IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Appeal No. 13-13528-AA

UNITED STATES,

Appellee

v.

SIMON ANDREW ODONI,

Appellant

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
DISTRICT COURT CASE NO. 8:08-cr-00172-MSS-EAJ

INITIAL BRIEF OF APPELLANT

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No. 13-13528

United States v. Simon Andrew Odoni

CERTIFICATE OF INTERESTED PERSONS

In compliance with FED. R. APP. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following listed persons and entities have an interest in the outcome of this particular case:

1. Bedke, Rachelle DesVaux, Assistant United States Attorney, trial counsel for appellee;
2. Bentley, A. Lee, III, acting United States Attorney, Middle District of Florida;
3. Brunvand, Bjorn E. , trial and appellate counsel for appellant;
4. Farmer, Matthew P., counsel for co-defendant Shoss;
5. Fernandez , Jr., Jack E., counsel for co-defendant Hartman;
6. Gunter, Paul Robert, co-defendant/co-appellant;
7. Gunter, Zibiah Joy, co-defendant;
8. Hartman, Lawrence S., co-defendant;
9. Hasbun, Marcos E., counsel for co-defendant Hartman;
10. Hernandez, Daniel M. , trial co-counsel for appellant;
11. Howard-Allen, Kelley Clement, Assistant United States Attorney, trial counsel for appellee;

12. Jenkins, The Honorable Elizabeth A., United States Magistrate Judge;
13. Lazzara, The Honorable Richard A., United States District Court Judge;
14. Loisel, Nicolette, co-defendant;
15. McNamara, Linda, Assistant United States Attorney, appellate counsel for appellee;
16. Muench, James A., Assistant United States Attorney, trial counsel for appellee;
17. Odoni, Simon Andrew, defendant/appellant;
18. O'Neill, Robert E., former United States Attorney, Middle District of Florida;
19. Pasco County Tax Collector, interested party;
20. Pope, Richard Sinclair, co-defendant;
21. Rankin, Mark P., counsel for co-defendant Pope;
22. Reback, Rochelle Anne, counsel for co-defendant Loisel;
23. Reeves, Frederick Tracy, counsel for Pasco County Tax Collector;
24. Samek, Sharon C., counsel for co-defendant Zibiah Gunter;
25. Scriven, The Honorable Mary S., United States District Court Judge;
26. Shoss, Roger Lee, co-defendant;
27. Srebnick, Scott Alan, counsel for co-defendant/co-appellant Paul Gunter;
28. Taylor, Neil Gary, counsel for co-defendant/co-appellant Paul Gunter;
29. Van Dusen, Susan W., counsel for co-defendant/co-appellant Paul Gunter;

30. Victims (*See* List attached to United States' Certificate of Interested Persons and Corporate Disclosure Statement, filed 10/01/2013);

31. Wise, J. Jervis, appellate co-counsel for Simon Odoni.

STATEMENT REGARDING ORAL ARGUMENT

The Appellant requests that this Court grant oral argument as to all issues raised in this appeal. The issues raised herein are relatively complex and heavily fact-intensive. Counsel, thereby, believes that oral argument is necessary and will be beneficial to the Court in its resolution of this appeal.

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STATEMENT OF JURISDICTION

Under 28 U.S.C. § 1291, the courts of appeal have jurisdiction from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court of the United States.

The United States District Court, Middle District of Florida, Tampa Division, had jurisdiction pursuant to 18 U.S.C. § 3231. The district court entered its final judgment on July 30, 2013. (Doc. 863). Mr. Odoni, thereafter, filed a timely notice of appeal on July 31, 2013. (Doc. 866).

STATEMENT OF ADOPTION

Appellant Simon Odoni hereby adopts the issues and arguments set forth in the initial brief of his co-appellant, Paul Gunter.

STATEMENT OF THE ISSUES

I.

WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE APPELLANT'S CONVICTIONS ON FRAUD RELATED CHARGES STEMMING FROM PENNY STOCK AND FOREX SCHEMES WHEN THE EVIDENCE FAILED TO PROVE THAT THE APPELLANT HAD KNOWLEDGE OF THE SCHEMES TO DEFRAUD?

II.

WHETHER THE DISTRICT COURT ERRED IN DENYING A MOTION FOR NEW TRIAL BASED ON THE FACT THAT THE COURT RESPONDED TO A QUESTION SUBMITTED BY THE JURY DURING DELIBERATIONS IN THE ABSENCE OF THE APPELLANT?

III.

WHETHER THE DISTRICT COURT ERRED IN DENYING THE APPELLANT'S MOTIONS TO DISMISS THE INDICTMENT ON GROUNDS THAT THE GOVERNMENT VIOLATED THE US-DOMINICAN EXTRADITION TREATY WHEN IT ARRANGED FOR THE APPELLANT'S FORCIBLE ADDUCTION FROM HIS HOME IN THE DOMINICAN REPUBLIC?

IV.

WHETHER THE DISTRICT COURT COMMITTED SUBSTANTIVE ERROR IN SENTENCING THE APPELLANT TO A TERM OF 160 MONTHS IMPRISONMENT WHEN ALL BUT ONE OF THE MORE-CULPABLE ALLEGED CO-CONSPIRATORS RECEIVED SENTENCES FAR BELOW THAT OF THE APPELLANT?

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

The Appellant, Simon Odoni, is a 56 year-old citizen of the United Kingdom who had no scoreable criminal history prior to the instant case. (PSR at 3, ¶83.)

On March 10, 2009, Mr. Odoni and six other co-defendants (Paul Gunter, Zibiah Joy Gunter, Lawrence S. Hartman, Richard Sinclair Pope, Roger Lee Shoss, and Nicolette Loisel) were charged by Superseding Indictment in the United States District Court for the Middle District of Florida, Tampa Division, with various counts of fraud and money laundering.[1] (Doc. 160). Specifically, Mr. Odoni was charged with conspiracy to commit mail and wire fraud (count 1), conspiracy to commit wire fraud (count 2), money laundering conspiracy (count 3), illegal monetary transactions (count 11), mail fraud (counts 18-27), and wire fraud (counts 28-46). (Doc. 160). The charges stemmed from penny-stock and fraudulent FOREX trading schemes that were masterminded by Hartman, Pope, and others. (Doc. 160.) Mr. Odoni would later set forth at trial that he had no knowledge of or intent to participate in an illegal scheme to defraud and that he had been an unwitting puppet of Pope and others. (Doc. 848:90-113.)

[1] At the time the Superseding Indictment was returned, Hartman and Pope had not been arrested. Pope remained a fugitive in Spain until his arrest in the Fall of 2010. (Doc. 424; 438). Hartman remained a fugitive in Costa Rica, but was later apprehended in Nicaragua and made his initial appearance in the Southern District of Florida on May 22, 2013. (Doc. 844:152; 798).

Aside from Mr. Odoni and co-appellant Paul Gunter, the remaining co-defendants had their charges resolved in a variety of ways: Zibiah Gunter entered pretrial diversion (Doc. 535); Richard Pope pled guilty and cooperated with the Government (Doc. 452); Roger Shoss and Nicolette Loisel were dismissed from the Superseding Indictment and indicted, tried, and convicted in a separate case (Doc. 498). Lawrence Hartman, who remained a fugitive until after Mr. Odoni's trial, has since entered into a plea agreement and is cooperating with the Government (Doc. 798, 908). Other participants in the conduct underlying the charges, including Government witnesses Sean McCart and Preston Valentine, were not charged with any offenses for their participation in the relevant conduct. (Doc. 848:93-102.)

Prior to trial, Mr. Odoni filed a motion to dismiss based on lack of jurisdiction and violation of due process stemming from the Government's abduction of Mr. Odoni from the Dominican Republic and his subsequent arrest on the charges set forth above. (Doc. 396.) The district court ultimately denied that motion. (Doc. 402.) The facts underlying that motion are discussed in the subsection to follow.

Mr. Odoni and Mr. Gunter later proceeded to a jury trial that began on March 18, 2013. (Doc. 713.) When the Government rested its case, Mr. Odoni orally moved for a judgment of acquittal based on insufficiency of the evidence to

support the charges against him. (Doc. 847:132). Mr. Odoni specifically argued that the Government's case was insufficient to prove that he had knowledge of or willful intent to participate in the schemes to defraud that underlied all of the charges against him. (Doc. 847:132-33). The trial court denied the motion. (Doc. 847:133-34). The jury went on to return a guilty verdict as to all of the charges against Mr. Odoni. (Doc. 780.)

After the trial, Mr. Odoni filed a motion for new trial that was based on the fact that he had not been present during proceedings related to a question submitted by the jury during deliberations and that the trial court's answer to the jury's question caused prejudiced to him. (Doc. 794.) The trial court went on to summarily deny that motion. (Doc. 816.) The facts surrounding that motion are discussed in more detail in the subsection to follow.

