No. 13-13528-AA

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SIMON ANDREW ODONI AND
PAUL ROBERT GUNTER,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
NO. 8:08-CR-172

BRIEF OF THE UNITED STATES

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May 19, 2014

United States v. Odoni et al.
No. 13-13528-AA

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In addition to the persons identified in the certificate of interested persons and corporate disclosure statements in Simon Odoni's and Paul Gunter's principal briefs, the following persons have an interest in the outcome of this case:

1. Bitkower, David M., Deputy Assistant Attorney General
2. Ellickson, Jenny C., Attorney, U.S. Department of Justice
3. O'Neil, David A., Acting Assistant Attorney General

STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose oral argument.

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STATEMENT OF JURISDICTION

This is an appeal from final judgments of the United States District Court for the Middle District of Florida in a criminal case. The district court had jurisdiction under 18 U.S.C. § 3231 and entered the judgments against Paul Robert Gunter and Simon Andrew Odoni on July 30, 2013. Doc. 862; Doc. 863. Odoni filed a timely notice of appeal on July 31, 2013, Doc. 866, and Gunter filed a timely notice of appeal on August 5, 2013, Doc. 869. *See* Fed. R. App. P. 4(b). This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUES

I. Whether the district court properly denied Odoni's motion to dismiss the indictment, which was based on Odoni's claim that his deportation from the Dominican Republic violated the extradition treaty between the two countries. (Odoni Issue III)

II. Whether the district court properly denied Gunter's motion to suppress copies of electronic data that the United Kingdom seized in that country in connection with an independent British criminal investigation. (Gunter Issue I)

III. Whether sufficient evidence supported the jury's conclusion that Odoni knowingly and intentionally participated in the schemes to defraud. (Odoni Issue I)

IV. Whether the district court abused its discretion in denying Gunter's motion for a mistrial after a government witness testified that one of Gunter's associates had been convicted of fraud. (Gunter Issue II)

V. Whether the district court abused its discretion in denying Odoni's motion for a new trial after Odoni's counsel, but not Odoni, was present for discussions with the court about how to respond to a jury note. (Odoni Issue II)

VI. Whether Odoni's sentence is substantively reasonable. (Odoni Issue IV)

STATEMENT OF THE CASE

Simon Andrew Odoni and Paul Robert Gunter appeal various aspects of their convictions and judgments on fraud and money-laundering charges. These charges stem from Odoni's and Gunter's involvement in two complex, multinational investment-fraud schemes that deprived would-be investors of more than $137 million.

I. COURSE OF PROCEEDINGS

A federal grand jury in Tampa, Florida, returned a 36-count superseding indictment charging Gunter, Odoni, and others with various offenses relating to two investment-fraud schemes, one involving the sale of fraudulent stock and one involving the sale of options on the currency market. Doc. 160.[1] Count One charged Gunter, Odoni, and others with conspiring to commit mail fraud and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 1349. Doc. 160 at 14-28. Count Two charged Gunter, Odoni, and others with conspiring to commit wire fraud, in violation of 18 U.S.C. §§ 1343 and 1349. Doc. 160 at 28-34. Count Three charged Gunter, Odoni, and others with conspiring to

[1] Documents from the district court docket in this case are cited by document number and, where appropriate, page number within the document, *e.g.*, Doc. 160 at 34. The page numbers correspond to the ECF page numbers that appear at the top of each page. The government's trial exhibits are referenced as "GEX," followed by the exhibit number and, where appropriate, page number within the exhibit, *e.g.*, GEX 822 at 1.

commit various money laundering offenses, in violation of 18 U.S.C. §§ 1956(a)(2)(A), 1956(a)(2)(B)(i), 1957 and 1956(h). Doc. 160 at 34-39. Counts Four through Seven and Nine through Seventeen charged Gunter and others – including Odoni, in Count Eleven – with engaging in illegal monetary transactions, in violation of 18 U.S.C. §§ 1957 and 2. Doc. 160 at 39-44. Counts Eighteen through Twenty-Seven charged Gunter, Odoni, and others with mail fraud, in violation of 18 U.S.C. §§ 1341 and 2. Doc. 160 at 44-47. Counts Twenty-Eight through Thirty-Six charged Gunter, Odoni, and others with wire fraud, in violation of 18 U.S.C. §§ 1343 and 2. Doc. 160 at 47-51. Following a lengthy trial, the jury found Gunter and Odoni guilty as charged. Doc. 849 at 7-12.

The district court sentenced Gunter to 300 months in prison, to be followed by three years of supervised release, Doc. 862, and sentenced Odoni to 160 months in prison, to be followed by three years of supervised release, Doc. 863. Gunter and Odoni appealed. Doc. 866; Doc. 869.

II. STATEMENT OF FACTS[2]

A. Offense Conduct

1. Fraudulent-stock scheme

The fraudulent-stock scheme began in approximately 2003, with Larry Hartman and Richard Pope. Doc. 836 at 103-05. Hartman's role in the scheme was to procure valueless United States shell companies that did no actual business but appeared to be legitimate publicly-traded entities, and Pope's role was to orchestrate the sale of stock in those companies to investors.[3] Doc. 836 at 104-11, 158-60, 174-75. Hartman and others created

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[2] This section summarizes the key facts that are relevant to resolving the issues that Gunter and Odoni raise on appeal. It does not attempt to describe all of the evidence that the jury considered during the multi-week trial.

[3] Hartman, an attorney, accomplished his role in the scheme by working with two other attorneys in the United States, Roger Shoss and Nicole Loisel, to steal the identities of publicly-traded companies that had no ongoing business and then append those stolen identities to newly-created shell companies. Doc. 833 at 158; Doc. 844 at 127-44. The government did not attempt to prove that Gunter or Odoni knew that the original companies were victims of corporate identity theft. Doc. 835 at 106. Shoss and Loisel were originally co-defendants in this case, but they ultimately proceeded to trial on a separate indictment because the government determined that neither was involved in the fraudulent scheme to sell stock in the shell companies. Doc. 844 at 144-45; Doc. 902 at 32-34. Shoss and Loisel were each convicted on one count of conspiracy to commit wire fraud in connection with their corporate identity theft. Doc. 902 at 33-34. *See* D.Ct. Dkt. 8:11-CR-366-T-30TBM. This Court affirmed Shoss's conviction, and Loisel did not appeal. *See United States v. Shoss*, 523 F. App'x 713 (11th Cir. 2013).

glossy brochures, websites, and press releases for the shell companies to make them look like legitimate investment opportunities. Doc. 833 at 166; Doc. 836 at 172-74. Pope recruited a network of people in Spain, including Rahul Patel, to sell stock in the shell companies to investors. Doc. 836 at 104-05, 110-11. These salespeople, termed "advisors," called potential investors, primarily in the United Kingdom, and convinced them to purchase the stocks. Doc. 833 at 160-62. The advisors used scripts during these phone calls that portrayed the stocks as attractive investments; these scripts were based on fabricated information about the companies. Doc. 836 at 148-50.

a. Gunter's role in the scheme

When Hartman and Pope began the fraudulent-stock scheme, Hartman's father managed the bank accounts that received the investor funds. Doc. 836 at 116. Gunter, who was an old friend of Pope's, later took over this banking function and managed it out of Florida. Doc. 836 at 80-81, 116-17, 120. This role required Gunter to establish several escrow companies and bank accounts to receive the investors' money. Doc. 836 at 117-18, 122-23. In addition, after investors agreed to purchase stock shares, Gunter and his associates sent paperwork to the investors that explained where the investors should send payments for the shares they had agreed to buy. Doc. 833 at 158-60, 164-67. Once investors wired payments to the designated bank accounts, Gunter's

daughter Zibiah contacted Hartman's associates in Costa Rica, who prepared board resolutions authorizing the issuance of stock certificates to those investors.[4] Doc. 833 at 170-72. Based on the board resolutions, a transfer agent produced stock certificates for those investors, and Zibiah Gunter sent the certificates to the investors via UPS delivery. Doc. 833 at 172-73.

Zibiah Gunter, acting at the direction of Gunter, Pope, Hartman, or an advisor, also redistributed the funds that the investors had wired into the escrow bank accounts. Doc. 833 at 174-76; Doc. 834 at 35-36. The sales teams, known as "advisor groups," typically received sixty percent or more of the total amount, and Gunter, Hartman, and Pope each took shares of the remaining funds. Doc. 836 at 111-14, 134-37, 160-62. No one told the investors about this redistribution of their investment principal. Doc. 836 at 114. Ultimately, more than $127 million in investor funds came through the various bank accounts that Gunter set up in furtherance of the fraudulent-stock scheme. Doc. 847 at 15; GEX 1130B at 150.

b. Odoni's role in the scheme

One of the advisor groups involved in the fraudulent-stock scheme was Bishop and Parkes, which had a sales floor of advisors selling stock. Doc. 836

[4] Zibiah Gunter worked for Gunter and was originally charged as a co-defendant in this case, but the charges against her were dismissed after she participated in a pretrial diversion program. Doc. 833 at 140-41, 146.

at 147-48. Like other advisor groups in the scheme, the advisors at Bishop and Parkes used scripts that provided false information to investors. Doc. 836 at 147-48. For example, one script told investors that Bishop and Parkes did not charge commissions to private investors. Doc. 842 at 179; GEX 270C. The script assured potential investors that "[e]very penny or cent" they invested would go directly to the company in which they were investing. Doc. 842 at 179-80; GEX 270C.

When Odoni moved to Barcelona in early 2005, he first stayed with Pope, who was an old friend, and then moved into a nearby apartment and started working for Pope. Doc. 836 at 144-46; Doc. 838 at 49. Pope talked to Odoni about the fraudulent-stock scheme, Doc. 836 at 168-69, and according to Pope, "Odoni knew full well what was going on and he was quite happy to take the proceeds." Doc. 838 at 80. Odoni began managing Bishop and Parkes, and Pope tasked him with ensuring that the advisors at Bishop and Parkes were "chasing money in." Doc. 836 at 147-48; Doc. 840 at 164-65. Odoni's responsibilities included helping the advisors write effective scripts to use when calling potential investors. Doc. 836 at 148. For his work at Bishop and Parkes, Odoni shared in the advisor group's cut of the investors' funds. Doc. 836 at 147-48.

Odoni also served as Chief Executive Officer and sole director of Nanoforce Incorporated, one of the valueless shell companies that Hartman had procured. Doc. 836 at 167-70; GEX 509C(1) at 2. Although the advisor groups told investors that Nanoforce was a nanotechnology company, Nanoforce did no business. Doc. 836 at 167, 169, 174-75. In early May 2005, Odoni took steps to set up a website for Nanoforce and told Hartman that "[i]t would probably look better" if they used a webhosting company in the United States. Doc. 836 at 172-74; GEX 505 at 1. In June 2005, Odoni circulated a Nanoforce press release, authored by Hartman, which made false statements about Nanoforce's business and efforts to expand. Doc. 836 at 174-75; GEX 507B. Beginning in mid-2005, Odoni signed board resolutions to approve the issuance of Nanoforce stock shares to investors who had bought the stock. Doc. 834 at 127-29, 132; GEX 509C(1). From May 25, 2005, through December 20, 2005, the advisor groups persuaded investors to invest more than $12 million in Nanoforce stock. Doc. 834 at 134.

2. Forex fraud

The Forex fraud scheme involved the sale of options on the currency market, known as "Forex"; such options enabled investors to speculate about

the future prices of major currencies, such as the dollar, yen, and euro.[5] Doc. 836 at 99; Doc. 843 at 123-24. In furtherance of the scheme, Michael Geraud, Jeff Jedlicki, and others created Hartford Management Group, a firm in Barcelona that employed salespeople who persuaded potential investors to invest in Forex options. Doc. 843 at 131-33, 139-40. When they spoke to investors, the salespeople at Hartford Management Group fabricated information about upcoming developments in the currency market and told investors only about potential profits without advising them of the significant risks associated with the investment. Doc. 836 at 100-01; Doc. 843 at 133, 174-75; Doc. 844 at 50-51.

