

**THE FEDERAL MAIL AND WIRE FRAUD STATUTES:
CORRECT STANDARDS FOR DETERMINING
JURISDICTION AND VENUE**

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I. INTRODUCTION

The federal mail and wire fraud statutes, particularly since their amendment in 2002, have become the most prevalent and lethal weapon in the federal prosecutor's arsenal in the post-Enron and WorldCom efforts of the United States Department of Justice (DOJ) to be tough on white-collar and financial crimes. While this has allowed the DOJ to expand the statutes' reach and root out new and increasingly more sophisticated frauds, it has also led to the "federalization" of fraudulent conduct that is more appropriately dealt with by state prosecutors under state law. An unfortunate by-product of this phenomenon is that far too many mail and wire fraud prosecutions have occurred in the wrong venue.

Perhaps one of the least-known provisions of the Sarbanes-Oxley Act of 2002¹ is the four-fold increase (from 5 to 20 years) in the statutory maximum term of imprisonment² for a violation of the federal mail fraud³ and wire fraud⁴ statutes. These statutory enhancements

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1. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2000 & Supp. III 2003)).

2. Title IX of the Sarbanes-Oxley Act is called the White-Collar Crime Penalty Enhancement Act of 2002, § 901, 116 Stat. 745, 804. Section 903(b) increases the statutory maximums for mail and wire fraud from five to 20 years. *See* § 903(b), 116 Stat. 745, 805. If the fraud "affects" a financial institution, the maximum term is 30 years. *See* 18 U.S.C. §§ 1341, 1343 (2002); *infra* text accompanying notes 3-4.

3. The mail fraud statute provides in pertinent part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . *for the purpose of executing such scheme* or artifice or attempting so to do, *places* in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, *or*

have considerably raised the stakes for federal white-collar criminal defendants, who invariably face at least one count of mail or wire fraud charged in their indictments. A conviction on just one count in an indictment alleging mail and/or wire fraud could send a defendant to federal prison for a long time. This is the primary reason the federal judiciary's view of subject matter jurisdiction and venue in mail and wire fraud cases must be critically reexamined.

My review of virtually all of the reported Supreme Court and courts of appeals mail and wire fraud decisions spanning the past 60 years leads to the inescapable conclusion that the federal judiciary allows federal prosecutors far too much leeway when it comes to determining whether a mail or wire fraud prosecution even belongs in federal court to begin with or, for that matter, whether it belongs in a particular district (often chosen by federal prosecutors because it is more convenient for the prosecution team and less convenient—and much more costly—for the defendant).

After reviewing the evolution of the law regarding jurisdiction and venue in mail and wire fraud cases, this Article suggests that federal courts take a more critical approach in determining whether to dismiss an indictment or grant a judgment of acquittal for lack of sub-

deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, *or takes or receives therefrom*, any such matter or thing, *or knowingly causes to be delivered* by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341 (emphasis added).

4. The wire fraud statute provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, *transmits or causes to be transmitted* by means of wire, radio, or television communication *in interstate or foreign commerce*, any writings, signs, signals, pictures, or sounds *for the purpose of executing such scheme* or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1343 (emphasis added). The original mail fraud statute was enacted in 1872 as part of an omnibus act chiefly intended as a broad revision of the postal code. *See* Act of June 8, 1872, ch. 335, § 301, 17 Stat. 283, 323 (1872). Wire fraud did not become a federal crime until 80 years later in 1952. *See* Communications Act Amendments, 1952, ch. 879, § 18(a), Pub. L. No. 554, 66 Stat. 711, 722 (1952) (codified at 18 U.S.C. § 1343). All references in this Article to mail and wire fraud also include “honest services” mail and wire fraud. 18 U.S.C. § 1346 (2000).

ject matter jurisdiction and/or venue in mail and wire fraud prosecutions. This Article then clarifies the standards federal courts should utilize in making such determinations and suggests the Supreme Court expressly overrule several inconsistent precedents in these areas.

II. SUBJECT MATTER JURISDICTION: “FOR THE PURPOSE OF EXECUTING SUCH SCHEME”

Far too many cases of white-collar fraud alleging violations of the mail and/or wire fraud statutes are prosecuted in federal court even though the subject mailing or wire transmission has only an incidental, tangential, collateral, or even non-existent relationship to the underlying fraudulent scheme—meaning federal subject matter jurisdiction is lacking.⁵ Unless the mailing or wire transmission is “for the purpose of executing such scheme,”⁶ then the jurisdictional predicate for proceeding under the federal mail and wire fraud statutes is lacking and the defendant is entitled to a dismissal of the indictment or information, or a judgment of acquittal, for lack of subject matter jurisdiction.⁷ The federal mail and wire fraud statutes do not punish fraudulent schemes, just the illegal use of the mails and wire facilities in furtherance of such schemes. In order to punish the underlying fraudulent scheme, one must resort exclusively to state law. Although a simple concept, it bears repeating given the penchant of the DOJ to involve itself in ever-increasing numbers and types of fraud cases—not all fraud prosecutions belong in federal court.

While the doctrine of subject matter jurisdiction in mail and wire fraud cases is easy to understand and apply in theory, the Supreme

5. Because the mail and wire fraud statutes employ the same operative language, courts apply the same analysis to both kinds of cases. *See* *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987) (“The mail and wire fraud statutes share the same language in relevant part, and accordingly we apply the same analysis to both sets of offenses here.”); *Pasquantino v. United States*, 544 U.S. 349, 355 n.2 (2005) (“we have construed identical language in the wire and mail fraud statutes *in pari materia*”).

6. *See* 18 U.S.C. §§ 1341, 1343; *supra* text accompanying notes 3–4.

7. Because mail and wire fraud offenses constitute felonies, such offenses must be prosecuted by indictment, although a defendant can waive prosecution by indictment and proceed by information, which normally occurs when a plea has been negotiated. *See* FED. R. CRIM. P. 7(a)(1)(B), 7(b). A motion to dismiss an indictment or information for lack of subject matter jurisdiction can be filed by the defendant at any time the case is pending. FED. R. CRIM. P. 12(b)(3)(B). A motion for judgment of acquittal can be filed by the defendant at the close of the government’s case, at the close of all the evidence, and within seven days after a guilty verdict. FED. R. CRIM. P. 29(a), (c).

Court has found it exceedingly difficult to consistently define the parameters of the doctrine in practice. As a result, the lower federal courts have had an even more difficult time applying the jurisdictional test to mail and wire fraud cases, leaving a thoroughly muddled and confusing doctrine. Consequently, it must fall to the Supreme Court to clarify the doctrine and, in the process, clearly define the appropriate limits of subject matter jurisdiction in mail and wire fraud cases.⁸

A. *Kann*

The first Supreme Court case to overturn a conviction based on the tenuous relationship of the act of mailing to the underlying fraudulent scheme was *Kann v. United States*.⁹ Gustav H. Kann, president of a Maryland munitions company, had large contracts with the United States Government (mostly the Navy) for the production of explosives during World War II. The charged fraudulent scheme involved Kann and his co-defendants diverting to themselves and others funds payable to Kann's company under a government contract through salaries, dividends, bonuses, and other expenditures.¹⁰ The use of the mails alleged involved Kann's co-defendants endorsing and cashing checks at banks for some of the diverted proceeds. Thereafter, those banks mailed the checks for ultimate settlement to other banks on which the checks were originally drawn.

8. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) ("Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level."); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977) ("[W]e are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction.").

9. 323 U.S. 88 (1944). Prior to *Kann*, in *Badders v. United States*, the Supreme Court—in upholding a conviction—provided language that it subsequently relied on to hold that a mailing could be for the purpose of executing the scheme "if it is a step in a plot." 240 U.S. 391, 394 (1916) (Holmes, J.). See *infra* text accompanying notes 81 and 102.

10. Interestingly, and a point largely omitted from the commentary on this case throughout the years, Kann was a co-defendant in a parallel mail fraud prosecution in which he was convicted. See *United States v. Decker*, 51 F. Supp. 15 (D. Md. 1943), *aff'd*, 140 F.2d 378 (4th Cir. 1944). Kann's company had also entered into contracts with certain foreign governments to produce explosives and the evidence revealed Kann's payment of certain monetary amounts to undisclosed foreign agents. *Id.* at 16–17. Some of the monies diverted included funds used for clothing, travel, liquor, home landscaping, placing relatives in "no-show" jobs on the company's payroll, and purchasing a \$160 suit for a Navy inspector (about \$2,200 in today's currency). See *United States v. Decker*, 51 F. Supp. 20, 23 (D. Md. 1943), *aff'd*, 140 F.2d 375 (4th Cir. 1944) (vacating Kann's conviction in a third prosecution for providing false financial reports to the Navy; the Fourth Circuit affirmed the district court's new trial order).

Kann's primary argument, in both the district court and the Fourth Circuit, was the mailing of the checks by the paying banks was not for the purpose of executing the scheme because the defendants, to whom those checks were delivered, had already received the money represented by the checks. Consequently, the checks were not mailed in the execution of, or for the purpose of executing, the scheme. The Fourth Circuit rejected this argument, based on the weak reasoning that Kann "was a party to the mailing of these checks by the bank which cashed them, to the bank on which the checks were drawn."¹¹

The Supreme Court, however, reversed and vacated Kann's mail fraud convictions, primarily because:

The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably. It was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank. *It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.*¹²

The government argued that the scheme was not complete because Kann and his co-defendants expected to receive additional bonuses and profits from additional diverted funds. But the Supreme Court rejected this argument as well because "the scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud, and the subsequent banking transactions between the banks concerned were merely *incidental and collateral to the scheme and not a part of it.*"¹³ And in a famous admonition that not all fraud prosecutions belong in federal court, the *Kann* majority stated: "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances in which the use of the mails is a part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law."¹⁴ Four Justices dissented, however, essentially agreeing with the government's argument that the mailings were part of "a continuing venture."¹⁵

Notwithstanding a four-Justice dissent, *Kann* was correctly de-

11. *Kann v. United States*, 140 F.2d 380, 382 (4th Cir. 1944).

12. *Kann*, 323 U.S. at 94 (emphasis added).

13. *Id.* at 95 (emphasis added).

14. *Id.*

15. *Id.* at 96 (Douglas, J., dissenting). Justices Black, Jackson and Rutledge joined the dissent.

cided. The scheme was already completed and the money obtained at the time Kann's co-defendants cashed the checks. What may have happened to the checks afterwards is of no consequence from a jurisdictional standpoint. For example, instead of being mailed, the checks could have been hand-delivered by the paying bank to the drawee bank, which obviously would have had no impact on the fact Kann and his co-defendants already obtained the funds. In fact, unless they are specifically intended to "lull" the victim in an attempt to conceal the fraud,¹⁶ *post*-scheme mailings and wire transmissions can *never* satisfy the jurisdictional predicate of the mail and wire fraud statutes. Similarly, *pre*-scheme mailings and wire transmissions are also insufficient unless they are "one step toward . . . the receipt of the fruits of the fraud."¹⁷

B. *Parr*

Almost 15 years later, in *Parr v. United States*,¹⁸ the Supreme Court again considered the required nexus between the mailing and the fraudulent scheme in order to satisfy the jurisdictional predicate of the mail fraud statute.

The individual defendants were primarily board members of a South Texas school district accused of diverting public monies for personal use. George B. Parr was the president and principal stockholder of two banks (also defendants) in which the school district deposited its funds and maintained other banking relationships. Although Parr was not a member of the school board, he attended the principal meetings of the board, completely dominated its activities, and personally countersigned the vast majority of the board's checks.¹⁹ Under Parr's direction, the school district staff made out

16. *See id.* at 94–95 (stating that "[a]lso to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated").

17. *Id.* at 94. Obviously, defining what *kind* of step the mailing or wire transmission constitutes toward receipt of the fruits of the fraud is the crux of the matter. In a later section of this Article, I suggest—based on Justice Frankfurter's analysis—that the mailing or wire transmission must constitute a *material* step toward the receipt of the fruits of the fraud. *See discussion infra.*

18. 363 U.S. 370 (1960). Future Justice Abe Fortas argued the case for the defendants. When Chief Justice Earl Warren announced his retirement in 1968, President Lyndon B. Johnson sought to elevate Justice Fortas to Chief Justice, but that effort failed. Justice Fortas was later forced to resign under threat of impeachment due to alleged financial irregularities. Justice Blackmun became his replacement.

19. *Parr v. United States*, 265 F.2d 894, 896–97 (5th Cir. 1959), *reh'g denied*, 268 F.2d

numerous checks both to non-existent persons and to actual payees for work not performed.²⁰ The tax assessments, tax statements, checks, and receipts for taxes paid that were sent and received by the school district constituted the mailings charged in the indictment.

Among Parr's arguments to the Fifth Circuit was that if funds received in the lawful payment of taxes were subsequently misappropriated, it is a case of embezzlement rather than mail fraud and, consequently, the subject mailings were not for the purpose of executing the scheme.²¹ In rejecting this argument and affirming the convictions, the Fifth Circuit held that because the use of the mails was reasonably foreseeable, the rule enunciated in *Pereira v. United States*²² applied, resulting in the mails being used for the purpose of executing the scheme.²³

In their argument to the Supreme Court, Parr and his co-

959 (5th Cir. 1959).

20. *Id.* at 897. About \$200,000, roughly \$1.6 million in today's currency, was ultimately diverted. *Id.* at 898. Microfilm records of the checks at issue in the Parr-controlled banks mysteriously "disappeared" soon after the investigation began. *Id.* n.4.

21. *Id.* at 898.

22. 347 U.S. 1, 8–9 (1954) ("Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used") (internal citations omitted).

23. *Pereira* is the foundation upon which an entire line of cases holds that a defendant "causes" the subject mailing or wire transmission by acting with the knowledge that use of the mails or wire facilities will occur in the ordinary course of business or where such use can reasonably be foreseen. See *United States v. Alexander*, 135 F.3d 470, 474–75 (7th Cir. 1998). The Seventh Circuit in *Alexander* stated:

It is not necessary that [defendant] himself utilized the mails. It is instead sufficient if he caused the mails to be used, which he would do by acting with the knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen.

Id. (internal quotation marks omitted). Although too lengthy a subject to discuss in this Article, the *Pereira* rule regarding causation in mail and wire fraud cases also merits critical reexamination, primarily because in today's business world it is virtually impossible to engage in a business or financial transaction in which the mails (including overnight delivery services such as FedEx) or wire facilities (such as faxes, wire transfers, ACH (Automated Clearing House) and PayPal payments, e-mails, and e-commerce) would *not* be utilized. The Supreme Court should expressly overrule *Pereira* and formulate a rule of proximate causation in mail and wire fraud cases that is not predicated on the antiquated business practices of the early 1950s. For example, in 1950 only 60% of U.S. households had a telephone. See INTERNATIONAL TELECOMMUNICATIONS UNION, WORLD TELECOMMUNICATION DEVELOPMENT REPORT 1998: UNIVERSAL ACCESS 62 (4th ed. 1998), available at <http://www.itu.int/ITU-D/ict/papers/witwatersrand/chap04.pdf> (last visited Feb. 29, 2008). In any event, the Fifth Circuit's reliance on *Pereira* was misplaced because the *Pereira* rule goes to causation—not jurisdiction.

defendants essentially conceded they engaged in embezzlement and a scheme to defraud, but that “these were essentially state crimes and could become federal ones, under the mail fraud statute, only if the mails were used ‘for the purpose of executing such scheme.’”²⁴ The Supreme Court essentially agreed, but primarily because the mailings at issue were legally compelled mailings by the school district (i.e., the billing for and receipt of taxes), noting:

[I]t cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys.²⁵

In addition to holding mailings required by law that are not false or fraudulent do not constitute mail fraud,²⁶ the Supreme Court also focused on the fact that none of the mailings (tax statements and checks) contained or constituted “false pretenses and misrepresentations to obtain money.”²⁷ Parr and his co-defendants did cause the school district to complete and mail to the state Commissioner of Education reports containing false information, but “those mailings were not charged as offenses in the indictment.”²⁸ In a final nod to the

24. *Parr*, 363 U.S. at 385. Notably, Parr and several of his co-defendants were tried in state court on charges stemming from the same matters involved in the federal case. Parr and several of his co-defendants were found guilty by a state court jury, but their convictions were reversed and the indictments dismissed on statute of limitations grounds. *Donald v. State*, 306 S.W.2d 360 (Tex. Crim. App. 1957); *Parr v. State*, 307 S.W.2d 94 (Tex. Crim. App. 1957). Another co-defendant was acquitted on one state court indictment and his conviction on another state court indictment was reversed because the trial court denied his motion for severance. *Chapa v. State*, 301 S.W.2d 127 (Tex. Crim. App. 1957). Consequently, Parr and his co-defendants were able to avoid criminal liability on both state and federal charges even after admitting that they had engaged in embezzlement and fraud on a grand scale.

25. *Parr*, 363 U.S. at 391.

26. *See United States v. Lake*, 472 F.3d 1247, 1255 (10th Cir. 2007) (noting “[t]he [Securities and Exchange Commission] reports were filed because they had to be, not because of any unlawful scheme”).

27. *Parr*, 363 U.S. at 391–92.

28. *Id.* at 392. The Supreme Court explained that the most likely reason for this had to do with venue, since the mailings from Benavides (Corpus Christi Division of the Southern District of Texas) to Austin (Western District of Texas) would have been outside the venue of the Houston Division of the Southern District of Texas (where the indictment was returned and the trial was held). *Id.* At the time, Rule 18 of the Federal Rules of Criminal Procedure required trials to be held both in the division as well as in the district where the offense was committed. *Parr*, 363 U.S. at 378 n.11. In 1966, the Supreme Court eliminated the requirement that prosecution be in a particular division in the district in which the offense was committed. *See* FED. R. CRIM. P. 18, Notes of Advisory Committee on Rules, 1966 Amendment. Many times federal prosecutors charge the wrong mailings or wire transmissions in the scheme,

limits of federal jurisdiction embodied in the mail fraud statute, the Supreme Court reiterated its prior admonition from *Kann*: “But the showing, however convincing, that state crimes of misappropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud.”²⁹

Three Justices dissented in a lengthy opinion by Justice Frankfurter, who made several statements which provide a clarifying lens through which modern mail and wire fraud cases can be critically analyzed.³⁰ First, he makes it clear that “[i]f the use of the mails occurred not as a step in but only *after* the consummation of the scheme, the fraud is the exclusive concern of the States.”³¹ Then, highlighting the practical difficulty in determining the exact relationship between a mailing and the scheme, Justice Frankfurter noted: “The adequate degree of relationship between a mailing which occurs during the life of a scheme and the scheme is of course not a matter susceptible of geometric determination.”³² However, in providing a solution to this problem, Justice Frankfurter stated that “[t]he determining question is whether the mailing was designed *materially* to aid the consummation of the scheme.”³³

By inserting a materiality requirement into the determination of whether a mailing is in furtherance of the scheme, Justice Frankfurter essentially solves our modern-day quandary of how to cabin the jurisdictional predicate in mail and wire fraud cases. In the hypothetical previously discussed,³⁴ the “thank you” note mailed by the defendant

largely due to venue concerns but sometimes because no other mailings or wire transmissions can be proved, or simply by mistake. For example, assume that a Maine defendant causes a New Hampshire victim to mail a check from New Hampshire to Vermont as part of the scheme, then later the defendant mails a “thank you” note from Maine to the victim in New Hampshire, and a federal prosecutor in Maine charges the post-scheme mailing of the “thank you” note from Maine to New Hampshire as a mail fraud count. As in *Kann*, such a prosecution would be improper because the post-scheme mailing of the note was after the money had already been obtained, and the scheme completed, by virtue of receipt of the check in Vermont. In fact, in three of the counts in *Parr*, the Supreme Court determined that *Kann* specifically controlled, because these three counts charged only the mailing of gas station credit card invoices and the checks sent to pay such invoices—both of which occurred long after the defendants had already obtained the goods and services from the scheme. *Parr*, 363 U.S. at 392–93.

29. *Parr*, 363 U.S. at 393–94.

30. *Id.* at 394 (Frankfurter, J., dissenting). Justices Harlan and Stewart joined the dissent.

31. *Id.* at 397 (citing *Kann v. United States*, 323 U.S. 88 (1944)) (emphasis added).

32. *Id.*

33. *Id.* at 398 (emphasis added).

