No. 06-1325

In the Supreme Court of the United States

HUBERT GARLAND EVANS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
KIRBY A. HELLER
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether a telefax sent by a victim of petitioner's scheme to confirm a meeting about past-due invoices formed part of a "lulling" communication, and thus was "for the purpose of executing the fraudulent scheme," pursuant to the wire fraud statute (18 U.S.C. 1343).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-15) is reported at 473 F.3d 1115. An earlier order of the district court (Pet. App. 16-39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 2006. A petition for rehearing was denied on January 31, 2007 (Pet. App. 40-41). The petition for a writ of certiorari was filed on March 30, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343. He

was sentenced to 18 months of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed.

1. Petitioner owned and operated Jagar Limited (Jagar), a Bahamian company that imported and distributed produce in the Bahamas. Jagar's principal supplier was Produce Direct, Inc. (PDI), a New York company that exported fresh fruits and vegetables to the Caribbean area. From 1994 to 1997, Jagar bought between $4 million and $6 million of produce each year, and Jagar became PDI's largest customer. Pet. App. 2-3, 18.

In 1995, PDI purchased a credit insurance policy from the Export-Import Bank to protect the company if Jagar defaulted on its payments. In 1996, PDI sought to renew the policy. To meet the bank's requirements, it requested financial statements from Jagar, and it forwarded those statements to the bank. The statements showed that Jagar was solvent and that its net income, for the year ending June 30, 1996, was $116,000. Based on those statements, the bank renewed the policy for the period of September 1, 1996, through May 1, 1997. Subsequently, a review by an independent auditor determined that Jagar had actually suffered a net loss of $987,596, and that there was a "substantial doubt" whether it would remain a "going concern." Pet. App. 2, 18-19.

Until early 1997, Jagar paid its bills from PDI within 30 days of receiving them. It then began to pay invoices more slowly, and by April 1997, it had accrued an outstanding balance exceeding $1 million. At that point, it abruptly discontinued its business with PDI and began purchasing produce from former PDI employees who had formed their own company. Pet. App. 3, 21.

Starting in May 1997, PDI's president, Mark Mayrsohn, attempted to persuade petitioner to resume his business with PDI and to pay Jagar's outstanding balance. Mayrsohn faxed a letter to petitioner on May 20, 1997, requesting a meeting to discuss their "business together and its future direction." Pet. App. 21. Mayrsohn then spoke with Jagar's bookkeeper, and they scheduled a meeting in the Bahamas for May 26. On May 22, Mayrsohn faxed a letter to the bookkeeper, confirming the meeting with petitioner and expressing his hopes for "a positive and successful meeting together." *Id.* at 3. On May 23, the bookkeeper faxed a letter to Mayrsohn in response, also confirming the meeting and listing invoices that needed to be reconciled between the parties. *Id.* at 4. Mayrsohn viewed that note as a "very positive sign by the Jagar company." *Id.* at 23.

The parties met on May 26, as scheduled, and petitioner made clear that he would not resume business with PDI. Nonetheless, he assured Mayrsohn that he would pay his outstanding balance, and he never mentioned his company's insolvency. On May 30, Jagar sent PDI a check for just over $27,500. Although Mayrsohn was disappointed that petitioner had not paid his outstanding balance in full, he believed that the payment demonstrated petitioner's intention to pay the remaining balance. On June 16, Jagar sent PDI another check for just over $12,000. Jagar made no further payments, and it defaulted on its remaining balance of $1,060,000. Pet. App. 4, 23-25.

2. A federal grand jury returned an indictment charging petitioner with three counts of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. 42-48. The indictment alleged a scheme whereby petitioner failed to disclose Jagar's true financial condition and the outside au-

ditor's conclusion, defrauding PDI and the Export-Import Bank of approximately $1,076,000. *Id.* at 45. Specifically, the indictment alleged that petitioner "omitted to disclose this information so that Jagar could continue to purchase, using the line of credit extended by PDI, substantial amounts of fresh fruits and vegetables from PDI, and to delay PDI's efforts to collect on Jagar's escalating outstanding invoices." *Id.* at 46. The indictment also charged:

> To lull PDI and the [Export-Import] Bank and prevent them from detecting Jagar's true financial condition and the falsity of Jagar's submitted financial statements, on repeated occasions, [petitioner] falsely represented and caused to be falsely represented to PDI that Jagar was in good financial condition, and that Jagar had the financial ability to pay its escalating outstanding balance to PDI.

