No. _____

In The
Supreme Court of the United States

DENNIS M. CARONI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether A Trial Court's Error In Directing A Verdict On Venue Can Be Deemed Harmless When That Element Was Genuinely Contested By The Defendant.

II.

Whether The General Business Expenditures Of A Company That Is Engaged In Illegal Activity, But Is Not Wholly Illegitimate, Satisfy The Promotion Prong Of The Money Laundering Statute.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Dennis M. Caroni, Petitioner.

Gerard M. DiLeo, co-defendant at trial and related appeal below. On February 16, 2016, he filed a Petition for Writ of Certiorari, No. 15-8254.

Joseph George Pastorek, II, co-defendant at trial and related appeal below. On March 14, 2016, he filed a Petition for Writ of Certiorari, No. 15-8604.

United States of America, Respondent.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINION OF THE COURT BELOW

The opinion of the Eleventh Circuit, *United States v. DiLeo*, No. 13-10661, 625 F. App'x 464 (CA11 2015), is attached as App.1-48.

JURISDICTION

The Eleventh Circuit affirmed the conviction and sentence on September 1, 2015 and denied rehearing on November 17, 2015. App.49.

Justice Thomas granted the Application to extend the time to file a petition for a writ of certiorari until April 15, 2016. No. 15A831.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW

U.S. Const., Article III, § 2, cl. 3, provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Federal Rule of Criminal Procedure 18 provides:

> Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed. The court must set the place of trial within the district with due regard for the convenience of the defendant, any victim, and the witnesses, and the prompt administration of justice.

STATEMENT OF THE CASE

Introduction

In *Neder v. United States*, 527 U.S. 1, 9 (1999), the Court held that the failure to submit to the jury an essential element of an offense is subject to the harmless error test. Since then, a "significant inconsistency" has developed "in the way courts have reviewed for harmlessness the failure to instruct on an element of a crime," prompting one circuit judge to "urge the Supreme Court to clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element." *United States v. Pizarro*, 772 F.3d 284, 303 (CA1 2014) (Lipez, J., concurring); *see also Monsanto v. United States*, 348 F.3d 345, 350-51 (CA2 2003) (Calabresi, J.) ("There is some tension between the harmless-error analysis in *Neder* and our articulation of it," which "has been noted by at least one other circuit court.").

In this case charging one count of drug conspiracy and one count of money laundering conspiracy – both conspiracies allegedly occurring in the prosecuting district "and elsewhere" – a three-judge panel of the Eleventh Circuit unanimously agreed that the district court erred by refusing to instruct the jury on venue, "an essential element in a criminal case." App.8-9. The panel disagreed, however, on whether the error could be deemed harmless. The two-judge majority deemed the error harmless by relying on facts that it described as "uncontroverted" to conclude

that there was "overwhelming evidence that overt acts in furtherance of the conspiracy occurred in" the prosecuting district. App.10-11. The dissenting judge, by contrast, understood that the "task on harmless error review" is not to determine whether a jury could find that "venue was proper in the Northern District of Florida," but "whether there exists 'evidence that could rationally lead to a contrary finding.'" App.46. Perceiving a disagreement with the majority over the proper harmless error test, the dissenting judge commented:

> To the extent that the majority applies some other harmless error standard, it has no basis in our precedent. And although several of our sister circuits have held that a failure to instruct the jury on venue is harmless error if evidence of venue is 'substantial and uncontroverted,' uncontroverted in this context takes its literal meaning: not contested at trial.

App.45 n.3.

Caroni petitions the Court for a writ of certiorari to address whether the trial court's error in denying a jury instruction on venue and prohibiting the defendant from arguing lack of venue in closing argument can be deemed harmless.

Caroni also petitions the Court to resolve a split in the circuits over the reach of the promotion prong of the money laundering statute. The defendants operated a legitimate business (a medical practice) that,

according to the Government, engaged in some criminal activity (prescribing controlled substances to some patients that were not for legitimate medical purposes). The Eleventh Circuit, aligning itself with the Tenth Circuit, held that using the proceeds of that medical practice to pay for routine business expenses such as "overhead, rent, malpractice insurance, bills, and whatnot" constitutes "financial transactions" that "promote the carrying on of specified unlawful activity" within the meaning of the money laundering statute, 18 U.S.C. § 1956(a)(1)(A)(i). The Fifth and Sixth Circuits have held that such ordinary business expenditures by a company that is engaged in illegal activity, but is not wholly illegitimate, do not constitute promotion money laundering.

Relevant Facts[1]

Caroni and his two co-defendants, Dr. DiLeo and Dr. Pastorek, operated Global Pain Management, LLC ("Global Pain"), medical pain management clinics in Louisiana that the Government claimed were "pill mills" engaging in prescription practices done "outside the usual course of medical practice and for other than legitimate medical purposes." App.2. In addition to Dr. DiLeo and Dr. Pastorek, the Louisiana clinics employed seven other doctors, none of whom

[1] The facts summarized are drawn from the opinion below and the briefs filed in the Court of Appeals, which contain citations to the trial record.

were accused of criminal activity in their practice of pain management.

The Louisiana clinics operated from 2004 until 2008. During that four-year span, Caroni opened a pain management clinic in Pensacola (Northern District of Florida), "which operated for eight days." App.10. Neither Caroni, Dr. DiLeo, nor Dr. Pastorek ever traveled to Pensacola. *Id*. Caroni closed the Pensacola clinic without ever opening a bank account in Florida or depositing any funds in Florida.[2]

The investigation of the Louisiana clinics spanned several years. Government agents in Louisiana began surveillance as early as 2005. In 2006, two undercover agents, posing as patients, tried to obtain prescriptions for controlled substances without a legitimate medical reason, but neither agent was successful. App.3. Meanwhile, a DEA investigator met with Dr. Pastorek, who periodically sent the DEA lists of patients discharged because they were suspected of wrongdoing. The clinics also provided lists to the Louisiana Board of Medical Examiners ("LSBME"), as well as to other law enforcement officers.

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[2] The Opinion of the Eleventh Circuit mistakenly states that "Caroni opened two bank accounts in Pensacola in the name of the clinic in which money from the clinic was deposited." App.10. Actually, those accounts were opened at AmSouth Bank in Louisiana, which had branches in Pensacola. Government Exhibit 34t at 19 (transcript of the deposition of Caroni) (introduced into evidence at Doc.656/102). The Government in the courts below did not claim that bank accounts were opened in Florida. Government Brief in Case No. 13-10661, at 42 (CA11, filed June 20, 2014).

Dr. O'Brien, one of at least seven Global Pain doctors not implicated in the conspiracy, testified that she and the staff screened new patients for suspect behaviors. She met with the patients to discuss their medical history and always did a physical exam. She reviewed the patients' MRI and pharmacy profiles and prepared a treatment plan. She randomly drug-tested; if she suspected abuse, she ordered drug tests and updated pharmacy profiles. Patients were rejected or discharged if her suspicions were confirmed. In her view, the clinics were continually trying to improve patient care.

Global Pain's office manager confirmed that the staff verified pharmacy reports by calling pharmacies, discussed new procedures and problem patients at regular staff meetings, and conducted random drug screens. In April 2005, Dr. DiLeo met with the Sheriff's office and drafted strict guidelines, which were amended from time to time. As the protocols became stricter, more patients were rejected or discharged. During the indictment period, the clinics rejected 145 potential patients and discharged 528 patients, mostly for failed drug screens and doctor-shopping.

Several patients testified for the Government. Most admitted that they suffered from chronic pain and that they obtained relief from their medications. Most had been arrested and had agreed to cooperate with the Government. Some denied having a thorough physical examination, though they also admitted their recollections were hazy. All admitted to

lying to the doctors. Some testified to having sold, traded, or shared medications. Most were discharged after the clinics learned of their suspicious conduct or abuse.

In 2008, the Government executed search warrants, which shut down the Louisiana clinics. Over 3,300 patient files were seized, of which only 96 were examined by the Government's expert, Dr. Parran, who opined that, in most instances, the clinics' treatment was "outside the usual course of medical practice and for other than legitimate medical purpose." App.3. But a defense expert explained that the 96 files from the Louisiana clinics were not a representative sample, so it would not be "scientifically valid" to draw any conclusions about the entire patient population from a review of the 96 files. Doc.663/183-92. Fourteen of the 96 files involved discharged patients whose files the defendants themselves had voluntarily turned over to the DEA. At least 2/3 of the files were handpicked precisely because the government knew they involved patients with a troubled history (36 files), or had been sent to the LSBME for review (24 files). Some of these had been sent by the defendants to the DEA precisely because they were problem patients whom the clinics had discharged. Significantly, many of the 96 patients had been prescribed medications by Dr. O'Brien, whom the Government conceded had "tried to do what's right." Doc.664/218.

Dr. Carol Warfield, a Harvard professor, founder of the pain-management center at Harvard's teaching

hospital, and author of the leading textbook on pain management, testified as a defense expert. Dr. Warfield examined the same 96 files that Dr. Parran did, but came to a very different conclusion: "This was not a sham practice. This was a legitimate medical practice and these patients were being treated for legitimate pain problems." Doc.660/137; App.3-4.

The Government called a different expert witness, Dr. Hamill-Ruth, to testify about eight Pensacola patients. Neither Dr. DiLeo nor Dr. Pastorek treated those eight, or any other, Pensacola patients. Pensacola patients were treated by Dr. Klug, with whom Caroni parted ways within two weeks. Dr. Hamill-Ruth opined that the Pensacola documentation was "substandard" and not "within the usual standard of care of a medical practice," but she did not opine that any patient was treated without a legitimate medical purpose. The jury only heard from one Pensacola patient who had visited the clinic a single time and had not been treated by any of the defendants. App.47.

Procedural History

Although almost all of the relevant events related to the four-year operation of the Louisiana clinics, the case was indicted and tried in Pensacola, Florida. The Indictment alleged that all three defendants conspired in the Northern District of Florida "and elsewhere" to dispense controlled substances (Count 1). Caroni and Dr. DiLeo (not Dr. Pastorek)

were also charged with conspiring there "and elsewhere" to commit promotion money laundering (Count 2). Doc.3.

At the close of the evidence, the district court denied the motions for judgment of acquittal. The district court refused the defendants' timely request for a venue instruction and explicitly prohibited them from even arguing lack of venue to the jury. App.40.

The prosecutor's closing argument emphasized that the Government did *not* have to "prove that . . . Drs. DiLeo and Pastorek and Caroni had a conspiracy to illegally prescribe starting early '04 and continued through '08. . . . All [the Government has] to show is that they had that agreement and they participated in it *on a single occasion*." Doc.665/99-100 (emphasis added).[3] Pointing to the Louisiana patients, the prosecutor argued: "Well, the Defendants are on trial for the contents of those 96 patient files and the analysis done of them and whether prescribing done in those 96 patient files was proper or improper." Doc.664/218-19. Thus, the jury was invited to convict based solely on the activities that occurred in Louisiana. To be sure, the Government also argued that the conspiracy

[3] The Government argued that "the single occasion that . . . clearly shows this conspiracy and the guilt of, at a minimum, Dennis Caroni and Dr. DiLeo" were the activities at the Pensacola clinic. Doc.665/100. But the verdict form did not reveal the "single occasion" (or multiple occasions) that the jury relied on to convict, much less in which venue.

reached into Florida, but the jury was authorized to convict even if it did not.

As to the money laundering charge against Caroni and Dr. DiLeo, the prosecutor argued that "the proceeds generated by that illegal activity [drug conspiracy] were laundered by Dr. DiLeo and Dennis Caroni *in their joint accounts* that they held that are included in these financial records." Doc.665/109-10. None of the joint accounts were opened in Florida. None of the proceeds were deposited in Florida. *See* note 2, supra.

In summation, Caroni and his co-defendants contested their guilt on all charges. Caroni emphasized that he owned a legitimate medical practice where "only two of seven or eight doctors were involved in" illegally prescribing medicine. Doc.665/74. Although Caroni's counsel was prohibited from arguing that lack of venue was a defense, he expressly denied that the Pensacola activities were in furtherance of any conspiracy, emphasizing that Caroni disassociated himself from Dr. Klug soon after the Pensacola clinic opened. Doc.665/61, 63.

The jury returned general verdicts of guilty against all three defendants on all applicable counts. The jury made no finding regarding venue.

At sentencing, the Government conceded, and the district court ruled, that the sentence for drug conspiracy (Count 1) was capped at 3 years, the statutory maximum for the controlled substance carrying the lowest penalty. The statutory maximum sentence for

the money laundering conspiracy (Count 2) was 20 years.

Dr. Pastorek was sentenced to one year and one day; Dr. DiLeo to two years incarceration. App.38. They have already served out the incarceration portion of their respective sentences.

Caroni, who did not dispense any controlled substances, was sentenced to the maximum sentence on each count: three years on the drug conspiracy and *twenty years* on the money laundering conspiracy, to run concurrently. App.31. The money laundering conviction thus increased Caroni's sentence by seventeen years.

