

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

ROBERT BRENNAN.

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CRIMINAL NUMBER
19-507

April 7, 2020

Anita B. Brody, J.

MEMORANDUM

On April 25, 2019, FBI agents interviewed Robert Brennan, a Catholic priest, in Brennan’s Maryland home. In 2013, Brennan had been indicted in state court for sexually abusing S.M.—a child who attended the parish school at which Brennan worked—from 1997 to 2000. Prior to trial, S.M. died, and the charges were dismissed. During the April 25, 2019 interview, Brennan told the FBI that he did not know S.M. or S.M.’s brother, father, or mother prior to 2013. On September 4, 2019, a grand jury indicted Brennan, charging him with four counts of making a materially false statement under 18 U.S.C. § 1001. Brennan has filed two motions to dismiss the indictment: one for failure to state an offense and another for improper venue. For the reasons that follow, I will deny both motions.

I. Context

This section provides context surrounding the indictment. The alleged facts in this section are taken, in part, from the parties’ briefing and do not represent factual findings by this Court. The government must prove all of factual allegations at trial, and it has not yet had a chance to do so at this pretrial stage.

Robert Brennan was ordained as a Catholic priest on May 16, 1964. He served in the Archdiocese of Philadelphia. From 1993 to 2004, Brennan served as a pastor at a Philadelphia

parish called “Resurrection of Our Lord,” which operated a school. Between 1997 and 2000, S.M.—then a minor—attended the sixth to eighth grades at Resurrection. In 2013, S.M. alleged that he was sexually abused by Brennan while attending Resurrection from 1997-2000.¹ As a result of S.M.’s allegations, the Philadelphia District Attorney’s Office filed criminal charges against Brennan in September 2013. One month later, S.M. passed away after a drug overdose. Without S.M. as a witness, the District Attorney dismissed its case against Brennan. In November 2013, S.M.’s family filed a civil suit against Brennan and the Archdiocese. In 2018, the civil case reportedly settled.

Between 2016 and 2018, the Pennsylvania Attorney General’s Office undertook an extensive grand-jury investigation into sexual abuse in the Pennsylvania Catholic Church. On July 27, 2018, the grand jury issued an 884-page report. In October 2018, federal prosecutors in the Eastern District of Pennsylvania—along with the FBI—began a similar investigation, focusing on uncovering potential federal crimes.

On April 25, 2019, as part of this investigation, two FBI agents drove from the FBI’s Philadelphia field office to interview Brennan in his home in Perryville, Maryland. Before the interview began, the FBI agents identified themselves and told Brennan that they were interested in discussing his time as a priest in the Archdiocese of Philadelphia. Brennan agreed to speak with them. During the interview, the agents showed Brennan a photograph of Brennan and S.M. posing together at S.M.’s eighth grade graduation. In response, Brennan told the agents that he did not know S.M. and had never been in his company. The agents pointed out that in 2013, Brennan had been arrested for sexually abusing S.M. and was then sued by S.M.’s family. Brennan responded that he knew S.M. was the person in the photograph but that he did not know

¹ Throughout this opinion, I replace the alleged victim’s name with the initials “S.M.”

S.M. prior to the 2013 civil lawsuit. He explained that the parish school was large, that he did not know everyone, and that students frequently wanted to be photographed with priests at graduation. He also told the agents that he did not know S.M.'s father, mother, or brother. The questioning then turned to other topics. Before ending the interview, the agents told Brennan it was a crime to lie to federal agents and repeated their questions about whether Brennan knew S.M. or S.M.'s family. Brennan told the agents that he understood the need to be truthful, and again denied knowing S.M. or S.M.'s family members until after the 2013 lawsuit was filed. The government alleges that Brennan was lying.

II. Background

On September 4, 2019, a grand jury issued an indictment charging Brennan with four counts of making a materially false statement under 18 U.S.C. § 1001. It alleges the following:

1. Defendant ROBERT BRENNAN was a Catholic priest ordained on May 16, 1964, who served in the Archdiocese of Philadelphia. From in or about December 1993 to in or about June 2004, defendant BRENNAN served as a priest at Resurrection of Our Lord parish in Philadelphia, Pennsylvania ("Resurrection").
2. In or about September 2013, the Office of the District Attorney of the City of Philadelphia filed criminal charges against defendant ROBERT BRENNAN, alleging that he had sexually abused a minor, S.M., during defendant BRENNAN's stint at Resurrection ("the criminal allegations"). Defendant BRENNAN was arrested on September 26, 2013.
3. On or about October 13, 2013, S.M. died of a drug overdose. The criminal charges against defendant ROBERT BRENNAN subsequently were dismissed.
4. In or about November 2013, the M. family filed a civil suit against the Archdiocese of Philadelphia and defendant ROBERT BRENNAN ("the civil lawsuit"). The Archdiocese of Philadelphia settled the civil lawsuit for an undisclosed amount on or about May 2, 2018.

