No. 15-1292

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

REPLY BRIEF FOR PETITIONER

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I.

No fewer than thirteen federal judges have acknowledged the conflict among the courts of appeals over the harmless-error standard that applies when a trial judge has directed a verdict in favor of the Government – whether on a substantive element of the offense or on the question of venue. *See United States v. Pizarro*, 772 F.3d 284, 303 (CA1 2014) (Lipez, J., concurring); *Monsanto v. United States*, 348 F.3d 345, 350-51 (CA2 2003) (Calabresi, joined by Sack and Garaufis, JJ.); *United States v. Brown*, 202 F.3d 691, 701 n.19 (CA4 2000) (King, joined by Murnaghan and Michael, JJ.); *United States v. Perez*, 280 F.3d 318, 333 (CA3 2002) (Ambro, joined by Scirica and Pollak, JJ.); *United States v. Haire*, 371 F.3d 833, 839-40 (CADC 2004) (Sentelle, joined by Henderson and Garland, JJ.).

Amici likewise observe that "[t]he availability and proper standard for harmless error review of this species of constitutional error is a recurring constitutional issue that divided this Court in *Neder*, and which has splintered the circuit courts since." Brief of Amici at 4. Concerned that "*Neder* has since been used by some circuits, including by the majority opinion below, to encroach upon the exclusive role of the jury through unwarranted applications of harmless error review," Amici urge "this Court to restore the bright line between the divergent roles of judges and juries that the Framers intended to safeguard." *Id*. at 10-11.

The Government asserts that "[t]his Court has previously declined to review this issue, see *Sessoms v. United States*, 134 S. Ct. 636 (2013) (No. 12-8965)," BIO 7; characterizes the conflict as little more than "slightly different frameworks" adopted by the courts of appeals, BIO 7; and suggests, for the first time in this Court, that because "*Neder* addressed the harmlessness of omitted instructions on a substantive element of the offense . . . it is not . . . directly applicable [to] a court's erroneous failure to instruct the jury on venue," BIO 14, so "this case would be an inapt vehicle to address the proper interpretation of *Neder*. . . ." BIO 13.

1. The Government's citation to *Sessoms* is off point. First, the Court's denial of certiorari in that case "imports no expression of opinion upon the merits of the case. . . .'" *Teague v. Lane*, 489 U.S. 288, 296 (1989).

Second, the *Sessoms* petition raised the different question of whether the defendant was entitled to a venue instruction in the first place, not the harmlessness of denying the instruction. *Sessoms'* petition did not even cite *Neder*. By contrast, all three judges below agreed that it was error to refuse to instruct the jury on venue.

Third, the Government in *Sessoms* argued that the petition "present[ed] a poor vehicle to address petitioner's venue-based arguments," because "all of petitioner's venue-based arguments could be reviewed only for plain error." Brief in Opposition in *Sessoms* at

11-12 and n.4. In contrast, the court of appeals explicitly held that Petitioner timely objected and preserved his venue-based arguments. App.8 n.3.

2. The concerns voiced by more than a dozen federal judges over *Neder*'s harmless error test reflect more than just a disagreement over "slightly different frameworks." BIO 7. This disagreement strikes at the heart of the right to a jury trial: at what point may facts not decided by a unanimous jury be instead decided by a non-unanimous panel of appellate judges. The disagreement prompted Judge Lipez to "urge the Supreme Court to clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element." *Pizarro*, 772 F.3d at 303. It prompted Judge Calabresi (joined by Circuit Judge Sack and District Judge Garaufis) to acknowledge the "tension between the harmless-error analysis in *Neder* and [the Second Circuit's] articulation of it," suggesting that the test adopted by the Second Circuit might be "rejected by a later Supreme Court decision." *Monsanto*, 348 F.3d at 350-51.

The Government reluctantly acknowledges a "dispute" between the Second and Fourth Circuits and an "intra-circuit debate" within the Second Circuit over the same question:

> 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."