The Court of Appeals affirmed the convictions and sentences. Although a unanimous three-judge panel agreed that the district court erred in refusing to instruct the jury as to venue, two judges concluded that the error was harmless; the dissenting judge concluded that it was not.

The panel unanimously concluded that the evidence of financial transactions to "pay overhead, rent, malpractice insurance, bills, and whatnot" was sufficient to establish promotion money laundering, and that the 20-year sentence was reasonable. App.26, 39.

Caroni has already served the three-year sentence for drug conspiracy (Count 1) but remains incarcerated on the money laundering conviction (Count 2).

REASONS FOR ISSUING THE WRIT

I. The Court Should Resolve The Conflict In The Circuits Over Whether A Trial Court's Error In Directing A Verdict On Venue Can Be Deemed Harmless When That Element Was Genuinely Contested By The Defendant

Judge Lipez's concurring opinion in *United States v. Pizarro* makes the case for the grant of certiorari in this case.

> In analyzing the complex issues in this case, I became aware of the significant inconsistency in the way courts have reviewed for harmlessness the failure to instruct on an element of a crime. I write separately to express my concern regarding this inconsistency, which exists within my circuit and in other courts, and the potentially unconstitutional applications of *Neder v. United States*, 527 U.S. 1 (1999), that have resulted from it. Given that the Sixth Amendment right to a jury trial is at stake, I urge the Supreme Court to clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element.

772 F.3d 284, 303 (CA1 2014) (Lipez, J., concurring).

A. The Conflict Over The *Neder* Harmless Error Analysis With Respect To A Contested Element

In *Neder*, the Court held that the failure to instruct the jury on an element of the offense is "an

error that is subject to harmless error analysis." *Neder*, 527 U.S. at 15.[4] That analysis evaluates "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id*. (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)).

In *Neder*, a tax case, the trial court erred in declining to instruct the jury on the element of materiality. Neder had failed to report over $5 million in income, which the Court described as "incontrovertibly establishing that Neder's false statements were material." *Id*. at 16. "The evidence supporting materiality was so overwhelming, in fact, that Neder did not argue to the jury – and does not argue here – that his false statements of income could be found immaterial." *Id.* The Court concluded that the error in

[4] Justice Scalia, joined by Justices Souter and Ginsberg, dissented, concluding "that depriving a criminal defendant of the right to have the jury determine his guilt of the crime charged – which necessarily means his commission of *every element* of the crime charged – can never be harmless." *Neder*, 527 U.S. at 30 (Scalia, J., dissenting) (emphasis in original). Justice Stevens concurred in the judgment, but did not join in the Court's opinion insofar as it "states that judges may find elements of an offense satisfied whenever the defendant failed to contest the element or raise evidence sufficient to support a contrary finding." His "views on this central issue are thus close to those expressed by Justice Scalia." *Id.* at 27-28 (Stevens, J., concurring). Justice Stevens concurred, however, because he concluded that the jury verdict "necessarily included a finding on [materiality]. That being so, the trial judge's failure to give a separate instruction on that issue was harmless error under any test of harmlessness." *Id*. at 26.

failing to instruct on the materiality element was therefore harmless:

> In this situation, where a reviewing court concludes beyond a reasonable doubt that the omitted element was *uncontested and supported by overwhelming evidence*, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless. We think it beyond cavil here that the error "did not contribute to the verdict obtained."

Id. at 17 (emphasis added) (quoting *Chapman*, 386 U.S. at 24).

Because the Court in *Neder* found harmless error where the element was "uncontested and supported by overwhelming evidence," *id.*, Judge Lipez interpreted *Neder* to require a two-part inquiry, in which an instructional error is deemed harmless only if the omitted element is: (1) "uncontested" by the defendant at trial, and (2) supported by "overwhelming evidence." Thus, where the trial court refuses to instruct the jury on an element of the offense, it is not sufficient on appeal for the Government to identify overwhelming evidence in support of the omitted element: "*Neder* . . . requires that an omitted element be uncontested in order to be found harmless." *Pizarro*, 772 F.3d at 304 (Lipez, J., concurring).[5]

[5] Judge Lipez cited a number of First Circuit cases that reversed convictions for instructional error where the omitted

(Continued on following page)

> *Neder* prescribed harmless-error review for "the *narrow* class of cases" where there was "a failure to charge on an *uncontested* element of the offense." *Neder*, 527 U.S. at 17 n.2 (emphases added).
>
> Hence, the Court evidently used the requirement that the omitted element be "uncontested" to justify departing from its repeated statements that harmless error review would be unavailable where a court had directed a jury verdict of guilty in a criminal case. The Court emphasized that it was not taking an "'in for a penny, in for a pound' approach" – i.e., by permitting harmless error review where the omitted element was uncontested, the Court was carving out an extremely limited exception to its bar against reviewing directed guilty verdicts for harmlessness.
>
> . . . .
>
> Thus, even where a reviewing court concludes beyond a reasonable doubt that an omitted element is supported by overwhelming evidence, I believe that the omission of that element is not harmless unless the court also concludes beyond a reasonable doubt that the element was "uncontested."

Id. at 309-10.

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element was "contested" by the defendant. *See, e.g.*, *United States v. Zhen Zhou Wu*, 711 F.3d 1, 20 (CA1 2013); *United States v. Bailey*, 270 F.3d 83, 89 (CA1 2001); *United States v. Prigmore*, 243 F.3d 1, 22 (CA1 2001).

Judge Lipez observed that "*Neder* did not explicitly elaborate on what would have been sufficient to 'contest' the omitted element." *Id*. at 310. Because the Court "focused on the fact that Neder 'did *not argue*' " at any stage of the proceedings that a rational jury could have found in his favor on the element in question (i.e., materiality), Judge Lipez "construed 'uncontested' to mean that the defendant did not argue that a contrary finding on the omitted element was possible." *Id*. at 311 (quoting *Neder*, 527 U.S. at 16).

Judge Lipez's concurring opinion cataloged the federal cases from the First, Second, Fourth, Ninth, and Eleventh Circuits reflecting what he describes as "The Debate over 'Uncontested.' " *Id*. at 304-07.

In response to Judge Lipez's concurrence, Judge Torruella penned a concurrence of his own, appending "a non-exhaustive list of thirty relevant cases – from the Supreme Court, First Circuit, and other circuit courts of appeal – that discuss the constitutional harmless-error test." *Id*. at 312-30 (Torruella, J., concurring). Contrary to the position taken by Judge Lipez, Judge Torruella opined that

> nothing in *Neder* supports, much less compels, a conclusion that the Supreme Court intended to supplant the standard *Chapman* harmless-error test with a new, mandatory, exclusive, two-pronged test (in which an omitted element must be both "uncontested" and "supported by overwhelming evidence")

> for cases in which the jury instructions erroneously omitted an element of the offense.

Id. at 318. To Judge Torruella's view, "such an interpretation is exceedingly strained and finds scant support in *Neder* itself, not to mention the numerous cases citing *Neder* over the past fifteen years. To the extent that there is inconsistency in the wake of *Neder*, [Judge Lipez's] concurrence adds to the confusion by presenting the issue as a much closer question than it is." *Id*. at 313.

Like the First Circuit, the Second Circuit has also produced conflicting intra-circuit views about *Neder*'s harmless error test. In one line of cases, the Second Circuit has held that,

> if the evidence supporting the omitted element was controverted, harmless-error analysis requires the appellate court to conduct a two-part inquiry, searching the record in order to determine (a) whether there was sufficient evidence to permit a jury to find in favor of the defendant on the omitted element, and, if there was, (b) whether the jury would nonetheless have returned the same verdict of guilty.

United States v. Jackson, 196 F.3d 383, 386 (CA2 1999); *accord United States v. Needham*, 604 F.3d 673, 679 (CA2 2010). In another case, the Second Circuit acknowledged that:

> There is . . . some tension between the harmless-error analysis in *Neder* and our articulation of it in *Jackson*. Thus, *Neder* appears to

> say that, once the court decides that the defendant offered evidence sufficient to support a finding in his or her favor on the omitted element, the court's error in omitting that element from the jury instruction cannot be deemed harmless, unless, for example, other conclusions by the same jury are the functional equivalent of a finding of the omitted element. *Jackson*, on the other hand, seems to allow the court to decide on its own whether the jury would have convicted the defendant, even where the evidence can support a finding in the defendant's favor on an omitted element and no functional equivalent of the omitted element has been found by the jury. This tension has been noted by at least one other circuit court, which has rejected the *Jackson* approach. *See United States v. Brown*, 202 F.3d 691, 701 n.19 (4th Cir. 2000).
>
> Despite this tension, . . . we are bound by *Jackson*, that is, unless and until that case is reconsidered by our court sitting in banc (or its equivalent) or is rejected by a later Supreme Court decision. Such an in banc rehearing, requested by a panel of our court, would seem particularly appropriate if our circuit's prior holding cannot be reconciled with an earlier, authoritative decision of the Supreme Court. And so it might be in a future case in which *Neder* and *Jackson* would dictate different results.

Monsanto v. United States, 348 F.3d 345, 350-51 (CA2 2003).

The Fourth Circuit has rejected the Second Circuit's view in *Jackson* that an appellate court may find an instructional error harmless if it determines that "the jury would nonetheless have returned the same verdict of guilty." *United States v. Brown*, 202 F.3d 691, 701 n.19 (CA4 2000) (quoting *Jackson*, 196 F.3d at 385-86). The Fourth Circuit

> do[es] not believe that *Neder* requires this additional inquiry; rather, *Neder* makes clear that if, for example, an appellate court determines that "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding[,] it should not find the error harmless," and the harmless error inquiry must end. *Neder*, 119 S.Ct. at 1838.

Id. In the Fourth Circuit, therefore, as long as "the element was *genuinely contested*, and there is evidence upon which a jury could have reached a contrary finding, the error is not harmless." *Id*. at 701 (emphasis added).

In the Ninth Circuit, an instructional error has been deemed not harmless where the defendant merely objected on authenticity grounds to the key evidence establishing the omitted element. *United States v. Guerrero-Jasso*, 752 F.3d 1186, 1194 (CA9 2014). Based solely on the defendant's challenge to "the government's belated evidentiary basis for proving" the omitted element, the court of appeals concluded that "[t]he government's evidence cannot, therefore, be described as 'uncontroverted.'" *Id*. The Ninth Circuit

cited with approval Black's Law Dictionary (9th ed. 2009), as defining "controvert" as "[t]o dispute or contest; esp. to deny (as an allegation in a pleading) or oppose in argument." *Id*.

In the Eleventh Circuit, the leading published case on the harmless error test is the court's opinion on remand in *Neder* itself. The Eleventh Circuit interpreted the Supreme Court's decision as "not hold[ing] that omission of an element can never be harmless unless uncontested"; thus, whether the defendant "contested materiality may be considered but is not the pivotal concern." *United States v. Neder*, 197 F.3d 1122, 1129 (CA11 1999).

The take-away from this summary of the circuit case law is that, according to some opinions (but not all), an instructional error requires reversal unless the Government establishes that the element was "uncontested," meaning "that the defendant did not argue that a contrary finding on the omitted element was possible." *Pizarro*, 772 F.3d at 311 (Lipez, J., concurring). Reversal is required if the defendant "genuinely contested" the element, *Brown*, 202 F.3d at 701, that is, he "dispute[d], den[ied], or oppose[d the] argument." *Guerrero-Jasso*, 752 F.3d at 1194 (citing Black's Law Dictionary (9th ed. 2009)). As explained below, the Eleventh Circuit applied a very different standard in this case.

B. The Conflict When The Contested Element Is Venue

The Sixth Amendment calls for trial "by an impartial jury of the State and district wherein the crime shall have been committed." Article III, § 2, cl. 3, instructs that "Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." Federal Rule of Criminal Procedure 18, which requires prosecution "in a district where the offense was committed," Fed. R. Crim. P. 18, "echoes the constitutional commands." *United States v. Cabrales*, 524 U.S. 1, 6 (1998).

Though the prevailing view in the circuit courts is that venue is an element of every offense, it is often "distinguish[ed] from 'substantive' or 'essential' elements." *United States v. Perez*, 280 F.3d 318, 330 (CA3 2002) (citing cases). Whereas trial courts must instruct on all substantive elements of a crime, the courts of appeal have uniformly held that a trial court is "not always required to present [the venue] question to the jury." App.42 (dissenting opinion). Rather, a venue instruction is required only when "the defendant requests it and the testimony puts venue at issue." App.8 (majority opinion).