On July 23, 2013, the district court sentenced Mr. Odoni to serve a total term of 160 months imprisonment. (Doc. 863). On July 31, 2013, Mr. Odoni filed his timely notice of appeal in this case. (Doc. 866).

Mr. Odoni remains incarcerated on the instant judgment and sentence.

(ii) Statement of the Facts

Structure of the Stock Fraud Scheme[2]

The Superseding Indictment charged that from July 2004 to March 2008, Mr. Odoni and the co-defendants took part in a scheme that was initiated by co-conspirators stealing the identities of dormant, publicly-traded companies and using such identities to create new empty shell companies, which were made to appear to be real publicly-traded companies. (Doc. 160). Lawyers and co-conspirators, Loisel and Shoss, stole the identities of the companies involved in this case (*i.e.* Mobilestream, Regaltech, Nanoforce, Rocky Mountain Gold Mining, Turquoise Development, Transglobal Oil, and IQ Web Quest"), which came to be the "shell corporations." (Doc. 844:129-30, 145-46). Loisel would later testify that she and Shoss stole the identities of these companies "in order to take over the company name and resell them to Larry Hartman … the lawyer that was the deal maker that came to Roger Shoss to acquire shell companies." (Doc. 844:129-30, 145-46). The Government conceded that Mr. Odoni was not "personally responsible for, personally participated in, or was aware of" the corporate identity theft "of the dormant publicly-trade shell companies implicated in this case." (Doc. 530).

[2] Much of the language in this subsection is adopted from co-appellant Gunter's initial brief.

The Shares of Stock and Setup in Spain

The next part of the alleged stock fraud scheme involved the selling of shares of stock in the above-mentioned companies. Because the companies were not "real" companies, their shares of stock were worthless. (Doc. 838:85). To sell these shares of stock, boiler room telemarketers were set up in Barcelona, Spain. (Doc. 835:82, 85-86; Doc. 837:188; 838:35-37) The evidence, including the testimony of Pope, established that Pope was in control of the operation in Spain. (Doc. 835: 82, 85-86; Doc. 837:188; 838:35-37).

The stocks were sold to investors outside of the United States, primarily in the United Kingdom. (Doc. 833:160). Pope would testify that the scripts used by the "floors" when making telephone calls to investors were "fabricated" and misleading. (Doc. 836:150). At trial, several investors testified as to their investments in the various above-mentioned corporations. Those investors testified that they were misled in their phone conversations with the advisors as to the businesses in which the companies were engaged, the safety and security associated with investment in the companies, and the likely monetary return on investments. (Doc. 836:4-75; 838:137-99; 838:200-21; 844:77-123; 845:17-110).

The Escrow Services

Pope would testify that he later introduced Paul Gunter to Larry Hartman because they were in need of escrow services that he believed Mr. Gunter could

provide. (Doc. 836:116-17). Gunter owned and operated an escrow business called Business Administration and Escrow Services ("BAES"). (Doc. 833:146). His daughter, Zibiah Gunter, began working at BAES in March of 2005 and would later testify in great length about her roles while working at BAES. (Doc. 834:74). She explained that after an investor agreed to purchase shares of stock, she would receive the "contract notes" by e-mail from Hartman's office in Costa Rica and would then send them to the respective investors. (Doc. 833:164). The contract notes described in detail the particular company being invested in, the number of shares the investor would receive, the price of the shares, and the relevant banking details. (Doc. 833:160, 167-70). The investors' payments would be sent to one of the bank accounts opened and managed by the Gunters through the various escrow companies they ran. (Doc. 833:160, 167-70). Ms. Gunter also testified that letters were sent with the contract notes that informed the investors that only a small fee, typically 1%, would be deducted from their investment funds to cover costs associated with the sales. (Doc. 833:160).

In the course of her work, Ms. Gunter would input records of various wires into a spreadsheet used to keep track of the money received. (Doc. 833:170). Ms. Gunter testified that she had a spreadsheet for each individual company the escrow business was working with. (Doc. 833:170-171). She explained that the various columns on the spreadsheets indicated the percentages of the investors' funds that

were allocated to the advisors, Hartman, Pope, Gunter's escrow fees, and the company. (Doc. 833:174; 835:92). She also testified that those various percentage breakdowns were established by Hartman and Pope. (Doc. 833:174; 835:92). Generally, the advisors would get around 60% and the escrow company would receive between 1 and 2.5%. (Doc. 835:92). Pope testified that the investors were not informed of these percentages being taken off the top of their investment funds. (Doc. 836:114).

Mr. Odoni's Connection to Pope and Gunter

Pope would later testify that Mr. Odoni was a friend of his and they had known each other for about 30 years. (Doc. 836:78). He testified that they had remained in contact off and on over the years and reconnected on a more regular basis around 2003-2004 in Barcelona, where they established a business relationship. (Doc. 836:79). Mr. Odoni eventually moved to Barcelona, lived in an apartment across from Pope, and started working in a stockroom for some individuals Pope did business with. (Doc. 836:145). Pope testified that Mr. Odoni did administration work and worked with various advisors. (Doc. 836:146).

At some point Mr. Odoni became CEO of Nanoforce. (Doc. 836:170). Pope testified that Mr. Odoni was the CEO of Nanoforce because of the "same reasons as Preston Valentine, … he was there, trustworthy, willing, able, prepared to do

what needed to get done." (Doc. 836:170). In his testimony, Pope described Mr. Odoni as a "puppet". (Doc. 838:50-51).

The Government would present testimony regarding a website and press release for the Nanoforce company that Mr. Odoni had prepared at Hartman's direction. (Doc. 836:172-74). In instructing Mr. Odoni to create the website, Hartman actually directed Mr. Odoni to contact Preston Valentine to answer any questions he had regarding the web hosting. (Doc. 836:172-73).

Preston Valentine and Sean McCart

In addition to the aforementioned co-defendants, Preston Valentine testified for the Government in the instant case. He has never been charged with any offense related to his involvement in this case. (Doc. 839:152). Valentine, similar to Mr. Odoni, was asked by Gunter to be an interim president for Regal Properties. (Doc. 839:14). The evidence at trial showed that the documents Valentine signed as "sole director" for Regal were very similar to the documents Mr. Odoni signed for Nanoforce. (Doc. 839:140). Valentine didn't compose or author any documents and would later testify that, as far as he knew, the companies he was involved with were legitimate corporations and that he had no knowledge of wrong doing. (Doc. 839:145-46).

Another similar individual, Sean McCart, also testified for the Government in the instant case. Like Valentine, McCart has never been charged with a criminal

offense for his involvement in this case. (Doc. 840:201-02). In about 2004-2005, McCart began doing some computer work for Gunter's office. (Doc. 840:133). McCart testified that the computer work grew and that he later set up remote computers for Gunter's office in the Tampa Bay area, as well at locations in Prince Edward Island, Canada and Jacksonville, Florida. (Doc. 840:136-58). McCart testified that he understood the purpose of the remote computer set-up was to allow the advisors in Spain to log into the computer and send a contract note out though e-mail. (Doc. 840:136-58). For his work, McCart was paid for each contract note that got sent out. (Doc. 840:136).

After the computer work, Gunter and Pope hired McCart to be the master of their yacht for the next 1 - 1½ years. (Doc. 840:179-185). Following the yacht-master job, McCart moved back to Tampa and was installed by Gunter as the CEO of Knightsbridge Escrow Services and Crown Escrow Services. (Doc. 840:185-86). McCart testified that he understood he was going to be the listed President of the two companies and that his duties would entail signing documents whenever something needed signing. (Doc. 840:189). McCart testified that Gunter explained to him that investors would wire money into the company, the company would then hold the money, and later disburse it. (Doc. 840:190). In his role with the companies, McCart was also involved in setting up the companies' bank accounts. (Doc. 840:191).

The FOREX Scheme

In Count Two of the Superseding Indictment, a second scheme was alleged which involved trading currencies in the foreign exchange market ("FOREX"). (Doc. 160). This scheme also involved boiler room telemarketers in Spain, but instead of selling shares of stock, it involved seeking funds from investors to invest in FOREX. (Doc. 160).

Michael Geraud testified as to this scheme and explained that the telemarketers would call investors and make various misrepresentations to attempt to convince investors to invest in the FOREX market. (Doc. 844:54-76). Like in the stock fraud scheme, the FOREX investors would wire their funds to bank accounts in the United States and elsewhere. (Doc. 836:181). For "months" Gunter received money on behalf of the investors through his escrow company. (Doc. 836:181). Pope would later testify that Gunter eventually stopped these escrow services for the FOREX scheme and Mr. Odoni took over. (Doc. 836:181).

