

NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2026

OSARETIN GODSPOWER OMORUYI,
a/k/a Nelson Bright, a/k/a Bright, Nelson,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

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

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October 15, 2026

QUESTIONS PRESENTED FOR REVIEW

- I. Whether the district court's erroneous response to a jury note resulted in the jury convicting Petitioner of a conspiracy which was not charged in the indictment. The court told the jury that evidence that both brothers had individual agreements with other co-conspirators was sufficient to convict the two brothers of the single conspiracy charged in counts three and four of the indictment. The district court should have instructed the jury that the government must prove the single conspiracy charged in the indictment and if the government proved some other conspiracy the jury must acquit. The Court of Appeal erroneously held that the court's response was not error because the response must be viewed in light of the instruction as a whole. This holding is in direct contravention of this Court's decision in Bollenbach v. United States, 66 S. Ct. 402 (1946) and should be reversed.
- II. Whether insufficient evidence existed to convict Petitioner of Bank Fraud or Conspiracy to Commit Bank Fraud. The government failed to prove that Petitioner intended to defraud a financial institution or that Petitioner intended to obtain any of the moneys...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. The Court of Appeals erroneously held that when a defendant uses a false name to open an account he defrauds the bank of the banks funds. This is error.

LIST OF PARTIES

United States Court of Appeal for the First Circuit

Petitioner/Appellant: Osaretin Godspower Omoruyi, a/k/a Nelson Bright, a/k/a Bright Nelson

Defendant-Appellant: Osakpamwan Henry Omoruyi, a/k/a Clifford Bernard, a/k/a Bernard Clifford

Respondent: United States of America

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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The Petitioner, Osaretin Godspower Omoruyi, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on July 15, 2026.

OPINION BELOW

On July 15, 2026, the Court of Appeals entered its Opinion affirming the Petitioner's sentence and conviction. Judgment is attached at Appendix 1. The Petition for Rehearing was denied on September 8, 2026, and is attached at Appendix 2.

JURISDICTION

On July 15, 2026, the United States Court of Appeals for the First Circuit entered its Opinion affirming Petitioner's conviction and sentence. (Court of Appeals for the First Circuit Dkt. No. 23-1957) Jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitutional Amendment V:

No person shall...be deprived of life, liberty, or property without due process of law...

STATEMENT OF THE FACTS

Introduction

On March 23, 2021, a criminal complaint was filed in U.S. District Court in Boston charging Petitioner and two others with Bank and Wire Fraud Conspiracy. (Presentence Investigation Report, 10/23/23, [hereinafter PSR] at 3, para. 1). On March 1, 2023, a Superseding Indictment charged Petitioner along with his brother, Osakpamwan Henry Omoruyi (Henry) with opening bank accounts in both their own name and under alias for the purpose of laundering money for a Nigerian fraud organization. Petitioner was charged in counts one, three and four of the indictment with Bank Fraud, Bank Fraud Conspiracy, and Money Laundering Conspiracy. (PSR at 4, para. 12). Petitioner and his co-defendant were alleged to have laundered approximately \$2 million in fraud proceeds. (PSR at 5, para. 13). On June 14, 2023, following an eight-day trial Petitioner was found guilty on all counts. (D.E. at 22, No. 185).

The Trial

At the outset, the government, during its opening, told the jury that Petitioner and Henry did not participate in the fraudulent schemes used to obtain money from various victims. (Transcript of Trial, Day One, 6/5/23 at 124-25 [hereinafter 'Day One at _']). Their role was confined to opening bank accounts to receive the proceeds of the fraud after the fraud was successful.

(Day One at 123). The government reiterated that the co-defendants were charged together in a single conspiracy.

A conspiracy is an agreement between two or more people to do something that is illegal. So, when the defendants agreed to work with each other and with other people to lie to banks, to open accounts in fake names, and to use those accounts to receive fraud money, that's conspiracy to commit bank fraud. (Day One at 131).

Multiple government witnesses testified that they were the victims of fraud, primarily romance frauds and unemployment compensation fraud. The victims were communicating online with people they believed were romantic partners, potential roommates, and friends in need of a loan. (Transcript of Trial, Day One, 6/5/23 at 145-149, [hereinafter "Day One at _], Transcript of Trial Day Two, 6/6/23, 23-48 [hereinafter "Day Two at _], Transcript of Trial Day Three, 6/7/23 at 68-84, [hereinafter "Day Three at _], Transcript of Trial Day Four, 6/8/23 at 17-23, 45-53 [hereinafter "Day Four at _"], Transcript of Trial, Day Five, 6/9/23 at 20-32, [hereinafter "Day Five at _"], at 158-170, Transcript of Trial, Day Six, 6/12/23 at 130-138). These witnesses testified they sent the money to various bank accounts.

