v. *Risley*, 111 U. S. 125, 127 (1884). Sometimes, the contract between the customer and the bank provides that the customer retains ownership of the funds and the bank merely assumes possession. Michie, ch. 9, §38, at 162; *Phoenix Bank, supra*, at 127. But even then the bank is like a bailee, say, a garage that stores a customer's car. Michie, ch. 9, §38, at 162. And as bailee, the bank can assert the right to possess the deposited funds against all the world but for the bailor (or, say, the bailor's authorized agent). 8A Am. Jur. 2d, Bailment §166, pp. 685–686 (2009). This right, too, is a property right. 2 W. Blackstone, Commentaries on the Laws of England 452–454 (1766) (referring to a bailee's right in a bailment as a "special qualified property"). Thus, Shaw's scheme to cheat Hsu was also a scheme to deprive the bank of certain bank property rights.

Hence, for purposes of the bank fraud statute, a scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a "financial institution," at least where, as here, the defendant knew that the bank held the deposits, the funds obtained came from the deposit account, and the defendant misled the bank in order to obtain those funds.

Second, Shaw says he did not intend to cause the bank financial harm. Indeed, the parties appear to agree that, due to standard banking practices in place at the time of the fraud, no bank involved in the scheme ultimately suffered any monetary loss. Brief for Petitioner 4; Brief for United States 4, 27–28. But the statute, while insisting upon "a scheme to defraud," demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss. Many years ago Judge Learned Hand pointed out that "[a] man is none the less cheated out of his property, when he is induced to part with it by fraud," even if "he gets a quid pro quo of equal value." *United States* v. *Rowe*, 56 F. 2d 747, 749 (CA2 1932). That is because "[i]t may be impossible to measure his loss by the gross scales available to a court, but he has suffered a wrong; he has lost," for example, "his chance to bargain with the facts before him." *Ibid.* Cf. O. Holmes, The Common Law 132 (1881) ("[A] man is liable to an action for deceit if he makes a false representation to another, knowing it to be false, but intending that the other should believe and act upon it"); *Neder* v. *United States*, 527 U. S. 1, 21–25 (1999) (bank fraud statute's definition of fraud reflects the common law).

It is consequently not surprising that, when interpreting the analogous mail fraud statute, we have held it "sufficient" that the victim (here, the bank) be "deprived of its right" to use of the property, even if it ultimately did not suffer unreimbursed loss. *Carpenter* v. *United States*, 484 U. S. 19, 26–27 (1987). Lower courts have explained that, where cash is taken from a bank "but the bank [is] fully insured[,] [t]he theft [is] complete when the cash [i]s taken; the fact that the bank ha[s] a contract with an insurance company enabling it to shift the loss to that company [is] immaterial." *United States* v. *Kucik*, 844 F. 2d 493, 495 (CA7 1988). And commentators have made clear that "on the criminal side, it is generally held that the lack of financial loss is no defense to false pretenses." 2 W. LaFave & A. Scott, Substantive Criminal Law §8.7(i)(3), p. 404 (1986). We have found no case from this Court interpreting the bank fraud statute as requiring that the victim bank ultimately suffer financial harm, or that the defendant intend that the victim bank suffer such harm.

Third, Shaw appears to argue that, whatever the true state of property law, he did not *know* that the bank had a property interest in Hsu's account; hence he could not have intended to cheat the bank of its property. Shaw did know, however, that the bank possessed Hsu's account. He did make false statements to the bank. He did correctly believe that those false statements would lead the bank to release from that account funds that ultimately and wrongfully ended up in Shaw's pocket. And the bank did in fact possess a property interest in the account. These facts are sufficient to show that Shaw knew he was entering into a scheme to defraud the bank even if he was not aware of the niceties of bank-related property law. To require more, *i.e.,* to require actual knowledge of those bank-related property-law niceties, would free (or convict) equally culpable defendants depending upon their property-law expertise—an arbitrary result. We have found no case from this Court requiring legal knowledge of the kind Shaw suggests he lacked. But we have found cases in roughly similar fraud-related contexts where this Court has asked only whether the targeted property was in fact property in the hands of the victim, not whether the defendant knew that the law would characterize the items at issue as "property." See *Pasquantino* v. *United States*, 544 U. S. 349, 355–356 (2005) (Canada's right to uncollected excise taxes on imported liquor counted as "property" for purposes of the wire fraud statute); *Carpenter*, *supra*, at 25–26 (a newspaper's interest in the confidentiality of the contents and timing of a news column counted as property for the purposes of the mail and wire fraud statutes). We conclude that the legal ignorance that Shaw claims here is no defense to criminal prosecution for bank fraud.

