No. 15-1292

In the Supreme Court of the United States

DENNIS M. CARONI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court's failure to instruct the jury on venue was harmless.

2. Whether petitioner's conviction for conspiracy to commit promotional money laundering was supported by sufficient evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-48) is not published in the Federal Reporter but is reprinted at 625 Fed. Appx. 464.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 2015. A petition for rehearing was denied on November 17, 2015 (Pet. App. 49-50). On February 8, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including April 15, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on one count of conspiracy to distribute

controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b), and 846; and one count of conspiracy to launder money, in violation of 18 U.S.C. 1956(h). See D. Ct. Doc. 500, at 3 (May 11, 2012). Petitioner was sentenced to 240 months of imprisonment, to be followed by three years of supervised release.[1] D. Ct. Doc. 563, at 1-3 (Feb. 6, 2013). The court of appeals affirmed. Pet. App. 1-39.

1. a. In 2004, petitioner and Theodore G. Aufdemorte, Jr., formed Global Pain Management, LLC (Global Pain) to operate pain management clinics in the New Orleans area. Pet. App. 2-3. In 2005, petitioner opened a pain management clinic in Pensacola, Florida. *Id.* at 3. The Pensacola clinic, which operated for two weeks, employed the same practices as the New Orleans clinics. *Id.* at 3, 9-10.

The clinics scheduled appointments in five-minute windows. Pet. App. 4. Global Pain charged patients between $100 and $400 per visit depending on the type and strength of the drug prescribed. *Id.* at 5; see Gov't C.A. Br. 6 (higher fees for oxycodone and methadone). A "very large" number of patients frequented each clinic, Pet. App. 20, and many appeared to be under the influence of drugs, *id.* at 5.[2] Petitioner also instituted a marketing program inviting patients to earn a free visit for every five patients they referred to Global Pain. *Ibid.*

The clinic examination rooms lacked tables or, alternatively, the tables went unused. Pet. App. 4. Doctors performed cursory physical examinations and

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[1] Petitioner's sentence was later reduced to 235 months pursuant to 18 U.S.C. 3582(c)(2). See D. Ct. Doc. 696 (Aug. 11, 2015).

[2] Two former employees estimated that 75% of patients used the clinic to support their addictions. Pet. App. 21.

prescribed drugs to patients despite obvious indications of addiction, drug abuse, and doctor-shopping. *Id.* at 4-5, 20.[3] Doctors also increased dosages for patients who had no demonstrable need, and for patients whose drug screening tests revealed that they had not taken their prescriptions as directed or had used other illicit narcotics. *Id.* at 20. For a period after Hurricane Katrina, the doctor visits stopped entirely, and the clinics distributed prescriptions to patients so long as they paid the fee. *Id.* at 4.

Global Pain did not accept insurance. Patients paid in cash and, later, by check, money order, and credit card. Pet. App. 5. Petitioner would often call the clinics seeking information on patient volume and cash counts. *Ibid.*; Gov't C.A. Br. 7. Petitioner and a clinic doctor, Gerard DiLeo, also opened 57 accounts at 15 different banks to store Global Pain's money. Pet. App. 5. Petitioner and others then made daily deposits, but limited their transactions to less than $10,000 to avoid reporting requirements. *Id.* at 6. Over the course of three years, they deposited over $8.5 million into these accounts. *Ibid.*

b. In 2005, Drug Enforcement Administration (DEA) agents began monitoring one Global Pain clinic and identified five incidents where individuals with prior convictions for controlled substance offenses had visited the clinic. On two occasions, undercover agents posed as patients and tried to obtain controlled substance prescriptions without success. Pet. App. 3.

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[3] One physician moved from California to New Orleans to accept a position at a Global Pain clinic for a $500,000 annual salary. Pet. App. 21. The physician quit after one month based on concerns that the clinic was a "pill mill." *Ibid.*

In 2008, agents conducted warrant-authorized searches of two Global Pain clinics. After reviewing 96 of the seized patient files, a government expert in pain management concluded that the clinics' practices were dangerous, inconsistent with the usual course of medical practice, and not for legitimate medical purposes. A second expert reached similar conclusions with respect to patient files from the Pensacola clinic. Pet. App. 4.

2. A federal grand jury in the Northern District of Florida indicted petitioner, DiLeo, and another clinic doctor, George Pastorek, on one count of conspiracy to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C), 846, and 21 U.S.C. 841(b)(1)(D) (2006); and one count of conspiracy to launder money, in violation of 18 U.S.C. 1956(h).[4] Pet. App. 2; D. Ct. Doc. 3, at 6-7 (Indictment).

At the charge conference, a dispute emerged as to whether petitioner and his co-defendants had stipulated to venue in the Northern District of Florida. The district court remarked that petitioner and his co-defendants were "long past a venue challenge" and that if they wanted a jury instruction on that issue, they should propose one. Pet. App. 7. Later that day, however, the district court informed defense counsel that they should not argue venue during closing argument and that the court would not instruct the jury on venue given that counsel had failed to raise the matter in a timely fashion. *Ibid.*

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[4] The grand jury also indicted Aufdemorte, but the government later dropped the charges. Pet. App. 2 & n.1. The grand jury further alleged that one or more deaths resulted from the drug conspiracy, but the government withdrew that charge at trial. *Id.* at 15; Indictment 6-7.

The jury convicted petitioner and DiLeo on all counts, and Pastorek on the drug conspiracy count only. Pet. App. 6.

3. The court of appeals affirmed in an unpublished per curiam opinion. Pet. App. 1-39.

a. The court of appeals held that the district court's failure to instruct the jury on venue, while erroneous, was harmless.[5] Pet. App. 6-11. The court stated that "although venue is an essential element" of the charged offenses, "it is not a substantive element," and, in any event, "harmless error applies when the trial court fails to instruct on an essential element of a crime." *Id.* at 9 (citing *Neder* v. *United States*, 527 U.S. 1, 9 (1999)). The court held that a district court's failure to issue a venue instruction in a conspiracy case, as here, would be harmless "if the evidence that the defendant committed the conspiracy in the district where convicted was substantial and uncontroverted." *Ibid.* (citing *United States* v. *Casch*, 448 F.3d 1115, 1117 (9th Cir. 2006)).

The court of appeals concluded that the evidence demonstrating venue in the Northern District of Florida was "uncontroverted." Pet. App. 9. The court observed that petitioner, DiLeo, and two others opened the Pensacola clinic, hired and trained the prescribing physician, and carried over the same unlawful practices from the New Orleans clinics. *Id.* at 9-10. The court further noted that petitioner and the co-defendants dispatched several of their New Orle-

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[5] The court of appeals rejected the district court's explanation for refusing a jury instruction on venue. Because petitioner and his co-defendants had lodged their venue objection before the close of evidence, the court of appeals held that their objection was timely. Pet. App. 8 n.3.

ans employees to either run the Pensacola clinic or to train those working there. *Id.* at 10. In light of the "overwhelming evidence that overt acts in furtherance of the conspiracy occurred in Pensacola," the court held that "venue existed." *Id.* at 10-11.

b. The court of appeals also found sufficient evidence to sustain petitioner's conviction for conspiracy to commit promotional money laundering. Pet. App. 24-26. To convict on this count, the jury had to find, *inter alia*, that petitioner engaged in a financial transaction with "the intent to promote the carrying on of such specified unlawful activity." *Id.* at 25 (quoting *United States* v. *Martinelli*, 454 F.3d 1300, 1318 (11th Cir. 2006), cert. denied, 549 U.S. 1282 (2007)). The court cited evidence that petitioner used clinic funds "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." *Id.* at 26. The court further noted that the pattern jury instructions given in this case would not allow the jury to return a guilty verdict on the money laundering charge "if it believed the financial transactions were undertaken for legitimate * * * business expenses." *Id.* at 25-26 (citation omitted).

c. In dissent, Judge Martin expressed the view that the district court's failure to issue a jury instruction on venue was reversible error. Pet. App. 39-48. Judge Martin specifically questioned whether the establishment of the Pensacola clinic was an overt act in furtherance of the greater conspiracy. *Id.* at 46. Judge Martin noted that the Pensacola clinic operated for only two weeks, petitioner was the only defendant who played a role in its founding, and the jury heard

"limited" evidence about its operations. *Id.* at 46-47. While "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," Judge Martin believed that the evidence "could rationally lead to a contrary finding." *Id.* at 47-48 (quoting *Neder*, 527 U.S. at 19). Therefore, Judge Martin concluded that the government had not carried its burden of showing that the district court's error was harmless. *Id.* at 48.

