No. 03-1326

In the Supreme Court of the United States

ARTHUR M. HAWKINS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether venue in petitioner's prosecution for wire fraud was proper, when the government alleged and subsequently proved that acts taken in furtherance of the fraudulent scheme, including the airing of false television advertisements, occurred in the district of prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B at 1-19) is reported at 340 F.3d 459. The opinion of the district court denying petitioner's motion for a change of venue (App., *infra*, 1a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2003. A petition for rehearing was denied on October 10, 2003, and an amended order denying the petition for rehearing was issued on October 14, 2003 (Pet. App. A at 1-2). On January 8, 2004, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including March 12, 2004, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Illinois, petitioner was found guilty on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 371, and one count of wire fraud, in violation of 18 U.S.C. 1343. Pet. App. B at 1; Gov't C.A. Br. 3-4. He was sentenced to consecutive terms of imprisonment of 60 months on each count, for a total of 120 months of imprisonment. Pearson Separate C.A. App. SA1045. The court of appeals affirmed. Pet. App. B at 1-19.

1. Petitioner was the Chief Executive Officer and Chairman of the Board of Exide Corporation, a battery manufacturer. Pet. App. B at 2. In April 1994, Exide was awarded a contract to manufacture DieHard batteries for Sears. The batteries that Exide manufactured pursuant to that contract contained a design flaw and did not conform to the representations made in Exide's bid. By October 1994, Sears warned Exide officials of significant quality problems with the batteries. By the end of that month, Exide removed defective batteries from approximately 700 Sears stores nationwide. *Ibid.*

In order to retain the lucrative Sears contract, Exide bribed Gary Marks, Sears's battery buyer. From March 1995 through February 1996, Exide made several payments of approximately $10,000 each to Marks. After Marks left Sears in July 1997, petitioner informed Marks that an investigation by the Florida Attorney General's Office had implicated Marks in the Exide bribery scheme. Petitioner and Marks attempted to conceal their arrangement by fabricating a consulting agreement and creating backdated documents to substantiate the bribe payments. Petitioner

paid Marks $15,000 in the spring of 1999 and an additional $10,000 in the fall of 1999 in return for Marks's participation in the cover-up. Pet. App. B at 2-3.

2. The federal wire statute establishes criminal penalties for any person who,

> having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice.

18 U.S.C. 1343. In July 2001, a federal grand jury in the Southern District of Illinois returned a two-count second superseding indictment against petitioner; Douglas N. Pearson, Executive Vice President of Sales and Marketing and then-President of North American Operations for Exide; and Alan E. Gauthier, Chief Financial Officer of Exide. Pearson Separate C.A. App. SA46-SA62.[1] Count One of the indictment charged the defendants with conspiracy to commit wire fraud. *Id.* at SA46-SA61; see 18 U.S.C. 371 (establishing criminal penalties for conspiracy "to commit any offense against the United States"). The indictment alleged that, as part of the conspiracy, "a nationwide advertising campaign was run both before and after the initial delivery of the defective batteries. Exide, acting together with the defendants and others, would and did misrepresent and cause to be represented material facts to the

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[1] Marks and Joseph Calio, Senior Vice President of Sales and Marketing for Exide, entered into plea agreements and pleaded guilty to wire fraud in March 2001. Pet. App. B at 4 n.1.

consumers." Pearson Separate C.A. App. SA55. Among the overt acts alleged to have been committed in furtherance of the conspiracy, the indictment charged that "[d]uring 1994, television advertising regarding the DieHard batteries was aired to consumers located in the Southern District of Illinois." *Id.* at SA60.

Count Two of the indictment charged the defendants with wire fraud, in violation of 18 U.S.C. 1343. Pearson Separate C.A. App. SA61-SA62. The substantive wire fraud count "reallege[d] and reincorporate[d] by reference" the allegations in the conspiracy count. *Id.* at SA61. The wire fraud count further alleged that from on or about January 1994 through February 1996, the defendants, in the Southern District of Illinois and elsewhere,

> for the purpose of executing the scheme and artifice to defraud consumers of money and property by means of false and fraudulent pretenses, representations, and promises in connection with the distribution, sale and marketing of Sears' automotive batteries manufactured by Exide, caused to be transmitted by wire from an Exide bank account at CoreStates Bank in Philadelphia, Pennsylvania, wire transfer B00035879, writings, signs, and symbols representing $10,000 cash to an account maintained at the Bank of Palatine, Palatine, Illinois in the name of DG Consulting, Inc., account no. 051-594-01.

Id. at SA62.[2]

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[2] Palatine is a northwestern suburb of Chicago and is located in the Northern District of Illinois.