Pope testified that Mr. Odoni would have needed to set up a United States escrow corporation and then open up bank accounts in order to assume the responsibility for receiving investor funds for Geraud's FOREX operation. (Doc. 836:182). At trial, Pope testified as to Government's Exhibit 7, which was comprised of corporate documents for International Escrow Enterprises, Inc., that listed Mr. Odoni as the incorporator and registered agent. (Doc. 836:182). Geraud

later testified that he had wanted to bank in England, as opposed to the U.S., so eventually Pope introduced him to Mr. Odoni, who set up accounts in London at Bank of America ("BOA"). (Doc. 838:74; 843:151-54). Geraud testified that he had Mr. Odoni set up the bank accounts so that he, Geraud, had direct access to the accounts and could see when the investor money would come into the accounts. (Doc. 843:191). He testified that he didn't authorize Mr. Odoni to look into the accounts and see what he was doing with the money that came in. (Doc. 843:192). He testified that that information was on a "need-to-know basis". (Doc. 843:192).

Geraud explained that the investor funds in the FOREX market were distributed through the escrow agents and that Mr. Odoni received 5%, which he split with Gunter and Pope, while the remaining 95% went to Continental Clearing (the clearing firm affiliated with Geraud's currency firm, Hartford Management Group. (Doc. 843:139-46, 156, 188). Geraud testified that from the escrow agent's standpoint, the foreign currency business appeared to be legitimate. (Doc. 843:190-91).

Eventually the bank accounts at BOA in London were frozen. (Doc. 837:22; 843:157). Geraud testified that after the funds were frozen he had a meeting with his two partners, Justin Schum and Jeff Jedlicki in Barcelona. (Doc. 844:5). He also testified he had meetings with Brian Giefing, Jedlicki, Schum, Pope, and Mr. Odoni regarding how to get the funds released and sent to them or back to the

investors. (Doc. 843:158). First, Giefing contacted law enforcement in London to try to get the funds released. (Doc. 843:159; 844:47). Geraud listened into that phone call and later testified that Giefing made false statements about the activity. (Doc. 844:47). When the funds weren't released at that time, Mr. Odoni tried to contact law enforcement and provide them with documentation to clear the matter. (Doc. 843:159-60; 844:47). Geraud would testify that he did not have a meeting with Mr. Odoni regarding this and that he did not listen to the conversation Mr. Odoni had had with law enforcement. (Doc. 844:48). Geraud, thereafter, closed down the FOREX company and had what he termed a "shredding party." (Doc. 843:159-60; 843:192). He would later testify that there existed no need for Mr. Odoni to know about the shredding parties. (Doc. 843:159-60; 843:192).

Mr. Odoni later moved to the Dominican Republic. (Doc. 843:161-63). Pope testified that Mr. Odoni relocated to the Dominican Republic in the Fall of 2006 because he was going to work at a resort property Gunter and Pope had purchased there. (Doc. 837:25-26; 838:75). According to Pope, Mr. Odoni was to tend to the property and make sure everything was running correctly. (Doc. 837:25). Pope testified that Mr. Odoni expressed a desire to have an interest in the property in the Dominican, but that it never came to fruition. (Doc. 837:26-27). Pope explained that Mr. Odoni received a small salary for his work in the Dominican. (Doc.

838:75-76). Mr. Odoni continued to reside and work in the Dominican Republic until his arrest in April of 2009. (Doc. 838:76).

Mr. Odoni's Abduction from the Dominican Republic and the Pretrial Motion to Dismiss Related Thereto

As discussed above, Mr. Odoni, a citizen of the United Kingdom, was lawfully residing and working in the Dominican Republic when the indictment came down in the instant case. (Doc. 396:1.) By 2009, Mr. Odoni had married a resident of the Dominican Republic and had a child on the way. (Doc. 396:4 and Ex. A.) On March 24, 2009, however, five armed Dominican agents arrived at the home of Mr. Odoni and his wife and told Mr. Odoni that he needed to accompany them to Santa Domingo, which was located a three hour car ride away from Mr. Odoni's home. (Doc. 396:2.) To entice his cooperation, the agents untruthfully told Mr. Odoni that a problem had arisen regarding his residency status. (Doc. 396:2.) The Dominican officials never told Mr. Odoni of the real reason for his abduction. (Doc. 396:2.)

Upon arriving in Santo Domingo, the agents held Mr. Odoni in jail and did not provide him with an opportunity to speak with counsel. (Doc. 396:2.) They, likewise, did not take Mr. Odoni before any judge, magistrate, or any other government official. (Doc. 396:2.) After spending a night in jail, the agents forced Mr. Odoni to board a commercial aircraft bound for Miami, Florida. (Doc. 396:2.)

Immediately upon boarding the plane, U.S. Marshals arrested and handcuffed Mr. Odoni. (Doc. 396:2.)

Sometime after arriving in Miami, Mr. Odoni, appeared before a United States Magistrate in the Southern District of Florida, and was subsequently transported to the Middle District of Florida, to answer to the indictment in the instant case. (Doc. 396:3.) He has been held in custody without bond ever since.

Prior to trial, Mr. Odoni filed a motion to dismiss the indictment, setting forth that his abduction from the Dominican Republic ran afoul of the extradition treaty between the United States and the Dominican Republic and that the Government thereby lacked jurisdiction to try him. (Doc. 396.) Mr. Odoni established in the motion that the sole basis for his abduction was a request made by the United States Attorney's Office allegedly to the government of the Dominican Republic to render Mr. Odoni to the U.S. agents. (Doc. 396.)

The trial court went on to deny the motion, relying on the *Ker-Frisbie* doctrine. In its order, the court reasoned that the treaty said "nothing about the obligations of the United States and the Dominican Republic to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the treaty if such an abduction occurs." (Doc. 402:2.) The court further relied on a particular passage of the treaty, which stated "[u]nder stipulations of this convention, neither of the Contracting Parties shall be bound to

deliver up its own citizens or subjects" and concluded that that clause "does not specify a single means by which one country may gain custody of a national, or a foreign national, of the other country for purposes of prosecution." (Doc. 402:2.)

Mr. Odoni's Defense

The case later proceeded to trial as set forth above. In defense to the allegations against him, Mr. Odoni set forth that "he was not a knowing participant or a willful participant in any criminal conspiracy" and that "he had absolutely no idea that his involvement in this relationship was in any way assisting the perpetration of a fraud." (Doc. 833:52). After opening statements, the district court observed that both Mr. Odoni and co-defendant Gunter were conceding that "the domestic transactions being alleged were criminal as it relates to participants Pope and Hartman and their friends and cohorts and the foreign transactions such that the real dispute is the question of the knowledge and intent of" Mr. Odoni and co-defendant Gunter. (Doc. 833:56). Based on the evidence adduced at trial, the district court found that the jury instruction on "good faith" defense was proper. (Doc. 848:158).

During trial and, more specifically during closing argument, Mr. Odoni, through counsel, argued that various "snapshots of innocence" were present in the Government's case. (Doc. 848:95-98.) One such snapshot of innocence, counsel argued, was seen in Government Exhibit 1131B. (Doc. 848:95-97.) Exhibit 1131B

consisted of a spreadsheet prepared by a Government auditor that purported to chronicle payments that Mr. Odoni received during the course of the events at issue. (Doc. 848:95-97.) One such payment was alleged to have been a $300,000 payment that went to a company listed only as "International." (Doc. 848:95-97.) That $300,000 payment was substantially greater than any other payment listed on the "Money to Simon Odoni" spreadsheet. (Doc. 848:95-97.) The Government, however, presented no evidence linking that payment to Mr. Odoni. (Doc. 848:95-97.) Indeed, the Government could present no evidence regarding the destination of that payment other than the fact that it went to an entity with the word "International" in its name. (Doc. 848:95-97.) Counsel, thereby, strenuously argued that the $300,000 payment could not be linked to Mr. Odoni in any plausible manner and that Exhibit 1131B, in turn, demonstrated Mr. Odoni's innocence. (Doc. 848:95-97.)

In addition, counsel also argued additional "snapshots of innocence," including the fact that Mr. Odoni earned $153,000 in a 19 month period, while those responsible for the schemes were making millions of dollars and the fact that Mr. Odoni was additionally paid in large sums of restricted shares of Nanoforce stock, which anyone with knowledge of the conspiracy would know were worthless. (Doc. 848:95-98.)

The Jury Question and the Motion for New Trial Related Thereto

As the trial came to a close in the case, Mr. Odoni's lead counsel informed the court that if the jury's deliberations went into the upcoming Friday, April 19, 2013, he would have another pressing matter to attend to in a different court. (Doc. 846:208-10.) He, thereby, requested permission to allow Mr. Odoni's co-counsel to stand-in for him during any proceedings that might occur on that day. (Doc. 846:208-10.) The court, thereafter, inquired of Mr. Odoni as to whether he was in agreement with allowing co-counsel to stand-in for lead counsel. (Doc. 816:2-3.) Mr. Odoni confirmed that he was. (Doc. 816:2-3.) The court did not, however, inquire into or otherwise ask Mr. Odoni if he agreed to waive his own presence during any proceedings that might occur on the date in question. (Doc. 816:2-3.)

