No.:__________

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2017

Jason Springer

And

Rick Makohoniuk

Petitioners

vs.

United States of America

Respondent

On Petition for Writ of Certiorari from
The United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED FOR REVIEW

I. Shaw v U.S., 137 S.Ct. 462, 469-70 (2016), decided while these cases were on appeal, held that a "scheme to defraud" in violation of 18 U.S.C. §1334(1) is a deception to "deprive the bank of something of value". Is the Appeals' Court decision that the jury instructions in this case, which while emphasizing deceit, included no reference to deprivation of "something of value", a decision of an important federal question in conflict with this Court's decision in Shaw?

II. In upholding these convictions, the Appeals' Court ignored the Government's failure to prove any element of bank fraud as: 1) none of the entities named as "financial institutions" could potentially suffer a loss of "something of value" because they did not own the mortgages released on short sale; 2) none were FDIC insured or a mortgage lending business; 3) any misrepresentation on the HUD-1 settlement statements were not material to any potential bank loss of something of value; 4) none of the mortgage owners prohibited immediate resale of the involved properties for profit; 5) no one aided and abetted Springer in filing the HUD-1 settlement statements except the trustees, Steven and Smith as signatories, and neither Springer nor Makohoniuk aided or abetted Steven or Smith in negotiating the short sales; and 6)there was no proof that the mortgage owners could have gotten more money under the circumstances for release of their mortgages than they negotiated. Is the Eighth Circuit's decision to uphold these convictions so far departed from the accepted and usual course of judicial proceedings to call for an exercise in this Court's supervisory power?

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The opinion of the Court of Appeals is reported at 866 F3d 949 (8th Cir 2017) and is reprinted at App50. The jury verdict, judgment and sentencing in the district court are set forth at App20-App38.

JURISDICTION

The judgment and sentence of the district court was entered on August 3, 2016, and timely appealed by Springer, pursuant to 28 U.S.C. §1291 and by Makohoniuk per a granted extension to the Court of Appeals. The judgment of the Court of Appeals, Rehearing denied, was entered on October 5, 2017. The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

United States Constitution – Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken from public use, without just compensation.

United States Constitution – Amendment 14(1)

All persons born are naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

18 U.S.C. §1344(1) Bank Fraud

Whoever knowingly executes, or attempts to execute a scheme or artifice -- (1) to defraud a financial institution . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years or both.

18 U.S.C. §3231

The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

STATEMENT OF THE CASE

On 7/24/2014, the grand jury charged defendants, Nathan Smith, (Smith) Patrick Steven (Steven), owners of entities buying and selling houses, Jason Springer (Springer), an attorney, Rick Makohoniuk (Makohoniuk), a realtor, and Jerod Hogan, a mortgage broker in eight counts of bank fraud, contrary to 18 USC §1344(1) and (2).

Count I, against Smith, Steven and Springer charges that the Bank Fraud consisted of submitting a materially false HUD-1 settlement statement on 7/24/09, stating that Smith paid $34,499.20 in cash to purchase a home on 1st Avenue in Slater, IA to "Wells Fargo".

Count II, against Smith, Steven and Springer alleges a scheme to defraud by causing a materially false HUD-1 statement stating that Smith and Steven paid $58,766.48 in cash to purchase a home on East Rose Avenue in Des Moines, on 3/19/2010 to "Bank of America".

Count III, against Smith, Steven, Springer and Hogan alleged a similar scheme to defraud by submitting a materially false HUD-1 on 5/14/2010 to purchase Kenyon Avenue, Des Moines, to "US Bank".

Count IV, against Smith, Steven and Springer alleging the same method and manner of committing Bank Fraud occurring on 6/8/2010 regarding 52nd Street, Des Moines, and the payment of $125,522.31 in cash against "CitiMortgage".

Count V was dismissed by the Government pre-trial.

Count VI, against Smith, Steven and Springer, alleging the same method and manner of committing Bank Fraud occurring on 12/21/2010, regarding Garden Avenue, Des Moines, and the payment of $26,453.20 in cash to "CitiMortgage".

Count VII against Smith, Steven, Springer, Makohoniuk and Hogan, alleging the same method and manner of committing Bank Fraud occurring on 2/18/2011 regarding 56th Street, Des Moines, and the payment of $62,321.41 in cash to "GMAC Mortgage".

Count VIII against Smith, Steven, Springer and Hogan, alleging the same method and manner of committing Bank Fraud occurring on 3/25/2011, regarding 142nd Street, Urbandale, Iowa, and the payment of $371,737.20 to "JP Morgan Chase Bank".[1]

A jury trial was held for Springer on Counts I - IV and VI and VII and Makohonik on Count VII. Smith entered into a plea agreement (Exhibit 12) and testified against both defendants. The jury returned a guilty verdict on all counts on 2/12/2015 (App20-25). The case was submitted exclusively under 18 USC §1344(1) for submitting a materially false HUD-1 settlement statement to the enumerated "financial institutions" (App94-5).

Springer was sentenced on 8/3/2016, and filed his notice of appeal on 8/16/2016. Makohoniuk was sentence 8/3/2016 and field his notice of appeal 9/16/2016 pursuant to an extension of time (App26-38).

On August 9, 2017, the 8th Circuit panel, circuit judges Arnold, Wollman and Gruender sustained the convictions. In doing so, the court never acknowledged that although the defendants were indicted under both 18 U.S.C. §1344(1) and (2) for general conduct of Smith/Steven in

[1] The original indictment included other alleged facts which related to a charge of violating 18 U.S.C. §1344(2) and flipping houses which are not referenced because the court only submitted charges under subsection 1, representing that Smith/Steven brought cash to the closing of the short sales.

negotiating with mortgage owners an amount that was agreeable for the release of their mortgages in connection with the sale of a property and specific conduct of submitting an allegedly false HUD settlement statement to these mortgage owners, the court only submitted to the jury the specific claims regarding submission of false HUD-1 settlement statements under 18 U.S.C. §1344(1). The circuit court also made substantive misstatements of fact regarding the record. It states at 952 "In fact, many of these lenders had a rule to prevent quick property flips after a short sale." As laid out in the petition for rehearing with respect to each of the sales under the heading "resale restrictions" (App65-74), there were no resale restrictions imposed by any of the mortgage owners. As to count II, Bank of America had a restriction in its closing instruction at ¶10 but it was a loan servicer not a mortgage owner. This provision was not specifically brought to Springer's attention and there is no evidence that he saw it or knew about it. Nor is there any evidence that Smith or Steven were aware of this provision.

