No. ________

IN THE
SUPREME COURT OF THE UNITED STATES

PAXTON JEFFREY ANDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The federal bank fraud statute 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 $1000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344. "Materiality" is an element of the mail, wire and bank fraud statutes although not expressly stated therein. Neder v. United States, 527 U.S. 1, 20-23, 22, n.5 (1999). Where evidence shows similar but distinct financial entities, the government must address the entities distinct corporate identities and inter-relationship or the evidence is insufficient and inadequate. United States v. Davis, 735 F.3d 194, 201 (5th Cir. 2013); United States v. Alexander, 679 F.3d 721, 728 (8th Cir. 2012).

The questions presented are:

1. Whether the Ninth Circuit's decision in this case deciding materiality under the general "means" test set forth in Neder v. United States, 527 U.S. 1 (1999) directly conflicts with the "means" test for bank fraud as set forth in Loughrin v. United States, 134 S.Ct. 2384 (2014).

2. Whether under 18 U.S.C. § 1344, the Government must prove the inter-relationship between "financial institutions" within the meaning of the Bank Fraud Act and other financial entities when evidence presented reflects multiple financial entities involved in alleged bank fraud scheme.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption. The petitioner is not a corporation.

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The petitioner, Paxton Jeffrey Anderson, respectfully requests that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 10, 2017 and the Order denying Panel Rehearing entered on January 2, 2018.

OPINIONS BELOW

The court of appeal's order denying panel rehearing/rehearing en banc; the court of appeal Memorandum affirming the conviction; and the district court's Judgment are unreported and are reproduced in Appendix A, B, and C, respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 10, 2017. The court of appeals denied timely petition for panel rehearing and rehearing en banc on January 2, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY & CONSTITUTIONAL PROVISIONS

> 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 $1000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344.

STATEMENT OF THE CASE

Petitioner Paxton Jeffrey Anderson, a builder, was charged in 2012 with thirty-one counts of bank fraud and one count of conspiracy to commit bank fraud in violation of 18 U.S.C. §§ 2, 1344, 1349 involving conduct occurring between December 2004 and June 2009. The indictment alleged that Mr. Anderson, his co-defendant Joseph Plany, and others devised a scheme to obtain real estate lot and construction loans through the use fraudulent loan applications from real and "straw" buyers/borrowers, in order to build custom homes and sell them for profit and/or to siphon off loan proceeds through fraudulent construction draws.

The government presented a witness on mortgage lending practices who testified that in regard to the construction draw requests, any forged signatures on those documents were not "relevant" because the bank only paid up to the amount on the draw requests based on their own intervening inspections of the work done to date, not based upon who signed the draw requests.

The government alleged that the "financial institutions" involved were Marshall and Ilsley Bank ("M&I Bank") and TierOne Bank. At trial the government presented evidence through loan applications, draw requests and wire transfers, etc., which also revealed additional that the "similar but distinct" financial entities, i.e., M&I Corp., M&I Mortgage Corp., MIMC, Axis Mortgage and Bank of America, were also involved in the transactions. However, the government presented no evidence to the jury clarifying the inter-relationship between the entities listed in the indictment and the other entities shown by the evidence.

The jury convicted Mr. Anderson of the conspiracy count and 26 counts of bank fraud (22 of which involved construction draws and the rest involved loan applications).

Petitioner contended on appeal, inter alia, that the district court erred in denying his motions for judgment of acquittal and motion for new trial on grounds prosecutorial misconduct and insufficiency of the evidence of the jurisdictional and materiality elements of bank fraud. The Court of Appeals reversed one count of bank fraud for insufficiency of the evidence and otherwise affirmed. The Court of Appeals

Petitioner timely filed petitions for panel rehearing and rehearing en banc which were denied on January 2, 2018.

REASONS FOR GRANTING THE WRIT

1. This Court must settle whether the "means" test expressed in Loughrin v. United States, 134 S.Ct. 2384 (2014), must be applied in determining the materiality element of bank fraud rather than the "means" test expressed in Neder v. United States, 527 U.S. 1 (1999).