The government submitted evidence to show that various bank accounts were opened in Petitioner's and Henry's names using their passports as identification. Furthermore, bank accounts in the name of Clifford Barnard, Nelson Bright (or Bright Nelson) and Zion Cleaning were opened using fake passports with Petitioner's and Henry's picture. (Day Three at 104-108, 112-113, Day Five at 34-50, 54-63, 67-95). The government

submitted evidence to show that some funds deposited in the Clifford Barnard and Nelson Bright accounts were later transferred to accounts in the name of Petitioner and Henry. (Day Seven at 36-56).

The government submitted evidence recovered from the search of two locations; 20 Bailey Court in Canton (where both brothers resided at the time), (Day Two at 139-150), and Prime Storage in Quincy (a storage locker maintained, paid for and accessed by Henry but not by the Petitioner). (Day Two at 76-92). The evidence included prepaid debit cards, multiple fake and authentic passports, including ones in the names of Petitioner and Henry as well as Nelson Bright and Clifford Barnard, licenses, cash, bank statements, also in the name of Nelson Bright and Clifford Barnard and multiple cell phones. (Day Two 76-92).

On of the items recovered from the search of 20 Bailey Court was a cell phone. (Day Two at 148-49). The government alleged the phone belonged to Petitioner. (Day Six at 32-36). The records indicated that numerous text messages were sent from between the providing bank account numbers and information for the Nelson Bright accounts. (Day Six at 47, 50-53). The records also showed two text messages between Henry and Petitioner sharing the Nelson Bright bank account information (Day Six at 53-54) and two text messages sharing the Clifford Bernard bank information. (Day Six at 68-69).

A cooperating witness, Mike Oziegbe Amiegbe, testified that he had pled guilty to conspiracy to commit mail fraud. He testified he opened banks

accounts with fake passports to process the proceeds of fraudulent scams. (Transcript of Trial Day Four, 6/8/23 at 55, [hereinafter “Day Four at_”]). Amiegbe testified he knew Henry and another man, McPherson Osemwegie were involved in unemployment fraud because they had a conversation about it. (Day Four at 66). He also testified that although he knew Petitioner, Osemwegie did not have any conversations about fraud with Petitioner and he had no knowledge that Petitioner was involved with employment fraud. (Day Four at 146-47).

The last witness for the government was a forensic accountant. The accountant testified that he reviewed 22 bank accounts for five account holders, Petitioner, (Osaretin Omoruyi), Henry Omoruyi, Clifford Bernard, Nelson Bright and Zion Cleaning for the period of 2018-2021. (Day Seven at 6-8). Incoming transfers to these accounts totaled \$1,352,000. (Day Seven at 8). The accountant testified that these five account holders sent \$920,757.48 overseas to Nigeria. (Day Seven at 56). The government entered into evidence a summary chart of all the bank accounts’ activity. (Day Seven at 82).

Jury Instructions

The indictment charged the Petitioner in Count One with Bank Fraud. (Day Seven at 188). The court charged the jury “The government has alleged that on or about September 8, 2020, the defendant withdrew proceeds from a TD Bank account that had previously been opened in the name of Nelson

Bright.” (Day Seven at 188-89). The court further charged the government had to prove:

First, there was a scheme, substantially as charged in the indictment, to defraud a financial institution or to obtain a financial institution’s money by means of false or fraudulent pretense.

The court defined the term “defraud” to mean:

...to deceive the bank in order to obtain money or other property by misrepresenting or concealing a material fact. (Day Seven at 189).

The indictment charged both Petitioner and his co-defendant Henry in Count Three with conspiring to commit bank fraud and in Count Four with conspiring to commit money laundering. The court charged that to find conspiracy the jury must find beyond a reasonable doubt:

First, that the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people to commit bank fraud.

Second, that the defendant willfully joined in that agreement.

Third, that one of the conspirators committed an overt act during the period of the conspiracy in an effort to further the purpose of the conspiracy. (Day Seven at 192-93).

Note from the Jury

After the jury retired to deliberate the jury returned a jury note containing two questions. (Trial Transcript, Day Eight, 6/14/23 at 5 [hereinafter “Day Eight at_”]). The note read:

On counts 3 & 4, element one, and per the indictment, did the Government need to prove beyond a reasonable doubt that Henry conspired w/ Osaretin, and that Osaretin conspired with Henry? Or is evidence that they both had individual agreements w/ other co-conspirators sufficient? In other words, does the “at least 2 people to

commit money laundering have to include the defendants conspiring with each other. Thank you- (Day Eight at 5D.E. at 23, No. 197).