34. See *supra* text accompanying note 28.

to the victim after the scheme had already reached fruition and after the money had already been obtained would, under Justice Frankfurter's test, clearly not be for the purpose of executing the scheme because the note had no *material* impact on the consummation of the scheme (i.e., the scheme occurred and the money was obtained whether or not the "thank you" note had ever been sent).³⁵

C. *Sampson*

Two years later, the Supreme Court returned to the jurisdictional issue in *Sampson v. United States*.³⁶ In *Sampson*, the district court dismissed virtually all charges in a 40-count mail fraud indictment against 23 individual defendants and one corporate defendant for failure to state an offense because "the mailings . . . relate to transactions where money had already been obtained from the victims prior to such mailings."³⁷ The government appealed the dismissal to the Fifth Circuit, which certified the appeal to the Supreme Court.³⁸

35. Justice Frankfurter's materiality test is also doctrinally consistent with more recent Supreme Court authority. *See Neder v. United States*, 527 U.S. 1, 25 (1999) (stating "we hold that materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes"). Applying Justice Frankfurter's materiality test to the mailings in *Kann*, it is easy to see why they were not in furtherance of the scheme. *Kann* and his co-defendants had obtained all of the money sought to be obtained from their scheme long before the banks involved mailed the cancelled checks between themselves for final settlement. Put another way, whether or not the banks mailed the checks between themselves after-the-fact had absolutely nothing whatsoever to do with *Kann* and his cohorts previously obtaining the money from their scheme.

36. 371 U.S. 75 (1962).

37. *United States v. Sampson*, 298 F.2d 826, 827 (5th Cir. 1962).

38. At the time, 18 U.S.C. § 3731 allowed the government to take direct appeals from the district court to the Supreme Court of decisions by a district court dismissing an indictment or any count thereof where such decision "is based upon the . . . construction of the statute upon which the indictment . . . is founded." *Sampson*, 298 F.2d at 827. However, as part of the Omnibus Crime Control Act of 1970, the statute was superceded in its entirety to provide that all such appeals are now directly to a court of appeals. *See* Pub. L. No. 91-644, 84 Stat. 1880, 1890 (1970) (codified as amended at 18 U.S.C. § 3731 (2006)). The statute, known as the Criminal Appeals Act of 1970, was further amended as part of the Comprehensive Crime Control Act of 1984. Pub. L. No. 98-473, 98 Stat. 1837, 2153 (1984) (codified as amended at 18 U.S.C. § 3731). This amendment allowed the government to take an interlocutory appeal from a district court's grant of a defendant's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33(b). *Id.* When the government first takes an interlocutory appeal, *inter alia*, from the grant of a defendant's new trial motion, arguably the defendant should likewise be allowed to take an interlocutory cross-appeal from the denial of his motion for judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). Although there is a circuit split on this issue, *compare* *United States v. Greene*, 834 F.2d 86 (4th Cir. 1987) (allowing defendant's interlocutory cross-appeal), *with* *United States v. Ferguson*, 246 F.3d 129 (2d Cir. 2001) (not allowing defendant's interlocutory cross-appeal), the Supreme Court has recently declined

The defendants (including officers, directors and employees of the corporate defendant) were allegedly engaged in a fraudulent “advance fee” loan scheme whereby “[t]he defendants purported to be able to help businessmen obtain loans or sell out their businesses.”³⁹ Not surprisingly, once the victims paid the advance fees, neither the business loans nor the sales of the businesses materialized. The charged mailings, so-called “accepted” applications with a form letter stating that the loans were in process, were mailed to the victims *after* the defendants had already cashed the victims’ checks.⁴⁰ Notably, the government conceded that “prior to each mailing of an acceptance to a victim the defendants had obtained all the money they expected to get from that victim.”⁴¹ Based on this admission, and relying primarily on *Kann* and *Parr*, the district court determined these mailings could not have been “for the purpose of executing” the scheme because the money had already been obtained by the defendants before the acceptances were mailed.⁴²

The Supreme Court, however, reversed. It held the post-scheme mailings of the acceptance letters to the victims, advising them the loans were in process, were designed “for the purpose of lulling [victims] by assurances that the promised services would be performed.”⁴³ Justice Douglas filed a lone dissent,⁴⁴ claiming *Sampson* is a “much weaker case than *Parr*”⁴⁵ where the convictions were reversed. According to Justice Douglas, *Sampson* can only be read to show that the defendants used the mails “to lull existing victims into a feeling of security so that a scheme to obtain money from other victims could be successfully consummated.”⁴⁶ Justice Douglas also lamented the unwarranted expansion of federal jurisdiction under the

to decide the matter. *See* United States v. Carpenter, 494 F.3d 13 (1st Cir. 2007), *cert. denied*, 76 U.S.L.W. 3226 (U.S. Feb. 25, 2008).

39. *Sampson*, 371 U.S. at 77.

40. *Id.* at 77–79.

41. *Id.* at 79.

42. *Id.*

43. *Id.* at 81.

44. *Id.* at 81 (Douglas, J., dissenting).

45. *Id.* at 83.

46. *Id.* at 82 (emphasis in original). The government conceded in its Supreme Court merits brief that once the advance fees were obtained from the victims, the defendants “had no intention of earning the balance due on the service contracts.” *Id.* at 83 n.3. Justice Douglas took this key admission to mean that there was an absence of any real possibility that the same victims could be defrauded again by the defendants, unlike in *Parr* where the defendants mailed out tax bills to the same taxpayers (and diverted the proceeds) every year for several years.

mail fraud statute when he stated: “We should not struggle to uphold poorly drawn counts. To do so only encourages more federal prosecution in fields that are essentially local.”⁴⁷

Justice Douglas was correct. The mailings in *Sampson* were not true “lulling” communications. In fact, for the scheme to succeed, the defendants did not have to mail the acceptance letters at all—they simply could have cashed the checks and never again communicated with the victims. This is a prime example of federal prosecutors improperly transforming a state crime into federal mail or wire fraud. There was no federal subject matter jurisdiction in this case because the defendants made *personal* visits to the victims in which false representations were made to convince the victims to part with their money.⁴⁸ During the same personal visits, the victims were convinced to sign an application and personally hand over to the salesman a check for the advance fee.⁴⁹ Since the mails were not used to communicate the false representations (or even to obtain the funds), this case did not belong in federal court and the district court’s decision should have been affirmed.

Sampson’s post-scheme mailings also would have failed Justice Frankfurter’s materiality test because they were not “designed materially to aid the consummation of the scheme.”⁵⁰ The scheme to obtain the funds had already been consummated by the time the acceptance letters were mailed. A true “lulling” communication is when a con artist, after taking money or property from a victim, mails something that gives the victim a false sense of security in order to discourage the victim from further investigation or scrutiny. For example, had the defendants sought to obtain *more* money from the *same* victims (i.e., the balance due on the service contracts), instead of just the initial application fee, then the acceptance letters would have been material in that effort. But so long as the scheme was just to obtain the initial application fee (as the government conceded), which was obtained in-person and not through the use of the mails, federal subject matter jurisdiction was clearly lacking in this case.⁵¹

47. *Id.* at 83.

48. *See id.* at 77 (majority opinion) (stating that, “[u]nder the plan, *personal* calls were made upon prospects who were urged by false and fraudulent representations to sign applications asking defendants to help them obtain loans or sell their businesses”) (emphasis added).

49. *Id.*

50. *Parr v. United States*, 363 U.S. 370, 398 (1960) (Frankfurter, J., dissenting).

51. As courts continue to rely on *Sampson*, if not overruled entirely, *Sampson* should be limited solely to determining whether a mailing has a “lulling effect.” *See United States v.*

D. Maze

In *United States v. Maze*,⁵² the Supreme Court put what should have been the final nail in the coffin on any attempt to characterize non-lulling, post-scheme mailings as being for the purpose of executing the fraudulent scheme.

In February 1971, defendant Thomas Maze moved into an apartment in Louisville, Kentucky, which was at the time occupied by Charles Meredith.⁵³ On the morning of April 10, 1971, Meredith awoke to find the simultaneous disappearance of (i) Maze, (ii) Meredith's wallet containing his credit card and identification papers, (iii) Meredith's checkbook, watches, and rings, and (iv) Meredith's 1968 Pontiac GTO. Embarking on a multi-state journey, Maze used Meredith's credit card "to obtain food and lodging at inns in California, Florida, and Louisiana by representing himself as Meredith."⁵⁴ Upon Maze's return to Louisville from his sojourn, Maze was indicted on four counts of mail fraud and one count of transporting a stolen vehicle in interstate commerce. After the district court's denial of his motion to dismiss the mail fraud counts for lack of subject matter jurisdiction, Maze was subsequently convicted on all counts and sentenced to five years imprisonment.⁵⁵

The mailings charged in the indictment, and for which Maze was convicted, were four separate instances where vendors mailed forged credit card sales receipts to the Louisville bank that issued Meredith's credit card so that the vendors could receive payment. Finding the case to be almost indistinguishable from *Kann* and *Parr*, the Sixth Circuit reversed and vacated the mail fraud convictions because:

Maze obtained goods and services from vendors in several states, and it was immaterial to him how (or whether) they collected their money or who eventually paid for the purchases . . . As far as [Maze] was concerned, his transaction was complete when he checked out of each motel; the subsequent billing was merely

Lane, 474 U.S. 438, 451–52 (1986), *reh'g denied*, 475 U.S. 1104 (1986) (focusing on the "lulling effect" of the mailings).

52. 414 U.S. 395 (1974).

53. *United States v. Maze*, 468 F.2d 529, 531 (6th Cir. 1972).

54. *Id.*

55. At trial, Maze testified that he had Meredith's permission to use Meredith's credit card and Pontiac GTO. *Id.* at 532. Although the jury evidently did not believe Maze, his credibility was irrelevant to the issue of whether the mailings charged in the indictment were for the purpose of executing the alleged scheme to defraud.

incidental and collateral to the scheme and not a part of it.⁵⁶

Unhappy with the Sixth Circuit's decision as to the mail fraud counts, the government sought and was granted certiorari.⁵⁷ In affirming the judgment of the Sixth Circuit, the Supreme Court first presumed Maze "caused" the mailings in question under the *Pereira*⁵⁸ test (i.e., it was reasonably foreseeable that the vendors would mail the sales receipts to the Louisville bank for payment). Then, posing the key issue directly, the Supreme Court noted: "But the more difficult question is whether these mailings were sufficiently closely related to respondent's scheme to bring his conduct within the statute."⁵⁹ Correctly describing the charged mailings as simply "adjusting accounts"⁶⁰ between and among the vendors, the bank, and Meredith, the Supreme Court mirrored the Sixth Circuit in holding:

Respondent's scheme reached fruition when he checked out of the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss. Indeed, from his point of view, he probably would have preferred to have the invoices misplaced by the various motel personnel and never mailed at all.⁶¹

Four Justices dissented.⁶² Chief Justice Burger argued the mail fraud statute should be given an expansive interpretation because it has always been a "stopgap device" used "to cope with the new varie-

56. *Id.* at 534 (citing *Kann v. United States*, 323 U.S. 88, 95 (1944) (internal quotation marks omitted)). However, Maze's conviction on the stolen vehicle charge was affirmed. *Id.* at 537-38. Incidentally, Maze was convicted for stealing a vehicle (a 1964 Chevrolet) that a repair shop in Tennessee had loaned him while it repaired Meredith's Pontiac GTO, and it was the Chevy on loan (rather than Meredith's Pontiac) that Maze was convicted of stealing and transporting across state lines from Tennessee into Kentucky. *Id.* at 537. Perhaps this lends credence to Maze's story that he did indeed have Meredith's permission to use the Pontiac, because it would have been much easier to charge Maze with stealing Meredith's Pontiac and transporting it across state lines rather than the loaner vehicle, which Maze also denied stealing. *See id.*

57. *United States v. Maze*, 411 U.S. 963 (1973).

58. *See supra* text accompanying note 22.

59. *United States v. Maze*, 414 U.S. 395, 399 (1974).

60. *Id.* at 402.

61. *Id.* The Supreme Court also suggested that if Congress desired fraudulent credit card activity to fall under the mail fraud statute, then an amendment to the mail fraud statute was necessary, not judicial enlargement of federal jurisdiction. *See id.* at 405 n.10 (stating "[i]f the Federal Government is to engage in combat against fraudulent schemes not covered by the statute, it must do so at the initiative of Congress and not of this Court").

62. *Id.* at 408 (White, J., dissenting). Chief Justice Burger and Justices Brennan and Blackmun joined Justice White's dissent. The Chief Justice also dissented separately, in which Justice White joined. *Id.* at 405 (Burger, C.J., dissenting).

ties of fraud that the ever-inventive American ‘con artist’ is sure to develop.”⁶³ Justice White’s dissent begins curiously by stating the mail fraud statute is “unambiguous.”⁶⁴ However, this would certainly come as a surprise to numerous courts, commentators, and practitioners who frequently lament the ambiguous nature of both the mail and wire fraud statutes.⁶⁵ Justice White then sought to distinguish the case by contending “it was the card-issuing bank that was actually defrauded,”⁶⁶ rather than the merchants. But it is difficult to see how such a distinction transforms the nature of the mailings with respect to the scheme. Regardless of who was actually defrauded, whether it was the merchants, the card-issuing bank, or even Meredith himself, Maze obtained the goods and services at the time he used the credit card and, consequently, the fraud had already reached fruition by the time the charged mailings occurred.⁶⁷

E. Schmuck

When Illinois used-car wholesaler Wayne T. Schmuck decided to roll back odometers to sell used cars to dealers at inflated prices, he most likely had no idea he was about to usher in an expansive new era in the exercise of federal jurisdiction under the mail and wire fraud statutes.⁶⁸

63. *Id.* at 405, 407 (Burger, C.J., dissenting). But the Chief Justice was also sensitive to the majority’s “seeming desire not to flood the federal courts with a multitude of prosecutions for relatively minor acts of credit card misrepresentation considered as more appropriately the business of the States.” *Id.* at 407 (Burger, C.J., dissenting).

64. *Id.* at 408 (White, J., dissenting).

65. *See, e.g.*, *United States v. Pierce*, 409 F.3d 228, 239 (4th Cir. 2005) (Gregory, J., dissenting) (noting “confusion in the jurisprudence surrounding the mail fraud statute leaves the very real possibility that courts and federal prosecutors will enforce the statute in arbitrary and unforeseeable ways”); Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 480 (1996) (arguing that courts’ current treatment of statutes such as the mail fraud statute “effectively transfers delegated lawmaking authority to individual prosecutors.”); Donald V. Morano, *The Mail-Fraud Statute: A Procrustean Bed*, 14 J. MARSHALL L. REV. 45, 47 n.3 (1980) (likening the mail fraud statute to the horrific practice of Procrustes, who in mythology forced his guests to lie on an iron bed and then either stretched out or lopped off their legs to make their bodies conform to the length of the bed); Ellen S. Podgor, *Mail Fraud: Opening Letters*, 43 S.C. L. REV. 223, 269 (1992) (“The mail fraud statute’s uncertainty has exceeded the bounds of mere judicial activism and entered the arena of absurdity.”).

66. *Maze*, 414 U.S. at 414 (White, J., dissenting).

67. The mailings also fail Justice Frankfurter’s materiality test, as they did not materially aid the consummation of a scheme (obtaining products and services with Meredith’s credit card) that had ended long before the mailings occurred.

68. *See Schmuck v. United States*, 489 U.S. 705 (1989), *reh’g denied*, 490 U.S. 1076

Schmuck's scheme was simple. To boost his profits, Schmuck would purchase used cars, turn back their odometers, sell the cars to dealers (several of whom were located in Wisconsin) at inflated prices based on the lower falsified mileage, and then provide the dealers with odometer statements reflecting the false mileage.⁶⁹ The Wisconsin dealers, after reselling the cars to their retail consumers, mailed title applications to the Wisconsin Department of Transportation (WDOT) containing Schmuck's fraudulent odometer statements.⁷⁰ The Wisconsin dealers' mailings of the title applications to the WDOT formed the basis of the 12 mail fraud counts charged in the indictment.⁷¹

Prior to trial, Schmuck requested an instruction allowing the jury to convict him of odometer tampering (at the time a misdemeanor)⁷² as a lesser included offense of mail fraud (a felony). However, the district court denied the motion, as well as a motion to dismiss the indictment altogether because the mailings of the title applications by the dealers were not for the purpose of executing the scheme.⁷³ At trial, Schmuck did not dispute the evidence that he tampered with the odometers. Rather, his defense asserted the mailings were not for the purpose of executing the scheme because they were not necessary to the scheme's success. Schmuck was ultimately convicted by a jury on all 12 counts of mail fraud.⁷⁴

(1989). Although "schmuck" is defined as a "contemptible or objectionable person," Dictionary.com Unabridged, <http://dictionary.reference.com/browse/schmuck> (last visited Feb. 29, 2008), and would certainly fit the description of the defendant in this case, one person named Schmuck who certainly did not fit the definition of his surname was Marine Corps Brigadier General Donald M. "Buck" Schmuck. Gen. Schmuck served with distinction in the bloody World War II battles of Guadalcanal, Bougainville, Pelelieu, and Okinawa (all recently brought to life in the award-winning Ken Burns PBS documentary *The War*), as well as in the famous Chosin Reservoir campaign during the Korean War, and continued his service through Operation Desert Storm in the first Gulf War. He received a Ph.D. in nuclear physics and was awarded the Navy Cross, two Silver Stars, two Bronze Stars, three Purple Hearts, and the Legion of Merit, among other domestic and foreign citations. Gen. Schmuck is buried in Arlington National Cemetery, not far from the gravesite of Justice Blackmun, who happened to author the majority opinion in *Schmuck*. See Arlington National Cemetery, <http://www.arlingtoncemetery.net/dmschmuck.htm> (last visited Feb. 29, 2008).

69. *Schmuck*, 489 U.S. at 707.

70. *United States v. Schmuck*, 840 F.2d 384, 385 (7th Cir. 1988) (en banc).

71. *Id.*

72. Odometer tampering is now a felony. See 49 U.S.C. § 32709(b) (1994) (providing for three years imprisonment).

73. *Schmuck*, 840 F.2d at 385.

74. *Id.* After Schmuck's motions for judgment of acquittal and a new trial were denied, the district court sentenced Schmuck to 90 days in jail, a fine of \$550, and four years proba-

On appeal to the Seventh Circuit, Schmuck contended he was entitled to a judgment of acquittal because no rational jury could have concluded the mailings were in furtherance of the scheme. The panel that initially heard the appeal, however, rejected his claim, instead reversing Schmuck's convictions and granting a new trial on the jury instruction issue.⁷⁵ The government petitioned for rehearing with a suggestion for rehearing en banc, which was granted and the panel opinion was vacated.⁷⁶ On rehearing, by a divided vote, the Seventh Circuit sitting en banc affirmed the convictions, holding odometer tampering is not a lesser included offense of mail fraud.⁷⁷ However, there was no analysis of the jurisdictional issue as to whether the mailings were in furtherance of the scheme.⁷⁸ Faced with this reversal of fortune, Schmuck petitioned for certiorari on both issues (jury instruction and whether the mailings were in furtherance of the scheme), and the Supreme Court granted certiorari,⁷⁹ in part to "define further the scope of the mail fraud statute."⁸⁰

In affirming the convictions, *Schmuck's* essential holding appears to be that mailings only incidental or tangential to the underlying fraud can support a mail fraud prosecution: "To be part of the execution of the fraud, however, the use of the mails need not be an essential element of the scheme. It is sufficient for the mailing to be incident to an essential part of the scheme, or a step in [the] plot."⁸¹ To support its holding, the *Schmuck* majority erected a weak foundation, stating Schmuck's scheme "did not reach fruition until the retail dealers resold the cars and effected transfers of title."⁸² In actuality, however, Schmuck received payment from the dealers once he sold

tion. *See* FED. R. CRIM. P. 29, 33. Execution of the sentence was stayed pending appeal.

75. *United States v. Schmuck*, 776 F.2d 1368, 1373 (7th Cir. 1985). Although the panel was divided as to the granting of a new trial, the dissent agreed with the majority that the mailings were in furtherance of the scheme. *Id.* at 1375 (Fairchild, J., dissenting).

76. *United States v. Schmuck*, 784 F.2d 846 (7th Cir. 1986). However, the two questions on which the parties were ordered to file supplemental briefs had to do with the jury instruction issue rather than the jurisdictional issue of whether the mailings were in furtherance of the scheme. *Id.*

77. *United States v. Schmuck*, 840 F.2d 384, 390 (7th Cir. 1988) (en banc).