Under Count VII, regarding 56th Street, the mortgage servicer, GMAC, imposed a nebulous restriction per testimony of its employee, Bonewitz, that there should be no flipping within "a short time frame". This restriction was not imposed by the owner of the mortgage, HUD. In the statement of facts the 8th Circuit misrepresents the role of GMAC as the servicer of the mortgage owned by HUD indicating, "At least one lender required a signed affidavit stating that no agreements were in place with other buyers to sell the property immediately after the short sale." *Id952.*

Another factual misstatement is that, "Lenders for the ultimate purchaser of the property typically would not approve a loan if the property had changed ownership within a certain amount of time, such as 90 days." *Id952.* This reference is to a HUD regulation, suspended at the time that all of these transactions, that denied HUD guarantees to borrowers who purchased property which had been flipped within 90 days. Since the provision was not in effect, this statement, in addition to being erroneous, is irrelevant.

It also states that Smith and Steven tried to get around this 90 day requirement by asking the original owners to quit claim the property to trusts while they were negotiating short sales with the mortgage owners. There is nothing in the record to substantiate this statement nor should there be since this HUD requirement did not apply to Steven and Smith as stated above. Smith testified that the reason for quit claiming the property to the individual trusts was to avoid the fixing of additional liens which would further complicate the job of clearing the liens off of the property while the negotiations were ongoing.

The Appeals' Court's statement of facts does properly recognize, that "Makohoniuk was a real estate agent who the Government alleged misrepresented that Smith and Steven did not have an agreement to flip a particular house (56th Street) when he knew they did." *Id952.* Facts which were not in the opinion but were material to evaluating the convictions are: 1) The government failed to prove that any of the entities alleged to be, "federal institutions" (FDIC insured) in Counts I - IV, VI & VIII, were the mortgage owners who were placed at a potential risk of loss of something of value at the time of the closings for sales from the original owners to the trusts (Count I - FDIC insured "Wells Fargo", mortgage owner "Wells Fargo Mortgage" or "Wells Fargo Financial Iowa 3, Inc."; Count II - "Bank of America" was only the loan servicer for "Argent Mortgage" the owner; Count III - "US Bank" was only a loan servicer", the investor/owner is "FreddyMac"; Counts IV & VI - "CitiMortgage" is listed in the indictment, the FDIC institution is "CitiBank" per testimony, mortgage owner is "CBNA"; Count VIII - "J.P. Morgan Chase Bank", is listed in the indictment, FDIC insured entity and mortgage owner is "Chase"; Count VII - "GMAC Mortgage" is alleged to be the "mortgage lending business", "GMAC" is the loan servicer and HUD is the owner).

The decision does not indicate factually how any of the alleged victims could have potentially suffered loss of something of value by reason of submission of the HUD settlement statements. Instead of laying out the factual basis for proof of this element, the court quotes Shaw v U.S., 137 S.Ct. 462, 469-70 (2016), as follows, "It is true that the court said later in the opinion that, 'the parties agree as do we, that the scheme must be one to deceive the bank and deprive it of something of value', *Id at 469*". However it indicates that being deprived of something of value can be narrower than the concept of "financial loss", *Id954*. Rather than explaining how the HUD settlement statements, on account of the alleged misrepresentation that cash was brought to the closing presented the lender with a prospect of losing of something of value, the Court skips to the unsubmitted theory that the loss that occurred by the lenders' approval of a short sale based on "misleading" information, *Id955*. This was not a potential loss of something of value charged in the case and submitted to the jury, nor was it proved because the mortgage owners were merely agreeing to release their mortgages for a certain sum. This sale to the trusts was not a conventional sale as it did not require repair of the properties (they were conveyed "as is") nor clearing of the title of liens in addition to the mortgage at issue here. In Count I "Wells Fargo Financial Iowa 3, Inc." was foreclosing its mortgage and had the option of purchasing and fixing it up and reselling it itself. In Count II, the loan servicer, "BAC Home Loan Servicing L.P." stated in its permission for the short sale that the house was in an "as is" condition. Further, there was an additional mortgage, a child support lien and two judgments against it. As to Count III, "U.S. Bank" the loan servicer insisted that the property be transmitted in an "as is" condition and did not provide for release of the Christopherson judgment. As to Count IV, "CitiMortgage" insisted that the property be transferred in "as is" condition and made no provisions for clearing a tax sale lien. In Count VI, "CitiMortgage", required transfer of the property in an "as is" condition and made no provisions for clearing the tax sale lien to the City of Des Moines. In Count VII, "GMAC Mortgage", the loan servicer, insisted on conveyance of the property in "as is" condition. It had already foreclosed on the property and thus had an option to purchase the house at foreclosure sale, fix it up and resell it. It also made no provision for releasing liens of the second mortgage and real estate taxes in calculating what it would take to release its mortgage. As to Count VIII, "Chase" insisted on the property being transferred in an "as is" condition and made no provision for release of a second mortgage or federal tax lien.