On Friday, April 19, 2013, the jury had, in fact, continued its deliberations. (Doc. 816:2-3.) During the course of the deliberations that day, the jury submitted a question to the court, stating "We are missing [Exhibit] 1133B [.] Could we please have a new copy?" (Doc. 816:3.) The court, thereafter, conducted a telephonic meeting with Mr. Odoni's co-counsel, Mr. Gunter's two attorneys, and one of the Government's attorneys. (Doc. 816:3.) Mr. Odoni himself was not a party to that meeting. (Doc. 849.) In the meeting, the court informed the attorneys:

> We have just gotten a question from the jury. I hated to disturb you, it's a simple question, I think. It says "We are missing 1133B, could we have a new copy?" There is no 1133B. We assume they mean 1130B, which is the Quick Books summary chart, but I don't know

> whether there's any objection to the Court just telling them there is no 1133B, perhaps you are referring to 1130B, and then just let them look at that. If that's not what they want, then they can ask us a follow-up question.

(Doc. 816:2.) In response, the Government stated "my only suggestion would be that . . . they could be thinking about . . . 1130B, 1131B or 1132B, because I think those are all possibilities given that they asked for an exhibit that ended in the letter B..." (Doc. 816:2.) Mr. Odoni's co-counsel then stated: "Judge, our preference would be that the Court simply tell them that they have all the exhibits [admitted in this case]." (Doc. 816:2.) To that, the Court responded: "Well, I can tell them there is no 1133B, they have all the exhibits, but I don't want them rummaging around looking for an 1133B. (Doc. 816:2.) The court went on to answer the jury, stating: "There is no Exhibit 1133B. You have all the exhibits that have been admitted. Thank you." (Doc. 816:2.)

The jury rendered guilty verdicts as to Mr. Odoni and co-defendant Gunter later that day. (Doc. 779, 780.)

After the verdict was rendered, Mr. Odoni became aware of the jury question discussed above. (Doc. 794.) Mr. Odoni's lead counsel, likewise, had not been aware of the jury question until after it had been answered. (Doc. 794.) When Mr. Odoni and lead counsel learned of the jury's question, they both surmised that the jury's reference to "Exhibit 1133B" was likely a mistaken

reference to Exhibit 1131B, which, as set forth above, was one of the "snapshots of innocence" relied on in Mr. Odoni's defense. (Doc. 794.)

Based on the jury question issue, Mr. Odoni filed a motion for new trial setting forth that when the jury was informed that "Exhibit 1133B" did not exist, it was likely left to believe that the Exhibit 1131B snapshot of innocence did not exist. (Doc. 794.) The motion also set forth that, had either Mr. Odoni or his lead counsel been aware of the jury's question, they would have pointed out the likely mistake regarding the exhibit number and would have, in turn, asked the court to make an inquiry of the jury as to whether it had erroneously referred to the wrong exhibit number in its question. (Doc. 794.)

In denying the motion for new trial, the court first reasoned that Mr. Odoni was not entitled to relief based on the fact that his lead counsel was not present during the meeting regarding the jury question because Mr. Odoni had agreed to allow lead counsel to be absent for a specified time period during which the jury might be deliberating. (Doc. 816:5-6.) The court went on to also rule, however, that the fact that Mr. Odoni was not present entitled him to no relief:

> The Court finds Defendant's arguments unpersuasive. First, Defendant's speculation that "one must assume the jurors did not consider Exhibit 1131B" is groundless. With no objection from the parties, including Mr. Hernandez, who was Mr. Odoni's counsel during the telephonic meeting, the Court instructed the jury, in response to its inquiry, that it had all of the exhibits admitted into evidence. Further, the Court instructed the jury to consider all of the evidence admitted in the case…

> … Finally, as for Defendant's argument that he himself was not present for the meeting, Defendant himself agreed that "Mr. Hernandez would answer in regard to matters having to do with [him] only and with matters having to do with [him] and Mr. Gunter collectively." Further, as the Eleventh Circuit has stated, "the right to be present at every stage of trial does not confer upon the defendant the right to be present at every conference at which a matter pertinent to the case is discussed, or even at every conference with the trial judge at which a matter relative to the case is discussed." *U.S. v. Vasquez*, 732 F.2d 846, 848 (11th Cir. 1984)...Thus, Defendant has failed to demonstrate that either a miscarriage of justice occurred or that his substantial rights were jeopardized at trial.

(Doc. 816:5-6.)

Sentencing

The trial court conducted Mr. Odoni's sentencing proceeding on July 23, 2013. (Doc. 902.) The Presentence Report calculated Mr. Odoni's Guidelines range at total offense level at 45 and criminal history category of I and provided an advisory range of 5,400 months incarceration. (Doc. 902:13.) The court went on to impose a total sentence of 160 months incarceration, which consisted of 100 months concurrent on counts 1, 2, 3 and 18 through 36 and a consecutive term of 60 months on count 11, the illegal monetary transaction count. (Doc. 902:47.) In imposing the sentence, the court stated:

> To the extent that this reflects a reduction in the guidelines, the Court notes that this Defendant is less culpable than the Defendant just sentenced; that on the range of disparity, the Court finds his sentence is appropriate against the other Defendants who were involved in this offense behavior. This Defendant has reflected a substantial level of remorse for his conduct involved and by the -- even the assessment of

> his co-defendant, he is less culpable and his offense behavior was -- either ceased voluntarily or forced to be ceased by detection.

(Doc. 902:47.)

In comparison to Mr. Odoni, Mr. Gunter received a total sentence of 300 months of imprisonment. Nicolette Loisel, however, was sentenced to only 12 months and 1 day imprisonment, to be followed by 36 months of probation. (PSR at 4.) That sentence was later amended to 48 months of probation. (PSR at 4.) Roger Shoss was similarly sentenced to 18 months imprisonment, to be followed by 36 months of probation. (PSR at 4.) Zibiah Gunter completed pre-trial diversion and the Government has administratively closed her case. (PSR at 4.) Richard Pope received a sentence of 57 months imprisonment to be followed by 36 months of probation. (Doc. 865.) Lawrence Hartman's sentencing remains pending. (Doc. 958.).

(iii) Standards of Review

As to Issue I, this Court reviews the sufficiency of the evidence *de novo*. *United States v. McCrimmon*, 362 F.3d 725, 728 (11th Cir. 2004). In conducting that review, the Court "views the evidence in the light most favorable to the government, making all reasonable inferences and credibility choices in the government's favor to determine whether a rational jury could have found the defendant guilty beyond a reasonable doubt." *Id.*

As to Issue II, this Court reviews for abuse of discretion the district court's denial of a motion for new trial. *United States v. Vallejo*, 297 F.3d 1154, 1163 (11th Cir. 2002). The interpretation of any questions of law related to a motion should, however, be reviewed *de novo*. *United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997)

As to Issue III, this Court reviews the denial of a motion to dismiss for abuse of discretion, but the district court's resolution of any related questions of law *de novo*. *Id.*

As to Issue IV, the reasonableness of a sentence is reviewed under the abuse of discretion standard. *United States v. Kapordelis*, 569 F.3d 1291, 1316 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

The Government failed to prove with sufficient circumstantial evidence that Mr. Odoni had knowledge of the schemes to defraud that were orchestrated by Richard Pope and his cronies. Given the alleged functions carried out by Mr. Odoni, coupled with the totality of the circumstances surrounding Mr. Odoni's participation in the relevant conduct, no reasonable person in Mr. Odoni's position would have known or had reason to know that they were participating in an illegal scheme to defraud. Given Mr. Odoni's lack of knowledge of the illegal activity underlying this case, no reasonable trier of fact could not have had reasonable doubt as to Mr. Odoni's guilt on all of the charges set forth against him.

Aside from the insufficiency of the evidence, a miscarriage of justice arose when the district court conducted proceedings related to the question submitted by the jury during deliberations in Mr. Odoni's absence. Mr. Odoni had a right to be present during that critical stage of his trial. Had Mr. Odoni been present during the proceedings related to the jury question, he could have apprised the court of the jury's likely mistake regarding the exhibit numbers and requested the court to give an instruction that would clear up the jury's likely confusion. Because, however, Mr. Odoni was not present during the jury question proceedings, the jury was seemingly left to believe that Exhibit 1131B, on which Mr. Odoni's defense

heavily relied, was nonexistent. The district court, thereby, erred in denying Mr. Odoni's motion for new trial on those grounds.

In addition to the error in denying the motion for new trial, the district court erred as a matter of law in denying Mr. Odoni's motion to dismiss the indictment based on the Government's violation of the U.S.-Dominican Extradition Treaty when it had Mr. Odoni forcibly abducted from the Dominican Republic. As Mr. Odoni asserts below, the text of the U.S.-Dominican Extradition Treaty exempts the Treaty from the *Ker-Frisbie* doctrine, which the district court relied on in denying Mr. Odoni's motion to dismiss.

