DOCKET NO. 05-13809-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff / Appellee,

v.

DAVID W. SVETE and RON GIRARDOT,

Defendants / Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
DISTRICT COURT DOCKET NO. 3:04-CR-10-MCR
THE HONORABLE M. CASEY RODGERS

BRIEF ON REHEARING *EN BANC* FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel for the National Association of Criminal Defense Lawyers, appearing as *amicus curiae*, hereby certifies that, to the best of his knowledge and belief, the following listed persons have an interest in the outcome of this appeal:

1. Acosta, R. Alexander, United States Attorney for the Southern District of Florida;

2. Beard, Benjamin W., Assistant United States Attorney for the Northern District of Florida;

3. Booth, Edmund A., Jr., United States Attorney for the Southern District of Georgia;

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5. Davidson, Matthew, Defendant Svete's Trial Counsel;

6. Davies, Robert G., Assistant United States Attorney for the Northern District of Florida;

7. Davis, Miles, United States Magistrate Judge;

8. Girardot, Ron, Defendant-Appellant;

9. Goldberger, Peter, Defendant Svete's Appellate Counsel;

10. Goodman, Nina, Attorney, United States Department of Justice;

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12. Lang, E. Brian, Defendant Girardot's Trial and Appellate Counsel;

13. Martin, Alice H., United States Attorney for the Northern District of Alabama;

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15. Monnin, Paul N., Of Counsel to *Amicus Curiae* National Association of Criminal Defense Lawyers;

16. Moran, H. Thomas, Court-Appointed Receiver;

17. Nahmias, David E., United States Attorney for the Northern District of Georgia;

18. O'Neill, Robert E., United States Attorney for the Middle District of Florida;

19. Pasano, Michael S., Defendant Svete's Trial Counsel;

20. Rhodes, Deborah J., United States Attorney for the Southern District of Alabama;

21. Rodgers, M. Casey, United States District Judge;

22. Rotker, Michael A., Attorney, United States Department of Justice;

23. Samuel, Donald F., Attorney for *Amicus Curiae* National Association of Criminal Defense Lawyers;

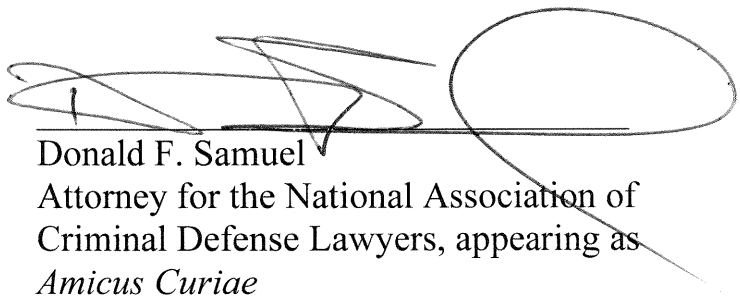
24. Svete, David W., Defendant-Appellant;

25. Wilk, Pamela A., Defendant Svete's Appellate Counsel;

26. Wilson, E. Bryan, Assistant United States Attorney for the Northern District of Florida;

27. Wood, Maxwell, United States Attorney for the Middle District of Georgia; and

28. Individual victims identified in the record at District Court Doc. 576.



Donald F. Samuel
Attorney for the National Association of Criminal Defense Lawyers, appearing as *Amicus Curiae*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a District of Columbia nonprofit corporation with more than 13,000 members nationwide, including both public and private defenders, active United States military defense counsel, law professors, and judges. NACDL's ninety state, local and international affiliate organizations comprise some 35,000 members in all fifty states. The American Bar Association recognizes NACDL as an affiliate organization and accords it full representation in its House of Delegates. Founded in 1958, NACDL promotes study and research in the field of criminal law and procedure, disseminates and advances legal knowledge in the area of criminal justice and practice, and encourages the integrity, independence and expertise of criminal defense lawyers in the state and federal courts.

To promote the proper administration of justice and appropriate measures to safeguard the rights of all persons involved in the criminal justice system, NACDL files approximately thirty-five *amicus* briefs per year in state and federal appeals courts, including at least ten *amicus* briefs in the United States Supreme Court, on a variety of criminal justice issues affecting the vital interests of its members and their clients. NACDL has appeared as an *amicus* in this Court in such cases as *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001) (*en banc*); *United States*

v. Dicter, 198 F.3d 1284 (11th Cir. 1999); *United States v. Nunez*, 801 F.2d 1260 (11th Cir. 1986); *United States v. Lignarolo*, 770 F.2d 971 (11th Cir. 1985); and *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. 1982).