The bank fraud statute provides, in pertinent part, as follows:

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

18 U.S.C. § 1344. Although the statute does not include "materiality" as an express element, the Supreme Court found that "materiality of falsehood is an element of the federal Mail Fraud, Wire Fraud, and Bank Fraud statutes." Neder v. United States, 527 U.S. 1, 20-24 (1999). Until recently, the test for determining whether fraudulent misrepresentations were "material" was set forth in Neder, based on common law principles:

> "In general, a false statement is material if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed."

Id. at 16 [applying the definition to tax fraud], citing United States v. Gaudin, 515 U.S. 506, 509, 115 S.Ct. 2310 (1995)[applying materiality definition to federal crime of making false statements] (quoting Kungys v. United States, 485 U.S.

759, 770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988)[applying common law definition of materiality to action to revoke citizenship].

However, in 2014~~, in an effort~~ to assuage federalism ~~concerns about~~ infringing on state criminal jurisdiction, this Court held that the "by means of" provision of the bank fraud statute, §1344(2), includes a relational component which imposes"a significant textual limitation on §1344(2) reach.

> [I]t is not enough that a fraudster scheme to obtain money from a bank and that he make a false statement.... The criminal must acquire (or attempt to acquire) bank property "by means of" the misrepresentation. That phrase typically indicates that the given result (the "end") is achieved, at least in part, through the specified action, instrument, or method (the "means"), such that the connection between the two is something more than oblique, indirect, and incidental... ¶ Section 1344(2)'s "by means of" language is satisfied when, as here, the defendant's false statement is the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control.

Loughrin v. United States, 134 S.Ct. 2384, 2393 (2014). Since then, several Circuits of the United States Courts of Appeals have applied Loughrin to indicted conduct occurring before Loughrin case was decided but while the cases were on direct appeal. See e.g., United States v. Brouchard, 828 F.3d 116, 124 (2nd Cir. 2016); United States v. Kalu, 791 F.3d 1194 (10th Cir. 2015); United States v. Bah, 587 Fed.Appx.752 (4th Cir. 2014); United States v. Selgjekaj, 678 Fed.Appx. 379 (6th Cir. 2017). Specifically, several circuits have applied Loughrin's "means" test in determining sufficiency of the evidence claims regarding the "materiality" element of federal bank and mail fraud statutes. See United States v. Berroa, 856 F.3d 141 (1st Cir. 2017)[indictment in 2015 after Loughrin]; United States v. Chittenden, 848 F.3d 188 (4th Cir. 2017), cert granted on other grounds, judgment vacated, 138 S.Ct. 447, 199 L.Ed.2d 327 (2017); United States v. Puerta, 607 Fed.Appx. 635 (9th Cir. 2015)["Importantly, after Puerta filed his appeal in this case, the Supreme Court provided additional guidance for interpreting the requirements of 18 U.S.C. § 1344(2) in Loughrin v. United States, — U.S. ——, 134 S.Ct. 2384, 189 L.Ed.2d 411 (2014)]. In particular, the Court explained there must be a "relational" connection between the alleged false statements or representations and the obtaining of bank property"].

Despite Mr. Anderson citing Loughrin's specific "means" test for determination of his claim on direct appeal that any forged signatures on the construction draw requests were not "material" for purposes of bank fraud under 1344(2), the Court of Appeals for the Ninth Circuit instead relied upon United States v. Lindsey, 850 F.3d 1009 (2017), applying the more general test cited in Neder v. United States, 527 U.S. 1, 16:

> There was [] sufficient evidence to allow jurors to conclude that the falsified draw requests were material. Evidence, including Daly's testimony, established that forgery of the borrowers' signatures was "capable of influencing[] ... the decision of the decisionmaking body to which [the misrepresentation] was addressed." See United States v. Lindsey, 850 F.3d 1009, 1013 (9th Cir.