The court heard arguments from the parties as to how they would answer the question. The government argued that the answer was ‘No’, because a single conspiracy may exist where there is no direct contact between some of the participants. (Day Eight at 6). When the court pointed out that the indictment charged that “Henry conspired with Osaretin and Osaretin conspired with Henry and others. That’s how you indicted it.”, the government argued “To the extent the indictment uses the word ‘and,’ it is sufficient for the government to prove the offense in the disjunctive as [if] the ‘or’ has been used.” (Day Eight at 6, 7). The government cited United States v. Garcia-Torres 341 F.3d 61, 66 (1st Cir. 2003) in support. The defense disagreed stating the government indicted, argued and tried to prove at trial that the brothers were part of a single conspiracy, and to change it at this juncture was prejudicial. (Day Eight at 6). The court took the matter under advisement. Two hours later the jury returned another note. The note read:

We are very close to a verdict, but we are waiting on a response to our question.

In the meantime, we have continued to review your instructions and the evidence, and we feel very close to a verdict. (Day Eight at 8, D.E. at 23, No 197, p.5).

After researching the issue, the court stated that it would give the following answer to the jury.

You must find the government proved the conspiracy as charged in Count 3 and 4 beyond a reasonable doubt. You can find Henry guilty even if you find Osaretin not guilty and vice versa. Of course, you can find both of them not guilty. Therefore, you do not need to find that they conspired with each other so long as the government proved beyond a reasonable doubt that a defendant conspired with at least one other person that is charged in the indictment.” (Day Eight at 8).

The defense continued to object, arguing that the government charged the indictment as the two brothers conspiring together. The defense argued that the way the court phrased the instruction was a prejudicial variance that changed the language of the indictment. Defense also argued that it was a constructive amendment to the indictment that changed the way the government charged the case. (Day Eight at 10). The court noted both defendants’ objections, stating “You preserve it on appeal and let the First Circuit deal with it.” (Day Eight at 9).

The Verdict

The jury returned a verdict of guilty on all counts. (Day Eight at 13-14).

Sentencing

Probation prepared the Presentence Investigation Report (PSR) on September 26, 2023. (PSR at 1). The PSR grouped Counts One, Three and Four for guideline calculation. (PSR at 19, para. 51). Probation calculated the loss amount as more than \$2 million. (PSR at 5, para 13). Probation aggregated the money flowing through accounts in the name of Petitioner,

Henry, Nelson Bright, Clifford Bernard, and Philip Weah, (a pseudonym the government attributed to Macpherson Osemwegie). (PSR at 4-5, para 13, 14).¹ For a total offense level of 32. (PSR at 19-21, para. 51-61).

Appeal

On appeal the Petitioner argued that the District Court prejudicially erred in its response to a jury note. The court told the jury that evidence that both brothers had individual agreements with other co-conspirators was sufficient to convict the two brothers of the single conspiracy charged in counts three and four of the indictment. This was error. The court should have instructed the jury that the government must prove the single conspiracy charged in the indictment and if the government proved some other conspiracy the jury must acquit. The Court of Appeals held that the district court did not prejudicially err because when the court's response to the jury note must be "examined as a whole" together with the court's other instructions to the jury and that as a whole the jury instruction "accurately conveyed what the law is" Slip Op. at 17-18. This holding is in direct contravention with the holding in Bollenbach v. United States, which clearly holds that an error in a supplemental instruction answering a jury's question is not cured by the court's prior charge. 66 S.Ct at 405 (1946).

Petitioner also argued that there was insufficient evidence existed to convict Petitioner of bank fraud. To prove bank fraud the government must

¹Macpherson who was indicted with Petitioner and Henry pleaded guilty to conspiracy before trial. (PSR at 4, para. 11)

prove a defendant intended to defraud a financial institution or prove a defendant intended to obtain any of the moneys...or other property owned by or under the custody or control of, a financial institution by means of false or fraudulent pretenses. Relying on Shaw v. United States, 580 U.S. 63, 66 (2016). Petitioner argued that the government failed to prove that Petitioner obtained the bank's money through false pretenses because according to Shaw a bank has "the right to possess the deposited funds against all the world but for [the customer]". Shaw at 66. The Court of Appeals without citing a single case in support of this supposition, held that because Petitioner used a fake name to open the account that Petitioner did not have a right to the money as against the bank. Slip Op. at 9-11.