NACDL has filed this *amicus* brief in support of appellants and in connection with this Court's *en banc* rehearing of their appeal because the central issue – whether the government must prove beyond a reasonable doubt that a scheme or artifice to defraud for purposes of the federal mail fraud statute, 18 U.S.C. § 1341, was "reasonably calculated to deceive a person of ordinary prudence and comprehension" – is one of signal importance in demarcating the boundary between, as this Court observed in *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996), conduct that is merely unethical from that which is truly unlawful and hence worthy of criminal interdiction, particularly given the statute's broad language and otherwise inclusive ambit. Further, this issue permeates the other federal fraud statutes within Title 18 that require proof beyond a reasonable doubt of a defendant's willful devising, participation in, or execution of a scheme or artifice to defraud as a predicate to criminal liability. *See, e.g.*, 18 U.S.C. § 1343 (wire fraud); 18 U.S.C. § 1344 (bank fraud); 18 U.S.C. § 1347 (health care fraud); 18 U.S.C. § 1348 (securities fraud); 18 U.S.C. § 2314 (travel in aid of fraud scheme); and 18 U.S.C. § 157 (bankruptcy fraud). Accordingly, because NACDL

has concluded, in light of its members' experience with the foregoing criminal statutes, that, absent a clear expression of Congressional intent, it is properly within the province of the jury, rather than the government, to police the line between conduct "that strays from the ideal," *Brown*, 79 F.3d at 1562, from that which is truly criminal, and also because its analysis and authorities differ somewhat from that presented by appellants, NACDL offers this brief in support of appellants in the hope of assisting the Court in resolving this critical issue.

All parties to this appeal consent to NACDL's appearance as *amicus curiae*.

STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED IN DECLINING TO INSTRUCT THE JURY THAT THE GOVERNMENT MUST PROVE THAT THE DEFENDANTS DEVISED OR PARTICIPATED IN A SCHEME TO DEFRAUD REASONABLY CALCULATED TO DECEIVE PERSONS OF ORDINARY PRUDENCE AND COMPREHENSION.

II. WHETHER THE *EN BANC* COURT SHOULD OVERRULE ITS EARLIER DECISION IN *UNITED STATES v. BROWN*, 79 F.3D 1550 (11TH CIR. 1996), THAT, ABSENT A FIDUCIARY RELATIONSHIP OR SIMILAR SPECIAL CIRCUMSTANCE, A SCHEME OR ARTIFICE TO DEFRAUD UNDER THE FEDERAL MAIL FRAUD STATUTE MUST BE REASONABLY CALCULATED TO DECEIVE PERSONS OF ORDINARY PRUDENCE AND COMPREHENSION.

SUMMARY OF THE ARGUMENT

As this Court observed in *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996), that a scheme to defraud be "reasonably calculated to deceive a person of ordinary prudence and comprehension" circumscribes the potentially all-encompassing scope of the federal fraud statutes by requiring, as a predicate to criminal liability, proof beyond a reasonable doubt that the defendant intended his victim's reasonable reliance. As such, application under *Brown* of a reasonably prudent person standard to the federal fraud statutes' scheme to defraud element ensures that the jury renders its verdict based in part on whether an objectively reasonable person would have acted on the misrepresentations or omissions in issue, and thus whether the defendant acted with the requisite degree of bad faith sufficient to warrant his conviction. It is not enough in this circuit to prove that the defendant's conduct was merely sharp or unethical; rather, the specific intent to defraud – as demonstrated by evidence that the defendant schemed to deceive ordinarily prudent persons – is required to find criminal liability.

This does not mean, however, that, should *Brown* be upheld, individuals are free to prey upon the gullible or the infirm in this circuit. While the relevant inquiry under *Brown* is whether an objectively reasonable person would have relied upon charged misrepresentations or omissions, this Court has ruled that such

analysis must consider the facts and circumstances underlying charged transactions, particularly including their effect on whether the alleged victim had access to relevant facts with which to dispute the validity of what he had been told or occupied a status (even short of a fiduciary relationship) that, under the circumstances, made him more susceptible to being taken in and therefore less likely to question the defendant's statements (or lack thereof).

Finally, *Brown*'s reasonably prudent person standard entrusts the jury with, in furtherance of its constitutional mandate, separating those schemes that are truly worthy of criminal prosecution from those that are more readily subject to civil or administrative interdiction. The jury already performs this function in connection with the essential elements of a defendant's specific intent to defraud and materiality under the federal fraud statutes, and there is no reason to doubt – indeed, there is every reason to believe – that juries are any less capable of vetting schemes to defraud by reference to whether they are reasonably calculated to deceive those of ordinary prudence and comprehension.

ARGUMENT AND CITATIONS OF AUTHORITY

I. REQUIRING THAT THE GOVERNMENT PROVE THAT A SCHEME OR ARTIFICE TO DEFRAUD WAS REASONABLY CALCULATED TO DECEIVE AN ORDINARILY PRUDENT PERSON ENSURES THAT A DEFENDANT'S ALLEGEDLY MANIPULATIVE PRACTICES ARE APPROPRIATELY SUBJECT TO CRIMINAL INTERDICTION

A. Standard of Review

Failure to give a requested jury instruction constitutes reversible error where, as here, the requested instruction: (1) was legally correct; (2) was not substantially covered by the charge actually given; and (3) dealt with some point in the trial so important that the failure to give it seriously impaired the defendant's ability to conduct his defense. *United States v. Chastain*, 198 F.3d 1338, 1350 (11th Cir. 1999); *United States v. Cornillie*, 92 F.3d 1108, 1109 (11th Cir. 1996). Each of these criteria is satisfied in this case because the district court's failure to instruct the jury that, per longstanding precedent repeatedly upheld by this Court, the government must prove as to the indictment's substantive mail fraud counts (and, relatedly, its Interstate Transportation of Stolen Property and conspiracy counts implicating the substantively charged mail fraud counts), that the defendants devised or participated in a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension seriously undercut their ability to mount their defense related to these charges.