In its 2002 opinion in *Perez*, which did not cite *Neder*, the Third Circuit acknowledged:

> The precise issue of when venue is "in issue" so as to raise a fact question for the jury is one on which our sister courts of appeal differ. The more narrow view, followed by the

> Fifth and Seventh Circuits, holds that venue is not in issue unless it is actually disputed at trial. But the Tenth Circuit holds that "failure to instruct [the jury] on venue, when requested, is reversible error unless it is beyond a reasonable doubt that the jury's guilty verdict on the charged offense necessarily incorporates a finding of proper venue." Straddling these opposing positions are the Fourth and Eighth Circuits, which hold, on the one hand, that venue is in issue whenever defendants might otherwise be convicted "of the offenses charged without an implicit finding that the acts used to establish venue had been proven," which is the Tenth Circuit's position, but on the other hand have found harmless the refusal by the trial court to instruct on venue because evidence that criminal acts occurred in the applicable districts was substantial and uncontroverted.

Perez, 280 F.3d at 333 (citations omitted); *accord United States v. Haire*, 371 F.3d 833, 839-40 (CADC 2004) (*Perez* "offer[s] an educational history of the various treatments in various circuits of . . . when the failure to instruct the jury on venue could constitute *reversible error*."). The Third Circuit ultimately found "the approach to the 'in issue' test formulated by the Fifth and Seventh Circuits to be more persuasive than the broader view taken (at least theoretically) by the Fourth, Eighth and Tenth Circuits." *Id*. at 334. The Third Circuit thus held that

> where the indictment alleges venue without a facially obvious defect, the failure to instruct the jury to determine whether that venue is proper is *reversible* error only when (1) the defendant objects to venue prior to or at the close of the prosecution's case-in-chief, (2) there is *a genuine issue of material fact with regard to proper venue*, and (3) the defendant timely requests a jury instruction.

Id. at 327 (emphases added).

Dicta in a later Third Circuit opinion construed *Neder* as holding that "the failure to instruct [on venue] would be harmless if the Government demonstrates under the *Chapman* standard that *sufficient* evidence of venue existed such that the jury would have come to that conclusion too." *United States v. Auernheimer*, 748 F.3d 525, 540 n.8 (CA3 2014) (emphasis added).

Consistent with the Third Circuit's view, the Seventh Circuit found the failure to instruct on venue to be harmless where it viewed the Government's evidence on venue as "overwhelming" compared to the defendant's "very weak evidence." *United States v. Muhammad*, 502 F.3d 646, 656 (CA7 2007) (citing *Perez*). Despite the existence of a "factual dispute," the Seventh Circuit deprived the defendant of a jury finding on venue because it did not view the factual dispute to be a "serious issue." *Id.*

Other circuits have adopted a "broader view," *Perez*, 280 F.3d at 334, about when the failure to

instruct is reversible error. Most notably, in the Tenth Circuit, the failure to instruct on venue requires reversal where, as in Caroni's case, the indictment charges crimes and overt acts in multiple districts, because a guilty verdict in such cases does not necessarily encompass a finding that the crime or an overt act was committed in the prosecuting district:

> The burden of proof on venue always remains with the government. The defendant is entitled to have a jury test the weight of the evidence even if he can adduce none of his own. Where the entirety of the defendant's illegal activity is alleged to have taken place within the trial jurisdiction, and no trial evidence is proffered that the illegal act was committed in some other place or that the place alleged is not within the jurisdiction, any defect in failing to specifically instruct on venue would be cured by the guilty verdict. This is so because in convicting of the offense charged, a jury of necessity finds an illegal act within the trial jurisdiction. *However, in a multidistrict indictment, such as we have in this case, the jury could find the elements of the charged offense without finding the factual predicate for proper venue in the trial jurisdiction.* We therefore adopt the rule that failure to instruct on venue, when requested, is reversible error unless it is beyond a reasonable doubt that the jury's guilty verdict on the charged offense necessarily incorporates a finding of proper venue.

United States v. Miller, 111 F.3d 747, 751 (CA10 1997) (emphasis added, footnotes omitted) (citing *United States v. Jenkins*, 510 F.2d 495, 498 (CA2 1975) (failure to instruct on venue is harmless where *all* evidence of commission of the crime is situated in the prosecuting district)). The Tenth Circuit emphasized that "[t]he question . . . is not whether the evidence, if believed by the jury, is sufficient to establish venue, but whether the jury as a matter of logical necessity made a finding on the omitted element in order to reach the verdict actually rendered." *Id.* at 753. The Tenth Circuit reversed Miller's conviction of "a multi-district conspiracy, where the guilty verdict [did] not by necessity incorporate a finding on venue." *Id*. at 754.[6]

Along the way, the Tenth Circuit expressly rejected the "Eighth Circuit's conclusion . . . that where venue is in issue and a finding of guilt on the offense does not encompass a finding of proper venue, a failure to instruct on venue can nevertheless be harmless merely because the evidence on venue was 'substantial.'" *Id*. at 754 n.10 (citing *United States v. Moeckly*, 769 F.2d 453, 462 (CA8 1985)). Thus, whereas the Eighth Circuit found the erroneous failure to instruct

[6] The Tenth Circuit's view that harmlessness turns on the Government establishing that the verdict incorporates a finding of venue as a matter of "logical necessity," *Miller*, 111 F.3d at 753-54, foreshadowed the views of Justice Stevens' concurrence in *Neder* that instructional error is harmless where the jury verdict "necessarily included a finding on [the omitted element]." *Neder*, 527 U.S. at 26 (Stevens, J., concurring).

on venue to be harmless in a drug smuggling case where the smuggling planes were stored in the prosecuting district, "[the] profits from smuggling activity were deposited there," and "[d]efendants [did not] contradict[ ] the evidence of activities in [the prosecuting district] to further the smuggling conspiracy," *Moeckly*, 769 F.2d at 461-62, in the Tenth Circuit's view, "[*n*]*o matter how overwhelming the evidence*, [the appellate court's] speculation as to the verdict a jury might reach may not substitute for an actual jury verdict. The right to a trial by jury does not depend on the magnitude of the evidence arrayed against the defendant." *Miller*, 111 F.3d at 753 (emphasis added). Notably, in a case that predates *Moeckly*, the Eighth Circuit reversed a conviction for failing to instruct on venue despite "sufficient evidence" upon which the jury could have found venue, because there was a "vigorous dispute" over where the crime occurred and "no indication in the record that this essential finding was actually made" by the jury. *United States v. Black Cloud*, 590 F.2d 270, 273 (CA8 1979).

The Fourth Circuit – which *Perez* described as "[s]traddling the[ ] opposing positions" of the Tenth Circuit on the one hand and the Fifth and Seventh Circuits on the other – has held that a trial court's refusal to instruct on venue was harmless where "evidence that criminal acts occurred in the applicable districts was substantial and uncontroverted." *Perez*, 280 F.3d at 333 (citing *United States v. Martinez*, 901 F.2d 374, 377 (CA4 1990)). In *Martinez*,

"uncontroverted" meant that the defendant offered "[n]o evidence" to contradict that his activities in the prosecuting district were in furtherance of the conspiracy. *Martinez*, 901 F.2d at 376-77. But an earlier Fourth Circuit case found the failure to instruct on venue harmless on evidence that was "compelling," but not uncontroverted:

> In this case, however, the failure to instruct on venue does not constitute reversible error. The evidence *strongly indicates* that Griley obtained the M-16 in Maryland rather than in North Carolina. . . . The only suggestion that Griley may have obtained the weapon in North Carolina comes from inconsistent testimony by Griley's mother, Mrs. Tracey. . . . Given the *compelling evidence* that Griley removed the M-16 from Maryland rather than North Carolina, any failure to instruct the jury on venue was harmless error.

United States v. Griley, 814 F.2d 967, 973-74 (CA4 1987) (emphasis added). Like the Seventh Circuit would later do in *Muhammad*, 502 F.3d at 656, the Fourth Circuit in *Griley* deprived the defendant of a jury finding on venue because it viewed the "compelling evidence" as "strongly indicat[ing]" that venue was proper, even though the defendant offered evidence (albeit inconsistent testimony) to the contrary. *Griley*, 814 F.2d at 973-74.

After *Perez* was decided in 2002, the Ninth Circuit entered the fray. In *United States v. Casch*, 448 F.3d 1115 (CA9 2006), the court of appeals explicitly

rejected "the apparently more vigorous standard set by the Tenth Circuit in *Miller*," in favor of the more government-friendly harmless error test applied by *Martinez* (CA4) and *Moeckly* (CA8):

> Because the evidence that [defendant] Casch committed conspiracy in Idaho was "substantial" and "uncontroverted," the district court's error was harmless. *See Martinez*, 901 F.2d at 377; *Moeckly*, 769 F.2d at 462. Here, as in *Martinez*, "proof of venue may be so clear that failure to instruct on the issue is not reversible error." 901 F.2d at 376.

Casch, 448 F.3d at 1118. In 2012, the Ninth Circuit took "a fresh look at the governing principles" and "formulate[d] the following rule to be applied: Where a rational jury could not fail to conclude that a preponderance of the evidence establishes venue, then a court is justified in determining venue as a matter of law." *United States v. Lukashov*, 694 F.3d 1107, 1120 (CA9 2012). Citing the Tenth Circuit's opinion in *Miller* as an example, the Ninth Circuit ruled that the failure to give a venue instruction is "harmless if the evidence viewed rationally by a jury could only support a conclusion that venue existed." *Id*. *Lukashov*, like *Miller*, involved "a multidistrict indictment." *Lukashov*'s citation to *Miller* is puzzling, therefore, because *Miller* found the denial of a venue instruction harm*ful*, not harm*less*, precisely because the indictment alleged acts in more than one district, and "the jury could find the elements of the charged offense without finding the factual predicate for proper

venue in the trial jurisdiction." *Miller*, 111 F.3d at 751. Yet the Ninth Circuit in *Lukashov* found the instructional error harm*less* by concluding that "the government had 'necessarily' proved venue by a preponderance of the evidence because the offense continued into and was completed in [the prosecuting district] as a matter of law." *Lukashov*, 694 F.3d at 1122.

C. This Case Presents A Suitable Vehicle To Resolve The Conflict

All three judges of the Eleventh Circuit agreed that venue was "at issue" in this case and that the district court erred by refusing to give a venue instruction. App.9. The only point of disagreement among the panel members was whether the error could be deemed harmless.

According to the dissenting judge, venue was not an "uncontroverted" element because there was a genuine issue of fact over whether "an overt act in furtherance of the conspiracy" occurred in the prosecuting district. App.46. To her view, "uncontroverted in this context takes its literal meaning: not contested at trial." *Id*. at n.3. Because "[t]he defendants here contested whether their conspiracy extended to the Northern District of Florida," and because "the record contain[ed] evidence that could rationally lead to a contrary finding with respect to" venue, the error was not harmless and reversal was required. *Id*. (quoting *Neder*, 527 U.S. at 19). The dissenting judge

expressed concern "that the majority applie[d] some other harmless error standard." *Id*.

Indeed, the majority did apply a different standard. Invoking the Ninth Circuit's 2006 decision in *Casch* (which explicitly rejected "the apparently more vigorous standard set by the Tenth Circuit in *Miller,*" 448 F.3d at 1118), the majority purported to analyze whether the *evidence* of venue "was substantial and uncontroverted." App.9. To the majority that meant identifying "uncontroverted" *evidence* of acts occurring in the prosecuting district, which the majority then characterized as "overt acts in furtherance of the conspiracy." App.10 ("Even though the three Defendants never traveled to the Northern District of Florida, it was abundantly clear that it was part of their plan and conspiracy.").

To be sure, the *evidence* of activities in Florida was uncontroverted, but the defendants denied the *factual inference* that those activities were "in furtherance of" the charged conspiracy. App.46 n.3 (dissenting opinion) ("The defendants here contested whether their conspiracy extended to the Northern District of Florida."); Doc.665/61 (Caroni's Closing Argument: "Dr. DiLeo and Dennis did the right thing in closing down Pensacola. They tried to open in Pensacola. [Caroni] really was not involved in it. You saw the evidence. It was really Dr. Klug speaking to Dr. DiLeo. But when Dr. DiLeo realized that it wasn't working, what did he do? He shut it down.").

The majority failed to recognize that "even though the basic facts are undisputed," there may still remain a dispute "regarding the material *factual inferences* that properly may be drawn from these facts." *Lighting Fixture & Elec. Supply Co. v. Cont'l Ins. Co.*, 420 F.2d 1211, 1213 (CA5 1969) (emphasis added) (collecting cases); *see also Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (recognizing that although "appellants did not contest the evidence" or "claim that appellees' . . . evidence . . . was untrue," the "District Court nevertheless was only partially correct in stating that the material facts before it were uncontroverted" because "motivation is itself a factual question").