5. On or about April 25, 2019, in the District of Maryland and the Eastern District of Pennsylvania, defendant

ROBERT BRENNAN,

in a matter within the jurisdiction of the Federal Bureau of Investigation, an agency of the executive branch of the United States, knowingly and willfully made materially false, fictitious, and fraudulent statements and representations, in that defendant BRENNAN:

COUNT	DESCRIPTION
1	Stated that prior to the criminal allegations and civil lawsuit, he did not know S.M., when in fact he previously knew S.M.;
2	Stated that prior to the criminal allegations and civil lawsuit, he did not know S.M.'s father, M.M. Sr., when in fact he previously knew M.M. Sr.;
3	Stated that prior to the criminal allegations and civil lawsuit, he did not know S.M.'s mother, D.M., when in fact he previously knew D.M.;
4	Stated that prior to the criminal allegations and civil lawsuit, he did not know S.M.'s brother, M.M. Jr., when in fact he previously knew M.M. Jr.

Each of these statements was made in a matter related to an offense under chapter 109A, 110, 117, and Section 1591 of Title 18 of the United States Code.

Redacted Indictment, at 1-2 (ECF No. 37). The indictment's references to the criminal code include the chapters for Sexual Abuse (109A), Sexual Exploitation and Other Abuse of Children (110), and Transportation for Illegal Sexual Activity and Related Crimes (117). The indictment also referenced 18 U.S.C. § 1591 (Sex Trafficking of Children by Force, Fraud, or Coercion).

III. Discussion

On January 27, 2020, Brennan filed motions to dismiss the indictment for failure to state an offense and improper venue, under Federal Rules of Criminal Procedure 12(b)(3)(B)(v) and 12(b)(3)(A)(i), respectively. In his first motion, Brennan argues that the indictment fails to state an offense as a matter of law because his statements can only relate to time-barred, non-prosecutable crimes, and thus cannot be “material” or within the FBI’s jurisdiction, which are two of the elements required under § 1001. This argument fails because it incorrectly assumes that an expired statute of limitations operates as a complete bar to initiating a prosecution.

In his second motion, Brennan argues that venue is improper in the Eastern District of Pennsylvania because he made his statements in Maryland. The government argues that venue is proper in this District under an effects-focused venue analysis, which provides that venue may be proper in a district that has felt the effects of a crime if that crime’s “essential conduct elements” are defined in terms of their effect. Brennan argues that this effects-based venue analysis is unavailable for § 1001 prosecutions. Circuit courts have split on this question. The majority have allowed for effects-based venue, however, and I follow the majority view. Section 1001’s “conduct element” is “making a materially false statement,” and the word “materially” necessarily contemplates a statement’s potential effects. Thus, as a matter of law, effects-based venue is *possible*, though the government must ultimately show at trial that this District *actually felt* the effects of Brennan’s conduct in order to satisfy the venue requirement.

A. Failure to State An Offense

Brennan first moves to dismiss the indictment for failure to state an offense. Under Federal Rule of Criminal Procedure 7(c)(1), an indictment “must be a plain, concise, and definite written statement of the essential facts constituting the offense charged” Fed. R. Crim. P.

7(c)(1). An indictment is facially sufficient if it “(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution.” *United States v. Stock*, 728 F.3d 287, 292 (3d Cir. 2013) (quoting *United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012)). Detailed allegations are unnecessary. *Id.* A recitation of the statutory language usually satisfies the first requirement, “so long as there is sufficient factual orientation to permit a defendant to prepare his defense and invoke double jeopardy.” *Id.* (internal quotation marks and citation omitted). The second and third requirements are normally satisfied by “a factual orientation that includes a specification of the time period of the alleged offense.” *Id.* (citation omitted).