Lastly, the district court erred in sentencing Mr. Odoni to a term of 160 months imprisonment. Based on the applicable sentencing considerations set forth in 18 U.S.C. § 3553, most notably the need to avoid unwarranted sentencing disparities, the 160 month sentence was unduly harsh and was greater than necessary to fulfill the purposes of sentencing set forth in § 3553.

ARGUMENT AND CITATIONS OF AUTHORITY

I.

THE DISTRICT COURT ERRED IN DENYING MR. ODONI'S MOTION FOR JUDGMENTS OF ACQUITTAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT THE HE KNOWINGLY AND WILLFULLY PARTICIPATED IN THE SCHEMES TO DEFRAUD

The evidence presented against Appellant Simon Odoni at trial was insufficient to prove that he knowingly and willfully participated in the fraudulent "penny stock" or Forex schemes. On the contrary, the evidence established that Mr. Odoni was nothing more than a pawn of those running the schemes, most notably Richard Pope who even testified at trial that Mr. Odoni was a "puppet." Pope and the other puppetmasters intentionally kept Mr. Odoni in the dark and asked him to perform various unwitting ministerial tasks that, unbeknownst to Mr. Odoni, ended up furthering the schemes to defraud. As Mr. Odoni argued at trial, and as he establishes below, he had no knowledge of or intent to participate in the schemes to defraud.

The various classes of the charges against Mr. Odoni are discussed separately below. Each of the charges, however, carried a knowledge element and each essentially required some form of proof that Mr. Odoni had knowledge of the unlawful activities that were being carried out in the schemes to defraud. Therefore, because the evidence was insufficient to prove that Mr. Odoni had the

requisite knowledge of the schemes or that he willfully participated in them, the evidence was insufficient to prove any of the charges for which Mr. Odoni was convicted.

The Government's case against Mr. Odoni relied almost exclusively on circumstantial evidence. Mr. Odoni is cognizant of the fact that a circumstantial evidence case does not need to "exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt." *United States v. Williams*, 390 F.3d 1319, 1324 (11th Cir. 2004) *citing United States v. Young*, 906 F.2d 615, 618 (11th Cir. 1990). On the other hand, this Court has held that it will reverse a conviction if it finds that "a reasonable mind must entertain reasonable doubt about the guilt of the defendants." *United States v. Parker*, 839 F.2d 1473, 1477 (11th Cir. 1988); *see also United States v. Simon*, 839 F.2d 1461, 1465 (11th Cir. 1988). As discussed with regard to the various charges below, no reasonable trier of fact could not have had reasonable doubt as to Mr. Odoni's purported guilt in the instant case.

A. Mr. Odoni did not have Knowledge of or Intent to Participate in the Scheme to Defraud Underlying the Wire Fraud, Mail Fraud, and Conspiracy to Commit Wire and Mail Fraud Charges

To prove the substantive charges of mail and wire fraud, the Government must prove that a defendant 1) intentionally participated in a scheme to defraud

and 2) that mailings or interstate wires were used in furtherance of the scheme to defraud. *United States v. Schmitz*, 634 F.3d 1247, 1260 (11th Cir. 2011) (concerning mail fraud); *United States v. Hasson*, 333 F.3d 1264, 1270 (11th Cir. 2003) (concerning wire fraud). More specifically as to the first element, a conviction for participation in a scheme to defraud requires proof that the defendant "had conscious, knowing intent to defraud." *Simon*, 839 F.2d at 1466 *citing United States v. Kreimer*, 609 F.2d 126, 128 (5th Cir. 1980). Mr. Odoni does not dispute that mailings and interstate wires were used in the perpetration of the schemes to defraud. He does, however, adamantly dispute that he had any knowledge of the schemes to defraud or that he, in turn, intentionally participated in the schemes. Consequently, the sufficiency of the evidence issue as to the substantive mail and wire fraud charges concerns only the first of the two elements of proof set forth above.

The offenses of conspiracy to commit fraud require proof of "(1) an agreement among two or more persons to achieve an unlawful objective; (2) knowing and voluntary participation in the agreement; and (3) an overt act by a conspirator in furtherance of the agreement." *Hasson*, 333 F.3d at 1270 *citing United States v. Adkinson*, 158 F.3d 1147, 1153 (11th Cir.1998). Proof of an express agreement to commit a fraud is not required and the existence of a conspiracy "may be inferred from the actions of the actors or by the circumstantial

evidence of a scheme." *Parker*, 839 F.2d at 1478 *quoting United States v. Cole*, 755 F.2d 748, 755 (11th Cir. 1985). Nevertheless, as with the substantive charges of wire and mail fraud, proof of conspiracy to commit those offenses requires proof that "the defendant knowingly and voluntarily agreed to participate in a scheme to defraud." *Hasson*, 333 F.3d at 1270.

1. Similar Scheme to Defraud Cases

A scheme to defraud, which is at the heart of the fraud and conspiracy charges against Mr. Odoni "requires proof of material misrepresentations, or the omission or concealment of material facts, reasonably calculated to deceive persons of ordinary prudence." *Hasson*, 333 F.3d at 1270-71 (internal citations omitted). "A material misrepresentation is one having a natural tendency to influence, or capable of influencing, the decision maker to whom it is addressed." *Id.* at 1271. In the *Hasson* case, which is repeatedly cited above, for instance, the defendant, himself, made hundreds of misrepresentations over the life of the fraudulent jewelry conspiracy at issue in that case, and, as this Court found, "[t]he government established that [the defendant] repeatedly misrepresented the carat weight, color grading, and clarity grading of gems; misrepresented semi-precious gems, synthetic gems, or simulants as natural gems and diamonds; misrepresented stones that had been color- or clarity-treated as natural stones; and misrepresented the history or provenance of items sold." *Id.* Given those obvious

misrepresentations, the *Hasson* defendant's actions were more than mere puffery and were, instead, clear misrepresentations of fact that evidenced his knowledge of and intent to participate in the scheme to defraud.

In the instant case, while a scheme to defraud was undoubtedly afoot at the hands of Pope, Hartman, and others, Mr. Odoni's actions did not evidence, as in *Hasson*, any knowledge of or intent to participate in a scheme to defraud. On the contrary, Mr. Odoni carried out the duties that any company executive could be expected to carry out. Any reasonable person in Mr. Odoni's position would have taken the same actions without any reason to believe that he or she may have been participating in a scheme to defraud. Given Mr. Odoni's alleged role in the schemes at issue, the instant case presents a scenario similar to those addressed by this Court in the past cases of *United States v. Parker*, *supra*, 839 F.2d 1473 and *United States v. McCrimmon*, 362 F.3d 725 (11th Cir. 2004).

In *Parker*, the defendants were involved in the sale of short-term investment securities that were represented to purchasers to have been backed by a substantial quantity of government bonds. *Parker*, *supra*, 839 F.2d 1473. The scheme at issue was hatched during a manager's meeting of a financial firm that faced a serious cash flow deficit. *Id.* at 1475-76. During the meeting, the firm owner instructed the sellers to market the securities at issue as "zero coupon treasury instruments." *Id.* at 1476. He told the sellers that the securities were backed by $10 to $12

million in bonds that the company possessed in a vault located in another state. *Id.* He further informed the sellers that the securities they would be selling were "instruments" and not actual bonds. *Id.* He, similarly, instructed the sellers to represent to investors that the return the investors would reap from the "instruments" would be "earnings" as opposed "interest", as would normally be collected on a bond. *Id.* During that meeting, the company's attorney had allegedly informed the president that the proposed "instrument" would not be a registered security and, therefore, could be legally marketed. *Id.* The seller-defendants, nevertheless, went on to sell $6 million worth of the "instruments", representing to potential customers that the securities were back by $10 to $12 million in government bonds. *Id.* at 1477. Each time a customer purchased the securities, the sellers would send the purchaser a sales confirmation and a brochure that explained the investment. *Id.* at 1475. A law enforcement investigation later revealed, however, that the securities in question were backed only by $405,000 in bonds, as opposed to the $10 to $12 million that the sellers had alleged to potential purchasers. *Id.* at 1477.

Following the investigation, the owner of the investment firm and his four top salespersons were charged with mail fraud and conspiracy to commit mail fraud. *Id.* After all were convicted at trial, this Court reviewed the evidence on appeal and concluded that, while the defendants all shared a common goal of

making money and all took steps that resulted in violations of the law, the Government had not proven that they had entered into a common agreement to violate the law. *Id.* at 1478. As a result, this Court found, "[w]ithout evidence showing or tending to show a meeting of the minds to commit an unlawful act, the convictions cannot stand." *Id.*

More recently, this Court addressed another fraud case that was similar to, but markedly distinguishable, from the instant case in *United States v. McCrimmon*, *supra*, 362 F.3d 725. In *McCrimmon*, the defendant had been convicted of wire fraud, securities fraud, and money laundering based on his role as a sales agent working for a Ponzi scheme that was posing as a high-end investor's club. *Id.* at 727-28. In reviewing the sufficiency of the evidence of the case, this Court noted that several of the Ponzi scheme's investors testified to "a pattern of misrepresentations to potential clients that the [investment program] was working like clockwork and that his other clients were pleased with their returns, even though he knew that most of his investors were not getting paid monthly as promised, and were often paid short if they did receive a payment." *Id.* at 728. Based on those misrepresentations alone, however, this Court stated that it was not convinced that that evidence "permit[ed] an inference that [the defendant] knew the [investment] program was a fraud." *Id.* at 729. The Court went on to find, however, that evidence of the circumstances surrounding the investment scheme,

coupled with the actions on the part of the defendant, were sufficient to support a finding of guilt. *Id.* at 729-30. More specifically, the Court found that the nature of the scheme, which promised yearly returns of 360-480% was "patently absurd," "nonsensical," and that any legitimate broker would have known that the program was a fraud. *Id.* at 729-30. Essentially, the Court found that, under the circumstances, the *McCrimmon* defendant had at least been willfully ignorant and/or had had reckless disregard for the obvious truth.