Thus, the majority misplaced its focus on whether "the *evidence* of venue was uncontroverted," App.9 (emphasis added), when the relevant question was whether the *element* of venue was uncontroverted. As the Solicitor General argued in its brief to the Court in *Neder*, "an [instructional] error should be found harmless when an appellate court can determine that the defendant did not dispute the *element* at trial, and, in light of the proof, the *element* was indisputable." Brief for the United States in *Neder v. United States*, No. 97-1985, 1999 WL 6660, at *6-7 (emphasis added); *accord id*. at *25 ("[A]n appellate court can find an instructional omission harmless when it can conclude beyond a reasonable doubt that the *element* was uncontroverted and established by overwhelming proof, such that the jury verdict would have been the same absent the error.") (emphasis added).

Thus, although the majority invoked the harmless error terminology from other circuits ("substantial and uncontroverted"), App.9, in reality it employed a sufficiency analysis, marshaling evidence from which a rational jury *could*, but need not necessarily, find venue. App.47 (dissenting opinion) ("For the reasons described in the majority opinion, it is certainly conceivable that the jury – if it had been presented with the question – would have found that venue was proper in the Northern District of Florida. But that is not our inquiry."). Once "the testimony put[ ] venue at issue," App.9, that *element* was, by definition, not uncontroverted. Whether uncontroverted *evidence* of the Florida activities supported the inference that the acts were "in furtherance of the conspiracy" so as to support the contested *element* of venue was quintessentially a question for the jury, not the appellate judges, to decide. *See* App.46 (dissenting opinion) ("While it was not disputed that Mr. Caroni founded Global Pensacola, the relevant question here is whether its establishment was an overt act in furtherance of the conspiracy between Messrs. Caroni, DiLeo, and Pastorek such that it could establish venue in the Northern District of Florida.").

The Sixth Amendment guaranteed the defendants the right to have *the jury* resolve the factual dispute over venue. And that right encompassed an opportunity to have their counsel, in closing argument, "sharpen and clarify . . . the inferences to be drawn" from the evidence, so that the issue of venue

could be resolved in their favor. *See Herring v. New York*, 422 U.S. 853, 860 (1975) ("The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor, however simple, clear, unimpeached, and conclusive the evidence may seem."). The trial court frustrated that right by categorically prohibiting any argument about venue in closing argument. Doc.664/120 ("[Y]ou cannot argue [venue] in closing argument, so please don't mention that in closing argument."). Meanwhile, jurors were told that they could convict based solely on the defendants' participation "on a single occasion," regardless of location. Doc.665/99-100 (Prosecutor's Closing Argument). Thus, the jury was invited by the Government to convict based on conduct that occurred exclusively in Louisiana, even if the jury inferred that the "quite limited" activities in Florida (the prosecuting district), App.47, were not in furtherance of the charged conspiracy – in which case the defendants should have been *acquitted* for lack of venue. The trial court's error in precluding a viable closing argument on a disputed element cannot be deemed harmless; indeed, it might well be structural error, *United States v. Miguel*, 338 F.3d 995, 1001 (CA9 2003) (holding that it was structural error to prohibit closing argument where "[r]easonable inferences from the evidence supported the defense theory"), although that remains an open question in the Court. *See Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) ("[E]ven assuming that *Herring* established that complete denial of summation amounts to

structural error, it did not clearly establish that the restriction of summation also amounts to structural error.").

This case thus presents a suitable vehicle to address "The Debate over 'Uncontested,'" *Pizarro*, 772 F.3d at 304-07 (Lipez, J., concurring), and to resolve the conflict over whether an appellate court conducting a harmless error analysis may "decide on its own whether the jury would have convicted the defendant, even where the evidence can support a finding in the defendant's favor on an omitted element." *Monsanto*, 348 F.3d at 350.

II. The Court Should Grant Certiorari To Resolve A Circuit Split Over Whether The General Business Expenditures Of A Company That Is Engaged In Illegal Activity, But Is Not Wholly Illegitimate, Satisfy The Promotion Prong Of The Money Laundering Statute

Count Two charged Caroni with money laundering conspiracy, the object of which was to promote the underlying criminal activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i). That charge required proof that Caroni agreed to conduct a financial transaction with the proceeds of unlawful activity, with the intent to promote the carrying on of the specified unlawful activity, in this case, the conspiracy to unlawfully dispense controlled substances charged in Count One.

The Court of Appeals concluded, without elaboration, that the evidence of "promotion" was sufficient

because the proceeds of the unlawful activity "were deposited into numerous bank accounts and then spent to pay overhead, rent, malpractice insurance, bills, and whatnot" – i.e., the ordinary business expenses of the clinics. App.26. The Court of Appeals so found, even though the pain clinics had many legitimate patients: only two of nine doctors were indicted and only 96 out of 3,331 patient files were reviewed in connection with the prosecution.[7] Indeed, when two undercover agents tried to obtain prescriptions for controlled substances without a legitimate medical reason, neither agent was successful.

The Court of Appeals' decision – allowing a money laundering "promotion" conviction to stand merely because a business deposits the proceeds of illegal activity in an account to pay routine business expenses – sharpened a pre-existing conflict among the circuits.

The Tenth Circuit in *United States v. Lawrence*, 405 F.3d 888, 900-01 (CA10 2005), held that evidence that a chiropractor deposited Medicare proceeds in his bank account and used the funds for payroll and rent, thus "keeping the doors of the clinic open," was sufficient to show an intent to promote the fraud for purposes of the money laundering scheme.

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[7] The 96 patient files that were reviewed were not randomly selected. According to a defense expert, it would not be "scientifically valid" to draw any conclusions about the entire patient population from the records reviewed. Doc.663/183-92.

By contrast, the Sixth Circuit in *United States v. McGahee*, 257 F.3d 520, 527 (CA6 2001), and the Fifth Circuit in *United States v. Brown*, 186 F.3d 661, 670-71 (CA5 1999) and *United States v. Miles*, 360 F.3d 472, 477-78 (CA5 2004), have rejected the argument that paying general business expenditures, even if the business is used to defraud, necessarily promotes the underlying crime. For example, in *McGahee*, the defendant was a builder who received federal funds to rehabilitate homes. He used approximately half the funds for the projects, but used the remainder of the funds to pay expenses, such as the mortgage on his residence which doubled as his business office. *McGahee*, 257 F.3d at 527. In reversing the defendant's convictions for promotion money laundering, the Sixth Circuit reasoned that, to "further criminal activity, the transaction must be explicitly connected to the mechanism of the crime." *Id.* Although McGahee needed to pay his home mortgage to continue his enterprise, the home "did not play an integral part in the embezzlement scheme." *Id.*

In *United States v. Brown*, 186 F.3d at 670-71, an auto dealer was charged with fraud for overcharging car buyers more than the amount authorized by state law for license and title fees and by secretly loaning money to car buyers for their down payments so that they would qualify for advances of credit. He was also charged with promotion money laundering for using the proceeds of the fraud to pay for parts, materials, office supplies, used cars, advertising, travel, membership fees and other ordinary expenses of his

business. *Id.* at 668 n.13. The Government argued that these expenditures promoted fraud because the car dealership was "one grand scheme to defraud" and the expenditures permitted the dealer to stay in business and "ensure a steady supply of potential victims." *Id.* at 669. The Fifth Circuit reversed the money laundering convictions because "[m]ere evidence of legitimate business expenditures that were necessary to support [the auto dealer's] non-fraudulent operations, however, was not enough to establish an intent to promote fraud," even though the expenditures may in fact have "increas[ed] the number of potential fraud victims." *Id*. at 670.

The Fifth Circuit stressed the importance of not turning "the money laundering statute into a 'money spending statute.'" *Id.* (citation omitted). The Fifth Circuit wrote:

> Strictly adhering to the specific intent requirement of the promotion element of § 1956(a)(1)(A)(i) helps ensure that the money laundering statute will punish conduct that is really distinct from the underlying specified unlawful activity and will not simply provide overzealous prosecutor with a means of imposing additional criminal liability any time a defendant makes benign expenditures with funds derived from unlawful acts.

Id.

In *Miles*, *supra*, the Fifth Circuit re-affirmed *Brown*'s holding that the money laundering promotion statute is not designed to criminalize ordinary

business expenditures of a company that is not wholly illegitimate. There, the defendants operated a home health care company that over-billed Medicare and submitted grossly inflated cost reports. They were charged with aiding and abetting money laundering promotion because their company made specific payments for office rent, payroll, and payroll taxes with the proceeds of the Medicare fraud. *Miles*, 360 F.3d at 476. Although the "scale and scope of the fraud taking place" exceeded the "'relatively minor fraudulent transactions' at issue in *Brown*," the Fifth Circuit stated that even a "substantial level of fraud" does "not suffice to prove [the defendants'] specific intent to promote the Medicare fraud by means of rent, payroll and payroll tax expenses." *Id.* at 478.[8]

This case presents an appropriate vehicle to resolve the conflict. First, the issue is squarely presented. Like the businesses in *McGahee, Brown*, and *Miles*, the evidence does not support the view that Global Pain was a wholly illegitimate operation. Though the Eleventh Circuit's opinion concluded that

[8] The Fifth Circuit distinguished *Miles* from *United States v. Peterson*, 244 F.3d 385, 392 (CA5 2001), a fraudulent telemarketing case, where the court "upheld the money laundering promotion conviction of a defendant who used fraudulently obtained funds to pay the general operating expenses of a business whose only purpose was to engage in fraudulent transactions." *Miles*, 360 F.3d at 478. The evidence showed that the same fraudulent misrepresentations were made to all the victims and "all the expenditures related to the illegitimate business operation." *Peterson*, 244 F.3d at 392.

the illegal behavior at Global Pain was "substantial," App.23, this was the same term the Fifth Circuit used in *Miles* to describe the Medicare fraud in that case, where ordinary expenditures were nevertheless deemed insufficient to satisfy the intent prong of the promotion money laundering statute.

Second, Caroni's money laundering conviction carried serious consequences. Whereas his sentence on the drug conspiracy count was three years, his sentence on the money laundering conspiracy count was twenty years, to run concurrently. Thus, the ordinary expenditures of the pain clinic for "overhead, rent, malpractice insurance, bills, and whatnot" – increased Caroni's sentence by *seventeen* years. The Court should resolve the conflict.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals,
Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Gerard M. DILEO, Dennis M. Caroni, Joseph George Pastorek, II, Defendants-Appellants.

No. 13-10661. | Sept. 1, 2015.

Affirmed.

Martin, Circuit Judge, filed dissenting opinion. Attorneys and Law Firms

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Appeals from the United States District Court for the Northern District of Florida. D.C. Docket No. 3:10-cr-00101-MCR-2.

Before MARTIN and ANDERSON, Circuit Judges, and COTE, District Judge.*

Opinion

PER CURIAM:

In September 2010, a federal grand jury charged Dennis Caroni, Gerard M. DiLeo, Theodore G. Aufdemorte, Jr.,[1] and Joseph George Pastorek, II, with one count of conspiracy to distribute drugs and one count of conspiracy to commit money laundering. The indictment charged that DiLeo and Pastorek were physicians licensed by the state of Louisiana with the authority to prescribe controlled substances in Schedules II through V. Using Caroni and Aufdemorte's company, Global Pain Management, LLC ("Global Pain"), the four codefendants allegedly conspired to unlawfully prescribe Schedule II and III controlled substances through prescription practices done outside the usual course of medical practice and for other than legitimate medical purposes. The indictment further alleged that the offense involved "a mixture and substance containing" multiple prescription drugs, and that the drugs had caused at least one death.

Caroni and Aufdemorte formed Global Pain in January 2004 to operate and manage pain management

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* Honorable Denise Cote, United States District Judge for the Southern District of New York, sitting by designation.

[1] The indictment against Aufdemorte was later dismissed.

clinics under various names in the New Orleans area. In 2005, Caroni opened a Global Pain pain management clinic in Pensacola that stayed open for approximately two weeks. The DEA began surveilling one of Global Pain's clinics in November 2005 and identified five separate incidents in which individuals who had previously been convicted of controlled substances charges visited the clinic. In January and March 2006, two undercover DEA agents tried to obtain prescriptions for controlled substances from Global Pain without a legitimate medical reason but neither agent was successful.

In February 2008, the Government obtained search warrants for the offices of two of Global Pain's clinics and for Caroni's grandmother's house. A jury trial was conducted from October 19, 2011, through November 23, 2011. Dr. Ted Parran, a government-retained expert in the field of pain management, addiction medicine, and the prescription of controlled substances, reviewed 96 patient files that were seized by the government. Dr. Parran opined that the prescription practices of Global Pain were dangerous, not consistent with the usual course of medical practice, and not for legitimate medical purposes. Another Government pain expert witness, Dr. Robin Hamill-Ruth, reviewed files from the Pensacola clinic and testified that the prescribing done there was unsafe and outside the usual course of medical practice. Dr. Carol Warfield, Caroni's expert in pain management, reviewed the same patient files that Dr. Parran had reviewed. She concluded that the pain medications

were prescribed to patients for legitimate medical reasons and were done so within the accepted standard of care of the practice of pain medicine.