78. The en banc dissent also failed to address the jurisdictional issue. *See id.* at 390 (Flaum, J., dissenting).

79. *Schmuck v. United States*, 486 U.S. 1041 (1988).

80. *Schmuck v. United States*, 489 U.S. 705, 710 (1989), *reh'g denied*, 490 U.S. 1076 (1989).

81. *Id.* at 710–11 (citing *Pereira v. United States*, 347 U.S. 1, 8 (1954); *Badders v. United States*, 240 U.S. 391, 394 (1916)) (internal quotation marks omitted).

82. *Id.* at 712.

the cars. Whether the dealers *resold* the cars to the consumers did not change the fact Schmuck already received his money from the dealers. Put another way, the success of Schmuck's scheme to obtain money from the dealers in no way depended upon the dealers' ability to resell the cars to consumers.⁸³ Once this is understood, it is easy to see why the mailings from the dealers to the WDOT were not in furtherance of Schmuck's scheme to defraud the dealers.⁸⁴

The *Schmuck* majority simply misunderstood the true nature of the scheme when it held: "Thus, although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, *they were necessary to the passage of title*, which in turn was essential to the perpetration of Schmuck's scheme."⁸⁵ However, the passage of title to the consumers was *not* necessary to the success of Schmuck's scheme to obtain money from the dealers, because his scheme had already reached fruition once the dealers paid him for the cars—regardless of when (or whether) the titles were ultimately registered in the names of the consumers. The *Schmuck* majority then went to great lengths to distinguish the case from *Kann*, *Parr*, and *Maze*. However, after reviewing the facts from *Schmuck*, the distinctions drawn were without a difference based on the true nature of Schmuck's scheme (i.e., obtaining money from the dealers rather than from the retail customers).⁸⁶ Before spending the

83. See Brief of Petitioner, *Schmuck*, 489 U.S. 705 (No. 87-6431), 1987 WL 880200, *3 (noting "after petitioner sold the cars, the *new owners* mailed the title documents into the Wisconsin Department of Motor Vehicles in order to *record the change in ownership*") (emphasis added); Brief of Respondent, *Schmuck*, 489 U.S. 705 (No. 87-6431), 1988 WL 1026045, *2 (where "[t]o obtain titles *in the names of the purchasers*, . . . the dealers mailed Wisconsin title applications to the Wisconsin Department of Transportation") (emphasis added); Reply Brief of Petitioner, *Schmuck*, 489 U.S. 705 (No. 87-6431), 1988 WL 1026051, *1 (stating "after petitioner sold each car, the used car dealer resold it to the purchaser, and the used car dealer mailed a title application *on behalf of the purchaser* to the State of Wisconsin Department of Motor Vehicles.") (emphasis added). Consequently, the purpose of mailing the title documents to the Wisconsin Department of Transportation (WDOT) was to register the titles in the names of the consumers, *not* to record the transfer from Schmuck to the dealers.

84. Even if it were assumed that the targets of Schmuck's fraud were the retail consumers instead of the dealers (or perhaps even the WDOT), the mailings from the dealers still were not in furtherance of the scheme because Schmuck received all of the money that he expected to receive once the dealers paid him for the cars—which occurred *before* the titles were mailed to the WDOT.

85. *Schmuck*, 489 U.S. at 712 (emphasis added).

86. *Id.* at 712–15. Yet another misunderstanding of the nature of the scheme occurred when the *Schmuck* majority sought to distinguish the legally-required tax mailings in *Parr* from the car registration procedures in *Schmuck*, stating: "the mailings in the present case, though in compliance with Wisconsin's car-registration procedure, were derivative of Schmuck's scheme to sell 'doctored' cars and would not have occurred but for that scheme."

remainder of the opinion on the jury instruction issue and holding odometer tampering is not a lesser included offense of mail fraud,⁸⁷ the *Schmuck* majority also created a subjective test for determining whether the mailing is in furtherance of the scheme: “The relevant question at all times is whether the mailing is part of the execution of the scheme as conceived by the perpetrator at the time.”⁸⁸

However, the application of this new subjective test should have resulted in the reversal of Schmuck’s convictions. At the time he devised his scheme to roll back odometers in order to trick dealers into paying him more for used cars than what the cars were actually worth, how (and whether) the dealers would transmit the retail consumers’ title applications to the WDOT was most likely the furthest thing from Schmuck’s mind. According to the scheme as charged, all Schmuck cared about was obtaining money from the dealers.⁸⁹ Once he received the funds from the dealers, for all Schmuck cared the dealers could have junked the cars and not resold them to consumers at all—which obviously would have resulted in no title applications being mailed to the WDOT. Or, more likely, for all Schmuck knew, the dealers *hand-delivered* the title applications to the WDOT because the dealers’ retail consumers did not want to suffer the delay inherent in using the postal service for such an important task as titling and registering their newly-acquired vehicles—meaning no mailings would have been sent at all.⁹⁰

Id. at 713–14 n.7. However, in order to sell the cars to the consumers, the dealers were required by law to mail the title documents to the WDOT, whether Schmuck’s odometer statements were true or false.

87. *Id.* at 721.

88. *Id.* at 715.

89. *United States v. Schmuck*, 840 F.2d 384, 385 (7th Cir. 1988) (en banc). It is important to remember that Schmuck was a wholesaler selling *used cars* to the dealers, so he already had the existing titles from the previous owners. Once Schmuck signed over the existing titles to the dealers, the dealers paid him the money and that was the end of the scheme. The dealers, after reselling the cars to the consumers, mailed the title applications to the WDOT in order to change the titles from the dealers’ names to the consumers’ names—a process in which Schmuck obviously had no financial interest.

90. “The 2005–07 Wisconsin budget bill requires all licensed motor vehicle dealers to *electronically process* all title/registration applications for their customers.” *Doing Business*, Wisconsin Department of Transportation, <http://www.dot.wisconsin.gov/business/dealers/emv11/index.htm> (last visited Feb. 29, 2008) (emphasis added). Consequently, if Schmuck were to conduct his scheme today, there would be no mailings from the dealers to the WDOT at all—so Schmuck could not be charged with mail fraud under the government’s theory of the relationship of the mailings to the scheme. Moreover, because the electronic transmissions from the Wisconsin dealers to the WDOT most likely would be *intrastate* wire communications, jurisdiction under the wire fraud statute would be lacking because only wire transmis-

The dealers' mailings to the WDOT also fail Justice Frankfurter's materiality test, as they occurred long after the dealers paid Schmuck for the cars. Nor did the mailings allow Schmuck to maintain "continued harmonious relations" with the dealers,⁹¹ because the dealers had no reason to suspect Schmuck altered the odometers in that he provided the dealers with (albeit false) mileage declarations.⁹²

There was a vigorous four-Justice dissent,⁹³ which began by clearly stating the majority's holding was "inconsistent with our prior cases' application of the statutory requirement that mailings be 'for

sions sent in *interstate or foreign commerce* are covered by the wire fraud statute. *See supra* text accompanying note 4; *United States v. Dwyer*, 238 F. App'x 631, 634 (1st Cir. 2007) (noting "the district court granted Dwyer's motion for judgment of acquittal on the two wire fraud counts . . . on the ground that there was no interstate communication as required under the wire fraud statute"). Thus, in today's electronic world, and under the government's theory of the crime, Schmuck could not be charged with mail or wire fraud. In this hypothetical, the only way to charge Schmuck with mail or wire fraud today would be to charge the mailings or wire transmissions *by which he sold the cars to the dealers*, since those mailings or wire transmissions would clearly be in furtherance of his scheme to obtain money from the dealers. This hypothetical also shows why Schmuck should have been acquitted, because the government (again) charged the wrong mailings in the indictment. Only the mailings by which Schmuck sought to obtain money from the dealers should have been charged and, assuming there were no such mailings (i.e., Schmuck conducted his business with the dealers in person), the United States Attorney for the Western District of Wisconsin should have referred the matter to the Wisconsin Attorney General.

91. *Schmuck v. United States*, 489 U.S. 705, 712 (1989), *reh'g denied*, 490 U.S. 1076 (1989). Courts have used this questionable line of reasoning to find that mailings which, standing alone, are not material, are still in furtherance of an ongoing fraudulent scheme if they serve to create harmonious relations between the perpetrator and the victim. *See United States v. Pimental*, 380 F.3d 575, 586 (1st Cir. 2004), *cert. denied*, 543 U.S. 1177 (2005) (stating "[a] rational jury could have readily found that the loss-control report from Brooks to Hartford Insurance furthered Pimental's fraudulent scheme because it was a necessary step in the continued relationship between Pimental and his victim, Hartford Insurance"). However, this kind of reasoning usually leads to the improper expansion of federal jurisdiction under the mail and wire fraud statutes, as any mailing or wire transmission—no matter how trivial—can conceivably be characterized as contributing to maintaining harmonious relations between the perpetrator and the victim of the fraud—and yet not rise to the level of a true "lulling" communication.

92. Of the five dealers involved, three made only one mailing each to the WDOT, so their involvement with Schmuck was limited to a "one-shot" operation. *See Schmuck*, 840 F.2d at 385. As a result, there were no "harmonious relations" to nurture between Schmuck and the majority of the dealers with whom he dealt, since they only dealt with him one time. More importantly, other dealers had dealt with Schmuck "on a consistent basis over a period of about 15 years," *Schmuck*, 489 U.S. at 711. Presumably these dealers had no reason to question Schmuck's veracity with respect to the cars involved, in light of their 15-year business relationship with him.

93. *Id.* at 722 (Scalia, J., dissenting). Justices Brennan, Marshall and O'Connor joined the dissent.

the purpose of executing' a fraudulent scheme."⁹⁴ The dissent then attacked the majority's effective creation of "a general federal remedy against fraudulent conduct"⁹⁵ by stating:

In other words, it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur—nor even one in which a mailing predictably and necessarily occurs. The mailing must be in furtherance of the scheme.⁹⁶

Unlike the *Schmuck* majority, the dissent fully understood the true nature of the charged scheme, finding the fraud was complete with respect to each car when Schmuck pocketed the dealers' money: "As far as each particular transaction was concerned, it was as inconsequential to him whether the dealer resold the car as it was inconsequential to the defendant in *Maze* whether the defrauded merchant ever forwarded the charges to the credit card company."⁹⁷ Consequently, the dissent found it "impossible to escape these precedents [*Kann*, *Parr*, and *Maze*] in the present case."⁹⁸ Finally, in what has been proven to be a truly prophetic statement, the dissent warned, after referencing Justice Frankfurter's observations in *Parr*, that this is: "All the more reason to adhere as closely as possible to past cases. I think we have not done that today, and thus create problems for tomorrow."⁹⁹

Schmuck indeed created substantial problems for defendants charged with mail or wire fraud since 1989, as courts generally took

94. *Id.*

95. *Id.*

96. *Id.* at 723. Notably, the language that a mailing or wire transmission must be "in furtherance of" the scheme appears in neither the mail nor wire fraud statutes. See *supra* text accompanying notes 3–4. Yet, the phrase is used throughout this Article and appears in both the *Schmuck* majority and dissenting opinions. See *Schmuck*, 489 U.S. at 707 (majority opinion), 723 (Scalia, J., dissenting). While the phrase did appear in early Supreme Court opinions interpreting the mail fraud statute, it was absent from subsequent cases. See *United States v. Young*, 232 U.S. 155, 155 (1914) ("charging the use of the mails in furtherance of a scheme to defraud"). However, because the phrase appears often in lower court opinions, it is assumed for purposes of this Article that the phrase "in furtherance of" is synonymous with the statutory requirement "for the purpose of executing such scheme."

97. *Schmuck*, 489 U.S. at 723 (Scalia, J., dissenting).

98. *Id.* at 724.

99. *Id.* at 725. Justice Scalia issued a similarly prophetic dissent regarding the prosecutorial abuses engendered by the Independent Counsel Reauthorization Act of 1994. See *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting) (stating "[t]oday's decision on the basic issue of fragmentation of executive power is ungoverned by rule, and hence ungoverned by law"). After several high-profile abuses, Congress wisely allowed that statute to sunset in 1999.

its holding to mean an incidental, tangential, collateral, or even trivial mailing or wire transmission can somehow be characterized as “incident to an essential part of the scheme, or a step in [the] plot.”¹⁰⁰ The unfortunate result has been to give the mail and wire fraud statutes virtually unlimited application, since in today’s economy it is virtually impossible to engage in a business or financial transaction that, somewhere along the line, does not involve a mailing or wire transmission. *Schmuck* was wrongly decided both on the facts and the law, and the Supreme Court should not hesitate—at the earliest opportunity—to expressly overrule it. *Schmuck* “is a clear departure from the *Kann*, *Parr*, and *Maze* line of cases.”¹⁰¹ Moreover, *Schmuck*’s key holding appears to be based on an application of *Badders* beyond its original context.¹⁰² The result has been that “the mailing element seemingly provides federal prosecutors with carte blanche to prosecute virtually any activity to which the mail or a shipment by interstate carrier can be linked, no matter how tangential.”¹⁰³

The Fifth Circuit appears to have taken the lead among the circuits in paring back the virtually unlimited application of the mail and wire fraud statutes ushered in by *Schmuck*, starting with a case decided only one month after *Schmuck*.¹⁰⁴

100. *Schmuck*, 489 U.S. at 711. See also *United States v. Cacho-Bonilla*, 404 F.3d 84, 91 (1st Cir. 2005), cert. denied, 546 U.S. 956 (2005) (stating “*Parr* can be distinguished on its facts, but in truth, *Schmuck*’s ‘perpetuation’ theory could arguably have been used in *Parr*. However, *Schmuck* is the later case, its perpetuation theory has been regularly followed in this circuit . . . and it binds us now.”).

101. Matthew J. Efken, Note, *The Mailing Element of the Federal Mail Fraud Statute: Schmuck v. United States*, 25 CREIGHTON L. REV. 97, 126 (1990).

102. *Id.* at 125 n.312. The holding in *Schmuck* that a mailing is in furtherance of the scheme if it is “a step in [the] plot,” *Schmuck*, 489 U.S. at 711, is based on the language from *Badders* that “[i]ntent may make an otherwise innocent act criminal, if it is a step in a plot.” *Badders v. United States*, 240 U.S. 391, 394 (1916). See *supra* text accompanying note 9. *Schmuck*’s essential holding appears to take the language from *Badders* too far.

103. Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B.C. L. REV. 435, 476 (1995). See also George D. Brown, *Carte Blanche: Federal Prosecution of State and Local Officials After Sabri*, 54 CATH. U. L. REV. 403, 437 (2005) (noting in *Schmuck*, “the Supreme Court appeared to take a loose approach to any requirement that the mails be a direct part of the scheme”).

104. My survey of the reported cases has shown the Fifth Circuit to have the most cases critically applying *Schmuck*.

F. Vontsteen

In *United States v. Vontsteen*,¹⁰⁵ the Fifth Circuit had to determine how the charged mailings advanced, or were integral to, the scheme to defraud. Gerald Vontsteen worked for a Texas company where he was in charge of buying and selling oilfield pipe.¹⁰⁶ The scheme (also engaging his boss who fled the country prior to trial) involved Vontsteen's company buying pipe on credit and then refusing to pay the pipe suppliers.¹⁰⁷ The charged mailings were the invoices (which were never paid) mailed to Vontsteen's company by those suppliers.¹⁰⁸ Vontsteen was convicted on 21 counts of aiding and abetting mail fraud and one count of transporting stolen property in interstate commerce.

Vontsteen's primary argument in the Fifth Circuit as to the mail fraud counts was the mailings were not in furtherance of the scheme. Agreeing with his argument, and relying primarily on *Parr* and *Maze*, the Fifth Circuit reversed the convictions on all of the mail fraud counts (but affirmed the conviction on the stolen property count) because:

The defendant used credit to obtain goods or services fraudulently. The mailing of invoices to [his company] by defrauded sellers of pipe in each case occurred after the pipe was already shipped and the credit and payment terms were fixed. The details of the scheme would have been exactly the same even without the mailings.¹⁰⁹

In other words, once the pipe was delivered and Vontsteen's company decided not to pay for it, the scheme was complete. The invoices mailed by the suppliers did not materially aid the consummation of the scheme because the scheme was over (Vontsteen's company received the pipe) before the invoices were mailed.¹¹⁰ The Fifth Circuit distinguished *Schmuck* by correctly concluding the supplier invoices "involved little more than post-fraud accounting among the

105. 872 F.2d 626 (5th Cir. 1989), *superseded on other grounds*, 950 F.2d 1086 (5th Cir. 1992) (en banc).

106. *Id.* at 627.

107. *Id.* at 627–28.

108. *Id.* at 628.

109. *Id.* at 629. This is yet another example of the government charging the wrong mailings. The mailings that should have been charged (or telephone calls and/or faxes in the case of wire fraud—at least with respect to those suppliers located outside of Texas) are those by which Vontsteen ordered the pipe.

110. For example, one supplier agreed to supply pipe to Vontsteen's company on 30 to 33 days credit and extended a \$200,000 line of credit for that purpose. *Id.* at 630.

potential victims.”¹¹¹ As a result, because the government failed to show how the dealer invoices “advanced or were integral to the fraud,”¹¹² Vontsteen’s mail fraud convictions were reversed.¹¹³ And in a final admonition to federal prosecutors that echoes the *Schmuck* dissent, the Fifth Circuit stated: “Mail fraud [does not occur] simply because a victim of the fraud (or a third party) has mailed a related document after the fact.”¹¹⁴

G. *Evans*

Cynthia Evans, a Texas parole officer, became much too friendly with a male parolee under her charge.¹¹⁵ The relationship between Evans and her parolee quickly turned into a romantic and financial relationship, and eventually led to Evans assisting the parolee’s leadership of a large cocaine trafficking operation.¹¹⁶ As a result, Evans was indicted and convicted for aiding and abetting a conspiracy to distribute cocaine, as well as extortion and mail fraud.¹¹⁷

Evans’s official duties as a parole officer included visiting her parolee paramour at his places of residence or employment. Evans was entitled to seek reimbursement for the costs of these visits by the State of Texas.¹¹⁸ Evans submitted false travel vouchers (i.e., seeking reimbursement for visits that were never made) to her supervisor, who in turn approved and mailed the vouchers to the state capital in Austin for processing and payment. These mailings formed the basis of the five mail fraud counts charged in the indictment.¹¹⁹

Evans moved three times in the district court for a judgment of acquittal on the mail fraud counts, claiming the mailed travel vouchers had “no bearing whatsoever”¹²⁰ on the scheme. But the district

111. *Id.* at 629 (citing *Schmuck v. United States*, 489 U.S. 705 (1989)).

112. *Id.* at 630. The mailings also fail Justice Frankfurter’s materiality test because they did not materially aid the consummation of a scheme that had already ended before the mailings occurred.

113. The Fifth Circuit also questioned why the case was even brought in federal court to begin with, stating “the instant scheme appears to constitute little more than an obvious run-of-the-mill [local] crime case that unfortunately was brought in federal, rather than state, court.” *Id.* at 630 n.4 (internal quotation marks and citations omitted) (brackets in original).

114. *Id.* at 629.

115. *See United States v. Evans*, 148 F.3d 477 (5th Cir. 1998).

116. *Id.* at 478–79.

117. *Id.*

118. *Id.* at 479.

119. *Id.* at 479–81.

120. *Id.* at 481.

court denied all three motions.¹²¹ However, relying on *Kann, Parr, Maze*, and *Vontsteen*, the Fifth Circuit held: “These rulings were in error. Judgment of acquittal should have been granted on the mail fraud counts because the government’s evidence did not establish that Evans’s travel vouchers were mailed in furtherance of her scheme to defraud the State of Texas.”¹²² The Fifth Circuit determined the object of the scheme was to defraud the State of Texas of its right to Evans’s honest and faithful services for the purpose of assisting her parolee in violating the conditions of his parole,¹²³ stating:

The mailing of the travel vouchers did not serve that goal because Evans had cleared the final hurdle when her supervisor approved her submitted travel vouchers . . . the submission of the vouchers to the supervisor and the supervisor’s approval of those vouchers constituted the completion of the fraud.¹²⁴

If the scheme was to deprive Texas of Evans’s honest services, that occurred once the vouchers were submitted and approved. Whether the vouchers were mailed (or even paid) after the fact is irrelevant. As noted by the Fifth Circuit: “If Evans’s travel vouchers had been thrown away by her supervisor, the scheme would have continued just the same. The mailing was entirely incidental to the scheme; there was nobody in Austin who might have uncovered the scheme because Evans did or did not submit travel vouchers.”¹²⁵ Finally, the Fifth Circuit lamented once again that the case had been brought in federal court to begin with, noting Evans’s “criminal acts of fraud should have been prosecuted under applicable state law . . . not a federal statute which cannot be stretched beyond its plain language.”¹²⁶

121. *Id.*

122. *Id.* Evans’s convictions on the conspiracy and extortion charges were affirmed. *Id.* at 485.

