

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 05-13809

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT APRIL 23, 2009 THOMAS K. KAHN CLERK

D. C. Docket No. 04-00010-CR-3-001-MCR

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID W. SVETE,
RON GIRARDOT,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Florida

(April 23, 2009)

Before DUBINA and KRAVITCH, Circuit Judges, and COOGLER,* District
Judge.

PER CURIAM:

* Honorable L. Scott Coogler, United States District Judge for the Northern District of
Alabama, sitting by designation.

Upon the majority vote of the judges in this court in active service, on July 1, 2008, this court vacated this panel’s prior opinion and granted rehearing en banc. *See* 532 F.3d 1133 (11th Cir. 2008) (en banc); 521 F.3d 1302 (11th Cir. 2008), *vacated and reh’g en banc granted*, 532 F.3d 1133. En banc, this court decided the question of whether the crime of mail fraud, which prohibits “any scheme or artifice to defraud” by use of the mail, 19 U.S.C. § 1341, requires proof that the scheme be capable of deceiving a reasonably prudent person or whether schemes aimed at the gullible or improvident also are prohibited, 556 F.3d 1157, 1159 (11th Cir. 2009) (en banc). This court overruled its prior holding in *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996), that the offense of mail fraud requires proof of a scheme calculated to deceive a person of ordinary prudence. 556 F.3d at 1166. Because prior to the court’s rehearing en banc, this panel was bound by *Brown*, the panel reversed Svete and Girardot’s convictions for mail fraud, where the district court had used a pattern jury instruction that did not contain the “person of ordinary prudence” standard articulated in *Brown*. *Id.* The court en banc affirmed the decision of the district court not to give the jury instruction about mail fraud requested by Svete and Girardot, which incorporated the standard from *Brown*, and remanded to the panel for further consideration of any remaining issues. *Id.* at 1170. Because the en banc panel considered only the

narrow mail fraud issue, we hereby reinstate the original panel's determinations as to all other issues, including sufficiency of the evidence for all convictions of both Svete and Girardot; the district court's proper denial of the Motion for New Trial; and the absence of error in the district court's increase of Svete's offense level. In light of our en banc opinion in *Svete*, we now affirm the defendants' convictions on Counts Three through Seven, and we reinstate our affirmance of the defendants' convictions on Counts One, Two, Eight, Nine, and Ten. We also affirm Svete's sentences.

AFFIRMED.¹

¹ The request by Svete to file supplemental briefing is DENIED.