> The Fourth Circuit, by contrast, omits the additional step.

BIO 12 and n.8 (citations omitted). The Government contends that this inter-circuit "dispute . . . has no bearing on this case because petitioner could not satisfy the initial hurdle," BIO 12; and likewise the Second Circuit's "intra-circuit debate is inapplicable to this case . . . because petitioner did not 'offer[] evidence sufficient to support a finding in his or her favor on the omitted element.'" BIO 12 n.8 (quoting *Monsanto*). The Government's contention cannot be reconciled with the unanimous finding of the Eleventh Circuit that the trial "testimony put[] venue at issue," App.9., sufficient to warrant the jury instruction, which means that "the evidence create[d] a genuine or serious issue of fact about whether the charged venue [was] proper." BIO 8. For her part, the dissenting judge below explicitly found that the trial record contained "evidence that could rationally lead to" a finding in Petitioner's favor on the question of venue. App.47-48.

The Government proposes to distinguish *United States v. Guerrero-Jasso*, 752 F.3d 1186 (CA9 2014), by contrasting that, in Petitioner's case, "the evidence pertaining to venue was admitted at trial and petitioner made no challenge to its admissibility." BIO 13. But Petitioner did not need to object to the *admissibility* of the Government's venue evidence to contest the venue element. According to the Ninth Circuit in *Guerrero-Jasso*, such an objection was just "*one* way" that a defendant could demonstrate that the evidence of the omitted element was controverted and the denial of the

instruction not harmless. *Id*. at 1194-95 ("The example provided in *Neder* is not the only way a constitutional error can be ruled not harmless; it is *one* way."). Petitioner surely contested the venue element by rebutting the factual inferences that could be drawn from the admissible evidence. Petition at 31-32.

> The *Neder* standard . . . places threshold significance on the lack of controversy regarding the element omitted from the jury instructions. Only in the absence of any controversy does *Neder* authorize appellate courts to go further to assess whether the evidence of record is, actually, both uncontroverted and overwhelming.

Brief of Amici at 13. Thus, it is beside the point that, on appeal, two judges have marshaled the evidence, which would have made for a spirited closing argument to a jury as to why it should find in favor of the Government on the element of venue. *See* App.9-11. The weight of the evidence alone, even if deemed "overwhelming" by appellate judges, cannot render harmless the denial of a jury instruction on a contested element. *Pizarro*, 772 F.3d at 309-10 (Lipez, J., concurring) ("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.").

3. That the omitted element "in issue" was venue, not a "substantive element" of the crime, neither diminishes the harm nor alters the inquiry into whether the factual decision belongs to judge or jury. This Court has never regarded venue as a second-class constitutional right just because it does not "bear on guilt or innocence." *See* BIO 13. To the contrary, the Court has observed that "[p]roper venue in criminal proceedings was a matter of concern to the Nation's founders," so much so that "[t]he Constitution twice safeguards the defendant's venue right." *United States v. Cabrales*, 524 U.S. 1, 6 (1998). "[T]he Framers double bolted the constitutional right of venue onto Article III of the original Constitution and the Sixth Amendment." Brief of Amici at 7.

This is not "an inapt vehicle to address the proper interpretation of *Neder* [just] because this case involves venue." BIO 13. To be sure, some appellate courts have held that venue need only be established by a preponderance of the evidence. BIO 10 (collecting cases). And as the Government observes more than once, appellate courts have held that a defendant

> is *not* entitled to a venue instruction unless the question of venue is sufficiently "in issue" to warrant resolution by the jury. . . . 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.

BIO 8 (emphasis added); *accord id.* at 14. Rephrased in the affirmative, this means that "if the evidence creates a genuine or serious issue of fact about whether the charged venue is proper," then "the question of venue is sufficiently 'in issue' to warrant resolution by the jury," and the defendant is "entitled to a venue instruction." BIO 8. Of course, if "the evidence creates a genuine or serious issue of fact," the evidence supporting that element, by definition, is not "uncontroverted."

