Docket No. 05-13809-HH

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID W. SVETE,

Defendant-Appellant.

On Appeal from Judgment in a Criminal Case
Filed July 7 (EOD July 8), 2005, as amended August 11, 2005, in the United States District Court for the Northern District of Florida in No. 3:04-CR-00010-MCR (Hon. M. Casey Rodgers, U.S.D.J.).

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EN BANC BRIEF FOR APPELLANT SVETE

(Appellant in Custody)

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PETER GOLDBERGER
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200

Attorneys for Appellant Svete

United States v. Svete

Case No. 05-13809-HH

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Local Rule 28-2(b), Peter Goldberger, counsel for the appellant, David Svete, certifies that the following persons and entities, in addition to the defendant, may have an interest in the outcome of this case:

Peter Goldberger, Esq., and Pamela A. Wilk, Ardmore, Penna. (counsel for appellant)

Michael S. Pasano, Esq., and Matthew Davidson, Esq., formerly of Zuckerman, Spaeder, Taylor & Evans, LLP, Miami now with Carlton Fields, Miami (trial counsel for defendant-appellant)

Hon. Miles Davis, U.S.M.J., N.D.Fla. (conducted initial appearance and accepted bond)

Benjamin W. Beard, Ass't U.S. Att'y (trial and appellate prosecutor), Pensacola, FL

E. Bryan Wilson, Ass't U.S. Att'y (prosecutor), Tallahassee, FL

Nina S. Goodman, Esq., Criminal Division, Appellate Section, U.S. Dept. of Justice (appellate prosecutor en banc)

Robert G. Davies, Ass't U.S. Attorney, Pensacola, FL (appellate prosecutor en banc)

Hon. M. Casey Rodgers, U.S.D.J., N.D. Fla. (Pensacola) (trial judge)

E. Brian Lang, Esq., E. Brian Lang and Assoc. (atty. for co-defendant and related appellant), Pensacola, FL

Victims: the district court treated as victims approximately 3000 people, about 900 of whom were listed in the attachment to D.Ct. Doc. 576

__s/Peter Goldberger_____
Attorney for Appellant Svete

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STATEMENT OF JURISDICTION

Appellate jurisdiction rests on 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Sentence was imposed June 23, 2005. RE688:166-81; DE:544.[1] The judgment filed July 7, 2005, was not final; the district court postponed determination of restitution. DE:558. An amended judgment was filed and entered August 11, 2005, RE:593, and the premature notice of appeal, filed June 23, DE:546, became effective then. Fed.R.App.P. 4(b)(2); United States v. Kapelushnik, 306 F.3d 1090, 1093-94 (11th Cir. 2002). The Northern District of Florida had subject matter jurisdiction over the offenses charged in the indictment. 18 U.S.C. § 3231.

STATEMENT OF THE ISSUES

1. Assuming United States v. Brown to have been correctly decided, did the district court abuse its discretion by refusing to charge on the requirement of ordinary prudence by investors, requiring a new trial on every count?

2. To be criminal under the mail fraud and cognate statutes, must a "scheme or artifice to defraud" (unless addressed to persons with whom the defendant stands in a fiduciary or other special relationship) be "reasonably calculated to deceive a person of ordinary prudence and comprehension"?

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[1] "RE233:3-6" means pages 3-6 of the item at the Tab marked 233 in the Record Excerpts, with Docket Item #233 behind that tab. "DE:106" refers to the district court docket entries, under the first tab of the Record Excerpts, and the document number. References in the form "41Tr(3/4):30-31" mean Volume 41 of the trial transcript, containing proceedings from 3/4/05 (all dates are in 2005 unless otherwise specified), pages 30 through 31.

3. Was the evidence insufficient on the substantive counts, because a properly instructed jury could not have found that a prudent investor would have relied on salemen's representations or promotional materials inconsistent with the clear language of the written contract?

4. Did the district court apply incorrect legal standards in rejecting a new trial based upon *Brady* and *Giglio* violations, and err in concluding that *Brady*'s materiality test had not been satisfied?

5. Was the "loss" measured erroneously in determining the advisory guideline range?

6. Did the court include an impermissible item in the restitution calculation, and overlook a required subtraction?

7. Was the evidence insufficient on Count 2, because the alleged money laundering conspiracy did not involve an agreement to launder any "profits" of the specified underlying offense of interstate transportation of property obtained by fraud?

8. Is the defendant entitled to resentencing, where the district court imposed a 200-month sentence on each of five counts of mail fraud which actually carried only a 60-month maximum term?

STATEMENT OF THE CASE

This direct criminal appeal from a jury trial and sentencing arises out of a complex insurance investment program which the government prosecuted as a fraud scheme.

a. The Course of Proceedings

On March 4, 2005, after a jury trial, appellant David W. Svete was convicted along with co-defendant Ron Girardot in the Northern District of Florida on five substantive counts of mail fraud, 18 U.S.C. § 1341. The jury also found Svete guilty on three counts of interstate transportation of property knowing it to have been taken by fraud, 18 U.S.C. § 2314 (commonly called the Interstate Transportation of Stolen Property Act, or "ITSP"). These offenses allegedly occurred on dates between June 1999 and July 2000. He was also convicted on two conspiracy counts: a fraud conspiracy said to have existed from about January 1, 1997, to September 21, 2001, in violation of 18 U.S.C. § 371 (with the object of committing mail and wire fraud, and ITSP), and money laundering conspiracy, id. § 1956(h) (alleging an agreement to conduct financial transactions with the proceeds of ITSP). The jury also returned a forfeiture verdict of $21 million under id. § 982(a)(1) of the defendants' interest in property involved in or derived from proceeds obtained as a result of the Count Two conspiracy, and property used to facilitate that offense. The jury deliberated for five

days. Three other co-defendants, Kordel, Lange and LaFrance, were acquitted. DE:430-37.[2]

Following the denial of post-trial motions, RE688(ptm):14-16, Judge Rodgers sentenced Mr. Svete to serve an aggregate 200 months (over 16½ years) in prison, followed by three years' supervised release, and to pay special assessments totalling $1000, as well as the criminal forfeiture. Any fine was waived. RE688(impos.sent.). Judgment was filed in July 2005, DE:558, and amended on August 11, 2005, to reflect the amount of restitution later determined, a total of $100,722,605.34 (calculated as stated in the judgment) to a list of almost a thousand investors. RE:593.

Svete appealed to this Court. DE:546. So did Girardot.

Following briefing and oral argument, the panel (per Coogler, D.J., with Dubina and Kravitch, JJ.) issued an opinion on March 26, 2008 (2008 WL 788407, 521 F.3d 1302 (adv.)) reversing Mr. Svete's and co-defendant Girardot's convictions on the substantive mail fraud counts, affirming the conspiracy and ITSP convictions, rejecting the sentencing arguments and remanding for resentencing. By Order dated July 1, 2008, this Court granted both appellant Svete's and the appellee govern-

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[2] Moreover, in a related case, Chief Judge Vinson entered post-trial judgments of acquittal as to three of LCI's most active salespersons, finding that the evidence showed many of LCI's allegedly fraudulent claims were not false, and that the evidence could not support a finding of intent to defraud as to those defendants. United States v. Rodgers, No. 3:02-CR-6 (N.D.Fla., July 18, 2002). The government voluntarily dismissed its notice of appeal from this ruling. No. 02-14621-FF (11th Cir., Nov. 27, 2002).

ment's petitions for rehearing en banc and vacated the panel's opinion.[3] By Order dated July 18, 2008, this Court set a schedule (later modified) for the filing of en banc briefs, instructing counsel to focus the briefs on two questions, specified in the Statement of Issues in this brief as Points 1 and 2.

b. Statement of Facts

In the 1990s, AIDS patients and others discovered they could sell the right to receive benefits under their life insurance policies for tax-free cash. Such sales were known as viatical settlement agreements. Brokers acted as middlemen to negotiate acquisition of policies and find investors seeking an interest in policies at a discount. Investors stood to gain if the viator died soon. Managing risk and maximizing profit for both broker and investor depended upon the reliability of life expectancies ("LEs") determined for viators. Inevitably, some died sooner, while others outlived their LEs by years.

One of these viatical companies was LifeTime Capital, Inc. ("LCI"), formed by appellant David Svete in 1997. In three

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[3] The order granting rehearing makes no reference to the related co-appellant, Girardot (No. 05-13810-HH), who had not filed any rehearing petition. However, the two appellants' cases were argued together, and were decided in a joint opinion after the panel decided that Girardot had adequately adopted the arguments advanced by appellant Svete. That opinion has now been vacated. On or about August 15, 2008, Girardot filed a motion to adopt appellant Svete's en banc submissions. As of the filing of this Brief, that motion had not been ruled upon. Appellant assumes that the outcome of the present proceedings will be applied to Girardot as well.

years, LCI spent more than $30 million (not counting related expenses and commissions) acquiring about 200 policies with face values exceeding $140 million. Through aggressive sales efforts LCI obtained approximately $100 million as investments in shares of the future insurance payouts from about 3000 individuals. LCI created several operating accounts, including an account called the Premium Reserve Account ("PRA"), which held money to cover policy premiums for the period of LE plus one year. Investors' written contracts clearly identified the risk that a viator could outlive the anticipated LE and that establishing anyone's future date of death was speculative.

The 35 investors who testified as government witnesses, (e.g., Neeb (RN) 8Tr(1/14); Tomlinson (BT) 11Tr(1/20)), complained that the life insurance policies of viators had failed to mature when they expected. 8Tr:90 (RN), 11Tr:91 (BT). All felt they were owed money, e.g., WAP 11Tr(1/20):154, although some conceded they had received pay-outs from LCI on matured policies. RN 8Tr(1/14):90. Most of the investors identified marketing materials which stated that LCI acquired policies of "terminally ill" viators. They testified that if they had known viators were not "terminally ill," they would not have invested.[4] Many of the investors dealt directly with inde-

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[4] E.g., 15Tr(1/11):107-08 (Lisa Millot); 6Tr(1/12):72-73 (Richard Oberer); 6Tr(1/12):145-46 (Ann Oberer); 6Tr(1/12):197-98 (Laurie Lee Allamon. See also 28Tr(2/15):272 (prosecutor's closing). Given LCI's expression of viators' life expectancies in terms of years, it was not always clear what "terminally ill" was taken to mean.

pendent agents not employed by LCI; witnesses testified that these agents made claims that were untrue. E.g., KLS 12Tr(1/21):40-41, 49-50. Most of these investors never met with or spoke to David Svete. E.g., RN 8Tr(1/14):100-01.

