IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRYAN J. SEVERSON,

Defendant.

ORDER

07-CR-074-C

As the government noted at the final pretrial conference, both the Supreme Court and the Court of Appeals for the Seventh Circuit have proclaimed that materiality is an element of a bank fraud prosecution under 18. U.S.C. §1344, *see United States v. Reynolds*, 189 F.3d 521, 524-25 (7th Cir. 1999), *citing Neder v. United States*, 527 U.S. 1 (1999), but these courts do not explain how a trial court is supposed to convey this concept to the jury in a prosecution under paragraph (1) of § 1344.

In *United States v. Pribble*, 127 F.3d 583, 587 (7th Cir. 1997), the court forgave the omission of a materiality instruction on the ground that the concept of fraud encompassed materiality, but in *Reynolds* the court admonished that "district courts should include materiality in the jury instructions for § 1344." 189 F.3d at 524, n.2. The key to materiality is whether a statement is capable of influencing a decision-maker, *Id.* at 525, but under § 1344(1), "a scheme to defraud need not involve any false statement or misrepresentation of fact," *see* Pattern Jury Instructions for the Seventh Circuit (1999) at 267 ("scheme–definition") and the committee comment. Okay, so how do we reconcile these directives? The government may be correct in its argument that the upper courts did not intend to infuse materiality into the first

paragraph of § 1344, but this court is not willing to bet a five-day jury trial on the correctness of this argument. So, let me suggest this ungainly edit:

> A scheme is a plan or course of action formed with the intent to accomplish some purpose. For the purposes of Counts 1 through 11, a scheme to defraud a bank means a plan or course of action intended *materially* to deceive or to cheat that bank and to obtain money or property or to cause the loss of money or property by the bank. A scheme to defraud need not involve any false statement or misrepresentation of fact.
>
> *Here, the adverb "materially" means that the plan or course of deceptive action was capable of influencing the bank's decision-making process.*

I'm not convinced that this adds much to what we've already got, but pending receipt of different marching orders from Chicago, prudence dictates insertion of some form of the word "material" somewhere in the definitional instructions for the elements of § 1344. The parties should be prepared to discuss this point at the October 18, 2007 final hearing.

Entered this 17th day of October, 2007.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge