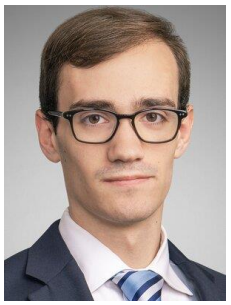
LAW360

Portfolio Media. Inc. | 230 Park Avenue, 7th Floor | New York, NY 10169 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Tricky Venue Issues Persist In Fortenberry Prosecution Redo

By **Kevin Coleman** (July 10, 2024, 3:55 PM EDT)


Kevin Coleman

On May 8, a federal grand jury in the U.S. District Court for the District of Columbia indicted former Rep. Jeff Fortenberry, R-Neb., for alleged violations of Title 18 of the U.S. Code, Section 1001.

As alleged, during two 2019 meetings with FBI investigators, Fortenberry made false statements to the agents, denying awareness of unlawful contributions to his 2016 reelection campaign. The first meeting occurred in Washington, D.C.; the second occured in Nebraska.

This indictment follows a December 2023 ruling by the U.S. Court of Appeals for the Ninth Circuit overturning Fortenberry's 2022 conviction in the U.S. District Court for the Central District of California for the same conduct.[1]

In his 2023 appeal, Fortenberry argued that his trial and conviction in California violated the U.S. Constitution because the crimes alleged were not committed in California, even though California was the location of the FBI investigation and of a fundraiser at which the illegal contribution activity took place.[2]

The Ninth Circuit agreed, holding that Fortenberry's prosecution in California violated the Constitution's venue clause.[3]

Article III, Section 2, of the Constitution instructs that "[t]he Trial of all Crimes ... shall be held in the State where the said Crimes shall have been committed."

Under current U.S. Supreme Court precedent, as articulated in its 1946 U.S. v. Anderson decision, one determines where a crime was committed by ascertaining the "locus delicti" of the offense, looking to "the nature of the crime alleged and the location of the act or acts constituting it."[4]

As the Supreme Court wrote in its 1999 U.S. v. Rodriguez-Moreno decision, this analysis requires the identification and consideration of the "essential conduct elements" of an offense, whereas mere "circumstance element[s]" are ignored.[5] To identify an offense's essential conduct elements, one must consider the relevant statutory language, but cannot focus solely on the key verbs in the statute.[6]

Title 18 of the U.S. Code, Section 1001, provides in relevant part:

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully —

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry

shall be fined under this title, imprisoned not more than 5 years ... or both.

The government argued before the Ninth Circuit in Fortenberry that, under Section 1001, in addition to the making of the false statement — which all parties agreed was an essential conduct element — the statute's materiality requirement was also an essential conduct element.

Thus, according to the government, the locus delicti analysis permitted consideration of both where the statement was made and the location where the statement's effects could have been felt, i.e., where the investigation was based.[7]

Although multiple federal appellate courts have endorsed this view,[8] the Ninth Circuit disagreed.

In rejecting prosecutors' effects-based venue theory, the Ninth Circuit reasoned that "[m]ateriality is not conduct because it does not require anything to actually happen." Rather, the element "requires only that a statement have the capacity to influence a federal agency."[9]

Therefore, "the false statement offense is complete when the statement is made," and "does not depend on subsequent events or circumstances, or whether the recipient of the false statement was in fact affected by it in any way."[10]

The Ninth Circuit also emphasized "[t]he likelihood of highly problematic venue outcomes" associated with venue situated in potentially remote locations where no false statement was made, and that is only connected to the defendant by the happenstance of investigators' geographic presence there.[11]

Despite another recent rejection of an effects-based venue theory by the U.S. Court of Appeals for the Eleventh Circuit in 2022 in U.S. v. Smith,[12] and no existing Supreme Court precedent on whether effects-based venue is permissible,[13] the U.S. Department of Justice declined to appeal the Ninth Circuit's ruling in Fortenberry.

Instead, the DOJ reindicted the former representative in Washington, D.C., charging him under Section 1001(a)(2) for the Washington-based statements, and also under Section 1001(a)(1) for both the Washington- and Nebraska-based statements.

In the California case, Fortenberry was also charged under both Section 1001(a)(2) (making false statements) and Section 1001(a)(1) (false statements scheme). However, neither party argued that the venue analysis differed between the two charges. Therefore, the Ninth Circuit assumed the analysis and result was the same.[14]

Accepting the Ninth's Circuit's ruling that effects-based venue under Section 1001 is improper, how can the DOJ prosecute the Nebraska-based statements in Washington, D.C., but not in California?

The answer likely lies in the difference between Section 1001(a)(2) and Section 1001(a)(1).

Under the Ninth Circuit's analysis, venue for a Section 1001 charge cannot be based solely on the effects of a false statement or a false statements scheme.[15] But, at least where venue is based on the location of a defendant's acts — rather than on the effects thereof — the law is clear that under Title 18 of the U.S. Code, Section 3237(a), venue may be proper in multiple districts, and is permitted "in any district in which such offense was begun, continued, or completed."[16]

A violation of Section 1001(a)(2), which criminalizes the making of a materially false statement, will not typically occur in multiple districts if a court, like the Ninth Circuit, is unwilling to consider the effects of the statement.

A Section 1001(a)(1) scheme, however, is different. Rather than focus on the making of a statement, the scheme offense encapsulates a broader pattern of conduct or series of acts that, together, are calculated to conceal or falsify a material fact.[17] Naturally, such schemes may consist of actions taken at different times or in different locations.