All of the investors signed contracts which fully and accurately disclosed the terms and the risks of investment. E.g., BT 11Tr(1/20):100-01. Specifically, the contracts identified the risk that a viator could outlive the life expectancy (LE), specified that establishing an LE was speculative, and warned that there were no guarantees as to when anyone would die. These contracts also advised that if a viator lived more than one year past the LE, investors would be responsible for paying insurance premiums to keep policies current (or else the cost of those premiums would be deducted from the eventual benefit payout). RE700V:2-3; GX 701A, GX 703X, GX 703AX, GX 705A. Each contract required investors to sign separately that they had read it before signing and had consulted or declined to consult their own financial planners. Some investors, however, admitted they had not read the contracts. E.g., KLS 12Tr(1/21):45.

Under contract with LCI, a company called Medical Underwriting, Inc. ("MUI"), which Svete had helped form, employed three well-credentialed doctors to review medical summaries and establish LEs. 7Tr(1/13):300-02, 8Tr(1/14):139-42, 8Tr(1/14):-229-30. Each testified he exercised independent medical judgment in calculating LEs. E.g., 7Tr(1/13):311. No one asked them to alter anyone's stated LE. E.g., 7Tr(1/13):311-16. Their pay was not contingent on fixing any specific LE. E.g.,

8Tr(1/14):234-35. None ever talked with Svete. E.g., 7Tr(1/13):322. The doctors testified that they examined summaries, not the viators' actual medical records. MUI prepared the summaries, e.g., 8Tr(1/14):152-55, which the doctors found satisfactory. Although each doctor reviewed twenty or more summaries every few days, there was ample time to make an accurate assessment. E.g., 8Tr(1/14):208-09, 214.

Evidence showed that Svete formed and controlled many other entities which provided services to one another, while mis-stating or concealing their interrelationships and his own role.

Nine viators testified; each denied being or having been "terminally ill." E.g., 10Tr(1/19):278. Every one, however, had been diagnosed with a serious or life-threatening condition, including HIV, morbid obesity, cancer or heart disease. E.g., 10Tr(1/19):284-91; see also 33Tr(2/22):50-52.

Charme Austin, who claimed (falsely) to be a registered nurse, joined LCI in 1997. 14Tr(1/25):173, 353-54. Austin later took over operation of MUI, which retained the doctors who provided life expectancies to LCI. 14Tr(1/25):221, 239-40.[5] Austin claimed Svete told her to fabricate life expectancies for viators, 9Tr(1/18):27, and that she and others falsified documents by "cutting and pasting" doctor letters. 9Tr(1/18):279-84. (No exhibit corroborated this, however; original doctor letters with original signatures were in the LCI files --

[5] Austin pleaded guilty to the Count One conspiracy and testified for the government pursuant to a plea bargain. 9Tr(1/18); 10Tr(1/19).

specifically including those applicable to every individual investor named in any of the substantive counts). Contradicting the three doctors' testimony, Austin said Svete often told her to send medical summaries of viators to MUI's doctors a second time if the LE came back different from what Svete wanted. 9Tr(1/18):61-62, 279-84.

Nanette Zima, LCI's president during its initial years, 14Tr(1/25):189-90, described various perceived improprieties within Svete companies. 14Tr(1/25):291-313. She claimed she was instructed to and (along with Ron Girardot, 14Tr(1/25):188) did alter investor "agreement[s]" by removing pages which contained the terms "terminally ill" and "by a physician" and replacing these pages. The physical evidence, however, belied this claim, as did her further testimony that it was not the asset purchase agreements she altered but rather some other, unidentified document in the form of a letter. 14Tr(1/25):186-88, 213-16, 321-43. She stated that Svete told her to change LEs, but could point to no policy where that happened. Zima was eventually fired. 14Tr(1/25):234-36, 266-67, 277-78, 281-82.

Several witnesses testified on behalf of the defense. An expert in medical underwriting, 33Tr(2/22):15, 19-20, explained the vagaries in establishing LEs. 33Tr(2/22):24-28. He testified that the methodology utilized at MUI and LCI compared favorably with industry practices, 33Tr(2/22):28-36, and that there were no fixed rules. Id. 37-39, 42-43. He had examined several LCI viator files and found the LEs that were fixed to be reasonable, 33Tr(2/22):44-46, and the medical summaries used to

be accurate. Id. 47-50. He said the expression "terminal illness" has no clear definition and does not imply imminent death. 33Tr(2/22):103-04. A certified fraud examiner testified as an expert that he was readily able to trace LCI funds from its own records, and that its expenditures appeared to be for legitimate expenses and fees. 30Tr(2/16):97-164.

Three witnesses who described themselves as being close to Svete and his family had invested in LCI, as did Svete family members. 31Tr(2/17):47-48, 31Tr(2/17):67-70, 31Tr(2/17):81-82, 100. They testified they did not believe Svete meant to lie or cheat. 31Tr(2/17):65-66, 31Tr(2/17):79-80, 31Tr(2/17):100.

David Svete testified for two days in his own defense. He denied any wrongdoing and insisted that LCI was a legitimate business. The terms and conditions of the investment and its risks were fully disclosed to investors in their contracts. He said he was unaware of any representations outside the contract language. 31Tr(2/17):102-22. Svete insisted LCI's underwriting was performed in good faith and denied instructing anyone to alter or change LEs. 31Tr(2/17):220-21.

Co-defendant Ron Girardot also testified over two days, insisting he acted at all times in good faith. 33Tr(2/22):263-71. He defended the operations and practices of LCI and its affiliated companies. 34Tr(2/23):38-78. He denied participating in or being aware of any wrongdoing by Svete. 33Tr(2/22):268-71. In rebuttal, the government recalled an FBI agent, who testified that Girardot made various statements that he denied on cross-examination having made. 35Tr(2/24):42-44.

c. Custody Status of the Appellant

Appellant is incarcerated. DE:598.

d. Standards and Scope of Review

(1) Denial of a requested instruction is reviewed for abuse of discretion. United States v. Martinelli, 454 F.3d 1300, 1309 (11th Cir. 2006). "Whether a district court's instruction mischaracterized the law or misled the jury to the prejudice of the defendant ... is subject to de novo review." United States v. Gray, 367 F.3d 1263, 1271 (11th Cir. 2004); see also United States v. Chirinos, 112 F.3d 1089, 1096 (11th Cir. 1997).

(2) The proper construction of a federal criminal statute is subject to de novo review on appeal. Review of the sufficiency of the evidence is likewise plenary. United States v. To, 144 F.3d 737 (11th Cir. 1998).

(3) Refusal to grant a new trial on account of a Brady violation is reviewed for abuse of discretion.

(4) A criminal sentence will be reversed if unreasonable. Gall v. United States, 552 U.S. --, 128 S.Ct. 586, 597-98 (2007); Rita v. United States, 551 U.S. --, 127 S.Ct. 2456 (2007); United States v. Booker, 543 U.S. 220, 260-63 (2005). A sentence which results from the consideration and application of an erroneously calculated guideline range is unreasonable as a matter of law. United States v. Crawford, 407 F.3d 1174, 1178-79 (11th Cir. 2005).

(5) Review of the legality of a restitution order, in whole or in part, is plenary and de novo. United States v. Cobbs, 967 F.2d 1555, 1556 (11th Cir. 1992) (per curiam).

SUMMARY OF ARGUMENT

The trial court abused its discretion when it denied defendant's request for a mail fraud jury instruction based upon United States v. Brown, 79 F.3d 1550, 1557, 1559 (11th Cir. 1996). Outside the context of fiduciary and similar special relationships, in order to prove a cognizable "scheme or artifice" or the element of intent to defraud in such cases, the government must establish that a reasonable person would have acted on the defendant's representations, and that the defendant "intended to create a scheme 'reasonably calculated to deceive persons of ordinary prudence and comprehension'." This error invaded the jury's fact-finding province and affected all counts. A new trial is required.

This Court's 1996 panel decision in Brown is correct and should not be overruled. The Congressional understanding in 1872 of the terms "fraud" and "false pretenses" as used in the mail fraud statute and echoed in later provisions encompassed only a "scheme or artifice" that was reasonably calculated to deceive a person of ordinary prudence and understanding. Nor did anything in the 1909 amendments of the mail fraud statute change the scope of its coverage in this regard. Common law fraud never covered schemes that a prudent person would disregard, and the question whether the offense of false pretenses, as incorporated into the mail fraud statute, had overthrown the "ordinary prudence" limitation was at best controverted among legal scholars of the mid- to late 19th

Century. Contemporaneous case law tends to support the "prudent person" limitation, and later cases questioning it are not consistent with the requirement that federal criminal statutes be strictly construed in accordance with understandings at the time of original enactment. Under the rule of lenity, it therefore cannot be concluded that Congress intended to adopt the harsher doctrine.

The evidence was insufficient for conviction on any of the substantive counts, Three through Ten. None of the investors named as victims in those counts had fiduciary relationships with appellant Svete; they were therefore subject to the Brown rule. A reasonable jury could not have found that a prudent investor would have relied upon the misrepresentations of salespersons and assertions in promotional materials which were inconsistent with the formal investment contracts they signed, which fully disclosed the exact risks that the sales agents allegedly discounted or misstated.