Focusing only on the charge of submission of a materially false HUD settlement statement, the 8th Circuit hypothesizes, ". . . there was always the risk that the closing on the second transaction might hit a snag, and so Smith and Steven would not be able to pay for the property." *Id955*. This does not comport with the record, which shows the transactions were structured so that the final HUD settlement statement is submitted contemporaneously with payment of the agreed amount for release of the mortgage and the mortgage owner does not release its mortgage until after it has received both the HUD and the funds. Further, since all payments were made out of Springer's trust account to the mortgage owners for release of their mortgages, if there was a slight delay in receipt of the proceeds from the ultimate resale purchaser, the Springer Trust Account provided those funds. (See the heading "Funds Source A to B" as to Count I, II and VII. (Application for rehearing App66-7 & 73).

Another factual omission from the Court of Appeals' decision is a description of why the HUD settlement forms submitted were materially false. The Government's case presented below was based on the claim that Line 303, entitled "cash from borrower" was a false statement because it was filled in for the amount which Smith and/or Steven were to have brought to the closing on behalf of whichever of their land trusts were purchasing the home from the original owner. It should be noted that this line refers to a "borrower", the land trust is noted above as a "borrower" with the lender noted as "cash". There is nothing in the form which would prevent the land trusts from borrowing from a mortgage lender or receiving the funds from either the ultimate purchaser, the Springer Trust Account or some undisclosed person or entity. Further, the signatories on the statement were the original owners as sellers, Smith or Steven, whichever was the trustee of the land trust purchasing the property and Springer as the settlement agent. The 8th Circuit did not explain why the failure of the "borrower", the land trust, to have actual cash on hand at the closing is a material misrepresentation as it relates to the mortgage owners as the final executed statements were submitted with the funds to make the agreed payment for release of the mortgages.

The jury instruction #10, (App17-16) which was analyzed for sufficiency regarding statement of the elements was analyzed by the Court of Appeals specifically for its definitions of "scheme to defraud" and "material". Instruction #5, (App13-15) is a statement of the elements as to each count. The elements of each of the crimes are: 1) that the defendant knowingly executed a scheme to defraud a financial institution, 2) the defendant did so with the intent to defraud; and 3) the financial institution was insured by the federal deposit insurance corporation or was a mortgage lending business. There is nothing in this explanation of the elements that would suggest to the jury that it has to find that whatever scheme to defraud that was knowingly executed, must be one to cause a potential loss of something of value. "Scheme to defraud", as defined in the jury instructions, could lead a reasonable juror to believe that a potential loss of something of value has nothing to do with a scheme to defraud. The instruction states as follows:

> "The phrase 'scheme to defraud' includes any plan or course of action intended to deceive or cheat another by employing material falsehoods, concealing material facts, or omitting material facts. No actual monetary loss or intent to cause a monetary loss is required, however the 'scheme to defraud' must be reasonably calculated to deceive persons of ordinary prudence." (App14).

The court rejected the argument that the jury instructions were faulty for failure to mention a potential loss of something of value, pointing to the definition of "material" as clarifying this point. *Id955.* The definition of material merely states:

> "A fact, falsehood, pretence, representation, or promise is 'material' if it has a natural tendency to influence, or is capable of influencing the decision of the institution in deciding whether to engage or not to engage in a particular transaction. However, whether a fact, falsehood, pretence, representation or promise is 'material' does not depend on whether the institution was actually deceived."(App50).

The court does not specifically refer to the "intent to defraud" definition, but this instruction also fails to mention any nexus between the alleged fraud and a "financial institution" potentially losing "something of value". It states, " . . . To act with 'intent to defraud' means to act knowingly and with the intent to deceive someone . . ." It specifically finds, "We are convinced that the 'materiality' qualification obviates any fear that the court's instructions could `allow the jury to convict the appellants for harmless misrepresentations". *Id955.* This statement does not clarify the essential nexus between the fraud of the "financial institute" and the potential of losing something of value.

Finally, when addressing the challenge to the submission of an aiding and abetting instruction, both with respect to Springer and Makohoniuk, the Appeals' Court fails to recognize that the basis for the argument is that there is not sufficient evidence to support such a jury instruction and accordingly submitting it invites error. In the Springer reply brief, page 17-18, and Makohoniuk reply brief, page 12, respectively, the comment is made, "Instruction #6 'aiding and abetting' should not have been submitted because it is not supported by the evidence . . ., and likely resulted in the jury blaming Springer for the actions of Smith and Steven and Makohoniuk for the actions of Smith, Steven and Springer." The instruction accurately indicates that in order to have aided and abetted, the commission of the crimes of bank fraud, a person must, before or at the time the crime was committed, have: 1) known the crime of bank fraud was being committed or going to be committed; 2) have knowingly acted in some way for the purpose of causing encouraging or aiding the bank fraud; and 3) have acted with the intention of causing the crime to be committed. If the crime charged, knowingly submitting a false HUD-1 settlement statement circumscribes the inquiry, then Springer is not appropriately charged as an aider or abetter but as the individual committing the crime, as he, in fact prepared and submitted the HUD-1 settlement statements. However, as previously indicated, there was no crime committed by submission of these statements.

Turning to Makohoniuk, he could not have committed this action since he is not shown to have known necessarily that a HUD-1 settlement statement would be submitted, what would be indicated on it or how the financing was to be arranged. This argument was dismissed by the Appeals' Court indicating, "The charges were not limited to the false HUD-1s only; the jury could, in fact, should consider the underlying scheme to defraud, which explains how the defendants duped the financial institutions into approving the short sales." *Id955*. This observation is contrary to the jury instructions which are limited only to the submission of allegedly false HUD-1s. It is also contrary to the evidence which is that none of the mortgage owners had restrictions on resale.