This exercise in tautology exposes the contradiction in the Government's argument and the majority opinion and highlights why this case is an *apt* vehicle. Given that the court of appeals unanimously held that the trial "testimony put[ ] venue at issue," App.9, Petitioner necessarily cleared "the initial hurdle," BIO 12, of establishing that "the evidence create[d] a genuine or serious issue of fact about whether the charged venue [was] proper." BIO 8. The existence of this "genuine or serious issue of fact," *id*., means that, unlike *Neder*, there was a factual dispute for the jury to resolve. Thus, the evidence supporting venue was not "uncontroverted." The venue element was not "uncontested."[1]

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[1] The Government suggests that "[t]he continued vitality of *Moeckly*[, 769 F.2d 453, 461 (CA8 1985)] is in doubt" as to "the threshold question of whether venue is 'in issue,' requiring a venue instruction." BIO 15 and n.9. That observation is purely academic because, as the Government admits, in Petitioner's case "[t]he court of appeals concluded that petitioner was entitled to an instruction on venue." BIO 8. The only issue raised in the Petition is whether this acknowledged constitutional error was harmless or not.

The Government insists that "petitioner left uncontroverted his role in establishing and operating the Pensacola clinic." BIO 12. Yet, in closing argument to the jury, Petitioner disputed his role and emphasized his decision to cease the Pensacola operation within two weeks of its opening because of a disagreement with another doctor's practices. Doc.665/61. Indeed, there was no evidence adduced of a bank account or financial transaction within the District, *see* Petition at 6 n.2, hardly the foundation for establishing an overt act of money laundering. As the dissenting judge recognized: "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 . . . such that it could establish venue. . . ." App.46. Because the jury was not instructed that the Government was required to establish venue in Florida, the jury did not address, much less make factual findings regarding, this contested issue. "[F]ailing to direct the jury's fact-finding mission by giving the omitted instruction permitted the jury to avoid any discussion of the specific factual venue details needed to justify their reaching any verdict." Brief of Amici at 17.

The observation that "venue is wholly neutral . . . and it does not either prove or disprove the guilt of the accused," BIO 13, actually makes this multi-district conspiracy prosecution a particularly suitable vehicle for addressing the conflict over *Neder*, because the jury's general "guilty verdict [did] not by necessity incorporate a finding on venue." *United States v. Miller*,

111 F.3d 747, 754 (CA10 1997); *see generally Neder*, 527 U.S. at 26 (Stevens, J., concurring) (concluding that the jury verdict "necessarily included a finding on [the omitted element of 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."). Here, the indictment charged acts in Louisiana and Florida, but, without a venue instruction, the jury was authorized to convict based on acts that occurred exclusively in Louisiana.

The Government does not dispute that under the Tenth Circuit's decision in *Miller*, the denial of Petitioner's requested jury instruction on venue would not be deemed harmless. But, according to the Government, *Miller* has been "abrogated by *Neder* . . . ," because *Miller* held a district court's failure to instruct on venue, when requested, constituted "structural" error. BIO 16-17, citing *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1122 n.3 (CA10 2011). The *Miller* court explained, "[c]ontrary to the assertion of the dissent" in that case and contrary to the assertion of the Government here, "the test we apply is harmless error analysis, not structural error analysis." *Miller*, 111 F.3d at 752 n.6. Accordingly, even after *Neder* was decided, the Tenth Circuit has reaffirmed the harmless-error test adopted in *Miller* – namely, 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. Kelly*, 535 F.3d 1229, 1239 n.7 (CA10 2008) (quoting

Miller). In its own view, the Tenth Circuit's test is particularly "rigorous," *id.*, and its sister circuits agree. *See United States v. Casch*, 448 F.3d 1115, 1118 (CA9 2006) (describing the Tenth Circuit's standard as "more vigorous" than its own); *Perez*, 280 F.3d at 334 (CA3 2002) (describing the Tenth Circuit's standard as "broader" than its own).[2]