123. *Id.* at 483.

124. *Id.*

125. *Id.* The Fifth Circuit also used this finding to distinguish the case from *Schmuck*, holding there was no relationship of trust between Evans and employees in Austin “that had to be maintained in order for the scheme to continue undetected.” *Id.* at 483 n.7.

126. *Id.* at 483 (stating “Congress has limited the scope of federal jurisdiction over mail fraud, and the prosecution in this case, in seeking to exploit a truly marginal relation to the mails, strayed beyond the boundary established by Congress.”). *See also* *Cleveland v. United States*, 531 U.S. 12, 24 (2000) (noting “[w]e resist the Government’s reading of § 1341 as well because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress”). The Fifth Circuit has applied similar reasoning to reject a theory of honest services mail and wire fraud under 18 U.S.C. § 1346 utilized by the DOJ’s Enron Task Force in several Enron prosecutions. *See, e.g.*, *United States v. Brown*, 459

The dissent argued that “[t]he facts of the pending case present a more compelling case of mail fraud than the facts of *Schmuck*,” because the documents mailed in *Schmuck* were “themselves totally innocent” and “Evans was an employee who occupied a sensitive post.”¹²⁷ But *Schmuck*’s doctored odometer statements were just as false as Evans’s padded travel vouchers, so the relative falsity of the mailing cannot be a determinative factor. Nor can the relative importance of the defendant’s job or function within the scheme matter. The relevant inquiry should be, as described by Justice Frankfurter, whether the mailings *materially* aided the consummation of the scheme.¹²⁸ Since Evans’s scheme already reached fruition before the travel vouchers were mailed (and the success of the scheme in no way depended on the mailings), the mailings clearly failed to satisfy Justice Frankfurter’s materiality test and the *Evans* majority correctly reversed Evans’s mail fraud convictions.

H. *Strong*

In keeping with the apparent trend of used car frauds delineating key aspects of the mail and wire fraud statutes, Dallas police officer Fredric Strong and his brother—used car dealer Phillip Strong—were charged with mail fraud for a fraudulent scheme known as “punching titles.”¹²⁹ The result was the first court of appeals decision to place logical and allowable limitations on the seemingly unbounded application of the mail and wire fraud statutes ushered in by *Schmuck*.

As described by the district court, “punching titles” was a scheme whereby the Strongs would bid on used cars at auctions and obtain immediate physical possession of the vehicles by tendering buyers’ drafts.¹³⁰ While the original titles remained at the auction

F.3d 509, 523 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007) (stating “[g]iven our repeated exhortation against expanding federal criminal jurisdiction beyond specific federal statutes to the defining of common-law crimes, we resist the incremental expansion of a statute that is vague and amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases.”). The Fifth Circuit has also rejected the government’s argument that a scheme to obtain the salary and employment benefits of elected office through misrepresentations made during an election also constitutes mail fraud. *See United States v. Ratcliff*, 488 F.3d 639, 649 (5th Cir. 2007) (stating “[w]e resist the Government’s reading of § 1341 . . . because it invites us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress.”) (internal citations omitted).

127. *Evans*, 148 F.3d at 486 (Reavley, J., dissenting).

128. *See Parr v. United States*, 363 U.S. 370, 398 (1960) (Frankfurter, J., dissenting).

129. *United States v. Strong*, 371 F.3d 225, 226 (5th Cir. 2004).

130. *United States v. Strong*, No. 02-cr-0271, slip op. 1, 1 (N.D. Tex. May 1, 2003).

houses, the auction houses would send the buyers' drafts to local banks for payment, which would ultimately not be honored.¹³¹ After 10 days, the banks would return the unpaid drafts to the auction houses.¹³² In the meantime, during the 10-day window before the auction houses discovered the drafts were dishonored, police officer Fredric Strong (clad in full police uniform)¹³³ would personally obtain certified copies of the original titles (CCOs) from the Carrollton office of the Texas Department of Transportation (TDOT), after presenting false and fraudulent applications for the titles. During the 10-day window, the Strongs resold the vehicles—with the CCOs—to unsuspecting third parties.¹³⁴ Once the buyers' drafts were returned to the auction houses unpaid, the auction houses would then futilely attempt to reclaim the cars after the Strongs had already been paid by the bona fide purchasers.¹³⁵ In sum, "[t]he Strongs' scheme thus resulted in substantial losses to the auction houses, as well as clouding the titles of the bona fide purchasers."¹³⁶ Sometime after Fredric Strong left TDOT-Carrollton with the CCOs in hand, the false applications submitted by him were mailed by TDOT-Carrollton to TDOT-Austin for microfilming and storage.¹³⁷ These mailings formed the basis of the eight mail fraud counts charged in the indictment of the Brothers Strong.

Phillip Strong (the used car dealer) pleaded guilty to the charges, while Fredric Strong (the Dallas police officer) pleaded not guilty and proceeded to trial.¹³⁸ After the government rested, and again after the defense rested, Fredric Strong moved for a judgment of acquittal,¹³⁹ arguing as a matter of law the evidence did not establish the requisite "mailing" necessary to constitute a violation of the mail fraud statute (i.e., the charged mailings were not in furtherance of the scheme).¹⁴⁰ The district court denied the motions without prejudice. After a four-day trial, the jury convicted Fredric Strong on three of the seven re-

131. *Id.*

132. *Id.*

133. *Strong*, 371 F.3d at 226.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Strong*, slip op. at 1.

138. *Id.* at 2.

139. See FED. R. CRIM. P. 29(a).

140. *Strong*, slip op. at 2.

maining mail fraud counts.¹⁴¹ Fredric Strong then made a post-verdict motion for judgment of acquittal, which the district court granted.¹⁴²

Distinguishing *Schmuck*, the district court granted the post-verdict motion for judgment of acquittal because:

The mailing to Austin was not a step in the passage of title. The CCOs were issued by TDOT-Carrollton and immediately given to Defendant Fredric Strong . . . the microfilming of the applications for the CCOs would not necessarily make it easier for a car to be sold . . . Indeed, several of the applications at issue in this case were missing from the microfilm records in Austin.¹⁴³

Then, after discussing *Kann*, *Parr*, *Maze*, *Schmuck*, *Pereira*, *Sampson*, and *Evans*, the district court summarized its decision:

The Court concludes that the use of the mails in this case was not sufficiently related to the defendant's fraud to satisfy the mailing element. The transmittal of the documents by TDOT-Carrollton to TDOT-Austin was merely for recordkeeping, and the mailings neither advanced the fraudulent scheme nor contributed to an effort to hide it. Each fraudulent act was complete when the defendant received the CCOs [in person] from TDOT-Carrollton.¹⁴⁴

Consequently, Fredric Strong was acquitted on all remaining counts. The government, obviously unhappy with this result, appealed to the Fifth Circuit.¹⁴⁵ The Fifth Circuit, finding the evidence insufficient "to establish that the mailings were sufficiently related to the success of the scheme,"¹⁴⁶ affirmed the district court's grant of the judgment of acquittal.¹⁴⁷ After analyzing the *Kann-Schmuck* line of

141. The government dismissed one count prior to trial.

142. See FED. R. CRIM. P. 29(c); *Strong*, slip op. at 1.

143. *Strong*, slip op. at 3. The missing microfilm records might explain why the jury acquitted Fredric Strong on four of the seven remaining mail fraud counts.

144. *Id.* at 7.

145. If the district court grants a judgment of acquittal *before* the jury returns a verdict, the government cannot appeal and retrial is barred by the Double Jeopardy Clause of the Fifth Amendment. FED. R. CRIM. P. 29(a) or (b); see *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575 (1977) (stating "the Double Jeopardy Clause bars appeal from an acquittal entered under . . . Rule 29(a) or (b)"). By contrast, the government can appeal the *post-verdict* entry of a judgment of acquittal because a reversal by the court of appeals will not result in a new trial, but only reinstatement of the jury's guilty verdict. FED. R. CRIM. P. 29(c); cf. *Smalis v. Pennsylvania*, 476 U.S. 140, 145-46 (1986) (noting post-acquittal appeals by prosecution barred only when they might result in a second trial).

146. *United States v. Strong*, 371 F.3d 225, 226 (5th Cir. 2004).

147. Fredric Strong was ultimately terminated from the Dallas Police Department for violating departmental regulations by virtue of his involvement in the charged scheme. He subsequently brought various civil rights claims against the City of Dallas and others, as well as state law defamation claims against one of the auction houses that was defrauded, but those

cases and synthesizing *Schmuck* with the earlier precedents, the Fifth Circuit determined *Schmuck*'s holding that a mailing need merely be "incident to an essential part of the scheme,"¹⁴⁸ is necessarily "cabined by the materiality of the mailing, as well as its timing: A tangential mailing occurring *after* the success of a fraud scheme is complete would never qualify, even if the mailing is 'incidental' to a part of the scheme."¹⁴⁹ Applying this test, as well as asking "whether the mailings themselves somehow contributed to the successful continuation of the scheme,"¹⁵⁰ the Fifth Circuit held the mailings of the CCOs from TDOT-Carrollton to TDOT-Austin had no material impact on the success of Strong's "title punching" fraud scheme.¹⁵¹

Strong was correctly decided because the mailings of the CCOs were not integral to Strong's scheme of obtaining either the vehicles from the auction houses or the money from the bona fide purchasers.¹⁵² More importantly, *Strong* represents the first court of appeals decision to place logical limitations of *materiality* and *timing* on the potentially unlimited application of the mail and wire fraud statutes ushered in by *Schmuck*.

I. Toward the Correct Jurisdictional Standard: Requirements of Materiality and Timing

The *Strong* test of "materiality and timing," which is supported by Justice Frankfurter's materiality test in *Parr* (i.e., whether the mailing was designed materially to aid the consummation of the scheme),¹⁵³ provides the foundation for the correct standard to be applied in mail and wire fraud cases to determine whether a mailing or

claims were all dismissed on summary judgment. *Strong v. City of Dallas*, 2002 WL 87459 (N.D. Tex. Jan. 17, 2002), *aff'd*, 54 F. App'x 794 (5th Cir. 2002). Thereafter, Fredric Strong brought another related suit against some of the same parties, but those claims were also dismissed on summary judgment based on res judicata. *Strong v. City of Dallas*, 2005 WL 1544799 (N.D. Tex. Jun. 29, 2005).

148. *Schmuck v. United States*, 489 U.S. 705, 711 (1989).

149. *Strong*, 371 F.3d at 229 (emphasis added).

150. *Id.* at 230. This inquiry is similar to that subsumed within Justice Frankfurter's materiality test.

151. *Id.* at 231–32.

152. For example, had TDOT-Carrollton *mailed* the CCOs to Fredric Strong, rather than him obtaining the CCOs in person (while conveniently clad in his police uniform), then those mailings would have been in furtherance of the scheme because the Brothers Strong needed to gain possession of the CCOs in order to resell the cars to the unsuspecting bona fide purchasers.

153. See *Parr v. United States*, 363 U.S. 370, 398 (1960) (Frankfurter, J., dissenting).

wire transmission is in furtherance of the fraudulent scheme.

Application of the correct standard involves a relatively simple two-step process. First, a federal court should define with precision the charged scheme to defraud. *What* is the object of the scheme—money, property, or deprivation of honest services? *How* was the scheme to be achieved? *When* was the scheme to be achieved (i.e., when was the money or property to be obtained, or the deprivation of honest services to be consummated, by the defendant, his agents and/or co-conspirators)? Defining precisely the “What, How, and When” of the charged scheme to defraud will avoid the pitfalls encountered by the *Schmuck* majority—where a misunderstanding of the true nature of the scheme led to an incorrect (and unjust) result.

Second, a federal court should determine whether *both* requirements of materiality and timing are satisfied with respect to the charged mailing or wire transmission. An incidental, tangential, collateral, or trivial mailing or wire transmission can *never* qualify—regardless of its timing.¹⁵⁴ Similarly (with the sole exception of lulling communications),¹⁵⁵ a mailing or wire transmission occurring *after* the scheme has reached fruition can *never* qualify—regardless of its materiality.¹⁵⁶ In other words, if the charged mailing or wire transmission does not *materially* aid the consummation of the charged scheme, or (other than a lulling communication) occurs *after* the scheme has reached fruition, the inquiry is at an end and the defen-

154. See *Schmuck v. United States*, 489 U.S. 705, 723 (1989) (Scalia, J., dissenting) (stating “[i]n other words, it is mail fraud, not mail and fraud, that incurs liability. This federal statute is not violated by a fraudulent scheme in which, at some point, a mailing happens to occur.”); *United States v. Hartsel*, 199 F.3d 812, 818 (6th Cir. 1999) (mailing must serve a “useful step, purpose, or role in furthering the scheme”).

155. See *Kann v. United States*, 323 U.S. 88, 94–95 (1944) (distinguishing “cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated”). The Eighth Circuit has created its own additional exception in this area, allowing a mailing to fall within the ambit of the statute if it permits the defendant “to retain the fruits of his fraud or convert them to cash.” *United States v. Pemberton*, 121 F.3d 1157, 1171 (8th Cir. 1997). However, such an exception finds no basis in the law because a mailing by which a defendant keeps his illicit gains has little, if anything, to do with “lulling” a victim into a false sense of security.

156. See *Parr*, 363 U.S. at 397 (stating “[i]f the use of the mails occurred not as a step in but only after the consummation of the scheme, the fraud is the exclusive concern of the States.”) (Frankfurter, J., dissenting); *United States v. Adkinson*, 158 F.3d 1147, 1163 (11th Cir. 1998) (writing “[w]e have not hesitated to reverse mail fraud convictions where the underlying scheme has reached fruition prior to the mailing.”). *But see* *United States v. Spirk*, 503 F.3d 619, 622–23 (7th Cir. 2007) (where “the mailing follows the fraud does not (necessarily) foreclose a conviction for mail fraud.”) (dictum comparing *Schmuck* with *Maze*, but the case focused on whether there was a mailing at all).

dant is entitled to a dismissal or judgment of acquittal with respect to that particular mailing or wire transmission.¹⁵⁷

The Supreme Court should expressly overrule *Schmuck* (as well as *Pereira* and *Sampson*) at the earliest opportunity.¹⁵⁸ However, until these cases are overruled, use by the federal judiciary of the two-step analysis outlined above will bring much needed consistency to the application of the mail and wire fraud statutes.¹⁵⁹ Hopefully, it will also cause the federal judiciary to be much more critical of those fraud prosecutions that are more appropriately “the exclusive concern of the States.”¹⁶⁰

J. Applying the Correct Jurisdictional Standard: Ingles

A recent Fifth Circuit mail and wire fraud case involving insurance fraud is an example of a fraud that should have been the exclusive concern of the States (or, more specifically, the State of Louisiana), and highlights the need for application of the two-step jurisdictional standard described in this Article.¹⁶¹

Ronald Ingles, the son of Dennis Ingles, owned two camp houses on Lake Bistineau, which is located near Shreveport in northwest

157. Obviously, in a multi-count indictment, this analysis must be undertaken separately with respect to each count of mail or wire fraud.

158. In each of *Kann*, *Parr*, *Maze*, and *Schmuck*, there was a three or four-Justice dissent, highlighting the difficulty—even among the Justices—of forging a consensus as to the appropriate jurisdictional limits of the mail and wire fraud statutes. If *Sampson* is not completely overruled, then it should be limited solely to discerning the effect of “lulling communications.” See *supra* text accompanying note 51. This Article leaves to others the suggestion of an appropriate rule of proximate causation in mail and wire fraud cases to replace *Pereira*—knowing only that a rule based on the antiquated business practices of the early 1950s has little relevance in today’s global cyber economy.

159. For example, in *United States v. Hubbard*, a case virtually identical to *Schmuck*, the Ninth Circuit held that in a scheme to sell used cars with rolled-back odometers, the state’s mailing of new titles with false mileage to the cars’ new owners was “sufficiently closely related” to the underlying scheme for those mailings to be in furtherance of the scheme, notwithstanding that the defendants had already obtained the funds from the new owners before the state mailed the new titles. 96 F.3d 1223, 1229 (9th Cir. 1996). *Hubbard*, like *Schmuck*, was wrongly decided.

160. *Parr*, 363 U.S. at 397 (Frankfurter, J., dissenting). Application of the correct jurisdictional standard will also avoid federalism problems. See Mark Zingale, *Fashioning a Victim Standard in Mail and Wire Fraud: Ordinarily Prudent Person or Monumentally Credulous Gull?*, 99 COLUM. L. REV. 795, 801 n.27 (1999) (noting “the open-endedness of the mailing requirement opens the statute both to federalism problems and to a concern for excessive inchoate liability for unexecuted schemes”).

161. See *United States v. Ingles*, 445 F.3d 830 (5th Cir. 2006).

Louisiana.¹⁶² Willie Hilson, a long-time Ingles family friend and a former co-worker of Dennis, admitted to setting fire to one of the camp houses late in the evening on June 2, 2003, and then shortly after midnight telephoned Dennis to tell him that “it was over with.”¹⁶³ Later that same morning, Dennis’s girlfriend—Michelle Wilhite—asked him why Hilson had called the night before and Dennis said, “If Willie did what he said he was gonna do, then the camp was burned down.”¹⁶⁴ The following day, Dennis’s son, Ronald, filed a homeowner’s insurance claim with the State Farm Insurance Companies for the damaged camp house and its contents.¹⁶⁵

Under Ronald’s policy, State Farm was obligated to pay the mortgagee, Mid-State Homes, regardless of the fire’s cause and was required to pay Ronald unless he was involved in the arson.¹⁶⁶ As part of the claims process, State Farm mailed at least three letters to Ronald and one letter to Mid-State.¹⁶⁷ Eventually, State Farm made two payments as a result of the fire: one to Mid-State to pay off the mortgage, and one to Wilhite (Dennis’s girlfriend) under her own State Farm homeowner’s policy for personal property that was destroyed in the fire.¹⁶⁸ Ronald, however, did not receive any payment on his claim because State Farm concluded that he was involved in the arson.¹⁶⁹

After discovering the fire was set intentionally, the United States Attorney for the Western District of Louisiana charged Ronald, Dennis, and Hilson in a six-count indictment.¹⁷⁰ Count One charged con-

162. *Id.* at 833. The camp houses were built on 10-foot high stilts and were located “on a bayou” that fed into Lake Bistineau. *See* Transcript of Record at 133, 151, *United States v. Ingles*, 445 F.3d 830 (5th Cir. 2006) (No. 05-30155).

163. *Ingles*, 445 F.3d at 833.

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* The amounts paid to Mid-State and Wilhite were \$11,889.65 and \$4,802.09, respectively, for a total payment by State Farm of \$16,691.74. *Id.* Many of Wilhite’s household items were in the camp house because she did not have a place to store them after moving in with Dennis. Transcript of Record at 201, 202, *United States v. Ingles*, 445 F.3d 830 (5th Cir. 2006) (No. 05-30155).

169. *Ingles*, 445 F.3d at 833. Ronald never contested State Farm’s decision and never sued State Farm under his policy. Transcript of Record at 342, *Ingles*, 445 F.3d 830 (No. 05-30155).