Pearson argued that venue for the wire fraud count was not proper in the Southern District of Illinois, and he asked that the case be transferred either to the Northern District of Illinois or to the Eastern District of Pennsylvania. See Pearson's Pretrial Motions (May 11, 2001). Petitioner adopted Pearson's pre-trial venue motion. See Government's Omnibus Response to Defendant Pearson's Pre-Trial Motions 2 (June 8, 2001). In opposing that motion, the government stated that, "[w]ith regard to count 2, the case law does not require that a wire pass through the subject district for proper venue on a wire fraud charge. Additionally, the offense is continuing in nature, over a large geographic area, with substantial points of contact and causative acts performed in Southern Illinois." *Id.* at 6. The government further explained: "The indictment alleges, among other causative acts, that the wires were used in interstate commerce, including in Southern Illinois, to promote the sale of known defective batteries through the use of false advertising. While those particular wire transmissions were not charged in count 2 as the subject wires, they were alleged as part of the overall scheme charged in count 2." *Id.* at 8.

The district court determined that venue was "proper in this Court as to both Counts One and Two of the Second Superseding Indictment." App., *infra*, 4a. The court explained that, "[b]ased on the pleadings, the situs of the Defendants' acts include causing the delivery and sale of defective batteries by Sears' distribution centers in the Southern District of Illinois and causing specific acts of concealment to facilitate the scheme, including but not limited to false advertising in the Southern District of Illinois." *Ibid.* The court further observed that the propriety of venue in the Southern District of Illinois did not depend on the

existence of a "personal 'tie' to any of the three Defendants." *Id.* at 5a.

The ensuing jury trial lasted approximately three months. Pet. App. B at 4. With respect to the wire fraud count, the jury was instructed as to venue:

> Count 2 charges a continuing offense occurring in more than one state or district. The Government must prove by a preponderance of the evidence that some part of the crime charged in count 2 of the Indictment occurred in the Southern District of Illinois. Venue is proper in any district in which part of the crime was committed.

Gov't C.A. Br. 21 n.6. (citation omitted). The jury found petitioner and Pearson guilty on both counts of the indictment. Pet. App. B4. Petitioner was sentenced to 120 months of imprisonment, to be followed by three years of supervised release, and was fined $1 million. *Ibid.* The prison sentence consisted of a 60-month term of imprisonment on each count of conviction, to run consecutively pursuant to Sentencing Guidelines § 5G1.2(d). Pearson Separate C.A. App. SA1045.

3. The court of appeals affirmed. Pet. App. B at 1-19. Petitioner and Pearson contended, *inter alia*, that venue on the substantive wire fraud charge was not proper in the Southern District of Illinois. See *id.* at 8-10. In addressing that claim, the court of appeals explained that, under the general federal venue statute governing offenses committed in more than one State or district, "any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." *Id.* at 8 (quoting 18 U.S.C. 3237(a)). The court also stated that "[p]roper

venue is not limited to districts where the defendants were physically present when they committed unlawful acts. So long as an overt act is intended to have an effect in the district where the case is finally brought, venue is proper." *Id.* at 9 (quoting *United States* v. *Frederick*, 835 F.2d 1211, 1215 (7th Cir. 1987), cert. denied, 486 U.S. 1013 (1988)).

Petitioner and Pearson contended "that the substantive wire fraud count should not have been tried in the Southern District of Illinois because the basis for that count, a wire transfer from a bank in the Eastern District of Pennsylvania to a bank in the Northern District of Illinois, did not originate in, pass through, or terminate in the Southern District of Illinois." Pet. App. B at 8. The court of appeals rejected that argument, explaining that petitioner and his co-defendant

> intended to defraud customers in the Southern District of Illinois. They were charged with wire fraud, including use of the wires to promote the sale of defective batteries through false advertising in the Southern District of Illinois. Moreover, the defective batteries themselves were distributed and sold in that district, and an audit of the battery quality conducted in the Southern District of Illinois initially uncovered the defects in the product. The Exide Corporation, a defendant in a companion case, was charged with similar crimes and pled guilty in the Southern District of Illinois.
>
> These fraudulent activities conducted in the Southern District of Illinois provided critical evidence of the "intent to defraud," an element of the crime of wire fraud. The Supreme Court has emphasized that when analyzing venue, courts must inquire into the nature of the offense, *see United*

> *States v. Rodriguez-Moreno*, 526 U.S. 275, 280 (1999) * * * , and Pearson and [petitioner]'s crime of wire fraud focused on defrauding and concealing their deceit of consumers, including those in the Southern District of Illinois.