> 2017)[1](quoting *Neder v. United States*, 527 U.S.1, 16 (1999)).

(Emphasis added. Appx. B at 3.) Thus, although the Ninth Circuit held that the alleged forged signatures were "capable of influencing" the bank to part with its money, that is not the test enunciated by this Court for materiality in the context of bank fraud. The government did not show below, nor can the Ninth Circuit find now, that the forged signatures were "the mechanism naturally inducing [the] bank ... to part with its money." *Loughrin* at 2393-94.

At trial, after the government rested, Anderson argued that there had been insufficient evidence presented of "materiality" because when a draw is requested, the bank/lending institution does *not* pay the request like they would a check presented against an account. Rather, an intervening act is required first, i.e., an independent inspection of the property. After that intervening act, the bank uses its discretion to pay for what they have found to be "completed" up to the amount indicated in the draw request. (Fed.R.Crim.P., Rule 29.)

Government witness Mark Acre, effectively testified regarding the TierOne Bank counts that the invoices and signatures were irrelevant to the bank's decision to fund the draw requests because the draw requests were only funded, or partially funded, based on the bank's own inspection of the properties. (CR

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[1] In *Lindsey*, the defendant was charged with nine counts of wire fraud and one count of aggravated theft. The issue on appeal was not whether sufficient evidence was presented to prove the misrepresentations were material, but instead the admissibility of certain evidence to disprove materiality.

497; R.T. 5/13/14, pp. 58-60, 71-73, 76-80; ER VOL. XII, pp. 2328-2330, 2341-2343, 2346-2350)

The government's expert witness Wil Daly, corroborated this testimony. Wil Daly testified to this process and evidence was submitted showing that the amounts received did not always match the draw requests because the amounts the banks paid were not based on the amounts requested (unlike a check), but instead based on their own inspections. A forged check will be funded in the exact amount requested on the check because the payment is based on the signed instrument. However, a draw request is not merely funded in the amount requested because it is not based on the signed instrument itself . Rather, a draw request is funded based on the amount declared valid by the bank inspection. Thus, a signed draw request may induce the bank to inspect, but the inspection itself is what induces the bank to pay, and in what amount. If the forgery was the mechanism by which the bank released the funds, the wires would always reflect amounts identical to those requested. They did not. When asked specifically about the importance and reliance by the bank on the inspections, the following colloquy occurred:

> Q. Your understanding from the bank was if work wasn't done, they wouldn't pay anything. If work was half done, they would pay half. If the work was all done, they would pay all, right.
>
> A. That was my understanding, yes.
>
> Q. And if it's a fake invoice for a fake concrete man, I'm still not

going to get any money right?

A. Right.

Q. Because your inspector is the one that decides that, correct?

A. Correct.

(CR499; RT 5/16/14, pp. 34-35; 5ER12.) Daly explained that the inspection process was to assure that payment was being made only based upon the work that was completed. Indeed, evidence of such inspections was admitted at trial. (CR499; RT 5/16/14, pp. 34-35; 5ER12.) Thus, the bank wired funds based on its own inspections verifying the work completed, not based on the borrower's signature, or even the amounts claimed on the invoices submitted. Mr. Anderson is aware that actual "reliance" on the misrepresentation is not a required element of bank fraud. However, materiality is. Neder at 25.

Further, when asked whether forgeries were irrelevant because payment was based on the lender's inspections, Wil Daly replied: "To the answer of your question is a forgery relevant, I would say no.") (CR499; RT 5/16/14, at 34;5ER12)

> 'Material' when used in respect to evidence is often confused with 'relevant', but the two terms have wholly different meanings. To be 'relevant' means to relate to an issue. To be 'material' means to have probative weight, i.e., reasonably likely to influence a tribunal in making a determination required to be made."

Weinstock v. United States, 231 F.2d 699, 701 (D.C. Cir. 1956). A statement may be relevant but not material. Id. However, a statement that is irrelevant cannot be material.