ADDITIONAL FACTS

Nathan Smith (Smith) and Patrick Steven (Steven), in their own names, as trustees of individuals trusts took title to distressed properties and in their wholly owned entities, Iowa Short Sales, LLC, (ISS) d/b/a Central Iowa Homebuyers, and Iowa Loan Modification (ILM) negotiated short sale payoffs of mortgagees, then purchased the properties for just enough to cover the sums necessary to pay the mortgage owners, clear some liens to the property and pay closing costs (Exh 10 & 11, T.p. 61-63,65-66,72-74, 76,82,84). The conveyances to the trusts occurred in order to protect the property against the attachment of future liens which would make it more difficult to clear in the event of a negotiated short sale (T.p.77-79). While Smith and Steven were negotiating with the lenders regarding the short sale, they looked for subsequent purchasers who would pay more money for the properties so they could make a profit. Rick Makohoniuk (Makohoniuk) had no role in running the companies or negotiating short sales. Attorney Jason Springer (Springer) closed a number of their purchase and sale transactions (T.p.63,82,100,130,133,135-136,159-160). In negotiating with Smith or Steven on the short sale, the mortgagees would counteroffer if they were dissatisfied with the offered payoff based on their own assessment of the property's fair market value (T.p.120-121). Counts 2, 3, and 7, named only servicing agents as victims not mortgage owners. As to the rest of the counts, there were discrepancies in the names charged as mortgage owners and the evidence. None of the mortgage owners restricted the time within which the houses could be resold. Two servicing agents, Bank of America, Count 2 and GMAC, Count 7, had some restrictions (App67, App72). Because of the practically simultaneous closings for the purchase and the resale, Smith or Steven would generally, but not always, bring a check for the amount of the trust's purchase from the distressed seller and Springer would deposit the check after the money came in from the ultimate buyer (T.p.99-100). Smith indicated that he could get financing by other means but that it would cost him money to do so. Accordingly he preferred this method (T.p.201,295,363,976).

As the attorney, Springer's role was to make sure that the numbers on the final HUD-1 settlement statement were accurate and disburse the funds accordingly (T.p.1146-1147, 1156, 1196,1201-1203). He closed the A to B transaction (Gannon to Trust) only for 56th Street (T.p.1240-1244; Exh 7E; Exh 22,pg46). Makohoniuk acted as a real estate agent only for the 56th Street transaction primarily on the B to C transaction (Trust to Sherman) representing the Shermans. He substituted for Marlene Thatcher, the original real estate agent on the A to B (Gannon to Trust) transaction on 2/17-

18/2011. (T.p.330-331,334-335,342,368,377-380,388-390,401,429). In that role, Makohoniuk signed a "name affidavit" indicating that the A to B transaction is an arms length transaction. There is no evidence that his knowledge of the transaction contradicted this statement (Exh 7GG).

On February 17, 2011, one day prior to closing, Makohoniuk learned from Smith that there was an anti-flipping affidavit which GMAC was requesting in connection with closing the transaction between Gannon and the Trust. Troublesome language in the affidavit related to whether there were pending plans to resell, "at a higher price" (Exh 22, File 1, page 76 & T.p.130-2, 140-2). Makohoniuk proposed to Smith that he step into the transaction to sign as the real estate agent. He thought the language of the affidavit was not written well and that they certainly were not "artificially inflating" the value of the house on resale (T.p.143-5). Some work had been done by the Trust on the property but the numbers for the work on the affidavit were artificially created by the Makohoniuk. This invoice and information were provided to Charles Hendricks, who was closing the B to C transaction for the HUD-1, not to support any entry on the A to B transaction HUD-1(T.p.158-166, 1037-1038).

The mortgagees or servicing agents generally obtained their own appraisal or estimate of value to determine the adequacy of a proposed payoff in a short sale. They countered, if necessary, based on their own number (Ex.502L, 502N, 506C, S-1, T-1; T.p.269,462,472, 574,723, 726, T.p.269,333,455,462,472,486-7,489,574,621,634-5,688, 723,726-727,760,762,788, 796,826-7,961,969,986). Five of the seven transactions involved in the case were either in foreclosure or had a foreclosure judgment entered against the homeowners at the time of the short sale negotiations. This includes 56th Street which was not only foreclosed upon but encumbered by other liens(Exh 22, File 1, pgs 34-37).

Because of the work that had to be done to clear liens on these properties before they were suitable for resale and the extended timeline associated with that process, these properties were unattractive for ordinary purchasers when the short sale negotiations were in progress. Accordingly, the properties resold were not the same properties as the properties at the time of the negotiated short sales. The representatives of the mortgagees or loan servicing entities and FBI Agent Kohler, testified that the banks did not actually lose any money because the short sale was a lot cheaper than a foreclosure process and also quicker, reflecting that time is money (T.p.264,269,466,471,485-6,1000). There was no evidence that Makohonuik had any role in preparing the HUD-1 settlement statement for the A to B closing between Gannon and the Trust or knowledge of Smith's finances

(T.p.55-6,72,76,98-9). There is no evidence to indicate that he was even at the closing(T.p.129-30,141-4,149).

Serious problems with the prosecution included failure to prove the jurisdictional element that the mortgagees were "financial institutions" within the meaning of the statute, presenting proof of a broader different crime, i.e. making a profit immediately following a short sale with a resale rather than the actual charge of "submitting a materially false HUD-1 stating that cash was paid in by the trusts at closing just prior to resale. Since Springer did not have anyone aiding or abetting him in submitting the HUD settlement statements, there was no need to submit an aiding or abetting instruction as to either Springer or Makohoniuk.

At trial, the Government's strategy was to associate Springer with the entities known as Iowa Loan Modification (ILM) and Iowa Short Sales (ISS), (T.p. 54-63,76,79,81-91). Both entities were founded on 10/13/2008. Springer did the paperwork as an organizer and was the registered agent. There was no testimony that Springer negotiated short sales. Smith stated that Springer trained some employees who handled the day-to-day negotiations advising on how to fill out preliminary HUD statements. These preliminary HUDs were filled in and submitted by ISS to the lenders or servicers(T.p.279). Thereafter as their real estate attorney, he handled closings, submitted HUD statements and disbursed the funds. Smith states that Springer did not originate the trust idea and merely attended a meeting conducted by an attorney for Iowa Realty Company at which trusts were discussed and gave Smith blank trust forms which ISS filled in (T.p.93-8,281, 313, 265-6,276-278).