ARGUMENT

Petitioner asserts that the district court committed reversible error when it failed to instruct the jury on venue (Pet. 13-35) and that his conviction for conspiracy to commit promotional money laundering was not supported by sufficient evidence (Pet. 35-40). Those contentions lack merit. The nonprecedential, unpublished decision of the court of appeals is correct and does not implicate a division of authority warranting this Court's review.

1. Petitioner argues (Pet. 22-30) that a writ of certiorari should be granted because the courts of appeals employ different inquiries for reviewing a district court's refusal to issue a venue instruction. Although the courts of appeals have adopted slightly different frameworks for reviewing these claims, no square conflict has emerged. This Court has previously declined to review this issue, see *Sessoms* v. *United States*, 134 S. Ct. 636 (2013) (No. 12-8965), and the same result is warranted here.

a. The proper venue to try an offense turns on "the nature of the crime alleged and the location of the act or acts constituting it." *United States* v. *Cabrales*, 524 U.S. 1, 7 (1998) (citation omitted). For a conspiracy

charge, "this Court has long held that venue is proper in any district in which an overt act in furtherance of the conspiracy was committed." *Whitfield* v. *United States*, 543 U.S. 209, 218 (2005); see 18 U.S.C. 3237(a). A defendant, however, is not entitled to a venue instruction unless the question of venue is sufficiently "in issue" to warrant resolution by the jury. See *United States* v. *Perez*, 280 F.3d 318, 333-335 (3d Cir.), cert. denied, 537 U.S. 859 (2002); see also *United States* v. *Massa*, 686 F.2d 526, 530 (7th Cir. 1982) ("[W]here venue is not in issue, no court has ever held that a venue instruction must be given.").

Most circuits have concluded that venue is not "in issue" unless the evidence creates a genuine or serious issue of fact about whether the charged venue is proper. See, *e.g.*, *United States* v. *Nwoye*, 663 F.3d 460, 466 (D.C. Cir. 2011); *United States* v. *Muhammad*, 502 F.3d 646, 656 (7th Cir. 2007), cert. denied, 552 U.S. 1144 (2008); *Perez*, 280 F.3d at 334-335; see also *United States* v. *Zamora*, 661 F.3d 200, 208 (5th Cir. 2011) (Jury instruction is not necessary if "the defendant fails to contradict the government's evidence."), cert. denied, 132 S. Ct. 1771 (2012); *Massa*, 686 F.2d at 531 (No instruction needed where evidence of venue is sufficient and defendant failed to "present[] any contrary evidence.").

The court of appeals concluded that petitioner was entitled to an instruction on venue under this standard, but that the district court's error was nonetheless harmless. In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that when a district court fails to instruct the jury on an element of the charged offenses, the error is harmless when "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." *Id.* at 17. The court of appeals applied the *Neder* standard to the instructional error on venue in this case, Pet. App. 9, and found "overwhelming evidence that overt acts in furtherance of the conspiracy occurred in Pensacola," observed that this evidence was "uncontroverted" at trial, and concluded that it was "abundantly clear" that the conduct in Pensacola "was part of [petitioner's] plan and conspiracy," *id.* at 10-11. The evidence, the court observed, showed multiple links between the charged conspiracies and the Northern District of Florida, including the co-conspirators' establishment and oversight of a pain clinic in Pensacola, Florida (in the Northern District of Florida) that carried out the same unlawful practices as the New Orleans operation. See *id.* at 9-11. The co-conspirators procured the facility for the clinic in Pensacola, recruited and instructed a physician for the clinic (who testified against petitioner), trained the Pensacola employees, and rented an apartment for an employee who was sent from another Global Pain clinic to work at the Pensacola clinic. *Id.* at 10. Accordingly, the court held the error was harmless under the *Neder* standard. *Id.* at 11. That fact-specific conclusion is correct and does not warrant further review.

