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 2002[1] is the four-fold increase (from 5 to 20 years) in the statutory maximum term of imprisonment[2] for a violation of the federal mail fraud[3] and wire fraud[4] 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 r banks

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 in-

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 de-

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 reexamiuit iient

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

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*

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

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 s0pg owsc7i-25.54[(Sa)4(6)p-0.0into Parr 6ling of sc0 TwNctiTJ0 -1.1302 TD0.

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

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).

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.

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 *Sc*

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

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 ha

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

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 opportu-

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

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

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*.

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

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

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

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 wid had no knowle to3t of p3

arson was completed was clearly only incidental and collateral to 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]

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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/ambl/hd_ambl.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 district in which an interstate or foreign wire transmission began,

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

In granting certiorari,

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 p ti

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 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.,

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, 89lo5a(Jerse)6.1(y287.46 0ell.1.6(§5.2("e)5 z3 one 'u 0 one 'u 0-0.9(e one '.19

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 f

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 prepa-

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.

Illinois, defense counsel for both White and Norwood failed to file a

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

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 Min-

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 occurre

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 imom Dnviv.2(1(en)4fmmerceJ19.704220 TD0.20012 T