Ibid. Count 1 charged that Mayrsohn's May 22, 1997, fax was "for the purpose of executing" the scheme and artifice to defraud; and counts 2 and 3 were based on subsequent faxed letters from Mayrsohn requesting payment. *Id.* at 46-47.

3. The jury found petitioner guilty on all three counts. Following the verdict, the district court denied petitioner's motion for a judgment of acquittal on count 1, but it granted petitioner's motion with respect to counts 2 and 3. Pet. App. 16-39. It concluded that the May 22 fax was in furtherance of the scheme under a "lulling" rationale, as applied by this Court in *United States* v. *Sampson*, 371 U.S. 75 (1962), because the scheme encompassed petitioner's efforts to reassure PDI that Jagar would pay its outstanding balance and to forestall PDI's taking legal action to collect the debt.

Pet. App. 35-38. On the other hand, the district court held that the transmissions charged in counts 2 and 3 were merely PDI's later efforts to collect the outstanding debt and were sent after the scheme terminated. *Id.* at 38.

The court sentenced petitioner to 18 months of imprisonment, to be followed by two years of supervised release. Gov't C.A. Br. 2.

4. The court of appeals affirmed. Pet. App. 1-15. Petitioner argued that the evidence was insufficient to support his conviction because the fax that formed the basis of the conviction was transmitted after Jagar had stopped acquiring produce on credit and the scheme had reached fruition. *Id.* at 6. The court disagreed, noting that petitioner mistakenly assumed that "a scheme to defraud necessarily reaches 'fruition' when the defendant receives the 'fruit' of his fraud." *Ibid*. To the contrary, the court explained, "it is a well-established principle of mail fraud law that use of the mails after the money is obtained may nevertheless be 'for the purpose of executing' the fraud," *id.* at 6-7 (quoting *United States* v. *Ashdown*, 509 F.2d 793, 799 (5th Cir. 1975)), and "[p]recedent is clear that letters designed to conceal a fraud, by lulling a victim into inaction, constitute a continuation of the original scheme to defraud," *id.* at 7 (quoting *United States* v. *Georgalis*, 631 F.2d 1199, 1204 (5th Cir. 1980)). The court concluded that the evidence sufficiently established that petitioner engaged in lulling behavior by encouraging PDI to "believ[e] that the parties' difficulties would be worked out," thus delaying detection of the fraud, and that Mayrsohn's May 22 fax fell within the lulling doctrine. *Id.* at 14.

ARGUMENT

Petitioner renews his contention (Pet. 10-28) that the government failed to prove that the May 22 fax, on which his wire fraud conviction was based, furthered the execution of the fraud. The court of appeals correctly rejected that claim, and petitioner's factbound challenge to his conviction does not warrant further review.

1. The court of appeals correctly determined that the evidence was sufficient to show that the May 22 wire transmission was "for the purpose of executing" petitioner's fraudulent scheme. 18 U.S.C. 1343. Petitioner does not dispute that he engaged in a scheme to defraud PDI or the Export-Import Bank. Pet. 10.[1] Rather, he argues only (Pet. 10-11, 22-28) that the wire transmission could not have been for the purpose of executing his scheme because it took place after he had received the produce from PDI on credit.

Contrary to petitioner's suggestion, wire transmissions after a defendant has received a benefit as a result of his fraud can be "for the purpose of executing" a scheme to defraud under Section 1343. This Court has held that the analogous mail fraud statute, 18 U.S.C. 1341, covers letters designed to lull victims into a false sense of security, to postpone their complaints, and to delay discovery of the fraudulent scheme. See *United States* v. *Lane*, 474 U.S. 438, 451-453 (1986) (mailing

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[1] Section 1343 requires that a defendant "transmit[] or cause[] to be transmitted" a wire transmission. A defendant "causes" a wire transmission where the use of the wires "can reasonably be foreseen, even though not actually intended" by him. *Pereira* v. *United States*, 347 U.S. 1, 9 (1954). In the court of appeals, petitioner did not dispute that the evidence on that element was sufficient, nor does he raise that issue here.