Fourth, Shaw argues that the bank fraud statute requires the Government to prove more than his simple *knowledge* that he would likely harm the bank's property interest; in his view, the Government must prove that such was his *purpose.* See *Voisine* v. *United States*, 579 U. S. ___, ___ (2016) (slip op., at 4) ("knowingly" committing an assault requires an awareness "'that [harm] is practically certain,'" whereas "purposefully" committing an assault is "to have that result as a 'conscious object'" (quoting ALI, Model Penal Code §§2.02(2)(a)–(b) (1962))). Shaw adds that his purpose was to take money from Hsu; taking property from the bank was not his *purpose.*

But the statute itself makes criminal the "*knowin[g]* execut[ion of] a scheme . . . to defraud." To hold that something other than knowledge is required would assume that Congress intended to distinguish, in respect to states of mind, between (1) the fraudulent scheme, and (2) its fraudulent elements. Why would Congress wish to do so? Shaw refers us to a number of cases involving fraud against the Government and points to language in those cases suggesting that the relevant statutes required that the defendant's purpose be to harm the statutorily protected target and not a third party. Brief for Petitioner 25–29. But in two of those cases, the fraudulent statement was made not to the Government but to the third party—a circumstance not present here. See *Allison Engine Co.* v. *United States ex rel. Sanders*, 553 U. S. 662, 665–668 (2008); *Tanner* v. *United States*, 483 U. S. 107, 110–112 (1987). In the third, the relevant portion of the statute expressly required a false statement "'for the *purpose* . . . of . . . defrauding the Government of the United States.'" *United States* v. *Cohn*, 270 U. S. 339, 343 (1926) (emphasis added). As for the fourth case, the language Shaw cites states the uncontroversial proposition that "defrauding or attempting to defraud the United States" means "fraud against the Government." *Bridges* v. *United States*, 346 U. S. 209, 221–222 (1953). In any event, these cases all involved crimes of fraud targeting the Government—an area of the law with its own special rules and protections. We have found no relevant authority in the area of mail fraud, wire fraud, financial frauds, or the like supporting Shaw's view.

Fifth, Shaw, reading the bank fraud statute as a whole, urges us to compare subsection (1) with subsection (2). *Supra,* at 1. Subsection (2), he points out, makes criminal the use of "false or fraudulent pretenses" to obtain "property . . . under the custody or control of" a bank. And in his view that fact means that we should read subsection (1) not to apply to those circumstances. That is to say, given the language of subsection (2), efforts such as his effort fraudulently to obtain money deposited in a bank account should not fall within the scope of the subsection (1) phrase "scheme . . . to defraud a financial institution." Brief for Petitioner 30–33.

As we read the two subsections, however, they do not demand that interpretation. The two subsections overlap substantially but not completely. Subsection (2) makes criminal the use of a scheme

> "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."

This language covers much that subsection (1) also covers, for example, making a false representation to a bank in order to obtain property belonging to that bank. See *Loughrin* v. *United States*, 573 U. S. ___, ___–___, n. 4 (2014) (slip op., at 6–7, n. 4) (recognizing the "substantial" overlap between the two subsections and noting that such overlap "is not uncommon in criminal statutes"). At the same time, it applies to a circumstance in which a shopper makes a false statement to a department store cashier in order to pay for goods with money "under the custody or control of a financial institution," say, Bank A. The shopper's false statement, though designed to obtain Bank A's property, might well not amount to an effort (under subsection (1)) to defraud Bank A (since the statement was made not to Bank A but to an agent of the department store). Given, on the one hand, the overlap and, on the other hand, a plausible reading of the language that applies it to circumstances significantly different from those at issue here, we have no good reason to read subsection (2) as excluding from subsection (1) applications that would otherwise fall within the scope of subsection (1), such as conduct of the kind before us.