B. *Brown*'s Gatekeeping Function

As this Court has observed, "The exercise of federal government power to criminalize conduct and thereby to coerce and to deprive persons, by government action, of their liberty, reputation and property must be watched carefully in a country that values the liberties of its private citizens." *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996). While the government has predictably asserted in its petition for rehearing *en banc* (and will presumably reiterate in its *en banc* response brief) that, in the context of the federal mail fraud statute, "any" scheme or artifice to defraud executed via use of the mails effectively includes and potentially criminalizes "all" such schemes, *see* Gov't's Pet. for Reh'g *En Banc* at 8-9 (citing *Ali v. Federal Bureau of Prisons*, 128 S. Ct. 831, 835-36 (2008), and *Jackson v. State Bd. Of Pardons and Parole*, 331 F.3d 790, 795 (11th Cir. 2003)), the inherent danger that the federal fraud statutes may thus be construed "to cover all behavior which strays from the ideal," *Brown*, 79 F.3d at 1562, is precisely what motivated this Court in *Brown* to circumscribe their prescriptive scope through application of a reasonably prudent person standard to their scheme to defraud element. As this Court observed in *Brown*: "The implications of allowing the federal fraud statutes to be treated by federal prosecutors as a largely unlimited

device to attack wrongdoing whenever prosecutors feel wrongdoing exists are extremely worrisome to us." *Id.*

This Court is hardly alone in articulating the view that "Congress has not yet criminalized all sharp conduct, manipulative acts, or unethical transactions," *id.*, and, as a result, in holding that, barring a fiduciary relationship or other special circumstance, only those schemes reasonably calculated to deceive persons of ordinary prudence and comprehension are criminally actionable under the federal fraud statutes. Indeed, prior to *Brown*, the Eighth Circuit reasoned that:

> It is true that the crime of mail fraud has been called broad in scope, but this does not mean that its net is so large as to catch all promotions that make money. Many shrewd advertising schemes are concocted to persuade the consumer into purchasing products of questionable worth. However, in all cases where mail fraud convictions have been affirmed, . . . [t]he schemes were proven to be illegal by evidence of affirmative misrepresentations or by evidence of nondisclosure manifesting an intent to defraud. . . . Without some objective evidence demonstrating a scheme to defraud, all promotional schemes to make money, even if sleazy or shrewd, would be subject to prosecution on the mere whim of the prosecutor. More is required under our criminal law.

United States v. Goodman, 984 F.2d 235, 239-40 (8th Cir. 1993) (internal quotations and citations omitted); *see also United States v. Winkle*, 477 F.3d 407, 413 (6th Cir. 2007) (quoting *United States v. Yoon*, 128 F.3d 515, 523-24 (7th Cir. 1997), for the proposition that, "[b]ecause direct evidence of a defendant's fraudulent intent is typically not available, specific intent to defraud may be

established by circumstantial evidence and by inferences drawn from examining the scheme itself[,] which demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension").

In this Circuit, as in others, *Brown*'s reasonably prudent person standard thus mandates that the government come forward with competent and objective evidence establishing a scheme to defraud, denoted by bad faith and fundamental dishonesty – as distinct from sharp or merely unethical conduct – and that the jury enforce this standard by holding the government to its burden of proof beyond a reasonable doubt. *See Brown*, 79 F.3d at 1562 ("Although the line between unethical behavior and unlawful behavior is sometimes blurred – especially under the federal fraud statutes – we, in the absence of clear direction from Congress, conclude that the behavior established by the government's evidence in this case is not the kind that a reasonable jury could find, in fact, violated the federal fraud statutes"); *see also United States v. Holzer*, 816 F.3d 304, 309 (7th Cir. 1987) (rejecting a broad reading of the mail fraud statute to include whatever is not a "reflection of moral uprightness, of fundamental honesty, fair play and right dealing the general and business life of members of society[,]" which, "given the ease of satisfying the mailing requirement. . ., would put federal judges in the

business of creating what in effect would be common law crimes, *i.e.*, crimes not defined by statute") (citations and quotations omitted).

Moreover, contrary to the government's implication in moving for rehearing, *see* Gov't's Pet. for Reh'g *En Banc* at 3, while *Brown* has over time occasionally been distinguished *on its facts* (where, for example, the defendant was in exclusive possession of material information, *United States v. Schlei*, 122 F.3d 944, 966-67 (11th Cir. 1997), or where circumstances plainly dictated that the victim was entitled to rely on the defendant's good faith, *United States v. Twitty*, 107 F.3d 1482, 1492-93 (11th Cir. 1997)), subsequent panels of this Court have continually and universally upheld the standard that, barring a fiduciary or other special relationship, a gatekeeper to liability under the federal fraud statutes is proof beyond a reasonable doubt that the defendant's scheme was designed to deceive an ordinarily prudent individual. *See generally United States v. Ross*, 131 F.3d 970, 986 (11th Cir. 1997); *United States v. Hasson*, 333 F.3d 1264, 1270-71 (11th Cir. 2003); *United States v. Yeager*, 331 F.3d 1216, 1221 (11th Cir. 2003); *United States v. Ward*, 486 F.3d 1212, 1222 (11th Cir. 2007); and *United States v. Williams*, 527 F.3d 1235, 1245 (11th Cir. 2008). So too have other federal courts of appeal. *See United States v. Brandon*, 17 F.3d 409, 425 (1st Cir. 1994); *United States v. Coyle*, 63 F.3d 1239, 1243-44 (3d Cir. 1995); *United States v. Jamieson*,