When investors chose to invest in Forex options through Hartford Management Group, they sent their money to an escrow company that collected a five-percent escrow fee and then transferred the remaining funds to Continental Clearing, a clearing firm. Doc. 843 at 141-46. Continental Clearing, in turn, sent half of the funds it received back to Hartford Management Group as "commission." Doc. 843 at 145-46. Over time, with multiple trades, the investors' funds often dwindled to zero, eaten up by commission payments, fees, and losses in the market. Doc. 843 at 150-51.

[5] Although legitimate firms sell Forex options, these firms will inform potential investors about the substantial risks of the investment, which include the possibility that small fluctuations in the market will wipe out an investor's entire investment. Doc. 843 at 174-75.

Hartford Management Group took steps to conceal this likelihood from potential investors. Doc. 844 at 50-51.

For five or six months, Gunter provided escrow services to Hartford Management Group by receiving investor funds and transferring them to Continental Clearing. Doc. 836 at 180-81; Doc. 843 at 144-45, 151. When Gunter decided that the risks associated with the scheme were too great, Pope introduced Geraud to Odoni, who had stopped working at Bishop and Parkes, and Odoni assumed responsibility for providing these escrow services. Doc. 836 at 181; Doc. 843 at 152-53, 167. Geraud showed Odoni around the Hartford Management Group offices and explained the operation to him from "A to Z." Doc. 843 at 153. According to Geraud, his escrow agents needed to be part of his inner circle, as Geraud would not give his money to someone unless he thought they were "on the same page." Doc. 844 at 41-42.

In connection with his role in the Forex scheme, Odoni incorporated an escrow company, International Escrow Enterprises, Inc., in Florida in October 2005. Doc. 836 at 182-83. Odoni also set up Bank of America bank accounts in the United Kingdom to receive the incoming investor funds. Doc. 843 at 153-55. In exchange for providing these escrow services, Odoni collected the five-percent escrow fee, which he shared with Gunter and Pope. Doc. 836 at

185-86; Doc. 843 at 156. In total, more than $10.7 million in investor funds came into bank accounts for International Escrow Enterprises. Doc. 847 at 19.

B. Evidence of Odoni's Knowledge and Intent

During trial, the government introduced the following evidence of Odoni's knowledge and intent, in addition to the evidence described in Part A above.

1. February 2006 email (GEX 285)

In February 2006, Odoni asked an accountant who worked with Pope for "urgent" help in responding to "some potentially awkward questions" from Bank of America about their escrow activities, which included questions about the identities of their clients. Doc. 836 at 87-88; Doc. 842 at 162-63; GEX 285 at 1. Odoni told the accountant in an email: "I want to make them believe that normal international property escrow transactions are our main activities in addition to small cap co's doing private offerings(?), but I need some help without raising any flags. HELP!!!!!!!!!!!!" Doc. 842 at 162-63; GEX 285 at 1.

2. Response to freezing of International Escrow accounts

In approximately May 2006, Bank of America contacted the City of London Police to report that its bank accounts for International Escrow Enterprises were potentially involved in criminal activity. Doc. 843 at 91, 100-01. The City of London Police launched an investigation and worked with

Bank of America and then Wachovia Bank to freeze International Escrow Enterprise's various bank accounts. Doc. 843 at 43-44, 92, 100-03. Upon discovering that the Bank of America accounts were frozen, Odoni had daily meetings with Geraud, Jedlicki, Pope, and Brian Giefing of Continental Clearing to figure out how to resolve the situation. Doc. 843 at 157-59. During these meetings, Odoni never expressed surprise or confusion at the fact that the accounts had been frozen. Doc. 844 at 48. The group repeatedly attempted to convince the City of London Police to release the funds in the frozen accounts, but when those efforts did not succeed, the group closed down Hartford Management Group, "shred[ded] everything," and left. Doc. 843 at 158-60; Doc. 844 at 46-47. After briefly opening another firm down the street to sell stocks, Geraud and Jedlicki returned to the United States. Doc. 843 at 160-61.

On June 14, 2006, the City of London Police interviewed Odoni and arrested him on suspicion of conspiracy to defraud and on suspicion of money laundering. Doc. 843 at 94-95. During the interview, the police asked Odoni whether he had engaged in business dealings with anyone named Zibiah or Paul Gunter, and Odoni said that he had not. Doc. 843 at 96. Odoni also brought several documents with him to the meeting; these documents reported that he had received an escrow fee of one-half of one percent on incoming

funds. Doc. 843 at 97-100; GEX 812B(1); GEX 812B(2). After the meeting, Odoni returned to Spain and later moved to the Dominican Republic. Doc. 837 at 24-25.

3. April 2007 emails (GEX 822A)

In early 2007, British law-enforcement officers seized a Ferrari that Odoni had bought from Pope with money from the Forex scheme. Doc. 837 at 30-31, 45-48. In an email to Gunter and Pope in April 2007, Odoni suggested that the British authorities must have discovered the Ferrari through "phone tapping," and he cautioned Gunter and Pope to be careful about what they said on "known Spanish phones." Doc. 837 at 45-46; GEX 822A at 1. Odoni told them that his phone number in the Dominican Republic "should be safe" but that he might get another phone "just to be sure." Doc. 837 at 46; GEX 822A at 1. Odoni further stated that he needed to "liquidate" all of his assets and transfer the money to the Dominican Republic. Doc. 837 at 46; GEX 822A at 1-2. At the end of the email, Odoni discussed the seized Ferrari:

> On the car the only remedy is to protest that it is owned by someone else but my attorney believes that person will have to appear in court to give evidence. I can get someone here to be the 'real owner' but if it means going to court I think I'm fucked.

Doc. 837 at 46; GEX 822A at 2.

In response to Odoni's email, Gunter suggested that Odoni meet with British law-enforcement officers and "give up" Geraud, Jedlicki, and Geifing, "the principals" in the Forex scheme. Doc. 837 at 47; GEX 822A at 1. Odoni responded: "I am prepared to give up the names of the Americans but Im [*sic*] not doing it face to face with the police…..are you mad????" Doc. 837 at 48; GEX 822A at 1. Odoni further stated that he wanted to empty his bank accounts "before the money is frozen" and noted that his Ferrari was "gone" unless he could provide evidence of how he had paid for it. Doc. 837 at 48; GEX 822A at 1.

4. January 2008 emails (GEX 822)

In January 2008, Odoni emailed Gunter and Pope to alert them to certain information he had seen on the Internet. Doc. 837 at 104-05; GEX 822. Odoni stated, "I found some very disturbing stuff on one of the links on Motley Fool which leads me to believe an insider is leaking info on our activities. Who the fuck could this be??????" Doc. 837 at 105; GEX 822 at 2. Odoni explained that an anonymous Internet poster had made connections between International Escrow Enterprises, Nanoforce, and other entities, accounts, locations, and people involved in the fraud schemes. Doc. 837 at 105-06; GEX 822 at 2. Odoni stated, "No one here knows ANYTHING about IEE," and asked Gunter and Pope, "[W]ho the hell knows all this???" Doc.

837 at 105; GEX 822 at 2. Odoni noted that the Internet poster had described Odoni as "nothing but a front man for others," and he closed the email by telling Gunter and Pope: "You need very much to be on your guard and lets [*sic*] get together bloody quickly and figure this shit out." Doc. 837 at 105; GEX 822 at 2.

Gunter agreed that the Internet posting was "quite disturbing." Doc. 837 at 106; GEX 822 at 2. In response, Odoni told Gunter and Pope that he had done further digging and had discovered more posts that he characterized as "very disturbing." Doc. 837 at 106-07; GEX 822 at 1. Among other things, these posts claimed that Odoni was "a gopher for the big guys who are too smart to have their names on anything." Doc. 837 at 107; GEX 822 at 1. In response, Pope suggested that they speak by phone the following day, rather than continuing discussions by email. Doc. 837 at 107-08.

C. Odoni's Motion to Dismiss the Superseding Indictment[6]

As of early 2009, Odoni, a citizen of the United Kingdom, was living in the Dominican Republic on a provisional residence permit.[7] Doc. 396 at 1;

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[6] This background section is based in part on factual allegations in Odoni's motion to dismiss (Doc. 396) and in the government's response to that motion (Doc. 401).

[7] Odoni had no official status in the United States and had been denied entry into the United States in 2006 for failing to disclose an arrest on his visa-waiver application. Doc. 401 at 4 n.1.

Doc. 396-1 at 1. In anticipation of the return of a superseding indictment in this case, one of the prosecutors contacted the Department of Justice's Office of International Affairs ("OIA") to explore available means to secure Odoni's presence in the United States for prosecution. Doc. 401 at 3-4. OIA advised that the Dominican Republic might deport Odoni if he had no official status in that country, in which case the United States might not need to pursue extradition. Doc. 401 at 4. OIA suggested that the prosecutor contact the United States Marshals Service to find out whether the Dominican Republic might deport Odoni. Doc. 404 at 4. The prosecutor did so and gave the relevant Marshal information about Odoni, which the Marshal then provided to a unit of the Dominican government that was responsible for investigating deportation-related inquiries.[8] Doc. 401 at 4-5. In February 2009, the United States learned that the Dominican Republic had decided to deport Odoni. Doc. 401 at 5. On March 10, 2009, a grand jury in the Middle District of Florida issued the superseding indictment in this case. Doc. 160.

On March 24, 2009, the Dominican Republic's State Department of Interior and Police announced that Odoni would be deported that day to the United Kingdom "for having violated the regulations contained in Law 285-04

[8] Although the record is not explicit on this point, it is reasonable to infer from this and other facts that the Marshal told the Dominican Republic that the United States was interested in procuring Odoni's presence for prosecution.

in relation to Migration and the Dominican Republic." Doc. 401-1 at 37. The same day, five Dominican agents arrested Odoni at his home in the Dominican Republic and drove him to Santo Domingo.[9] Doc. 396 at 2. United States law-enforcement agents were not present for and did not participate in the arrest. Doc. 401 at 6. The Dominican authorities detained Odoni overnight in Santo Domingo and then, using airline tickets purchased by the United States Marshals Service, put Odoni on a U.S.-carrier flight bound for Miami, Florida, where he was scheduled to board a connecting flight to the United Kingdom. Doc. 396 at 2; Doc. 401 at 6; Doc. 401-1 at 41.

When Odoni boarded his plane to Miami, two United States Marshals were waiting and placed him in handcuffs. Doc. 396 at 2; Doc. 401 at 6. When Odoni arrived in Miami, United States law-enforcement agents executed the outstanding arrest warrant for Odoni, and read him his rights. Doc. 166; Doc. 396 at 3; Doc. 401-1 at 43-44. Odoni told the agents that he was willing to answer questions and waived his right to have an attorney present. Doc. 401-1 at 43-44. Odoni was later removed to the Middle District of Florida for prosecution in this case. Doc. 396 at 3; Doc. 401 at 7.

In 2010, Odoni filed a motion to dismiss the superseding indictment for lack of jurisdiction. Doc. 396. In the motion, Odoni argued that the

[9] The agents were armed, but the record does not suggest that the agents ever drew their guns or threatened Odoni. Doc. 396 at 2.

extradition treaty between the United States and the Dominican Republic applied to him and that the district court lacked jurisdiction over him because the United States had "refus[ed] to abide by the legal requirements of the Treaty." Doc. 396 at 7. However, Odoni did not explain why the United States was obliged to invoke the treaty in his case, nor did he identify any treaty requirements that he believed the United States had failed to honor. Doc. 396 at 7-8.

The district court denied Odoni's motion. Doc. 402. The court held that Odoni's claim was precluded by the *Ker-Frisbie* doctrine, which provides that a criminal defendant cannot defeat personal jurisdiction by asserting the illegality of the procurement of his presence in the relevant jurisdiction. Doc. 402 at 2. The court also rejected Odoni's claim that his procurement had violated the extradition treaty. Doc. 402 at 2-4.