REASON FOR GRANTING THE WRIT

- I. **The District Court prejudicially erred in its response to a jury note. The court told the jury that evidence that both brothers had individual agreements with other co-conspirators was sufficient to convict the two brothers of the single conspiracy charged in counts three and four of the indictment. This was error. The court should have instructed the jury that the government must prove the single conspiracy charged in the indictment and if the government proved some other conspiracy the jury must acquit. The Court of Appeals prejudicially erred when it held in contravention of this Court's holding in *Bollenbach v. United States*, 66 S. Ct. 402 (1946).**

Argument

The law of multiple conspiracies makes it pellucid that if the government fails to prove the conspiracy alleged in the indictment and instead proves a different conspiracy or series of separate conspiracies, the jury must acquit. *United States v. Niemi*, 579 F.3d 123, 125-27 (1st Cir. 2009) (The government must prove the conspiracy charged in the indictment and not some other conspiracy or conspiracies. If it does not the jury must acquit), *United States v. Walker-Couvertier*, 860 F.3d 1, 16 (1st Cir. 2017) (government had to prove not only the overall conspiracy but that defendant joined that conspiracy. If not, the jury must acquit), *United States v. Trainor*, 477 F.3d 24, 34-35 (1st Cir. 2007) (the court gave the jury an extended instruction on the government's burden to prove the existence of "one overall conspiracy—as opposed to separate and independent conspiracies"). In the present case the jury specifically asked the court whether the government

had to prove one overall conspiracy to convict Defendants, or could they convict if they found separate, different conspiracies.

...did the government need to prove beyond that Henry conspired with Osaretin and that Osaretin conspired with Henry?

Or is evidence that they both had individual agreements with other co-conspirators sufficient”. (emphasis in the original) (D.E. at 23, No. 197).

Instead of correctly instructing the jury that if it did not find Defendants joined the single conspiracy charged, they must acquit, the court told the jury they could convict Defendants if they found Defendants joined individual, separate conspiracies with other people,

You do not need to find that they [defendants] conspired with each other so long as the government proved beyond a reasonable doubt that a defendant conspired with at least one other person that is charged in the indictment.

This was error. United States v. Boylen, 898 F.2d 230, 244 (1st Cir. 1990) (only a conspiracy charged in a particular count of the indictment, and no other conspiracy, whether or not charged elsewhere in the indictment, can properly support a conviction), United States v. Trainor, 477 F.3d 24, 35 (2007) (It is the government's burden to prove the existence of “one overall conspiracy ... as opposed to separate and independent conspiracies.”), United States v. Portela, 167 F.3d 687, 699 (1st Cir.1999) (jury must acquit if they find a conspiracy or conspiracies different from the single one charged.)

It is true that the jury clearly could have acquitted one Defendant and convicted the other, and in that sense, the two defendants did not have to conspire with each other to be guilty of the single charged conspiracy. United States v. Pena, 24 F.4th 46, 71 (1st Cir. 2022) (The two defendants did not have to conspire with an unindicted co-conspirator named in the indictment to be found guilty of the conspiracy charged). However, to convict either defendant, each had to join the conspiracy charged, and not some other conspiracy not set out in the indictment. Pena, 24 F.4th at 63, n. 15, 74. (“we think it highly unlikely that the jury convicted the two of them for participating in a separate conspiracy with Black, as necessarily required to support their reversible error argument, rather than a single conspiracy that included at least Pena and Ortiz.”) .

In the present case, the jury convicted Petitioner of participating in a separate conspiracy, not charged in the indictment. The jury specifically asked the court in a clearly worded compound question, “Is evidence that they both (Petitioner and Henry) had individual agreements with other co-conspirators sufficient” to convict. The answer to this question was “No”. By instructing the jury that, “you do not need to find that they conspired with each other so long as the government proved beyond a reasonable doubt that a defendant conspired with at least one other person that is charged in the indictment.” (Day Eight at 8), the court allowed the jury to convict Petitioner of “some other or separate conspiracy” not charged in the indictment.

The government's about-face concerning the jury's note is particularly egregious because aside from violating the multiple conspiracy rule, the government's argument was contrary to their own theory of the case. Before, during, and after trial, the government argued repeatedly and exhaustively that they were charging a single conspiracy. (D.E. at 15, No 110, Response to Motion to Sever at 6, Preliminary Conf., 5/30/23 at 49 [hereinafter Preliminary Conf. at _], Day Seven at 107, 11). Even after trial the government continued to argue a single conspiracy (Sentencing at 39, at 309). Importantly, the government argued at sentencing that each defendant was responsible for the loss caused by the other defendant because the defendants were in a single conspiracy. An argument that doubled each Defendants' loss amount. (PSR at 4-5, para 13, page 19, para 52). United States v. Tormos-Vega, 959 F.2d 1103, 115 (1st Cir. 1992) (defendant must have sufficient knowledge of the charge against him to prepare an effective defense and avoid surprise at trial.), United States v. Mitchell, 85 F.3d 800, 811 (finding no prejudice because, inter alia, the court's instruction was not inconsistent with the government's argument at trial).