In Fortenberry's case, the charged scheme includes conduct in the Washington, D.C., and Nebraska. Under Section 3237, the scheme is likely prosecutable in either location.[18]

In this sense, Section 1001(a)(1) is analogous to a conspiracy charge, for which it is well established that venue is proper for an entire conspiracy if the jury finds that an overt act in furtherance of the conspiracy occurred in the district of prosecution.[19]

In this regard, Section 1001(a)(1), strategically deployed, may give the government significant latitude in selecting a forum for prosecution, and could avoid potentially burdensome duplication of prosecutorial efforts in multiple districts.

Yet this result, while potentially consistent with analogous case law, can produce results that are arguably inconsistent with the purpose of the venue clause. Unlike the substantive elements of an offense, which must be proven beyond a reasonable doubt, venue need only be proven to a jury by the lesser standard of a preponderance of the evidence.[20]

Thus, in a case like Fortenberry's, a jury could find venue proper by accepting that the in-district conduct more likely than not occurred under the preponderance-of-the-evidence standard. As to the substantive offense, though, the jury could acquit on that same in-district conduct under the more stringent reasonable-doubt standard. And that same jury could convict relying solely on the out-of-district conduct as the substantive basis for guilt.

As such, using the DOJ's apparent approach in the Fortenberry case, a jury's factual basis for guilt in a false-statements-scheme prosecution could be based entirely on out-of-district conduct, without running afoul of the venue clause under existing law.

It is fair to question whether that might encourage prosecutorial forum-shopping, and whether that approach is inconsistent with the framers' desire to prevent the prosecution and conviction of

defendants for local conduct in distant and potentially hostile jurisdictions.[21]

At bottom, the Fortenberry case illustrates that Section 1001(a)(1) scheme charges, much like conspiracy counts, remain a powerful tool for federal prosecutors, enhancing the government's authority in venue and other areas, including potentially the admissibility of uncharged "crimes, wrongs, or acts" evidence under Rule 404(b) of the Federal Rules of Evidence,[22] and the calculation of the applicable statute of limitations.[23]

Thus, as the DOJ continues to invoke Section 1001(a)(1), defense counsel should (1) be mindful of the distinct attributes of the statute, (2) consider the potential effects of those attributes on the facts at hand, and (3) be ready to evaluate the feasibility of contesting and narrowing the scope of an alleged scheme wherever reasonably possible.

Notably, existing case law has not clearly defined the outer boundaries of a Section 1001(a)(1) scheme. Does a scheme exist whenever a defendant makes more than one false statement? What additional conduct is required beyond that which would violate Section 1001(a)(2)?

In short, when does a statement become a scheme?

Reflexive reliance by the government on a Section 1001(a)(1) scheme charge, and the procedural advantages it may present, carries meaningful risk. Courts have not hesitated to reject novel conceptions of venue, including for other scheme-based offenses, such as wire and mail fraud.[24]

And as white collar practitioners know well, the Supreme Court has often overturned convictions that relied on expansive prosecutorial theories in white collar cases. Whether that will hold true in Fortenberry and similar cases remains to be seen.

Kevin Coleman is an associate at Covington & Burling LLP.

[1] See United States v. Fortenberry, 89 F.4th 702 (9th Cir. 2023).

[2] Id. at 704-05.

[3] Id. at 713.

[4] United States v. Anderson, 328 U.S. 699, 703 (1946).

[5] United States v. Rodriguez-Moreno, 526 U.S. 275, 279-82 (1999).

[6] See id. at 279-80 (rejecting application of so-called "verb test").

[7] See Fortenberry, 89 F.4th at 706.

[8] See, e.g., United States v. Oceanpro Indus., Ltd., 674 F.3d 323, 329 (4th Cir. 2012); United States v.

Coplan, 703 F.3d 46, 79 (2d Cir. 2012); United States v. Ringer, 300 F.3d 788, 791-92 (7th Cir. 2002).

[9] Fortenberry, 89 F.4th at 707.

[10] Id.

[11] Id. at 709.

[12] United States v. Smith, 22 F.4th 1236 (11th Cir. 2022).

[13] See Rodriguez-Moreno, 526 U.S. at 279 n. 2.

[14] Fortenberry, 89 F.4th at 706 n.2.

[15] See Fortenberry, 89 F.4th at 707.

[16] See also Rodriguez-Moreno, 526 U.S. at 281 (citing United States v. Lombardo, 241 U.S. 73, 77 (1916)).

[17] See United States v. Menendez, 291 F. Supp. 3d 606, 638-39 (D.N.J. 2018).

[18] See Menendez, 291 F. Supp. 3d 638.

[19] See, e.g., United States v. Brodie, 524 F.3d 259, 243 (D.C. Cir. 2008).

[20] Id.

[21] See Smith v. United States, 599 U.S. 236, 246-49 (2023) (describing the historical context of the Venue Clause).

[22] See United States v. Mermelstein, 487 F. Supp. 2d 242, 263-64 (E.D.N.Y. 2007) (recommending admission of uncharged false statements outside limitations period to show, inter alia, "the origins of the [false statements] scheme charged in the indictment as well as its scope").

[23] See United States v. Saffarinia, 424 F. Supp. 3d 46, 59-60 (D.D.C. 2020); United States v. Craig, 401 F. Supp. 3d 49, 75-76 (D.D.C. 2019); United States v. Menendez, 137 F. Supp. 3d 688, 698-700 (D.N.J. 2015); Mermelstein, 487 F. Supp. 2d at 256. But see United States v. Mubayyid, 567 F. Supp. 2d 223, 240-41 (D. Mass. 2008).

[24] See, e.g., United States v. Jeferson, 674 F.3d 322, 367-69 (4th Cir. 2012) ("scheme" element in §1343 is "circumstance element" and cannot form basis for venue where wire was not transmitted); United States v. Ramirez, 420 F.3d 134, 144-45 (2d Cir. 2005) (same, for mail fraud).