D. Gunter's Suppression Motion[10]

In 2004, the Norfolk Constabulary, an independent police force in the United Kingdom, began to investigate the fraudulent-stock scheme. Doc. 841

[10] Because the district court denied Gunter's motion without holding a hearing, the facts set forth in this subsection are drawn from the evidence at trial and from the exhibits that Gunter submitted in support of his suppression motion. *See United States v. Epps*, 613 F.3d 1093, 1097 (11th Cir. 2010) ("When reviewing the denial of a motion to suppress, this Court is not restricted to the evidence presented at the suppression hearing and instead considers the whole record.").

at 115-16. In April 2005, when the needs of the case began to outstrip the resources of the Norfolk Constabulary, that police force referred the case to the United Kingdom's Serious Fraud Office, which assumed management of the investigation. Doc. 841 at 116-17; Doc. 842 at 109-10. In October 2005, in furtherance of the investigation, British authorities simultaneously searched fifteen locations throughout the United Kingdom. Doc. 842 at 112.

The British investigators also worked with authorities in Spain and Iceland on the case. Doc. 842 at 110. In 2005, the United Kingdom sent an Interpol request and a letter rogatory to Spain, seeking information about so-called "boiler rooms" that British law-enforcement officers believed were located in Barcelona. Doc. 841 at 164; Doc. 842 at 110-11. After receiving the letter rogatory, Spanish authorities discovered an abandoned rental car containing nine laptops and numerous papers that appeared to be responsive to the British requests for information. Doc. 841 at 167-69; Doc. 842 at 17-18. In March 2006, Spain forwarded seven boxes of evidence from the car to British law-enforcement officers, and members of the British investigative team inspected their contents. Doc. 842 at 114-16. At this point, the United States was not involved in the British investigation. Doc. 842 at 118.

British investigators made two investigative trips to Spain in late 2006. Doc. 841 at 118-21. During the second trip, in November 2006, the Spanish

police simultaneously executed six search warrants at the United Kingdom's request. Doc. 841 at 121-22, 170; Doc. 842 at 149. Members of the British investigative team were part of the Spanish task force that executed the searches and identified relevant documents. Doc. 841 at 170-71; Doc. 842 at 150. The United States was not involved in these searches. Doc. 841 at 122, 171.

The Spanish task force seized approximately fifty computers and many boxes of paper from the search locations. Doc. 841 at 125-27, 172-73. Apart from locating the boiler rooms, however, the Spanish police were not investigating the fraud scheme, and they turned all seized materials over to the United Kingdom's Serious Fraud Office. Doc. 841 at 174; Doc. 842 at 26. British law-enforcement officers worked to analyze the materials that they had received from the Spanish authorities and began making arrests and conducting interviews. Doc. 841 at 129. The British investigators also circulated a list of persons who were "wanted on all ports," which meant that anyone on the list should be stopped and interviewed upon entering or leaving the United Kingdom. Doc. 841 at 129. Paul Gunter was on the United Kingdom list. Doc. 841 at 129.

Because of Gunter's inclusion on the British "wanted on all ports" list, British officers arrested Gunter on April 13, 2007, as he was traveling through

Gatwick Airport, a major international airport south of London. Doc. 841 at 130-31. The British authorities detained Gunter overnight, interviewed him the following day, and then released him on bail. Doc. 841 at 135-36. Before releasing him, however, the British officers searched Gunter and seized various items from him, including two mobile telephones, a laptop computer, a thumb drive (sometimes referred to as a "memory stick"), some photo CDs, and a camera. Doc. 841 at 131-32, 136. The United States was unaware of Gunter's arrest in the United Kingdom when it occurred and did not request, direct, or participate in any way in the British search of Gunter or subsequent seizure of his laptop, thumb drive, and other items. Doc. 404-7 at 1-2, 6.

An officer with the Norfolk Constabulary initially took custody of the items seized from Gunter, and on June 4, 2007, he delivered the evidence to the Serious Fraud Office in London. Doc. 841 at 132-33; Doc. 843 at 6. The officer did not search the thumb drive himself because United Kingdom procedure dictated that a computer expert with the Serious Fraud Office examine the disk and copy it. Doc. 841 at 133. On September 7, 2007, Assistant IT Forensic Investigator Peter Littler of the Serious Fraud Office created image copies of Gunter's laptop computer and thumb drive.[11] Doc.

[11] After creating the image, the Serious Fraud Office returned the original thumb drive to Gunter. Doc. 843 at 6-7. It is not clear from the record whether the United Kingdom also returned Gunter's laptop and other items.

404-4 at 1-3; Doc. 843 at 6-7. Investigator Littler also analyzed the data on the computer and thumb drive. Doc. 404-4 at 2-3; Doc. 404-7 at 6. During his analysis of the laptop computer, Investigator Littler discovered that the laptop's Basic Input/Output System ("BIOS") displayed an incorrect date and time. Doc. 404-4 at 2. Investigator Littler wrote a witness statement that described his creation of the image copies and his discovery of the BIOS error, and he compiled separate case notes of his analysis.[12] Doc. 404-4 at 1-3. Thereafter, the Serious Fraud Office shared the forensic images with the City of London Police, who were investigating a related fraud. Doc. 404-7 at 6.

In early November 2007, the City of London Police provided the United States with copies of the data from Gunter's laptop and thumb drive. Doc. 404-5; Doc. 404-6 at 1; Doc. 404-7 at 6. The United States submitted a formal request for assistance pursuant to the Mutual Legal Assistance Treaty between the United States and the United Kingdom, and in February 2008, pursuant to the treaty, the City of London Police provided the United States with official copies of the seized data. Doc. 404-7 at 6; Doc. 843 at 8. In March 2008, the United States applied for two search warrants in connection with this case; the

[12] The government originally planned to call Investigator Littler at trial as a chain-of-custody witness to testify that the image copy of Gunter's thumb drive was an exact duplicate of the original thumb drive. Doc. 839 at 251. Because defense counsel stipulated to that fact, however, Investigator Littler did not testify. Doc. 839 at 251-52.

affidavits in support of both applications discussed evidence from Gunter's laptop computer and thumb drive, in addition to other evidence. Doc. 404-1 at 25-26, 36-44, 53-55; Doc. 404-2 at 31, 42-49.

On August 3, 2010, Gunter moved to suppress all evidence that British officers had seized from him in the United Kingdom. Doc. 404 at 1. In the motion, Gunter explained that he was not challenging the legality of the initial British search and seizure. Doc. 404 at 8. Instead, Gunter argued that the United States violated his Fourth Amendment rights when, after receiving copies of his data from the United Kingdom, United States agents reviewed his data in the United States without first obtaining a warrant. Doc. 404 at 8. Gunter requested an evidentiary hearing, as well as a taint hearing "to determine the fruit of the poisonous tree." Doc. 404 at 1. Gunter claimed that "the fruit of the poisonous tree" included all evidence that the government had seized pursuant to the March 2008 search warrants. Doc. 404 at 5. Gunter attached several exhibits to his motion, including correspondence from the prosecutors that explained why the United Kingdom's April 2007 search of Gunter was not a joint venture with the United States. Doc. 404-7.

The following day, the district court denied Gunter's motion without requiring a response from the government or holding an evidentiary hearing. Doc. 405 at 1. The district court found that the British detention and search of

Gunter in April 2007 was "nothing more than a routine law enforcement arrest and seizure of evidence" that did not shock the conscience of the court. Doc. 405 at 4. The district court further found that Gunter had alleged "no factual basis from which this Court can reasonably conclude that American officials were substantially involved in the seizure of Gunter's computer and memory stick or that British officials were actually acting as agents for their American law enforcement brethren at the time of the seizure." Doc. 405 at 4. The district court therefore concluded that Gunter had failed to demonstrate a Fourth Amendment violation. Doc. 405 at 4. Gunter filed a motion for reconsideration, Doc. 406, and the district court denied the motion. Doc. 407.

At trial, the government presented evidence from Gunter's thumb drive but not from Gunter's laptop computer. Doc. 806 at 9. The government also introduced evidence seized pursuant to the March 2008 search warrants, which Gunter had challenged in his suppression motion as "fruit of the poisonous tree." *See, e.g.*, Doc. 833 at 71-73.

E. Gunter's Motion for a Mistrial

In his opening statement at trial, Gunter's attorney told the jury that Count One of the indictment charged "two separate and distinct sets of crimes," one set within the United States and one set in Spain "by the people who were selling . . . the stock in the fictitious, bogus companies." Doc. 833 at

31-32. Gunter's attorney stated that although the trial evidence would establish both the domestic and international crimes, the crimes had been committed "by people other than Paul Gunter." Doc. 833 at 33. After opening statements, outside the jury's presence, the district court observed that Gunter was "conceding entirely the criminal conduct, *i.e.*, the transactional conduct on the domestic transactions and the conduct on the foreign transactions, just not conceding Mr. Gunter's knowledge and participation in it." Doc. 833 at 56. Gunter did not dispute the court's characterization of his defense. Doc. 833 at 56. Indeed, Gunter's counsel later characterized the fraudulent-stock scheme as a "scam" during cross-examination of a witness. Doc. 837 at 135.

During the first five days of the government's case, Zibiah Gunter and Richard Pope each testified about Gunter's dealings with Rahul Patel, a business associate of Gunter's. Their testimony revealed that Patel and another man, Rajah "Dom" Binoy, had run advisor offices in Barcelona that sold various stocks to investors, including Nanoforce stock. Doc. 834 at 28-29; Doc. 836 at 131, 155-57. Patel and Binoy's offices had been among the biggest advisor groups with whom Gunter and Pope worked, and in some cases, Patel and Binoy had pocketed up to eighty percent of the funds they collected from investors. Doc. 834 at 28-29, 102-04; Doc. 836 at 155-62.

During the first ten days of the government's case, the jury also heard that law-enforcement officers in the United Kingdom and Spain had been investigating Patel. For example, Pope testified that Patel had been "under prosecution in the U.K. for some breaches of securities laws." Doc. 837 at 52. Pope further explained that Patel and Binoy had asked him to destroy certain records in Gunter's offices, at least in part because of the United Kingdom's investigation of Patel. Doc. 836 at 190-92. Another witness, Inspector Juan Simarro Bermejo of the National Police of Spain, described Patel as a person who was "wanted by the SFO" – *i.e.*, the United Kingdom's Serious Fraud Office. Doc. 841 at 166-67. During her first day of testimony, Helen Ratcliffe, a former investigative lawyer for the Serious Fraud Office, confirmed that Patel and Binoy had been "main suspects" in the Serious Fraud Office's investigation, and she testified that United Kingdom authorities had searched Patel's house in London. Doc. 842 at 112-13.

Gunter objected to none of this testimony about Patel. In fact, Gunter's attorney elicited the following testimony about Patel during his cross-examination of Pope:

> Q. And some of the other people in this community that you were living with, for example, Patel, Ramsden, Goldstein, Downs, they all ultimately get arrested and imprisoned?
>
> A. The names again, Downs, Goldstein?

Q. Patel.

A. Yes.

Q. They all end up in prison?

A. Yes.

Q. Prison within this community of people appears to be the cost of doing business, almost like an injury to an athlete?

A. . . . [T]hat is a bit of an exaggeration, sir.

Q. Was it any surprise to learn that some of these people had been incarcerated?

A. No.

Doc. 837 at 138. Shortly thereafter, Gunter's attorney asked Pope additional questions about Patel:

Q. You told us that there had been some enforcement issues that arose during this time, for example, Binoy and Patel had some issues in Barcelona?

A. Yes.

Q. The issues were they were arrested?

A. Not in Barcelona.

Q. They were arrested somewhere else?

A. In the U.K. Only one of them was arrested because one of them escaped to India.

Doc. 837 at 145.

All of this evidence was before the jury, without objection from Gunter, when Ratcliffe, the former lawyer for the Serious Fraud Office, testified on the eleventh day of the government's case. When Ratcliffe explained that "a lot of people" had been prosecuted in the United Kingdom as a result of the Serious Fraud Office's investigation, the prosecutor asked, "Roughly how many, if you recall?" Doc. 843 at 10. Gunter's attorney objected on relevance grounds, and the district court sustained the objection. Doc. 843 at 11. The prosecutor then asked, "When were the prosecutions?" Doc. 843 at 11. Gunter's attorney again objected on relevance grounds, and the district court again sustained the objection. Doc. 843 at 11. At that point, the prosecutor asked Ratcliffe, "What became of Rahul Patel?" Doc. 843 at 11. Ratcliffe answered, "He was convicted for fraud," and Gunter's attorney stated, "Same objection, Your Honor." Doc. 843 at 11.