Petitioner asserts (Pet. 33) that, while the court of appeals employed "harmless error terminology * * * in reality, it employed a sufficiency analysis." That suggestion is unfounded. The court reviewed the evidence and correctly concluded that it "overwhelming[ly]" established the commission of an overt act in the district of prosecution. Pet. App. 11. The court

recited the evidence and emphasized that no dispute over the relevant facts pertaining to the establishment and operation of the Pensacola clinic existed. *Id.* at 10. The court also made clear that all that was required to establish proper venue was the commission of an overt act in the district by any single conspirator. *Ibid.* The evidence overwhelmingly cleared that bar, particularly because venue need be established only by a preponderance of the evidence. See, *e.g.*, *United States* v. *Rommy*, 506 F.3d 108, 119 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008); *Muhammad*, 502 F.3d at 652; *United States* v. *Stickle*, 454 F.3d 1265, 1271-1272 (11th Cir. 2006); *Perez*, 280 F.3d at 330; *United States* v. *Lanoue*, 137 F.3d 656, 661 (1st Cir. 1998); *United States* v. *Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988); *United States* v. *Griley*, 814 F.2d 967, 973 (4th Cir. 1987).

Petitioner asserts that "[o]nce 'the testimony put[] venue at issue,' * * * that *element* was, by definition, not uncontroverted," and therefore could not be held harmless under *Neder*. Pet. 33 (citation omitted). *Neder,* however, expressly permits a reviewing court to evaluate the strength of the evidence supporting an omitted element to determine whether the error was harmless. See 527 U.S. at 17-19. The Court in *Neder* observed that, in conducting a harmless-error analysis, "a court, in typical appellate-court fashion, asks whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Id.* at 19. *Neder* did not suggest that this approach was inapplicable whenever the defense objected to the omission of an element in the

jury instructions.[6] The critical component of *Neder*'s harmless-error analysis involves review of the record evidence. An objection preserves a claim for harmless-error, rather than plain-error review.[7]

b. Petitioner claims (Pet. 13-21) that the courts of appeals have adopted differing definitions of "uncontroverted" under the *Neder*'s harmless-error test. Petitioner is incorrect. No such division of authority exists warranting this Court's review.

Petitioner first relies (Pet. 14-17) on a concurring opinion in *United States* v. *Pizarro*, 772 F.3d 284 (1st Cir. 2014), which advanced the proposition that errors should be deemed harmless under *Neder* only where the element omitted from the jury instructions "is supported by overwhelming evidence" and the element was "uncontested"—meaning that "the defendant did not argue that a contrary finding on the omitted element was possible." *Id.* at 310-311 (Lipez, J., concurring); but see *id.* at 313 (Torruella, J., concurring) (characterizing the concurring judge's interpretation of *Neder* as "exceedingly strained" and finding "very little—if any—inconsistency" in the case law). Neither the First Circuit nor any other circuit has narrowed *Neder*'s harmless error inquiry in this fash-

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[6] *Neder* made this clear by indicating that its approach would find omission of an instruction on an element harmful "for example, where the defendant contested the omitted element *and* raised evidence sufficient to support a contrary finding." 527 U.S. at 19 (emphasis added). Petitioner's approach would find an instructional omission harmful when only the first condition was satisfied.

[7] The dissenting judge did not, as petitioner suggests (Pet. 4), accuse the majority of deviating from *Neder*. Rather, the dissenting judge "part[ed] ways * * * in [the] *application* of the harmless error standard." Pet. App. 45 (Martin, J., dissenting) (emphasis added).

ion, and a concurring opinion itself cannot create a conflict.

The assertion of a division between the Second and Fourth Circuits also lacks merit. When reviewing harmless-error claims under *Neder*, the Second Circuit asks "whether there was sufficient evidence to permit a jury to find in favor of the defendant on the omitted element" and, if so, "whether the jury would nonetheless have returned the same verdict." *United States* v. *Jackson*, 196 F.3d 383, 386 (1999), cert. denied, 530 U.S. 1267 (2000). The Fourth Circuit, by contrast, omits the additional step. See *United States* v. *Brown*, 202 F.3d 691, 701 n.19 (2000).[8] The dispute has no bearing on this case because petitioner could not satisfy the initial hurdle. Based on its review of the evidence, the court of appeals rejected the contention that a rational jury could have found venue lacking in the Northern District of Florida because petitioner left uncontroverted his role in establishing and operating the Pensacola clinic.