170. The amount paid by State Farm to Mid-State and Wilhite totaled less than \$17,000, which is hardly the sort of princely sum that would normally attract the attention of federal prosecutors. By comparison, in civil cases based on diversity of citizenship, Congress deemed

spiracy to commit mail and wire fraud; Count Two charged wire fraud (for the late night telephone call from Hilson to Dennis);¹⁷¹ and Counts Three through Six charged mail fraud (for the four claims processing letters sent by State Farm to Ronald and Mid-State). Hilson pleaded guilty to Count Two (wire fraud), but Dennis and Ronald proceeded to trial.¹⁷²

At trial, both Dennis and Hilson testified Ronald had nothing to do with the arson.¹⁷³ Hilson testified that several weeks before the fire, Dennis (alone) asked him to set fire to Ronald's camp house for \$5,000 and that the money would come from the insurance proceeds.¹⁷⁴ However, State Farm's claims representative testified Dennis never filed a claim and, even if he had, would not have received any money because Dennis owned neither the property nor the policy (both of which were in Ronald's name).¹⁷⁵ Dennis's girlfriend (Wilhite) testified that Dennis paid for both properties and virtually all of the expenses, but put the properties in Ronald's name because he (Dennis) was planning to file for bankruptcy.¹⁷⁶ After a two-day trial, two hours of jury deliberations, and the denial by the district court of both defendants' (Ronald and Dennis) motions for judgment of acquittal, on September 22, 2004, the jury acquitted Ronald on all

the amount in controversy necessary to invoke federal subject matter jurisdiction to be \$75,000, exclusive of interest and costs. *See* 28 U.S.C. § 1332(a) (2005). Perhaps the DOJ should adopt a similar benchmark in white-collar prosecutions before spending scarce federal resources on cases that have only a *de minimis* effect on interstate commerce.

171. The indictment alleges that the telephone call was made on June 3, 2003, from Hilson in Louisiana to Dennis in Arkansas (where Dennis had moved), thus satisfying the requirement that the wire communication occur in interstate commerce. At trial, the government proved that Hilson used his cellular phone in Louisiana to place a two-minute call to Dennis's cellular phone in Arkansas at 12:14 a.m. on the morning of June 3, 2003. Transcript of Record at 194, 283, *Ingles*, 445 F.3d 830 (No. 05-30155).

172. For his guilty plea, Hilson received five years probation and was ordered to make restitution to State Farm in the amount of the Mid-State claim (\$11,889.65). Hilson's probation was terminated in September 2006—three years early.

173. *Ingles*, 445 F.3d at 833. Dennis testified that he also had nothing to do with the arson and that the subject came up a couple of months before as a joke while he and Hilson were both drunk at a party. Transcript of Record at 308–09, *Ingles*, 445 F.3d 830 (No. 05-30155).

174. *Ingles*, 445 F.3d at 833–34. Dennis testified that at the party where the arson was discussed, Hilson said that he needed \$3,000 and bragged that “he could burn the camp down and not a leave a trace.” Transcript of Record at 309, *Ingles*, 445 F.3d 830 (No. 05-30155). In response, Dennis said “Well, if you can do that, I’ll give you \$3- or—\$3- to \$5,000.” *Id.* Dennis also said that he did not think Hilson would actually burn the camp down and did not want him to do so. *Id.*

175. *Ingles*, 445 F.3d at 834.

176. *Id.*

counts and convicted Dennis on all counts.¹⁷⁷ On appeal, the Fifth Circuit reversed Dennis's convictions on the four mail fraud counts but affirmed the convictions on the wire fraud and conspiracy counts. The Fifth Circuit's analysis in this "split" decision provides an excellent example of how this Article's two-pronged standard for determining jurisdiction in mail and wire fraud cases should be applied. Its application in this case would have avoided a miscarriage of justice.

In reversing the convictions on the four mail fraud counts (Counts Three through Six), the Fifth Circuit determined that the four claims processing letters sent by State Farm to Ronald and Mid-State were not in furtherance of the charged scheme to defraud based on the following reasoning. The letter from State Farm to Mid-State was not in furtherance of a fraudulent scheme because, under the terms of the policy, State Farm was required to pay Mid-State *regardless* of the cause of the fire.¹⁷⁸ Therefore, the claim submitted by Mid-State could not have been fraudulent.¹⁷⁹ Similarly, the three letters mailed by State Farm to Ronald were not fraudulent because the evidence demonstrated Ronald had no knowledge of the scheme and the jury acquitted him on all counts. Consequently, Ronald's claim (which was never paid) also was not fraudulent.¹⁸⁰ Because the claims submitted by Ronald and Mid-State *were not fraudulent*, the four claims processing letters by which the claims were submitted—and which formed the basis of the four mail fraud counts in the indictment—could not, by definition, have been in furtherance of a *fraudulent* scheme.¹⁸¹

The government argued that, because Dennis was the de facto owner of the property (by virtue of his paying many of the property's expenses), even though Ronald was not aware of the scheme he would have turned over the insurance proceeds to Dennis just the

177. Dennis was held without bail immediately after the verdict because the government informed the district court that Wilhite, Dennis's (by now former) girlfriend, "has told the government that Mr. [Dennis] Ingles has threatened her and that he told her that if he was going to spend any time in jail over this, he would get his lawyer to give him a week before he would go to jail and then he would track her down and kill her like a dog, and has told her that several times." Transcript of Record at 413, *Ingles*, 445 F.3d 830 (No. 05-30155). Dennis was eventually sentenced to 66 months. Dennis's sentence was enhanced because he was on probation for a state offense at the time. *Ingles*, 445 F.3d at 840.

178. *Ingles*, 445 F.3d at 836.

179. *Id.*

180. *Id.*

181. *Id.* at 836–37.

same.¹⁸² As a result, the government argued, Dennis violated the mail fraud statute when Ronald caused mailings in innocent furtherance of Dennis's scheme to defraud.¹⁸³ The Fifth Circuit rejected this argument because there was no evidence Ronald knew there was arson when he submitted the claim to State Farm, and Dennis's hope or expectation that Ronald might share the insurance proceeds with him (so that he, Dennis, could pay the "torch" Hilson) was too attenuated.¹⁸⁴ Citing *Kann*, the Fifth Circuit ultimately held the four letters, which formed the basis of the four mail fraud counts, were not for the purpose of executing a fraudulent scheme because the claims of both Ronald and Mid-State were not fraudulent.¹⁸⁵ Put another way, the legitimate and non-fraudulent claims of Ronald and Mid-State caused the letters to be generated, so their mailing was not in furtherance of a fraudulent scheme. While there might have been sufficient evidence that Dennis conspired with Hilson to commit arson, Dennis was not guilty of mail fraud "*because no mail fraud occurred.*"¹⁸⁶

Dennis then argued, for the same reasons, there was insufficient evidence to support his convictions for conspiracy (Count One) and wire fraud (Count Two). The Fifth Circuit, however, disagreed, basing its decision on extremely weak and disjointed reasoning. In just one paragraph of the opinion, the Fifth Circuit upheld the remaining conspiracy and wire fraud convictions because (i) Hilson telephoned Dennis to inform him the arson was complete, and (ii) Dennis clearly intended to defraud State Farm.¹⁸⁷ While neither of these asseverations can be disputed, they have absolutely nothing whatsoever to do with whether Hilson's late-night telephone call to Dennis—the only charged wire transmission—was in furtherance of a scheme which the Fifth Circuit earlier ruled was not fraudulent.

It is easy to see how Hilson's telephone call to Dennis implicated them in a (state) arson conspiracy. It is difficult to see how the same telephone call constituted (federal) wire fraud when the submitted in-

182. *Id.* at 836.

183. *Id.*

184. *Id.* at 836–37. Nor was there any evidence that Ronald agreed or was obligated to share the insurance proceeds with Dennis. *Id.* at 837.

185. *Id.*

186. *Id.* at 838 (citations omitted) (emphasis in original).

187. *Id.* "Of course, the mail fraud statute does not require a completed fraud, just that the defendant has devised or intended to devise a scheme to defraud." *United States v. Ratcliff*, 488 F.3d 639, 645 n.7 (5th Cir. 2007) (internal citations and quotation marks omitted). However, the mailing or wire transmission still must be in furtherance of the fraudulent scheme in order to bring the intended fraud within the ambit of the mail and wire fraud statutes.

surance claims were not fraudulent. The wire transmission must be in furtherance of the charged scheme, and an arson conspiracy was not charged in the indictment. While the telephone call might have been in furtherance of a scheme to commit arson, it clearly was not in furtherance of a fraudulent scheme, which, in any event, the Fifth Circuit ruled did not exist. This disjointed and illogical result could have been avoided by application of the two-step jurisdictional analysis described in this Article.

First, the Fifth Circuit (or the district court on a motion for judgment of acquittal)¹⁸⁸ should have defined with precision the charged scheme to defraud. *What* is the object of the scheme—money, property, or the deprivation of honest services? *How* was the scheme to be achieved? *When* was the scheme to be achieved? The “What” was to obtain insurance proceeds (money) from State Farm.¹⁸⁹ The “How” was by (i) burning the property to the ground, and (ii) submitting an insurance claim. While the first part of the “How” was achieved, the second part was not because Dennis did not submit a claim and the claim submitted by Ronald was determined to be non-fraudulent. The “When” never occurred either because not only did Ronald and Dennis fail to receive any insurance proceeds (and, presumably, Hilson was never paid),¹⁹⁰ but—most critically—the actual submission of the insurance claims was not fraudulent because Ronald had no knowledge of the arson and Mid-State was entitled to payment regardless of the fire’s cause. Since the money to be obtained from State Farm was not the result of a *fraudulent* scheme, the charged wire transmission fails the “What, How, and When” part of the test.

The charged wire transmission also fails the second part of the test because the requirements of *materiality* and *timing* were not satisfied. The late-night telephone call from Hilson informing Dennis the

188. See FED. R. CRIM. P. 29. Both Dennis and Ronald moved for a judgment of acquittal in the district court at the close of the government’s case and again at the close of all the evidence. Transcript of Record at 304, 306, 346–47, *United States v. Ingles*, 445 F.3d 830 (5th Cir. 2006) (No. 05-30155).

189. During voir dire, the government stated: “The victim in this case is State Farm Insurance Company.” Transcript of Record at 65, *Ingles*, 445 F.3d 830 (No. 05-30155). During its opening, the government argued that “the defendants and another man had a plan to defraud State Farm Insurance Company.” Transcript of Record at 114, *Ingles*, 445 F.3d 830 (No. 05-30155).

190. However, “to violate the [wire fraud] statute, the defendant need not have completed or succeeded in his scheme to defraud, and the scheme need not have resulted in actual injury to the scheme’s victims.” *United States v. Reifler*, 446 F.3d 65, 96 (2d Cir. 2006).

arson was completed was clearly only incidental and collateral to the consummation of the scheme. The scheme involved burning the property and filing an insurance claim—and Hilson’s telephone call had no impact on either of those aims. Once the arson occurred, it was irrelevant to the scheme whether or not Hilson called Dennis afterwards to inform him that the property was burned. Put another way, if Hilson had forgotten or just not bothered to call Dennis that night, the arson still would have occurred, the property still would have burned to the ground, and the plan to obtain insurance proceeds by filing a claim with State Farm still would have proceeded. By like token, the telephone call obviously had no impact on the filing of an insurance claim. Because the telephone call did not materially aid the consummation of the scheme, it fails the materiality test. Since the materiality test is not satisfied, there is no need to determine whether the timing test is also satisfied and the inquiry is at an end.¹⁹¹

A determination that the charged wire communication was not in furtherance of the scheme is fatal both to the substantive wire fraud count as well as to the conspiracy to commit wire fraud count, even if Dennis and Hilson engaged in an *uncharged* arson conspiracy. “[U]nder our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process.”¹⁹² Dennis’s conviction and subsequent incarceration on the wire fraud and conspiracy to commit wire fraud charges amount to a miscarriage of justice. This case is also a shining example of why not all fraud prosecutions belong in federal court.

191. In its closing, the government argued: “And the wire fraud, I mean, I don’t know how this all could have been more clearly related to the scheme. It’s one conspirator calling another one to say: Hey, it’s done.” Transcript of Record at 358, *Ingles*, 445 F.3d 830 (No. 05-30155). However, it is difficult to see how one conspirator calling another *after* the arson has already occurred to say “it’s done” furthers the scheme of burning the house or filing an insurance claim. If the call had occurred *before* the arson, such as seeking to make last-minute plans, then perhaps that would have been material to the consummation of the scheme (i.e., burning the house). But a call made *after* the arson has already occurred is completely irrelevant and immaterial to the success of the scheme of (i) burning the house and (ii) filing a claim. In other words, if Hilson had never made the telephone call, “the scheme would have continued just the same. The [telephone call] was entirely incidental to the scheme.” *United States v. Evans*, 148 F.3d 477, 483 (5th Cir. 1998); *see also* *United States v. Vontsteen*, 872 F.2d 626, 629 (5th Cir. 1989), *superseded on other grounds*, 950 F.2d 1086 (5th Cir. 1992) (en banc) (stating “[t]he details of the scheme would have been exactly the same even without [Hilson’s telephone call]”).

192. *Parr v. United States*, 363 U.S. 370, 394 (1960) (Frankfurter, J., dissenting).

III. VENUE: "IN A DISTRICT WHERE THE OFFENSE WAS COMMITTED"

Even if a mailing or wire transmission can be characterized as being in furtherance of the charged scheme to defraud, the next issue to be determined is *where* the prosecution should take place, meaning what is the proper venue of the case? Unfortunately, the Supreme Court has provided even less direction for determining the proper venue in mail and wire fraud prosecutions than it has regarding subject matter jurisdiction.¹⁹³ This is problematic because, unlike jurisdictional requirements created by Congress, venue requirements are created by the Constitution.¹⁹⁴ As with a lack of subject matter jurisdiction, improper venue requires dismissal of the indictment or a judgment of acquittal.¹⁹⁵

A. *Historical Background*

The constitutional limits on where a criminal defendant can be brought to trial derive from two separate provisions of the Constitution and also from the Federal Rules of Criminal Procedure. The Venue Clause states: "The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed."¹⁹⁶ The Sixth Amendment improves upon the Venue Clause by mandating the trial take place in the same *district* as that in which the crime was committed.¹⁹⁷ The Federal Rules of Criminal Procedure give a practical ap-

193. See *United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985) (noting "the Supreme Court has yet to articulate a coherent definition of the underlying [venue] policies").

194. See *United States v. Cofield*, 11 F.3d 413, 426 (4th Cir. 1993) (Luttig, J., concurring in part and dissenting in part) (stating "[t]he Constitution, not public policy, dictates venue in federal criminal prosecutions").

195. See *United States v. Strain*, 396 F.3d 689 (5th Cir. 2005), *reh'g denied*, 407 F.3d 379, 380 (5th Cir. 2005) (remanding for entry of judgment of acquittal due to the government's failure to prove venue and stating that such failure "does not entitle the government to a second chance at prosecution").

196. U.S. CONST. art. III, § 2, cl. 3.

197. See U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed[.]") The Third Circuit has described these provisions as follows:

Literally, the provision in Article III is a venue provision since it specifies the place of trial, whereas the provision in the Sixth Amendment is a vicinage provision since it specifies the place from which the jurors are selected. This distinction, however, has never been given any weight, perhaps because it is unlikely that jurors from one district would be asked to serve at a trial in another district, or perhaps, more importantly, because the requirement that the jury be chosen from the state and district where the crime was committed presupposes that the jury will sit where it is chosen.

plication of these constitutional guarantees by providing “the government must prosecute an offense in a *district* where the offense was committed.”¹⁹⁸ The touchstone in each of these provisions is the place where the crime was committed.

It is worth a few words of historical background to describe the origination of these constitutional provisions. A prominent reason for these provisions was action taken by England to try American colonists in England. Over the objection of those who said such a course would lead to war, in 1769 the British Parliament proposed taking colonists from the Massachusetts Bay Colony who were accused of treason against the Crown to England for trial.¹⁹⁹ This aroused pas-

United States v. Passodelis, 615 F.2d 975, 977 n.3 (3d Cir. 1980). See also Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1686 (2000) (“The Venue Clause did not guarantee the right to a local jury, but it did ensure that defendants would not be transported to a distant federal capital or to another state for trial.”).

198. FED. R. CRIM. P. 18 (emphasis added).

199. This is the primary reason that, in the early morning hours of Wednesday, April 19, 1775, John Hancock and Samuel Adams were forced to take drastic measures to evade capture by British troops, who were under direct orders from King George III to arrest and transport them from Massachusetts Bay Colony to England to be tried for treason. See A letter from Col. Paul Revere to the Corresponding Secretary (on file with the Massachusetts Historical Society 1798) (“Dr. [Joseph] Warren sent in great haste for me, and begged that I would immediately set off for Lexington, where Messrs Hancock and Adams were, and acquaint them of the Movement [of British Regulars], and that it was thought they were the objects.”). While sleeping at the Hancock-Clarke House in Lexington, Adams and Hancock “were hastily aroused by Paul Revere notifying them of the impending approach of several hundred British troops marching on their way to Concord.” S. LAWRENCE WHIPPLE, *THE HANCOCK-CLARKE HOUSE, PARSONAGE AND HOME* 6 (Lexington Historical Society 1984). William Dawes arrived at the house with the same warning about a half hour later. See Letter from Col. Paul Revere to the Corresponding Secretary, available at <http://www.paul-revere-heritage.com/ride-letter-to-Belknap.html> (last visited Feb. 29, 2008) (“After I had been there about half an Hour, Mr. Daws came; we refreshid our selves, and set off for Concord.”). Able to make their escape (after Orderly Sergeant William Munroe, proprietor of nearby Munroe’s Tavern, posted a guard to ensure their safety), Hancock and Adams fled on their way to Philadelphia to join the Second Continental Congress. As they departed, they could hear the report of musketry in the distance from Lexington Green, whereupon Adams turned to Hancock and said: “This is a glorious day for America.” JOHN C. MILLER, *SAM ADAMS: PIONEER IN PROPAGANDA* 332 (Little, Brown & Co. 1936). The Hancock-Clarke House today contains such treasured relics as British Major John Pitcairn’s Scottish dueling pistols and William Diamond’s drum (Capt. John Parker’s Lexington militia appeared on Lexington Green after 19-year-old William Diamond beat the call to arms—the first overt act of the Revolution). See generally DAVID HACKETT FISHER, *PAUL REVERE’S RIDE* (Oxford Univ. Press 1994); ARTHUR BERNON TOURTELLOT, *WILLIAM DIAMOND’S DRUM: THE BEGINNING OF THE WAR OF THE AMERICAN REVOLUTION* (Doubleday & Co. Inc. 1959); Lexington Historical Society, <http://www.lexingtonhistory.org> (last visited Feb. 29, 2008). Pitcairn, who fell off his horse shortly after Lexington and lost his two matching pistols, which were later used by American general Israel Putnam for the duration of the Revolution, died two months later at the Battle of Bunker Hill on June 17, 1775. Pitcairn’s death is famously depicted in John Trumbull’s 1786 painting of the Battle. The

sionate objections in Massachusetts Bay and other Colonies on behalf of those who were to be conveyed to a distant land for trial before total strangers without having witnesses available to testify to their innocence.²⁰⁰ The feeling of outrage throughout the Colonies on this issue was so strong that King George III was criticized “for transporting us beyond the Seas to be tried for pretended offenses.”²⁰¹ Justice Story later explained the overriding purpose of the Venue Clause in his treatise:

The object of this clause is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighborhood; and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him. Besides this; a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence.²⁰²

painting focuses on the death of American Major General Joseph Warren, but the wounded British officer in the background is, in Trumbull’s own words:

Major Pitcairn, of the British marines, mortally wounded, and falling in the arms of his son, to whom he was speaking at the fatal moment . . . The artist was on that day adjutant of the first regiment of Connecticut troops, stationed at Roxbury; and saw the action from that point.

CATALOGUE OF PAINTINGS BY COL. TRUMBULL NOW EXHIBITING IN THE GALLERY OF YALE COLLEGE 10, 11 (New Haven, J. Peck 1835); *see also* Question Authority, http://artgallery.yale.edu/flash/focus/q_authority/large_1832_1.html (last visited Feb. 29, 2008). Pitcairn was killed by African-American militiaman Salem Prince (who also appears in Trumbull’s painting).

200. *See* William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59, 64 (1944).

201. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

202. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1775 (Boston, Hilliard, Gray & Co. 1833), *available at* http://press-pubs.uchicago.edu/founders/documents/a3_2_3s19.html. The remainder of this section reads: “There is little danger, indeed, that Congress would ever exert their power in such an oppressive, and unjustifiable manner. But upon a subject, so vital to the security of the citizen, it was fit to leave as little as possible to mere discretion.” *Id.* Justice Story’s father, Dr. Elisha Story (a surgeon in the Continental Army), was a founding member of the Sons of Liberty who participated in the Boston Tea Party and fought at Lexington, Concord, Bunker Hill, White Plains and Trenton. According to Justice Story, Dr. Story recounted that he fought beside his friend (and fellow surgeon) Major General Joseph Warren at Bunker Hill (General Warren’s younger brother John also fought at Bunker Hill and later founded Harvard Medical School; the author of this Article grew up on Warren Street—where General Warren lived and which was named after him—in the Roxbury section of Boston) and attended to General Warren before he succumbed to the mortal wounds depicted in Trumbull’s famous painting. *See generally* RICHARD FROTHINGHAM, LIFE AND TIMES OF JOSEPH WARREN 5 (Little, Brown & Co. 1865); WILLIAM WETMORE STORY, LIFE AND LETTERS OF JOSEPH STORY 3–12 (Charles C. Little & James

Our constitutional rule, based on its history, requires venue be linked to the nature of the crime charged, where the acts constituting it took place, and the accused not be subject to the hardship of being tried in a district remote from where the crime was committed. Read as a whole, these provisions manifest a strong constitutional policy disfavoring trials removed from the situs of the alleged criminal activity.²⁰³ As explained by the First Circuit:

Venue in a criminal case is not an arcane technicality. It involves matters that touch closely the fair administration of criminal justice and public confidence in it . . . The result is a safety net, which ensures that a criminal defendant cannot be tried in a distant, remote, or unfriendly forum solely at the prosecutor's whim.²⁰⁴

B. Current Standards

Because the government initiates federal criminal prosecutions, it has first crack at selecting the venue. When a defendant challenges venue, the “burden of showing proper venue is on the government, which must do so by a preponderance of the evidence.”²⁰⁵ Moreover,

Brown, eds. 1851). Justice Story's son, William Wetmore Story, studied under his father while attending Harvard Law School and eventually wrote two legal treatises. After his father's death in September 1845, William abandoned the law and went on to become America's greatest neoclassical sculptor. *See generally* American Neoclassical Sculptors Abroad, http://www.metmuseum.org/TOAH/HD/amb/hd_amb.htm (last visited Feb. 29, 2008). Among William's many famous works is the statue of his father, sculpted in Rome in 1853, which used to sit in the Story Chapel at Mount Auburn Cemetery in Cambridge, Massachusetts (not far from Justice Story's tomb), but which now sits in the foyer of the Harvard Law School Library in Langdell Hall in Cambridge, Massachusetts. *See* HLS Library: Virtual Tour, http://www.law.harvard.edu/library/about/tour/v_tour/v_tour_0.php (last visited Feb. 29, 2008).

203. *See* United States v. Muhammad, 502 F.3d 646, 651 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 1104 (2008) (stating “[c]ertainly, given our Nation's history, one underlying policy concern is the protection of a defendant from prosecution in a place far from his home and the support system that is necessary to mount an adequate defense.”).

204. United States v. Salinas, 373 F.3d 161, 162, 164 (1st Cir. 2004) (internal citations and quotation marks omitted); *see also* United States v. Cores, 356 U.S. 405, 407 (1958) (opining “[t]he provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place.”).

205. United States v. Scott, 270 F.3d 30, 34 (1st Cir. 2001). Of course, the *substantive* elements of any criminal offense must be proven according to the higher standard of beyond a reasonable doubt. *See* In re Winship, 397 U.S. 358, 361 (1970) (stating “that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation”); United States v. Rommy, 506 F.3d 108, 119 (2d Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3443 (U.S. Feb. 4, 2008) (No. 07-1031) (“As this court has frequently observed, the venue requirement, despite its constitutional pedigree, is *not* an element of a crime so as to require proof beyond a reasonable doubt; rather, venue need be proved only by a preponderance of the evidence.”) (internal citations and quotation marks omitted) (emphasis in original).

“when a defendant is charged in more than one count, venue must be proper with respect to *each* count”²⁰⁶ and “may be established by direct or circumstantial evidence.”²⁰⁷ Thus, venue may be proper as to some counts in an indictment and improper as to other counts in the same indictment. “The criminal law does not recognize the concept of supplemental venue.”²⁰⁸ On appeal, “[q]uestions of jurisdiction and venue are questions of law, and [a court of appeals] reviews them de novo.”²⁰⁹

The Supreme Court has formulated a general set of guidelines for determining criminal venue:

The Supreme Court has set forth the basic inquiry that the lower courts must undertake in addressing the question of venue. First, we must ascertain whether there is any statutory directive on the matter of venue. In the absence of such legislative direction . . . we should use as a general guide, the nature of the crime alleged and the location of the act or acts constituting it.²¹⁰

Consequently, if a statute (either the statute defining the substantive crime or a general venue statute) provides a venue determination, that statutory provision is to be honored (assuming, of course, that it satisfies the constitutional requirements). The mail fraud statute contains its own specific venue provision,²¹¹ which controls venue determinations regarding mail fraud counts. The general (and broader) federal venue statute governs venue determinations regarding wire fraud counts because the wire fraud statute does not contain its own specific venue provision.²¹² As a result, an indictment charging both mail and

206. *United States v. Geibel*, 369 F.3d 682, 696 (2d Cir. 2004) (emphasis added).

207. *United States v. Jaber*, 509 F.3d 463, 465 (8th Cir. 2007).

208. *Salinas*, 373 F.3d at 164.

209. *United States v. Svoboda*, 347 F.3d 471, 482 (2d Cir. 2003).

210. *United States v. Muhammad*, 502 F.3d 646, 652 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 1104 (2008) (internal citations and quotation marks omitted). *See also* *Travis v. United States*, 364 U.S. 631, 635 (1961) (“Where Congress is not explicit, the locus delicti must be determined from the nature of the crime alleged and the location of the act or acts constituting it”) (internal quotation marks omitted). The *locus delicti* is defined as: “The place where an offense was committed; the place where the last event necessary to make the actor liable occurred.” BLACK’S LAW DICTIONARY 959 (8th ed. 2004).

211. *See supra* text accompanying note 3.

212. *See supra* text accompanying note 4. The federal venue statute, 18 U.S.C. § 3237(a) (1984), provides, in pertinent part, as follows:

Except as *otherwise expressly provided* by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was *begun, continued, or completed*.

wire fraud requires the application of different venue tests to the mail and wire fraud counts, respectively.

The mail fraud statute explicitly states venue is proper only where the defendant (i) “places,” (ii) “deposits or causes to be deposited,” (iii) “takes or receives,” and (iv) “causes to be delivered,” mail matter.²¹³ Congress has “otherwise expressly provided,”²¹⁴ for venue in the mail fraud statute, thus the general venue provision found in § 3237(a) is inapplicable to mail fraud cases.²¹⁵ Consequently, venue in a mail fraud prosecution is *improper* in a district through which the mail matter only happened to pass.²¹⁶

Unlike the mail fraud statute, the wire fraud statute makes no reference to the venue of the offense.²¹⁷ Consequently, the provisions of § 3237(a) apply, and wire fraud prosecutions may be instituted in

(Emphasis added). This statute is applied to what are called “continuing offenses” and is often referred to as the “continuing offense” statute. *See Muhammad*, 502 F.3d at 653 (noting “Congress has determined that, with respect to a continuing crime, venue is proper in any district where the crime began, continued or was completed.”) (citing 18 U.S.C. § 3237(a)). Wire fraud is considered a continuing offense. *See United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir. 1987) (stating “both sections 1343 and 2314 are continuing offense crimes pursuant to 18 U.S.C. § 3237(a) so that venue is proper in any district in which the offenses were begun, continued, or completed”).

213. *See supra* text accompanying note 3.

214. *See supra* text accompanying note 212.

215. *See, e.g., United States v. Turley*, 891 F.2d 57, 60 (3d Cir. 1989) (acknowledging and approving government concession that § 3237 “is not applicable to mail fraud”); CRIMINAL RESOURCE MANUAL § 966 (1997) (“section 3237 is inapplicable to mail fraud”).

216. CRIMINAL RESOURCE MANUAL § 9-43.300 (noting that the “Department of Justice policy opposes mail fraud venue based solely on the mail matter passing through a jurisdiction.”); *see also United States v. Brennan*, 183 F.3d 139, 147 (2d Cir. 1999) (holding that § 3237 is inapplicable to mail fraud). *Brennan* held that the second paragraph of § 3237(a), which states that “[a]ny offense involving the use of the mails . . . is a continuing offense,” does not apply to mail fraud prosecutions because “the mail fraud statute does not proscribe conduct involving ‘the use of the mails’ *within the meaning of § 3237(a)*.” *Brennan*, 183 F.3d at 146 (emphasis in original). *But see United States v. Wood*, 364 F.3d 704, 713 (6th Cir. 2004) (stating “venue in a mail fraud case is limited to districts where the mail is deposited, received, or moves through, even if the fraud’s core was elsewhere.”) (emphasis added); *id* at 723 (Gwin, J., concurring in part and dissenting in part) (“applying § 3237(a) to mail fraud, the majority could permit the government to hale a defendant into court in distant jurisdictions having virtually no relation to the underlying crime.”). *Brennan*’s analysis makes it clear why the Sixth Circuit’s approach to determining venue in mail fraud cases is not only wrong, but unconstitutional.

217. *Compare supra* text accompanying note 3, *with supra* text accompanying note 4. While it can be argued that the wire fraud statute’s language of “transmits or causes to be transmitted” is a venue provision, that language is subsumed within § 3237(a)’s reference to venue being proper where the wire transmission “was begun, continued, or completed,” since “transmitting” is the same as beginning, continuing, or completing. *See supra* text accompanying note 212.

any district in which an interstate or foreign wire transmission began, continued, or was completed. The venue standards for mail and wire fraud appear straightforward and easy to apply; however, these standards are consistently either misunderstood by prosecutors and defense attorneys alike, or misapplied by federal courts. Perhaps the primary reason for this confusion lies with the Supreme Court's recent criminal venue decisions, which have nothing to do with the unique venue concerns raised in mail and wire fraud cases, yet are *mistakenly* relied upon by defense attorneys, federal prosecutors, and federal courts in making mail and wire fraud venue determinations.

C. *Cabrales*

Vickie S. Cabrales made a series of bank deposits and withdrawals in Florida of money that was traceable to illegal cocaine sales in Missouri.²¹⁸ Cabrales was indicted on two counts of money laundering and one count of conspiring to launder money in the Western District of Missouri because, as the government asserted, since the drug conspiracy operated in Missouri and Cabrales was "laundering" its profits, she could be tried in Missouri.²¹⁹ The district court dismissed two substantive money laundering counts for improper venue and the government appealed the dismissal to the Eighth Circuit.²²⁰

In affirming the dismissal, the Eighth Circuit cited the Constitution and Rule 18 of the Federal Rules of Criminal Procedure²²¹ in stating that "a person [must] be tried for an offense where that offense is committed" and such a place "must be determined from the nature of the crime alleged and the location of the act or acts constituting it."²²² The Eighth Circuit found that Cabrales's money laundering charges were for "transactions which began, continued, and were completed only in Florida. That the money came from Missouri is of no moment in this case, because Cabrales dealt with it only in Florida."²²³ Consequently, the Eighth Circuit upheld the dismissal of the two money

218. *United States v. Cabrales*, 524 U.S. 1, 4 (1998).

219. *United States v. Cabrales*, 109 F.3d 471, 472 (8th Cir. 1997), *amended by*, 115 F.3d 621 (8th Cir. 1997).

220. The district court did not dismiss the conspiracy count because an overt act had been committed in Missouri by some of the conspirators. *Cabrales*, 109 F.3d at 472 n.2. Consequently, the conspiracy charge was not part of the government's appeal.

221. *See supra* text accompanying notes 196–198.

222. *Cabrales*, 109 F.3d at 472 (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)) (internal quotation marks omitted).

223. *Id.*

laundering counts because the charges “consisted of banking transactions which Cabrales executed only in Florida.”²²⁴ The government again appealed.

In granting certiorari,²²⁵ the Supreme Court recognized a difference of opinion among the courts of appeals as to the proper venue for money laundering charges when the financial transactions underpinning the laundering occurred in a district separate from where the funds were unlawfully generated.²²⁶ In a unanimous decision, the Supreme Court affirmed the dismissals, ruling that because Cabrales was indicted “for transactions which began, continued, and were completed in Florida . . . venue in Missouri is improper.”²²⁷ The Supreme Court announced the criteria for determining proper venue by stating “the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.”²²⁸ Recognizing that some crimes may constitute “continuing offenses,” the Supreme Court applied its venue criteria to conclude the money laundering statutes “interdict only the financial transactions (acts located entirely in Florida), not the anterior criminal conduct that yielded the funds allegedly laundered.”²²⁹

Cabrales was widely criticized among commentators and in Congress.²³⁰ As a result, Congress amended the money laundering statute such that venue is proper in a district where the underlying criminal conduct occurred as well as where the financial transactions took place.²³¹ However, the importance of *Cabrales* with respect to determining venue in mail and wire fraud cases is its adoption of the criteria set forth in *Anderson* that the *locus delicti* is determined “from the nature of the crime alleged and the location of the act or acts con-

224. *Id.* at 474.

225. *United States v. Cabrales*, 522 U.S. 1072 (1998).

226. *See United States v. Cabrales*, 524 U.S. 1, 5–6 (1998).

227. *Id.* at 8.

228. *Id.* at 6–7 (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)).

229. *Id.* at 7.

230. *See* Jennifer Herring, Note, *Selecting an Appropriate Venue for Money Laundering Prosecutions*, 69 GEO. WASH. L. REV. 293, 308 (2001) (“Amending the money laundering statutes [as proposed] would be an effective and efficient mechanism for alleviating the problems raised by the *Cabrales* decision.”).

231. *See* 18 U.S.C. § 1956(i) (2006). The amended venue provision was added as section 1004 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272, 392 (2001) (codified as amended in 18 U.S.C. § 1956(i)).

stituting it.”²³² This single phrase caused defense attorneys, federal prosecutors, and federal courts to divert their attention from where the charged mailing or wire transmission originated, terminated, or (for wire fraud only) passed through and, instead, to focus *incorrectly* on the location of the fraudulent scheme as the determining factor regarding venue. This error has been exacerbated by the application of the holding in the Supreme Court’s other recent criminal venue decision to mail and wire fraud cases.²³³

232. *Cabrales*, 524 U.S. at 6–7.

233. It is a serious, but common, mistake to make venue determinations in mail and wire fraud cases based on the location of the fraudulent scheme *because the mail and wire fraud statutes do not punish fraudulent schemes, only the illegal use of the mails or wire facilities in furtherance of such schemes*. Prosecutors must resort to state law in state courts in order to punish the underlying fraudulent scheme that does not involve the illegal use of the mails or wire facilities. *See United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002) (“A scheme to defraud, however, without the requisite illegal use of wires, does not violate the wire fraud statute.”). Consequently, as discussed *infra*, venue determinations in mail and wire fraud cases must be based on the specific geographic characteristics of the charged mailing or wire transmission—*not the location of the fraudulent scheme*. So, for example, if a defendant is charged with causing a Massachusetts resident to wire funds that were sent from a bank wire room located in Wyomissing, Pennsylvania (near Reading in the Eastern District of Pennsylvania) to a brokerage house in the Southern District of New York, all as part of an alleged fraudulent scheme whose base of operations is in Massachusetts, venue of this wire fraud charge would be *improper* in the District of Massachusetts. Proper venue would lie only in the Eastern District of Pennsylvania (origination), the Southern District of New York (termination), and any district through which the wire transmission passed. A few cases have held that if a wire transfer of funds “passed” through a particular Federal Reserve Bank, then venue would also be proper in the district in which that Federal Reserve Bank is located. *See United States v. Goldberg*, 830 F.2d 459, 465 (3d Cir. 1987) (noting venue was proper in the Eastern District of Pennsylvania because the wire transfer “passed through the Federal Reserve Bank in Philadelphia.”); *United States v. Edelman*, 458 F.3d 791, 812 (8th Cir. 2006) (where the “[witness] explained that the money went through a clearinghouse for wires and that all wired funds go through the Federal Reserve.”). However, the government must be put to its proof when attempting to show that a wire transfer “cleared” or “passed through” a particular Federal Reserve Bank, given the manner in which the nation’s Electronic Fund Transfer (EFT) networks operate. Most of the nation’s electronic payments are processed through two EFT systems owned and operated by the nation’s 12 Federal Reserve Banks (which, including the Board of Governors of the Federal Reserve System, are individually and collectively referred to simply as the “Fed”). *See* The Federal Reserve Board, <http://www.federalreserve.gov/otherfrb.htm> (last visited Feb. 29, 2008) (showing the 12 Federal Reserve Districts). “Fedwire” and “FedACH” (the Fed’s Automated Clearing House) are the national EFT networks operated by the Fed that process most of the nation’s electronic payments (including wire transfers and ACH payments). Fedwire deals with “wholesale” payments (larger than \$5 million) while FedACH deals with “retail” payments (less than \$5 million). Fedwire operations are governed by Article 4A of the Uniform Commercial Code and Regulation J of the Board of Governors of the Federal Reserve System. *See* 12 C.F.R. § 210 (2004). FedACH operations are governed by the Electronic Fund Transfer Act, 15 U.S.C. § 1693 (2005), and Regulation E of the Board of Governors of the Federal Reserve System. *See* 12 C.F.R. § 205 (2007). Each financial institution that is a member of the Fed (there are over 10,000 members) maintains a “reserve ac-

count” at one of the 12 Reserve Banks. Virtually all of the financial institutions that are members of the Fed interface with Fedwire and FedACH through an Internet Protocol (IP)-based access solution called FedLine, which provides real-time connectivity in an online PC-based or mainframe environment. See generally Federal Reserve Financial Services, <http://www.frbservices.org> (last visited Feb. 29, 2008) (generally describing Fedwire, FedACH, and FedLine). Assume that a banking customer of PNC Bank in Pittsburgh (whose reserve account is maintained at the Cleveland Fed) seeks to wire \$5 million to a banking customer of Evergreen Bank in Seattle (whose reserve account is maintained at the San Francisco Fed). The multi-step Fedwire process (all of which occurs electronically and virtually instantaneously through FedLine—transfer of a smaller amount would operate similarly through FedACH) is as follows: (i) PNC sends the \$5 million transfer order to the Cleveland Fed; (ii) Cleveland Fed debits \$5 million from PNC’s reserve account; (iii) Cleveland Fed sends the transfer order to the Interdistrict Settlement Fund (ISF) in Washington, D.C. (which is overseen by the Fed Board of Governors and operates as the clearing house for the 12 Reserve Banks to “clear” funds among themselves); (iv) *ISF debits \$5 million from the Cleveland Fed’s account and credits \$5 million to the San Francisco Fed’s account*; (v) ISF notifies the San Francisco Fed of a \$5 million credit to its account; (vi) San Francisco Fed credits \$5 million to Evergreen’s reserve account at the San Francisco Fed; (vii) San Francisco Fed notifies Evergreen of a \$5 million credit; and (viii) having been duly notified, Evergreen credits its customer’s bank account for \$5 million. See generally *United States v. Mills*, 199 F.3d 184, 187–88 (5th Cir. 1999) (partially describing interdistrict Fed process); DONALD I. BAKER & ROLAND E. BRANDEL, 1 *THE LAW OF ELECTRONIC FUND TRANSFER SYSTEMS* ¶ 11.02 at 11-8 (2007); Michael I. Shamos, Chairman, eBusiness Technology Program, Carnegie-Mellon Univ., *Electronic Payment Systems Lecture: Automated Clearing and Settlement Systems*, Institute for eCommerce (Spring 2004). Critically, due to the involvement of the ISF, the actual wire transfer of funds does not “clear” at either the Cleveland Fed or the San Francisco Fed. The wire transfer only “clears” at the ISF in Washington, D.C., at the time the Cleveland Fed and San Francisco Fed debit and credit, respectively, the \$5 million transfer *on their own books*. Consequently, if the \$5 million wire transfer described above were charged as a wire fraud count, venue would *not* lie in the Northern District of Ohio (Cleveland) or the Northern District of California (San Francisco). Proper venue would exist *only* in the Western District of Pennsylvania (Pittsburgh), the District of Columbia (ISF), and the Western District of Washington (Seattle). Furthermore, FedLine computer connections from financial institutions are “hooked to the centralized computer of the Federal Reserve Banks by a dedicated circuit,” BENJAMIN GEVA, *THE LAW OF ELECTRONIC FUNDS TRANSFERS* § 3.04[2][a] (2006), and the “primary processing center for Fedwire and other critical national electronic payment and accounting systems . . . [is] in New Jersey.” Adam M. Gilbert et al., *Creating an Integrated Payment System: The Evolution of Fedwire*, FED. RES. BANK OF N.Y. ECON. POL’Y REV., July 1997, at 4; see also Kimmo Soramäki et al., *The Topology of Interbank Payment Flows*, FED. RES. BANK OF N.Y. STAFF REPORTS No. 243, at 2 (March 2006) (“From a technical perspective, Fedwire is a star network where all participants are linked to a central hub, i.e., the Federal Reserve, via a proprietary telecommunications network [FedLine].”). Therefore, because wire transfers do not physically “pass through” a particular Reserve Bank, the \$5 million wire transfer described above did not “pass through” the Cleveland Fed or the San Francisco Fed (and, similarly, the wire transfer in *Goldberg* did not “pass through” the Philadelphia Fed). So, for example, in *United States v. Carpenter*, the government sought to prove that venue was proper in the District of Massachusetts with respect to several wire fraud counts for wire transfers that the defendant was able to prove were sent from bank wire rooms located outside of Massachusetts to brokerage firms in the Southern District of New York. 405 F. Supp. 2d 85 (D. Mass. 2005), *aff’d in part, appeal dismissed in part*, 494 F.3d 13 (1st Cir. 2007), *cert. denied*, 76 U.S.L.W. 3226 (U.S. Feb. 25, 2008) (a mail and wire fraud case in which the author of this Article served as special defense counsel). Although the government