The district court asked to see counsel at sidebar and questioned the prosecutor about whether Gunter's and Odoni's alleged conduct had continued after the British prosecutions that Ratcliffe was describing. Doc. 843 at 11-12. At that point, one of Gunter's attorneys moved for a mistrial, arguing in part that Ratcliffe's testimony had informed the jury that the overall fraud scheme had resulted in convictions. Doc. 843 at 12-13. The prosecutor responded: "Your Honor, I believe, I may be mistaken, but I believe Mr. Pope

already testified to that fact. I don't think this is news." Doc. 843 at 13. The prosecutor further explained that she had been trying to establish that Gunter had known about the British prosecutions, but the district court noted that the prosecutions would not be relevant unless Gunter knew about them at the time of his alleged criminal conduct. Doc. 843 at 13.

After Ratcliffe proffered testimony outside the presence of the jury, the district court found that Patel had not been convicted until after the period charged in the indictment in this case. Doc. 843 at 21-22. The prosecutor noted that Pope had previously testified that Gunter and Odoni knew about Patel's charges in the United Kingdom, and the court responded that, in its view, the prosecutor's question was not "intended to create a mistrial" and instead had "skirted on the edge of the Court's sustaining objections as to the line of inquiry." Doc. 843 at 21-22. When the jury returned to the courtroom, the district court gave the following curative instruction:

> The jury is to disregard any testimony that you may have heard about anyone else having been convicted. We are not aware of what their charges were, whether they are and to what extent they are related to the charges that are before this Court, so to the extent that any evidence was introduced about other people's convictions, you are to disregard it.

Doc. 843 at 23.

Later that day, the district court denied Gunter's motion for a mistrial. Doc. 843 at 86. The court found that Ratcliffe's testimony was not "so

prejudicial as to impu[gn] the entire proceedings," particularly in light of the court's curative instruction. Doc. 843 at 86. The court also noted that the jury already knew that the fraud schemes had resulted in criminal convictions because "Mr. Pope was convicted and he sat there in his orange jumpsuit and testified." Doc. 843 at 86. Gunter's attorney stated for the record that, in the view of the defense, the district court's curative instruction had not "solved the problem." Doc. 843 at 86. The court asked whether the defense believed that "some greater curative instruction" was necessary, and Gunter's attorney clarified that, in the defense team's view, no curative instruction would have been sufficient. Doc. 843 at 87. Gunter's attorney further stated, "[I]f we had been agreeable to a curative instruction, what the Court gave is what we would have requested." Doc. 843 at 87.

At the end of trial, Gunter's attorney delivered a closing argument that revisited the themes of his opening statement. Among other things, Gunter's attorney acknowledged that the evidence had proven both domestic and international crimes, describing the latter as "the misrepresentations that took place in Spain." Doc. 848 at 58. Gunter's attorney argued, however, that the government had not proven that Gunter was "a knowing and willful participant" in those crimes. Doc. 848 at 58.

F. Odoni's Post-Trial Motions

During trial, the government elicited testimony about hundreds of exhibits, including Exhibits 133B, 1130B, 1131B, 1132B, and 1133. Exhibit 133B was a settlement statement from the United States Department of Housing and Urban Development for a real-estate transaction in which Gunter was involved. Doc. 839 at 95-98; GEX 133B. Exhibits 1130B, 1131B, 1132B, and 1133 were exhibits that the government had created to summarize some of the financial evidence in the case. Doc. 846 at 197-201; Doc. 847 at 5-7, 20-21, 30-31, 56-59. During closing argument, Odoni's counsel described Exhibits 1131B and 1133 as two "snapshots of innocence" that supported the notion that Odoni had been an unwitting participant in the fraud scheme. Doc. 848 at 95-97. In its final instructions, the district court told the jury that it had to decide whether the government had met its burden of proof, which required the jury to "carefully and impartially consider[] all the evidence in the case." Doc. 848 at 136.

Before the jury began its deliberations, one of Odoni's two attorneys, Bjorn Brunvand, informed the court that he had a scheduling conflict with the deliberations, but that Odoni's other attorney, Daniel Hernandez, would be "covering" during his absence. Doc. 847 at 126. The district court then addressed Odoni directly, stating in part: "Often, the jury, when it's

deliberating, will inquire of the Court on some matters. If that were to happen, Mr. Hernandez would answer in regard to matters having to do with you only and with matters having to do with you and Mr. Gunter collectively." Doc. 847 at 126. Odoni confirmed that he understood and had discussed the issue with his lawyers. Doc. 847 at 126-27. The court asked whether Odoni objected to Brunvand being absent during deliberations, and Odoni responded that he did not. Doc. 847 at 127.

During its second day of deliberations, the jury sent the following note to the district court: "We are missing 1133B, could we have a new copy." Doc. 807-2 at 3; Doc. 849 at 3. There was no Exhibit 1133B. Doc. 849 at 3. Before responding to the jury's question, the court held a telephonic conference with the attorneys to get their input on how best to answer. Doc. 777; Doc. 849 at 3-5. Odoni's attorney, Hernandez, participated in this discussion, but Odoni himself was not present. Doc. 816 at 3; Doc. 849 at 3. Odoni's counsel did not note Odoni's absence on the record or object to the teleconference proceeding without Odoni. Doc. 849 at 3-5.

In discussing the jury's question with counsel, the court suggested that the jury's reference to "1133B" was a mistaken reference to Exhibit 1130B and asked whether counsel objected to the court telling the jury that there was no Exhibit 1133B, but that perhaps the jury was referring to Exhibit 1130B. Doc.

849 at 3. Odoni's counsel responded, "I can't think of any problem with that" and further stated that he and Gunter's counsel had no objection to that approach. Doc. 849 at 3-4.

At that point, the government suggested that the district court tell the jurors that they might be thinking about Exhibit 1130B, Exhibit 1131B, or Exhibit 1132B. Doc. 849 at 4. The district court asked whether defense counsel objected to that approach. Doc. 849 at 4. After confirming that the jury had all of the exhibits, Odoni's counsel said, "[O]ur preference would be that the Court simply tell them that they have all the exhibits." Doc. 849 at 4. The court then stated, "I think what I should tell them [is] there is no 1133B, you have all the exhibits that were admitted into evidence." Doc. 849 at 5. Odoni's counsel said, "That's fine." Doc. 849 at 5. Accordingly, the court informed the jury: "There is no Exhibit 1133B. You have all the exhibits that have been admitted. Thank you." Doc. 807-2 at 2. The jury delivered its verdict later that day. Doc. 849 at 5-6.

After trial, Odoni moved for a new trial based on his absence from the discussions about the jury's question. Doc. 794. The district court denied Odoni's motion. Doc. 816. Among other things, the court found that there was no basis for Odoni's claim that the jury had not considered Exhibit 1131B during its deliberations. Doc. 816 at 5-6.

Odoni also adopted Gunter's motion for judgment of acquittal, in which Gunter argued that he was not guilty of the crimes of conviction because he lacked knowledge of the fraud scheme. Doc. 793 at 3-4; Doc. 795. The district court denied that motion as to both defendants. Doc. 815.

G. Sentencing

At sentencing on July 23, 2013, the district court adopted the factual statements and Sentencing Guidelines applications in the Presentence Investigation Reports for Gunter and Odoni. Doc. 902 at 12. The court determined that Gunter's total offense level was 49, his criminal history category was I, and his advisory Guidelines range was 6840 months. Doc. 902 at 12. The court determined that Odoni's total offense level was 45, his criminal history category was I, and his advisory Guidelines range was 5400 months.[13] Doc. 902 at 13.

The court asked the government about the sentences and potential sentences for other persons involved in the fraud schemes. Doc. 902 at 31. The government noted that Richard Pope was scheduled to be sentenced later that day and further stated that the government had filed a substantial-

[13] The advisory Guidelines range for a defendant with a total offense level of 43 or higher and a criminal history category of I is life. None of Gunter's and Odoni's crimes of conviction allows for a life sentence, however, and so their advisory Guidelines ranges represent the sum of the statutory maximums for their counts of convictions.

assistance motion on Pope's behalf that recommended a downward departure based on his "significant substantial assistance" to the government. Doc. 902 at 31-32.

With respect to Roger Shoss and Nicolette Loisel, the government explained that they had been charged and convicted at trial before a different district judge of a single count of conspiracy, in violation of 18 U.S.C. § 371, which had a five-year statutory maximum penalty. Doc. 902 at 33. Although the government had recommended the statutory maximum sentence of five years for both Shoss and Loisel, the district judge in their case had imposed lower sentences, at least in part because of "their very significant health issues." Doc. 902 at 33. Shoss, who suffered from a rare neuromuscular condition that required him to have "assistance in even the most rudimentary of daily activities," had received a sentence of 18 months in prison, followed by three years of home detention. Doc. 902 at 33-35. Loisel, who suffered from laryngeal cancer, had received a lesser sentence of one year and a day in prison, in part because the sentencing judge determined that she had been a "lesser player" in the conspiracy. Doc. 902 at 36.

The court asked the government why Shoss and Loisel had been charged only with conspiracy, rather than any substantive offenses. Doc. 902 at 34. The government responded that the investigation had revealed that neither

Shoss nor Loisel had been involved in "the boiler-room side of the case" or "any solicitation of shares." Doc. 902 at 34. The government further stated that it had been difficult to determine how much loss was attributable to Shoss and Loisel, "given their circumscribed role," which had contributed to the government's decision to pursue only the conspiracy count. Doc. 902 at 34-35. In addition, the government noted that it had been "mindful" of Shoss's and Loisel's health issues. Doc. 902 at 35. Later in the hearing, the court asked the government about Odoni's role in the offense as compared to the other participants in the scheme. Doc. 902 at 40. The government responded that Odoni "was certainly a lesser player," particularly compared to Gunter, Pope, and Hartman. Doc. 902 at 41.

After hearing argument from all of the parties, the court sentenced Gunter to 300 months in prison and Odoni to 160 months in prison. Doc. 902 at 44, 47. With respect to Odoni, the court explained that it had imposed a sentence below his advisory Guidelines range because: (1) Odoni was less culpable than Gunter; (2) Odoni's sentence was appropriate when compared to the sentences received by other defendants involved in the offense; (3) Odoni had shown "a substantial level of remorse for his conduct"; and (4) his involvement in the offense had ended earlier than others'. Doc. 902 at 47.

The court concluded that Odoni's sentence was "appropriate and not greater than necessary, or less than necessary, to ensure that he be punished for the offense conduct in which he was engaged." Doc. 902 at 48. The court further stated, "Having considered the advisory guidelines and all the factors identified therein, the Court finds that this sentence is sufficient, but not greater than necessary to comply with the statutory purposes of sentencing." Doc. 902 at 49.

III. STANDARDS OF REVIEW

I. This Court ordinarily reviews a district court's denial of a motion to dismiss an indictment for abuse of discretion and reviews *de novo* the district court's resolution of questions of law. *United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997). However, an issue raised for the first time on appeal is reviewed for plain error. *United States v. Spoerke*, 568 F.3d 1236, 1244 (11th Cir. 2009).

II. In an appeal of the denial of a motion to suppress, this Court reviews the district court's findings of fact for clear error and its application of the law to those facts *de novo*. *United States v. Epps*, 613 F.3d 1093, 1097 (11th Cir. 2010). The Court views the facts in the light most favorable to the government. *United States v. Franklin*, 323 F.3d 1298, 1300 (11th Cir. 2003).

III. This Court reviews *de novo* a challenge to the district court's denial of a Rule 29 motion for judgment of acquittal based on sufficiency of the evidence. *United States v. Reeves*, 742 F.3d 487, 497 (11th Cir. 2014). In so doing, the Court views the evidence in the light most favorable to the jury verdict and draws all inferences in favor of the verdict. *Id.*

IV. This Court reviews the district court's decision not to grant a mistrial for abuse of discretion. *United States v. Newsome*, 475 F.3d 1221, 1227 (11th Cir. 2007).