Further, the government presented absolutely no witnesses from TierOne Bank regarding the relevancy of the signatures on the draw requests to the Bank's decision to honor draw requests. Moreover, borrower and government witness, Mark Acre, testified that his signature was not required by the TierOne construction agreement. (T1639; CR 497;RT5/13/14 at 19-20, 71-73, 80-81;XIIPER at 2289-2290, 2351-2353.) Acre testified that he did not sign the draws, however he did approve the draws. (T1639; CR 497;RT5/13/14 at 19-20, 71-73, 80-81;XIIPER at 2289-2290, 2351-2353.) Moreover, a settlement agreement admitted during Mark Acre's testimony showed that $609,000, an amount less than that requested through the draw requests, but more than that which was approved after the inspections, was actually properly spent on construction at "Lot 28 Mirabel," which was the subject property of counts 6,11,12,14,16-23, and 25. (CR143;11ER32;TE130-1,1398,1641;CR497; RT5/13/14 at 52-55;3ER10.) Acre acknowledged that TierOne only released funds based on its own inspections and not the documents allegedly submitted by Anderson and co-defendant Plany. (CR497; RT 5/13/14 at 71-82.)

Here, no reasonable juror could have found that forged signatures allegedly submitted by Anderson and Plany were "the mechanism naturally inducing [the] bank...to part with its money", when there was both expert and lay testimony directly to the contrary, i.e., that the bank funds were dispersed based only upon the bank's own inspections of the properties. Accordingly, looking at the evidence in the light most favorable to the government, none of Anderson's convictions on the 22 "draw request" counts can stand because the government's evidence of materiality was legally insufficient under Loughrin. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

In failing to apply the Loughrin "means" test to Mr. Anderson's bank fraud case, the decision of the Ninth Circuit in this case directly conflicts with the United States Supreme Court's Opinion in Loughrin. Thus, the petitioner respectfully moves this Court to grant the Writ, and remand the case to the Ninth District Court of Appeals with instructions to reverse petitioner's convictions and sentences on all relevant counts, or remand with instructions to reconsider the relevant claims applying Loughrin.

2. This Court must settle for the lower federal courts whether, when the government presents evidence of the involvement of both "federal institutions" and non-"federal institutions" in an alleged bank fraud scheme, it must also must present evidence of the inter-relationship between the entities in order to meet the jurisdictional element of bank fraud.

The United States Court of Appeals for the Ninth Circuit affirmed the United States District Court of Arizona's failure to hold the government to its burden of proving the jurisdictional requirement of bank fraud by proving the alleged fraudulent funds were owned or controlled by an FDIC insured institution rather than one of its non–insured subsidiaries or mortgage lending businesses. The Ninth Circuit held that there was "sufficient evidence to allow reasonable jurors to find that M& I Bank and TierOne were FDIC-insured institutions and were lenders on the [] counts." (Appx. B at 3) The court noted that the evidence consisted of certificates of proof of insured status, witness testimony, copies of loan applications, construction draw requests and wire transfers. However, the government evidence revealed that additional "similar but distinct" financial entities[2], not named in the indictment were also involved in the alleged scheme to defraud.

In this case, in nine counts of bank fraud, the construction draw request documents were stamped "M&I Mortgage Corp." and included "M&I Mortgage Corp." loan numbers (e.g., 733-00; TE675)[3]; the payment information for those draw requests, i.e., the wire transfers and supporting documents, reflected the source of the funds as coming from a Tax ID number for "M&I Corporation" and/or referencing an "M&I Mortgage" Loan Memo account (11ER27); and at least one loan package presented, reflected not the named bank in the

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2 These entities were M&I Corp., M&I Mortgage Corporation, MIMC, Axis Mortgage and Bank of America