Under Rule 12(b)(3)(B)(v), a defendant can move to dismiss an indictment for failure to state an offense in at least two ways. *Id.* First, the defendant can assert that the indictment “fails to charge an essential element of the crime.” *Id.* Second, he can argue that the “specific facts alleged . . . fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation.” *Id.* (internal quotation marks and citation omitted). A “pretrial motion to dismiss an indictment is not a permissible vehicle for addressing the sufficiency of the government’s evidence,” and the district court must “accept as true the factual allegations” in the indictment. *Huet*, 665 F.3d at 595. The court must determine only “whether, assuming all of those facts as true, a jury could find that the defendant committed the offense for which he was charged.” *Id.* at 596.

Brennan argues that the indictment fails, as a matter of law, to state an offense under 18 U.S.C. § 1001(a)(2). He contends that the indictment fails to allege two of the statute’s essential elements—“jurisdiction” and “materiality”—because his statements relate solely to time-barred

crimes that the FBI is legally prohibited from investigating or prosecuting. As explained below, this argument fails because it incorrectly assumes that an expired statute of limitations operates as an absolute bar on the government's power to initiate a prosecution. Thus, I will deny this motion.

Section 1001(a)(2) punishes anyone who, "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . makes any materially false, fictitious, or fraudulent statement or representation." 18 U.S.C. § 1001(a)(2). To secure a conviction under § 1001(a)(2), the government must prove that (1) the defendant made a statement or representation; (2) the statement or representation was false; (3) the statement or representation was made knowingly and willfully; (4) the statement or representation was material; and (5) the statement or representation was made in a matter within the jurisdiction of the federal government. *United States v. Moyer*, 674 F.3d 192, 213 (3d Cir. 2012) (citing *United States v. Barr*, 963 F.2d 641, 645 (3d Cir. 1992)).

Section 1001's "jurisdiction" element asks whether the federal entity in question was engaged in an "authorized function" when it received the statement, and the element is satisfied if the agency in question had a "statutory basis" for its information request. *United States v. Rodgers*, 466 U.S. 475, 479-81 (1984) (citing *Bryson v. United States*, 396 U.S. 64, 71 (1969)). The FBI is statutorily authorized to "detect and prosecute" federal crimes. *Id.* at 481 (quoting 28 U.S.C. § 533(1)). Thus, "jurisdiction" exists under § 1001 when someone lies to FBI agents performing a legitimate investigation into federal crimes. *Id.*; *Brogan v. United States*, 522 U.S. 398, 402, 405 (1998).

A statement is "material" under § 1001 if it has a "natural tendency to influence, or [is] capable of influencing the decision of the decisionmaking body to which it was addressed."

United States v. Gaudin, 515 U.S. 506, 509 (1995) (citation and internal quotation marks omitted). A statement may be material even if no agency actually relied on it in making a decision. *United States v. McBane*, 433 F.3d 344, 350 (3d Cir. 2005). The relevant question is whether the statement is “of a type that would naturally tend to influence a reasonable decisionmaking agency in the abstract.” *Id.* (emphasis omitted).

Brennan argues that, as a matter of law, his statements could not be “material” or within the FBI’s jurisdiction because (i) they only relate to crimes involving S.M. that occurred between 1997-2000; (ii) the statute of limitations for these crimes has now expired; and (iii) those crimes are therefore impossible to prosecute.² *See* Brennan Mot. to Dismiss for Failure to State an Offense, at 8 (ECF No. 44) (arguing that the FBI lacks jurisdiction to ask about S.M.-related offenses because it “cannot legally prosecute” those offenses); *id.* at 7 (arguing that materiality cannot be met because “[s]tatements cannot influence a decisionmaking body if that body is time-barred from prosecuting the case.”). As he made clear at oral argument, Brennan’s position hinges upon the assumption that an expired statute of limitations operates as a complete bar to initiating a prosecution, akin to that imposed by the Double Jeopardy Clause. *See* Oral Arg. Tr. at 9:21-10:8 (Brennan’s counsel arguing that an expired statute of limitations, like a Double Jeopardy bar, means that a case “can never be brought to a prosecution.”).