Former office staff testified that follow-up visits at the clinics took an average of five minutes per patient. At some point during the conspiracy, patients were able to pay for two two-week prescriptions, with the second prescription post-dated, in a single visit; they would pick up the second prescription later, without having to see a doctor. Global Pain eventually required patients to make two clinic visits per month where the second visit would entail the patients receiving their prescriptions after only briefly seeing a doctor. During the week after Hurricane Katrina occurred, Global Pain allowed its patients to pick up their prescriptions without having to see a doctor or enter the clinic as long as they paid for their prescriptions.

The patient files revealed that Global Pain was aware that several of its patients suffered from drug addiction, and some of those patients' families asked Global Pain to not give them access to pain medication. Patients testified that they were never examined by a doctor at the clinics even though some of their respective files indicated that an examination was performed. Clinic staff testified that the exam rooms either contained no examination tables or that the tables were not used because they never changed the tables' paper covering. One of the doctors testified that the only physical examination he conducted was to check a patient's heart and lungs with a

stethoscope. Patients often appeared to be under the influence when they were in the waiting room. Prescriptions were sometimes provided despite the doctors stating that the medication was not needed.

Global Pain employees testified that patients were charged between $100 to $400 per visit based on whether they were receiving Schedule II drugs or Schedule III, IV, or V drugs. Caroni called the clinics regularly, though later on he was rarely physically present, and he instructed one of his employees to give him daily updates of the cash totals. He established a patient referral program where patients could earn a free visit if they referred five patients to Global Pain. Caroni told at least two employees that what patients did with the prescriptions was not his business. One doctor testified that he walked away from Global Pain's $500,000 annual salary without any future job prospects because he did not want to be a part of a "pill mill."

Global Pain did not accept insurance claims, and patients had to pay in cash until 2007, at which point it also began accepting some payments by check, money order, and credit card. At some point in time, Global Pain's money was kept at Caroni's grandmother's house for approximately one month because the clinic did not have a bank account. It frequently changed banks because bank managers closed the company's accounts as a result of Caroni's behavior. Caroni and DiLeo opened approximately 57 bank accounts at 15 different banks during the course of the conspiracy. Caroni, or other employees on his behalf,

deposited large sums of cash into the bank accounts almost daily, and sometimes into more than two separate bank accounts. Each deposit was always under $10,000 to avoid the reporting requirements. In total, Global Pain deposited approximately $8,557,205 from January 2004 through December 2007. After a jury trial, Caroni and DiLeo were found guilty of both drug and money laundering conspiracies, and Pastorek was found guilty of the drug conspiracy. The Defendants raise numerous challenges to the judgment of the district court. We address each in turn.

I. DISCUSSION

A. *Venue*

DiLeo argues that the Government failed to prove venue and that the district court erred when it refused to allow the defense to argue it was missing or submit a jury instruction on the issue.[2] The parties stipulated that Pensacola – the location of the third clinic that Caroni ran for a short time – was located in the Northern District of Florida for venue purposes. Specifically, the parties agreed that "the activities within Pensacola, and in Escambia County, that those activities, Pensacola and Escambia County are situated within the Northern District of Florida for venue purposes." During the charge conference, the Government attorney stated that the Defendants had stipulated to venue while defense counsel countered

[2] Both Caroni and Pastorek adopt this argument.

that they had just stipulated that Pensacola was in the Northern District. The court suggested that the Defendants were "long past a venue challenge." After reading the stipulation, the court stated that if they were seeking an instruction on venue, they needed to get working on it, because it was not something that had ever been presented to her before as an issue and it was really a legal question that needed to be decided first and foremost. After the Government attorney stated that venue had never been raised before, counsel for one of the Defendants stated that he did not realize that it was an issue until now. The Government attorney replied that he did not know how the Defendants did not know because he mentioned why they were in Florida in his opening statement. The court told defense counsel that he should research and prepare something for her because it was not something she had anticipated.

Later that same day, the court told the defense that it could not argue venue to the jury and then refused to instruct the jury on venue. At first, she stated that they could bring a proposed instruction later but then she scolded the defense for not raising it sooner and stated that they could not bring the issue in a proposed instruction at all.

DiLeo argues that the district court committed structural error when it prohibited defense counsel from arguing the Government failed to prove venue,

and reversible error when it refused to give the requested jury instructions on venue.[3]

We have stated that venue is an essential element in a criminal case and should not be treated as a mere technicality. *United States v. Snipes*, 611 F.3d 855, 865 (11th Cir.2010). It is guaranteed by the Constitution and a question of fact for the jury. *Id.* at 866. We have also stated:

> A conspiracy may be prosecuted in the district where it was formed or in any district where an overt act was committed in furtherance of its objects. An overt act may be that of only a single one of the conspirators and need not be itself a crime. An individual conspirator need not participate in the overt act in furtherance of the conspiracy. Once a conspiracy is established, and an individual is linked to that conspiracy, an overt act committed by any conspirator is sufficient.

United States v. Schlei, 122 F.3d 944, 975 (11th Cir.1997) (internal citations and punctuation omitted). Our precedent states that it is reversible error to fail to instruct when the defendant requests it and the

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[3] The Defendants did not waive this argument by raising it when they did: "when an indictment contains a proper allegation of venue so that a defendant has no notice of a defect of venue until the Government rests its case, the objection is timely if made at the close of evidence." *United States v. Daniels*, 5 F.3d 495, 496 (11th Cir.1993). Here, the indictment alleged venue and thus, Defendants' objection to venue was timely. Defendants did not waive the objection by failing to raise it before trial.

testimony puts venue at issue. *United States v. Green*, 309 F.2d 852, 856-57 (5th Cir.1962).[4] We have stated that although venue is an essential element, it is not a substantive element, requiring per se reversal when instructions are sought but not given. *United States v. White*, 611 F.2d 531, 536 (5th Cir.1980) (holding that no plain error was committed when the district court failed to instruct on venue). The Supreme Court has held that harmless error applies when the trial court fails to instruct on an essential element of a crime, *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 1834, 144 L.Ed.2d 35 (1999), and other courts have held that this specific error should be reviewed for harmless error, *United States v. Casch*, 448 F.3d 1115, 1117 (9th Cir.2006). In *Casch*, the court employed a standard that if the evidence that the defendant committed the conspiracy in the district where convicted was substantial and uncontroverted, the district court's error was harmless. *Id.*

While the district court erred, the evidence of venue was uncontroverted, making that error harmless. After the Defendants entered into their conspiracy, Caroni, DiLeo, and two others made plans to open the clinic in Pensacola. Caroni and DiLeo hired and trained Dr. Klug to be the prescribing physician. The same unlawful practices used in New Orleans

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[4] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

were carried over to the Pensacola Global clinic. When Dr. Klug asked Dr. DiLeo for guidance because of his inexperience with respect to pain management, Dr. DiLeo instructed him to just prescribe what the patients had previously been receiving. And with respect to physical exams, Dr. Klug testified that he merely listened with a stethoscope to the patients' hearts and lungs. Expert Hamill-Ruth testified that Klug's prescribing was outside of the standard of care and inconsistent with the operation of a legal clinic. Caroni opened two bank accounts in Pensacola in the name of the clinic in which money from the clinic was deposited.

Defendants also procured facilities to house the Pensacola clinic and operated it for eight days. Defendants sent several employees to either run the office or help train those working there. They procured an apartment for one of those employees, whom they sent from the office in Covington to work at the new clinic. Even though the three Defendants never traveled to the Northern District of Florida, it was abundantly clear that it was part of their plan and conspiracy. Although there was strong evidence that the activities in Pensacola were in fact criminal, venue exists under our case law "in any district where an overt act was committed in furtherance of its objects . . . [and the] overt act . . . need not be itself a crime." *Schlei*, 122 F.3d at 975 (internal citations and punctuation omitted). The foregoing evidence is uncontroverted. There is overwhelming evidence that overt acts in furtherance of the conspiracy occurred in

Pensacola. In sum, there was overwhelming evidence that venue existed there. Thus, any error was harmless.

B. *Deliberate ignorance*

Pastorek argues that the district court erred when it instructed the jury on deliberate ignorance.[5] He asserts that this court has stated that the instruction should be given only in rare cases where the facts point in the direction of deliberate ignorance, but that in this case, the Government argued that the Defendants knew what they were doing and took steps to cover their tracks. The two battling theories of the case were that the Defendants knew the controlled substances were being issued outside their usual course of medical practice or that the substances were being prescribed pursuant to a legitimate medical purpose. Neither, he argues, supports the deliberate ignorance factual predicate of defendants being subjectively aware of a high probability that controlled substances were being issued outside the usual course of medical practice and that they deliberately contrived to avoid discovering or confirming this. He further argues that the error was not harmless: giving the instruction, without the proper factual predicate, runs the risk that the jury will convict based on a belief that the Defendants were negligent or reckless in failing to learn of the alleged

[5] Caroni and DiLeo adopt this argument.

illegal activity, rather than that they had actual knowledge of it.

This court gives wide discretion to the style and wording of instructions on deliberate ignorance. Such an instruction is justified when the facts "support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution." *United States v. Rivera*, 944 F.2d 1563, 1571 (11th Cir.1991). We have stated that when the deliberate ignorance instruction is correctly given, and because by its own words the instruction did not apply because there was insufficient evidence to prove deliberate ignorance, there was no reason to believe that the jury convicted the defendant on it and such an instruction is harmless per se. *United States v. Stone*, 9 F.3d 934, 939, 941-42 (11th Cir.1993). In *Stone*, we determined that the instruction was clear in setting as a precondition of finding the defendant guilty of deliberate ignorance that there was proof beyond a reasonable doubt that he deliberately kept himself ignorant. *Id.* at 937-38. Rejecting the defendant's argument that the jury had not followed the instruction, we reasoned that as long as one theory of conviction was supported by evidence, the error is harmless. *Id.* at 939. Further, where one theory was supported, the jury will be presumed to have made the proper choice. *Id.* Finally, we rejected the ideas that a jury instructed on deliberate ignorance in the absence of evidence would

employ a reckless or negligence standard or that by finding this error harmless, the appellate court substituted itself for the jury. *Id.* at 941.

Stone thus stands for the principle that a jury, when presented with two alternate theories, will take the instructions to heart and apply them. Here, there was evidence that the Defendants ignored evidence that their patients were abusing the prescribed substances: they did not order routine and inexpensive drug screens to ensure that the patients were complying with the prescriptions, they refilled prescriptions early without questioning, they did not administer physical exams to ensure an underlying pathology, and they wrote blanket prescriptions based upon previous doctors' scripts. Additionally, as discussed below, there was sufficient evidence to support the alternative theory. Thus, it was not error to instruct on deliberate ignorance.

C. *Prejudicial Evidence*

Caroni argues that his motion for mistrial should have been granted after the jury was improperly exposed to evidence about two patients' death (i.e., the deaths of J.P. and E.A.A.).[6] He also supported his mistrial motion with the fact that the jury was exposed to three letters from parents of two patients – complaining to the clinics or to the Louisiana State

[6] Both Pastorek and DiLeo adopt this argument.

Board of Medical Examiners ("LSBME") that the clinics' prescriptions caused overdoses, and urging the clinics to stop prescribing to their son. There were four such letters, all admitted for the purpose of showing that Defendants had notice that their prescriptions were being misused and were creating dangerous health conditions. After it became apparent that the clinics had not received three of the four letters, the jury was instructed that Defendants had had no knowledge of those letters, which therefore could not serve as notice to them that their prescriptions were being misused.

The prosecution stated, during opening argument, that Defendants were responsible for the deaths and had ignored letters from the patients' parents asking them to cease giving the patients drugs. The jury heard from one patient's (J.P.'s) girlfriend who was with him when he had a seizure and crashed his car into a tree, killing him. The Government put the state trooper who responded to the accident on the stand as well as the coroner who issued the death certificate but did not do the autopsy. The director of the lab testified and introduced into evidence the toxicology report, and opined that J.P.'s level of methadone was sufficient to cause death. After receiving that toxicology report, J.P.'s autopsy report was modified to reflect that the cause of death was an overdose. However, the director of the toxicology lab later testified that he had not conducted the tests himself or done the analyses underlying the report, causing the defense to move to strike his testimony. Similarly, the

other victim's (E.A.A.'s) daughter testified about her mother's drug addiction and death. After a friend also testified, the prosecution admitted that it did not have the person who performed the toxicology report available to testify, and therefore the prosecution admitted that it could not prove the cause of death.