D. Rodriguez-Moreno

In another Supreme Court case, Jacinto Rodriguez-Moreno and his co-defendants kidnapped the middleman in a failed drug deal, and drove the victim from Texas to New Jersey, New York, and eventually Maryland, where Moreno brandished a .357 magnum revolver while threatening to kill the victim.²³⁴ Moreno and his co-defendants were indicted and convicted in the District of New Jersey for kidnapping offenses and Moreno was also convicted of using and carrying a firearm during and in relation to the kidnapping in violation of 18 U.S.C. § 924(c)(1).²³⁵ At the conclusion of the government's case, Moreno argued he was entitled to a judgment of acquittal on the § 924(c)(1) charge for lack of venue because, since the evidence con-

was able to convince the district court that the wire transfers "cleared through the Federal Reserve Bank in Boston," *id.* at 91, the district court was incorrect in its finding on this issue in light of the network topology and system characteristics of Fedwire and FedACH. The district court in *Carpenter* mistakenly assumed the role of factfinder for making venue determinations and also wrongly looked to the location of the fraudulent scheme for determining venue, rather than the specific geographic characteristics of the charged mailing or wire transmissions. *See id.* at 92 ("many of the acts done in execution of that scheme occurred within Massachusetts, and venue is proper."). Interestingly, a similar type of analysis is utilized to determine venue in federal securities fraud cases. All public company filings are submitted electronically to the Securities and Exchange Commission (SEC) through the Electronic Data Gathering, Analysis, and Retrieval system (EDGAR), and EDGAR's "computer servers, which store the transmitted files and make them publicly available through the EDGAR website, are located in Alexandria, Virginia, in the Eastern District of Virginia." *United States v. Johnson*, 510 F.3d 521, 523 (4th Cir. 2007). For securities fraud offenses, Congress has provided a specific venue provision: "Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred." 15 U.S.C. § 78aa (2000). Consequently, because the EDGAR computer servers are located in Alexandria, Virginia, any securities fraud offense wherein it is alleged that false and fraudulent documents were filed with the SEC (via EDGAR) can be prosecuted in the Eastern District of Virginia. "[W]e simply hold that [the Eastern District of Virginia] is one permissible venue." *Johnson*, 510 F.3d at 528. However, if the Eastern District of Virginia is a burdensome or inconvenient forum for a particular securities fraud defendant, that defendant can move to transfer venue to his home district for convenience. FED. R. CRIM. P. 21(b); *see United States v. Ferguson*, 432 F. Supp. 2d 559, 562 (E.D. Va. 2006) (transferring venue from the Eastern District of Virginia to the District of Connecticut because three of the four defendants lived in Connecticut). Mail and wire fraud defendants finding themselves being prosecuted in foreign, unfriendly, and/or inconvenient districts can and should avail themselves of this procedure.

234. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 276–77 (1999).

235. At the time the offense was committed, 18 U.S.C. § 924(c)(1) (1994) provided, in pertinent part:

Whoever, *during and in relation to* any crime of violence . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence . . . be sentenced to imprisonment for five years . . .

(Emphasis added).

clusively established he had neither used nor carried the gun outside of Maryland, venue on this charge properly lay only in the District of Maryland.²³⁶

In a 2-1 decision, the Third Circuit reversed Moreno's conviction on the § 924(c)(1) charge for lack of venue (but affirmed all other convictions of all defendants). Relying on the so-called "verb test,"²³⁷ the Third Circuit found that § 924(c)(1) "unambiguously designates the criminal conduct that is prohibited as 'using' or 'carrying' a firearm. It follows that one 'commits' a violation of § 924(c)(1) in the district where one 'uses' or 'carries' a firearm."²³⁸ Since Moreno used or carried the gun only in the District of Maryland, venue was improper in the District of New Jersey—even though the underlying crime of violence (kidnapping) occurred in the District of New Jersey. The dissent argued venue should be proper in any district in which the underlying crime was committed and, since the kidnapping also occurred in the District of New Jersey, venue of the § 924(c)(1) offense was proper there.²³⁹

In a 7-2 decision, the Supreme Court reversed the Third Circuit and affirmed Moreno's § 924(c)(1) conviction, holding that "[a]s the kidnaping was properly tried in New Jersey, the § 924(c)(1) offense could be tried there as well."²⁴⁰ The Supreme Court eschewed the "verb test" because it "unduly limits the inquiry into the nature of the offense and thereby creates a danger that certain conduct prohibited by statute will be missed."²⁴¹ Rather, the Supreme Court instructed courts to look to the "essential conduct elements" of the criminal stat-

236. *United States v. Palma-Ruedes*, 121 F.3d 841, 847 (3d Cir. 1997).

237. *See United States v. Scott*, 270 F.3d 30, 35 (1st Cir. 2001) ("[The key verb] approach analyzed the key verbs in the statute defining the criminal offense in order to determine the scope of the relevant conduct."); Armistead M. Dobie, *Venue In Criminal Cases In The United States District Courts*, 12 VA. L. REV. 287, 289 (1926) ("All federal crimes are statutory, and these crimes are often defined . . . in terms of a single verb. That essential verb usually contains the key to the solution of the question: In what district was the crime committed.[sic]"). At the time of his famous law review article, Judge Dobie was a professor at the University of Virginia Law School. Judge Dobie was later appointed by President Franklin D. Roosevelt to the Fourth Circuit and, while serving on the Fourth Circuit, Judge Dobie authored all of the Fourth Circuit opinions in the *Kann* cases. *See supra* text accompanying notes 9–11.

238. *Palma-Ruedes*, 121 F.3d at 849.

239. *Id.* at 859 (Alito, J., dissenting). Then Judge Alito complained that the majority's reliance on the "verb test" amounted to "syntactical trifles" and "grammatical arcana." *Id.* at 860, 865.

240. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 282 (1999).

241. *Id.* at 280.

ute at issue to determine venue.²⁴² “The Court interpreted § 924(c)(1) as containing two distinct elements: (1) the usage and carrying of a firearm; and (2) the commission of a predicate violent crime.”²⁴³ The commission of the predicate crime of kidnapping occurred in the District of New Jersey, therefore venue of the § 924(c)(1) offense was found to be proper even though Moreno did not use or carry a gun in that district.

Justice Scalia dissented because “[i]t seems to me unmistakably clear from the text of the law that this crime can be committed only where the defendant *both* engages in the acts making up the predicate offense *and* uses or carries the gun.”²⁴⁴ The dissent concluded:

The short of the matter is that this defendant, who has a constitutional right to be tried in the State and district where his alleged crime was ‘committed,’ . . . has been prosecuted for using a gun during a kidnaping in a State and district where all agree he did not use a gun during a kidnaping. If to state this case is not to decide it, the law has departed further from the meaning of language than is appropriate for a government that is supposed to rule (and to be restrained) through the written word.²⁴⁵

In determining venue in mail and wire fraud cases, federal courts improperly relied upon *Cabrales* and *Rodriguez-Moreno* to focus more on the essential conduct elements of the fraudulent scheme rather than the specific geographic characteristics of the charged mailing or wire transmission. This is a mistaken view of venue in (i) mail fraud cases because the mail fraud statute contains its own express venue provision,²⁴⁶ and (ii) wire fraud cases because the “continuing offense” statute, § 3237(a), supplies the proper venue for wire fraud.²⁴⁷ Simply put, federal courts should not apply *Cabrales* or *Rod-*

242. *Id.*

243. Christopher W. Pratt, Comment, “*I’m Being Prosecuted Where?*”: Venue Under 18 U.S.C. § 924(c)(1), 37 HOUS. L. REV. 893, 899 (2000).

244. *Rodriguez-Moreno*, 526 U.S. at 282-83 (Scalia, J., dissenting) (emphasis in original). Justice Stevens joined the dissent.

245. *Id.* at 285 (Scalia, J., dissenting). *Rodriguez-Moreno* has been criticized as “constitutionally dangerous” and “improperly decided.” Todd Lloyd, Note, *Stretching Venue Beyond Constitutional Recognition*, 90 J. CRIM. L. & CRIMINOLOGY 951, 980, 983 (2000). The Supreme Court recently held that a person who trades his drugs for a gun does not “use” a firearm during and in relation to a drug trafficking crime under the modern version of § 924(c)(1). See *Watson v. United States*, 128 S. Ct. 579 (2007).

246. See *supra* text accompanying note 3; see also *Kreuter v. United States*, 218 F.2d 532, 534 (5th Cir. 1955) (“The place where the scheme is conceived or put in motion is immaterial, it is the place of mailing or delivery by mail.”).

247. See *supra* text accompanying note 212.

riguez-Moreno to determine venue in mail and wire fraud cases.²⁴⁸ Rather, federal courts should focus *solely* on the specific geographic characteristics of the charged mailing or wire transmission. Failure to do so carries a grave risk that a defendant charged with mail or wire fraud will be denied his constitutional right to be charged and tried in the correct venue. A recent case from the Second Circuit is the first court of appeals case to distinguish the “essential conduct element” approach of *Cabrales* and *Rodriguez-Moreno* as applied to mail and wire fraud.

E. Ramirez

In *United States v. Ramirez*,²⁴⁹ Dr. Angela Vitug and her co-defendant, Attorney Silverio Ramirez, were charged with “a variety of offenses stemming from their efforts to obtain fraudulent visas for Ramirez’s clients.”²⁵⁰ The indictment, filed in the Southern District of New York (which encompasses Manhattan), alleged Vitug and Ramirez falsely represented to the Immigration and Naturalization Service (INS) and the Department of Labor (DOL) that Vitug’s medical practice would employ Ramirez’s clients in order for those clients to obtain visas to enter and/or remain in the United States.

To consummate this scheme, Vitug and Ramirez completed and mailed various forms to the INS and DOL on behalf of Ramirez’s clients who sought visas. Vitug’s medical practice was located in New Jersey and Ramirez’s law office was located in Manhattan.²⁵¹ Vitug signed some INS forms in New Jersey that were mailed to an INS branch office in Vermont. Attached to these INS forms were DOL forms Vitug previously signed in New Jersey and mailed to the DOL office in Manhattan.²⁵² Other forms were filed with the DOL in New

248. Neither case involved mail or wire fraud. Moreover, the Supreme Court explicitly stated that the essential conduct element approach was to be used *only* where the statute in question “does not contain an express venue provision.” *Rodriguez-Moreno*, 526 U.S. at 279 n.1. Even though the wire fraud statute does not contain its own express venue provision, the Supreme Court relied on the “continuing offense” statute (which also governs venue in wire fraud cases) in *Rodriguez-Moreno*. See *id.* at 282. Consequently, the analytical framework for determining venue adopted in *Cabrales* and *Rodriguez-Moreno* (i.e., focusing on the essential conduct elements of the offense) does not apply to venue determinations in mail and wire fraud cases.

249. 420 F.3d 134 (2d Cir. 2005), *cert. denied*, 546 U.S. 1113 (2006).

250. *Id.* at 136.

251. However, Ramirez had a branch office in New Jersey and Vitug’s medical practice “was curiously located in Ramirez’s New Jersey law office.” *Id.* at 138.

252. *Id.* at 137.

Jersey, which later forwarded them to the DOL office in Manhattan.²⁵³

Vitug and Ramirez were indicted in the Southern District of New York for making false statements, visa fraud, mail fraud, wire fraud, and conspiracy. At the close of the government's case and at the close of all the evidence, Vitug moved for a judgment of acquittal on several counts for improper venue. The district court denied the motion, evidently relying on *Cabrales* and *Rodriguez-Moreno* in holding the evidence "clearly demonstrates that essential elements of the conduct constituting the charged offenses occurred in the Southern District of New York."²⁵⁴ The jury subsequently convicted both defendants on all counts. After analyzing *Cabrales* and *Rodriguez-Moreno*, the Second Circuit reversed Vitug's convictions on several visa fraud and mail fraud counts for improper venue, but affirmed the convictions on the other counts. This Article focuses on the Second Circuit's analysis of venue with respect to one of the mail fraud counts.

The mail fraud count at issue charged Vitug with mailing an INS document from New Jersey to Vermont, which included an attachment previously mailed from New Jersey to the DOL office in Manhattan for approval. The government urged the Second Circuit to hold venue in mail fraud cases is also proper in any district where the scheme to defraud was devised or practiced because the scheme to defraud was devised in and operated out of Ramirez's law office in Manhattan—meaning that the DOL forms sent to Manhattan in preparation for the mailings from New Jersey to Vermont were part of the scheme to defraud rather than preparatory to it.²⁵⁵ In declining the government's invitation, the Second Circuit, after parsing the "essential conduct element" analysis of *Cabrales* and *Rodriguez-Moreno*, held: "While a scheme to defraud is certainly one of three essential elements of mail fraud, it is not an essential *conduct* element."²⁵⁶ Consequently, "we conclude that 'having devised or intending to devise a scheme or artifice to defraud,' while an essential element, is not

253. *Id.* at 138.

254. *Id.*

255. "[V]enue is *not* proper in a district in which the only acts performed by the defendant were preparatory to the offense and not a part of the offense." *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1190 (2d Cir. 1989) (emphasis added); *see also* *United States v. Muhammad*, 502 F.3d 646, 653 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 1104 (2008) ("However, actions that are merely preparatory are not probative in determining the nature of the crime.").

256. *Ramirez*, 420 F.3d at 144 (emphasis in original).

an essential *conduct* element for purposes of establishing venue.”²⁵⁷ Otherwise, the Second Circuit warned, “a defendant who devised a scheme to defraud while driving across the country could be prosecuted in virtually any venue through which he passed.”²⁵⁸ As a result, the Second Circuit reversed Vitug’s conviction on this mail fraud count for improper venue because the mailing at issue was sent from New Jersey to Vermont, and the preliminary mailing to the DOL in Manhattan “was a separate event that occurred prior to the charged offense and in preparation for it.”²⁵⁹

Ramirez is important because it is the first court of appeals mail or wire fraud case to hold specifically (and correctly) that (i) the “essential conduct element” analysis of *Cabrales* and *Rodriguez-Moreno* does not apply to mail (or wire) fraud venue determinations, and (ii) the location where the scheme to defraud is devised or located has no bearing on the venue determination.

F. Toward the Correct Venue Standard: Specific Geographic Characteristics of the Charged Mailing or Wire Transmission

Ramirez shows why federal courts should not use the “essential conduct element” analysis of *Cabrales* and *Rodriguez-Moreno* to determine venue in mail and wire fraud cases. Doing so causes federal courts to focus *improperly* on the location of the fraudulent scheme rather than the specific geographic characteristics of the charged mailing or wire transmission.²⁶⁰

In mail fraud cases, the method of determining proper venue is supplied by the mail fraud statute itself.²⁶¹ Venue for mail fraud is proper in any district in which the defendant (i) places, (ii) deposits or causes to be deposited, (iii) takes or receives, or (iv) knowingly causes to be delivered, the mail matter that is charged in the indict-

257. *Id.* at 145 (emphasis in original).

258. *Id.* The Second Circuit also rejected the government’s invitation “to extend the reasoning of *Rodriguez-Moreno* to our case,” based on the critical difference between the mail fraud statute and the charged offense in *Rodriguez-Moreno*. *Id.*

259. *Id.* at 146.

260. Defendants are not immune from making this mistake. *See* *United States v. Kim*, 246 F.3d 186, 191–92 (2d Cir. 2001) (rejecting defendant’s argument that venue for wire fraud was improper in the Southern District of New York because the charged wire transmissions were sent to and from the Southern District of New York, notwithstanding that “neither [defendant] nor any of his co-conspirators committed any acts in furtherance of their scheme in that district”).

261. *See supra* text accompanying note 3.

ment—in other words, the place where the mail matter originates and terminates. Venue is *improper* in a district through which the mail matter happens to pass.

Unlike mail fraud, wire fraud is a “continuing offense,” thus the proper venue is supplied by the continuing offense statute, 18 U.S.C. § 3237(a).²⁶² Venue for wire fraud is proper in any district in which the charged wire transmission (i) began, (ii) continued (i.e., passed through), or (iii) was completed.²⁶³ Critically, for both mail and wire fraud, the location where the scheme to defraud is devised or located is completely irrelevant to the venue determination. The mail and wire fraud statutes do not punish fraudulent schemes—only the illegal use of the mails or wire facilities in furtherance of such schemes. As a result, federal courts should focus *only* on the specific geographic characteristics of the charged mailing or wire transmission—meaning where did it originate, terminate, or (for wire fraud only) pass through? Application of this simple standard for determining venue in mail and wire fraud cases will prevent the prosecution of defendants in improper and unconstitutional venues.

G. Applying the Correct Venue Standard: *Ratliff-White*

*United States v. Ratliff-White*²⁶⁴ is an unfortunate example of what can happen when venue determinations in mail and wire fraud cases are based on the location of the fraudulent scheme, rather than the specific geographic characteristics of the charged mailing or wire transmission. This case resulted in the unjust indictment, trial, conviction, and incarceration of a Navy veteran for wire fraud in the Northern District of Illinois where venue was so clearly improper that the indictment should have been dismissed on its face, or a judgment of

262. See *supra* text accompanying notes 4, 212.

263. However, preparatory acts cannot form the basis for venue. See *Ramirez*, 420 F.3d at 141 (quoting *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1190 (2d Cir. 1989)). In *United States v. Carpenter*, the government sought to prove venue for wire fraud by showing that preparatory acts were taken in Massachusetts that resulted in the actual wire transfers being sent from bank wire rooms located outside of Massachusetts. See 405 F. Supp. 2d 85, 91 (D. Mass. 2005). However, the acts by which the wire transfer process was initiated (i.e., by a bank customer walking into a local bank branch in Massachusetts to request that a wire transfer be sent from the bank’s wire room located outside of Massachusetts) were merely preparatory to the transmission of the actual wire transfers themselves and, consequently, the district court erred in finding that venue was proper in the District of Massachusetts as to those wire fraud counts. See *id.*

264. 493 F.3d 812 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 1070 (2008).

acquittal granted, based on improper venue had such motions been made.

1. Insufficiency of the Venue Allegations in the Indictment

A grand jury in the Northern District of Illinois indicted Tracy Ratliff-White and Dorothy Norwood on two counts of wire fraud in May 2004, followed by a superseding indictment in August 2005.²⁶⁵ The Department of Veterans Affairs (VA) found White was disabled due to post-traumatic stress disorder and suffering from related flashbacks.²⁶⁶ The VA agreed to provide full-time in-home companion care services for White as part of its Fee Basis Service Program.²⁶⁷ This home care was available through a VA program that allowed skilled health care professionals to provide treatment to an eligible veteran at the veteran's home, and the health care providers would later submit invoices to the VA for payment.²⁶⁸

After White requested full-time care in November of 2001, a handful of health care providers entered into contracts with the VA to provide services to White, but those providers terminated their agreements soon after commencing such services.²⁶⁹ In April 2002, White informed the VA that she had located a company called Compassionate Home Health Services (Compassionate Health) to provide her with companion services. In fact, Compassionate Health was a fictitious company that could provide no services and had no employees.²⁷⁰ During that time, co-defendant Dorothy Norwood, who had worked for one of the companies that previously (but no longer) provided companion services to White, contacted the VA facility in Hines, Illinois, representing herself (Norwood) to be the Vice President of Compassionate Health.²⁷¹ Over a period of several months,

265. *Id.* at 815; Petition for Writ of Certiorari at 7-8, *Ratliff-White v. United States*, No. 07-471 (U.S. Oct. 9, 2007).