The Third Circuit has held otherwise. *See United States v. Levine*, 658 F.2d 113, 120 (3d Cir. 1981) (“Whereas the Double Jeopardy . . . Clause[] bar[s] the sovereign from prosecuting at all, . . . statutes of limitations do not insulate the defendant from trial per se.”). While other Circuits have treated an expired statute of limitations as an “absolute bar to the sovereign’s

² The government disputes points (i) and (ii), arguing that (i) Brennan’s statements are not solely limited to S.M.-involved crimes and (ii) the statute of limitations had not expired as to the S.M.-related crimes from 1997-2000. I need not address either of these issues because Brennan’s argument fails even if both issues are resolved in his favor, as explained below.

power to prosecute,” *id.* at 119 & n.3, the Third Circuit has expressly rejected that position, and has held that a limitations defense provides only an affirmative waivable of defense, rather than “absolute immunity from prosecution” or a “right not to be tried,” *id.* at 120, 128; *United States v. Karlin*, 785 F.2d 90, 92-93 (3d Cir. 1986).

Accordingly, even if the statute of limitations expired on the 1997-2000 S.M.-related crimes, it does not follow that those crimes were impossible to prosecute. In fact, there were several potential avenues to prosecution at the time of Brennan’s interview with the FBI. For instance, it was surely possible that Brennan—if subsequently prosecuted—could have waived any limitations defense by failing to raise it or pleading guilty. *See Levine* at 120 n.8 (noting that a guilty plea “waives [a] statute of limitations defense” (citations omitted)); *Karlin*, at 91-93 (affirming conviction on tax-evasion count filed after limitations period expired and holding that defendant waived limitations defense by failing to raise it during or before trial).³ And even if Brennan raised the defense, the trial judge might have decided to defer on assessing its merits until trial. *See Levine* at 123 (noting that limitations defenses are often “inextricab[le] . . . from the course of events emerging at trial” and “often involve[] questions . . . closely connected with the merits [that] may be assessed only after a trial”).⁴ In each of these scenarios, there would have been subsequent prosecutorial steps to take after Brennan’s interview that might have led to trial or a conviction for the S.M.-related crimes.

Because all of these possibilities existed when Brennan made his statements, it is wrong to suggest that the 1997-2000 S.M.-related crimes were incapable of prosecution and thus

³ *See also United States v. Oliva*, 46 F.3d 320, 325 (3d Cir. 1995) (reaching same waiver conclusion and affirming conviction); *United States v. Ciavarella*, 716 F.3d 705, 733 (3d Cir. 2013) (same).

⁴ *See also id.* at 123-24 (“Were we deciding as an abstract matter whether statute of limitations defenses are collateral to the merits and susceptible to pretrial resolution, or whether such claims are affected by evidence and events at trial, we would be inclined to conclude that limitations defenses often intersect with matters that develop at trial.”).

outside of the FBI's jurisdiction. Given that these crimes were possible to prosecute, the FBI had jurisdiction to ask about them and, contrary to Brennan's materiality argument, did in fact have permissible actions left to influence.⁵ Therefore, I will deny Brennan's motion to dismiss.

B. Venue Motion

Brennan also moves to dismiss the indictment for improper venue. He argues that venue is only proper in the District of Maryland because that is where he made the alleged false statements. This argument implicates a Circuit split on an issue that the Third Circuit has not directly addressed: if a defendant makes an allegedly false statement in District A that relates to an investigation in District B, can venue be proper in District B for a § 1001 prosecution? The First, Second, Fourth, and Seventh Circuits have said "yes,"⁶ while the Tenth and Eleventh Circuits seem to say "no."⁷ The majority view is more persuasive. Accordingly, I will deny Brennan's venue motion.

1. Standard of Review

Federal Rule of Criminal Procedure 12(b)(3)(A)(i) allows a criminal defendant to file a pretrial motion to dismiss an indictment for improper venue. Venue must be proper for each count of an indictment, and the "Government ultimately bears the burden of making that showing by a preponderance of the evidence." *United States v. Menendez*, 831 F.3d 155, 176 n.3

⁵ I take no position on whether Brennan's statements actually satisfy the "materiality" standard, a question for the jury to resolve during trial. *Gaudin*, 515 U.S. at 522-23. I only reject his position that it is legally impossible for his statements to be material because there were no permissible actions left to influence. This is the only materiality argument Brennan has raised at this stage.

⁶ See *United States v. Coplan*, 703 F.3d 46, 79-80 (2d Cir. 2012) (allowing for venue—on similar facts—in the district where the investigation occurred); *United States v. Oceanpro Indus., Ltd.*, 674 F.3d 323, 329-30 (4th Cir. 2012) (same); *United States v. Ringer*, 300 F.3d 788, 792 (7th Cir. 2002) (same); *United States v. Salinas*, 373 F.3d 161, 167 (1st Cir. 2004) (stating the same in dicta).