V. This Court reviews a district court's denial of a motion for a new trial for abuse of discretion. *United States v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006) (en banc).

VI. This Court reviews the reasonableness of a sentence under an abuse of discretion standard. *See United States v. Kuhlman*, 711 F.3d 1321, 1326 (11th Cir. 2013).

SUMMARY OF ARGUMENT

I. The district court properly denied Odoni's motion to dismiss, in which Odoni argued that the district court lacked jurisdiction over his prosecution because the United States "abducted" him from the Dominican Republic. In fact, the record reveals that the Dominican Republic elected to deport Odoni pursuant to its independent sovereign authority. Furthermore,

under the *Ker-Frisbie* doctrine, Odoni cannot defeat personal jurisdiction by arguing that the United States illegally procured his presence in this country. The Supreme Court suggested a limited exception to this general rule in *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188 (1992), for abductions that violate the terms of an extradition treaty, but this exception does not apply to Odoni, both because the Dominican Republic deported Odoni and because the extradition treaty between the United States and the Dominican Republic does not contain an explicit provision making the treaty the exclusive means by which the United States could secure Odoni's presence for prosecution. This Court must also reject Odoni's alternative argument that *Alvarez-Machain*, a Supreme Court case, was wrongly decided.

II. The district court properly denied Gunter's motion to suppress electronic data that British law-enforcement officers seized from Gunter in the United Kingdom in furtherance of an independent British investigation. Evidence that a foreign law-enforcement agency obtains through searches on its own soil is generally admissible in the United States, and the two narrow exceptions to this general rule do not apply here. This Court should not accept Gunter's invitation to create a third exception by holding that evidence seized by a foreign government is inadmissible unless the United States obtains a warrant before reviewing it. Moreover, even with his proposed exception,

Gunter would not be entitled to suppression because he lacked a reasonable expectation of privacy in his electronic data by the time the United Kingdom provided it to the United States.

III. The evidence was sufficient to support Odoni's conviction on all counts. Although Odoni claims that he was a mere "puppet" or "pawn" in the fraud schemes, the evidence reveals that Odoni intentionally participated in the schemes, knowing full well that they were fraudulent. Among other things, Odoni had direct exposure to some aspects of the schemes and repeatedly took steps to conceal the true nature of his activities, including by lying to the London police. Odoni also made statements that revealed his knowledge that the money he had gained through the scheme represented the proceeds of illegal activity.

IV. The district court properly denied Gunter's motion for a mistrial, which was based on a government witness's testimony that one of Gunter's associates, Rahul Patel, had been convicted of fraud in the United Kingdom. This testimony did not prejudice Gunter because it was consistent with Gunter's defense at trial and because Gunter's own attorney had already elicited similar testimony from an earlier witness. Furthermore, to the extent that Gunter suffered any prejudice, it was sufficiently mitigated by the district court's curative instruction to the jury.

V. The district court properly denied Odoni's motion for a new trial. As an initial matter, it is not clear that Odoni's absence from a conference between the court and counsel about how to respond to a jury note constituted a violation of Federal Rule of Criminal Procedure 43, as Odoni now claims. However, the Court need not resolve that question because, even if there were a Rule 43 violation, Odoni suffered no prejudice from it.

VI. Odoni's 160-month sentence is well below his advisory Guidelines range and is substantively reasonable. In particular, there are no unwarranted disparities between Odoni's sentence and the sentences imposed on others who were involved in the same fraud schemes.

ARGUMENT

I. THE DISTRICT COURT PROPERLY DENIED ODONI'S MOTION TO DISMISS THE INDICTMENT.

A. The district court properly concluded that the Dominican Republic's deportation of Odoni did not defeat jurisdiction in the United States.

The district court properly denied Odoni's motion to dismiss, in which he argued that his deportation from the Dominican Republic deprived the district court of jurisdiction over his prosecution. As this Court has repeatedly held, "a criminal defendant cannot defeat personal jurisdiction by asserting the illegality of the procurement of his presence in the relevant jurisdiction – here,

the United States." *United States v. Arbane*, 446 F.3d 1223, 1225 (11th Cir. 2006). Under this principle, known as the *Ker-Frisbie* doctrine, jurisdiction is not impaired even when a defendant was brought within the court's jurisdiction by a "forcible abduction" from another country. *Id.*; *Frisbie v. Collins*, 342 U.S. 519, 522, 702 S. Ct. 509, 511 (1952) (citing *Ker v. Illinois*, 119 U.S. 436, 444, 7 S. Ct. 225, 229 (1886)). This rule squarely forecloses Odoni's claim, despite Odoni's attempts to characterize his deportation as an "abduction" that violated the United States' extradition treaty with the Dominican Republic.

Odoni did not arrive in the United States through the extradition process. Instead, the Dominican Republic exercised its independent sovereign authority to deport Odoni because Odoni had violated that country's immigration laws. *See* Doc. 401-1 at 37. As the Supreme Court has explained, deportation is "a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state." *Harisiades v. Shaughnessy*, 342 U.S. 580, 587-88, 72 S. Ct. 512, 518 (1952). *Cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 864, 102 S. Ct. 3440, 3445 (1982) (explaining that "[t]he power to regulate immigration" is "an attribute of sovereignty essential to the preservation of any nation"). The Dominican Republic's deportation of Odoni does not constitute an extradition and therefore does not implicate any

extradition treaty, much less deprive United States courts of jurisdiction to prosecute Odoni. *Cf. United States v. Ceja*, 543 F. App'x 948, 953 (11th Cir. 2013) (not selected for publication) ("[A]s long as Ceja was not extradited pursuant to the treaty, whether his transfer to the United States violated provisions of the treaty is of no consequence under the *Ker-Frisbie* doctrine.").

Odoni's reliance on the Supreme Court's decision in *United States v. Alvarez-Machain*, 504 U.S. 655, 112 S. Ct. 2188 (1992), is misplaced for two reasons: (1) the Dominican Republic elected to deport Odoni; and (2) the extradition treaty between the United States and the Dominican Republic does not purport to be the exclusive means by which the United States could secure Odoni's presence. In *Alvarez-Machain*, the Drug Enforcement Administration ("DEA") first attempted to gain Alvarez-Machain's presence in the United States through informal negotiations with Mexican officials. 504 U.S. at 657 & n.2, 112 S. Ct. at 2190. When these negotiations failed, DEA officials paid a reward to have Alvarez-Machain forcibly kidnapped from Mexico and returned to the United States by private plane. *Id.* Mexico protested the abduction through diplomatic notes and asked the United States to extradite two persons that Mexico suspected had been involved in the abduction. 504 U.S. 669 & n.16, 112 S. Ct. at 2196. Nevertheless, the Supreme Court held that Alvarez-Machain's abduction did not provide a basis for him to challenge

the jurisdiction of United States courts because that abduction did not violate the extradition treaty between United States and Mexico. *See* 504 U.S. at 669-70, 112 S. Ct. at 2196-97. This holding implies that a defendant may challenge his abduction by the United States only when that abduction violates an extradition treaty. *See Arbane*, 446 F.3d at 1225 ("In *Alvarez-Machain*, the Court held that unless an extradition treaty contains an explicit provision making the treaty the exclusive means by which a defendant's presence may be secured, extra-treaty seizures are permitted.").

Odoni implies that his deportation was an "abduction" akin to the kidnapping that occurred in *Alvarez-Machain*, but the facts of his deportation belie that characterization. In Odoni's case, United States officials merely provided the Dominican Republic with information that the Dominican Republic could use in evaluating Odoni for deportation. *See* Doc. 401 at 4-5. Thereafter, pursuant to its sovereign authority, the Dominican Republic independently determined that Odoni should be deported "for having violated the regulations contained in Law 285-04 in relation to Migration and the Dominican Republic." Doc. 401-1 at 37. *See Arbane*, 446 F.3d at 1225 ("Whereas the defendant in *Alvarez-Machain* was abducted by law enforcement agents, Arbane was simply placed, by Ecuadorian officials, on a plane that stopped in the United States."). By contrast, in *Alvarez-Machain*, Mexico did

not consent to Alvarez-Machain's removal from its territory. 504 U.S. at 669, 112 S. Ct. at 2196.

Nonetheless, Odoni argues that the district court should have dismissed the indictment under *Alvarez-Machain* because his deportation violated the extradition treaty between the United States and the Dominican Republic. However, even assuming *arguendo* that the United States had "orchestrated . . . Odoni's abduction," Odoni Br. 45, the *Alvarez-Machain* exception still does not apply because Odoni has failed to "demonstrate, by reference to the express language of a treaty and/or the established practice thereunder, that the United States affirmatively agreed not to seize foreign nationals from the territory of its treaty partner." *Noriega*, 117 F.3d at 1213.

As a matter of international law, nations are under no legal obligation to surrender a fugitive from justice in the absence of a treaty. *United States v. Puentes*, 50 F.3d 1567, 1572 (11th Cir. 1995). Accordingly, "[e]xtradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures." *Alvarez-Machain*, 504 U.S. at 664, 112 S. Ct. at 2194. Consistent with this general principle, the extradition treaty between the United States and the Dominican Republic reflects an agreement that each country will extradite to the other country "any person who may be charged with, or may have been

convicted of" the crimes listed in the treaty, provided certain treaty requirements are satisfied. Convention for the Mutual Extradition of Fugitives from Justice, U.S.-Dom. Rep., Jun. 19, 1909, 36 Stat. 2468, *available at* Doc. 396-2 ("Extradition Treaty"), Art. I. The treaty therefore provides a potential mechanism by which the United States and the Dominican Republic can procure the presence of persons for prosecution.

The extradition treaty does not, however, state or imply that it is the exclusive mechanism for such transfers. *See Noriega*, 117 F.3d at 1213. Even Odoni concedes that the treaty "does not explicitly forbid kidnapping or directly state that extradition is the only means by which a person may be sought." Odoni Br. 51. *See United States v. Gardiner*, 279 F. App'x 848, 850 (11th Cir. 2008) (not selected for publication) ("Gardiner failed to establish that the [United States-Dominican Republic extradition] treaty prohibited methods other than extradition to obtain custody."). Nor does Article XI of the treaty imply that the treaty would "be the only means by which the two countries would make requests for the procurement of one of the other country's residents," as Odoni now claims. Odoni Br. 52.

Because Odoni raises Article XI for the first time on appeal, *see* Doc. 396 at 7-8, this Court should review his Article XI claim only for plain error. *See Noriega*, 117 F.3d at 1213 n.4. However, Odoni's Article XI argument fails

under any standard of review. Nothing in the following language of Article XI cited by Odoni manifests an agreement that the extradition treaty would be the exclusive means of transferring persons from one country to the other:

> The stipulations of this Convention shall be applicable to all territory wherever situated, belonging to either of the Contracting Parties or in the occupancy and under the control of either of them, during such occupancy or control.
>
> Requisitions for the surrender of fugitives from justice shall be made by the respective diplomatic agents of the Contracting Parties. . . .
>
> It shall be competent for such diplomatic or superior consular officers to ask and obtain a mandate or preliminary warrant of arrest for the person whose surrender is sought. . .

Extradition Treaty, Art. XI. *See* Odoni Br. 51. This language simply states that the stipulations of the treaty apply to all territory of the two countries and then sets forth procedures that the United States and the Dominican Republic agree to follow when making "[r]equisitions for the surrender of fugitives from justice" – *i.e.*, requests for extradition.[14] Extradition Treaty, Art. XI. But the

[14] When the United States and the Dominican Republic signed the extradition treaty in 1909, "requisition" was essentially a term of art for an international or interstate extradition request. *See, e.g.*, *Elias v. Ramirez*, 215 U.S. 398, 406, 30 S. Ct. 131, 134 (1910) ("requisition had been duly made for the extradition"); *People ex rel. McNichols v. Pease*, 207 U.S. 100, 110, 28 S. Ct. 58, 61 (1907) (referring to "the extradition warrant and requisition papers"); *Neely v. Henkel*, 180 U.S. 109, 119, 21 S. Ct. 302, 305 (1901) (referring to a "requisition upon the President for the extradition of Neely"). *Cf. Ker*, 119 U.S. at 438 (referring to "the requisition on Peru"). Indeed, Article XI itself equates an extradition

treaty does not suggest that the same procedures must be followed when the two countries discuss an alternative means to facilitate the transfer of a person, such as deportation or expulsion. And this provision imposes no restrictions on either country's independent deportation authority, even in situations where the other country may have submitted an extradition request. Accordingly, it is not clear or obvious from Article XI that the treaty is the exclusive "means by which the two countries would make requests for the procurement of one of the other country's residents." Odoni Br. 52.