The jury had a right to be correctly instructed and to determine whether a single conspiracy existed. The court's incorrect instruction usurped the jury's fact-finding role. United States v. Sabetta, 373 F.3d 75, 80 (1st Cir.2004) (a district court must use extreme caution in answering questions from juries so as not to usurp the jury's fact finding role), United States v.

Argentine, 814 F.2d 783, 788 (1st Cir. 1987) (court may not step in and direct a finding of contested fact in favor of the prosecution “regardless of how overwhelming the evidence may point in that direction”), Trainor, 477 F.3d at 35 (determining whether one or more conspiracies existed is “ordinarily a question of fact for the jury to resolve.”), United States v. Portela, 167 F.3d 687, 699 (1st Cir.1999) (jury must acquit if they find a conspiracy or conspiracies different from the single one charged.)

Moreover, the error was prejudicial because regardless of the weight of the evidence, the jury would have acquitted had the court properly instructed them. It was clear from the jury’s last note that the jury’s verdict depended on the court’s instruction, “We’re very close to a verdict, but we are waiting on a response to our question” (D.E. at 23, No 197 at 5). Had the court instructed the jury correctly, the jury would have acquitted both defendants. United States v. Trainor, 477 F.3d at 35 (approving of the court’s instruction: if you find there was not one overall conspiracy as alleged by the government but instead there were several separate and independent conspiracies, then you must find the defendant not guilty of the conspiracy charged), United States v. Calderon, 127 F.3d 13,14 (11th Cir.1997) (prejudice is shown where the jury would have acquitted had they been correctly instructed.)²

² It was clear from the district court’s musing that the court believed the court’s answer to the jury’s question was dispositive. “I must say I have been thinking about this case. I don’t know if it’s a dealbreaker, but apparently one way or another, they’re ready to come up with a verdict, and they’re waiting for our response.” It is also clear that the court believed the jury was ready to acquit one or both Defendants. “So, I think the key is, for example, they could easily find, based, for example on the set of texts with Godfrey, that Mr. Osaretin Omoruyi is guilty and not find Henry is guilty. And similarly, they

Therefore, the district court's error in answering the jury's note in the affirmative was reversible error. Petitioner's convictions on counts three and four of the indictment should have been vacated.

Instead of vacating Petitioner's convictions however, the Court of Appeals held that:

When reviewing a preserved instructional error ...we are obligated to "examine the jury [instructions] as a whole in order to determine whether the district judge clearly conveyed the relevant legal principle."

When looking at the conspiracy instructions as a whole, it did not misstate the law. Instead, the initial jury instruction accurately conveyed what the law is. Slip Op. at 17-18.

This was an error of law. This Court has clearly stated that an error in supplemental instruction, particularly a supplemental instruction answering a jury's question, is not cured by the court's prior charge. Bollenbach v. United States, 66 S. Ct 402, 405 (1946) ("Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge"), See also Arroyo v. Jones, 685 F.2d 35, 38-40 (2nd Cir.1982) citing Bollenbach, ("We do not believe that the trial court's unobjectionable charge on intent can be deemed to have cured the defective language in the supplemental charge...the initial instructions cannot be deemed to have disinfected the later [supplemental instruction] because the jury's questions reveal that the initial charge simply was not understood").

could easily find, based on the fact that Ms. Varner sent money directly to Henry, that he was part of this

In the present case, the district court told the jury that they could convict Petitioner's of conspiracy if they had individual agreements with other co-conspirators. This was a mistake of law.

It's true the district court's answer to the jury's question, referenced the initial charged indictment" twice. Slip Op. 18. However, Bollenbach and its progeny make clear that "When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy". Referring the jury to the "indictment" and the prior misunderstood instruction on conspiracy, is not answering the jury's question with concrete accuracy. It is misleading the jury with a completely "unilluminating" reference. Bollenbach at 404.