⁷ See *United States v. Smith* 641 F.3d 1200, 1207 (10th Cir. 2011) (holding that venue is only proper where the statement is made, but not where the investigation is located); *United States v. John*, 477 F. App'x. 570, 572 (11th Cir. 2012) (same).

(3d Cir. 2016) (internal quotation marks and citations omitted)). When assessing a pretrial challenge to venue, however, “only the indictment may be considered,” and the “allegations must be taken as true.” *United States v. Menendez*, 137 F. Supp. 3d 688, 693-94 (D.N.J. 2015) (quoting *United States v. Mendoza*, 108 F.3d 1155, 1156 (9th Cir. 1997)); see also *United States v. Engle*, 676 F.3d 405, 415 (4th Cir. 2012); *United States v. Villalobos-Macias*, 280 F. Supp. 3d 1211, 1215 (D.N.M. 2017). At subsequent stages of the litigation defendants may assert that the Government has not met its burden of proving venue by a preponderance of the evidence. *United States v. Perez*, 280 F.3d 318, 334-35 (3d Cir. 2002). But at the pretrial stage, a motion to dismiss an indictment is not an appropriate “vehicle for addressing the sufficiency of the government’s evidence” on venue. *Menendez*, 831 F.3d at 176 n.3 (3d Cir. 2016).

2. General Venue Principles

In criminal cases, proper venue is an important constitutional safeguard. The “proper place of colonial trials was so important” to the framers that they listed it as a grievance in the Declaration of Independence and imposed a criminal venue requirement in two separate parts of the Constitution: Article III and the Sixth Amendment. See *United States v. Auernheimer*, 748 F.3d 525, 532 (3d Cir. 2014). Article III provides that the “Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed . . .” U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment provides criminal defendants with the right to trial “by an impartial jury of the State and district wherein the crime shall have been committed. . . .” U.S. CONST. amend. VI. Federal Rule of Criminal Procedure 18 codifies this requirement: “[u]nless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.” Fed. R. Crim. P. 18.

Congress “may prescribe specific venue requirements for particular crimes.” *Auernheimer*, 748 F.3d at 532 (citation omitted). But when it has not done so, courts must determine the crime’s “*locus delicti*,” the “place where an offense was committed.” *Id.* (citation omitted). The *locus delicti* “must be determined from the nature of the crime alleged and the location of the act or acts constituting it.” *Id.* (citations and internal quotation marks omitted). This inquiry requires courts to first “identify the conduct constituting the offense” and “then “discern the location of the commission of the criminal acts.” *Id.* (citations and internal quotation marks omitted). Courts engaging in this analysis must distinguish between a statute’s “essential conduct elements” and its “circumstance elements.” *Id.* at 533 (citation and internal quotation marks omitted). “Only ‘essential conduct elements’ can provide the basis for venue; ‘circumstance elements’ cannot.” *Id.* (citing *United States v. Bowens*, 224 F.3d 302, 310 (4th Cir. 2000)). Conduct elements describe actions proscribed by a criminal statute, while “circumstance elements” are “fact[s] that existed at the time” those actions are performed. *Id.*; *see also United States v. Strain*, 396 F.3d 689, 694 (5th Cir. 2005) (defining “circumstance elements” as those that “do not involve any proscribed conduct by the accused”). For instance, if Congress made it a crime to jaywalk at 2:00 p.m., the “conduct element” would be “jaywalking,” while the “circumstance element” would be the time-of-day requirement.

3. The “Effects-Based” Venue Analysis

Congress “may, consistent with the venue clauses of Article III and the Sixth Amendment, define the essential conduct elements of a criminal offense in terms of their effect, thus providing venue where those effects are felt.” *Bowens*, 224 F.3d at 312; *Auernheimer*, 748 F.3d at 537 (citing *Bowens* at 311); *see also United States v. Johnson*, 323 U.S. 273, 275 (1944) (Congress may “provide that the locality of a crime shall extend over the whole area through

which the force propelled by an offender operates.”). This “effects-based” test asks two questions: (1) did Congress define a crime’s essential conduct elements in terms of their effect; and (2) if so, did the district in question *actually feel* the effects of the proscribed conduct? The first question is purely legal and may be addressed at the motion-to-dismiss stage. The second question is factual and must be proven by a preponderance of the evidence at trial.