Summarizing, there is no uniform expectation that when there is a real estate closing, that the purchaser brings cash to the closing or the cash is at the closing the instant of the closing, as opposed to sometime proximate to the closing because this is indicated on the HUD, line 303.

The Government asserted that it proved potential financial loss indicating:

> "The victim lenders testified that if they had known that the buyer had not brought cash to closing, but instead had immediately or shortly thereafter resold the property at a higher price and used that money to fund the short sale, they would not have agreed to the short sale."[2]

This is represented as proof that the HUDs were false. At no point was it specifically explained how the HUD settlement statement should have been modified to be more accurate. Further, no mortgage owner's representative stated that the HUDs alone were misleading, only that had they known of the subsequent resales, they would have wanted more money to release the mortgage. This is not proof of the falsity of the HUDs,(Bank of America re:

[2] See Appellee's brief

Rose App543-6, T.p. 482; J.P.Morgan re: 142nd, App852-3,864-5, 884-95,903, T.P. 631; CitiBank re: 52nd, Exh 6H, T.p.677-8; Wells Fargo re: 1st, T.P.713-5, App435-94; GMAC (HUD), re: 56th, Exh 7BB, T.p. 751; U.S. Bank re: Kenyon, T.p.823-4; App584-90,618-22). Simultaneous closings of A-B, B-C do occur and the mortgage releases can take up to 30 or 60 days after closing to be issued(T.p.1165-6). There can also be a two-to-three day delay before funding is received from the purchasers' lenders after the date of closing(T.p.1208). Clients have presented personal checks of up to $100,000 at closing. The Government never specifically indicates why the net funding with the A-B, B-C situation makes the A-B HUD false in its discussion.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. This Eighth Circuit decision conflicts with Shaw v. U.S.

Discussion

Smith, Steven, Springer and Makohoniuk (on Count 7 only), were indicted for bank fraud, contrary to 18 U.S.C. §1344(1). The scheme or artifice identified as constituting the crime was the submission of false HUD-1 settlement statements with the goal of cheating financial institutions by claiming on the statements that the purchaser had brought cash to the closing. In the indictment, there was also some general information about a scheme to flip houses for profit that was not instructed upon as an act constituting bank fraud.

The elements of proof, post Shaw v U.S., 137 S.Ct. 462 (2016), for this chargewere: 1) potential victims were "financial institutions" at the time of the fraud; 2) a "scheme or artifice" involving false representations was made to a financial institution; 3) the false representation was one which could cause a financial institution a potential loss of something of value; 4) the false representation was one which was material in that it could influence the financial institution to enter into a transaction which put it at risk of loss; and 5) the defendant making the false representation knew it put the financial institution at risk of something of value. Shaw, specifically endorsed an instruction indicating that it should have read, "That the scheme must be one to deceive the bank and deprive it of something of value", *Id469*. The instructions actually given in this case allowed for a conviction based on any deception of the bank irregardless of whether it could lead the bank to lose something of value.

There is a failure to prove that the HUD-1's actually purported to represent whether the purchaser was bringing cash rather than a check, letter of credit, etc., to the closing and that the funds were going to be disbursed to the entity issuing a mortgage release the date the HUD-1's were signed as opposed to when the transaction was fully processed. Reference was only made by the Government to Line 303 of the settlement statement, summarizing the transaction amount for "cash from borrower" and "cash to seller". The line "to borrower" is misleading in this case since the purchasers were not borrowers. Upon closing, the funds and the executed HUD-1's were presented to lenders or servicers simultaneously with the check for their mortgage payoff. The mortgage owner or servicer was then obligated, only after receipt of these funds, to issue a mortgage release. Several representatives of lending institutions or mortgage debt servicers testified that they would not have approved of the practice of the funds not being available until the subsequent closing for the resale but they never testified that this practice could cause them an actual potential for loss because of the sequence involved. Further, Springer was willing to finance the mortgage payoffs, as necessary, out of his trust account, (see Counts 1, 2 and 7). In those cases, the funds from the resale did not come into Springer's trust account until a few days later, however he issued timely checks to the entities to release the mortgages.

At the trial court level, the omission of the essential element that: a) misrepresentation or fraud be directed toward a "financial institution" in such a way as to potentially cause a loss of something of value, was occasioned by the confusion between instructing on articulation of 18 U.S.C.§1344(1) versus 18 U.S.C. §1344(2). In U.S. v Rice, 2011 WL3841973 (US DC ED Tenn), the court coherently reviewing the issues arising out of the need to distinguish these crimes states:

> "The federal bank fraud statute is not a model of clarity. It was passed in an effort to ensure bank fraud scheme's such as check kiting could be prosecuted federally . . . and to combine in one statute authority found in a number of federal laws . . . ".

It explains that the offense under subsection (1),

> " . . . is the knowing execution of the scheme or artifice to defraud a financial institution. This offense requires an intent to defraud . . . (distinct from subsection (2)) There is some confusion in the case law regarding this, and often the cases conflate the two offenses into one crime. In doing so, the cases fail to distinguish the required state of mind for the two crimes. Although risk to the bank is not mentioned in either prong of the statute and is not an element of either of the offenses, it is often used as a shorthand to describe the necessary state of mind of an offender. Risk of loss can be thought of as the bridge between the two offenses, or as the thread the two offenses have in common. To put it simply, it is hard to imagine how one could devise a scheme or artifice to defraud a bank . . . without at the same time either putting the funds of the bank at risk or intending to put the fund of the bank at risk." *Id2.*

In U.S. v Sinclair, 2016 WL199042 (N.D. Ohio), the court indicates in discussing "scheme to defraud":

> "While the Government need not show that the financial institutions suffered an actual loss, or even that it was exposed to a risk of loss to establish the crime of bank fraud, risk of loss is one way of establishing intent to defraud in bank fraud cases."

citing U.S. v Curley, 784 F3d 327,343 (6th Cir. 2015), "Intent to defraud means to act with intent to deceive or cheat for the purpose of causing a financial loss to another or bringing about a financial gain to oneself". *Id7.* The Model Jury Instruction for the 8th Circuit (2014), 6.18.1344 (hereafter 6.18.1344) has one instruction for both bank fraud subsections. It states that "scheme to defraud", "Includes any plan or course of action intended to deceive or cheat another out of money, property or property rights by employing material falsehoods." As to "intent to defraud", it indicates:

> "Means action knowingly and with the intent to deceive someone for the purpose of causing some financial loss, loss of property or property rights or bringing about some financial gain to oneself."