after arson was completed and insurance proceeds were collected was intended to lull insurer into a false sense of security); *United States* v. *Sampson*, 371 U.S. 75, 80 (1962) (subsequent mailings assured victims that the services they had paid for would be performed). Likewise, the courts of appeals have repeatedly upheld convictions under Sections 1341 and 1343 on the theory that subsequent mailings and wire transmissions furthered the defendants' schemes because they lulled victims into believing that they had not been defrauded. See, *e.g.*, *United States* v. *Lack*, 129 F.3d 403, 408-409 (7th Cir. 1997); *United States* v. *Ruuska*, 883 F.2d 262, 264-266 (3d Cir. 1989); *United States* v. *Brewer*, 807 F.2d 895, 898 (11th Cir.), cert. denied, 481 U.S. 1023 (1987); *United States* v. *Snowden*, 770 F.2d 393, 398 (4th Cir.), cert. denied, 474 U.S. 1011 (1985); *United States* v. *Elkin*, 731 F.2d 1005, 1008-1009 (2d Cir.), cert. denied, 469 U.S. 822 (1984); *United States* v. *Martin*, 694 F.2d 885, 889-890 (1st Cir. 1982); *United States* v. *Toney*, 605 F.2d 200, 206-207 (5th Cir. 1979), cert. denied, 444 U.S. 1090 (1980).

Consistent with those principles, the court below correctly concluded that the evidence was sufficient to sustain petitioner's conviction. The scheme charged in the indictment included petitioner's efforts to lull PDI into a false sense that Jagar would pay its outstanding balance by preventing PDI from "detecting Jagar's true financial condition and the falsity of Jagar's submitted financial statements," thus delaying PDI's "efforts to collect on Jagar's escalating outstanding invoices." Pet. App. 46. The wire transmission on May 22 furthered

that aspect of the scheme.[2] The jury could reasonably have found that petitioner's conduct following his final receipt of produce on credit—including his partial payment in May, his agreement to meet with Mayrsohn to reconcile the outstanding bills, and his promise at the meeting to pay the debt—sought to lull Mayrsohn into believing that Jagar would pay the outstanding balance.

2. Petitioner contends (Pet. 21) that review is necessary to "re-examin[e]" and "reconcil[e]" this Court's decisions on whether mailings that occur after a defendant benefits from his scheme can be in furtherance of that scheme. In particular, he relies on *Kann* v. *United States*, 323 U.S. 88 (1944), *Parr* v. *United States*, 363 U.S. 370 (1960), and *United States* v. *Maze*, 414 U.S. 395 (1974), which reversed mail fraud convictions, and which, he suggests, conflict with other cases that have upheld convictions under the mail and wire fraud statutes. There is no conflict. Instead, all of the decisions have turned on the factual question whether the alleged scheme had reached "fruition" before the charged mailings took place. As this Court has explained, there is nothing "in either the *Kann* or the *Parr* case which suggests that the Court was laying down an automatic rule that a deliberate, planned use of the mails after the victims' money had been obtained can never be 'for the purpose of executing' the defendants' scheme." *Sampson*, 371 U.S. at 80; see *ibid.* ("[T]he Court found only that under the facts in those cases the schemes had been fully executed before the mails were used."); see

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[2] Petitioner contends (Pet. 22-23) that the "lulling" alleged in the indictment did not include the conduct surrounding the May 22 fax. Petitioner conceded below, however, that the indictment's allegations "essentially asserted that the May 22nd fax was a 'lulling' letter." Pet. App. 9 (citation omitted).

also *Schmuck* v. *United States*, 489 U.S. 705, 712-713 (1989) ("Once the full flavor of Schmuck's scheme is appreciated, the critical distinctions between this case and the three cases in which this Court has delimited the reach of the mail fraud statute—*Kann*, *Parr*, and *Maze*—are readily apparent.").

In *Kann*, *Parr*, and *Maze*, the Court held that the mailings did not further the schemes because the schemes' objectives had been achieved before the mailings occurred, and the defendants were indifferent to the actions related to the mailings. See *Kann*, 323 U.S. at 94 ("The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably."); *Parr*, 363 U.S. at 393 (scheme reached "fruition" when petitioners received services through unauthorized use of credit card, and it was immaterial to the scheme how the company that issued the credit card collected its payment); *Maze*, 414 U.S. at 402 ("Respondent's scheme reached fruition" when he used an unauthorized credit card to check out of the motel, and establishment's mailing of invoice to the bank that had issued the credit card did not affect the success of the scheme.).