Lastly, in *United States* v. *Guerrero-Jasso*, 752 F.3d 1186 (2014), the Ninth Circuit held that, for purposes of *Neder*, the defendant adequately contested

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[8] Petitioner notes (Pet. 18-19) that another decision of the Second Circuit, *Monsanto* v. *United States*, 348 F.3d 345 (2003), cert. denied, 543 U.S. 831 (2004), questioned whether *Jackson*'s holding was in tension with *Neder* because *Jackson* would find an error harmless "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," whereas *Neder* would not seem to permit a harmless-error finding under such circumstances. *Id.* at 350-351. That intra-circuit debate is inapplicable to this case, however, because petitioner did not "offer[] evidence sufficient to support a finding in his or her favor on the omitted element." *Id.* at 350.

the government's documentary evidence, submitted post-conviction, on the omitted element where the defendant challenged the document as inaccurate and incomplete. The court in *Guerrero-Jasso* noted that the defendant, in such circumstances, did not have "the opportunity to challenge the authenticity of [the document] at trial," and it rejected the government's argument that the defendant "has an affirmative obligation to introduce evidence post hoc to defeat the government's harmlessness argument." *Id.* at 1194-1195. In this case, by contrast, the evidence pertaining to venue was admitted at trial and petitioner made no challenge to its admissibility. *Guerrero-Jasso* is therefore inapposite.

c. In any event, this case would be an inapt vehicle to address the proper interpretation of *Neder* because this case involves venue, rather than an instructional error as to a substantive element of a criminal offense. Venue is fundamentally different than a substantive element of an offense. "[U]nlike the substantive facts which bear on guilt or innocence in the case[,] [v]enue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused." *Wilkett* v. *United States*, 655 F.2d 1007, 1011-1012 (10th Cir. 1981), cert. denied, 454 U.S. 1142 (1982); accord *Perez*, 280 F.3d at 330; *Kaytso*, 868 F.2d at 1021; cf. *United States* v. *Maldonando-Rivera*, 922 F.2d 934, 969 (2d Cir. 1990) ("[V]enue provisions deal not with whether prosecution of a given charge is permissible but only with that prosecution's permissible location."), cert. denied, 501 U.S. 1233 (1991). Thus, a dismissal of the indictment for improper venue does not, on double jeopardy grounds, bar a retrial on the charges in the proper

venue, even where the dismissal occurs in the midst of trial. See, *e.g.*, *Kaytso*, 868 F.2d at 1021; *United States* v. *Hernandez*, 189 F.3d 785, 792 & n.5 (9th Cir. 1999), cert. denied, 529 U.S. 1028 (2000); *Wilkett*, 655 F.2d at 1011-1012. Courts have also noted that "the standard for finding a waiver of venue rights is much more relaxed than the rigorous standard for finding waivers of the right to trial by jury, the right to confront one's accusers or the privilege against compulsory self incrimination." *United States* v. *Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984); accord *United States* v. *Miller*, 111 F.3d 747, 750 (10th Cir. 1997).

Because the propriety of venue has no bearing on guilt or innocence, it does not implicate the requirement under the Fifth and Sixth Amendments that a criminal conviction "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged beyond a reasonable doubt." *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995); see also *In re Winship*, 397 U.S. 358, 364 (1970). That distinction also explains why a defendant is not entitled to an instruction on venue except where the evidence at trial places that question sufficiently "in issue" that resolution by the jury is necessary. See p. 8, *supra*. By contrast, the jury must always be instructed to find the substantive elements of the offense (although an omitted instruction on an element is reviewed for harmless error). See *Neder*, 527 U.S. at 8-11. *Neder* addressed the harmlessness of omitted instructions on a substantive element of the offense, and it is not, therefore, directly applicable a court's erroneous failure to instruct the jury on venue.