Id. at 9-10 (citations omitted). In a footnote, the court of appeals stated that, "[a]though neither party discusses the case, in *United States v. Pace*, 314 F.3d 344, 350 (9th Cir. 2002), the Ninth Circuit held that venue for a wire fraud offense may only 'lie where there is a direct or causal connection to the . . . wires.' This approach differs with the rubric we have established for analyzing venue * * * , and we decline to adopt the analysis outlined by the Ninth Circuit in *Pace*." *Id.* at 10.[3]

ARGUMENT

Petitioner contends (Pet. 4-12) that the courts below erred in ruling that venue was proper in the Southern District of Illinois for the wire fraud count of his indictment. Petitioner further argues (Pet. 5-10) that the court of appeals' resolution of the venue issue is incon-

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[3] Petitioner also contended in the court of appeals that venue in the Southern District of Illinois was improper on the conspiracy count. Pet. App. B at 10. The court rejected that argument, explaining that "[b]oth the sale of defective batteries and the broadcasting of advertisements in the Southern District of Illinois were overt acts that supported the charge of conspiracy to commit mail fraud." *Ibid.* Relying on the principle that "[a]s long as one overt act in furtherance of the conspiracy was committed in a district, venue is proper there," the court held that venue was proper in the Southern District of Illinois on the conspiracy count as well as on the substantive wire fraud charge. *Ibid.* (quoting *United States* v. *Molt*, 772 F.2d 366, 369 (7th Cir. 1985), cert. denied, 475 U.S. 1081 (1986)). In this Court, petitioner does not contest the propriety of venue on the conspiracy charge.

sistent with decisions of other circuits. As the court of appeals explained, however, petitioner's fraudulent scheme was effectuated in part through false television advertising aired in the district of prosecution. Petitioner identifies no decision suggesting that such contacts are insufficient to establish venue in a federal wire fraud case. Because any differences between the legal standards employed by various courts of appeals in resolving venue questions would not affect the disposition of the instant case, the petition for a writ of certiorari should be denied.

1. In *United States* v. *Rodriguez-Moreno*, 526 U.S. 275 (1999), this Court considered a venue challenge to a conviction for using or carrying a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1). The underlying crime of violence in that case was a kidnapping that continued through several States (and thus through several federal judicial districts). See 526 U.S. at 276-277. The defendant was prosecuted in the District of New Jersey, one of the locations in which the victim had been held captive. *Id.* at 277. The Section 924(c)(1) charge was based on evidence that the defendant had used a firearm in Maryland in furtherance of the crime. *Ibid.*

This Court rejected the defendant's argument "that venue was proper only in Maryland, the only place where the Government had proved he had actually used a gun." 526 U.S. at 277. Rather, the Court interpreted Section 924(c)(1) as containing "two distinct conduct elements": "the 'using and carrying' of a gun and the commission of a kidnaping [or other crime of violence]." *Id.* at 280. The Court further explained that "§ 924(c)(1) does not define a 'point-in-time' offense when a firearm is used during and in relation to a continuing crime of violence." *Id.* at 281. It observed that "[t]he kidnaping,

to which the § 924(c)(1) offense is attached, was committed in all of the places that any part of it took place, and venue for the kidnaping charge * * * was appropriate in any of them." *Id.* at 282. "Where venue is appropriate for the underlying crime of violence," the Court concluded, "so too it is for the § 924(c)(1) offense." *Ibid.*

The same analysis applies here. Like Section 924(c)(1), 18 U.S.C. 1343 requires proof of two distinct elements: that the defendant has devised a "scheme or artifice to defraud," and that he has used a "wire, radio, or television communication in interstate or foreign commerce" to execute that scheme. Like the kidnapping in *Rodriguez-Moreno*, the scheme or artifice to defraud in Section 1343 is a continuing crime for which venue is proper in any district in which a portion of that scheme or artifice was devised and carried out. And, as in *Rodriguez-Moreno*, a wire fraud prosecution under Section 1343 may properly be brought in any district where the fraudulent scheme was devised and implemented, whether or not the wires were used in that district. Thus, the facts that petitioner "intended to defraud consumers in the Southern District of Illinois," and that "the defective batteries themselves were distributed and sold in that district," provide a sufficient basis for rejecting petitioner's venue challenge in this case. Pet. App. B at 9.[4]

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[4] *United States* v. *Cabrales*, 524 U.S. 1 (1998), is not to the contrary. The defendant in *Cabrales* was charged with money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii) and 1957, based on financial transactions that were alleged to have occurred in Florida and to have involved funds derived from unlawful cocaine distribution in Missouri. 524 U.S. at 3-4. This Court held that the Western District of Missouri was not a proper venue for the money-laundering prosecution. *Id.* at 6-10. In explaining that