The district court applied incorrect legal standards in analyzing the defense motion for a new trial under Brady and Giglio. The court failed to separate the Brady material analytically from the Giglio material, and confused the Brady materiality standard with the different standard governing non-Brady motions for new trial. Under a correct analysis, a new trial is required.

The district court erred at sentencing in calculating the "loss," by failing to subtract from the total purchase price of the policies their current fair market value. In calculating

restitution, the district court improperly included $25 million for the cost of operating the receivership. Also, while the sentencing court did subtract the fair market value from the restitution figure (in contrast with its Guidelines "loss" error), it failed to subtract the amount already paid (and thus "returned," 18 U.S.C. § 3666A(b)(1)(B)(ii)) to investors by insurance companies on account of policies which had matured. These errors inflated the restitution figure by a combined $31 million. For these reasons, resentencing is required.

In addition, the evidence failed to establish any conspiracy to launder the "proceeds" of interstate transportation of property obtained by fraud, as alleged in Count Two, once the term "proceeds" is understood to mean "profits," as recently determined by the Supreme Court.

Finally, the 200-month sentence imposed on each of Counts Three through Seven was illegal, in violation of the Ex Post Facto Clause. At the time of commission of these offenses, the statutory maximum was five years for each count.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO CHARGE THE JURY, PURSUANT TO *U.S. v. BROWN*, ON THE REQUIREMENT OF ORDINARY PRUDENCE BY INVESTORS.

The district court abused its discretion in refusing to instruct the jury as requested by the defense on the requirement that a "scheme or artifice to defraud," to be cognizable as mail fraud, must normally be "reasonably calculated to deceive persons of ordinary prudence and comprehension." The court's

failure to give the requested instruction invaded the jury's factfinding province and permitted conviction without the required proof. This error infected not only the substantive mail fraud counts and related conspiracy, but also the money laundering conspiracy and ITSP counts. Reversal and a new trial on all counts is necessary.

Defendant-appellant Svete requested a jury charge consistent with United States v. Brown, 79 F.3d 1550, 1557, 1559 (11th Cir. 1996). Specifically, the defense proposed to add language to *Pattern Jury Instructions (Criminal Cases)*, No. 50.1 (11th Cir. Jud. Council 2003 rev.) (Mail Fraud), as follows:

> To prove a fraud crime, the government must show that the defendant under consideration intended to devise or participate in a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension. The person of ordinary prudence standard is an objective standard and is not directly related to the gullibility or level of knowledge and experience of any specific person or persons. For purposes of this offense, the government must prove that a reasonable person of average prudence and comprehension would have acted on the representation made ....

DE324:9; see 14Tr(1/25):15-16 (charging conf.). The district court rejected the defendant's request. See RE665:20-23.

The court's final instructions to the jury on mail fraud and wire fraud, RE:676:56-59, 64-67, did not contain any of what the defense sought under Brown. The court delivered only the pattern charge. That charge, in pertinent part, was as follows:

> The term "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by means of false or fraudulent pretenses, representations or promises.
>
> * * *
>
> To act with intent to defraud means to act knowingly and with the specific intent to deceive or cheat

> someone, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

RE676:65-66. At the conclusion of the final instructions, the defendant preserved his objection under Fed.R.Crim.P. 30. 38Tr(3/1):77.

In failing to charge under Brown, the district court abused its discretion in several respects.

A. The Brown "Ordinary Prudence" Standard Presents a Jury Question and Required an Instruction Here.

Appellant Svete must be retried on all counts because the pattern instruction on "scheme to defraud" given by the district court incorrectly omitted an "ordinary prudence" charge. This instruction is required by United States v. Brown, 79 F.3d 1550 (11th Cir. 1996), in fraud cases where the defendant is not in an undisputed fiduciary relationship with all alleged victims. This omission seriously impaired Mr. Svete's ability to conduct his defense on all counts.

Each of the five substantive mail fraud counts concerned a mailing allegedly caused for the purpose of executing the scheme to defraud with respect to a particular investor or investors, identified by initials. Each ITSP count charged the transportation of money "taken by fraud," that is, by executing the scheme to defraud addressed in the mail fraud counts. The trial evidence did not establish that any of these investors had a fiduciary relationship with defendant-appellant Svete. In fact, none of the six individuals referenced in these counts had ever met or spoken with Svete. They dealt with a sales representa-

tive they met in connection with this investment only, who functioned as a salesman, not as a financial adviser.[6] Precisely because the jury could have found no fiduciary relationship -- indeed, on the facts of this case would have been bound to find none, with respect to Counts Three through Ten -- the court erred in denying the defense request for a Brown instruction.[7]

Where there is no fiduciary relationship:

> in this Circuit, mail fraud requires the government to prove that a reasonable person would have acted on the representations [charged against the defendant as fraudulent]. ... To prove a crime, the government must show the defendant intended to create a scheme 'reasonably calculated to deceive persons of ordinary prudence and comprehension.'

Brown, 79 F.3d at 1557, reaffirmed in United States v. Hasson, 333 F.3d 1264, 1271 (11th Cir. 2003). See also United States v. Williams, 527 F.3d 1235, 1245 (11th Cir. 2008) (stating and applying "ordinary prudence" standard); United States v. Ward, 486 F.3d 1212, 1222 (11th Cir. 2007); United States v. Yeager, 331 F.3d 1216, 1221 (11th Cir. 2003) (noting that "elements of

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[6] Because no fiduciary relationship could have been found between these investors and Svete, the district court was correct on the substantive counts to reject the government's request to address fiduciary relationships in the instructions. DE:319 (No. 8, at 10); 14Tr(1/25):35 (conf.).

[7] Appellee has not questioned appellant's demonstration that he had no fiduciary relationship with the great majority of the investors, including none of those named in the substantive counts.

reasonable reliance and materiality analytically overlap"); United States v. Ross, 131 F.3d 970, 986 (11th Cir. 1997).[8]

The reasonable prudence standard is part of the meaning of "scheme or artifice to defraud," as well as an aspect of the intent-to-defraud element. In United States v. Gray, 367 F.3d 1263, 1268 n.15 (11th Cir. 2004), this Court noted:

> Presumably, that a reasonable person would have acted on the defendant's representation is some evidence of the defendant's intent to defraud. ... [I]f a reasonable person would not have acted on the representation, a finding that the defendant made the representation with the intent to defraud would be problematic.

As thus clarified, to meet its burden of proof the government must prove that the defendant "intended to create a scheme 'reasonably calculated to deceive persons of ordinary prudence and comprehension'" and "[a]dditionally, it must show that the defendant ... [made] a material representation ... to the would-be victim that 'a reasonable person would have acted on.'" 367 F.3d at 1268 (emphasis added), quoting Brown, 79 F.3d at 1557.

As already noted, the reasonable person standard is also a part of the "scheme to defraud" element. In Brown, this Court determined that the historical meaning of criminal fraud, as incorporated into the mail and wire fraud statutes and similar

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[8] United States v. Twitty, 107 F.3d 1482, 1492-93 (11th Cir. 1997), declined to create what it referred to as an "extension" of Brown, in a situation involving joint venturers who made false representations on a real estate mortgage loan application in order to secure financing for a real estate development project. The Twitty panel found the factual situation in Brown distinguishable, and held that the lender had been entitled to rely on the applicant's statements in the application, although no fiduciary relationship existed between them.

federal criminal laws, does not include any "scheme" (in the absence of a fiduciary relationship) that is not "'reasonably calculated to deceive persons of ordinary prudence and comprehension.'" Brown, 79 F.3d at 1557; see also Hasson, 333 F.3d at 1271. In other words, the government at trial must show (and the jury therefore must be told that the government must prove) "that the defendant ... [made] a material representation ... to the would-be victim that 'a reasonable person would have acted on.'" Gray, 367 F.3d at 1268, quoting Brown, 79 F.3d at 1557. See also Pelletier v. Zweifel, 921 F.2d 1465, 1498-99 (11th Cir. 1991) (relied upon in Brown, 79 F.3d at 1557-58).

Thus, as to the substantive mail fraud and ITSP counts, all solely concerned with investors lacking any fiduciary relationship with Svete, the government had the burden to prove that these investors' reliance on oral representations and informal brochures was reasonable, that is, that a person of ordinary prudence and comprehension would have relied on them. Jury instructions holding the government to this burden were therefore necessary. In Gray, which did not involve any fiduciary relationship, this Court approved a jury instruction requiring the jury, inter alia, "to look at a person of ordinary prudence, as Brown instructed," and stating that "[t]he person of ordinary pruden[ce] standard is an objective standard and is not directly related to the level of knowledge and experience of any specific person." 367 F.3d at 1271-72.[9]

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[9] At the charging conference, the prosecutor conceded that Gray states "the current law in the area." 14Tr(1/25):18.

Nor was it proper for the district court to deny a Brown instruction on the basis of its own finding that the investors could not independently verify the accuracy of the salespeople's representations.[10] First, the court misidentified the inquiry that investors reasonably should have undertaken in this case. Exaggerated or untrue assertions that the "victim" can readily investigate are an example of circumstances which may fall outside this aspect of the definition of criminal fraud. See, e.g., Gray; United States v. Schlei, 122 F.3d 944, 966-67 (11th Cir. 1997). It is not the sine qua non.

Nor is the Brown instruction applicable only to cases where the challenged statements can be described as mere "puffing." See United States v. Martinelli, 454 F.3d 1300, 1317 (11th Cir. 2006). Here, the defendant's theory was (and is) different -- not that the investors could or should themselves have investigated the viators' medical conditions and life expectancies, and not that they should inherently have discounted the salesmen's representations as "mere puffing," but rather that "persons of ordinary prudence and comprehension" making a significant investment decision do not rely on salesmen's oral pitches in the face of written contract language telling them differently. See authorities cited at 37-38 post.