Bollenbach, also makes clear that it is error to examine a supplemental instruction, given in response to a question from the jury, "in light of the charge as a whole". Bollenbach at 405 (a duty of special care is indicated in replying to a written request from the jury. Any error in the answer is "not cured by a prior unexceptional and unilluminating abstract charge"), Tart v. McGann, 697 F.2d 75, 76-77 (2d Cir.1982) (the district court "must use special care to see that inaccuracy or imbalance in supplemental instructions do not poison an otherwise healthy trial"), Arroyo v. Jones, 685 F.2d 35, 39 (A supplemental charge must be viewed in a special light. Offending language in the supplemental charge is different from language in the body of the court's initial charge). Unlike the initial charge, the court's supplemental charge is often the last thing the jury hears, and the jury often returns a verdict

greater scam; but Osaretin really, who was in a different place was not." (Day Eight at 9-10).

immediately following the instruction. Bollenbach, 66 S. Ct. at 405 (Particularly in a criminal trial the judge's last word is apt to be the decisive word), Arroyo, 685 F.2d at 40 (the judge's supplement instruction will enjoy special prominence in the minds of the jurors and "the judge's last word is apt to be the decisive word"), Tart, 697 F.2d at 77 (after having asked for additional guidance on an issue, and receiving it in the supplemental instruction, an unambiguous answer is critical, especially as the judge's "last word is apt to be decisive").

Most importantly, supplemental instruction in answer to a jury question cannot be judged in context of the instruction as a whole because the jury has asked for further clarification on a vital issue about which the jury remains unclear after the initial instruction. Bollenbach 66 S. Ct. at 405 (It would indeed be a "long jump at guessing" to conclude that the jury did not rely on an erroneous instruction given them as a guide to their specific question), Tart, 697 F.2d at 76 ([M]ost importantly, the supplemental charge will normally be accorded special emphasis by the jury because it will generally have been given in response to a question from the jury."), Arroyo, 685 F.2d at 40 (When jurors have so little comprehended the unobjectionable initial charge that they found it necessary to ask for clarification, it would be "decidedly dense of us to assume that the unobjectionable initial charge, as to which enlightenment was requested, itself enlightened the jury as to the real meaning of the improper enlightenment.")

The Court of Appeals’ decision also states that Petitioner’s “concede” that “the district court’s answer correctly conveyed that the jury could have acquitted Hemry but convicted Osaretin, vice versa, and in that instance, the jury would have found that Henry and Osaretin had not conspired with each other. This is misleading and entirely beside the point. One brother could have been acquitted of the conspiracy charged but to convict either brother, each had to join the same conspiracy and could not have “individual agreements with other coconspirators”. Petitioner’s brief at 32.

Since the supplemental instruction in this case was “on a vital issue and misleading” a new trial is called for”. Bollenbach, at 405. Also, because the appeals court’s decision conflicts with this Court decision in Bollenbach and misapprehends the law concerning supplemental instructions following a jury question, this Court should grant certiorari to consider this issue.

- II. To be guilty of bank fraud a defendant must knowingly execute a scheme to deceive the bank and deprive the bank of its property. In the present case, Petitioner did not deprive the bank of property in its custody and control when he withdrew money from his own account. The Court of Appeals holding to the contrary, directly conflicts with this Court’s holding in Shaw v. United States, 580 U.S. 63 (2016) and other courts of appeals which have addressed the issue.**

Argument

The Bank Fraud Statute (BFS) has two subsections, 18 U.S.C. §1344(1) and §1344(2), which, while overlapping, are two distinct methods of committing the offense of Bank Fraud. Shaw v. United States, 580 U.S. 63, 70-71 (2016), Loughrin v. United States, 573 U.S. 351, 358 n.4 (2014). A defendant is guilty of bank fraud under § 1344(1) if the prosecution proves beyond a reasonable doubt that defendant engaged in a scheme or artifice to defraud a federally insured financial institution and did so knowingly. United States v. Brandon, 17 F.3d 409, 424 (1st Cir.1994). The scheme to defraud a bank “must be one to deceive the bank and deprive it of something of value”, that is money or property. Id. at 72. A defendant is guilty of bank fraud under § 1344 (2) if he knowingly engages in a scheme or artifice employing materially false and fraudulent pretenses to obtain money or property owned by, or under the custody or control of a federally insured financial institution. Id. The false or fraudulent pretenses or statements must be the means by which a defendant caused the bank to release the funds. Loughrin, 573 U.S. at 363 (the “by means of” language is satisfied

when, as here, the defendant's false statement is the mechanism naturally inducing a bank to part with money in its control), Shaw, 580 U.S. at 68 (the false statements led the bank to release funds "that ultimately and wrongfully ended up with Shaw"). In the present case, the government failed to prove bank fraud under either section of the bank fraud statute.

Section 1344 (1) requires the government to show a scheme to defraud the bank, that is, to deceive the bank and deprive it of its property. Shaw, 580 U.S. at 72. The government must prove that the scheme was one to victimize the bank or expose it to a risk of loss. Brandon, 17 F.3d at 427. The bank need not suffer actual loss, nor must the government prove a defendant intended to cause the bank financial loss, so long as a defendant knowingly executes or attempts to execute a scheme which deprives the bank of its property, thus exposing it to a potential risk of loss. Shaw, 580 U.S. at 67-68.