427 F.3d 394, 415 (6th Cir. 2005); *United States v. Yoon*, 128 F.3d 515, 523-24 (7th Cir. 1997); *United States v. Hawkey*, 148 F.3d 920, 924 (8th Cir. 1998); and *United States v. Shepard*, 396 F.3d 1116, 1124 (10th Cir. 2005).

In other words, contrary to the government's characterization, subsequent panels of this Court have neither been called upon to extend nor to "revive" *Brown*, but rather to apply it. And prior holdings within this Circuit that the government's evidence was plainly sufficient to establish that a defendant schemed to defraud victims of ordinary prudence and comprehension, *see, e.g.*, *Schlei*, 122 F.3d at 966-67, do nothing to lessen *Brown*'s impact or enforceability. *See, e.g.*, *Hasson*, 333 F.3d at 1271 (applying yet distinguishing *Brown* on the basis that the defendant's "conduct simply cannot be analogized to the mere misrepresentation of accessible market values which, as we held in *Brown*, could not be reasonably calculated to induce purchase by a person of ordinary prudence").

C. The District Court's Failure to Instruct Under *Brown* Materially and Unlawfully Impacted Appellants' Defense

Whether a scheme to defraud was calculated to deceive an objectively reasonable person is, under *Brown*, a question of fact for the jury; the trial court and this Court's role being limited to whether, based on the evidence presented, a rational jury could have returned a favorable government verdict. *See, e.g.*, *Ross*, 131 F.3d at 986 (applying rational juror standard to scheme to defraud and

reasonably prudent person evidence); *accord Williams*, 527 F.3d at 1244; Fed. R. Cr. P. 29.[1] Here, however, in denying defendant Svete's proposed instruction under *Brown*, the district court impermissibly deprived appellants of the chance to argue, specifically by reference not only to the evidence but also, and equally if not more important in federal fraud trials invariably involving hotly contested issues of intent (and thus where lay jurors can be expected to give particular deference to the district court's legal instructions on the mental state required to convict), to an instruction expressly implicating the jury's assessment of whether ordinarily prudent investors either would not or objectively should not have relied upon the representations of independent agent salespersons related to viator life expectancy

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[1] While there are certain circumstances, such as those involving mere "puffing" or "seller's talk," that are plainly beyond the purview of the federal fraud statutes, *United States v. Martinelli*, 454 F.3d 1300, 1317 (11th Cir. 2006), or, conversely, breaches of fiduciary duty or other similar special circumstance wherein "a reasonable person is always permitted to rely," *Brown*, 79 F.3d at 1557, those otherwise highly fact intensive assessments of intent and reasonable reliance that are perforce bound up in federal fraud prosecutions are uniquely within the jury's prerogative. *Gray*, 367 F.3d at 1269 n.17; *see also Yeager*, 331 F.3d at 1221 ("[T]he elements of reasonable reliance and materiality analytically overlap; both concern the expected effectiveness of the misrepresentations, and it is difficult to describe precisely which element is fulfilled by different forms of proof and argument"). Accordingly, in declining to deliver an objective reasonableness instruction under *Brown*, based in substantial part on its own conclusions regarding the degree of information otherwise available to investors (which in any event was *not* appellants' theory of defense related to whether they engaged in a scheme to defraud), the district court improperly invaded the jury's province, and their convictions on all counts directly or indirectly implicating this intent element must be reversed.

in the face of contract language plainly disclosing the risks of investment (including investor liability for premium payments should a viator outlive his or her life expectancy).

While the district court's delivery of this circuit's pattern mail fraud instruction appropriately advised the jury that it had to find both appellants' execution of a scheme to defraud – denoted by a plan to deceive or to cheat another out of money or property – as well as their devising of and participation in said scheme with the specific intent to defraud, the instructions impermissibly excluded the companion charge that a legally necessary hallmark of such schemes, and a required attribute of culpable intent, is that they reflect the design to deceive or cheat persons of reasonable prudence. In other words, given the inherently abstract nature of a "scheme to defraud" under the federal mail fraud statute (notwithstanding the further requirement that the scheme implicate the specific intent to deceive or to cheat for purposes of obtaining money or property, *see* Eleventh Circuit Judicial Council, *Pattern Jury Instructions (Criminal Cases)*, No. 50.1, at 282 (West 2003)), application of the companion standard – repeatedly upheld by this Court and numerous of its sister circuits – that the scheme be reasonably calculated to deceive persons of ordinary prudence and comprehension

gives structure to the jury's assessment of what is often a plethora of putative intent evidence and discipline to the government's advocacy in relation to that evidence.