Thus, the only dispute to resolve at this pretrial stage is whether Congress defined § 1001’s essential conduct element in terms of its effects. This question requires the Court to (i) identify § 1001’s “essential conduct element” and then (ii) determine whether it is “defined in terms of its effects.” *See Oceanpro*, 674 F.3d at 329-30 (noting that the analysis “begin[s] by “determin[ing]” § 1001’s “essential conduct elements,” and then addressing whether those elements were defined “in terms of their effects.”). I conclude that (i) § 1001’s essential conduct element is “making a materially false statement,” and (ii) by using the word “materially,” Congress defined § 1001’s essential conduct element in terms of its effects. Thus, the effects-based analysis is potentially available here, as a matter of law. As a factual matter, however, the government has the burden of proving at trial, by a preponderance, that this District actually felt the effects of Brennan’s conduct.

i. Identifying Section 1001’s “Essential Conduct Element”

There is a Circuit split on whether § 1001 allows for an effects-based venue analysis. The key difference between the majority and minority positions is whether § 1001’s essential conduct element is (1) “making a *materially* false statement” or (2) merely “making a false statement.” A majority of Circuits—the First, Second, and Fourth—have adopted the first position and conclude that the word “materially” references effects, making effects-based venue

possible.⁸ The minority view—the Tenth and Eleventh Circuits—defines § 1001’s essential conduct element as merely “making a false statement.” Because these Circuits omit the word “materially,” they conclude that venue is only proper where a statement is made, but not where its effects are felt.⁹

The majority view is more persuasive. First, it adheres to the text of the statute, while the minority view deviates from the text. Section 1001(a)(2) punishes anyone who “makes any materially false, fictitious, or fraudulent statement or representation.” 18 U.S.C. § 1001(a)(2). The minority carves the word “materially” out of the statute while leaving the rest of the provision’s conduct-focused clause intact. Second, and relatedly, the materiality element defines *conduct*, not circumstances. Not all lies are illegal under § 1001—only *material* lies. Congress drew a line between proscribed and permissible conduct, and it used the word “materially” to draw that line. The minority definition simply ignores that line and expands § 1001’s scope beyond its textual limits.

Third, the minority view relies on precisely the kind of restrictive “verb test” analysis that the Supreme Court has warned courts against using. The verb test is an interpretive approach that looks to a statute’s verb to discern its *locus delicti*, the place where the offense was committed. In *Smith*, the Tenth Circuit relied solely on the verb test to conclude that under § 1001, venue can only be proper in the district where a statement is made. *Smith*, 641 F.3d at

⁸ See *Oceanpro*, 674 F.3d at 329 (4th Cir. 2012) (“[T]he essential conduct element prohibited by [§ 1001] is ‘making any materially false statement.’”); *Coplan* 703 F.3d at 79 (2d Cir. 2012) (same); cf. *Salinas*, 373 F.3d at 167 (1st Cir. 2004) (“Section 1001 explicitly criminalizes only those false statements that are material.”). The Seventh Circuit reaches the same result as the other “majority” Circuits—i.e., it concludes that someone can be prosecuted under § 1001 in a district other than the district where the statement was made—but never attempts to identify § 1001’s “conduct element.” *Ringer*, 300 F.3d at 791-92 (7th Cir. 2002).

⁹ See *Smith*, 641 F.3d at 1207 (10th Cir. 2011) (“[T]here is [no] language [in § 1001] suggesting any ‘essential conduct element’ other than making a false statement. Therefore, the *locus delicti* is where the defendant makes the false statement.”); *United States v. John*, 477 F. App’x. at 572 (11th Cir. 2012) (“[T]he only ‘essential conduct’ prohibited by [§ 1001] is the making of a false statement.”).

1207. In *United States v. Rodriguez-Moreno*, the Supreme Court warned courts not to “rigidly” focus on a statute’s verb “to the exclusion of other relevant statutory language,” adding that the verb test “unduly limits the inquiry into the nature of the offense.” 526 U.S. 275, 280 (1999). *Smith* did just that.¹⁰ This is not a persuasive approach.