2. The Instant Case

As discussed above, the perpetrators of the schemes to defraud purposefully kept Mr. Odoni in the dark as to the details of their scheme. While Mr. Odoni *incidentally* participated in the schemes to defraud, no competent evidence existed to suggest that he *intentionally* participated in the schemes. Similar to the securities at issue in *Parker*, and in contrast to the investments at issue in *McCrimmon*, the securities that Mr. Odoni dealt with in the course of his duties would have appeared to any reasonable person to be legitimate investments. Likewise, the duties that Mr. Odoni was asked to perform in the course of his employment were tasks that any reasonable person in Mr. Odoni's position would expect to perform. Furthermore, Mr. Odoni's role in the scheme mirrored the roles of Preston Valentine and Sean McCart, both of whom also served as heads of some

of the shell companies. In contrast to Mr. Odoni, however, Valentine and McCart were never charged with any offenses.

In its case against Mr. Odoni, the Government relied, circumstantially, on the various roles that Mr. Odoni carried out in the course of his business to suggest that he must have had knowledge of the schemes to defraud simply by virtue of the tasks he performed. Those tasks included transmitting payments at the direction of his superiors, opening bank accounts, creating a website and a press release, and serving as a figurehead president of one of the shell companies. In performing those tasks, Mr. Odoni played the role of the quintessential patsy. In carrying out such roles as serving as president and opening bank accounts, Mr. Odoni was performing the functions that put his name out in the open and clearly tied him to the fraud. Certainly, no reasonable person who had knowledge of the fraud would have taken on such roles. On the contrary, those who had knowledge of the fraud, such as Richard Pope, would have understandably wanted to recruit an unwitting puppet such as Mr. Odoni to carry out those functions. The fact that Mr. Odoni performed those tasks simply does not provide evidence to allow a reasonable trier of fact to conclude that Mr. Odoni had knowledge of the schemes to defraud. At best, Mr. Odoni was on the same level of culpability within the schemes as were the *Parker* salespersons.

In addition to the alleged ministerial functions carried out by Mr. Odoni, the Government's case relied on the circumstantial evidence of Mr. Odoni's contact with law enforcement and bank officials in the U.K. The evidence of Mr. Odoni's alleged minimal role in a purported cover-up did not, however, show that Mr. Odoni had knowledge of the fraud, but rather, showed only that Mr. Odoni wanted to protect the company he worked for from an undue government intrusion, which, for all Mr. Odoni may have known, could have been nothing more than a baseless investigation. Moreover, even assuming for purposes of argument that Mr. Odoni had had knowledge of some fraudulent activity at the point of the alleged cover-up, it would be quite reasonable to assume that Mr. Odoni was not informed of the alleged fraud until after the fraudulent activities had transpired.

In the end, the totality of the evidence was insufficient to support a finding that Mr. Odoni had knowledge of the schemes to defraud. Without having knowledge of the schemes, he certainly could not have participated in them intentionally or willfully. The Government's case attempted to present a mirage of intent based on the facts that Mr. Odoni unwitting carried out tasks at the bidding of Pope and others. When examining the evidence objectively, however, one can see that the Government's case, even in a light most favorable to the Government, was devoid of any competent evidence to prove that Mr. Odoni had knowledge of the schemes to defraud. Without such knowledge, Mr. Odoni could not have

intentionally participated in the schemes to defraud no matter if his unwitting actions may have furthered those schemes. As such, no reasonable trier of fact could have found Mr. Odoni guilty of the mail and wire fraud or conspiracy to commit mail and wire fraud charges.

B. The Evidence was Similarly Insufficient to Sustain the Conviction for Conspiracy to Commit Money Laundering

Just as no reasonable jury could have found Mr. Odoni guilty of the charges of conspiracy to commit mail and wire fraud, no reasonable juror could have found Mr. Odoni guilty of the charge of conspiracy to commit money laundering based on the evidence presented at trial. The Government proceeded on multiple theories of money laundering conspiracy in this case: that the defendants conspired to violate 18 U.S.C. §§ 1956(a)(2)(A), 1956(a)(2)(B)(i), and 1957. Under those theories for the money laundering conspiracy charge, the Government had to prove (1) that Mr. Odoni knowingly transmitted or attempted to transmit a monetary instrument either from a place in the United States to a place outside the United States, or to a place in the United States from a place outside the United States, with the intent to promote the carrying on of specified unlawful activity, here, mail fraud and wire fraud, and/or (2) that he made or attempted such an international transmission knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer

was designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; and/or (3) that he knowingly engaged or attempted to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and that such property was derived from specified unlawful activity. 18 U.S.C. §§ 1956(a)(2)(A), 1956(a)(2)(B)(i) and 1957; *see also United States v. Molina*, 413 Fed. Appx. 210, 213, 2011 WL 445650 (11th Cir. 2011). More importantly, however, "[i]n the case of conspiracy to launder money, the 'essential aspect of the conspiracy charge' is that the defendant 'knew that the funds involved in the transactions represented the proceeds of unlawful activity.'" *Id. quoting United States v. Awan*, 966 F.2d 1415, 1434 (11th Cir. 1992). To have the requisite knowledge, Mr. Odoni must, in turn, have had knowledge of the existence of the scheme to defraud, as that scheme was the unlawful activity that was the source of the funds underlying the money laundering conspiracy.

As discussed in the preceding subsection, Mr. Odoni had no knowledge of the schemes to defraud and, instead, acted as an unwitting pawn led on by misrepresentations of the actual conspirators. Given the lack of evidence to prove Mr. Odoni's knowledge of or intent to participate in the scheme to defraud, the evidence was also insufficient to prove (1) that there was a meeting of the minds between Mr. Odoni and any alleged co-conspirator to launder money and (2) that

Mr. Odoni knew the essential objectives of the conspiracy. While Mr. Odoni did participate in some of the monetary transactions that the Government proposed to be overt acts in furtherance of the conspiracy, Mr. Odoni, like any reasonable person in his position, had no reason to know that the transactions involved the proceeds of illegal activity or that they were designed to cover up illegal activity.

Furthermore, since Mr. Odoni did not agree to participate in the alleged conspiracy, and he did not know the essential elements of the schemes to defraud, it follows that Mr. Odoni did not know that the funds he received were proceeds of such unlawful activity. Consequently, given the lack of competent evidence to prove knowledge that the scheme to defraud was afoot, no reasonable juror could not have had reasonable doubt as to Mr. Odoni's purported guilt on the charge of conspiracy to commit money laundering.

C. The Government Failed to Prove that Mr. Odoni Knowingly Dealt in Criminally Derived Property so as to Sustain the Illegal Monetary Transaction Conviction

Similar to the conspiracy to commit money laundering charge, the illegal monetary transactions statute under which Mr. Odoni was convicted, 18 U.S.C. 1957, requires that the defendant knowingly engaged or attempted to engage "in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity. *United States v. Silvestri*, 409 F.3d 1311, 1333 (11th Cir. 2005). The statute goes on to provide that **"**the Government is not required to prove the defendant knew that the offense from

which the criminally derived property was derived was specified unlawful activity." 18 U.S.C. § 1957(c).[3] Still, the statute quite clearly requires proof that the defendant knew that the property at issue in the monetary transaction was "criminally derived." The statute defines the term "criminally derived property" as "any property constituting, or derived from, proceeds obtained from a criminal offense." *Id.* at (f)(2).

The one illegal monetary transaction charged against Mr. Odoni was a $13,000 wire from a Wachovia bank account in the name of Business Administration Escrow Service Escrow II to an account in Mr. Odoni's name in the U.K. at National Westminster Bank. The superseding indictment alleged that the transaction was carried out by Mr. Odoni, Paul Gunter, and Zibiah Gunter. (Doc. 160:42.) For Mr. Odoni's role in that transaction, the evidence presented at trial showed that that transaction was nothing more than a transaction carried out in the regular course of Mr. Odoni's business. The evidence failed to suggest that a reasonable person in Mr. Odoni's position would have had reason to believe that the transaction involved criminally derived property. Furthermore, the amount of the transaction at issue was a drop in the bucket compared to the money that was changing hands between the actors behind the scheme to defraud. Indeed, the

[3] 18 U.S.C. § 1957 cross-references section 1956 for a definition of the term "specified unlawful activity." 18 U.S.C. § 1956(c)(7), in turn, defines "specified unlawful activity" as several specified classes of criminal offenses, including various financial frauds.