2. As the court of appeals recognized (Pet. App. B at 10 n.3), the Ninth Circuit appears to have taken a more restrictive view of permissible venue in prosecutions under Section 1343. See *United States* v. *Pace*, 314 F.3d 344 (9th Cir. 2002).[5] The court in *Pace* stated that "[a]lthough a fraudulent scheme may be an element of the crime of wire fraud, it is using wires and causing wires to be used in furtherance of the fraudulent scheme that constitutes the prohibited conduct." *Id.* at

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conclusion, however, the Court emphasized that the money laundering statutes did not prohibit "the anterior criminal conduct that yielded the funds allegedly laundered," and that the defendant was "charged in the money-laundering counts with criminal [money-laundering] activity 'after the fact' of [a different] offense begun and completed by others." *Id.* at 7. In the instant case, by contrast, the basis for laying venue in the Southern District of Illinois was not that petitioner was alleged to have acted "after the fact" to prevent detection of crimes committed by other persons in that district. Rather, petitioner was from the outset an integral member of a criminal scheme, prohibited by the wire fraud statute, to defraud consumers in, *inter alia*, the district of prosecution. Nor, contrary to petitioner's contention (Pet. 5-6), did the lower courts' venue rulings turn on "the intended effects of unlawful conduct in a given district." Cf. *Rodriguez-Moreno*, 526 U.S. at 279 n.2 (reserving that issue). The devising of a scheme to defraud is an element of a wire fraud offense.

[5] In addition to alleging a conflict with *Pace* (see Pet. 5-7), petitioner also contends (Pet. 9-10) that the court of appeals' resolution of the venue issue in the instant case conflicts with the Second Circuit's decision in *United States* v. *Svoboda*, 347 F.3d 471 (2003), cert. denied, No. 03-1438 (May 17, 2004), and the Fourth Circuit's unpublished decision in *United States* v. *Mitchell*, 70 Fed. Appx. 707 (2003), cert. denied, 124 S. Ct. 1114 (2004). Petitioner's reliance on *Svoboda* and *Mitchell* is misplaced. Neither of those cases involved a prosecution under 18 U.S.C. 1343, and the courts of appeals in both cases *rejected* the defendants' venue challenges to their convictions. See *Svoboda*, 347 F.3d at 475, 482-485; *Mitchell*, 70 Fed. Appx. at 709, 710-713.

349. The court indicated that venue in Section 1343 prosecutions was limited to districts "where the wire transmission at issue originated, passed through, or was received, or from which it was orchestrated." *Id.* at 349-350 (internal quotation marks omitted).[6]

In the instant case, however, venue would be proper in the Southern District of Illinois even under the approach taken by the court of appeals in *Pace*. The wire fraud statute applies whenever the defendant, "having devised or intending to devise any scheme or artifice to defraud, * * * transmits or causes to be transmitted by means of wire, radio, *or television* communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice." 18 U.S.C. 1343 (emphasis added). The government alleged in petitioner's indictment, and subsequently proved at trial, that false television advertising in the Southern

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[6] After the certiorari petition in the instant case was filed, the Sixth Circuit adopted a similar venue rule for mail fraud prosecutions under 18 U.S.C. 1341. See *United States* v. *Wood*, No. 01-2548, 2004 WL 828097, at *4-*9 (6th Cir. Apr. 19, 2004). Court in *Wood*, however, based its decision on the second paragraph of 18 U.S.C. 3237(a), which states that "[a]ny offense involving the use of the mails * * * may be inquired of and prosecuted in any district from, through, or into which such * * * mail matter * * * moves." See *Wood*, 2004 WL 828097, at *7-*8. The court concluded that "[a] plain reading of the text" of Section 3237(a) "leads us to the conclusion that venue in a mail fraud case is limited to districts where the mail is deposited, received, or moves through, even if the fraud's core was elsewhere." *Id.* at *8. Because 18 U.S.C. 3237(a) contains no comparable language governing offenses that involve the use of *wire* communications, it is by no means clear that the Sixth Circuit would adopt a similar limit on venue in wire fraud prosecutions brought under 18 U.S.C. 1343.

District of Illinois was used to mislead consumers about the characteristics of Exide's batteries. See Pearson Separate C.A. App. SA55, SA56, SA60 (indictment); Gov't C.A. Br. 11 (summarizing record evidence of false television advertising). Both of the courts below relied in part on those television communications in rejecting petitioner's challenge to venue in the Southern District of Illinois. See App., *infra*, 4a (district court explains that, "[b]ased on the pleadings, the situs of the Defendants' acts include causing the delivery and sale of defective batteries by Sears' distribution centers in the Southern District of Illinois and causing specific acts of concealment to facilitate the scheme, including but not limited to false advertising in the Southern District of Illinois"); Pet. App. B at 9 (court of appeals observes that petitioner and his co-defendant were "charged with wire fraud, including use of the wires to promote the sale of defective batteries through false advertising in the Southern District of Illinois").