3 Evidence of M&I Mortgage Corporation being the actual funding agency was corroborated during the post-verdict motion for judgment of acquittal proceedings by a Government disclosed FBI restitution loss chart reflecting that the "M&I Company" which suffered the losses was "MIMC". (Doc. 323-2)

indictment, but instead Bank of America and "Axis Mortgage[4]" without any explanation as to how these entities were involved or why their names were on the loan documents.[5] The "financial institution" named in the Indictment was listed as "Marshal and Isley Bank." The certificate of FDIC insurance presented by the government reflected a different spelling, i.e, "M&I Marshall & Ilsley Bank." The witness testimony referred to "M&I Bank" funding the loans and draws, while the documentary evidence of the loans, draw requests and payments referenced similar but distinct entities of M&I Corp. and M&I Mortgage Corporation and MIMC. Where as here, the evidence presented does not address the entities distinct corporate identities, nor depict their inter-relationship, the evidence is insufficient and inadequate. Davis, 735 F.3d at 201. In petitioner's case, the only FDIC certification presented was for "M&I Marshall & Ilsley Bank" not for M&I Bank, M&I Corporation, M&I Mortgage Corporation or MIMC. (TE734.) Further, proof was not submitted that the funds obtained by these other institutions were owned or controlled by "M&I Marshall & Ilsley Bank" or any other "financial institution" for purposes of § 1344(2). See Bennett at 1138.

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4 The indicted conduct in this case occurred before Congress' 2009 amendment to include "mortgage lending businesses" to the definition of "financial institution" in 18 U.S.C. § 20(1) for purposes of the bank fraud statute 18 U.S.C. § 1344.

5 (TE727-084;TE727-093;SER90-91.)

This Court and several of the United States Court of Appeals have held that "financial institution" is not a loose or colloquial term, but a term of precise definition that can lead to grave criminal consequences" and "that § 1344(2) should not be read to 'federaliz[e] frauds that are only tangentially related to the banking system.'" United States v. Bouchard, 828 F.3d 116, 126-27 (2nd Cir. 2016), citing, Loughrin v. United States, 134 S.Ct. 2384, 2393 (2014). Because corporate parents and their subsidiaries are distinct separate entities and can have separate assets, evidence of a bank's FDIC status alone does not suffice to prove that the money taken was insured. Thus, where the government puts on evidence of the involvement of financial entities not included under 18 U.S.C. § 20, the government must be required to show the relationship of the entities to the "financial institution" and the scheme alleged in the indictment in order to prove the funds actually taken were owned or controlled by an FDIC insured entity. Bouchard at 126; see Dole Food Co. v. Patrickson, 538 U.S. 468, 474-75 (2003)["[a] corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary"]; see also United States v. Bennett, 621 F.3d 1131, 1136 (9th Cir.2010) (banks are distinct legal entities from their subsidiaries for the purposes of § 1344(2)); see also United States v. White, 882 F.2d 250, 253 (7th Cir.1989) (in the context of § 1014, "it would be ... perilous to assume that Congress wanted to extend the statute's protection to [financial institutions'] affiliates, when so far as appears there is no (or only the most attenuated) federal stake in preventing fraud against affiliates of a federally insured bank, as distinct from fraud against the bank itself").

This Court should confirm for the lower federal courts that where loans are written by similar but distinct institutions, other than the bank named in the indictment, evidence must be presented that the institution is itself FDIC insured, or that property or assets subject to the fraud are owned or controlled by a federally insured entity. Bennett, 621 F.3d at 1135 [insufficient evidence to support a conviction under § 1344, where the primary lender itself was not a financial institution but, instead, was a wholly owned subsidiary of a financial institution]. This is so because where the evidence presented does not address the entities distinct corporate identities, nor depict their inter-relationship, the evidence is insufficient and inadequate. Davis, 735 F.3d at 201.[federal courts have warned the Government to tread carefully in proving up this element of bank fraud]; United States v. Alexander, 679 F.3d 721, 728 (8th Cir.2012) [where there is insufficient evidence in the record to establish that the additional funding entities shown at trial were either alter egos or otherwise FDIC insured, the Government fails to meet its burden on the jurisdictional element of bank fraud].

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted on February 21, 2018.

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