In short, § 1001’s “essential conduct” is making a “*materially* false statement,” rather than merely making any false statement, as even Brennan’s own briefing appears to recognize. See Brennan Reply Br. at 6 (ECF No. 39) (“Materiality is not only an essential element of the conduct charged in this case, it should also be considered an essential fact. . . .”); *id.* at 7 n.4 (“In a false statement case, . . . the utterance of the statement is not the gist of the offense; rather, it is the materiality of the offense that is the gist, or essential. . . . [O]ne cannot commit the offense of false statements without materiality.”).

ii. Section 1001’s Conduct Element Is “Defined In Terms Of Its Effects”

Section 1001’s essential conduct element is “making a materially false statement.” By using the word “materially,” Congress defined this conduct element in terms of its effects. A statement is “material” if it “ha[s] ‘a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.’” *Gaudin*, 515 U.S. at 509 (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)). The word “influence” inherently references effects.¹¹ Therefore, by inserting the word “materially” into the conduct-focused

¹⁰ The *Smith* court began its statutory analysis by stating: “While not an exclusive test, it is often helpful to look at the verb or verbs used in the criminal statute to determine where the crime was committed.” *Smith*, 641 F.3d at 1207 (citing *Rodriguez-Moreno*, 526 U.S. at 280)). Despite recognizing that the verb test should not be exclusively applied, the *Smith* court then appears to rely exclusively on the verb test. See *id.* (quoting § 1001(a)(2), italicizing the verb “makes,” and concluding that the “*locus delecti* is where the defendant makes the false statement.”). Brennan concedes in his own briefing that the minority approach focuses on § 1001’s verb to the exclusion of the rest of its statutory language. See Brennan Mot. to Dismiss for Improper Venue, at 13 (ECF No. 44) (“The Tenth and Eleventh Circuits focus on the verb ‘make’ in section 1001(a)(2), *rather than* the noun [sic] ‘materiality’ [sic].” (emphasis added)).

¹¹ See *Influence*, MERRIAM-WEBSTER DICTIONARY ONLINE, <https://www.merriam-webster.com/dictionary/influence>

language of § 1001, Congress “inherently reference[d] the effects of that conduct.” *Oceanpro*, 674 F.3d at 329; *see also Coplan*, 703 F.3d at 79 (“[Section 1001’s] materiality requirement proves dispositive with respect to venue . . . [because materiality] turns on the tendency or capacity of [defendant’s] statements to influence the decisionmaking body at issue . . .”).

This conclusion is not altered by the fact that § 1001 only requires proof of *potential* rather than *actual* effects. *See McBane*, 433 F.3d at 350 (3d Cir. 2005) (“[A] statement may be material even if no agency actually relied on the statement in making a decision.”).¹² In *Auernheimer*, the Third Circuit indirectly established this principle by recognizing that another criminal law—the Hobbs Act—was sufficiently “defined in terms of its effects” for venue purposes. *See Auernheimer*, 748 F.3d at 537 (noting that the “terms of the [Hobbs Act] themselves forbid affecting commerce.”). The Hobbs Act punishes anyone who “obstructs, delays, or affects commerce . . . by robbery or extortion or attempts or conspires to do so . . .” 18 U.S.C. § 1951(a). Like § 1001, a conviction under the Hobbs Act does *not* require proof that an actual effect was caused—rather, it merely requires proof of a potential effect. *See United*

(last accessed Apr. 7, 2020) (defining the transitive verb “influence” as “to affect or alter by indirect or intangible means [or] to have an effect on the condition or development of . . .”); *id.* (defining the noun “influence” as the “power or capacity of causing an effect . . .”); *United States v. Chriswell*, 401 F.3d 459, 470 (6th Cir. 2005) (“The definition of ‘influence’ [is] . . . ‘to affect the mind or action of.’” (quoting OXFORD ENGLISH DICTIONARY)); *United States ex rel. Longhi v. United States*, 575 F.3d 458, 469-70 (5th Cir. 2009) (discussing the False Claims Act’s “materiality” standard—which asks the same “capable of influencing” question as § 1001’s materiality element—and noting that “influence” means the “power or capacity of causing an effect” (citation and internal quotation marks omitted)); *cf. United States v. Caldwell*, 463 F.2d 590, 593 n.3 (3d Cir. 1972) (noting that the verb “affect” means “to produce a *material influence* upon . . .” (emphasis added) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (UNABRIDGED) (1966))).