Finally, Shaw asks us to apply the rule of lenity. Brief for Petitioner 40–41. We have said that the rule applies if "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U. S. 587, 596 (1961), there is "'a grievous ambiguity or uncertainty in the statute,'" *Muscarello* v. *United States*, 524 U. S. 125, 138–139 (1998) (quoting *Staples* v. *United States*, 511 U. S. 600, 619, n. 17 (1994)). The statute is clear enough that we need not rely on the rule of lenity. As we have said, a deposit account at a bank counts as bank property for purposes of subsection (1). *Supra,* at 2–3. The defendant, in circumstances such as those present here, need not know that the deposit account is, as a legal matter, characterized as bank property. *Supra*, at 4–5. Moreover, in those circumstances, the Government need not prove that the defendant intended that the bank ultimately suffer monetary loss. *Supra,* at 3–4. Finally, the statute as applied here requires a state of mind equivalent to knowledge, not purpose. *Supra*, at 5–6.

III

Shaw further argues that the instructions the District Court gave the jury were erroneous. He points out that the District Court told the jury that the

> "phrase 'scheme to defraud' means any deliberate plan of action or course of conduct by which someone intends to deceive, cheat, *or* deprive a financial institution of something of value." App. 18 (emphasis added).

This instruction, Shaw says, could be understood as permitting the jury to find him guilty if it found no more than that his scheme was one to deceive the bank but not to "*deprive*" the bank of anything of value. Brief for Petitioner 22–23. The parties agree, as do we, that the scheme must be one to deceive the bank *and* deprive it of something of value.

For reasons previously pointed out, we have held that a plan to deprive a bank of money in a customer's deposit account is a plan to deprive the bank of "something of value" within the meaning of the bank fraud statute. The parties dispute whether the jury instruction is nonetheless ambiguous or otherwise improper. We leave to the Ninth Circuit to determine whether that question was fairly presented to that court and, if so, whether the instruction is lawful, and, if not, whether any error was harmless in this case.

For these reasons, the judgment of the Ninth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	No. 13-50136
v.	D.C. No. 2:12-cr-00862-JFW-1
LAWRENCE EUGENE SHAW, *Defendant-Appellant*.	OPINION

On Remand from the United States Supreme Court

Filed March 27, 2018

Before: Mary M. Schroeder, Jacqueline H. Nguyen, and Andrew D. Hurwitz*, Circuit Judges.

Opinion by Judge Mary M. Schroeder

* This case was submitted to a panel that included Judge Pregerson, who recently passed away. Following the passing of Judge Pregerson, Judge Hurwitz was drawn by lot to replace him. Ninth Circuit General Order 3.2.h. Judge Hurwitz has read the briefs and reviewed the record.

SUMMARY[**]

Criminal Law

On remand from the Supreme Court, the panel affirmed a conviction for bank fraud.

The panel held that the defendant did not fairly present to this court, or to the district court, his challenge to the disjunctive form of the district court's jury instruction that a "scheme to defraud" within the meaning of 18 U.S.C. § 1344(1) means a defendant must intend to "deceive, cheat *or* deprive" the bank of something of value. The panel held that even if the defendant had preserved the objection, any error was harmless.

COUNSEL

James H. Locklin, Deputy Federal Public Defender; Hilary L. Potashner, Federal Public Defender; Federal Public Defender's Office, Los Angeles, California; for Defendant-Appellant.

Elana Shavit Artson, Assistant United States Attorney; Tracy L. Wilkison, Executive Assistant United States Attorney; Lawrence S. Middleton, Chief, Criminal Division; Sandra R. Brown, United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

OPINION

SCHROEDER, Circuit Judge:

This case, involving a conviction for bank fraud in violation of 18 U.S.C. § 1344(1), is before us on remand from the Supreme Court. *See Shaw v. United States*, 137 S. Ct. 462 (2016). Shaw had created a scheme to siphon off the funds in the account of a bank depositor, Stanley Hsu, through the use of an online payment and money transfer service, PayPal. The losses were eventually borne by Hsu and PayPal, not the bank, prompting Shaw to argue that he had not defrauded the bank within the meaning of the statute. *See id.* at 466.