For all of these reasons, the Dominican Republic's deportation of Odoni did not deprive the district court of jurisdiction over Odoni's prosecution.

B. Neither the district court nor this Court may "reconsider" the Supreme Court's decision in *Alvarez-Machain* or the *Ker-Frisbie* doctrine.

Odoni argues in the alternative that *Alvarez-Machain* is "inconsistent with prior precedent of the Supreme Court" and was wrongly decided. Odoni Br. 54. Odoni therefore asks this Court to "reconsider the *Ker-Frisbie* doctrine" for the reasons set forth in Justice Stevens's dissenting opinion in *Alvarez-Machain*, even though he acknowledges that both the doctrine and *Alvarez-Machain* are

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request with a "requisition." *See* Art. XI, cl. 2 ("[W]here extradition is sought from territory [belonging to a contracting party], other than the United States or the Dominican Republic, requisition may be made by superior consular officers.").

binding on this Court. *Id.* Because Odoni makes this argument for the first time on appeal, this Court's review is for plain error. *See Noriega*, 117 F.3d at 1213 n.4.

Needless to say, it was not plain error for the district court to rely on binding Supreme Court precedent, and Odoni cannot prevail on his contrary claim. *See Ceja*, 543 F. App'x at 953 n. 2 (rejecting defendant's request to "revisit" *Alvarez-Machain* on the ground that this Court has "no such authority"); *Evans v. Sec'y, Fla. Dep't of Corrections*, 699 F.3d 1249, 1264 (11th Cir. 2012) (recognizing that Supreme Court precedent is binding on this Court "unless and until the Supreme Court explicitly overrules it"). Furthermore, the concerns about international law and territorial integrity that motivated Justice Stevens's dissent in *Alvarez-Machain* are not present in this case, where the Dominican Republic exercised its independent sovereign authority in deporting Odoni. *See* Odoni Br. 53 (citing *Alvarez-Machain* dissent).

II. THE DISTRICT COURT PROPERLY DENIED GUNTER'S MOTION TO SUPPRESS.

Gunter's suppression claim is foreclosed by the general rule that "evidence obtained from searches carried out by foreign officials in their own countries is admissible in United States courts, even if the search would not otherwise comply with United States law or the law of the foreign country."

United States v. Emmanuel, 565 F.3d 1324, 1330 (11th Cir. 2009). This rule squarely covers the evidence that Gunter seeks to suppress – *i.e.*, electronic data that British law-enforcement officers seized from him during a search in the United Kingdom, without the involvement or knowledge of the United States.

Although this Court has recognized two narrow exceptions to the general rule that evidence from foreign searches is admissible, neither applies in this case. The first exception is triggered when the conduct of the foreign officials during the search "shocks the judicial conscience." *Emmanuel*, 565 F.3d at 1330. Gunter does not argue that this exception applies, *see* Gunter Br. 23, and the conduct of the British officers in this case is not shocking or untoward.

The electronic data also falls outside the scope of the second exception, which applies if United States law-enforcement officials substantially participated in an unlawful search or if the foreign officials conducting the search were acting as agents for their United States counterparts. *Emmanuel*, 565 F.3d at 1330. In this case, British officers arrested and searched Gunter in connection with an independent British investigation of the fraudulent-stock scheme, and the United States did not participate in the search at all. *See* Doc. 841 at 129-33. Indeed, the United States was wholly unaware of the search

and subsequent seizure of Gunter's laptop and thumb drive until after they had occurred. *See* Doc. 404-7 at 1-2, 5-6. Gunter has therefore conceded that he has "no basis to allege that U.S. authorities participated in that seizure as part of a 'joint venture.'" Gunter Br. 23 n. 8.

Nevertheless, Gunter suggests that this Court should, in essence, create a third exception to the general rule that evidence from foreign searches is admissible. Specifically, Gunter argues that this Court should conclude that evidence seized during a foreign search is inadmissible when the United States reviews the evidence without first obtaining a search warrant, unless an exception to the warrant requirement applies. *See* Gunter Br. 22. However, Gunter identifies no court that has adopted such an exception, and the Court should reject Gunter's invitation to blaze this new path.

In addition to being unprecedented, Gunter's proposed exception is inconsistent with basic Fourth Amendment principles. The Fourth Amendment prohibits "unreasonable searches and seizures." U.S. Const. Amend. IV. However, the protections of the Fourth Amendment apply only when the person invoking the protection has "an objectively reasonable expectation of privacy in the place searched or item seized." *Rehberg v. Paulk*, 611 F.3d 828, 842 (11th Cir. 2010). To establish a reasonable expectation of privacy, the person must show: (1) that he manifested "a subjective expectation

of privacy" in the item searched or seized, and (2) that society is willing "to recognize that expectation as legitimate." *Id.* It is difficult to see how a defendant could ever retain a subjective expectation of privacy in electronic data or other evidence that a foreign government seized in furtherance of its own criminal investigation and subsequently provided to the United States. But even if a defendant could have such a subjective expectation, society surely would not recognize it as reasonable.

Gunter's case illustrates this overall problem with his proposed exception, as Gunter himself cannot demonstrate that he had a reasonable expectation of privacy in his electronic data by the time the United Kingdom provided it to the United States.[15] Before his arrest in April 2007, Gunter may well have had a reasonable expectation of privacy in his data, but the reasonableness of any such privacy interest had clearly eroded by the time the United Kingdom provided a copy of his data to the United States. *See United States v. McKennon*, 814 F.2d 1539, 1544 (11th Cir. 1987) ("Extenuating circumstances can erode the reasonableness of a privacy expectation to the extent that the interest is not constitutionally protected.").

[15] The government does not dispute that Gunter, a permanent resident alien of the United States, is generally entitled to the protections of the Fourth Amendment. *See United States v. Verdugo-Urquidez*, 494 U.S. 259, 271, 110 S. Ct. 1056, 1064 (1990).

By the time British officers seized Gunter's data in April 2007, British law-enforcement authorities had spent more than two years on their own independent investigation of the fraud scheme at issue in this case. *See* Doc. Doc. 841 at 115-17. In connection with its investigation, British law-enforcement officers undertook many resource-intensive efforts to gather relevant evidence. Among other things, British law-enforcement agencies executed fifteen simultaneous searches at different locations throughout the United Kingdom; sought international assistance from multiple countries; traveled twice to Spain to investigate; and obtained fifty computers and many boxes of documents that Spain had seized at the United Kingdom's request. Doc. 841 at 118-29, 167-74; Doc. 842 at 23-26, 110-16, 149-50. Given the intensity of the British investigation and the British investigators' repeated searches for new evidence of the fraud scheme, Gunter could not reasonably expect that his data would remain private once British officers seized it from him. Instead, the reasonable inference is that British investigators reviewed Gunter's seized data before providing a copy to the United States in November 2007.

Indeed, the record confirms that, by November 2007, British officers had already taken steps to preserve and review that data as potential evidence. For example, in September 2007, an officer with the Serious Fraud Office created

image copies of Gunter's computer and thumb drive. Doc. 404-4 at 1-3; Doc. 843 at 6-7. He also analyzed the data and prepared separate case notes of his analysis. Doc. 404-4 at 2-3; Doc. 404-7 at 6. Thereafter, the Serious Fraud Office shared copies of Gunter's data with the City of London Police for use in a related investigation. Doc. 404-7 at 6. Only then did the United States obtain a copy of Gunter's data. Doc. 404-6 at 1; Doc. 404-7 at 6; Doc. 843 at 8. Gunter could not retain a reasonable expectation of privacy under these circumstances. *See United States v. Jacobsen*, 466 U.S. 109, 199, 104 S. Ct. 1652, 1659-60 (1984) (holding that a defendant retains no privacy interest in the contents of a container that a private party has already searched and then made available for government inspection); *United States v. Runyan*, 275 F.3d 449, 464-65 (5th Cir. 2001) (applying *Jacobsen* to police examination of computer disks following private search).

For all of these reasons, this Court should affirm the district court's denial of Gunter's suppression motion and should decline to adopt a new exception to the general rule that evidence obtained from searches carried out by foreign officials in their own countries is admissible in the United States.[16]

[16] Even if the Court were to find a Fourth Amendment violation, it should not reverse Gunter's judgment but should instead order a limited remand so that the district court may address Gunter's contention that the alleged Fourth Amendment violation taints the two March 2008 search warrants. This question requires application of the independent-

III. SUFFICIENT EVIDENCE SUPPORTED THE JURY'S CONVICTION OF ODONI ON ALL COUNTS.

The evidence was sufficient to support the jury's conclusion that Odoni was a knowing and intentional participant in the fraud schemes. In challenging the sufficiency of the evidence, Odoni asks the Court to draw inferences in his favor and to construe the evidence in the light most favorable to his theoretical innocence. *See* Odoni Br. 34-36. The Court must reject that invitation and must view the evidence in the light most favorable to the verdict. *See Reeves*, 742 F.3d at 497. Viewed in that light, the evidence is more than sufficient to establish that Odoni understood the fraudulent nature of the fraudulent-stock and Forex schemes but voluntarily and intentionally participated in them anyway.

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source doctrine, but the record is not sufficiently developed to allow this Court to apply that doctrine now because the district court denied Gunter's suppression motion without a hearing. For example, the government has not had the opportunity to present evidence showing that the affiant agents would have sought and obtained the warrants even without the electronic data from the United Kingdom. *See United States v. Bush*, 727 F.3d 1308, 1316 (11th Cir. 2013) (describing independent-source doctrine). Accordingly, if the Court holds that a Fourth Amendment violation occurred, it should remand the case to the district court for the limited purpose of making findings of fact and conclusions of law on the independent-source doctrine. *See United States v. Noriega*, 676 F.3d 1252, 1263 (11th Cir. 2012). The Court should retain jurisdiction over the appeal and direct the district court to certify its ruling to the Court.

The conspiracies charged in Counts One and Two required the government to prove that Odoni knowingly and voluntarily agreed to participate in the fraudulent-stock and Forex schemes. *See United States v. Hasson*, 333 F.3d 1264, 1270; Doc. 160 at 14-34. The money-laundering conspiracy charged in Count Three required the government to prove that Odoni knew that the funds involved in the fraudulent-stock scheme represented the proceeds of unlawful activity. *See United States v. Awan*, 966 F.2d 1415, 1434 (11th Cir. 1992); Doc. 160 at 34-39. The money-laundering offense charged in Count Eleven required the government to prove that Odoni knowingly engaged or attempted to engage in a monetary transaction in property that was criminally derived from the fraudulent-stock scheme. *See United States v. Lander*, 668 F.3d 1289, 1297 (11th Cir. 2012); Doc. 160 at 39-42. The substantive mail-fraud and wire-fraud offenses charged in Counts Eighteen through Thirty-Six required the government to prove that Odoni's participation in the fraudulent-stock scheme was intentional. *See United States v. Schmitz*, 634 F.3d 1247, 1260 (11th Cir. 2011) (mail fraud); *Hasson*, 333 F.3d at 1270 (wire fraud); Doc. 160 at 44-51.

Although there are slight variations among these knowledge and intent requirements, Odoni mounts the same challenge to the government's evidence as to all of these requirements. Specifically, he contends that the evidence

failed to show that he knowingly and intentionally engaged in the fraudulent schemes. *See* Odoni Br. 27-28. That argument lacks merit.