Simply put, by distinguishing those schemes that are worthy of reliance from those that are not, *Brown*'s requirement of objective reasonableness indisputably advances the jury's evaluation of intent, and, as a result, its delineation of what is truly deserving of criminal sanction from that which is more appropriately subject to the assessment of administrative penalties or an award of civil damages.

II. REQUIRING THAT A SCHEME OR ARTIFICE TO DEFRAUD BE REASONABLY CALCULATED TO DECEIVE THOSE OF ORDINARY PRUDENCE AND COMPREHENSION DOES NOT IMPERMISSIBLY ASCRIBE BLAME TO THOSE WHO HAVE BEEN DEFRAUDED

A. *Brown* Did Not Engraft an Actual Reliance Element Onto the Federal Fraud Statutes

As reflected repeatedly in its petition for *en banc* rehearing, *see* Gov't's Pet. for Reh'g *En Banc* at 2-3, 10-15, principal among the government's anticipated challenges to *Brown* is its assertion that continued application of a reasonably prudent person standard impermissibly shifts the factfinder's analysis from the defendant to his victims, effectively putting them on trial. In making this claim, however, the government conflates "justifiable reliance" – always an essential element of the federal fraud statutes – with "actual reliance" – which has never been required. *See generally Yeager*, 331 F.3d at 1221-22 (citing *Pelletier v.*

Zweifel, 921 F.2d 1465, 1498 (11th Cir. 1991)). While the Supreme Court noted in *Neder v. United States* that the "common law requirement[] of 'justifiable reliance' . . . plainly ha[s] no place in the federal fraud statutes[,]" 527 U.S. 1, 24-25 (1999), in context, it is clear that the Court was focused on *actual* reliance, *not* on whether charged misrepresentations or material omissions were reasonably capable of inducing reliance. *See id.* at 25 (citing *United States v. Stewart*, 872 F.2d 957, 960 (10th Cir. 1989), for the proposition that the government does not have to prove *actual reliance* upon the defendant's misrepresentations, and further noting that a showing of actual reliance, *i.e.*, a hallmark of a completed fraud, "would clearly be inconsistent with the [federal fraud] statutes Congress enacted").

Indeed, since *Neder*, both this Court and others have concluded that reasonable reliance – that is, whether the charged scheme was *worthy* of reliance, not whether it *actually succeeded* in inducing reliance – is plainly an essential element of liability under the federal fraud statutes. *See, e.g., Hasson*, 333 F.3d at 1271 ("[N]ot all misrepresentations or omissions constitute a scheme to defraud; the misrepresentation or omission must be material *and it must be one on which a person of ordinary prudence would rely*") (emphasis supplied); *Williams*, 527 F.3d at 1245 (noting that the government merely needs to show that the accused intended to defraud his victim and that his or her communications were reasonably

calculated to achieve this end); *see also United States v. Jamieson*, 427 F.3d 394, 415 (6th Cir. 2006) ("A plain reading of *Neder* thus indicates that the Supreme Court did not intend to remove the requirement that misrepresentations be worthy of reliance or credence"); *United States v. Welch*, 327 F.3d 1081, 1106 (10th Cir. 2003) (that a scheme to defraud be reasonably calculated to deceive ordinarily prudent persons is not inconsistent with *Neder*'s rejection of justifiable reliance). This is not to say that the government must prove that the victim was actually deceived or that the scheme was in fact successful (neither of which is an element of federal fraud liability, *Ross*, 131 F.3d at 970), but rather that, as a predicate to liability, the government must show that the defendant intended his victim's reasonable reliance. *See generally Gray*, 367 F.3d at 1269 ("All that the Government needs to show to establish the *mens rea* element of the offense is that the defendant anticipated the intended victim's reliance").

B. *Brown*'s Standard of Objective Reasonableness Serves as Both a Relevant and Necessary Proxy from Which to Infer Intent

It follows that, as required by *Brown*, whether an objectively reasonable person would have acted on charged misrepresentations or material omissions (but not that the alleged victims in fact so relied) is a necessary element under the federal fraud statutes not only because application of this standard polices the border "between real fraud and sharp dealing," *United States v. Coffman*, 94 F.3d

330, 334 (7th Cir. 1996), but also because it "guide[s] the jury in evaluating circumstantial evidence of fraudulent intent" *Id.* Put simply, "that the defendant's scheme was calculated to deceive a person of ordinary prudence is some evidence that it was intended to deceive." *Id.*

Here, the district court failed to instruct the jury that, per *Brown*, the government was obligated to show reasonable reliance in connection with the charged investment representations as an embodiment of the appellants' intent. That is, appellants were denied the opportunity to assert – by reference to an express instruction from the trial court – that the government had to prove beyond a reasonable doubt that an objectively reasonable person would have relied solely upon the oral representations in issue, rather than upon these representations in combination with – or, more accurately, in the face of – plainly worded risk disclosures otherwise set forth by contract. *See Winkle*, 477 F.3d at 413 ("Because direct evidence of a defendant's fraudulent intent is typically not available, specific intent to defraud may be established by circumstantial evidence and by inferences drawn from examining the scheme itself[,] which [should] demonstrate that the scheme was reasonably calculated to deceive persons of ordinary prudence and comprehension") (internal quotations and citation omitted). As such, the jury's examination of this critical facet of appellants' good faith – and its companion

obligation to find that it was reasonable for investors to rely upon an oral sales pitch (made by individuals other than the defendants) in the face of contrary contract language affirmatively disclosing the risks of investment – was improperly (and indeed illegally) foreclosed in this case.