¹² At least one district court opinion—which Brennan cites—has pointed to this distinction to conclude that effects-based venue is inappropriate for § 1001. *See United States v. Bin Laden*, 146 F. Supp. 2d 373, 378-79 (S.D.N.Y. 2001) (declining to apply effects-based venue analysis, in part, because § 1001 “do[es] not include any requirement that there be proof of the false statement’s effect, if any.”). *Bin Laden*, however, has been effectively overruled by the Second Circuit, *see Coplan*, 703 F.3d at 79 (2d Cir. 2012), and other Circuits have invoked § 1001’s requirement of *potential* effects as sufficient to permit effects-based venue, *see, e.g., Ringer*, 300 F.3d at 792 (7th Cir. 2002) (“That the government does not have to prove that a proceeding was affected, however, does not mean that the Indiana investigation was irrelevant. Proving that the investigation was *reasonably likely* to be affected by Ringer’s statements [in Kentucky] was the keystone to materiality in this case.” (emphasis added)).

States v. Powell, 693 F.3d 398, 404-05 (3d Cir. 2012) (“[T]he effect on interstate commerce required for a Hobbs Act conviction need only be ‘potential’ . . .”).¹³ Nonetheless, the Third Circuit still concluded that the Hobbs Act is “defined in terms of its effect” for purposes of venue. *Auernheimer* at 537. Therefore, statutes that require only *potential* effects can nonetheless be “defined in terms of their effects” for venue purposes. *Cf. Oceanpro* 674 F.3d at 329 (“[J]ust as Congress defined the effects of conduct in the Hobbs Act, . . . it defined the effects in § 1001 to include the element of materiality. . . . [P]roving materiality necessarily requires evidence of . . . the potential effects of [a defendant’s] statement . . .”).

In sum, Congress defined § 1001’s essential conduct element in terms of its effect, making the effects-based venue analysis available here. Thus, I will deny Brennan’s venue motion without prejudice to his ability to again challenge venue at a later stage.¹⁴

¹³ See also *United States v. Urban*, 404 F.3d 754, 764 (3d Cir. 2005) (noting that “proof of a ‘potential effect’ is all that is required under the Hobbs Act” (citation omitted)); *id.* at 765 n.3 (“The majority of our sister circuits have endorsed the ‘potential effect’ reading of the Hobbs Act’s effect on commerce requirement.” (citations omitted)).

¹⁴ My ruling only addresses the first step of the effects-based venue analysis, concluding that § 1001 *is* the kind of statute that allows for venue to be based on effects. Of course, this does not end the inquiry. Under the “second step” of the analysis, the government must prove at trial, by a preponderance of the evidence, that the Eastern District of Pennsylvania actually felt the effects of Brennan’s conduct. See *Bowens*, 224 F.3d at 312 (“Congress may . . . define the essential conduct elements of a criminal offense in terms of their effects, thus providing venue *where those effects are felt.*” (emphasis added)); *Auernheimer*, 748 F.3d at 537 (agreeing with *Bowens* that effects-based venue can be proper in a “location in which a crime’s effects *are felt*” (emphasis added)); *Oceanpro*, 674 F.3d at 328 (“*Bowens* recognized that Congress had the power to ‘define the essential conduct elements of a criminal effect in terms of *their effects*, thus providing venue *where those effects are felt.*” (emphasis in original) (quoting *Bowens* at 312)); see also *United States v. Johnson*, 323 U.S. at 275 (“Congress may . . . provide that the locality of a crime shall extend over the whole area through which *force propelled by an offender operates.*” (emphasis added)).

Because no evidence has yet been offered, it would be premature to address this issue at the pretrial stage. *Menendez*, 831 F.3d at 176 n.3. But Brennan is free, at later stages, to argue that the government has not met its burden. See *Perez*, 280 F.3d at 334-35 (“A defendant may object to venue by raising its absence in a pre-trial motion, challenging during the Government’s case its evidence as to venue, or making a motion for acquittal at the close of the Government’s case that specifically deals with venue.”).

IV. Conclusion

For the reasons given above, I will deny Brennan's motions to dismiss for failure to state an offense and improper venue. A separate order will follow.

s/ANITA B. BRODY, J.
ANITA B. BRODY, J.

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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NUMBER
	:	19-507
v.	:	
	:	
ROBERT BRENNAN.	:	
	:	

ORDER

AND NOW, this 7th day of April, 2020, it is **ORDERED** that Defendant Robert Brennan's Motions to Dismiss the Indictment for Failure to State an Offense (ECF No. 23) and Improper Venue (ECF No. 24) are both **DENIED**.¹

s/ANITA B. BRODY, J.
ANITA B. BRODY, J.

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¹ Both of these motions are filed under seal. Redacted versions of the motions are publicly available on the docket at ECF Nos. 43 (Failure to State an Offense) and 44 (Improper Venue).