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[10] In later orally denying a judgment of acquittal premised on Brown, the trial judge articulated two points: she "found" that a "fiduciary relationship did exist" and that "these individual investors could [not] independently verify whether or not these viators were terminally ill." RE631:5-6, 10. In addition, the district judge stated that "I do not believe that these investors could have discovered the

Second, the trial court's proper role was only to determine whether the evidence would support a rational jury finding on the issue, not to make its own about what the investors did or could have "discover[ed]." Questions of fact are for the jury to decide, upon proper instructions with respect to legal principles. See United States v. Goetz, 746 F.2d 705, 712 (11th Cir. 1984). It was for the jury to determine whether a reasonable, prudent investor would have compared the oral representations with the written contract documents, or would rely on the sales pitch. See Gray, 367 F.3d at 1269 n.17 (reasonable reliance is "'basically a jury question; it is a concept that loses meaning when courts try to pin it down'," quoting Wisdom, J.). The government conceded this point below,[11] and it has been recognized by criminal law scholars for as long as the mail fraud statute has existed. See 2 Francis Wharton, *A Treatise on the Criminal Law of the United States* § 2129, at 561 (7th ed. 1874); accord, id. § 1188, at 89-90 (10th ed. 1896).

The question for decision by the jury was whether the LCI program, including but not limited to the sales pitch, constituted a "scheme or artifice to defraud" and thus whether the mailings cited in the indictment were caused "for the purpose of executing such scheme [to defraud]." 18 U.S.C. § 1341. If there was "'any foundation in the evidence'" for the defendant's

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truth or falsity of the representations that were made to them on their own." RE635:21.

[11] "The determination of whether the investors' reliance is reasonable is a jury question. See United States v. Gray, 367 F.3d 1263, 1271 (11th Cir. 2004)." DE206:3.

view, he was entitled to that instruction. Martinelli, 454 F.3d at 1315, quoting United States v. Ruiz, 59 F.3d 1151, 1154 (11th Cir. 1995). That "'extremely low'" standard, id., was more than satisfied here. The contracts themselves, coupled with the investors' testimony that, for example, they signed those contracts without reading them, afforded a substantial foundation for the instruction.[12] "It may be said in general that there is no class of cases which are more peculiarly within the province of the jury than such as involve the existence of fraud." Sonnentheil v. Christian Moerlein Brewing Co., 172 U.S. 401, 410 (1899).

Thus, the trial court's decision to refuse the Brown jury instructions partly on the basis of its own "findings" was

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[12] The viatical investments involved here could not be made without signing a written contract which stated, in plain English:

- that both life expectancies and projected "demise dates" are inherently unpredictable due to potential advances in medical treatment and research;
- that the signer was relying on nothing other than what was stated in the contract;
- that the investor had consulted his or her own professional adviser or chosen not to do so; and
- that "the Agent provides no guarantee as to the Maturity Date of the policy or payment date of the Policy Benefits ...."

See AOB 33-34; RE tab GX 700V. Most of these points would be deemed self-evident by any prudent person endowed with common sense, even had they not been specified in writing. In other words, on this record, a jury at the very least could have found (indeed, would be bound to find, applying a reasonable doubt standard), that no reasonably prudent person, making an

erroneous, in that it usurped the jury's exclusive constitutional function. Cf. Goetz, 746 F.2d at 712 (court invaded jury's province by requiring defense to establish prima facie showing of good faith before submitting question to jury), quoting United States v. Murdock, 290 U.S. 389, 396-98 (1933). A Brown instruction was required here.

B. All Counts Must Be Reversed Due to the District Court's Failure to Instruct the Jury in Accordance with *Brown*.

The error in the jury instructions undermined the verdicts on the substantive counts differently from how it affected the conspiracy counts. AOB 30-32. In the end, however, the error requires a new trial on any count not reversed for insufficiency of evidence. The jury instructions prevented the jury from learning that even a reasonable doubt on the "reasonable prudence" aspect of criminal fraud afforded Mr. Svete a complete defense.[13] Denial of the instruction was reversible error on all counts.

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investment as significant as these, would rely on mere brochures or verbal assurances of salesmen.

[13] The Brown principle applies equally to a conspiracy charge. To be guilty of conspiracy, a defendant must have not only the intent to agree but also the intent to achieve the commission of the substantive crime. United States v. United States Gypsum Co., 438 U.S. 422, 443 n.20 (1978). Here, in other words, an intent to defraud was a necessary element of the conspiracy counts as well. At the least, the instructions on each count had to incorporate (implicitly or by reference) a correct instruction given with respect to the mail fraud counts. (If a retrial is ordered, and if Count One is allowed to go to the jury on a construction encompassing those few investors -- not named in any substantive count -- with whom Svete may have had a fiduciary relationship, then an instruction would presumably

First, for reasons fully elaborated in appellant's opening brief (at 27-29) and not included in the questions on which rebriefing was requested for the Court en banc, the refusal of a Brown instruction, if error, could not have been harmless. Moreover, the deficiency in the instruction is fatal on all counts. The same definition of "fraud" as has been developed under the mail fraud statute applies in other, cognate federal fraud statutes. See Pasquantino v. United States, 544 U.S. 349, 355 n.2 (2005); Neder v. United States, 527 U.S. 1, 20 (1999) (no difference between "fraud," as term is used in mail fraud statute, and same concept in wire fraud law).[14] For this reason, a jury could not properly find that the property involved in Counts Eight through Ten had been "taken by fraud" before being transported. Thus, as to the substantive counts, the district court's failure to give a Brown instruction was a reversible abuse of discretion which "seriously impaired the defendant's ability to conduct his defense." United States v. Yeager, 331 F.3d 1216, 1222-23 (11th Cir. 2003). For this reason, a new trial is required on all counts.

Reversal is also necessary on the two conspiracy counts. Count One charged conspiracy to commit mail and wire fraud as

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also be required defining the fiduciary duties of a personal investment adviser and distinguishing the duties owed by fiduciaries from the duties of mere sellers of financial products.)

[14] This is not to say, however, that any ruling this Court makes would necessarily be applicable to all other "scheme to defraud" statutes, such as 18 U.S.C. § 157 (bankruptcy fraud), id. § 1347 (health care fraud), or id. § 1348

well as ITSP. Count Two charged a money laundering conspiracy predicated on transactions with the "proceeds" of ITSP. Count One as drafted was not limited to the investors named in Counts Three through Seven, just as Count Two was not limited to the particular allegations of Counts Eight through Ten; thus, these conspiracy allegations potentially encompassed some investors for whom the jury could have found a fiduciary relationship with Svete as well as the great majority of others where it could not. Under these circumstances, the court would have to give the jury a Brown instruction on all counts.[15]

Because the instructions to the jury on the conspiracy counts encompassed two legal theories of fraud, one correct (as to fiduciary-relationship victims only, however[16]) and one incorrect (as to the others), and it is impossible to know on which the jury may have relied, reversal of the convictions on Counts One and Two is required. United States v. Pendergraft, 297 F.3d 1198, 1210 (11th Cir. 2002), explaining and applying Griffin v. United States, 502 U.S. 46, 59 (1991); accord, United

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(securities fraud). Each inquiry would depend on that statute's history.

[15] Under Counts One and Two (the conspiracies), the "reasonably prudent person" standard could be inapplicable -- but only if the jury were unanimously to find a conspiratorial agreement to defraud investor(s) with whom the jury found Svete did have a fiduciary relationship.

[16] Even as to these few investors, the instructions were deficient for lack of an instruction explaining correctly the nature of an investment adviser's fiduciary duties. (The government had sought a greatly overbroad fiduciary instruction, which the court below rejected.)

States v. Adkinson, 135 F.3d 1363 (11th Cir. 1998); United States v. Range, 94 F.3d 614, 619-20 (11th Cir. 1996).

Nor does United States v. Martinelli, 454 F.3d 1300 (11th Cir. 2006), support a reversal only on the substantive counts, as the panel decided. Martinelli held that no instruction is required at a money laundering conspiracy trial on the elements the offense constituting the "specified unlawful activity" (there, mail fraud) underlying the alleged conspiracy. 454 F.3d at 1310-12. This Court held that the "pattern mail fraud instruction ... does not apply in a money laundering conspiracy case, where the defendant need only have knowledge that the funds were derived from mail fraud." Id. 1311.

The defendant in Martinelli, however, was convicted only of money laundering conspiracy, not of any mail fraud offense. Because the district court therefore had not instructed the jury on the elements of mail fraud at all, it had not given an incorrect instruction on mail fraud. Here, by contrast, the court gave an improper definition of "scheme to defraud" when it refused to include the Brown "ordinary prudence" limitation. Then it referenced that mis-definition of "fraud" when instructing on the other counts. Nothing in Martinelli excuses an instruction on conspiracy to commit mail fraud that expressly incorporated an incorrect charge given in the same case on the substantive counts.

While a complete instruction on the elements of mail (or wire) fraud was unnecessary in charging under § 1956(h), § 2413, and § 371, what was necessary was a correct charge on what

constitutes "fraud" under those statutes. If the jury does not understand the meaning of criminal "fraud," then it cannot determine whether the defendant conspired to execute a scheme to defraud or to conduct financial transactions with the proceeds of "fraud," and it likewise cannot adjudge whether he caused the interstate transportation of money obtained by "fraud."

On Count One, the error in defining fraud was expressly incorporated into the instructions as to each of the three objectives.[17] On money laundering conspiracy the court instructed that "specified unlawful activity" means, in this case, "money stolen, converted or taken by fraud," RE676:62, giving no definition or explicit cross-reference to any part of the instructions explaining "fraud." The jury thus could not have mistaken the impled reference to the ITSP counts. Only if a proper jury instruction had been given with respect to those counts, which it was not (see note 17 ante) might a specific fraud instruction not be required in a case involving both mail fraud counts as well as other counts involving fraud, such as

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[17] The Count One conspiracy under 18 U.S.C. § 371 had three objectives (on all of which the jury convicted). As to the first, mail fraud, the court affirmatively instructed, RE676:56, that "the elements of this offense are set out in the instructions in counts 3 through 7" -- the substantive mail fraud counts. As to the second alleged objective, wire fraud, the district court gave the jury the same incorrect instruction as for mail fraud. RE676:56; cf. Pasquantino, 544 U.S. at 355 n.2; Neder, 527 U.S. at 20 ("fraud" in mail and wire fraud statutes has same meaning). On the third alleged objective, ITSP, the court referred to its instructions on counts 8-10. RE676:56. On these ITSP counts, the district court affirmatively gave the jury an incorrect instruction on the definition of "taken by fraud," RE676:69, omitting the "ordinary prudence" standard.

money laundering conspiracy and ITSP substantive and/or conspiracy counts.[18] The instructional error thus affected the reliability of the verdict on all counts.