It is true that the substantive wire fraud count of petitioner's indictment (see Pearson Separate C.A. App. SA61-SA62) did not specifically identify the false advertising as a wire or television communication by means of which the fraudulent scheme was executed.[7] The conspiracy count of the indictment alleged, however, that "[a]s a further part of the conspiracy, * * * Exide, acting together with the defendants and others, would and did misrepresent and cause to be represented material facts to the consumers" about the characteristics of the DieHard batteries that Exide had

[7] Rather, the only use of the wires that was described in the wire fraud count was a transfer of funds to a bank located in the Northern District of Illinois. Pearson Separate C.A. App. SA62; see p. 4 & note 2, *supra*.

manufactured. *Id.* at SA55. The conspiracy count also alleged, as an overt act, that television advertising was aired to consumers in the Southern District of Illinois. *Id.* at SA60. The indictment's allegations relating to the conspiracy were expressly "reallege[d] and reincorporate[d] by reference" in the wire fraud count. *Id.* at SA61. The government in opposing the defendants' motion to transfer, and the district court in denying that motion, relied in part on the indictment's allegations of false advertising in the district of prosecution. See p. 5, *supra*.

The indictment's description of the false television advertising in this case as an overt act in furtherance of the defendants' conspiracy to commit wire fraud is, for purposes of determining venue, functionally equivalent to treating that advertising as a communication undertaken "for the purpose of executing [the] scheme or artifice" to defraud. 18 U.S.C. 1343. The venue inquiry turns on the substance of the criminal conduct alleged, not on formal labels. See *Rodriguez-Moreno*, 526 U.S. at 279 ("[T]he *locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it.") (internal quotation marks omitted; bracketed material added by the Court). And the trial proof indisputably established that the scheme was executed by the use of the wires, in the form of television communications, within the district of prosecution.

Thus, even under the venue analysis adopted by the Ninth Circuit in *Pace*, petitioner's claim would fail. The absence of any specific reference in the wire fraud count to false advertising as a means of executing the scheme was at most a technical defect that would not have prevented the jury from finding that venue was proper in the district of prosecution. See p. 6, *supra*

(quoting jury instructions on venue). Because the outcome would be the same under the approach taken by the Ninth Circuit, this case presents an unsuitable vehicle for resolving the analytical disagreement between the courts of appeals about permissible venue in federal wire fraud prosecutions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2004

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 01-CR-30006-DRH

UNITED STATES OF AMERICA, PLAINTIFF

v.

ARTHUR M. HAWKINS, ALAN E. GAUTHIER, AND
DOUGLAS N. PEARSON, DEFENDANTS

[Filed Nov. 7, 2001]

MEMORANDUM AND ORDER

HERNDON, District Judge

I. Introduction and Background

On January 19, 2001, the Grand Jury returned the initial Indictment in this matter (Doc. 1). That same day, Magistrate Judge Clifford J. Proud ordered that indictment sealed (Doc. 4). On March 22, 2001, the Grand Jury returned a sealed Superseding Indictment (Doc. 9). The Court unsealed the Superseding Indictment on March 23, 2001 (Doc. 11). Subsequently, the Grand Jury returned a Second Superseding Indictment (Doc. 73). The Second Superseding Indictment contains two counts against Arthur M. Hawkins, Alan E.

Gauthier and Douglas N. Pearson. Count One charges Defendants with conspiracy to commit wire fraud in violation of 18 U.S.C. § 371 and Count Two charges Defendants with wire fraud in violation of 18 U.S.C. § 1343. Specifically, Defendants are charged with participating in a scheme to defraud and defrauding consumers in connection with the distribution, sale and marketing of automotive batteries.

Now before the Court are Defendants' motion to change venue (Doc. 41-1); Defendants' motion to dismiss the superseding indictment as time barred and based on duplicity (Doc. 41-4) and Defendants' supplemental motion to dismiss Second Superseding Indictment as containing a third independent theory which is duplicitous (Doc. 79). The Government objects to Defendants' motions. Based on the pleadings and the applicable law, the Court denies Defendants' motions.