d. Petitioner also asserts (Pet. 22-30) that the courts of appeals have established different standards

to evaluate whether a district court's erroneous failure to instruct on venue was harmless. No such conflict exists. Petitioner cites decisions of the Fourth and Eighth Circuits that have adopted a stricter test than other courts of appeals for the threshold question of whether venue is "in issue," requiring a venue instruction. Compare p. 8, *supra* (citing cases holding that venue is "in issue" only where a serious or genuine issue of fact exists as to proper venue), with *United States* v. *Moeckly*, 769 F.2d 453, 461 (8th Cir. 1985) (venue is "in issue" when "defendants can be convicted of the offenses charged without an implicit [jury] finding that the acts used to establish venue have been proven"), cert. denied, 475 U.S. 1015, and 476 U.S. 1104 (1986); *United States* v. *Martinez*, 901 F.2d 374, 376-377 (4th Cir. 1990) (adopting *Moeckly*'s test).[9] The court of appeals, however, decided that question in petitioner's favor and determined that the district court erred by failing to instruct the jury on venue. See Pet. App. 8-9.

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[9] The continued vitality of *Moeckly* is in doubt. The Eighth Circuit has subsequently held that a district court may determine venue "as a matter of law" if a defendant fails to "present[] any evidence at trial that create[s] a factual dispute on whether venue [i]s proper," even if the defendant "assert[s] that venue [i]s a disputed issue." *United States* v. *Bascope-Zurita*, 68 F.3d 1057, 1063 (1995), cert. denied, 516 U.S. 1062 (1996); see *United States* v. *Jaber*, 509 F.3d 463, 466 (2007) ("[W]hen the evidence establishing venue is * * * uncontradicted, the district court may resolve the issue as a matter of law.") (citing *Bascope-Zurita*). That reformulation of when venue is "in issue," combined with the Eighth Circuit's failure to subsequently apply *Moeckly*'s "implicit finding" standard, suggests that the Eighth Circuit has now aligned itself with its sister circuits. The Fourth Circuit, for its part, has not applied the *Moeckly* formulation in a precedential decision after *Martinez*.

But the courts of appeals agree, consistent with the court of appeals' decision in this case, that an erroneous failure to instruct on venue must then be evaluated for harmlessness. As to that dispositive issue, courts, including the Fourth and Eighth Circuits, apply the same test: the erroneous failure to instruct on venue is harmless if the evidence of proper venue is "overwhelming" and "uncontroverted." See Pet. App. 9-11; *Martinez*, 901 F.2d at 376-377; see also *Moeckly*, 769 F.2d at 462; *Perez*, 280 F.3d at 334 (observing that "the Fourth and Eighth Circuits have followed conclusions that venue was properly 'in issue' with harmless error analyses affirming the decision not to submit the question to the jury"). No disagreement accordingly exists with the Fourth and Eighth Circuits on the ultimate question of whether any instructional error on venue was harmless.

Petitioner also relies (Pet. 26-27) on the Tenth Circuit's decision in *Miller*, *supra*, which held that a district court's "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." 111 F.3d at 751. The court in *Miller*, moreover, refused to "examine the evidence to determine what the jury would have found if properly instructed." *Id.* at 752. *Miller* concluded that such an error is structural and therefore a court cannot "speculat[e] as to the verdict a jury might [have] reach[ed]," "[n]o matter how overwhelming the evidence," if the district court "'prevent[ed] the jury from rendering a verdict on an element'" by failing to provide instructions on the element." *Id.* at 750, 752-753 (quoting *United States* v. *Wiles*, 102 F.3d 1043,

1059 (1996) (en banc), amended on reh'g on other grounds, 106 F.3d 1516, cert. denied, 522 U.S. 947 (1997)).

But those portions of *Miller* and *Wiles* have been abrogated by *Neder*, which, contrary to those decisions, held that the failure to instruct the jury on an element of the offense is not structural error, but rather is subject to harmless error review. 527 U.S. at 12-13. Accordingly, the Tenth Circuit has since recognized that *Wiles* (and *Miller*'s reliance on *Wiles*) is no longer good law. See *United States* v. *Acosta-Gallardo*, 656 F.3d 1109, 1122 n.3, cert. denied, 132 S. Ct. 540 (2011).

2. Petitioner next contends (Pet. 35-40) that the evidence at trial was insufficient to show that he entered a conspiracy to launder money for the purpose of promoting his clinics' illegal prescription business. That factbound argument does not warrant this Court's review.

a. Section 1956(h) of Title 18 of the United States Code makes it a crime to conspire to violate the substantive provisions of 18 U.S.C. 1956. Section 1956(a)(1), in turn, makes it a crime, "knowing that * * * a financial transaction represents the proceeds of some form of unlawful activity, [to] conduct[] * * * a financial transaction which in fact involves the proceeds of specified unlawful activity * * * with the intent to promote the carrying on of specified unlawful activity." 18 U.S.C. 1956(a)(1).