II. THIS COURT'S 1996 DECISION IN *U.S. v. BROWN* SHOULD NOT BE OVERRULED, BECAUSE A "SCHEME OR ARTIFICE TO DEFRAUD," AS THAT TERM WAS UNDERSTOOD WHEN THE MAIL FRAUD STATUTE WAS ENACTED, ENCOMPASSES ONLY CONDUCT THAT IS REASONABLY CALCULATED TO DECEIVE A PERSON OF ORDINARY PRUDENCE AND COMPREHENSION.

This Court's panel decision in United States v. Brown, 79 F.3d 1550 (11th Cir. 1996), correctly interprets and applies the federal criminal law of mail fraud. It should not be overruled. The issue before this Court is not one of public policy -- such as, how can we best protect fraud victims in the context of a free and competitive market? -- but rather a question of statutory interpretation of a Nineteenth Century criminal law.

When Congress uses a word or expression in a criminal statute without defining it, and that term has a settled legal meaning, the Court ordinarily must construe the statute in accordance with the understanding of legally-educated people at the time of enactment. Taylor v. United States, 495 U.S. 575, 594-96 (1990); id. 603 (Scalia, J., concurring).[19] This rule

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[18] Indeed, in Brown itself the Court reversed (on sufficiency grounds) not only the substantive counts but also the related mail fraud conspiracy charge and counts under 18 U.S.C. § 2314.

[19] See also, e.g., Perrin v. United States, 444 U.S. 37, 42-43 (1979) (meaning of "bribery" as of 1961); United States v. Nardello, 393 U.S. 286 (1969) (meaning of "extortion" as of 1961); Gilbert v. United States, 370 U.S. 650, 655-57 (1962) (meaning of "forge" as of 1823); cf. Scheidler v. National Org. for Women, Inc., 537 U.S. 393, 402 (2002) (noting but not applying rule, where term at issue had

ensures that judges will enforce the law as passed by Congress, rather than usurp the legislative power.[20] See Dixon v. United States, 548 U.S. 1, 12-13 (2006) (applying same principles to discern scope of nonstatutory defense to federal crime). Scrupulous adherence to this rule respects both American legal tradition and Due Process considerations, which dictate that there are no federal common law crimes. See, e.g., United States v. Britton, 108 U.S. 199, 206 (1883); United States v. Hudson & Goodwin, 7 Cranch (11 U.S.) 32 (1812). The bar against creation or enforcement of nonstatutory offenses constrains judges' authority to develop or modernize the substantive criminal law. Application of the contemporary-understanding doctrine decides this case in appellant's favor.

The Supreme Court has repeatedly applied the rule of contemporary understanding to problems in construction of the mail fraud statute. See Cleveland v. United States, 531 U.S. 12, 18-20 (2000); Neder v. United States, 527 U.S. 1, 21-23 (1999); McNally v. United States, 483 U.S. 350, 356-59 (1987); see also Pasquantino v. United States, 544 U.S. 349, 359-68 (2005). To ascertain the meaning of the elements "scheme or

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express statutory definition); Carter v. United States, 530 U.S. 255, 264-65 (2000) (noting but not applying rule, where statute used recognizable description of common law offense but not common law term itself).

[20] Thus, in civil cases as well, "Where Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms." NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981), quoted in Field v. Mans, 526 U.S. 59, 69 (1995).

artifice to defraud" and "for the purpose of executing such scheme," the Court examines the understanding of those terms as of 1872, when the law was first adopted, and 1909, when it was last substantively amended. Thus, in McNally, the Court determined that the term "defraud," as understood in 1872 (and unchanged as of 1909) meant to deprive another, by deceit or misrepresentation, of money or property, and did not include schemes by public officials to deprive their constituents of "honest services."[21] In Neder, the Court applied the same methodology to conclude that "materiality" was an element of a mail fraud offense. It did so by determining that even though the mail fraud statute encompasses both what the common law called "fraud" and what was added to common law by 18th Century statutes against "false pretenses,"[22] the requirements of traditional "fraud" must always be met (except those which are plainly inconsistent with the language, such as actual reliance and damages).

In Field v. Mans, 526 U.S. 59 (1995), the Supreme Court applied the same strategy to address a question very much like

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[21] In doing so, the Court overturned the decisions of nearly every circuit, which had failed to follow the contemporaneous-understanding principle. Congress, of course, was free to disagree with the result as a matter of policy, and did so by enacting 18 U.S.C. § 1346. In Cleveland, as it had in Carpenter v. United States, 484 U.S. 19 (1987), the Court used the same historical technique to explore what constitutes "property" under the mail fraud law.

[22] See 3 Wayne R. LaFave, *Substantive Criminal Law* § 19.7(a), at 114 (2d ed. 2003) (dating British "false pretenses" statute to 1757, making it pre-Revolutionary and

that involved here: whether the term "fraud," as used in the 1978 Bankruptcy Reform Act provision for exempting debts from discharge due to fraud, requires that the creditor's reliance have been "reasonable," merely "justifiable," or neither. Examining the state of fraud law as of the BRA's 1978 enactment, the Court found that a determination of fraud requires a finding of "justifiable" reliance. Construction and application of the mail fraud law requires an analysis of what the same term, "fraud," meant a hundred years earlier than 1978 -- in 1872-1909. (Actual reliance of any sort, of course, is inapplicable in a mail fraud case, however. Neder, 527 U.S. at 24-25.) Applying that methodology, as it must, this Court should reaffirm that a scheme or artifice "to defraud," with few exceptions, means one which is "reasonably calculated to deceive persons of ordinary prudence and comprehension."

The original language adopted by Congress in 1872 still appears in the mail fraud law: a "scheme or artifice to defraud." As amended in 1909, the statutory coverage also expressly encompasses schemes to obtain money "under false pretenses."[23] (There is only one offense, however, which always requires proof of "fraud"; any "false pretenses" lacking the

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thus part of American common law; see 1 id. § 2.1(c), at 106 & nn. 14-15).

[23] The original 1870 bill on which the mail fraud law of 1872 was based had included "false pretenses" coverage: "It shall not be lawful to convey by mail ... any letters or circulars ... concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses." Cong. Globe, 41st Cong., 3d Sess. 35 (Dec. 7, 1870). See McNally, 483 U.S. at 356 n.5.

essential characteristics of common law fraud are not covered. Cleveland, 531 U.S. at 25-26, explaining McNally, 483 U.S. at 358-59.) The limitation recognized in Brown is implicated both in the term "defraud" -- which takes its content from the crime of "common law cheat" and from the doctrine of fraud in the law of equity (sounding both in tort and in contract) -- and in the phrase "false pretenses" -- originating with English criminal statutes predating the American Revolution -- all as understood in 1872 and 1909.

Common law fraud never covered schemes not designed to cheat a person of reasonable prudence. This was clearly recognized in the leading treatises of the time when the mail fraud law was enacted.

> The largest class of cases in which courts of justice are called upon to give relief against fraud, is where there has been a misrepresentation .... If a man represents as true, that which he knows is false, and makes the representation in such a way, or under such circumstances as to induce a reasonable man to believe that it is true, and is meant to be acted on, ... there is fraud to support an action of deceit at law, and to be ground for the rescission of the transaction in equity.

William W. Kerr, *A Treatise on the Law of Fraud and Mistake* 53 (Amer. ed. Orlando Bump 1872) (emphasis added). Similarly, the 1870 revision of Justice Story's treatise on equity, which was consulted by the Supreme Court in Neder, 527 U.S. at 22, stated, in discussing what he called "actual fraud":

> Nor is it every wilful misrepresentation even of a fact, which will avoid a contract upon the ground of fraud, if it be of such a nature that the other party had no right to place reliance on it; for courts of equity, like courts of law, do not aid parties who will not use their own sense and discretion upon matters of this sort.

1 Joseph Story, *Commentaries on Equity Jurisprudence* § 199, at 201 (10th ed. Isaac Redfield 1870). As the Supreme Court stated in Farrar v. Churchill, 135 U.S. 609, 615 (1890), to win relief on account of a "fraudulent representation" the complainant must have had "a reasonable belief that it was true."

"Courts of equity," Story went on to note in his 1870 discussion of fraud, "do not sit for the purpose of relieving parties, under ordinary circumstances, who refuse to exercise a resonable [sic] diligence or discretion." Id. § 200a, at 203.[24] The revisers of Story's treatise had not changed these opinions in 1886 (§ 199, at 223 [13th ed. Melville Bigelow 1886]) or in

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[24] Justice Story's entire theory of "constructive fraud," by contrast, was designed to show how the rule with respect to fiduciary and other special relationships (and the rule for those on whom duties are imposed by a particular law) is completely different. Finally, even in the absence of a special relationship, Story writes, fraud can consist of taking "unconscientious advantages" over those "disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from taking due care of, or protecting their own rights and interests." Id. § 221, at 223 (emphasis added). To be "disabled" by "age," Story makes clear, and thus exempted from the rule of ordinary prudence, requires the complainant to be either a very young child or a person who is infirm due to "extreme old age": "And it is quite immaterial from what cause such weakness arises; whether it arises from temporary illness, general mental imbecility, the natural incapacity of early infancy, the infirmity of extreme old age, or those accidental depressions which result from sudden fear, or constitutional despondency, or overwhelming calamities." Id. § 234, at 233. It must be remembered, however, that the "prudent person" rule is, in part, an objective one about how the fraud scheme was "designed"; it does not address the vulnerability of particular victims except insofar as this influenced a defendant's alleged "intent to defraud."