II. Motion to Transfer

Trials must be held in the state and district in which the offense was committed. See U.S. Const. art. III, § 2, cl. 3; FED.R.CRIM.P. 18. For crimes that occur in more than one state or district, venue is constitutionally and statutorily proper in any district in which part of the crime was committed. See 18 U.S.C. § 3237(a); *United States v. Tingle*, 183 F.3d at 719, 726 (7th Cir. 1999). Thus, the traditional rule is that a conspiracy charge may be tried in any district in which an overt act of the conspiracy occurred. See *United States v. Rodriguez*, 67 F.3d 1312, 1318 (7th Cir. 1995); *United States v. Molt*, 772 F.2d 366, 369 (7th Cir. 1985) ("As long as one overt act in furtherance of the conspiracy is committed in a district, venue is proper there.").

"[W]here a crime consists of distinct parts which have different localities the whole may be tried where any part can be proven to have been done." *United States v. Rodriguez-Moreno*, 119 S. Ct. 1239, 1244 (1999). "Proper venue is not limited to districts where the defendants were physically present when they committed unlawful acts. So long as an overt act in furtherance of the conspiracy is intended to have an effect in the district where the case is finally brought, venue is proper." *United States v. Brown*, 739 F.2d 1136, 1148 (7th Cir. 1984). The Government need prove facts supporting venue only by a preponderance of evidence. *Id.*

Defendants maintain that venue is not proper in the Southern District of Illinois under either Count One or Count Two.[8] Specifically, Defendants maintain that venue is not proper in Count Two because none of the wire frauds occurred or passed through the Southern District of Illinois; and that venue is not proper in Count One because the overt acts were performed by Sears and or EXIDE, who have not been named as co-conspirators, therefore, the alleged acts cannot be attributable to Defendants. The Court does not agree.

As to Count One, the conspiracy count, the Court finds that the conspiracy occurred, in part, in the Southern District of Illinois. First this Court has continuing jurisdiction over the companion case, *United States v. EXIDE Illinois, et al*; 01-CR-30035-DRH, which arose out of the same set of facts as this case.[9]

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[8] The Court notes that Defendants do not cite to any case law or statutes to support its argument of why venue is not proper under Count Two.

[9] The three defendants in 01-CR-30035-DRH are EXIDE Illinois, Joseph C. Calio and Gary Marks.

The defendants in the companion case have pled guilty to one count of wire fraud and one count of conspiracy to commit wire fraud and sentencing is pending. As to Count Two, the wire fraud count, the Second Superseding Indictment alleges that the wires were used in interstate commerce, including the Southern District of Illinois, to promote the sale of known defective batteries through the use of false advertising. In addition, the audit conducted in the Southern District of Illinois revealed the problem to Sears. Furthermore, the Second Superseding Indictment alleges that illegal payments were made in an effort to influence the independent judgment buyer of the Sears battery, which allowed EXIDE to continue to do business in the Southern District of Illinois.

Applying the "substantial contacts analysis" found in *United States v. Reed*, 773 F.2d 477, 480 (2nd Cir. 1985), the Court finds that venue is proper in this Court as to both Counts One and Two of the Second Superseding Indictment. Based on the pleadings, the situs of the Defendants' acts include causing the delivery and sale of defective batteries by Sears' distribution centers in the Southern District of Illinois and causing specific acts of concealment to facilitate the scheme, including but not limited to false advertising in the Southern District of Illinois. As stated earlier EXIDE, a defendant in a companion case, pled guilty to charges containing allegations of delivering known defective products in the Southern District of Illinois and causing false advertising in this judicial district in furtherance of the unlawful agreement. The Second Superseding Indictment alleges that overt acts in furtherance of the conspiracy took place in this judicial district and numerous alleged acts comprising the scheme to defraud

occurred in the Southern District of Illinois. There need not be a personal "tie" to any of the three Defendants to the Southern District of Illinois. The Court concludes that venue for Counts One and Two is proper in the Southern District of Illinois.

Lastly pursuant to FEDERAL RULE OF CRIMINAL PROCEDURE 21, Defendants move the Court to transfer the case to either the Northern District of Illinois or the Eastern District of Pennsylvania. Rule 21(b) provides that "[f]or the convenience of the parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to that defendant or any of the courts thereof to another district." The decision to transfer a case pursuant to Rule 21(b) is within the sound discretion of the trial judge. See *United States v. Zylstra*, 713 F.3d 1332, 1336 (7th Cir. 1983).

Here, the facts do not compel transfer to another venue. The facts demonstrate that the Defendants, the witnesses, the lawyers and the location of the Governments' evidence are in different locations throughout the country. The crimes charged were committed in the Southern District of Illinois and the Government's evidence is located here. Further, the interests of justice do not mandate transfer and Defendants failed to provide any reason for doing so. Despite the fact that the Court finds Defendants' argument that transfer is necessary in light of the horrific events that occurred on September 11, 2001 compelling, the Court rejects Defendants' argument. One could easily infer that persons traveling to and around the East coast are most at risk. Traveling to or from St. Louis could, as a consequence, be the safest destination point or origination location. The Court does not accept Defendants'

rhetoric in this regard. Thus, the Court denies the motion to transfer venue.