The Fifth Circuit updated its Instruction in 2015, Pattern Criminal Jury Instructions, Fifth Circuit 2.58A(2015), addressing only violations of 18 U.S.C. §1344(1). “Scheme or artifice" is defined as:

> "Any plan, pattern or course of action intended to deceive others in order to obtain something of value, such as money, from the institution to be deceived. . . A defendant acts with a requisite intent to defraud if the defendant acted knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to the defendant."

In the recent case of Shaw v U.S., 137 S.Ct., 462 (2016), the United States Supreme Court, construing a charge under 18 U.S.C. §1344(1), has clarified the appropriate definition of "scheme to defraud" stating: "Subsection (1) also covers, for example, making a false representation to a bank in order to obtain property belonging to that bank." It criticized the 9th Circuit Instruction, Model Criminal Jury Instructions, 9th Circuit 8.125(2010) re: violations of 18 U.S.C. §1344(1) which defined "scheme to defraud" as "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", observing, "The parties agree, as do we, that the scheme must be one to deceive the bank and deprive it of something of value". *Id469.* Accordingly, Jury Instruction 10 re: "scheme to defraud" is erroneous since it does not include that the concept that the scheme could deprive the bank of something of value.

In dealing with the definition of "intent to defraud", the Supreme Court indicated that: 1)there is no requirement that the Government show ultimate financial loss by the bank; and 2) it does not have to show a specific purpose on the part of the defendant to cause financial loss; however a defendant must have, "knowledge that he would likely harm the bank's property interest" as a result of the scheme to defraud. *Id467-8* The district court's instruction, "To act with 'intent to defraud' means to act knowingly and with the intent to deceive someone" should have included "knowing this scheme would likely harm the bank's property." Jury Instruction number 10, defining the two terms, is clearly erroneous in a way that is prejudicial as it emphasizes deceitfulness without tying it to losing property or something of value. This interpretation of the statute is also supported by the common law re: fraud which was found in Neder v U.S., 137 S.Ct. 462 (1999), to be instructive in interpreting the statute and is favorably cited in U.S. v Steffen, 687 F3d 1104,1113 (8th Cir. 2012). It states that the common law provides guidance except when expressly contradicted by the statute, *Id21-2.* Black's Law Dictionary Abridged 6th Edition, (1990) defines cheat as:

> "To deceive and defraud. . . . The words 'cheat and defraud' usually mean to induce a person to part with the possession of property by reason of intentionally false representations relied and acted upon by such person to his harm."

Fraud is defined as:

> "An intentional perversion of truth for the purpose of inducing another . . . to part with something of value belonging to him or to surrender a legal right."

Applying the common law also requires that "scheme to defraud" be one where a bank could lose property and that the "intent to defraud" requires that defendant be aware of this fact. (Neder expressly eliminates the common law elements of "actual reliance" and "damages" as proof of bank fraud). Despite the fact that the Shaw decision is now a year old, the model instructions of most circuit's remain unchanged or changed and erroneous. For example, the 9th Circuit instruction criticized, still reads "to deceive, cheat or (not "and") deprive a financial institution of something of value" (App93).

Contrary to the 8th Circuit's ruling, this misinstruction of the jury is not harmless error. The inclusion of the definition of "materiality" does not alert the jury that a scheme or artifice to defraud must relate to a potential loss of something of value by the "financial institution". Per Neder v U.S., 119 S.Ct. 1827, 1837 (1999), the test for whether a failure to instruct properly on an element is, "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"[3] In these cases, there are no potential for loss of something of value caused by the information in the HUD-1's as it is the submission of the funds followed by a mortgage release which is at the core of the financial transaction. Therefore, the case should have been reversed and remanded.

II. The Appeals' Court decision failed to demonstrate that any element of Bank Fraud submitted was proved beyond a reasonable doubt requiring the exercise of this Court's supervisory power.

The United States Supreme Court can exercise its supervisory power to reverse a conviction as long as the error challenged is not considered harmless, US v Hastings, 103 S.Ct., 1974 (1980). Further, these powers cannot be exercised if they involve an area which has been comprehensively

[3] See also Arthur Andersen LLP vs U.S., 125 S.Ct. 2129, 2136-7 (2005); Osborne v Ohio, 110 S.Ct. 1691, 1703 (1990) (failure to properly instruct on an element is a violation of due process).

reviewed and addressed by Congress. The purposes underlying the use of supervisory powers are: 1) to implement a remedy for violation of recognized rights; 2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and 3) as a remedy designed to deter illegal conduct. Request is made for the Court to exercise its supervisory powers on the first two grounds but not the third.