266. Brief for the United States in Opposition at 4, *Ratliff-White v. United States* No. 07-471 (U.S. Dec. 2007) (citing Transcript of Record at 42-43, *United States v. Ratliff-White*, No. 04-cr-10 (N.D. Ill. Aug. 18, 2005)).

267. Petition for Writ of Certiorari at 7, *Ratliff-White*, No. 07-471 (citing Transcript of Record at 38-39, 41, 48-52, *Ratliff-White*, No. 04-cr-10).

268. See generally *Veteran Health Affairs*, http://www1.va.gov/vhapublications/ViewPublication.asp?pub_ID=787 (last visited Feb. 29, 2008) (outlining the procedures and specifics of outpatient care).

269. *Ratliff-White*, 493 F.3d at 815.

270. *Id.*

271. *Id.* Hines, Illinois is located just outside of Chicago, in the Northern District of Illinois.

White and Norwood submitted time sheets to the VA reflecting hours spent providing companion services to White by various employees of Compassionate Health, even though the individuals listed on the time sheets were not employees of Compassionate Health and such individuals had not provided the services reflected on the time sheets.²⁷² In July and August 2002, Norwood instructed the VA to deposit payments totaling roughly \$32,000 for services allegedly performed by Compassionate Health into a bank account jointly owned by White, Norwood and Norwood's daughter.²⁷³

The specific wire fraud allegations were as follows:

on or about July 16, 2002, Ratliff-White and Norwood "knowingly caused to be transmitted in interstate commerce from Hyattsville, Maryland to Dallas, Texas, by means of wire communication . . . payment instructions for \$22,470 in funds intended for Compassionate Home Health Services, from the United States Department of the Treasury, Hyattsville, Maryland to the Federal Reserve Bank in Dallas, Texas. . . ."²⁷⁴

. . .

[O]n or about August 15, 2002, Ratliff-White and Norwood "knowingly caused to be transmitted in interstate commerce from Hyattsville, Maryland to Dallas, Texas by means of wire communication . . . payment instructions for [] \$9,150 in funds intended for Compassionate Home Health Services, from the United States Department of the Treasury, Hyattsville, Maryland to the Federal Reserve Bank in Dallas, Texas. . . ."²⁷⁵

By charging two wire transmissions from the Treasury Department in Hyattsville, Maryland (the District of Maryland) to the Federal Reserve Bank in Dallas, Texas (the Northern District of Texas), and without alleging either wire transmission originated, terminated, or passed through the Northern District of Illinois, the superseding indictment failed to allege venue was proper in the Northern District of Illinois. Based on this fact, the superseding indictment should have been dismissed for improper venue. A common mistake was made by all concerned by focusing on the location of the fraudulent scheme (Illinois) rather than the specific geographic characteristics of the charged wire transmissions (Maryland and Texas), as evidenced by the fact the government indicted the case in the Northern District of

272. *Id.*

273. *Id.*

274. *Id.* at 815–16.

275. *Id.* at 816.

Illinois, defense counsel for both White and Norwood failed to file a pretrial motion to dismiss for improper venue, and the district court did not raise the issue *sua sponte*²⁷⁶ (although, unlike with issues of subject matter jurisdiction, such is not required of the district court).²⁷⁷ As previously stated, the mail and wire fraud statutes do not punish fraudulent schemes, only the illegal use of the mails and wire facilities in furtherance of such schemes. Consequently, the location of the fraudulent scheme is completely irrelevant to the venue determination—only the specific geographic characteristics of the charged mailing or wire transmission are relevant. Both White and Norwood were clearly entitled to a pretrial dismissal of the superseding indictment for lack of venue (if such a motion had been made).²⁷⁸

Neither counsel for White nor Norwood raised the issue of improper venue and, as a result, the issue was waived.²⁷⁹ If a defect in venue appears from the face of an indictment (as in this case), a defendant must object to venue prior to trial.²⁸⁰ However, if a venue defect does not appear until after the close of the government's case, it is timely for a defendant to challenge venue in a motion for judgment

276. The government charged the transmissions of the “payment instructions” rather than the actual wire transfers of funds.

277. *Cf.* *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900) (“On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and then of the court from which the record comes. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it.”).

278. As it turned out, Norwood pled guilty to one count of wire fraud and agreed to testify against White. In return, she was sentenced to five years probation and ordered to make restitution in the amount of roughly \$32,000. Brief for the United States in Opposition at 6 n.1, *Ratliff-White v. United States*, No. 07-471 (U.S. Dec. 2007).

279. “However, it is quite clear that this right is considered a privilege that may be waived by failure to make timely objection.” *United States v. Polin*, 323 F.2d 549, 556–57 (3d Cir. 1963).

280. *See United States v. Delfino*, 510 F.3d 468, 473 n.2 (4th Cir. 2007) (“Because the Delfinos’ improper venue claim was raised in their post-trial motion for judgment of acquittal and/or new trial, we conclude that it was untimely and that the claim is waived.”); *United States v. Novak*, 443 F.3d 150, 161 (2d Cir. 2006) (“[T]his Court has found a waiver of the right to challenge venue in a criminal trial only under extraordinary circumstances. One such circumstance is when the indictment or statements by the prosecutor clearly reveal [a venue] defect but the defendant fails to object.”); *United States v. Johnson*, 297 F.3d 845, 861 (9th Cir. 2002) (finding defendants waived venue challenge to certain wire fraud counts in indictment because “[i]t is clear . . . that certain counts did not involve any activity within the District of Arizona, as certain counts did not list Arizona as either the site of origination or the site of destination. Therefore, it was apparent from the indictment that venue was not proper in Arizona as to certain counts, and Defendants waived their objection to venue by failing to raise the challenge before the close of the government’s case.”).

of acquittal.²⁸¹ While the venue defects in the indictment in *Ratliff-White* were abundantly clear, the lack of evidence regarding venue at trial was appallingly obvious.

2. *Insufficiency of the Venue Evidence at Trial*

The trial took place September 7–9, 2005, and concluded on September 12, 2005, with a verdict of guilty on both counts. While there was sufficient evidence at trial that White and Norwood (who had earlier pleaded guilty) engaged in a scheme to defraud as described in the superseding indictment, there was absolutely no evidence whatsoever that the charged wire transmissions began, passed through, or terminated in the Northern District of Illinois. This total lack of proof warranted the entry of a judgment of acquittal for improper venue.²⁸²

The evidence showed that White prepared the false invoices and timesheets and then Norwood sent them by fax to the VA in Hines, Illinois.²⁸³ After reviewing and processing the payment request, the VA's processing center in Austin, Texas submitted the payment file to the Treasury Department's mainframe computer in Hyattsville, Maryland.²⁸⁴ Once the Treasury's mainframe received the payment request, it validated the request and then sent a pre-edit report back to the VA in Austin as well as to the Treasury Department's financial center, which is also located in Austin.²⁸⁵ The VA in Austin, after reviewing the pre-edit report, then electronically certified the payment back to the Treasury's mainframe in Maryland, which caused the Treasury's financial office in Austin (which is remotely connected to the mainframe) to create a payment file for issuance of the payment to Compassionate Health.²⁸⁶ The payment file was formatted for the

281. See *United States v. Delgado-Nunez*, 295 F.3d 494, 497 (11th Cir. 2002) (“[O]bjection at the close of trial is appropriate solely where the impropriety of venue only becomes apparent at the close of the government’s case.”).

282. While a motion for judgment of acquittal was made, improper venue was not one of the grounds upon which acquittal was sought.

283. *United States v. Ratliff-White*, 493 F.3d 812, 815 (7th Cir. 2007). Because all of these faxes—which were clearly in furtherance of the scheme to obtain money from the VA under materially false and fraudulent pretenses—were *intrastate* (i.e., within Illinois), they could not be charged under the wire fraud statute. See *supra* text accompanying note 4. Also, because none of the invoices or timesheets were mailed to the VA, no mailings occurred that could give rise to mail fraud charges. *Id.*

284. *Ratliff-White*, 493 F.3d at 815.

285. *Id.*

286. Brief for the United States in Opposition at 5 (citing Transcript of Record at 174-

Federal Reserve Bank of Dallas (Dallas Fed), and the Treasury office in Austin instructed the mainframe in Maryland to send a payment authorization to the Dallas Fed.²⁸⁷ Once the Dallas Fed received the payment authorization, it sent a wire transfer to Compassionate Health's bank account.²⁸⁸ However, because TCF National Bank, where Compassionate Health maintained its bank account, is a Minnesota-based bank, the wire transfers sent from the Dallas Fed to the White-Norwood joint bank account at TCF National Bank were actually sent to TCF National Bank in Minneapolis, Minnesota.²⁸⁹

The payment instructions charged in the superseding indictment migrated from Maryland to Texas, and the movement of the funds to which those payment instructions related (but which were not charged) was from Texas to Minnesota. Consequently, venue was improper in the Northern District of Illinois both as to the charged wire transmissions (the payment instructions) and the uncharged wire transmissions (the funds transfers).

At the close of the government's case, White's counsel moved for a judgment of acquittal—but not for improper venue. Rather, the argument was essentially that the government did not prove (i) the wire transmissions charged in the indictment (the payment instructions) actually occurred, and (ii) White “caused” the wire transmissions of the payment instructions because the intricate payment processes outlined above were not reasonably foreseeable.²⁹⁰ During argument on White's motion regarding foreseeability, the district court asked the government: “Why didn't you charge the actual transfer of the funds from Dallas to Minneapolis? . . . [I]t would seem to

78), *Ratliff-White v. United States*, No. 07-471 (U.S. Dec. 2007).

287. *Id.* at 5–6 (citing Transcript of Record at 182–84, *Ratliff-White*, No. 07-471).

288. *Id.* at 5 (citing Transcript of Record at 174–78, *Ratliff-White*, No. 07-471). The bank account actually used was a personal account in the names of White, Norwood and Norwood's daughter. *Id.* at 6.

289. *Ratliff-White*, 493 F.3d at 816. TCF National Bank maintains its reserve account at the Minneapolis Fed rather than the Chicago Fed, so the government could not argue a nexus to the Northern District of Illinois even on that basis—not that it would have mattered in any event had a venue motion been interposed. *See supra* text accompanying note 233.

290. Petition for Writ of Certiorari at 12, *Ratliff-White v. United States*, No. 07-471 (U.S. Oct. 9, 2007). While the government proved that the funds were actually wired into the joint White-Norwood bank account, the wire transmissions by which the funds were sent were not charged in the superseding indictment. The superseding indictment only charged the wire transmissions of the “payment instructions,” and there was little direct evidence that the payment instructions were actually sent as charged (although the fact that the funds were actually sent and received pursuant to those instructions is credible circumstantial evidence that the instructions were indeed sent).

me it would be more foreseeable for her to understand that the funds would be coming into the TCF Bank headquarters.”²⁹¹ The government responded that “. . . we thought this was the most appropriate wire to charge and we thought it was equally foreseeable as with the deposit or the transfer to TCF Bank, ACH Minneapolis.”²⁹²

The district court reserved decision on White’s motion both at the close of the government’s case and at the close of all the evidence.²⁹³ White also submitted a post-verdict motion for judgment of acquittal on the same issues (but not on venue).²⁹⁴ All motions for judgment of acquittal were denied and White was sentenced to 21 months plus roughly \$32,000 in restitution. She appealed her convictions to the Seventh Circuit based primarily on causation. In affirming White’s convictions, the Seventh Circuit relied on *Pereira* and its progeny to hold that White knowingly caused both wire transmissions

291. Petitioner’s Reply to Brief in Opposition, app. at 2a, *Ratliff-White v. United States*, No. 07-471 (U.S. Dec. 21, 2007). As previously discussed, such a charging decision would not have saved the government’s case had a venue challenge been raised. The only wire transmissions that could have properly been charged in the Northern District of Illinois were those transmissions by which the Hines VA sent payment approvals down to the Austin VA which got the entire payment process started—although if those transmissions had been charged, there would have been a strong argument that they were too attenuated and tangential to have materially aided the consummation of the scheme (i.e., no subject matter jurisdiction).

292. Petitioner’s Reply to Brief in Opposition, app. at 2a, *Ratliff-White v. United States*, No. 07-471 (U.S. Dec. 21, 2007). The government’s reference here to “ACH” most likely meant the FedACH network. *See supra* text accompanying note 233. The Second Circuit appears to be the only circuit to hold that there is a foreseeability requirement for establishing venue, as distinguished from the foreseeability requirement to establish causation as required by *Pereira*. *See supra* text accompanying notes 22–23; *United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003) (holding that “venue is proper in a district where (1) the defendant intentionally or knowingly causes an act in furtherance of the charged offense to occur in the district of venue or (2) it is foreseeable that such an act would occur in the district of venue.”); *United States v. Geibel*, 369 F.3d 682, 696 (2d Cir. 2003) (quoting *Svoboda*, 347 F.3d at 482–83). The Fourth Circuit, on the other hand, is loathe to “judicially engraft a mens rea requirement onto a venue provision that clearly does not have one.” *United States v. Johnson*, 510 F.3d 521, 527 (4th Cir. 2007) (interpreting venue in a securities fraud case). There is nothing in the mail, wire or securities fraud statutes, let alone the Constitution, that suggests foreseeability is a requirement for determining venue. As stated by the Fourth Circuit regarding the securities fraud venue provision found in 18 U.S.C. § 78aa, “[i]f Congress had wanted to limit venue to those districts where the defendant could have reasonably foreseen his criminal conduct taking place, it could have easily done so. Instead, it enacted a broad venue provision, one that lacked any reference to a defendant’s mental state or predictive calculus” *Johnson*, 510 F.3d at 527. The same analysis holds true for the mail and wire fraud statutes, including the continuing offense statute. 18 U.S.C. § 3237(a) (2006).

293. *See* FED. R. CRIM. P. 29(b) (court may reserve decision on the motion, submit the case to the jury, “and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict.”).

294. *See* FED. R. CRIM. P. 29(c).

because they were reasonably foreseeable.²⁹⁵ Had a venue challenge been raised, it is a virtual certainty the indictment would have been dismissed or a judgment of acquittal granted. Instead, White was tried and convicted in the wrong venue and forced to serve 21 months in federal prison unnecessarily.²⁹⁶ Application of the correct venue standard in White's case (through a timely motion to dismiss or for judgment of acquittal for improper venue) would have avoided this unfortunate result.²⁹⁷

295. *United States v. Ratliff-White*, 493 F.3d 815, 818–19, 824–25 (7th Cir. 2007).

296. White's term of imprisonment was scheduled to end in 2007. Even though White lived in the Northern District of Illinois, she could have argued that venue there was improper (i.e., that a federal grand jury sitting in that district had no right to indict her, and a federal court sitting in that district had no right to convict her). If the indictment had been dismissed for lack of venue, the government could have re-indicted the case in the proper venue (Maryland, Texas, or Minnesota). If that had occurred, White could have then moved to transfer venue of the case back to her home district—the Northern District of Illinois—for *convenience*. FED. R. CRIM. P. 21(b). On the other hand, if a motion for judgment of acquittal had been made for lack of venue and the district court granted that motion, the case would be over and no further prosecution could occur. *See supra* text accompanying note 195.

297. The following case is another example of the care that must be taken in analyzing each count of mail and wire fraud separately when determining subject matter jurisdiction and/or venue in a multi-count mail and wire fraud indictment. The Third Circuit recently affirmed the convictions of several defendants in a high-profile Philadelphia public corruption case in which the superseding indictment contained 63 counts (most of which charged mail or wire fraud) spanning 174 pages. *See United States v. Holck*, 398 F. Supp. 2d 338 (E.D. Pa. 2005), *aff'd*, 500 F.3d 257 (3d Cir. 2007), *cert. denied*, 76 U.S.L.W. 3442 (U.S. Feb. 19, 2008); *United States v. Kemp*, 379 F. Supp. 2d 690 (E.D. Pa. 2005), *aff'd*, 500 F.3d 257 (3d Cir. 2007), *cert. denied*, 76 U.S.L.W. 3442 (U.S. Feb. 19, 2008). The overriding theme of the case was that one of the original defendants, attorney Ronald White (who died two days after the return of the superseding indictment) gained control in 2002 and 2003 over the decision-making of Philadelphia City Treasurer Corey Kemp through illicit payments and other benefits and promises extended to Kemp. White used that control to influence the award of city contracts to himself, his cronies (including his paramour), and to companies which favored White and Kemp with special payments, gifts, gratuities, contributions, loans, and other remuneration. *See Kemp*, 500 F.3d at 264. The jury acquitted the defendants or was unable to reach a verdict on most of the charges, but did convict four out of the five defendants on at least one count of mail or wire fraud. *Id.* at 278. However, some of the charged mailings and wire transmissions that formed the basis of the mail and wire fraud counts on which the defendants were ultimately convicted either (i) were not in furtherance of the fraudulent scheme, or (ii) were improperly venued in the Eastern District of Pennsylvania. For example, Counts 19 and 21 were wire fraud counts involving an interstate e-mail transmission and interstate cellular telephone call, respectively, by which some defendants discussed some preliminary and preparatory matters going to the ultimate fraudulent scheme and conspiracy. *See Holck*, 398 F. Supp. 2d at 356. Application of the two-pronged jurisdictional standard described in this Article shows that the charged wire transmissions in those two counts were not in furtherance of the fraudulent scheme. Count Two charged a \$5,000 wire transfer of funds from First Independence National Bank in Detroit to Commerce Bank, which is headquartered in New Jersey but has branches in Pennsylvania. *See generally* Commerce Online, http://www.commerceonline.com/about_commerce/index.cfm (last visited Feb. 29, 2008). While the scheme to de-

IV. CONCLUSION

“Some have observed that these statutes are increasingly used effectively to convict and punish for the substantive fraud, and that the use of the mails or wires is merely a ‘jurisdictional hook’ to bring the conduct within the proscription of the mail and wire fraud statutes.”²⁹⁸ Application by the federal judiciary of this Article’s two-pronged standard for determining subject matter jurisdiction in mail and wire fraud cases will ensure that the “jurisdictional hook” is not ignored or marginalized. It will also further those goals of judicial federalism espoused by Justice Frankfurter in *Parr* and elsewhere,²⁹⁹ whereby prosecutions of frauds that should be “the exclusive concern of the States”³⁰⁰ are not improperly transmogrified into federal mail and wire fraud cases. Similarly, application by the federal judiciary of the correct standard for determining venue in mail and wire fraud cases will ensure that the “safety net”³⁰¹ provided by the Constitution remains strong and enduring. Remaining true to these constitutional and statutory principles in mail and wire fraud cases is vitally important, primarily because “[t]he government’s ‘war on corporate crime’ shows no signs of slowing, and prosecutors continue to place a premium on expediency in individual prosecutions.”³⁰²

fraud operated and was based in Philadelphia, and Kemp’s account at Commerce Bank was maintained at a Pennsylvania branch, the actual wire transmission charged in the superseding indictment and for which Kemp was convicted was sent from Detroit to Commerce Bank in Mt. Laurel, New Jersey. Consequently, venue of this wire fraud count was improper in the Eastern District of Pennsylvania even if Commerce Bank maintains its reserve account at the Philadelphia Fed. *See supra* note 233.

298. *United States v. Sawyer*, 85 F.3d 713, 723 n.5 (1st Cir. 1996).

299. “Today’s concept of judicial federalism can be traced largely to the work of one man: Felix Frankfurter.” Mary Brigid McManamon, *Felix Frankfurter: The Architect of “Our Federalism,”* 27 GA L. REV. 697, 701 (1993). “[T]he terms ‘judicial federalism’ and ‘our federalism’ connote heightened federal court sensitivity to the balance of power between Nation and States with a resulting deference to the States.” *Id.* at 699 n.15.

300. *United States v. Parr*, 363 U.S. 370, 397 (1960) (Frankfurter, J., dissenting).

301. *United States v. Salinas*, 373 F.3d 161, 162 (1st Cir. 2004).

302. Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 378 (2007). Notwithstanding shrinking budgets for U.S. Attorneys, federal white-collar prosecutions are one of the few categories that have seen recent increases. *See* Scot J. Paltrow, *Justice Delayed: Budget Crunch Hits U.S. Attorneys’ Offices*, WALL ST. J., Aug. 31, 2007, at A1.