At that point, the Justice Department advised the prosecution that it should concede the inadmissibility of the autopsy evidence. The court then instructed the jury that it would not be asked to consider whether the deaths resulted from the conspiracy charge, and that it must not consider that part of the indictment. The court instructed the jury to disregard all of the evidence introduced about the deaths. In particular, the jury was instructed as follows:

> [Y]ou will not be asked in this case to consider whether death resulted to [J.P.] and/or [E.A.A.] from the conspiracy charged in the indictment. And you must not consider this part of the indictment in any way for any purpose during your deliberations. As a result, you are instructed that you must disregard all of the evidence introduced in the trial regarding the circumstances surrounding and the cause of the deaths of [J.P.] and [E.A.A.]. This would include all of the testimony of the following witnesses: the toxicologist, Robert Middleberg; the coroner, Tom Wilson; the Alabama Trooper, James Ray; and the medical examiner, Dr. Emily Ward.

> You must also disregard portions of the testimony of the following witnesses: Lisa Riddle, who was [E.A.A.'s] daughter; Joyce Bohannon, who we heard from yesterday afternoon, who was [E.A.A.'s] friend; and then, Hollie Thompson, who was [J.P.'s] fiancé. You must disregard the portions of their testimony that specifically referred to the circumstances surrounding and the cause of their deaths.

Docket 656:25:3-27:13 (format changed). This contemporaneous instruction was repeated almost verbatim in the court's final instructions to the jury.

Caroni also identifies as prejudicial letters from a patient's parent to the clinic that expert Dr. Parran read into evidence. The letters asked the clinic to stop prescribing to her son because he almost died of an overdose. The government argued that the letters were relevant to show that the defendants knew what their actions were causing. This parent wrote three letters, but only the first was received before the patient was discharged by the clinic. Although the government conceded that the defendants had not received the last two letters before the patient's final office visit, the court allowed the mother to testify why she had written the letters and to identify the letters. The court gave a limiting instruction with respect to the two letters which were not received before the patient's final office visit. Expert Dr. Parran also discussed another patient whose mother had written a letter of complaint to LSBME, but the intended copy of that letter was never received by the

defendants. The court struck that letter, but stated that the jury could consider the patient's mother's testimony about writing the letter and the fact that she had made a complaint.

Caroni had moved for a mistrial after the government rested, which the court denied. Caroni argued that the evidence was so prejudicial that, even though curative instructions were given, they could not cure the damage done.

We review a district court's refusal to grant a mistrial for an abuse of discretion. *United States v. Trujillo*, 146 F.3d 838, 845 (11th Cir.1998). "The decision of whether to grant a mistrial lies within the sound discretion of a trial judge as he or she is in the best position to evaluate the prejudicial effect of improper testimony." *United States v. Perez*, 30 F.3d 1407, 1410 (11th Cir.1994). "When a curative instruction has been given to address some improper and prejudicial evidence, we will reverse only if the evidence 'is so highly prejudicial as to be incurable by the trial court's admonition.'" *Id.* (quoting *United States v. Funt*, 896 F.2d 1288, 1295 (11th Cir.1990)).

In *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir.2012), we held that the admission of autopsy reports and testimony about them by a physician who was not their author was a violation of the Confrontation Clause. We determined that the admission of the reports and the testimony was not harmless. Because it was a constitutional error, we reviewed under a more stringent standard: "whether it appears beyond

a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 1235. We stated that we could not ignore the powerful impact the reports must have had, and we also noted that the jury was allowed to consider the testimony concerning seven deaths. *Id.* Furthermore, knowledge of the deaths undermined the defendant's good faith defense. *Id.* at 1236.

Unlike in *Ignasiak*, the prejudicial evidence about the deaths in this case was excluded, and the jury was instructed not to consider it. Additionally, the jury was instructed that the clinic did not receive the three challenged letters and the jury was instructed that it could consider those letters only for the limited purpose of revealing what the two patients' families thought of the clinic but not as notice to the clinic or the defendants about the effect of the prescriptions.

Because the evidence about the deaths was excluded, there was no Confrontation Clause violation and thus we need not employ the more stringent standard of review that the court used in *Ignasiak*. Because the court gave clear instructions to the jury to disregard the evidence, we instead review for whether the evidence was so highly prejudicial as to be incurable. *Perez*, 30 F.3d at 1410.

Our careful review of the entire record persuades us that the jury's exposure to the evidence relating to the two deaths and to the challenged letters was not so highly prejudicial as to be incurable. As noted, the

jury was clearly instructed – both shortly after the exposure to the inadmissible evidence of the deaths and in the final instructions – to "disregard all of the evidence introduced . . . regarding the circumstances surrounding and the cause of the deaths." Similarly, strong and proper curative instructions were given at both times with respect to the challenged letters. With respect to the latter, there was ample other evidence that the defendants were aware that the prescriptions were causing or contributing to addiction or overdoses. With respect to the exposure to the evidence of the deaths, the jury is presumed to have followed the clear instructions to disregard same. Our careful review of the totality of the evidence persuades us that the jury could and did do that.

In its closing arguments, the government did not comment at all on the death evidence that was ruled inadmissible. Moreover, with respect to both deaths, the jury was also exposed to significant evidence that indicated either that the death was not in fact caused by the defendants' prescriptions or that eroded the prejudicial effect of the inadmissible evidence. With respect to J.P., the jury was exposed to evidence that he had obtained 120 methadone tablets from a Tennessee clinic a week before his fatal automobile accident, thus eroding any causal link between J.P.'s death and these defendants' prescriptions. The jury could very readily, and most probably actually did, follow the judge's instruction to disregard all of the evidence tending to link the drugs prescribed by these defendants as a cause of J.P.'s death. With respect to

E.E.A. [sic], the jury was also exposed to evidence that she had cervical cancer, thus eroding the prejudicial impact of the jury's exposure to the inadmissible evidence with respect to her death, and making it easier for the jury to follow the judge's instruction. Moreover, there was ample other evidence that the strength and combination of the drugs being prescribed by these defendants, and their *modus operandi*, had the potential to cause serious harm, and ample other evidence that defendants' prescriptions had actually caused overdoses. In light of the totality of the evidence in this case, we do not believe that the inadmissible evidence that the jury was clearly instructed to disregard was so highly prejudicial as to be incurable.

With respect to the totality of the evidence in this case, unlike the *Ignasiak* case, the evidence of these defendants' guilt was strong. Numerous patients and former employees testified that the drugs were prescribed notwithstanding the complete absence of, or only cursory, physical examinations. They also testified that patients were able to obtain prescriptions despite obvious indications of addiction, abuse of the drugs, and doctor-shopping. There was evidence that the number of patients the doctors saw each day was very large; that patients were offered bonuses for referrals; and that patients' dosages were increased upon request (i.e., not based upon demonstrable need) and in spite of drug screening indicating that the patients were not taking the drugs and, in some cases, were taking street drugs. There was significant

evidence from employees, including Dr. Klug, that defendants Caroni and DiLeo actually said that what the patients did with the drugs after they left the office was none of their business or concern. And there was evidence that patients were selling some of the drugs prescribed, and at least some evidence that co-conspirator Caroni was aware of that. Dr. Klug also testified that, when he sought guidance because of his own inexperience with pain management, Dr. DiLeo advised him to just prescribe the same controlled substances that the patient had been receiving. The evidence showed that defendants charged fees depending upon the type and strength of the controlled substance, much more like drug dealers than like professionals who base their fees on the time expended and/or the complexity or value of the service. Significant testimony also came from Dr. Lonseth, who brought his family to New Orleans from California to accept a position with Global Pain at a salary of $500,000. After observing the operation for a [sic] less than a month, he walked away from the $500,000 salary (notwithstanding he had no other current offer) because he thought the operation was a "pill mill." Two former staff members also estimated that about three-fourths of the patients were there to support their addictions. Although there was some conflict in the expert testimony, the foregoing evidence provides strong support for the opinions of the two government experts – Dr. Parran and Dr. Hamill-Ruth – that the operation of Global Pain was inconsistent with the legal requirement that prescriptions for controlled substances must be issued for legitimate

medical purposes in the usual course of a professional practice.

In sum, we cannot conclude that the district court abused its discretion in denying defendant's motion for a mistrial.

D. *Sufficiency of evidence – conspiracy*

Caroni argues that the evidence was legally insufficient to support his conviction for conspiring with his co-defendants to run an illegitimate practice.[7] Under 21 CFR § 1306.04(a), "a prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." The indictment alleges that DiLeo, Pastorek, and Caroni conspired to unlawfully distribute Schedule II, III, and IV controlled substances through prescription practices done outside the usual course of medical practice and for other than legitimate medical purpose. Caroni asserts that the Government's theory was that the clinics were pill mills but yet the clinics had employed nine doctors and only two were indicted. Caroni asserts that the Government alleged, and had to prove, an entirely corrupt practice. He also argues that the files reviewed by the experts were not statistically representative of the whole practice.

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[7] Both Pastorek and DiLeo adopt this argument.

We review questions about the sufficiency of the evidence *de novo*, "viewing the evidence in the light most favorable to the government, with all reasonable inferences and credibility choices made in the government's favor." *United States v. Sosa*, 777 F.3d 1279, 1289 (11th Cir.2015) (internal quotations omitted and alterations adopted). Further, "we will affirm a conviction where 'a reasonable jury could find the defendant's guilt beyond a reasonable doubt.'" *Id.* (quoting *United States v. Utter*, 97 F.3d 509, 512 (11th Cir.1996)).

Caroni cites no cases that require the Government to show that the entire practice was illegitimate. This would be an unreasonable burden and allow a completely illegal clinic to evade prosecution by having a few legitimate patients. Rather, the Government needed to prove that there was very substantial illegal activity occurring at the clinic, thus removing any reasonable doubt that unlawful prescriptions were being issued by mistake or through negligence.[8] Thus, the selection of the files for the experts to review did not need to precisely reflect the composition of the clinic's patient population; rather, it had to demonstrate that the illegal behavior was substantial and it did just that.

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[8] The district court expressly instructed the jury that "negligence, mistake or carelessness is not a sufficient finding of knowledge."

In *United States v. Joseph*, 709 F.3d 1082 (11th Cir.2013), we upheld a jury's finding of an illegitimate practice. There, we pointed to the defendant's prescription of large quantities of controlled substances, the large number of those prescriptions, failure to do physical examinations, prescriptions to patients knowing they were giving them to others, and no relationship between the drug prescribed and the treatment of the condition alleged.

The evidence in this case was similar to that in *Joseph*. As set forth in the immediately preceding Part C. of this opinion, there was ample evidence to support the jury's verdict. And while there was some evidence that the Defendants became more careful about doctor shopping and misuse of prescriptions in the last year of the clinic, a reasonable jury could have concluded this was a response to the shutting down of other pain management clinics by the DEA and an effort to evade detection.

E. ***Sufficiency of evidence – money laundering***

Caroni argues that the Government produced insufficient evidence to prove promotion money laundering.[9] To prove promotion money laundering, the Government must show not only that the money was the result of illegal activity but also that it was spent on promoting the illegal activity. Caroni argues that

[9] DiLeo adopts this argument.

the evidence only showed that cash was deposited into bank accounts, using simple graphs prepared by the agent.

Caroni is correct that our precedent requires the Government to show that the deposited money was intended [sic] promote the conspiracy. In *United States v. Calderon*, we reversed a conviction because the Government only showed that the Appellant knew that the money was ill-gained but never put on any evidence that the Appellant intended to do more than conceal the money. 169 F.3d 718, 721 (11th Cir.1999). There was no evidence of how the money was to be spent once it was deposited or any evidence of how her actions furthered the underlying drug trafficking. *Id.*

Our *United States v. Martinelli*, 454 F.3d 1300 (11th Cir.2006), decision approved a district court's instruction that the jury had to find that the defendant engaged in the financial transaction with "the intent to promote the carrying on of such specified unlawful activity" and that "[t]he term with the intent to promote the carrying on of the specified unlawful activity means that the defendant must have conducted or attempted to conduct the financial transaction for the purpose of facilitating or making easier or helping to bring about the specified unlawful activity as has been defined." *Id.* at 1318. We stated that with such instructions, "the jury could not have found Martinelli guilty if it believed the financial transactions were undertaken for legitimate, non-fraudulent business expenses." *Id.*

Here, the jury was instructed with the same pattern jury instructions as in *Martinelli.* The agent who provided evidence about the monetary transactions testified that the funds at issue were used to pay overhead, rent, and malpractice insurance. Further, in Caroni's deposition in a civil case, which was entered into evidence, he testified that they used the funds from Global Pensacola to pay "bills and whatnot." Thus, the proceeds of the unlawful activity were deposited into numerous bank accounts and then spent to pay overhead, rent, malpractice insurance, bills, and whatnot – all expenses incurred to promote and continue the operation of the conspiracy to unlawfully dispense controlled substances. Accordingly, there was sufficient evidence that the funds were spent to promote the illegal practice.