1918 (§ 282, at 288-89 [14th ed. W.H. Lyon, Jr. 1918]).[25] These ideas have roots extending to Roman law. See 1 Story (10th ed. 1870) § 202, at 204; 1 Francis Wharton, *A Treatise on the Criminal Law of the United States* xiii (7th ed. 1874) (Preface, noting that common law requirement of "latency" in law of fraud, "by use of false tokens or tricks, against which ordinary prudence cannot guard," derives from Roman law).

This idea -- that the law is reluctant to protect those who do not act reasonably to protect themselves, despite the mental and physical capacity to do so -- was reflected especially strongly in the law of criminal fraud ("common law cheat"), as expressed at the time of enactment of the mail fraud statute. "Cheats, punishable at common law, may in general be described as such cheats (not amounting to felony[26]) as affect, or may affect, the public, and are effected by deceitful or illegal practices, against which common prudence could not have guarded." 2 Wharton, id. § 2056, at 514. Accord, 1 Joel Bishop, *Commentaries on the Criminal Law* § 571, at 321 (6th ed. 1877) ("fraud accomplished through the instrumentality of some

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[25] State supreme court decisions in civil fraud cases predating and contemporaneous with the 1872-1909 period affirm this definition. See Safford v. Safford, 224 Mass. 392, 113 N.E. 181 (1916) (ordinary prudence and circumspection); Foss v. Foss, 94 Mass. 26 (1866) (proper and reasonable prudence and discretion); Dare County v. Smith Const. Co., 152 N.C. 23, 67 S.E. 37 (1910) (people not protected by law from their own negligence); Walsh v. Hall, 66 N.C. 233 (1872) (reasonable reliance).

[26] That is, falling short of larceny by trick, and therefore not capital. See 4 *Blackstone's Commentaries* *157 (2d ed. Thomas Cooley 1876).

false symbol or token, of a nature against which common prudence cannot guard"). See also Respublica v. Powell, 1 U.S. (1 Dall.) 47 (Pa. 1780) (indictment for "cheat" held valid because, inter alia, the "public, indeed, could not, by common prudence, prevent the fraud").

The recodification and general revision of federal criminal law in 1909 included the addition to the mail fraud statute of a reference to false pretenses. See McNally, 483 U.S. at 357-58. Whether the offense of "false pretenses," in and of itself, carried with it an "ordinary prudence" limitation was at best controverted among legal scholars of the mid to late 19th Century. Some declared that false pretenses had the same "ordinary prudence" qualification as criminal fraud: "Representations which, though false, could not have misled the person to whom they were made had he exercised common prudence and caution, are not false pretenses." Stewart Rapalje, *A Treatise on the Law of Larceny and Kindred Offenses* § 404, at 558 (1892).[27] Other contemporaneous scholars viewed the matter as

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[27] Rapalje cites four state supreme court decisions as examples. He acknowledges, however, that it is "not a defense" that the falsehood "would not have deceived a shrewd man" -- that is, the test was not overly stringent -- and acknowledges that "some states" hold that "it is not necessary that the false pretense be such as is calculated to deceive a person of ordinary prudence or caution; that it is as criminal to defraud the unwary as the wary." Id. 558-59. An incomplete review suggests that the states were indeed divided. Compare Perkins v. State, 67 Ind. 270, *2 (1879) (false pretenses must "be such as would deceive a person of ordinary sense, prudence and caution"); Commw. v. Morrill, 62 Mass. (8 Cush.) 571 (1851) (applying standard in upholding indictment); State v. Estes, 46 Me. 150 (1858) (quashing indictment under similar standard); State v.

being in doubt. "How it is if the pretence [sic] is frivolous in nature, not calculated to deceive the average of men, but, being addressed to a weak or incautious mind, does deceive this person and work a fraud upon him, is one of the questions, connected with this subject, upon which judicial opinions are not harmonious." Joel Bishop, *Commentaries on the Law of Statutory Crimes* § 451, at 302-03 (1873); see also Wharton (3d ed. 1855) at 729-30 ("it is a subject on which there has been some conflict of opinion whether the pretences should of themselves be of a character which would necessarily impose upon a man of ordinary caution"); 2 Wharton (7th ed. 1874) § 2128, at 560 (courts in disagreement); 2 Wharton (10th ed. 1896) §§ 1186-1187, at 87-88 (dispute still not resolved).

This Court need not resolve the difficult question whether Congress in 1909 took sides in this controversy over the reach of "false pretenses." Cf. Moskal v. United States, 498 U.S.

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Morgan, 109 Tenn. 157, 69 S.W. 970, 972 (1902) (indictment sufficient; described presentation "might mislead any person of ordinary prudence"), with Johnson v. State, 36 Ark. 242 (1880) (unnecessary that pretenses be calculated to deceive ordinarily prudent person); Commonwealth v. Henry, 22 Pa. (10 Harris) 253, 256 (1853) (same); State v. Van Ruschen, 38 S.D. 187, 160 N.W. 811 (1916) (same). Compare also People v. Crissie, 4 Denio 525 (N.Y. 1847) (upholding indictment under test requiring "an ingenious contrivance or unusual artifice, against which common sagacity and the exercise of ordinary caution would not be a sufficient guard"), with People ex rel. Phelps v. Court of Oyer & Terminer, 83 N.Y. 436, *7 (1881) ("pretenses must be calculated to deceive ... in the circumstances," and "If the pretense is capable of defrauding, that is sufficient."); Commw. v. McDowell, 136 Ky. 8, 123 S.W. 313, 316 (1909) (question of whether pretenses would deceive a "person of ordinary prudence" looks primarily to particular victim's capacities, and is jury question).

103, 114-18 (1990) (doctrine at issue not applied where "no fixed usage existed at common law," id. 116). As the Supreme Court held in Cleveland, 531 U.S. at 25-26, there is no separate "false pretenses" offense under the mail fraud law which need not also meet the definition of "fraud." And to be "fraud" in 1872 or 1909, the defendant's misconduct had to be reasonably calculated to deceive a person of ordinary prudence.

The application of the "prudent person" limitation was especially clear in cases -- as here -- of alleged fraud victims who signed a contract containing honest written disclosures without first reading it, after being subjected to oral misrepresentations. E.g., Farlow v. Chambers, 21 S.D. 128, 110 N.W. 94 (1907) (citing numerous other states' cases); Craig v. Hobbs, 44 Ind. 363 (1873) (illiterate party bound by contract he authorized another to sign for him, where defendant did not misrepresent its terms). As stated in a contemporaneous treatise:

> A person in the full possession of all his faculties, and able to read, is bound to know and understand the contents of an instrument executed by him ..., unless indeed it contain technical or foreign terms, and he has been misled as to their meaning by the opposite party. ... If a man execute a solemn instrument ..., he cannot affect not to know what he was doing; and it is not enough for him afterwards to say that he thought it was only a form.

Melville M. Bigelow, *The Law of Fraud and the Procedure Pertaining to the Redress Thereof* 73-74 (1877). Nothing in the record suggests that LifeTime targeted investors with poor or no English literacy skills, or that the contracts were written to confuse or obfuscate -- just the opposite.

The federal cases from the same era addressing fraud in various contexts, and mail fraud in particular, agree that a reasonably prudent person standard applies. The leading decision of this Court's predecessor is Etheredge v. United States, 186 F. 434 (CCA 5th 1911). There, the Court reversed the failure to grant a demurrer (judgment of acquittal), squarely basing its holding on the proposition advanced by appellant here:

> [I]t takes something more than the mailing of a letter with a fraudulent intent to constitute 'a scheme or artifice to defraud' within the meaning of the statute. ... [T]he scheme [must be] of such a character, if truly presented, as would ordinarily deceive a person capable of attending to his own affairs. If the plan does not have these characteristics, ... [it] does not constitute 'a scheme or artifice to defraud' ....
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> * * * *
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> The purpose of the statute was to prevent the circulation through the mails of cunning appeals to human passion for gain by untruthful and seductive embellishment of advantages ..., begetting confidence where it would not otherwise be bestowed, and luring persons of ordinary prudence and intelligence into fraudulent transactions and ventures, in which they would not otherwise be persuaded to embark.

The Court expressed concern that a broader construction would involve the federal courts, through criminal prosecutions, in a general regulation of consumer credit transactions, with any eventual failure to pay leading to potential charges of fraud.

Just six years later, in Whitehead v. United States, 245 F. 385 (CCA 5th 1917), without citing Etheredge, the Court rejected (with sardonic wit) an appeal advancing 85 objections to a mail fraud indictment, as well as a challenge to the sufficiency of

the evidence (and more than 475 other issues). In rejecting the indictment demurrers, the Court noted:

> Neither the mental nor financial condition of the person against whom the fraud is directed ... will increase or diminish a crime completed when, a scheme to defraud having been devised, the mails have been used in an effort to make it effective.

Id. at 388 (emphasis added). Nothing in the opinion, however, questions the already-binding holding of Etheredge as to what constitutes "a scheme to defraud." Instead, the Whitehead opinion goes on to hold that the "quality" of the scheme is a jury question. Id. 389-90. In that light, the Court had no trouble (after describing the scheme's execution) in finding the evidence fully sufficient to support the verdict. Id. 392-99.

The course of Fifth and Eleventh Circuit panel precedent after Etheredge and Whitehead, leading eventually to Brown and cases discussing it, does not shed the same sort of direct light on Congress's intent as of 1872-1909 as do these earlier cases. For example, in the leading mid-20th Century case of Silverman v. United States, 213 F.2d 405 (5th Cir. 1954), the Court affirmed a mail fraud conviction (in a clearly non-fiduciary setting) against a challenge to the sufficiency of the evidence, holding that under "well settled" law, a misrepresentation need not be proven. Rather, "[i]t is only necessary to prove that it is a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension, and that the mail service of the United States was used and intended to be used in the execution of the scheme." Id. 407. The Court cited other circuits' precedent, but neither Etheredge nor Whitehead.