The right violated by these convictions, as argued before the 8th Circuit is the right to due process of law in connection with a criminal trial (see Springer appellant brief page 2 & 3). The challenge is based on the statute's vagueness with respect to its definition of "intent", which per Shaw requires acting knowing that a potential loss to a federal institution could be caused and with respect to the definition of "scheme or artifice to defraud", that as an objective, the scheme must be able to potentially cause a loss to a "federal institution". This infirmity in the statute has been cured through further construction in Shaw, but these concepts were not incorporated at trial. As a result, irrelevant information regarding the actions of Smith and Steven, which were not attributable or known to Springer and Makohoniuk and vague suggestions that the "federal institutions" would have liked to receive more money in return for release of their mortgages than for the amounts actually bargained for made up the majority of the evidence presented at trial. In Shaw, this Court tried to establish a national standard for the germane terms in 18 U.S.C. §1344(1). This clarity was not imposed at the time of trial and the resulting conviction violated the Due Process clause, Skilling v US, 130 S.Ct. 2896, 2928-2934 (2010). There has been no exhaustive Congressional output in the area of the germane terms of 18 U.S.C. §1344(1). Accordingly, this Court is free to exercise its supervisory powers to strike down the conviction as not based on a reasonable construction of the statute.

Springer challenged all the elements in his Motion for Judgment of Acquittal. Makohoniuk challenged proof that of GMAC as being a "mortgage lending business". Both the District Court and 8th Circuit failed to adequately consider whether the evidence on the elements support these convictions.

There was a failure of Proof that the scheme to defraud could cause "potential loss" to a "Federal institution".

Much of the vagueness problem imposed by the statute is resolved by the recent case Shaw v. U.S. *supra*. Per the discussion re: jury instructions, the Government must prove that a "scheme to defraud" might possibly cause loss to the "federal institution" or gain to the defendants and "intent to defraud" requires the defendants to know the scheme could cause such a gain or loss. The question is did the scheme to file a HUD-1 Settlement

Statement for the A-B closing deceive the "federal institutions" and, if so, could it potentially have deprived the bank of something of value?

The Government argued that there was overwhelming evidence that the "federal institutions" actually lost money due to the scheme. But the claimed loss is the difference between the short-sale price and the resale price:

> "The entire point of the scheme was for the defendants to maximize the bank's loss in order to maximize their profit; they induced the bank to approve a short sale at as low a price as possible so that they could immediately resell the property at its actual fair market value, once they truly marketed the property . . ."[4]

The Government ignores the defendant's argument that the only loss that could be occasioned by the submission of a HUD-1 indicating cash was brought to the closing is the failure of the mortgage owner to receive its money for the release of the mortgage on short sale. No loss could occur because the mortgage owner would simply refuse to subsequently release its mortgage if it were not fully paid.

The Government did not sustain its burden even under its theory that the loss was caused by a subsequent resale for a higher price. (It is frequently the case on resale of property in the market place that there is a profit). The mortgage owners clearly approved the short sales based on their

[4] Government's brief before the 8th Circuit

own opinion as to fair market value as evidenced by their counteroffers. The properties resold were not the same as purchased by the trusts because liens, including foreclosure judgments, had been cleared and there had been some fix-up to meet the inspection requirement of subsequent purchasers or their lenders. It did not prove that the "financial institutions" would have cancelled the short sales had they known about the resale. Only the servicer, GMAC required any assurances that resale would not be immediate. The actual mortgage owner, HUD, explicitly did not require it. No other mortgage owner's or its agent stated that there was an affirmative obligation to advise them about subsequent resales(T.p.269.805).

<u>The government did not prove a "scheme to defraud" would likely harm the mortgage owner's interest.</u>

The Government argues that the "scheme" was shown to have been committed by Springer by aiding and abetting Smith and Steven. Thus, it concedes that submitting the HUD-1 would not cause a loss. It claims Smith, Steven and Springer concealed the fact of the resales. This is a claim of concealment, not a material misstatement. Thus, the Government had to prove an independent legal duty to disclose the material information <u>U.S. v. Steffen</u>, 687 F.3d 1104,1114 (8th Cir. 2012). Further, acts to be bank fraud must conceal, create a false impression, mislead or otherwise deceive, thus, preventing the other party from acquiring material information, <u>Steffen</u>

Id115. Concealment by Smith or Steven was not proved because the majority of the purchase agreements submitted to the mortgage owners/agents reveal an intent to contemporaneously market and resell the properties(Exh 2B,¶11, Exh 3D¶11, Exh 3K¶11, Exh4S¶11, Exh 6C¶11, Exh7SS¶11,Exh 8E¶11). Further no lender restricted resale in anyway. Springer's only action with reference to the specific transactions charged was to submit HUD-1s. Except GMAC's "investor affidavit", there is no indication that the mortgage owners were concerned about resales so Springer cannot be charged with concealing them. The Government failed to explain how Springer was aiding and abetting Smith and Steven to commit bank fraud. Further, with respect to Makohoniuk, there was no explanation how he aided and abetted Springer in submitting the HUD-1's. to GMAC.

The Government did not prove Springer and/or Makohoniuk acted "with intent to defraud".

The Government argues to prove "intent to defraud" it does not have to show Springer knew the scheme would likely cause mortgage owners a loss. However, per Shaw, this argument has no validity. Alternatively, it claims proof of this element occurred because Springer knew there were double closings and that Smith or Steven were not bringing cash to the closing of the A-B transaction. Even if Springer had disclosed on the HUD-

1's that the money came from his trust account or a loan from another person (the ultimate purchaser), this would not have advised the mortgage owners of a resale. Further, Springer did not close all the B-C transactions only the A-B sales in the case of East Rose(App.530-1), 56th Street (App.835-8) and 142nd Street(App.909).

The Government claims proof of intent because Springer allegedly lied to Agent Kohler when interviewed briefly in 2013 as he stated that he was unsure if ISS always had end-buyers and Smith and Steven had their own funds(G.B. 13). Smith agreed with Springer's statements regarding these facts in his testimony(T.p.295-6,297). There was evidence of many transactions where this was the case(T.p.306-310). The Government claims Springer lied because he said he did not purposely delay deposits of ISS checks(T.p.848). Springer did not make the deposits or wire the funds as the responsibility fell on his law partner, Laughlin who was slow in performing these functions.