F. ***Indictment amendment***

Caroni argues that his Fifth Amendment rights were violated when the jury was charged in the disjunctive but the indictment read in the conjunctive.[10] Count One charged the Defendants with engaging in a conspiracy to unlawfully dispense controlled substances through prescription practices done outside the usual course of medical practice *and* for other than legitimate medical purposes. However, the Government's proposed jury instructions stated that the jury only had to find one or the other. Caroni objected

[10] Both Pastorek and DiLeo adopt this argument.

and asked for a ruling before opening arguments. The district court instructed the lawyers to avoid the standard in their openings and did not rule until 20 days into the trial, after the Government had rested. It overruled Caroni's objection and instructed the jury in the disjunctive. Caroni argues that the charge impermissibly expanded the indictment by broadening the possible bases for conviction.

Caroni points to our decision in *United States v. Cancelliere*, 69 F.3d 1116 (11th Cir.1995), where we held that the Government had to prove willfulness even though the statute did not include that language because the Government had put the word in the indictment. We so held because the entire defense was based on the defendant's lack of willfulness and the Government did not seek to have willfulness removed until after the close of evidence. Here, Caroni contends that his entire defense was prepared based on the grand jury's charges and changing the rules midstream was highly prejudicial.

We have explained that a constructive amendment "takes place 'when the essential elements of the offense contained in the indictment are altered to broaden the possible bases for conviction beyond what is contained in the indictment.'" *United States v. Mozie*, 752 F.3d 1271, 1283 (11th Cir.2014)) (quoting *United States v. Dortch*, 696 F.3d 1104, 1111 (11th Cir.2012)). We have stated repeatedly that when an indictment charges several means of violating a statute, a conviction may be obtained on proof of only one of the means. *Id.* at 1283-84. In *Mozie*, we explained

that in *Cancelliere*, there were some key differences. One was that willfulness was not an alternative means because it was not in the statute. *Id.* at 1284. Second, *Cancelliere* was different because the defendant based his entire defense on disproving the mental state that was removed. *Id.* Finally, we stated that to the extent *Cancelliere* supported Mozie's position, it was inconsistent with cases that came before it and they would trump *Cancelliere*. *Id.* at 1285.

Caroni's argument fails for several reasons. This case is more like *Mozie* than *Cancelliere*. The disjunctive instruction was not error. Section 1306.04(a) of Title 21 of the Code of Federal Regulations provides an exception to the prohibitions found in § 841 that ban the sale and provision of certain drugs. That regulation permits prescriptions for controlled substance if they are "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." Thus, under the plain language of the regulation, in order to qualify for the exception, a defendant must have provided the prescription for both a legitimate medical purpose and while acting in the usually [sic] course of his profession. Without both, the defendant is subject to prosecution. *Accord Joseph*, 709 F.3d at 1094 (citing the regulation and holding "[i]f a prescription is issued without a legitimate medical purpose or outside the usual course of professional practice", it is subject to criminal penalties). Hence, the Government needed only to prove one of the two prongs and the

Defendants were on notice because the language of the section clearly mandated that requirement.

G. *Caroni's sentence*

1. General verdict precluded sentencing to an underlying object offense.

Caroni asserts that in a multi-object conspiracy, a general verdict from the jury precludes the court from sentencing the defendant to an underlying object offense unless the court finds beyond a reasonable doubt that the defendant conspired to commit that particular object offense. He argues that his sentences should be limited by his three-year statutory maximum sentence for Count 1 because the jury did not specifically find that he was guilty of conspiring to distribute Schedule II drugs. He also contends that the district court erred by failing to separately calculate his offense level for Count 2 under U.S.S.G. § 2S1.1 to determine what his highest guideline range was. He argues that the court's use of § 2D1.1 to calculate his offense level for Count 2 in conjunction with the application of the statutory maximum sentence for Count 2 is unconstitutional.

Pursuant to 18 U.S.C. § 1956, a person convicted for money laundering faces a maximum sentence of 20 years' imprisonment. 18 U.S.C. § 1956(a)(1)(B)(ii). The Sentencing Guidelines dictate that closely related counts shall be grouped together for sentencing purposes. U.S.S.G. § 3D1.2. In a case where the defendant is convicted of money laundering and convicted

of the underlying offense from which the laundered funds were derived, the counts shall be grouped pursuant to § 3D1.2(c), and the highest offense level shall be applied. U.S.S.G. § 2S1.1, comment. (n.6); U.S.S.G. § 3D1.3(a). While typically it is necessary to determine the offense level for each of the counts, the formal determination of the offense level is unnecessary where it is clear that one count cannot have a higher offense level than another. U.S.S.G. § 3D1.3, comment. (n.2).

Money laundering offenses are covered by § 2S1.1 of the Guidelines. U.S.S.G. § 2S1.1. Under § 2S1.1, the offense level of the underlying offense from which the laundered funds were derived is to be applied as long as it can be determined. U.S.S.G. § 2S1.1(a)(1). Offenses involving a conspiracy to distribute controlled substances are covered by § 2D1.1 of the Guidelines. U.S.S.G. § 2D1.1. In determining the drug quantity for purposes of § 2D1.1, types and quantities of drugs not specified in the count of convictions may be considered. U.S. S.G. § 2D1.1, comment. (n.12) (2011).[11] Additionally, the court may approximate the drug quantity by considering various factors, including financial and business records. *Id.*

Caroni's claim fails because the district court properly calculated his guideline range and neither of his sentences exceed their respective statutory

[11] The district court employed the 2011 Guidelines because the trial took place that year.

maximum penalties. Because he was convicted of laundering the money that he derived from the drug offense, the district court properly grouped his counts. U.S.S.G. § 2S1.3, comment. (n.6). Because Caroni's base offense level under § 2S1.1 was set to the offense level of his underlying drug offense, and he was eligible for the role adjustment in connection with either provision, he had the same total offense level for both counts. *See* U.S.S.G. § 2S1.1(a)(1). As such, it was unnecessary to independently determine his offense level for both counts, and either one could be used as the highest offense level. *See* U.S.S.G. § 3D1.3(a); U.S.S.G. § 3D1.3, comment. (n.2). He was subsequently sentenced to concurrent sentences of 36 months for Count 1 and 240 months for Count 2, both within his respective statutory maximum penalties.

Although Caroni argues that the court should have limited his sentence for Count 2 with his statutory maximum penalty for Count 1, he offers no authority to support this position, and the money laundering guidelines specifically require the use of the drug offense guidelines in cases like this without any directive to alter the respective statutory penalties.[12] Finally, he offers no authority to support his

[12] We also reject Caroni's arguments based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and *United States v. Allen*, 302 F.3d 1260 (11th Cir.2002), because the pertinent statutory maximum is the one for money laundering.

position that the court was not entitled to consider the Schedule II drugs involved in the drug offense under the Guidelines in determining his drug quantity. *See* U.S.S.G. § 2D1.1, comment. (n.12). Accordingly, Caroni's challenge fails.

2. Calculation of drug quantity

Caroni challenges the court's calculation of his drug quantity. He argues that the district court clearly erred in determining the drug quantity based upon his assertion that many of the drugs were prescribed legitimately and the court was required to exclude those drugs.

This Court reviews the district court's interpretation of the Sentencing Guidelines *de novo* and accepts its factual findings unless clearly erroneous. *United States v. Jordi*, 418 F.3d 1212, 1214 (11th Cir.2005). In order to be clearly erroneous, the finding of the district court must leave this Court with a "definite and firm conviction that a mistake has been committed." *United States v. Rothenberg*, 610 F.3d 621, 624 (11th Cir.2010). However, a factual finding cannot be clearly erroneous when the fact finder is choosing between two permissible views of the evidence. *United States v. Saingerard*, 621 F.3d 1341, 1343 (11th Cir.2010). For sentencing purposes, the government bears the burden of establishing drug quantity by a preponderance of the evidence. *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir.2005). The court must ensure that the government carries this

burden by presenting reliable and specific evidence. *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir.1995).

The district court did not rely on a limited subset of the patient files to conclude that all of the patients received illegitimate prescriptions, but instead analyzed all of the identified patient files to reach the conclusion that all of the prescriptions were not for a legitimate medical purpose and were outside of those [sic] usual course of medical practice. Thus, with respect to *all* of the controlled substances for which Caroni was held responsible, the district court made a finding of fact that they were not prescribed for a legitimate medical purpose. The evidence showed that patients were able to pick up their prescriptions, often without seeing a doctor, simply by making the required payments. Patients had to pay in all cash, and prescriptions were often given out to patients with addiction problems, to patients that appeared to be under the influence, and in situations where the prescribing doctor believed that medication was not necessary. Furthermore, the government and the court excluded many of the patient files from the original 96 patient files that were seized and reviewed. The PSI initially considered 68 of the patient files, and only 67 were considered at sentencing following the government's concession that one of the patients' prescriptions should not be counted.

Although Caroni argued that some of the patient files contained information suggesting that the patients legitimately needed the medication, he offered

no reliable evidence to establish that the medications were for a legitimate medical purpose or within the usual course of medical practice. Caroni submitted the conclusions of his expert witness, Warfield, but the district court correctly noted that the weight of her opinion had to be tempered by the jury's guilty verdict. Accordingly, the district court did not clearly err in determining that a preponderance of the evidence supported the drug quantity specified in the PSI.

3. Substantively unreasonable sentence

Finally, Caroni argues that his sentences are substantively unreasonable. He contends that the court impermissibly concluded that the conspiracy involved Schedule II drugs. Additionally, he points to the sentencing disparity between his sentences and those of his codefendants to argue that the district court made a clear error in judgment. He also argues that the court improperly considered evidence of the patient deaths and of Mark Artigues's[13] conduct, evidence that he argues was not properly in the record. Finally, he asserts that the court prejudicially concluded that he was responsible for ruining the lives of the doctors involved in the cases when they were culpable for their own conduct.

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[13] Artigues was the former employee whom Caroni sued when he alleged that Artigues stole the Pensacola clinic from him.

This Court reviews the reasonableness of a sentence under a deferential abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586, 591, 169 L.Ed.2d 445 (2007). This Court may "set aside a sentence only if [it] determine[s], after giving a full measure of deference to the sentencing judge, that the sentence imposed truly is unreasonable." *United States v. Irey*, 612 F.3d 1160, 1191 (11th Cir.2010) (en banc).

The district court must impose a sentence "sufficient, but not greater than necessary, to comply with the purposes" listed in 18 U.S.C. § 3553(a)(2), including the need to reflect the seriousness of the offense, promote respect for the law, provide just punishment for the offense, deter criminal conduct, and protect the public from the defendant's future criminal conduct. 18 U.S.C. § 3553(a)(2). In imposing a particular sentence, the court must also consider the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the applicable guideline range, the pertinent policy statements of the Sentencing Commission, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims. 18 U.S.C. § 3553(a)(1), (3)(7).

In reviewing the reasonableness of a sentence, this Court first ensures that the sentence was procedurally reasonable, meaning the district court properly calculated the guideline range, treated the Guidelines as advisory and not mandatory, considered the § 3553(a) factors, did not select a sentence based

on clearly erroneous facts, and adequately explained the chosen sentence. *Gall*, 552 U.S. at 51, 128 S.Ct. at 597. The Guidelines dictate that where a sentence imposed on the count carrying the highest statutory maximum is less than the total punishment, then the sentence imposed on the other count shall run consecutively to the extent necessary to produce a combined sentence equal to the total punishment. U.S.S.G. § 5G1.2(d). Once the Court determines that a sentence is procedurally sound, it examines whether the sentence was substantively reasonable in light of the totality of the circumstances. *Id.*

"The party challenging the sentence bears the burden to show it is unreasonable in light of the record and the § 3553(a) factors." *United States v. Tome*, 611 F.3d 1371, 1378 (11th Cir.2010). Although this court does not apply a presumption of reasonableness for sentences falling within the guidelines range, "ordinarily [this Court] would expect a sentence within the Guidelines range to be reasonable." *United States v. Talley*, 431 F.3d 784, 787-88 (11th Cir.2005). This Court reverses only if "left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case." *Irey*, 612 F.3d at 1190. "The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." *Gall*, 552 U.S. at 51, 128 S.Ct. at 597.

Congress has explicitly provided that there is no limitation on the information concerning "the background, character, and conduct" of the defendant that a court may consider in determining the appropriate sentences. 18 U.S.C. § 3661. At sentencing, a court's factual findings may be based on trial evidence, undisputed statements in the PSI, or evidence presented at the sentencing hearing. *United States v. Wilson*, 884 F.2d 1355, 1356 (11th Cir.1989).

First, the district court did not err in considering evidence regarding Artigues or the patient deaths. The Caroni deposition testimony recounted how two Global Pain employees were hired to work at Artigues's clinic, and the clinic's earnings went to Caroni, who would then pay Artigues. It was also permissible for the court to consider the evidence of the patient deaths because that evidence was introduced at sentencing. *Wilson*, 884 F.2d at 1356. Regardless, any error with respect to the consideration of the death evidence was harmless because the court stated that it did not affect Caroni's sentences.