In the present case, the government did not prove that the scheme was one to deprive the bank of its property or expose the bank to potential risk of loss. In the present case, the victims validly withdrew money from their accounts which was deposited in accounts under Petitioner's control, and Petitioner withdrew the money from his own account. At no time was the money the property of the bank, nor was the bank exposed to risk of loss. In re: Whitley, 848 F.3d 205, 210 (4th Cir. 2017) (When a debtor's makes deposits and accepts wire transfers into his own, unrestricted checking account, he continues to possess, control, and have custody over those funds, which are

freely withdrawable at his will), Shaw, 580 U.S. at 66 (As the bailee the bank can assert the right to possess the deposited funds against all the world but for the bailor) (emphasis added).

It is true that Shaw held that deposits in a customer's account ordinarily become the property of the bank. Id. However, Shaw is distinguishable from the present case, because in Shaw the scheme targeted a customer's account at the bank, and the bank although not the intended victim of the scheme, was exposed to risk of loss because it owed a duty of care to its customer whose funds were in the custody and control of the bank. Shaw at 67 (a scheme fraudulently to obtain funds from a bank depositor's account normally is also a fraudulent scheme to obtain property from a financial institution). In the present case however, Petitioner's scheme did not deprive the bank of its property or expose it to risk of loss because the money was deposited (valid electronic transfers) in Petitioner's own account and the bank never had custody and control of the funds as against Petitioner. Isaiah v. JPMorgan Chase Bank, 960 F.3d 1296, 1302-1304 (11th Cir.2020) (A bank's right to use depositors' funds is always subject to its obligation to the accountholder to return the funds upon request. An account holder never relinquishes his interest in or control over the funds deposited into his account).

It is true that after Shaw the government need not prove the bank ultimately suffered a financial loss, nor that the defendant's purpose or

intent was to cause the bank financial loss. Shaw, 5890 U.S. at 67. (“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”). Nonetheless, under subsection 1344(1), the government must prove that Petitioner knowingly executed a scheme to deceive the bank and deprive the bank of its property. Shaw, 580 U.S. at 72. Where the scheme does not involve a potential loss to the bank the scheme is not one to deprive the bank of its property under 1344(1). United States v. Brandon, 17 F.3d 409, 427 (1st Cir. 1994), United States v. Blackmon, 839 F.2d 900, 906 (2nd Cir. 1988), United States v. Moran, 312 F.3d 480, 489 (1st Cir.2002), United States v. Lemons, 941 F.2d 309, 315-16 (5th Cir. 1991). ³

Petitioner is likewise not guilty of bank fraud under §1344(2). Section 1344(2) unlike section 1, does not require a scheme to defraud the bank. Loughrin v. United States, 573 U.S. 351, 356 (2014). This section envisions a scheme to obtain bank property “by means of false or fraudulent pretenses Loughrin v. United States, 573 U.S. 351, 353 (2014). 18 U.S.C. § 1344 (2) (Whoever knowingly executes a scheme or artifice 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, representation, or promises).

³ The Supreme Court’s ruling in both Loughrin and Shaw call into question the validity of the holdings in some of these cases. But that is only to the extent that the cases hold that a defendant’s intent to defraud the bank must be an element of the crime of bank fraud as defined by 1344 (1) & (2).

While it is true that the government's evidence at trial supported a finding that Petitioner made false representations to the bank (using an alias to open various accounts), the evidence did not show that the false representations were how Petitioner obtained bank property. As Loughrin made clear, § 1344(2) contains a "relational component". This relational component requires that a defendant acquire bank property by means of the misrepresentation. Id. at 363.

In the present case Petitioner's false statements were not the means by which he acquired the funds. The false statements did not "bring about" the result of obtaining of the funds, either from the victims or from the bank. Id. ("Its not enough that a fraudster schemes to obtain money from a bank and that he make a false statement". Petitioner's false statements must be the means by which he acquires bank property). Here the false statements to the bank were not the means by which Petitioner acquired the funds. The lie was not "the mechanism naturally inducing [the] bank to part with its money". Petitioner's false statement, opening his account under an alias, like the lie that induces the victims to part with their money, was not the "mechanism" which induced the bank to release the funds. Id. at 363.