The government presented ample evidence that petitioner and his co-defendants operated clinics that unlawfully dispensed prescriptions outside the usual course of medical practice and for other than legitimate medical purposes. Pet. App. 20-22. Proceeds

from this activity were deposited into Global Pain's numerous bank accounts, and then spent on overhead, rent, malpractice insurance, and other bills. *Id.* at 26. As the court of appeals observed, these expenditures allowed petitioner to "continue the operation of the conspiracy to unlawfully dispense controlled substances." *Ibid.* Thus, the court found sufficient evidence that petitioner agreed to launder money for the purpose of promoting his clinics' illegal enterprise.

b. Petitioner's contention (Pet. 37-39) that this ruling conflicts with decisions from the Fifth and Sixth Circuits lacks merit.

In both *United States* v. *Brown*, 186 F.3d 661, 667-671 (1999), and *United States* v. *Miles*, 360 F.3d 472, 477-479 (2004), the Fifth Circuit reversed money laundering promotion convictions of defendants who deposited fraudulently obtained funds into general business operating accounts because, it concluded, the evidence did not establish that the business was a "*wholly* illegitimate enterprise," *Miles*, 260 F.3d at 478, such that the payments for operating expenses may have been "aimed * * * at maintaining the legitimate aspects of a business," rather than "transactions which funnel ill-gotten gains directly back into the criminal venture," *id.* at 479.

The Sixth Circuit, in *United States* v. *McGahee*, 257 F.3d 520 (2001), addressed a similar scenario. A city employee approved a series of illegal disbursements to a building contractor, who deposited the funds into his personal account. *Id.* at 524–525. The contractor then used those funds to make payments on a home mortgage. *Id.* at 526-527. The Sixth Circuit held that the record failed to establish that the defendant "made the payment with the intent to pro-

mote the embezzlement." *Ibid.* In doing so, the court rejected the government's theory that the home payments promoted the defendant's illegal contracting activities because, as a matter of convenience, the defendant used his residence as a business office. *Ibid.*

This case, by contrast, involved "a business [that] as a whole [wa]s illegitimate," such that "individual expenditures that are not intrinsically unlawful can support a promotion money laundering charge." *Miles*, 360 F.3d at 478 (quoting *United States* v. *Peterson*, 244 F.3d 285, 392 (5th Cir.), cert. denied, 534 U.S. 857, and 534 U.S. 861 (2001)).

Petitioner disputes "the view that Global Pain was a wholly illegitimate operation," Pet. 39, but a rational factfinder could disagree. The court of appeals catalogued "ample evidence" showing Global Pain operated an illegitimate medical practice. Pet. App. 24; see *id.* at 4-5 (noting that follow-up visits at the Global Pain clinics took five minutes; that exam rooms contained no examination tables or that the tables were not used; and that patients were initially required to pay cash). Petitioner and co-defendant DiLeo opened 57 accounts at 15 different banks to store the clinic money, and subsequent deposits to those accounts never exceeded $10,000, thereby avoiding reporting requirements. *Id.* at 5-6. Finally, when Global Pain had no bank account for a month, petitioner stored cash payments collected from patients in his grandmother's freezer. *Id.* at 5; Gov't C.A. Br. 52. Such conduct corroborates the view that Global Pain was, as a whole, illegitimate. And when petitioner and his co-defendants agreed to deposit illegal proceeds into various bank accounts and then use the proceeds to

pay general operating expenses, they acted with the requisite intent to promote the clinics' unlawful enterprise.

The court of appeals, moreover, found that the jury instructions would not have allowed the jury to find petitioner "guilty if it believed the financial transactions were undertaken for legitimate * * * business expenses." Pet. App. 25 (citation omitted). In any event, the question whether Global Pain operated a wholly illegitimate enterprise, as opposed to "a legitimate business pay[ing] customary, reasonable and legal operating expenses," *Miles*, 360 F.3d at 479, is a factbound dispute that does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

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