Similarly, in an opinion by Judge John R. Brown, the Court reaffirmed that "[a]ll that is necessary is that it be a 'scheme reasonably calculated to deceive persons of ordinary prudence and comprehension'." United State v. Blachly, 380 F.2d 665, 671 (5th Cir. 1967), quoting Silverman. By his affirmation of this standard, Judge Brown made clear that the passage in Gregory v. United States, 253 F.2d 104 (5th Cir. 1958) -- which he also authored -- rejecting an overly "literal reliance on some of our words in Etheredge v. United States," see 253 F.2d at 109 (without specifying which "words"), could not have meant the reasonably calculated/prudent person standard. Nor, in light of Blachly's endorsement of Silverman, could that have been the import of the next paragraph of Gregory, introducing the idea of a "nontechnical standard" for interpreting fraud, based on "fundamental honesty, fair play and right dealing in the general and business life of members of society." 253 F.2d at 109.

Least of all, as the Brown panel correctly recognized, 79 F.3d at 1556, could the Gregory Court have meant literally the full implications of its recitation of the passage from Weiss v. United States, 122 F.2d 675, 681 (5th Cir. 1941), that the "law does not define fraud; it needs no definition ...."[28] Judges

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[28] This oft-quoted sentence ends with the memorable remark that fraud "is as old as falsehood and as versable as human ingenuity." Id. The "nontechnical" standard of "moral uprightness," which it termed "indeed broad," was introduced by ipse dixit in Gregory, 253 F.2d at 109. Although also a typically well-turned phrase, it is inconsistent not only with due process constraints but also with original understanding analysis. The 1870 and 1872 editions of Story's and Kerr's treatises, respectively, for example, warned

may need no definition for "fraud," but juries (and prosecutors) surely need guidance. The time-tested formula of a "scheme reasonably calculated to deceive a person of ordinary prudence and comprehension," as this Court articulated before and after Gregory, including in Blachly and Brown,[29] is exactly that standard -- objective in form, yet flexible enough for a jury to consider the particular circumstances and to do justice, with fairness, in each case.

There is today, as the Court knows, continuing tension in the panel cases, and a near-even split in the Circuits. Compare United States v. Coyle, 63 F.3d 1239, 1243-44 (3d Cir. 1995) (cognizable scheme "must" be "reasonably calculated to deceive persons of ordinary prudence and comprehension"); United States v. Jamieson, 427 F.3d 394, 415 (6th Cir. 2005) (same); United States v. Yoon, 128 F.3d 515, 523-24 (7th Cir. 1997) (same); United States v. Hawkey, 148 F.3d 920, 924 (8th Cir. 1998) (same); United States v. Shepard, 396 F.3d 1116, 1124 (10th Cir.

_____(footnote continued)

against confusing a legal standard of fraud with the higher ideals of social morality. See Kerr (Amer. ed.) 96-97 ("The principles of morals require more scrupulous good faith in the dealings of men with each other than is exacted either at law or in equity."); Story (10th ed.) § 194, at 196-97 ("The principles of natural justice and sound morals ... require the most scrupulous good faith, candor, and truth, in all dealings whatsoever. But courts of justice generally find themselves compelled to assign limits ...; and with reference to the concerns of human life, they endeavor to aim at mere practical good ....").

[29] The Blachly Court also noted that the traditional "prudent person" standard -- going to the design of the scheme and the intent of the defendant -- is not inconsistent with a recognition that even "the monumental credulity of the victim is no shield for the accused." 380 F.2d at

2005) (intent), with United States v. Brien, 617 F.2d 299, 311 (1st Cir. 1980) (rejecting Brown standard on intent); United States v. Amico, 486 F.3d 764, 780 (2d Cir. 2007) (same); United States v. Colton, 231 F.3d 890, 903 (4th Cir. 2000) (same); United States v. Ciccone, 219 F.3d 1078, 1083 (9th Cir. 2000) (scheme need not meet "ordinary prudence" test).[30] Regardless of the head count, however, only a resolution of the issue consistent with the Supreme Court-mandated methodology of contemporaneous understanding can lead to a correct analysis.

Adherence to Brown is not, as the government has claimed, in conflict or even in tension with Neder. The Sixth Circuit fully analyzed and debunked the government's argument in Jamieson, 427 F.3d 415-16. Appellant fully endorses that analysis and will not rescribe it here.

Moreover, two other tools of statutory construction, invoked by the Supreme Court in construing the mail fraud statute, add weight to the conclusion that Brown must not be overruled. First, is the presumption that Congress has not

_____(footnote continued)

672 n.13. Some of the cases in the following decades rely entirely on the "moral uprightness" approach, disregarding the "well settled" limitation of mail fraud to schemes "calculated to deceive a person of ordinary prudence." Silverman, 213 F.2d at 407.

[30] Cf. Manta v. Chertoff, 518 F.3d 1134, 1142 (9th Cir. 2008) (if defendant devised scheme meeting "prudent person" test, then evidence of fraudulent intent is sufficient). The D.C. Circuit alone has apparently never addressed the precise question. Cf. United States v. Maxwell, 920 F.2d 1028, 1036 (D.C.Cir. 1990) (neither "monumental credulity" of victims nor absence of loss is a defense). As recognized in Blachly, the conclusions in Maxwell (and cases cited) are not inconsistent with a proper understanding of the "ordinary prudence" test.

"'significantly changed the federal-state balance' in the prosecution of crimes." Cleveland, 531 U.S. at 25. Second, of course, is the rule of lenity. Id.; McNally, 483 U.S. at 359-60. To the extent that the correct understanding of "scheme to defraud" and "intent to defraud" are left unclear after an examination of statutory language and history, in relation to the issue of calculation "to deceive a person of ordinary prudence," doubts must be resolved against extending the statute's reach.

Because the terms "fraud" and "false pretenses" as used in the mail fraud statute (and as echoed in later laws) were understood at the time of enactment to encompass only a "scheme or artifice" that was reasonably calculated to deceive persons of ordinary prudence and comprehension, the Brown limitation is part of the law of mail fraud that cannot be overruled by any court. The jury instructions in this case were deficient in omitting this requirement.

III. A PROPERLY INSTRUCTED JURY COULD NOT HAVE FOUND BEYOND A REASONABLE DOUBT THAT A PRUDENT INVESTOR WOULD HAVE RELIED ON THE CHARGED MISREPRESENTATIONS, REQUIRING ACQUITTAL ON THE SUBSTANTIVE COUNTS.

Applying the proper legal standard, as discussed in the preceding Points of this brief, the evidence was insufficient to convict appellant Svete on any of the substantive counts of this indictment.[31] With a single exception discussed in the

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[31] Mr. Svete's appeal did not challenge the sufficiency of the evidence on the two conspiracies, because these included fiduciary-relationship victims, as to whom the "reasonable prudence" restriction would not apply.

following paragraphs, appellant Svete petitioned only for panel rehearing on the sufficiency question, and did not suggest it be reviewed by the Court en banc. See Aplt. Pet. Reh. 9-13.[32] If the Court agrees with appellant on the legal issues designated for consideration en banc, the Court should remand to the panel the question of whether the evidence presented by the government at trial was sufficient to support the verdicts under the correct standard on any of the substantive counts.

The one sufficiency issue which is before the Court en banc (as the Court granted the parties' petitions without limitation) -- which the panel called its "more important" reason, Op. 15 -- focuses Mr. Svete's testifimony in his own defense. The panel suggested that the trial jury "was entitled to disbelieve Svete's testimony and was entitled to believe the opposite of Svete's testimony." Op. 15, citing United States v. Brown, 53 F.3d 312, 314 (11th Cir. 1995).[33] Taking into account the negative of Svete's testimony, together with corroborative evidence, the panel found the proof sufficient. Id. The Court en banc should reject this analysis for two reasons.

First, is the Supreme Court's view on this subject: "When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclu-

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[32] The sufficiency issue was elaborated at pages 32-37 of appellant Svete's amended opening brief and pages 7-8 of his reply brief.

[33] This decision, also captioned Brown, is unrelated to the 1996 opinion at 79 F.3d 1550, discussed above.

sion." Bose Corp. v. Consumers Union, 466 U.S. 485, 513 (1984). As other Circuits have long recognized, this principle applies equally in criminal cases -- not only is disbelief alone not sufficient evidence, but it is also not a basis to infer that the jury believed the opposite. See, e.g., United States v. Aulicino, 44 F.3d 1102, 1114-15 (2d Cir. 1995); United States v. Pechenik, 236 F.2d 844, 847 (3d Cir. 1956).

The panel's reasoning on this point was also contrary to the logic of the 1996 Brown case, 79 F.3d 1550, and to Gray, 367 F.3d 1263. As Brown made clear, the "ordinary prudence and comprehension" standard is an objective one. 79 F.3d at 1557; see also Gray, 367 F.3d at 1271-72. Thus, if the jury disbelieved (or even believed the opposite of) Mr. Svete's testimony emphasizing his own good faith, the most that could have tended to establish is the required element that Mr. Svete had a subjective intent to defraud. This could not satisfy the additional and separate requirement that Mr. Svete have, objectively, schemed to commit cognizable "fraud" -- or engaged in transportation of money taken by "fraud." Mr. Svete's testimony could not have tended to prove whether a "person of ordinary prudence," Brown, 79 F.3d at 1558, would have read and relied on the written contract rather than on salespersons' representations or LCI's brochures to decide whether to invest.

The 1995 panel decision in Brown, even if not flatly wrong, does not and could not stand for the proposition that the evidence can never be insufficient following a criminal trial at which the defendant testifies. Intent alone is not criminal.

The corroborative evidence did not eliminate the contract language which was right there for investors to read. The evidence of fraud was insufficient on the substantive counts.