III. Motion to Dismiss based on Duplicity

Defendants maintain that if Sears is an unindicted co-conspirator both Counts One and Two of the indictment are duplicitous and must be dismissed. The Court rejects Defendants' argument.

Duplicity is the "joining of two or more offenses in a single count." *United States v. Marshall*, 75 F.3d 1097, 1111 (7th Cir. 1996). The adverse effects a duplicitous count can have on a defendant include "improper notice of the charges against him, prejudice in the shaping of evidentiary rulings, in sentencing, in limiting review on appeal, in exposure to double jeopardy, and of course the danger that a conviction will result from a less than unanimous verdict as to each separate offense." *Id.*; see also *United States v. Kimberlin*, 781 F.2d 1247, 1250 (7th Cir. 1985), cert. denied, 479 U.S. 938 (1986).

Duplicity is not always fatal to an indictment, as corrective instructions and other measures can cure any prejudice that might exist. *See, e.g.*, *Kimberlin*, 781 F.2d at 1251. Nonetheless, the court must first determine whether the counts at issue are duplicitous. Duplicity exists if a count contains "more than one distinct and separate offense." *United States v . Berardi*, 675 F.2d 894, 897 (7th Cir. 1982). It does not exist if the count merely charges the "commission of a single offense by different means." *Id.*; *see also United States v. Kramer*, 711 F.2d 789, 797 (7th Cir.), cert. denied, 464 U.S. 962 (1983). FEDERAL RULE OF CRIMINAL PROCEDURE 7(c) specifically permits a count to allege that the offense was committed by "one or more specified means." Rule 7(c) has been inter-

preted to contemplate the joining of two or more acts, each one of which would constitute a violation of the same offense standing alone, without offending the rule against duplicity. *Berardi*, 675 F.2d at 898. While it is often a fine line to draw, a count is not duplicitous where it alleges multiple acts, which independent of each other constitute separate violations of the same statute, if the multiple acts are part of a continuing course of conduct. *Id.*; *see also United States v. Bruce*, 89 F.3d 886, 890 (D.C. Cir. 1996) (involving a bank fraud scheme comprised of several transactions); *United States v. Shorter*, 809 F.2d 54, 57 (D.C. Cir.), cert. denied, 484 U.S. 817 (1987) (involving an ongoing scheme to evade taxes).

A single act or purpose of the conspiracy is alleged herein. Ultimately, consumers were to be deprived of the kind of product they were led to believe they would receive. The allegations suggest that as time went along, person were added to the conspiracy and it was broadened, but remained the same conspiracy. *See United States v. Varelli*, 407 F.2d 735, 742 (7th Cir. 1969) (Agreement may continue for a long period of time and include the performance of many transactions in which new parties join the agreement at any time . . .). The Court finds that the second superseding indictment is not duplicitous. Therefore, the Court denies the motion to dismiss based on duplicity.

Further, Defendants argue that the Second Superseding Indictment should be dismissed because the Government introduces a new and independent conspiracy relating to Hawkins (Doc. 79). Specifically, Defendants maintain that this new conspiracy has a wholly different objective and that it commenced more than two years after the conclusion of the earlier conspiracy.

The Government responds that Defendants misstate the law of conspiracy and the standard for determining whether two separate conspiracies have been charged in the same count and that the Second Superseding Indictment charges only one continuous conspiracy. The Court agrees with the Government.

In *Grunewald v. United States*, 353 U.S. 391 (1957), the Supreme Court held that acts performed after the accomplishment of the primary purpose of the conspiracy that furthered the conspiracy only by disguising its existence generally are not considered part of the conspiracy. Relying on its decisions in *Lutwak v. United States*, 344 U.S. 604 (1953) and *Krulewitch v. United States*, 336 U.S. 440 (1949), the Supreme Court concluded that "after the central criminal purposes of a conspiracy have been attained, a subsidiary conspiracy to conceal may not be implied from circumstantial evidence showing merely that the conspiracy was kept a secret and that the conspirators took care to cover up their crime in order to escape detection and punishment." *Grunewald*, 352 U.S. at 402. Further, the Supreme Court stated that "[a]cts of covering up, even though done in the context of a mutually understood need for secrecy, cannot themselves constitute proof that concealment of the crime after its commission was part of the initial agreement among the conspirators. For every conspiracy is by its very nature secret; a case can hardly be supposed where men concert together for crime and advertise their purpose to the world. And again, every conspiracy will inevitably be followed by actions taken to cover the conspirators' traces." *Id.* at 402. To hold that later acts of concealment are part of the original conspiracy, the Supreme Court said, "would result in a great widening of the scope of conspiracy

prosecutions, since it would extend the life of a conspiracy indefinitely" and would "wipe out the statute of limitations in conspiracy cases, as well as extend indefinitely the time within which hearsay declarations will bind co-conspirators." *Id.*