$13,000 at issue in that transaction was the lowest amount of any of the 14 illegal monetary transactions set forth in the indictment, most of which exceeded $100,000. *See* Doc 160:40-44. Neither the amount of the transaction, nor the circumstances under which it took place, would have caused Mr. Odoni or any other reasonable person in his position to believe that the funds involved in that transaction were criminally derived. As such, the evidence was insufficient to support a finding of guilt as to the illegal monetary transaction charge.

II.

THE DISTRICT COURT ERRED IN DENYING THE MOTION FOR NEW TRIAL BASED ON MR. ODONI'S ABSENCE FROM PROCEEDINGS RELATING TO A QUESTION SUBMITTED BY THE JURY DURING DELIBERATIONS

Mr. Odoni suffered a miscarriage of justice when the district court considered and answered the jury question regarding "Exhibit 1133B" in Mr. Odoni's absence. Given the jury's likely error with regards to the exhibit number referenced in its question to the court, coupled with the great significance of Exhibit 1131B to Mr. Odoni's defense, the nature of the jury question casts serious doubt on the propriety of the jury's verdict. Exhibit 1131B was one of the most, if not *the* most, significant snapshot of innocence that Mr. Odoni's counsel relied on during his closing argument. Given the significance of Exhibit 1131B, coupled

with the fact that an "Exhibit 1133B" did not exist, it only makes sense that the jury was mistakenly referring to Exhibit 1131B when it presented its question to the district court. However, when the jurors were advised that the "Exhibit 1133B" they had requested did not exist, they quite likely concluded that Mr. Odoni's counsel somehow misled them about a non-existent exhibit. Likewise, given that the jurors were informed that that exhibit did not exist, if the jury was mistakenly referring to Exhibit 1131B, one must assume that the jurors did not consider Exhibit 1131B during their deliberations. Given the significance of Exhibit 1131B to Mr. Odoni's case, had Mr. Odoni been aware of the jury question and had the opportunity to ask the court to take the appropriate action regarding the likely confusion over the exhibit numbers, the result of the trial would have likely been different. While Mr. Odoni did agree to allow his co-counsel to stand in for his lead counsel during any proceedings that may arise during the time period in question, he did not waive his own right to be present during any such proceedings. The district court, consequently, erred in denying Mr. Odoni's motion for new trial.

A. The Applicable Law

Federal Rule of Criminal Procedure 43(a) provides that:

> "Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:
> (1) the initial appearance, the initial arraignment, and the plea;

> (2) every trial stage, including jury impanelment and the return of the verdict; and
> (3) sentencing.

FED. R. CRIM. P. 43(a). The only exceptions that Rule 43 provides for are 1) when the defendant is an organization, 2) when the case involves only misdemeanor charges and certain other prerequisites are met, 3) when a "proceeding involves only a conference or hearing on a question of law," and 4) when a hearing involves only a sentencing correction. FED. R. CRIM. P. 43(b).

The Supreme Court, in *Rogers v. United States*, recognized that "Federal Rule Crim. Proc. 43 guarantees to a defendant in a criminal trial the right to be present 'at every stage of the trial including the impaneling of the jury and the return of the verdict.'" *Rogers v. United States*, 422 U.S. 35, 39, 95 S.Ct 2091 (1975). In a scenario very similar to the instant case, the Court in *Rogers* ultimately reversed the defendant's conviction based on the trial court having answered a jury question of whether it would accept a verdict of "guilty with extreme mercy" without having informed the defendant or his counsel of the question prior to answering it. In so holding, the Court reasoned "[c]ases interpreting the Rule make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court and that petitioner's counsel should have been given an opportunity to be heard before the trial judge responded." *Id.*; *see also United States v. Wright*, 392

F.3d 1269, 1280 (11th Cir. 2004) (adhering to *Rogers* and finding error, albeit harmless, in the district court's furnishing the jury with a ruler, in response to a jury request during deliberations, without informing the defendant or counsel of the jury communication); *United States v. Desir*, 257 F.3d 1233 (11th Cir. 2001) (addressing an issue separate from the instant issue, but reasoning that responding to a jury question was a critical stage of trial).

B. The Instant Case

The instant case exemplifies the need for a defendant to be present during a court's answer to a jury question. While a question may appear, as it likely did in this case, to be one that calls for a very simple answer, a defendant is in a unique position to have knowledge that may establish that the question calls for a more complex answer. Moreover, when, as in this case, the trial has gone on for several weeks and the evidence comprises thousands of documents, the need for the defendant to be present during all critical stages is even more crucial.

Rule 43 afforded Mr. Odoni a right to be present during any proceedings related to the jury question at issue. To be sure, in the aforementioned *Wright* case, this Court found error in the preclusion of the defendant from proceedings even when the proceedings related to something as simple as a request for a ruler. In contrast to the *Wright* case, however, Mr. Odoni's preclusion from the proceedings in this case resulted in more than harmless error. Indeed, had Mr.

Odoni been present for proceedings regarding the jury question, the apparent discrepancy over the "Exhibit 1133B" could have easily been cleared up. The district court was correct in concluding in its order denying the motion for new trial that we must speculate as to whether the jury was mistakenly referring to Exhibit 1131B when it make the request for the non-existent "Exhibit 1133B." However, had Mr. Odoni simply been present during the proceedings relating to the jury question, he could have requested the court to make an appropriate inquiry to dispel any such concern. Under the circumstances, however, Mr. Odoni's preclusion from those proceedings resulted in prejudice and likely altered the outcome of the trial. The failure to inform Mr. Odoni of the jury question and to secure his presence at any proceedings related thereto violated Rule 43 and was contrary to *Rogers* and its progeny. As a result, the district court erred in denying Mr. Odoni's motion for new trial.

III.

THE DISTRICT COURT ERRED AS A MATTER OF LAW IN DENYING THE MOTION TO DISMISS THE INDICTMENT BASED ON THE GOVERNMENT'S VIOLATION OF THE U.S.-DOMINICAN EXTRADITION TREATY

Without regard for the extradition treaty in place between the United States and the Dominican Republic, the Government orchestrated Mr. Odoni's abduction from his home at the hands of Dominican agents acting on behalf of U.S. Marshals.

The Marshals, thereafter, took Mr. Odoni into custody on Dominican soil and then transported him to the United States against his will. At no point prior to reaching U.S. soil was Mr. Odoni afforded the assistance of counsel or presented before any Dominican officials. The Government followed virtually none of the provisions agreed to in the U.S.-Dominican Extradition Treaty. While Mr. Odoni recognizes the *Ker-Frisbie* doctrine and the applicable precedent that has applied that doctrine in recent years, he submits, as discussed below, that the text of the U.S.-Dominican Treaty essentially holds that the extradition treaty is the only means by which the parties to the Treaty are to seek to obtain an alleged fugitive from the other country. As a result, *Ker-Frisbie* would not preclude Mr. Odoni from relief. The district court, consequently, misapplied the *Ker-Frisbie* doctrine and, thereby, erred as a matter of law in denying Mr. Odoni's motion to dismiss the indictment based on the alleged violation of the extradition treaty.

A. *Alvarez-Machain* and the *Ker-Frisbie* Doctrine

What has come to be known as the *Ker-Frisbie* doctrine "holds that a criminal defendant cannot defeat personal jurisdiction by asserting the illegality of the procurement of his presence in the relevant jurisdiction…" *United States v. Arbane*, 446 F.3d 1223, 1225 (11th Cir. 2006). The one exception to the *Ker-Frisbie* doctrine, however, is when "an extradition treaty contains an explicit provision making the treaty the exclusive means by which a defendant's presence

may be secured." *Id. citing United States v. Alvarez-Machain*, 504 U.S. 655, 664, 112 S.Ct 2188 (1992).

In the first namesake case of the *Ker-Frisbie* doctrine, *Ker v. Illinois*, 119 U.S. 436, 7 S.Ct 225 (1886), the defendant had been forcibly abducted from Peru by a private messenger and was brought to Illinois to be tried on a larceny charge. *Alvarez-Machain*, 504 U.S. at 660. The Court concluded that the defendant had not been brought to the United States under an extradition treaty and that his forcible abduction at the hands of a private individual was not a basis to exempt him for prosecution in the United States. *Id.* at 660-61 *citing Ker*, 119 U.S. at 444. In the *Frisbie* case, which was decided many years later, the Court extended the *Ker* rule to a situation in which the defendant was kidnapped in Chicago by Michigan law enforcement and taken to Michigan to be tried in a criminal case. *Alvarez-Machain*, 504 U.S. at 661 *citing Frisbie v. Collins*, 342 U.S. 519, 72 S.Ct 509 (1952).