IV. THE DISTRICT COURT ERRED IN ITS *BRADY* RULINGS.

This issue, argued at pages 37–45 of appellant Svete's amended opening brief and 9–11 of his reply brief, is here preserved for possible remand to the panel.

V. THE DISTRICT COURT ERRED IN CALCULATING FRAUD LOSS.

This issue, argued at pages 46–52 of appellant Svete's amended opening brief and 11–15 of his reply brief, is here preserved for possible remand to the panel.

VI. THE RESTITUTION ORDER IMPROPERLY INCLUDES $25 MILLION WHICH WAS NOT PART OF THE "LOSS" TO ANY VICTIM.

This issue, argued at pages 52–54 of appellant Svete's amended opening brief, page 15 of his reply brief, and page 13 of his petition for rehearing en banc, is here preserved for possible remand to the panel.

VII. THE EVIDENCE FAILED TO ESTABLISH A CONSPIRACY TO COMMIT MONEY-LAUNDERING OF THE "PROCEEDS," THAT IS, THE PROFITS, OF INTERSTATE TRANSPORTATION OFFENSES, AS CHARGED.

Count Two of the superseding indictment charged conspiracy, in violation of 18 U.S.C. § 1956(h), to conduct financial transactions with the "proceeds" of a specified unlawful activity. The indictment stated that these funds consisted of "money taken by fraud and transferred in interstate commerce, in violation of Title 18 [U.S.C. §] 2314." (Section 2314 prohibits the inter-

state transportation of stolen property ("ITSP").) Count Two further alleged that the transactions were designed to disguise and conceal the ownership or location of those funds. Critically, the allegation of Count Two was that the "money laundering conspiracy" involved the "proceeds" of ITSP, not the proceeds of the Count One mail fraud conspiracy.[34] No substantive counts of money laundering were charged.

The facts alleged in Count Two are not consistent with a proper understanding of "proceeds," as authoritatively defined in United States v. Santos, 553 U.S. --, 128 S.Ct. 2020 (June 2, 2008). In Santos, the Supreme Court held that "proceeds," as used in the federal money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i), means *profits* rather than *gross receipts*.[35] Because the government's theory of laundering was focused on ITSP, not the underlying fraud, proof of the § 1956(h) offense failed. The prosecution never established that the offense of

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[34] A money laundering offense requires a transaction involving funds constituting "proceeds" of a "specified unlawful activity." This latter term is defined in 18 U.S.C. § 1956(c)(7). Incorporated by reference into the definition is the list of offenses which may be RICO predicates under id. § 1961(1). Among those crimes, listed at § 1961(1)(B), is ITSP, that is, id. § 2314.

[35] The object of the conspiracy alleged in Count Two ("to conceal and disguise the nature, location, source, ownership and control of the proceeds") would have been a violation of § 1956(a)(1)(B)(i), not subsection (a)(1)(A)(i), as in Santos. The logic of the Supreme Court decision, however, has nothing to do with which subsection of § 1956 was charged, as long as it requires proof of "proceeds." Nor is Santos inapplicable where, as in this case, the charge is conspiracy to conduct transactions with "proceeds"; one of the counts overturned in Santos charged a § 1956(h) conspiracy. See 128 S.Ct. at 2023.

interstate transportation of property obtained by fraud itself had any "profits." The funds taken out of LCI, as alleged in Count Two, may have been the "proceeds" of the alleged mail fraud conspiracy (Count One), but they were the corpus of the ITSP offenses, not their profits. No "profit" was generated (or intended to be generated, as might be the case in an unconsummated conspiracy) by moving money, once obtained from investors, from Florida to Ohio or Texas, as alleged in the ITSP Counts 8 through 10, for example.

The *actus reus* of an ITSP violation is the transportation or transmission of at least $5000 which has already been taken illegally. The transportation, as such, may entail certain minor expenses but does not produce any gross receipts (except, for example, in the case of a person paid to undertake the illegal transportation).[36] An ITSP violation is not, in and of itself, ordinarily a crime undertaken for profit but rather constitutes an act ancillary to the achievement of some antecedent criminal purpose. Accordingly, the agreement to transfer some of LCI's funds, after being transported out of Florida, from company to company and from Ohio to Canada and other locations, alleged in Count Two to constitute a conspiracy in violation of § 1956(h), did not involve any agreement to disguise the "proceeds" of ITSP violations, as recently defined in Santos.

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[36] If the purpose of the interstate transportation is to then utilize the funds to generate further profit, such as by investing it, then the fruits of that investment might also be considered to be profits of the ITSP, but the government offered no evidence here of a conspiracy to engage in transactions with profits in this sense.

For this reason, the conspiracy alleged in Count Two was not proven to have as its objective the commission of an offense. Although not raised in the trial court, this error is now apparent. See Johnson v. United States, 520 U.S. 461, 467-68 (1997). An issue of insufficient evidence to prove legal guilt is reversible "plain error," because it always results in a miscarriage of justice. United States v. Olano, 507 U.S. 725, 736 (1993), citing Wiborg v. United States, 163 U.S. 632 (1896).[37] Because he is not guilty of the money laundering conspiracy charged, Mr. Svete's conviction on Count Two must be reversed and remanded for judgment of acquittal. Moreover, because the forfeiture judgment was triggered solely by the Count Two conviction, RE 277:27, the criminal forfeiture must be vacated as well.

VIII. THE SENTENCE ON EACH OF THE MAIL FRAUD COUNTS EXCEEDED THE APPLICABLE 60-MONTH STATUTORY MAXIMUM.

In Counts Three through Seven of the superseding indictment, appellant Svete was convicted of particular instances of mail fraud, in violation of 18 U.S.C. § 1341, on certain dates in 1999 and 2000. RE:277.[38] Specifically, the date of commission of Count Three was June 26, 1999; Count Four, July 24,

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[37] Santos itself arose under 28 U.S.C. § 2255, which requires a standard even more stringent than "plain error." See United States v. Frady, 456 U.S. 152, 164-67 (1982).

[38] Each mailing constitutes a separate count of mail fraud; the statute does not define a continuing offense. See United States v. Edmondson, 818 F.2d 768, 768 (11th Cir. 1987) (per curiam).

2000, Count Five, April 6, 2000, Count Six, July 21, 2000, and Count Seven, July 20, 1999.

From at least 1948 until 2002, the maximum sentence set by § 1341 for each count of mail fraud (if not alleged and proven to have affected a financial institution) was five years' imprisonment. On July 30, 2002, Congress amended § 1341 to raise that statutory maximum to 20 years per count. See Sarbanes-Oxley Act, Pub. L. 107-204, § 903(a), 116 Stat. 745, 804 (2002). Because the dates of commission of the substantive mail fraud counts all predate July 30, 2002, Mr. Svete was not subject to the increased maximum. See United States v. Paradies, 98 F.3d 1266, 1284 & n.33 (11th Cir. 1996) (although scheme was devised prior to effective date of amendment, its execution continued after; therefore, mailings subsequent to that date could be prosecuted as mail fraud under new § 1346 "honest services" statute).

Defendant Svete received a sentence of 200 months' imprisonment on each of Counts Three through Seven. RE:688(impos. sent.).[39] Because each of the mailing in those counts predated the amendment, the imposition of the higher maximum in violated U.S. Const., art. I, § 9, cl. 3, the Ex Post Facto Clause. United States v. Lightsey, 886 F.2d 304, 305 (11th Cir. 1989).

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[39] He was also sentenced to serve 200 months' imprisonment on Count Two, 60 months on Count One (the mail fraud conspiracy), and 120 months' on Count Eight through Ten, all concurrent. Each of these terms is for the statutory maximum, except on Count Two. The aggregate is thus 200 months' imprisonment.

An illegal sentence constitutes plain error. United States v. Clark, 274 F.3d 1325, 1329 (11th Cir. 2001).

Because the sentences on Counts Three through Seven are illegal, if any of appellant's mail fraud convictions is not reversed, the judgment must be vacated and the case remanded for resentencing to no more than five years on each of those counts.

CONCLUSION

As discussed under Points I and II, this case must be remanded for a new trial. Point III shows that the judgments on Counts Three through Ten should be vacated and remanded for entry of acquittals. At the least, appellant Svete is entitled to a resentencing.

Respectfully submitted,

Dated: August 22, 2008

s/Peter Goldberger

PETER GOLDBERGER
PAMELA A. WILK
50 Rittenhouse Place
Ardmore, PA 19003-2276

(610) 649-8200
fax: (610) 649-8362
e-mail: peter.goldberger@verizon.net

Attorneys for Appellant Svete

Of Counsel:
MICHAEL PASANO
Carlton Fields
4000 International Place
100 S.E. Second St.
Miami, FL 33131-2114

(305) 530-0050

CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (XyWrite vers. 4.07), that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) and this Court's Order dated July 18, 2008, in that the brief is prepared in a monospaced format (with no more than 10.5 characters to the inch) and contains fewer than 14,000 countable words, to wit, no more than 13,989 words.

__s/Peter Goldberger_____

CERTIFICATE OF SERVICE

On August 23, 2008, I served two copies of the appellant's en banc brief, on the attorneys for the appellee by FedEx second-day delivery (and by PDF attachment to e-mail), and a copy on the attorney for the related co-appellant, Priority postage prepaid, addressed to:

Nina S. Goodman, Esq.
Criminal Div., Appellate Section
U.S. Dept. of Justice
950 Pennsylvania Av., Suite 1264
Washington, DC 20530

Robert G. Davies, Esq.
Assistant U.S. Attorney
21 E. Garden St., Suite 400
Pensacola, FL 32502

E. Brian Lang, Esq.
E. Brian Lang and Assoc.
801 North Twelfth Ave.
Pensacola, FL 32501-2635

On August 23, 2008, I also deposited with FedEx, addressed to the Clerk of this Court, 16 copies of the appellant's en banc brief for filing on before 10:30 a.m. on August 25 pursuant to this Court's Order dated July 24, 2008.

_s/Peter Goldberger_____