It is true that the false statements are arguably a "but for cause", of obtaining the funds, (had the bank known that the accounts were not in Petitioner's legal name, they would not have allowed him to open the accounts through which he accessed funds). Loughrin, 573 U.S at 364 (a lie is

a but for cause of a bank's payment where the bank would not have disbursed the funds had the misrepresentation never occurred). But Loughrin makes clear that not every "but for" cause will result in a violation of the statute. Id. at 363. There is a

significant textual limitation on § 1344(2)'s reach. Under that clause, it is not enough that a fraudster scheme to obtain money from a bank and that he make a false statement. The provision as well has a relational component: The criminal must acquire (or attempt to acquire) bank property "by means of" the misrepresentation. Id. at 362-363. (emphasis in original)

Indeed, we know that the false representations to the bank (defendant's alias) were not "integral to the fraudulent scheme" i.e. to obtaining money from the bank, because proceeds of various fraud were also deposited in accounts in Petitioner's own name. (PSR at 5, para. 13). A strict relational component is necessary to prevent the BFS from being used to criminalize fraud that is only incidentally related to federal banks. Id. at 363.

The false statements were a means of hiding Petitioner's true identity. In the present case the government's proof at most showed Petitioner's false statements to the bank was merely an "incidental by product of the scheme" to defraud the victims of the romance and unemployment scams. Id.

Moreover, and most importantly, section 1344(1), section (2) requires that a defendant attempt to acquire property in the custody and control of the bank and the funds in question were never in the bank's custody as against the custody and control of Petitioner. (Infra at 41-43).

The Court of Appeal's decision that there was sufficient evidence to support Petitioner's bank fraud and conspiracy to commit bank fraud convictions is in conflict with the Supreme Court's decision in Shaw v. United States, 580 U.S. 63, 72 (2016). Shaw holds that to be guilty of bank fraud a defendant must knowingly execute a scheme to deceive the bank and deprive the bank of its property. Shaw, at 72, United States v. Davis, 989 F.2d 244, 246-47 (7th Cir. 1993). "the purpose of [the bank fraud statute] is not to protect people who write checks to con artists but to protect the federal government's interest as an insurer of financial institutions."). Shaw makes clear that a bank does not have a property interest in the deposited funds superior to that of the account holder. Id. at 66 ("As bailee the bank can assert the right to possess the deposited funds against all the world but for the bailor). Between the bank and the depositor, the depositor has a superior property right in the funds.

The panel states that "Shaw does not focus on how the bank's interest in a customer's deposited funds compares to the customer's interest in those same funds." Slip Op. at 11. This is incorrect. The Shaw decision turns on the bank's property interest in the customer's account. Shaw holds that the bank's interest in a customer's account is a property interest in that account and states that a bank has the right to possess those deposited funds against all the world but for the account holder. Shaw, 580 U.S. at 66. Thus, Shaw juxtaposes the bank's property interest in the funds in another account

against its property interest in the funds of the account holder. In the first instance, the bank has a property interest superior to the defendant, in the second instance, it does not. When a defendant obtains the funds from another customer's account it is bank fraud. When a defendant withdraws funds from an account under his control it is not. Therefore, Petitioner's scheme was not bank fraud, because it was not a scheme to knowingly deprive the bank of its property or expose the bank to risk of loss. Shaw, at 67-68. The bank is never on the hook for giving that money in Petitioner's account back to anyone. Davis, 989 F.2d at 246-47 (7th Cir. 1993). "the purpose of [the bank fraud statute] is not to protect people who write checks to con artists but to protect the federal government's interest as an insurer of financial institutions.").

This Court's panel decision, which annuls the depositor's superior interest in the funds because the depositor used a false name in opening the account, has no support in case law and conflicts with a decision of another Court of Appeals. Slip Op. at 11 (Because--unlike in Shaw—Henry and Osaretin used fake names to open the accounts, their reliance on Shaw does not aid them"). United States v. Orr, 932 F.2d 330, 332 (4th Cir. 1991) (Setting up an account under a false name may have been a step in the plot to acquire a victim's money, but the bank fraud statute requires more. Whether the account was in the name of Rogers, or Elkins, was not of significance to the giving of checks payable to certain payees and the return

of such checks for reasons of insufficient funds.) See also, United States v. Braeger, No. 21-CR-233, 2023 WL 2136722, at *6 (E.D. Wis. Feb. 21, 2023) (Even read in the light most favorable to the government, it cannot be inferred that defendant's false statement in setting up the account induced the bank to later disburse the funds). Whether the account was in the name of Osaretin Omoruyi or Nelson Bright, was not of significance to fraudulently obtaining the victim's money or releasing those funds to Petitioner. Loughrin v. United States, 573 U.S. 351, 358 n.4 (2014).

Therefore, the Court misapprehends the law and its panel decision is in conflict with the Supreme Court and another circuit court and this Court should grant a panel rehearing and/or a rehearing en banc.

CONCLUSION

For the above reasons, this Court should grant the Petition for a Writ of Certiorari.

Dated at Portland, Maine this 15th day of October 2026.

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