C. Upholding *Brown* Will Hardly Result in Open Season on the Gullible or the Infirm

As noted above, the government's principal objection herein is that, read literally, *Brown*'s reasonably prudent person standard "excludes from the statute's protective reach the most vulnerable segments of the populace." Gov't's Pet. for Reh'g *En Banc* at 2. That is, individuals of either below-average intelligence or above-average gullibility, or both. In *Brown*, however, this Court expressly ruled that "[t]he 'person of ordinary prudence' standard is an *objective standard* not directly tied to the experiences of a specific person or persons." 79 F.3d at 1557 (emphasis in original). As such, the relevant inquiry under *Brown* is not with regard to the alleged victim's subjective intelligence, gullibility or ability to withstand risk,[2] but rather whether an objectively reasonable person would, under

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[2] It is critical to note that, "risk-aversion and reasonableness are not necessarily the same thing." *Gray*, 367 F.3d at 1270 n.18. Indeed, risk aversion has no place in the jury's analysis of whether a scheme was reasonably calculated to deceive persons of ordinary comprehension because otherwise reasonable individuals may possess markedly different risk profiles. It follows that "[t]o confuse reasonable behavior for risk-preferences could have troubling implications

similar circumstances, have relied upon the charged misrepresentations or material omissions. *Hasson*, 333 F.3d at 1271; *Gray*, 367 F.3d at 1269.[3]

Contrary to the government's assertion, then, *Brown*'s "'reasonable person' language has two purposes, neither of which has anything to do with declaring open season on the people most likely to be targets of fraud." *Coffman*, 94 F.3d at 334. The first, as noted above, is to serve as a means by which to assess the defendant's intent. *Id.* The second is to separate those misrepresentations "that, being so commonplace as to be 'normal,' [are] not likely to fool anyone." *Id.* These include lies so small or inconsequential that they are categorically discounted as part of ordinary (albeit aggressive) commercial language, as distinct from the

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in myriad mail fraud situations, *e.g.*, would liability attach in a Ponzi [scheme] where only reasonable people, albeit reasonable people with a certain tolerance for risk, would be swayed while reasonable people who are more risk averse would stay away?" *Id.*

[3] Indeed, while the government complains that *Brown*'s continued application in this circuit will inexorably victimize the weak and the infirm, it ignores the fact that an appeal to *subjective* reasonableness in those instances in which the putative victim (typically a business entity) is both resourceful and well-advised, yet has refused (often due either to greed or simply not being mindful of fraud) to press its advantages in relation to the charged transaction, would also, and equally anomalously, absolve the defendant of liability. In other words, requiring that a scheme be designed to deceive the *ordinarily* prudent victim corrals the argument in large fraud schemes (*i.e.*, those typically involving either spectacular gains the avoidance of spectacular losses) that the defendant is any less culpable simply because the hyper-sophisticated and well-counseled victim declined to take advantage of its resources. Simply put, "it is not a defense that the intended victim was too smart to be taken in." *Coffman*, 94 F.3d at 333.

extraordinary (or simply abnormal) representation made with the intent – and couched in a set of circumstances – to induce reasonable reliance. *See id.* (declining to foreclose wire fraud liability where the "lies [are] so large that the sophisticated see through them").

In practice, this means it is objectively *unreasonable*, and hence not in furtherance of a scheme to defraud, to rely upon representations the accuracy of which could easily, and again objectively, be confirmed by reference to readily available external sources. *See Brown*, 79 F.3d at 1559 (citing cases); *see also Hasson*, 333 F.3d at 1271 ("nor would a person of ordinary prudence engaged in an arm's-length purchase rely on the seller's representations regarding the market value of the property when the market value can be, and should be, easily verified by consulting other sources"). Conversely, it is inherently *reasonable* to rely, as this Court has repeatedly held since *Brown*, and thus for a rational jury to find liability: (1) where the property in issue was not readily accessible to the victims, *Schlei*, 122 F.3d at 966-67; (2) where, under the circumstances, the victim was entitled to rely upon the defendant's good faith, *see Williams*, 527 F.3d at 1245 (grantor-grantee relationship); *Twitty*, 107 F.3d at 1493 (lender-debtor relationship); (3) where the defendant made hundreds of separate misrepresentations over the course of his fraud scheme, *Hasson*, 333 F.3d at 1271;

(4) where the defendant lied about material information neither accessible nor subject to the victim's external verification, *Yeager*, 331 F.3d at 1222; or (5) where the defendant promised to engage in illegal activity also plainly not subject to the victim's verification, *Gray*, 367 F.3d at 1270-71.