We affirmed the conviction, and the Supreme Court agreed that a fraudulent scheme to obtain money in a depositor's account violates the statute. The Court also rejected the defendant's theory that the government must show that the bank itself suffered a financial loss or that the defendant intended the bank to suffer a financial loss. *See id.* at 466–68. We had reached the same conclusion. *See United States v. Shaw*, 781 F.3d 1130, 1135–36 (9th Cir. 2015).

The Supreme Court remanded the case, however, on an issue we had not considered. In the Supreme Court, Shaw challenged the disjunctive form of the district court's instruction to the jury that a "scheme to defraud" within the meaning of the statute means a defendant must intend to "deceive, cheat *or* deprive" the bank of something of value. *Shaw*, 137 S. Ct. at 469. The parties agreed in the Supreme Court that a conviction under subsection (1) requires both a scheme "to deceive the bank *and* deprive it of something of value." *Id.* Shaw argued in the Supreme Court that because the instruction was in the disjunctive, the jury was allowed to convict if it found the defendant intended only to deceive the bank and not to deprive it of something of value. *Id.* The Court remanded to us to consider whether this argument was fairly presented below, "and, if so, whether the instruction is lawful, and, if not, whether any error was harmless in this case." *Id.* at 470.

We called for supplemental briefs. Not surprisingly, Shaw contends he preserved such an instructional error argument in the district court and to us, and the government maintains he did not.

We have carefully reviewed the record. It shows that Shaw did object to the instruction given by the district court. But the objection was not on the ground he urged in the Supreme Court—that the instruction allowed the jury to convict if it found only an intent to deceive the bank without regard to an intent to deprive it of something of value. Rather, Shaw argued in the district court and on appeal to us that the instruction erroneously allowed the jury to convict for stealing Hsu's money, not the bank's. This was consistent with the position Shaw advanced all the way to the Supreme Court—that the government had to prove an intent to cheat the bank and not the depositor. As the Supreme Court has now clarified, an intent to obtain money from a depositor's bank account is sufficient to constitute bank fraud under 18 U.S.C. § 1344(1). It is not necessary to show an intent to cause the bank itself a financial loss. *See id.* at 467.

Accordingly we conclude that the argument the Supreme Court identified for consideration on remand was not fairly presented to us or to the district court. Shaw's argument was one of statutory interpretation that was creative and consistent with the record: that he did not violate the bank fraud statute because he was after Hsu's money. He did not object to the instruction on the ground it was in the disjunctive.

Moreover, even if Shaw had preserved the objection to the instruction, any error was harmless. *See United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1197 (9th Cir. 2000) (en banc) (holding that an instructional error is harmless if "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'") (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). The evidence was overwhelming that Shaw deceived the bank in order to obtain money from Hsu's bank account, and that he transferred the money from Hsu's account into accounts Shaw controlled. There was thus no reasonable possibility the jury could have convicted him on the basis of a deception alone, without the intent to obtain anything of value. Any error in the instruction was therefore harmless. Shaw would have been convicted whether the instruction was in the disjunctive or conjunctive.

The judgment of conviction is again **AFFIRMED**.

FILED

JUN 4 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LAWRENCE EUGENE SHAW, Defendant-Appellant.	No. 13-50136 D.C. No. 2:12-cr-00862-JFW-1 Central District of California, Los Angeles ORDER

Before: SCHROEDER, NGUYEN, and HURWITZ, Circuit Judges.

The panel has voted to deny Defendant-Appellant's petition for panel rehearing. Judges Nguyen and Hurwitz have voted to deny the petition for rehearing en banc, and Judge Schroeder has so recommended.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Defendant-Appellant's petition for panel rehearing and petition for rehearing en banc are denied.