To begin with, Richard Pope and Michael Geraud both provided direct evidence of Odoni's knowledge and intent, based on their conversations and interactions with Odoni. Pope, an old friend of Odoni's, testified that he talked to Odoni about the schemes and that "Odoni knew full well what was going on and . . . was quite happy to take the proceeds." Doc. 836 at 168-69, 181; Doc. 838 at 80. Likewise, Geraud testified that he had shown Odoni around Hartford Management Group, which was the main Barcelona location of the Forex scheme, and "[p]retty much walked him through [the operation] A to Z." Doc. 843 at 153. Geraud further testified that he needed Odoni to be on the same page with him because Odoni was handling the money from the Forex scheme. Doc. 844 at 41-42. This testimony, standing alone, was sufficient to prove Odoni's knowing and intentional participation in the schemes.

Furthermore, Odoni had direct exposure to some of the fraudulent aspects of the fraudulent-stock scheme through his work at Bishop and Parkes and his role as CEO of Nanoforce. At Bishop and Parkes, Odoni helped draft the fraudulent scripts that advisors used when calling investors; these scripts deployed fabricated information to encourage potential investors to buy

questionable stocks. Doc. 836 at 148-50. And the jury could readily infer that Odoni knew the truth about the stocks they were selling because he was the putative CEO of Nanoforce and therefore knew that Nanoforce was merely a shell company that did no actual business. *See* Doc. 836 at 167-75. Despite that knowledge, Odoni distributed a false press release about Nanoforce's purported activities, helped set up a website for Nanoforce, regularly signed board resolutions for the distribution of Nanoforce stock, and expressed concern about making Nanoforce appear legitimate to the outside world. *See* Doc. 834 at 127-29, 132; Doc. 836 at 169-75; GEX 505 (noting that "[i]t would probably look better" to use a United States webhosting company for the Nanoforce website); GEX 507B; GEX 509C(1) at 2. These steps, combined with his awareness of the false statements made by the advisor groups, demonstrate Odoni's willingness to encourage and facilitate the sale of valueless stock to unwitting investors.

Additional evidence proved that Odoni knowingly and intentionally participated in the Forex fraud scheme. For example, in February 2006, Odoni expressed concern about questions that Bank of America was asking about his Forex bank accounts and implied that he did not want Bank of America to know the true nature of his escrow activities. *See* Doc. 842 at 162-63; GEX 285. Several months later, Odoni expressed no surprise or confusion

when Bank of America froze his Forex bank accounts. Doc. 844 at 48. Instead, Odoni participated in discussions about shredding potential evidence of the Forex scheme. *See* Doc. 843 at 158-60; Doc. 844 at 46-47. And shortly thereafter, when the London police interviewed Odoni about his Forex bank accounts, Odoni falsely told them that he did not know Gunter, when in fact he had been splitting his Forex escrow fee with Gunter and Pope for months. *See* Doc. 836 at 185-86; Doc. 843 at 96. Odoni also gave the City of London Police documents showing that his escrow fee was only one-half of one percent, when in fact his escrow fee was five percent. *See* Doc. 843 at 156; GEX 812B(1); GEX 812B(2). All of this evidence shows that Odoni understood that he was involved in illegal activity and wanted to prevent discovery of the fraud.

Odoni's emails with Gunter and Pope in April 2007 and January 2008 provide still more confirmation of Odoni's knowledge and intent. For example, Odoni discussed the fact that British law-enforcement officers might be tapping his phones and noted that he might get a new phone in the Dominican Republic "just to be sure." Doc. 837 at 45-46; GEX 822A at 1. After British law-enforcement officers seized his Ferrari, Odoni said that he wanted to "liquidate" his assets and regretfully reported that he probably would not be able to recover the car because he could not procure in-court

evidence of how he had paid for it. Doc. 837 at 46; GEX 822A at 1-2. Collectively, these statements show that Odoni understood that the money he had gained through the fraudulent-stock and Forex schemes represented the proceeds of crime and therefore was subject to seizure by British law-enforcement authorities. Odoni's January 2008 emails also revealed that he understood the interconnections between the fraudulent-stock and Forex schemes, and in those emails, Odoni again expressed concern that the true nature of the schemes would be exposed. Doc. 837 at 104-07; GEX 822 at 1-2.

Taken together, this evidence provides ample support for the jury's conclusion that Odoni had the knowledge and intent required for all of the crimes with which he was charged. It also belies Odoni's claim that he was nothing more than a "pawn" or "puppet" of Pope and others. Odoni Br. 27. Nor does Odoni's case resemble *United States v. Parker*, 839 F.2d 1473 (11th Cir. 1988), as Odoni now claims. In *Parker*, several salespersons who had sold fraudulent investments appealed their fraud convictions on the ground that there was insufficient evidence of their knowing and intentional participation in the fraud. 839 F.2d at 1478-81. This Court agreed, finding that the salespersons' enormous success at selling the investments was the only evidence that even remotely suggested that they had intentionally joined the

scheme. *Id.* at 1479. But that case is nothing like this one – here, the government presented far more evidence of Odoni's knowledge and intent.

This Court's decision in *United States v. McCrimmon*, 362 F.3d 725 (11th Cir. 2004), also does not help Odoni. In *McCrimmon*, the Court concluded that the defendant's repeated misrepresentations to investors, without more, were not enough to permit the jury to infer that the defendant had understood the fraudulent nature of the investment program he was selling. *Id.* at 729. However, additional evidence led the Court to conclude that a reasonable jury could infer that the defendant had, in fact, known that the program was fraudulent. *Id.* at 729-30. Here, the government's proof of Odoni's knowledge and intent was not limited to the fact that Odoni made false statements to investors. Instead, the evidence showed that Odoni had direct exposure to information revealing the fraudulent nature of the investments involved in the schemes and that he repeatedly took steps to conceal the true nature of his business. This evidence is more than enough to support the jury's verdict on all counts.

Finally, there is no merit to Odoni's suggestion that the jury should have acquitted him because, in Odoni's view, he was similarly situated to Preston Valentine and Sean McCart, who were never charged with crimes. *See* Odoni Br. 34-35. The trial evidence showed that Valentine never worked at an

advisor office and was not a willful participant in the scheme. Doc. 836 at 170; Doc. 839 at 145-46; Doc. 846 at 158-59. Similarly, the evidence showed that McCart was not involved in the day-to-day activities of the fraudulent schemes, did not attempt to conceal any information relating to the schemes, and did not appear to understand the fraudulent nature of the activities at issue in this case. Doc. 846 at 105-07. In other words, the evidence of Valentine's and McCart's knowledge and intent was not the same as the evidence of Odoni's.

For all of these reasons, sufficient evidence supported the jury's conclusion that Odoni had the knowledge and intent required for all counts of conviction.

IV. THE DISTRICT COURT PROPERLY DENIED GUNTER'S MOTION FOR A MISTRIAL.

A. The testimony about Rahul Patel's fraud conviction did not substantially prejudice Gunter.

A defendant is entitled to a mistrial only upon a showing of "substantial prejudice," which occurs when there is a reasonable probability that, but for the alleged error, the outcome of the trial would have been different. *United States v. Grzybowicz*, __ F.3d __, No. 12-13749, 2014 WL 1328250, at *12 (11th Cir. Apr. 4, 2014). As this Court has recognized, "a trial judge is often in the best position to evaluate the prejudicial effect of a statement or evidence on the

jury." *Id.* (internal quotation marks omitted). On appeal, Gunter claims that Ratcliffe's testimony about Patel's fraud conviction was "highly prejudicial," but he does not explain what prejudice he suffered. Gunter Br. 47. Gunter's silence is not surprising because the record clearly shows the absence of prejudice.

To begin with, the testimony about Patel's fraud conviction was wholly consistent with Gunter's defense at trial. During opening statements, Gunter's attorney explained to the jury that the trial evidence would be sufficient to prove two sets of crimes – one set in the United States and a second set in Spain. Doc. 833 at 31-33. Gunter's attorney described the Spanish crimes as "the sales misrepresentations that took place from the sales people over in Spain," and he did not dispute that this behavior had been criminal. Doc. 833 at 33. Instead, he emphasized that those crimes had been committed "by people other than Paul Gunter." Doc. 833 at 33. Indeed, Gunter's defense throughout trial was that he had been an unwitting pawn in a fraud scheme concocted by his business associates. *See, e.g.*, Doc. 833 at 29-33, 39-49 (opening statement); Doc. 848 at 57-58, 62-71 (closing argument); Gunter Br. 17-18. Ratcliffe's testimony about Patel's conviction did not undermine this defense. If anything, it bolstered the story that Gunter and his attorneys were attempting to tell.

Perhaps for that reason, Gunter elected to elicit similar evidence from Pope several days before Ratcliffe testified. In particular, Gunter's attorney asked Pope whether Patel had "end[ed] up in prison," and Pope confirmed that he had. Doc. 837 at 138. Gunter's attorney also asked Pope more than once whether Patel had been arrested. Doc. 837 at 138, 145. In light of this questioning and testimony, a reasonable jury would infer that Patel had been convicted of a crime that was sufficiently serious to warrant a prison term. Furthermore, other trial evidence established that Patel had been engaging in fraud and was a target of a United Kingdom fraud investigation, which would lead a reasonable jury to infer that Patel's conviction was for fraud, rather than for some other crime. *See, e.g.*, Doc. 834 at 102-04; Doc. 836 at 155-62; Doc. 842 at 112-13.

Because Ratcliffe's testimony that Patel "was convicted for fraud" was therefore consistent with Gunter's defense and duplicative of other trial evidence, it did not substantially prejudice Gunter. Accordingly, the district court properly denied Gunter's motion for a mistrial.

B. The district court's curative instruction cured any prejudice Gunter may have suffered.

In any event, any conceivable prejudice to Gunter was sufficiently mitigated by the district court's curative instruction to the jury. *See* Doc. 843 at

23. When a district court gives a curative instruction, this Court will reverse the denial of a motion for a mistrial "only if the evidence is so highly prejudicial as to be incurable by the trial court's admonition." *United States v. Delgado*, 321 F.3d 1338, 1347 (11th Cir. 2003) (internal quotation marks omitted). Because Ratcliffe's testimony was not highly prejudicial, the district court's curative instruction was more than adequate to address any lingering prejudice.

Gunter does not attempt to explain why Ratcliffe's testimony amounts to "highly prejudicial evidence." *See* Gunter Br. 47. Instead, Gunter criticizes the wording of the district court's curative instruction, arguing that it was "confusing at best, and misleading at worst." Gunter. Br. 46-47. But Gunter took the opposite position during trial. After the court asked defense counsel whether they believed that an additional curative instruction was needed, Gunter's attorney responded, "[I]f we had been agreeable to a curative instruction, what the Court gave is what we would have requested." Doc. 843 at 87. Given his express approval of the court's wording of the curative instruction, Gunter cannot now challenge that wording on appeal. *See, e.g.*, *United States v. House*, 684 F.3d 1173, 1210 (11th Cir. 2012) (holding that defendant waived right to challenge district court's failure to give a jury instruction when defense counsel expressly declined court's offer to call jury

back for such an instruction); *United States v. Fulford*, 267 F.3d 1241, 1246-47 (11th Cir. 2001) (holding that defendant waived right to challenge jury instruction on appeal where defendant stated that "the instruction is acceptable to us").

In any event, the curative instruction was favorable to Gunter. Gunter's only complaint about the instruction is that, in his view, it conflicted with evidence showing that Patel "was a main suspect in the SFO's fraud investigation" and "was profoundly and inextricably related to the charges" against Gunter.[17] Gunter Br. 46. To the extent that such a conflict exists, however, the district court's instruction was favorable to Gunter, insofar as it informed the jury that no evidence showed that Patel had been charged with and convicted of fraud in connection with the same fraud scheme with which Gunter had been charged. *See* Doc. 843 at 23.

V. THE DISTRICT COURT PROPERLY DENIED ODONI'S MOTION FOR A NEW TRIAL BECAUSE THE ALLEGED RULE 43 VIOLATION DID NOT PREJUDICE ODONI.