As to his argument regarding the consideration of Schedule II drugs in calculating his drug quantity, such consideration is expressly contemplated by the Guidelines. *See* U.S.S.G. § 2D1.1, comment. (n.12). Likewise, the court's partial attribution of the consequences the doctors faced to Caroni is consistent with the determination that he held a leadership role in the offense, and the court stated that it was not absolving the doctors of their own conduct. While Caroni is correct in pointing out that his sentences

are significantly higher than those of DiLeo and Pastorek, their sentences are the result of "extraordinary" situations that warranted significant departures. DiLeo initially had a sentencing range of 188 to 235 months, the same range Caroni would have had without the leadership role adjustment. He received a 12-level departure because of the medical condition and special needs of his child, which resulted in a guideline range of 51 to 63 months. From there, the court imposed concurrent sentences of 24 months for both counts, representing a 27-month variance from the low end of his guideline range. Pastorek started with a much lower initial sentencing range because he was only charged and convicted for Count 1, and his guideline range was limited by his statutory maximum penalty. He received a 6-level departure for the medical condition and medical needs of his child, and he was sentenced to 12 months and 1 day of imprisonment, which was within his guideline range.

By contrast, Caroni's otherwise applicable guideline range was 292 to 365 months. Under § 5G1.2(d), the court should have imposed his statutory maximum sentences consecutively to approximate his recommended guideline range, which would have resulted in a sentence of 276 months. Thus, his total sentence of 240 months represented a downward variance of 36 months, which is actually greater than the variance that DiLeo received. Accordingly, the disparities in the sentences are explained by the differences in circumstances between the three defendants.

Finally, Caroni's sentences are reasonable in light of the record as a whole. The district court thoroughly considered the § 3553(a) factors, the trial evidence, and the arguments of the parties. The court emphasized that it believed strong sentences were warranted based on the seriousness of the offenses and Caroni's role in perpetuating them. The nature and scope of Caroni's conduct resulted in the distribution of the equivalency of 16,517.99 kilograms of marijuana and resulted in the laundering of approximately $8,557,205 in funds. Further, his 240-month sentences represented a downward variance from his applicable guideline range, as discussed above. Given the seriousness and magnitude of the offenses, Caroni's leadership role in the offenses, and the district court's consideration of the § 3553(a) factors, Caroni's sentences are substantively reasonable. Accordingly, this Court affirms Caroni's sentences.

AFFIRMED.

MARTIN, Circuit Judge, dissenting:

It is well-settled that the government bears the burden of proving venue in every criminal case. *United States v. Snipes*, 611 F.3d 855, 865 (11th Cir.2010). Here, Dennis Caroni, Gerard DiLeo, and Joseph Pastorek were indicted and tried in the Northern District of Florida even though they never traveled to that district. Consistent with our long-standing precedent, the government alleged that venue was proper

because the defendants briefly extended their drug and money laundering conspiracies to the Northern District of Florida by hiring co-conspirators to open Global Pensacola, a pain management clinic in Pensacola, Florida. *See United States v. Schlei*, 122 F.3d 944, 975 (11th Cir.1997) (a conspiracy may be prosecuted in any district in which an "overt act was committed in furtherance of its objects").

The precise issue that Messrs. Caroni, DiLeo, and Pastorek raise is not that this is a legally insufficient allegation, or even that the government failed to offer evidence in support of it. Instead, they argue that because venue is a question of fact, they were entitled to have the jury make a specific finding that either they or one of their co-conspirators committed an overt act in the Northern District of Florida. I agree with Messrs. Caroni, DiLeo, and Pastorek, as well as the majority, that the District Court erred by refusing to provide a jury instruction on venue and prohibiting defense counsel from arguing that the government had failed to prove venue.

I part ways with the majority with respect to its holding that the District Court's error was harmless. I write separately to explain why the District Court's failure to instruct on venue and restriction of defense counsel's closing arguments constitute reversible error.

I.

A defendant in a criminal case has the right to be tried in the district in which the crime was committed. For conspiracy offenses that span more than one district, venue is proper in any district in which the conspiracy was formed or in which a co-conspirator committed an act in furtherance of the conspiracy. *Schlei*, 122 F.3d at 975.

Questions of venue are not merely "pedantic, justice-defeating technicalit[ies]," but issues of constitutional magnitude. *Green v. United States*, 309 F.2d 852, 856 (5th Cir.1962).[1] As the Supreme Court explained in *United States v. Johnson*, 323 U.S. 273, 65 S.Ct. 249, 89 L.Ed. 236 (1944), venue "touch[es] closely the fair administration of criminal justice and public confidence in it" by protecting defendants from prosecution in unfavorable or remote locations. *Id.* at 276, 278, 65 S.Ct. at 250, 252. Indeed, the importance of this right is evident from the fact that it is guaranteed by two separate constitutional provisions and a federal statute. *See* U.S. Const. art. III, § 2, cl. 3 ("The Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed. . . ."); *id.* amend. VI (requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed"); Fed.R.Crim.P. 18

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), this Court adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1207.

("Unless a statute or these rules permit otherwise, the government must prosecute an offense in a district where the offense was committed.").

Because it is grounded in our constitution, we have characterized venue as an "essential element of the government's proof at trial," *Snipes*, 611 F.3d at 865, and continuously reaffirmed that the government bears the burden of proving venue in every criminal prosecution, *see, e.g.*, *United States v. Stickle*, 454 F.3d 1265, 1272 (11th Cir.2006); *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir.2004); *United States v. White*, 611 F.2d 531, 534 (5th Cir.1980). And we have also explained that it is especially important for courts to safeguard a defendant's venue right in conspiracy prosecutions because a jury need not find that the government proved every act alleged in the indictment in order to convict. Thus, "[t]he dangers of abuse are manifold if the Government can obtain an indictment for conspiracy in a district other than the district where the offense was actually committed merely by alleging that one act, which need never be proved, was committed in that district." *Green*, 309 F.2d at 856.

However, although venue is a question of fact – did the crime take place in the district of prosecution? – our precedent makes clear that a district court is not always required to present this question to the jury. *Compare Bellard v. United States*, 356 F.2d 437, 439 (5th Cir.1966), *with Snipes*, 611 F.3d at 866; *see also United States v. Perez*, 280 F.3d 318, 330 (3d Cir. 2002) (stating that "venue does not automatically

present a question for the jury"). This Court last addressed the specific question raised by the appellants – in what circumstances a district court errs by failing to instruct the jury on venue – in *White*, 611 F.2d 531. In that case, Charles White was convicted in the Middle District of Florida for a number of offenses arising from the theft and forgery of a Social Security check. *Id.* at 533-34. Mr. White argued that the district court erred by failing to give a jury instruction on venue because the government had offered no direct evidence that his crimes had been committed in the Middle District. *Id.* at 535-36.

We held that the district court's failure to provide a venue instruction did not constitute plain error[2] for the following reasons:

> First, Count Two of the indictment charged that White forged the check in the Middle District of Florida. The indictment appears to have been read to the jury only once, before the jury was sworn, but the trial judge sent a copy of the indictment into the jury room for consideration by the jury during its deliberations. Second, in instructing the jury on the essential elements of forgery, the trial court stated that the government must prove beyond a reasonable doubt "the act of forging the payee's endorsement on the United States Treasury check as charged." Third,

[2] Unlike the appellants in this case, Mr. White did not request a jury instruction on venue. *White*, 611 F.2d at 536.

> White's counsel argued the territorial jurisdiction and venue question in his closing argument. Finally, there was sufficient evidence for a jury to conclude that the forgery occurred in the Middle District of Florida.

Id. at 537.

White's reasoning is instructive: no separate venue instruction was required because the jury's guilty verdict necessarily included a finding of proper venue. In other words, because the indictment alleged offense conduct *only* in the Middle District of Florida, the jury could not have found the defendant guilty unless it specifically found that the defendant committed an act within that jurisdiction. *See id.* Several other circuits have articulated similar rules. *See, e.g.*, *United States v. Miller*, 111 F.3d 747, 751 (10th Cir.1997) ("We therefore adopt the rule that failure to instruct on venue, when requested, is reversible error unless it is beyond a reasonable doubt that the jury's guilty verdict on the charged offense necessarily incorporates a finding of proper venue."); *United States v. Martinez*, 901 F.2d 374, 376 (4th Cir.1990) ("Venue is an issue in this case because the jury was able to convict the defendant of the offenses charged without an implicit finding that the acts used to establish venue had been proven."); *United States v. Moeckly*, 769 F.2d 453, 461 (8th Cir.1985) ("The issue here is whether venue was proven where there was no finding by the jury that at least one overt act or the conspiratorial agreement occurred in Minnesota. . . .

Some finding by the jury on this issue should have been required.").

Applying this standard, the District Court erred. The indictment in this case alleged a conspiracy in both the Northern District of Florida and the Eastern District of Louisiana, and the jury's guilty verdict did not necessarily incorporate a finding that the defendants committed any act – criminal or otherwise – in the Northern District of Florida. Thus, the District Court should have provided a jury instruction on venue and permitted defense counsel to argue that the government had failed to prove venue. The majority does not dispute this conclusion.

The majority and I part ways, however, in our application of the harmless error standard. Under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), Messrs. Caroni, DiLeo, and Pastorek are entitled to reversal unless the government "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."[3] *Id.* at 24, 87 S.Ct. at 828. Under these

[3] To the extent that the majority applies some other harmless error standard, it has no basis in our precedent. And although several of our sister circuits have held that a failure to instruct the jury on venue is harmless error if evidence of venue is "substantial and uncontroverted," uncontroverted in this context takes its literal meaning: not contested at trial. *See Martinez*, 901 F.2d at 377 (holding that evidence of venue was "substantial and uncontroverted" where it had not been contested at trial); *see also United States v. Neder*, 197 F.3d 1122, 1129 n. 6 (11th Cir.1999) (stating that the fact that an omitted element "was *not*

(Continued on following page)

circumstances, where the jury has made no finding on a required element of an offense, our inquiry focuses on "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder v. United States*, 527 U.S. 1, 19, 119 S.Ct. 1827, 1839, 144 L.Ed.2d 35 (1999). Said differently, the government bears the burden of proving, beyond a reasonable doubt, that a rational jury could not have concluded that venue was improper. I believe the government has failed to carry this burden.

The majority makes much of the "substantial and uncontroverted" evidence regarding Global Pensacola. However, while it was not disputed that Mr. Caroni founded Global Pensacola, the relevant question here is whether its establishment was an overt act in furtherance of the conspiracy between Messrs. Caroni, DiLeo, and Pastorek such that it could establish venue in the Northern District of Florida. The evidence on this question was more limited. Global Pensacola operated for only two weeks during what was otherwise a four-year conspiracy, and Mr. Caroni was the only one of the three defendants who had a role in founding the clinic. Indeed, the government presented no evidence whatsoever linking Mr. Pastorek

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contested supports the conclusion that the jury's verdict would have been the same absent the error." (emphasis added)). The defendants here contested whether their conspiracy extended to the Northern District of Florida.

to Global Pensacola.[4] Finally, as a result of the short amount of time that Global Pensacola operated, the government's evidence about this clinic's operations was necessarily quite limited. For instance, although a critical question in this case was whether patients received prescriptions that were made "outside the usual course of medical practice and for other than legitimate medical purposes," the jury only heard from one Global Pensacola patient who had visited the clinic a single time and had not been treated by any of the defendants.

For the reasons described in the majority opinion, it is certainly conceivable that the jury – if it had been presented with the question – would have found that venue was proper in the Northern District of Florida. But that is not our inquiry. Because this question was taken away from the jury in violation of the defendants' constitutional rights, our task on harmless error review is to determine whether there exists "evidence that could rationally lead to a

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[4] I recognize that a co-conspirator may be held responsible for aspects of a conspiracy in which he had no direct involvement. However, the government's inability to connect Mr. Pastorek to Global Pensacola is undoubtedly relevant to the question we face here – whether the establishment of Global Pensacola was an overt act in furtherance of a conspiracy involving Mr. Pastorek. *See United States v. Chandler*, 388 F.3d 796, 811-12 (11th Cir.2004). As this Court explained in *Green*, "[t]here is grave danger of injustice where, as in the present case, one defendant was not even alleged to have participated in the one act which occurred in the district where the indictment against him . . . was returned." 309 F.2d at 856.

contrary finding." *Neder*, 527 U.S. at 19, 119 S.Ct. at 1839. Under these facts, my answer is yes. I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-10661-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERARD M. DILEO,
DENNIS M. CARONI,
JOSEPH GEORGE PASTOREK, II,

Defendants-Appellants.

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

(Filed Nov. 17, 2015)

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: MARTIN and ANDERSON, Circuit Judges, and COTE, District Judge.

PER CURIAM:[1]

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[1] Appellant Pastorek's motion to adopt co-appellants' petitions for rehearing and rehearing en banc is granted.

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES
CIRCUIT JUDGE

*Honorable Denise Cote, United States District Judge for the Southern District of New York, sitting by designation.