However, *Grunewald* did recognize that some acts of concealment can serve as conspiratorial acts and thus constitute part of the original conspiracy. *Grunewald* distinguished "acts of concealment done in furtherance of the main criminal objectives of the conspiracy" —which are considered part of the conspiracy—from "acts of concealment done after these central objectives have been attained, for the purpose of covering up after the crime"—which are not considered part of the conspiracy. *Id.* at 405. The Seventh Circuit has indicated that whether a particular act of concealment constitutes part of the original conspiracy depends on the nature of the conspiracy's objective. In *United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995), the Seventh Circuit held that where the conspiracy's objective was never "finally attained," acts of concealment may be considered to be part of the conspiracy. *Id.* at 659. According to the Seventh Circuit, "[a] conspiracy ends when its main criminal objective has been accomplished or abandoned, *i.e.*, 'when the design to commit substantial misconduct ends.'" *Id.* (quoting *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1024 (7th Cir. 1992)). But "'[w]here a conspiracy contemplates a continuity of purpose and a continued performance of acts, it is presumed to exist until there has been an affirmative showing that it has been terminated. . . .'" *Id.* at 660 (quoting *United States v. Elwell*, 984 F.2d 1289, 1293 (1st Cir. 1993)).

Here, the conspiracy as charged did not end with the last wire transfer. The Second Superseding Indictment charges that the conspiracy and the continuing success of the conspiracy depended on the ability to continuously conceal the truth about the product from consumers and to prevent shareholders in the marketplace from learning the truth about the quality of the product being supplied by a publicly traded corporation, EXIDE. The Second Superseding Indictment alleges that acts of concealment began before the wire transmissions (i.e., falsifying internal quality assurance reports) and continued as part of the wire transmissions (i.e., falsifying corporate books and records) to conceal the true status of the payments. The Second Superseding indictment also alleges that the later acts of concealment "relate back" to the original decision to defraud. See *United States v. Mackey*, 571 F.2d 376, 384 (7th Cir. 1978). As alleged, the acts of concealment are inextricably interrelated to the functioning of the scheme and the continued exploitation charged in the indictment. Based on these allegations, the Court finds that the Second Superseding Indictment alleges a continuing conspiracy including the acts of concealment and not three separate conspiracies. Thus, the Court denies Defendants' supplemental motion to dismiss Second Superseding Indictment as containing a third independent theory which is duplicitous.

IV. Motion to Dismiss the Superseding Indictment as Time Barred

Next, Defendants argue that superseding indictments are time barred unless they properly relate back

to the January 19, 2001 indictment.[10] The Government responds that the superseding indictments relate back to the timely original indictment. The Court agrees with the Government.

"A superseding indictment that supplants a still-pending original indictment relates back to the original indictment's filing date so long as it neither materially broadens nor substantially amends the charges initially brought against the defendant." *United States v. Ross*, 77 F.3d 1525, 1537 (7th Cir. 1996) (citations omitted).

The Court reviewed the original sealed January 19, 2001 indictment. The Court concludes that the superseding indictments *do* relate back to the original indictment, which was only amended in the manner represented by the Government. Thus, the charges brought against Defendants are not time barred. Neither of these superficial changes amounts to the kind of broadening or amendment that would prevent relation back to an earlier pending indictment. The Second Superseding Indictment contains additional language regarding the Defendants at bar, but Defendants do not claim that the additional language does not relate back. Even so, such a claim would be frivolous as it clearly relates back and simply provides more details. Thus, the Court denies Defendants' motion to dismiss the second superseding indictment as time barred.

VI. Conclusion

Accordingly, the Court DENIES Defendants' motion to change venue (Doc. 41-1); Defendants' motion to dismiss Superseding Indictment as time barred and based

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[10] Defendants maintain that the statute of limitations for conspiracy to commit wire fraud and wire fraud are five years.

on duplicity (Doc. 41-4) and Defendants' supplemental motion to dismiss second superseding indictment as containing a third independent theory which is duplicitous (Doc. 79).

IT IS SO ORDERED.

Signed this 7th day of November, 2001.

/s/ DAVID R. HERNDON
DAVID R. HERNDON
United States District Judge