Far from "effectively overrul[ing]" (Pet. 21) *Kann*, *Parr*, and *Maze*, as petitioner suggests, this Court has adhered to the analysis established by those cases. In *Schmuck*, the petitioner rolled back odometers on used cars and then sold them to retail dealers. 489 U.S. at 711. After reselling the cars, the dealers mailed title-application forms to the state on behalf of the buyers. *Id.* at 707. The Court concluded that the mailings satisfied the mailing element of the statute, and it expressly distinguished *Kann*, *Parr*, and *Maze*:

> The title-registration mailings at issue here served a function different from the mailings in *Kann*,

> *Parr*, and *Maze*. The intrabank mailings in *Kann* and the credit card invoice mailings in *Parr* and *Maze* involved little more than post-fraud accounting among the potential victims of the various schemes, and the long-term success of the fraud did not turn on which of the potential victims bore the ultimate loss. Here, in contrast, * * * [t]he mailing of the title-registration forms was an essential step in the successful passage of title to the retail purchasers. Moreover, a failure of this passage of title would have jeopardized Schmuck's relationship of trust and goodwill with the retail dealers upon whose unwitting cooperation his scheme depended.

Id. at 714.

This Court drew a similar distinction in *Lane*. In that case, respondents were charged with mail fraud based on a scheme to obtain insurance proceeds after they hired an arsonist to burn down a building. *Lane*, 474 U.S. at 440. Each time the insurance adjuster received a proof-of-loss claim from one of the respondents, the adjuster mailed it to the insurer's headquarters. *Id.* at 441. Although respondents received the insurance proceeds before the last claim was mailed, the Court held that the scheme had not been completed because the mailing was intended to "lull" the insurer into a false sense of security. *Id.* at 452. The Court further noted that its decision did not conflict with *Maze*, because the mailings in that case, "rather than acting to lull the bank into acquiescence, instead increased the probability that [the defrauder] would be detected and apprehended." *Id.* at 453 n.16 (internal quotation marks omitted).

3. For similar reasons, this Court's review is not needed to establish uniformity in the courts of appeals. Any apparent inconsistencies among the decisions of the

courts of appeals result from the fact-specific nature of the analysis and do not demonstrate a genuine conflict among the circuits. In particular, the cases that petitioner cites (Pet. 24-25) as inconsistent with the decision below are readily distinguishable. In each of those cases, the evidence established that the letters at issue did not attempt to "lull" the victims, but instead threatened to expose the fraud. Here, in contrast, the May 22 fax did not threaten to expose petitioner's scheme. Indeed, at the time he sent the fax, Mayrsohn did not yet suspect that he was a victim of fraud.

In *United States* v. *Georgalis*, 631 F.2d 1199 (5th Cir. 1980), the defendant solicited investments in a venture to manufacture products that, unknown to the investors, either did not exist or did not work. *Id.* at 1201. He was convicted of several counts of mail fraud based on letters mailed after he received the money from his scheme. *Id.* at 1202. The court of appeals observed that "letters designed to conceal a fraud, by lulling a victim into inaction, constitute a continuation of the original scheme to defraud." *Id*. at 1204. Applying that principle, the court found the evidence sufficient on several counts based on letters that "were designed either to allay suspicions, or to solicit further funds." *Id*. at 1204-1205. It reversed two counts, however, because they rested on letters that were from victims complaining about the defendant or threatening legal action, and thus were not in furtherance of the scheme to defraud. *Id.* at 1205.

Similarly, in *United States* v. *LaFerriere*, 546 F.2d 182 (5th Cir. 1977), defendants engaged in a complex fraud involving the solicitation of mortgage applications and the receipt of funds from borrowers that were intended to be held in escrow until the issuance of a mortgage commitment. *Id.* at 183. Instead of retaining the

funds in escrow, defendants distributed the money among themselves. *Id.* at 184. The mailing was a letter written by a lawyer for one of the victims demanding proof that the funds were still in escrow and threatening legal action if he did not receive an adequate response. *Id.* at 185. The court of appeals acknowledged that letters lulling a victim into a false sense of security after defendants have received the proceeds of their fraud may support a mail fraud conviction. *Id.* at 186. The letter at issue, however, "did not have any tendency to postpone inquiries or discovery of the fraud, but rather alerted the perpetrators to the fact that a victim strongly suspected that he was a victim of a fraud and proposed to take remedial action." *Ibid*.

Finally, in *United States* v. *Castile*, 795 F.2d 1273 (6th Cir. 1986), in which the mail fraud charges were based on the defendant's insurance claims in connection with an arson scheme, the court held that letters mailed during the course of the insurance company's investigation of the fire were not in furtherance of the scheme. *Id.* at 1277. In so holding, the court emphasized that the purpose of the letters was "the investigation and the detection of the scheme." *Id.* at 1281.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
KIRBY A. HELLER
Attorney

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