4. Given the turmoil in the circuits, the fact that the court of appeals' opinion was designated a "nonprecedential, unpublished decision," BIO 7, should not dissuade the Court from providing guidance to the circuit courts on this important question of constitutional law. *See*, *e.g.*, *Luis v. United States*, 14-419 (granting writ and reversing Eleventh Circuit's "nonprecedential, unpublished decision" on the question of whether restraining of untainted assets needed to retain counsel of choice violates the Sixth Amendment). After all,

> placing the initial and final resolution of contested essential elements in the hands of appellate judges, rather than trial juries, is a momentous step in the journey of our justice system which should not occur by misapplication or misunderstanding of either this

[2] The Tenth Circuit's decision in *Acosta-Gallardo*, which the Government claims abrogated *Miller*, did not cite *Miller*. It was a "plain-error" case in which the defendant never requested a jury instruction and "neither party argue[d] that harmless error review should apply to a district court's failure to instruct the jury on venue," so the court did "not reach this question." 656 F.3d at 1122 n.3.

> Court's precedent or the Constitution left us by its Drafters.

Brief of Amici at 18.

II.

Although not expressly acknowledging the conflict, the Government does not dispute that the circuits are divided on whether the ordinary business expenditures of a not-wholly-illegitimate company, engaged in some illegal activity, may satisfy the promotion money laundering statute. Equally significant, the Government does not dispute that Petitioner's money laundering conspiracy conviction – and his 17-year sentence – were based solely on routine expenditures of his clinics, such as overhead, rent, and malpractice insurance.

Instead, the Government argues that the decision below does not conflict with the decisions of the Fifth and Sixth Circuits because this case involved a "business [that] as a whole [wa]s illegitimate," so that "individual expenditures that are not intrinsically unlawful can support a promotion money laundering charge." BIO 19 (quoting cases). The Government thus attempts to characterize the issue as a "factbound dispute." BIO 20.

The flaw in the Government's argument is that the jury never made a finding that the pain clinics were "wholly illegitimate." Contrary to the Government's claim, BIO 20, the district court's standard jury

instruction for promotion money laundering did not require such a finding. That instruction permitted a conviction if the financial transactions were conducted "for the purpose of making it easier to bring about the specified unlawful activity as just defined." DE665:127. However, as the Fifth Circuit explained in *United States v. Brown*, almost any routine expenditure by a *legitimate* company engaged in some amount of fraud makes it easier to bring about the fraud by allowing the company to stay in business and "increase[ ] the number of potential fraud victims." 186 F.3d 661, 670 (CA5 1999). Moreover, the Eleventh Circuit, in upholding the sufficiency of the evidence regarding the drug conspiracy charged in count one, expressly stated that the law did *not* "require the Government to show that the entire practice was illegitimate," only that "there was very substantial illegal activity occurring at the clinic." App.23. Neither the jury's verdict nor the Eleventh Circuit's rejection of Petitioner's money laundering challenge was premised on a finding that the clinics were wholly illegitimate.

Allowing a jury to find promotion money laundering from routine business expenditures would turn "the money laundering statute into a 'money spending statute.' " *Brown*, 186 F.3d at 670. For purposes of inferring specific intent of promotion money laundering, courts must distinguish "between payments that further or promote illegal money laundering with ill-gotten gains and payments that represent customary costs of running a legal business." *United States v.*

Miles, 360 F.3d 472, 479 (CA5 2004). Even "very substantial illegal activity" at a clinic is not sufficient to equate ordinary business expenditures into promotion money laundering. *See id*. at 476 (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.").

The opinion below squarely conflicts with the decisions of the Fifth and Sixth Circuits and has broad implications to legitimate companies nationwide.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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