Accordingly, in applying *Brown*, subsequent panels of this Court have assessed its reasonably prudent person standard by reference not only to the relationship between the defendant and his intended victim, but also the particular circumstances underlying their course of dealings. As one such panel has noted:

> [A]s a practical matter, even the objective, reasonable person of ordinary prudence standard must be anchored in reality and connected to the material circumstances surrounding the victim or the intended victim of a scheme to defraud if it is to serve a useful function in guiding a jury's deliberations. *Stated differently, if a jury could not take into account the material circumstances surrounding a scheme to defraud, almost no mail fraud conviction could be upheld in cases where the victim faced a 'peculiar situation' far removed from the circumstances with which most people of ordinary prudence are generally familiar, and where . . . the defendant tailored his scheme to defraud that particular individual because of the unique circumstances confronting the victim.* We do not see *Brown* as extending so far as to require an instruction that a jury may not consider the targeted victim's circumstances although those circumstances are relevant to establishing whether the defendant had the requisite intent to defraud the victim.

Id. at 1272-73 (emphasis added).

It follows that in examining whether a scheme to defraud was reasonably calculated to deceive ordinarily prudent individuals (or entities) *in the same*

circumstances as those presented by indictment, the jury is neither at liberty to discount the victim's unique circumstances – including, potentially, his susceptibility (under the circumstances) to being defrauded – nor the unique circumstances surrounding the parties' interaction. "Otherwise fraudulent schemes aimed at people who find themselves in extraordinary situations would always lie beyond the purview of the criminal statutes penalizing fraud because the jury could only consider whether a given scheme to defraud would have deceived a person of ordinary prudence and not a person 'under the same circumstances' faced by the fraud victim." *Id.* at 1272 n.20. Rather, under applicable authority within this circuit, the jury must consider such circumstances – including their effect on whether the victim either already was or had become more trusting and therefore less likely to question the validity of the defendant's representations – in evaluating whether a charged fraud scheme is appropriately subject to criminal sanction. In short, the applicable analysis under *Brown* and its progeny is whether the putative victim acted reasonably under the circumstances – as any other objectively reasonable victim would have in the same circumstances – in relying upon charged misrepresentations or omissions. Far from declaring open season on the gullible or the infirm, then, this standard mandates jury consideration of the factors underlying

the victim's circumstantial disabilities and, moreover, whether the defendant tailored his scheme to prey upon these weaknesses.

III. *BROWN* IS NEITHER IN TENSION WITH *NEDER v. UNITED STATES*, 527 U.S. 1 (1999), NOR THIS CIRCUIT'S PATTERN INSTRUCTION ON MATERIALITY, BOTH OF WHICH DEFINE A SCHEME TO DEFRAUD BY REFERENCE TO WHETHER IT IS CAPABLE OF INFLUENCING ORDINARILY PRUDENT INDIVIDUALS

Finally, the government's opposition to the continued application of *Brown*'s reasonably prudent person standard in many ways echoes its opposition to the Supreme Court's holding in *Neder* that materiality is an essential element under the federal fraud statutes. 527 U.S. at 24-25. There, as here, the government reasoned that, because the federal fraud statutes punish not only successfully completed schemes to defraud, but also the devising of or participation in said schemes that precedes their execution, "criminal liability . . . exist[s] so long as the defendant intended to deceive the victim, even if the particular means chosen turn out to be immaterial, *i.e.*, incapable of influencing the intended victim." *Id.* at 24. In other words, according to the government in *Neder* and once again here, the federal fraud statutes punish the intent to defraud without regard to whether the scheme in issue was capable of deceiving anyone. The Supreme Court, of course, rejected this contention in *Neder*, *see id.* at 25 (finding that, while neither actual reliance nor damages are elements of the federal fraud statutes, materiality is indeed a required

element), and it makes no sense to revive it in this context, particularly given the "analytical[] overlap" between materiality and reasonable reliance. *Yeager*, 331 F.3d at 1221; *see also Pattern Jury Instructions (Criminal Cases)*, No. 50.1, at 282 (noting that a "material" fact "has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to whom or to which it is addressed").

Aside from the fact that materiality, and hence reasonable reliance, is an essential element under the federal fraud statutes, neither a purported misrepresentation's materiality nor the reasonability of relying on it are assessed by reference to the *subjective* understanding of the person or entity to whom it is directed. *See Brown*, 79 F.3d at 1557 (reasonably prudent person standard is one of objective reasonableness); *accord Hasson*, 333 F.3d at 1271; *Gray*, 367 F.3d at 1269. Indeed, following *Neder*, this Court's pattern mail fraud instruction (as well as its pattern wire and bank fraud charges) expressly provides as follows with regard to materiality:

> A "material fact" is a fact that would be important to a *reasonable person* in deciding whether to engage or not to engage in a particular transaction. . . . a false or fraudulent statement, representation or promise can be material even if the decision maker did not actually rely on the statement, or even if the decision maker actually knew or should have known that the statement was false.

Pattern Jury Instructions (Criminal Cases), No. 50.1, at 282 (emphasis supplied); *see also Yeager*, 331 F.3d at 1222 (noting that the "Supreme Court in *Neder* . . . define[d] a material matter fundamentally [by reference] to an objective test"). Thus, the misrepresentation must have been capable of influencing the conduct of a reasonable person in the victim's shoes (*i.e.*, reasonable reliance), regardless of whether the intended victim in fact relied or failed to rely because he knew the truth underlying the charged assertions or omissions (*i.e.*, actual reliance).