Under Federal Rule of Criminal Procedure 33, a district court may grant a criminal defendant a new trial "if the interest of justice so requires." Fed. R. Crim. P. 33(a). Odoni argues that he satisfies this standard because the district court violated Federal Rule of Criminal Procedure 43 when it discussed a jury

[17] It is difficult to square Gunter's claim that Ratcliffe's testimony was "highly prejudicial" with his acknowledgement of this other evidence.

note with counsel, without Odoni present. But even if a Rule 43 violation occurred, it would not warrant a new trial because it did not prejudice Odoni. Accordingly, the district court properly denied Odoni's motion.

Because Odoni was represented by counsel at the jury-question discussion, it is not wholly clear that Odoni's absence from the conference violated Rule 43, as Odoni now claims. Rule 43 generally requires that criminal defendants be present at "every trial stage," Fed. R. Crim. P. 43(a)(2), but this requirement does not apply to proceedings that involve "only a conference or hearing on a question of law." Fed. R. Crim. P. 43(b)(3). Nor does *Rogers v. United States*, 422 U.S. 35, 95 S. Ct. 2091 (1975), on which Odoni relies, definitively resolve whether Rule 43 required Odoni's presence. In *Rogers*, the Supreme Court stated that "petitioner's *counsel* should have been given an opportunity to be heard before the trial judge responded" to a jury question, but it did not discuss whether the defendant himself needed to be present as well. 422 U.S. at 39, 95 S. Ct. 2095 (emphasis added); *see also* 422 U.S. at 38, 95 S. Ct. 2094 (quoting *Fillippon v. Albion Vein Slate Co.*, 250 U.S. 76, 39 S. Ct. 435 (1919), for the proposition that "the orderly conduct of a trial by jury . . . entitles the parties who attend for the purpose to be present in person or by counsel at all proceedings. . .").

This Court has previously noted that "[t]he right to be present at every stage of trial does not confer upon the defendant the right to be present . . . at every conference with the trial judge at which a matter relative to the case is discussed." *United States v. Vasquez*, 732 F.2d 846, 848 (11th Cir. 1984). On the other hand, this Court has stated that, under *Rogers*, "a defendant has the right to be present and participate during any communications between a judge and the jury." *United States v. Wright*, 392 F.3d 1269, 1280 (11th Cir. 2004). However, the Court has not expressly held that Rule 43 is violated when defense counsel, but not the defendant, confers with the court about the proper response to a jury question.

Indeed, since *Rogers*, different courts of appeals have reached different conclusions about whether Rule 43 mandates that defendants, and not merely defense counsel, be present for all discussions about jury questions. The Seventh, Ninth, and Tenth Circuits have all held that, in at least some circumstances, Rule 43 does not require the defendant's presence during communications between the court and counsel about jury questions. *See United States v. Neeley*, 189 F.3d 670, 679 (7th Cir. 1999); *United States v. Terrazas*, 190 F. App'x 543, 549 (9th Cir. 2006) (not selected for publication); *United States v. Gonzalez*, 596 F.3d 1228, 1243 (10th Cir. 2010). By contrast, the Fourth Circuit has suggested that a district court commits at least "a technical

violation" of Rule 43 when it responds to a jury question when the defendant is not in the courtroom. *United States v. Harris*, 814 F.2d 155, 157 (4th Cir. 1987) (per curiam); *see also United States v. Rhodes*, 32 F.3d 867, 874 (4th Cir. 1994).

This Court need not resolve whether Odoni's absence violated Rule 43 because any error was harmless and therefore would not justify the grant of a new trial. *See United States v. Cuchet*, 197 F.3d 1318, 1320-21 (11th Cir. 1999 (harmless Rule 43 violation does not warrant reversal). Perhaps most importantly, the district court's answer to the jury's question was entirely proper, and so Odoni's presence would not have altered it. In response to the jury's request for a copy of Exhibit 1133B, the court correctly informed the jury that there was no Exhibit 1133B and that the jurors had copies of all admitted exhibits. Doc. 807-2 at 2-3. Because this response was accurate, Odoni cannot show that it caused him harm. *Cf. United States v. Zielie*, 734 F.2d 1447, 1460 (11th Cir. 1984), *abrogated on other grounds by Bourjaily v. United States*, 483 U.S. 171, 107 S. Ct. 2775 (1987) (finding that Rule 43 violation was harmless where "[t]he district court's action was purely ministerial, advising the jury that no transcript was available").

Because it is impossible to determine which exhibit the jury was seeking when it requested "a new copy" of the non-existent Exhibit 1133B, the court's

response to the jury properly declined to speculate about which exhibit the jury had in mind. Although Odoni's counsel characterized two exhibits – Exhibit 1131B and Exhibit 1133 – as "snapshots of innocence" in his closing argument, Doc. 848 at 95-97, the jury heard testimony about five exhibits whose identifying numbers were similar to 1133B: Exhibits 133B, 1130B, 1131B, 1132B, and 1133. Doc. 839 at 95-98; Doc. 846 at 197-201; Doc. 847 at 20-21, 30-31, 56-59. The jury may have mistakenly described one of these five exhibits as "1133B," but it is entirely possible that the jury was thinking about another exhibit. Given the many possibilities, the court properly declined to direct the jury to focus its attention on any particular exhibit, including Exhibit 1131B. And there is no danger that this decision led the jury to disregard Exhibit 1131B, as Odoni now claims. The court had already instructed the jurors about their obligation to "carefully and impartially consider[] all the evidence in the case," Doc. 848 at 136, and so this Court must presume that the jury did, in fact, review all of the trial exhibits, including Exhibit 1131B. *See United States v. Lopez*, 649 F.3d 1222, 1237 (11th Cir. 2011) ("We presume that juries follow the instructions given to them.").

Equally meritless is Odoni's claim that he was prejudiced by the alleged Rule 43 violation because his absence prevented him from requesting a different response to the jury's question. Odoni argues that, if present, he

would have requested that the court "make an appropriate inquiry" to determine whether the jury's request for Exhibit 1133B was a mistaken reference to Exhibit 1131B. Odoni Br. 45. However, government counsel presented essentially the same proposal in Odoni's absence, suggesting that the court alert the jurors to the possibility that they were thinking of Exhibit 1130B, 1131B, or 1132B. Doc. 849 at 4. The court considered this proposal, but after Odoni's own counsel objected, the court decided instead to respond with the answer it ultimately provided to the jury. *See* Doc. 849 at 4-5. Odoni does not explain why his proposal would have swayed the court when the court considered and rejected the government's similar proposal.

Furthermore, the court's response to the jury did not risk harming the credibility of Odoni's counsel. *See* Odoni Br. 42. As discussed above, this Court should presume that the jury reviewed all of the exhibits and, during that process, the jury would have located and examined the exhibits that Odoni's counsel had described as "snapshots of innocence," including Exhibits 1131B and 1133. Under those circumstances, and in light of the court's response to the jury's question, no reasonable juror would infer that Odoni's counsel had "somehow misled them about a non-existent exhibit." Odoni Br. 42. Rather, the jury would conclude that a juror had mistranscribed or misremembered an exhibit number.

For all of these reasons, Odoni suffered no prejudice as a result of his absence from the district court's teleconference with counsel about the jury's question. Because it would not be in the interest of justice to grant Odoni a new trial on this ground, the district court's denial of Odoni's motion was a proper exercise of discretion.

VI. ODONI'S SENTENCE IS SUBSTANTIVELY REASONABLE.

Odoni does not dispute the district court's calculation of his Guidelines range or claim that his sentence was procedurally unreasonable. Nonetheless, Odoni argues that his below-Guidelines sentence of 160 months is substantively unreasonable because, in his view, the district court "failed to adequately consider" some of the sentencing factors set forth in 18 U.S.C. § 3553(a). Odoni Br. 55. This Court will vacate a sentence as substantively unreasonable only if the Court is "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." *United States v. Irey*, 612 F.3d 1160, 1190 (11th Cir. 2010) (en banc). This standard is rarely satisfied, *see id.*, and Odoni surely has not satisfied it here.

First, this Court should reject Odoni's claim that his sentence was unduly harsh when compared to the sentences of other defendants involved in

the same fraud schemes. In fashioning Odoni's sentence, the district court plainly understood its obligation to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Indeed, Odoni's sentence was far shorter than the 300-month sentence that the district court imposed on Gunter at the same hearing, which reflected the district court's understanding that Odoni was the "less culpable" of the two defendants. Doc. 902 at 47.

Furthermore, there was no unwarranted disparity between Odoni's sentence and the sentences of Shoss, Loisel, and Pope. As the government explained, Shoss and Loisel were ultimately charged and convicted in a different case on only one conspiracy count, which carried a five-year statutory maximum sentence. Doc. 902 at 33. Shoss and Loisel were not involved in the scheme to sell fraudulent stock, and they both had serious health problems that warranted downward departures. Doc. 902 at 33-36. Because Shoss and Loisel were not similarly situated to Odoni, it was wholly reasonable for the district court to give Odoni a higher sentence. *See United States v. Docampo*, 573 F.3d 1091, 1101 (11th Cir. 2009) ("A well-founded claim of disparity . . . assumes that apples are being compared to apples.")

It was also reasonable for the court to give Odoni a higher sentence than Pope even though Pope may have played a more central role in the fraud schemes. Unlike Odoni, Pope pleaded guilty approximately two months after his arrest in the United States in this case. Doc. 440, 452, 455. Thereafter, he provided "significant substantial assistance" to the government, Doc. 902 at 31-32, which included testifying at Gunter and Odoni's trial and at the earlier trial of Shoss and Loisel. *See* Doc. 827 at 1. As a result, the government filed a substantial-assistance motion on Pope's behalf before his sentencing hearing, *see* U.S.S.G. § 5K1.1, and the district court sentenced Pope to 57 months in prison. Doc. 827; Doc. 854. As this Court has explained, "there is no unwarranted disparity when a cooperating defendant pleads guilty and receives a lesser sentence than a defendant who proceeds to trial." *United States v. Langston*, 590 F.3d 1226, 1237 (11th Cir. 2009). In light of Pope's guilty plea and cooperation with the government, it was reasonable for the district court to sentence him to a shorter term of imprisonment than the one it imposed on Odoni.

This Court should also reject Odoni's suggestion that he was entitled to a lesser sentence because Zibiah Gunter, Preston Valentine, and Sean McCart served no prison time. None of these persons were convicted of crimes. Although Zibiah Gunter was at one point a co-defendant of Odoni's, the

charges against her were dismissed after she participated in a pretrial diversion program. Doc. 833 at 140. And, as Odoni acknowledges, Valentine and McCart were never charged. Odoni Br. 57. Because Zibiah Gunter, Valentine, and McCart have not been found guilty of any criminal conduct, much less conduct that is similar to Odoni's, Section 3553(a)(6) did not require the district court to consider them when evaluating the need to avoid unwarranted sentencing disparities.

Odoni also argues, briefly, that the district court's sentence is substantively unreasonable because it does not properly account for several alleged mitigating facts. Odoni Br. 58. But the district court did consider Odoni's lesser role in the fraud scheme, specifically stating that it had imposed a below-Guidelines sentence because Odoni was "less culpable" than Gunter. Doc. 902 at 47. It also adopted the factual findings in Odoni's Presentence Investigation Report, which discussed the other facts Odoni raises – *i.e.*, his education, his career history, his family, and his age. *See* PSR ¶¶ 88-98; Doc. 902 at 12. These facts simply "do not compel the conclusion that the sentence crafted in accordance with the 18 U.S.C. § 3553(a) factors was substantively unreasonable." *United States v. Snipes*, 611 F.3d 855, 873 (11th Cir. 2010) (concluding that similar facts did not render sentence substantively unreasonable).

For all of these reasons, Odoni's 160-month sentence was substantively reasonable.

CONCLUSION

For the reasons set forth above, the United States requests that this Court affirm the judgments of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

On May 13, 2014, the Court granted the government's motion for leave to file an answering brief of up to 19,000 words. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the type-volume limitations set forth in the Court's order of May 13, 2014, because this brief contains **17,435 words**, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

Date: May 19, 2014

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CERTIFICATE OF SERVICE

I certify that a copy of this brief was sent by CM/ECF and Federal Express on May 19, 2014, to:

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