In closing, the Government indicated it had proven "intent to defraud" as "he" [Springer] more than anyone, knew that banks had strict requirements for a short sale – including that the home be marketed and that it be sold for market value in an arm's-length transaction . . ."(G.B.p.36).

But marketing had nothing to do with the price and no mortgage owners, including HUD prohibited immediate resale.

There was no proof that alleged victims were FDIC insured or a mortgage lending business.

Springer and Makohoniuk argued that it was necessary to prove, 1)the identity of the mortgage owner; and 2) that it could possibly lose money. The Government argued it is not required but then states there was a possibility of a financial loss, citing U.S. v. Alexander, 679 F.3d 721,726 (8th Cir. 2012) which requires this proof. Alexander also requires materiality. The alleged false statement must be capable of influencing the FDIC-insured institution to take an action which could cause a potential loss, *Id* 727.

The Government argues with respect to all short sales, except 56th Street, the variations in the names charged versus proved as "federal institutions" are insignificant because they are obviously the same institution. Alexander held that an unsupported assertion that various names are used by the same FDIC-insured institution is not sufficient. "After our review of the trial record in the present case, we must conclude that the Government failed to present sufficient evidence which would allow a reasonable jury to find that Bank of America, N.A. and Bank of America

Mortgage were wholly owned subsidiaries or alter-egos of Bank of America, *Id728.*

As to 1st Avenue, Zenor states she is employed by Wells Fargo Home Mortgage and refers to it as the "victim" rather than Wells Fargo(T.p.707). She also failed to explain why the mortgage foreclosure action was brought by Wells Fargo Financial Iowa Three, Inc. or that the payoff was directed to Wells Fargo Bank N.A. to a beneficiary account in the name of Wells Fargo Financial Iowa One, Inc(Springer Appellant's Brief p.19-20).

The indictment charges the FDIC-insured institution as CitiMortgage for Garden and 52nd. There is no evidence that CitiMortgage is FDIC insured, only CitiBank, which was not characterized as the sole owner of CitiMortgage. Johnson testified that:

> "CitiMortgage, as an entity, is our mortgage company. And the umbrella that it is under is . . . underneath CitiBank, CitiGroup is the main one."

This is insufficient proof (T.p.667-9). She did not explain why their documents state that CitiBank of North America is the owner of the mortgages and the recipient of the funds or why the foreclosure action was brought by CitiMortgage, Inc. (App.677-9).

J.P. Morgan Chase Bank is the named FDIC-insured entity as to 142nd Street. Testimony was that "Chase" was the entity insured by FDIC and foreclosure is brought by Chase Bank, N.A. Other entities mentioned in the documents were “Chase Home Finance” and “Chase Home Finance LLC” (App.213,230, Exh. 508,App.863-4). To avoid these contradictions, the Government argues that entities other than "Chase" were servicers of the mortgage. It cites no record authority. Relying on Alexander, which imposed liability for actionable misrepresentations, made to someone knowing they will be transmitted to the institutions, the Government claims misstatements to servicers are sufficient. This does not resolve the lack of proof of the identity of the mortgage owner, whether it is an FDIC-insured institution or whether the statement to a servicer was relayed to the mortgage owner.

As to Rose, Bank of America according to the Government was the servicer was not the owner of the mortgage (G.B.p.43)[5]. The mortgage owner is "Argent Bank Company LLC and it assigned the mortgage to "BAC Home Loan Mortgage Servicing LP" for collection. Neither of these entities were charged as the "victim" or represented to be the servicer at trial. The Government asserts it proved the servicer had a potential financial loss if it had, "not collected the proper information regarding the short sale, they could open themselves up to a possible claim from the investor."(T.p.473,

[5] G.B. is the Government's appeal brief.

App.176). There is no proof that "Bank of America" was the involved entity or that it received any false information from outside sources.

As to Kenyon, Webb of U.S. Bank testified it was a servicer and the mortgage owner was Freddie Mac(T.p.812-3,App.302-3). The Government made the same argument as with Rose because Webb testified that U.S. Bank could be required to buy the account if it had failed to service it properly or committed fraud itself(T.p.813). This argument also fails for lack of proof. Further both the recorded mortgage and release indicate the lender is US Bank N.A., not US Bank and the mortgagee is "Mortgage Electronic Registration Systems, Inc, as the nominee for US Bank N.A.".

A similarly deficient argument is advanced as to 56th Street because GMAC is identified by Bonewitz, as a servicer and the investor as HUD (T.p.749-50,780). Incongruously, the Government argues GMAC is a "mortgage lending business". Yet, Martin of HUD testified that the investor or owner of the mortgage is HUD. In claiming that GMAC was proved to be a mortgage lending business, the Government references:

> "Q. . . . . have they made over hundreds, if not over one-thousand loans in the time period 2010 to 2012, loans that were insured by FHA?
>
> A. Yes, sir.
>
> Q. Were those loans that occurred in states all across the country?

A. Yes, sir."(T.p.450-1)

As explained in Springer's Brief,[6] this is insufficient proof that GMAC is either a mortgage lending business or the servicer. Bonewitz's correspondence is on "GMAC Mortgage" letterhead, the mortgage foreclosure action against Gannon was brought by "GMAC Mortgage LLC" (App770-5,794,849-51). Further there is no evidence that GMAC specifically passed along any alleged "misrepresentations" to HUD.

In summary, there was no proof of any element of the bank fraud charged under 18 U.S.C. §1344(1), yet both Springer and Makohoniuk were convicted. This result was a consequence of vagueness in the indictment, proof, and jury instruction as to all counts. This Court, exercising its supervisory powers, since these issues were not extensively considered by Congress and there was not harmless error below, should result in overturning all convictions.

CONCLUSION

Jason Springer and Rick Makohoniuk respectfully requests that the Supreme Court grant their petition for a writ of certiorari for all the reasons stated herein and subsequently remanded for retrial.

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[6] Springer's initial Appellant's brief