Moreover, following *Neder*, materiality is a jury question that, under this circuit's pattern instructions, is evaluated by reference to whether a charged misrepresentation or omission was capable of influencing the behavior of a reasonable person. *Id.*; *see also Neder*, 527 U.S. at 24. Accordingly, in passing on materiality, trial juries in this circuit are routinely called upon (notably without the dire consequences predicted by the government) to make much the same factual assessment as that required by *Brown*; *i.e.*, whether the misrepresentations or omissions in issue would have been important to an objectively reasonable person in the victim's shoes and, to that end, whether they were also reasonably capable of deceiving the same ordinarily prudent individual. In other words, the Supreme Court's ruling in *Neder* (coupled with this Court's holding on remand, *see United States v. Neder*, 197 F.3d 1122, 1128-29 (11th Cir. 1999)), imposes much the same

jury obligation with respect to materiality that *Brown* and its progeny impose with respect to the mail fraud statute's scheme to defraud element; namely, that the government must prove beyond a reasonable doubt, and the jury must so find, that the charged scheme was reasonably calculated to influence the behavior of an ordinarily prudent victim, regardless of whether the scheme in fact succeeded.

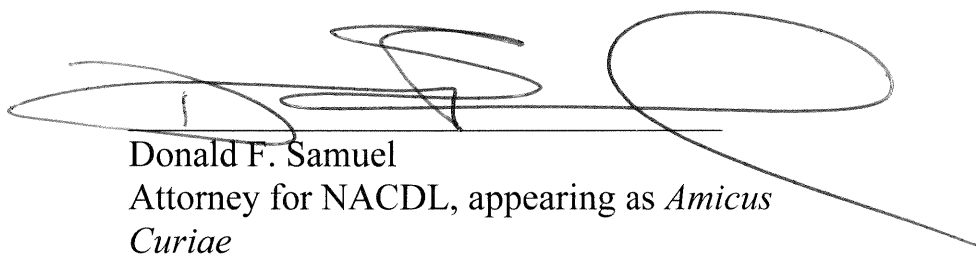
It makes little sense, then, to on the one hand entrust the jury with the duty of finding materiality as an objectively reasonable construct under *Neder*, while on the other depriving it of the companion obligation to find that the alleged scheme to defraud was reasonably calculated to deceive an objectively reasonable person. Both a "scheme to defraud" and "materiality" are essential elements under the federal fraud statutes, and, as such, the facts supporting both must – in conjunction with appropriate legal instructions – be submitted to the jury's deliberation and verdict.

CONCLUSION

Based upon the foregoing argument and authority, NACDL respectfully submits that the district court erred in failing to instruct the jury that a scheme to defraud under the federal mail fraud statute, 18 U.S.C. § 1341, must be reasonably calculated to deceive persons of ordinary prudence and comprehension. This error substantially prejudiced appellants' ability to conduct their defense because it

invaded the jury's province and deprived it of the opportunity to render a verdict on a critical element not only of the substantive mail fraud charges in issue, but also each of the other indicted counts that implicated mail fraud as a predicate showing.

More broadly, this Court should not overrule *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996), because its mandate that the government elicit proof beyond a reasonable doubt that an alleged scheme was designed to deceive ordinarily prudent individuals separates those schemes that are denoted by bad faith and fundamental dishonesty from those that involve merely sharp or unethical conduct. In this circuit, it is only the former that are deserving of criminal interdiction, and *Brown*'s reasonably prudent person standard is a necessary aid to the jury in making this determination.



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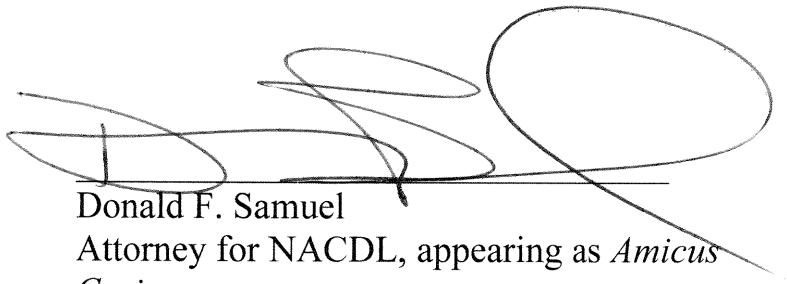
CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) because it contains 6,322 words, excluding those parts of the brief exempted by Rule 32(a)(7)(B)(iii). I further certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) in that it has been prepared in proportionally spaced face, using Times New Roman font and 14-point type.



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CERTIFICATE OF SERVICE

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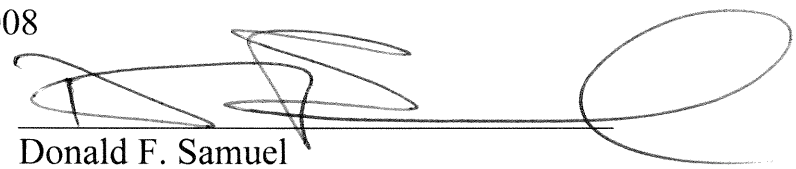

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