More recently, in *Alvarez-Machain*, the Supreme Court addressed the *Ker-Frisbie* doctrine to decide "whether a criminal defendant, abducted to the United States from a nation with which it has an extradition treaty, thereby acquires a defense to the jurisdiction of this country's courts." *Alvarez-Machain*, 504 U.S. at 657. In that case, the defendant, a doctor who had allegedly participated in the murder of a DEA agent, had been forcibly abducted from his medical office in

Mexico and brought to the United States to answer to an indictment. *Id.* The district court presiding over the indictment later found that the DEA was responsible for the abduction even though it did not actually carry it out. *Id.* In analyzing the applicable United States-Mexico Extradition Treaty in light of the *Ker-Frisbie* reasoning, the Court noted that the Treaty said "nothing about the obligations of the United States and Mexico to refrain from forcible abductions of people from the territory of the other nation, or the consequences under the Treaty if such an abduction occurs." *Id.* at 663. The Court went on to reason that "the language of the Treaty, in the context of its history, does not support the proposition that the Treaty prohibits abductions outside of its terms." *Id.* at 666. It then turned to the remaining question of "whether the Treaty should be interpreted so as to include an implied term prohibiting prosecution where the defendant's presence is obtained by means other than those established by the Treaty." *Id.* In the end, the Court answered that question in the negative. *Id.* 668. The Court found that, while the abduction of the *Alvarez-Machain* defendant may be "shocking" and "in violation of general international law principles," it did not violate the United States-Mexico Extradition Treaty because the Treaty did not expressly prohibit kidnappings or state that it was the only means by which one of the countries could obtain an individual located in the other country. *Id.* at 669-70.

A few years after *Alvarez-Machain*, this Court analyzed the *Ker-Frisbie* doctrine and the *Alvarez-Machain* holding with regard to the United States-Panamanian Extradition Treaty. *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997). In deciding the issue of whether the defendant's abduction to the United States violated the Treaty, the Court noted that the defendant had not cited to specific language in the Treaty that would have supported a violation, but instead, included the claim as part of a broader Geneva Convention claim. *Id*. at 1213 n.4. The Court, nevertheless, went on to analyze the language of the treaty and noted that the only potential limiting language was a clause of the treaty that was very similar to a clause contained in the Mexican treaty that the Supreme Court also considered in *Alvarez-Machain*. That clause provided: "Neither of the contracting parties shall be bound to deliver up its own citizen or subject..." *Id.* at 1213. This Court, like the Supreme Court in *Alvarez-Machain*, reasoned that that clause, along with the rest of the extradition treaty, "'fail[ed] to specify the only way in which one country may gain custody of a national of the other country for purposes of prosecution.'" *Id*. *quoting Alvarez-Machain*, 504 U.S. at 663-64.)

B. The U.S.-Dominican Extradition Treaty Falls into the Recognized Exception to the *Ker-Frisbie* Doctrine

The extradition treaty in force between the United States and the Dominican Republic ("U.S.-Dominican Extradition Treaty") is entitled the *Convention for the Mutual Extradition of Fugitives from Justice*. (signed June 19, 1909, entered into

force August 2, 1910; 36 Stat. 2468.) [4] The Treaty provides procedures for the arrest and transfer of fugitives and suspects between the two countries. The Treaty applies to all fugitive "persons" and contains no requirement that an individual be a citizen of either nation state to be subject to the provisions of extradition. In addition, the Treaty provides for a wide range of offenses that are covered under the Treaty, including very broadly defined financial crimes. Given those provisions of the Treaty, the Treaty would apply to Mr. Odoni and the alleged offenses at issue in this case, should the Court find that the Treaty falls outside of the *Ker-Frisbie* doctrine.

In reasoning that the *Ker-Frisbie* doctrine applied to the U.S.-Dominican Treaty, the trial court relied in part on Article VIII of the Treaty which states, "[u]nder stipulations of this convention, neither of the Contracting Parties shall be bound to deliver up its own citizens or subjects" and reasoned that "that Article

[4] This Court considered an extradition treaty violation claim involving a defendant taken from the Dominican Republic in an unpublished opinion, *United States v. Gardiner*, 279 Fed.Appx. 848, 2008 WL 2204590 (11th Cir. 2008). In that case, however, the Court noted that the defendant had not referred to any express language of the Dominican Treaty that would have exempted it from the *Ker-Frisbie* doctrine. *Id.* The Court did not, thereby, address the text of the Dominican Treaty or reach the specific question set forth in the instant appeal. *Id.* The Fifth Circuit, prior to the creation of the Eleventh Circuit, also addressed a *Ker-Frisbie* issue in a case involving a bail-jumper who was apprehended in the Dominican Republic. *United States v. Lopez*, 542 F.2d 283 (5th Cir. 1976). That case, which was decided prior to *Alvarez-Machain*, revolved around whether the actions of law enforcement triggered an exception then recognized by the Second Circuit in *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974).

does not specify a single means by which one country may gain custody of a national, or a foreign national, of the other country for purposes of prosecution." Doc. 402 at 2. To be sure, as discussed above, the treaties considered in both *Alvarez-Machain* and *Noriega* contained very similar clauses that this Court and the Supreme Court found did not expressly limit the applicability of the treaties so as to fall within the *Ker-Frisbie* exception. In addition to that particular clause, however, the U.S.-Dominican Treaty also contains the following provisions, quoted in relevant part:

> *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…*

U.S.-Dominican Extradition Treaty at Art. XI (emphasis added). [5]

While the Dominican Treaty does not explicitly forbid kidnapping or directly state that extradition is the only means by which a person may be sought, it does very plainly state that it applies to all territories of the contracting countries.

[5] The U.S.-Panamanian Extradition Treaty contains a similar clause, though it is contained in a less detailed and less encompassing article. U.S.-Panamanian Extradition Treaty at Art. III.

More importantly, the text of Article XI of the Dominican Treaty does not refer to provisions for "extradition" alone, but rather, refers to any requests for the surrender of purported fugitives. Given the wording of Article XI, it only makes sense that the drafters of the Treaty intended for it to be the only means by which individuals would be transferred among the two countries. Under the circumstances, Article XI is essentially an express provision requiring that the Treaty be the only means by which the two countries would make requests for the procurement of one of the other country's residents. As a result, the Dominican Treaty falls within the exception to the *Ker-Frisbie* doctrine recognized in *Alvarez-Machain* because it prohibits any methods of procurement other than extradition. Given the inapplicability of *Ker-Frisbie*, Mr. Odoni's abduction very clearly violated the U.S.-Dominican Extradition Treaty and the district court, thereby, erred as a matter of law in denying Mr. Odoni's motion to dismiss the indictment.

C. Should this Court Decline to Find that the U.S.-Dominican Treaty Falls within the Exception to the *Ker-Frisbie* Doctrine, Mr. Odoni Would Respectfully Request, in Good-Faith and for Purposes of Preserving the Record, that the Court not Adhere to *Ker-Frisbie*

In a detailed dissent to the *Alvarez-Machain* opinion, Justice Stevens, joined by Justices Blackmun and O'Connor, strongly criticized the majority's holding. *Alvarez-Machain*, 504 U.S. at 670-88 (Stevens, J., dissenting). Justice Stevens began his dissent by distinguishing the *Alvarez-Machain* case, which involved the Government's abduction of another country's citizen, from *Ker*, which involved an

abduction by a bounty hunter, and *Frisbie*, which involved "an American fugitive who committed a crime in one State and sought asylum in another." *Id.* at 670. Unlike *Ker* and *Frisbie*, the dissent reasoned, *Alvarez-Machain*, like the instant case, "involve[d] a violation of the territorial integrity of that other country, with which this country has signed an extradition treaty." *Id.* It went on to reason that, with such a treaty in place, the provisions of the treaty "'only make sense if they are understood as *requiring* each treaty signatory to comply with those procedures whenever it wishes to obtain jurisdiction over an individual who is located in another treaty nation.'" *Id.* at 674-74 *quoting United States v. Verdugo-Urquidez*, 939 F.2d 1341, 1351 (9th Cir. 1991).

After reviewing the Court's prior treatment of treaties and contemplating the need for and purpose of extradition treaties, the dissent reasoned with respect to the facts of *Alvarez-Machain*, "[w]hen done without consent of the foreign government, abducting a person from a foreign country is a gross violation of international law and gross disrespect for a norm high in the opinion of mankind. It is a blatant violation of the territorial integrity of another state; it eviscerates the extradition system (established by a comprehensive network of treaties involving virtually all states)." *Id.* at 681 *quoting* Henkin, A Decent Respect to the Opinions of Mankind, 25 John Marshall L.Rev. 215, 231 (1992) (footnote omitted). The dissent concluded by scathingly criticizing the majority's holding: "I suspect most

courts throughout the civilized world-will be deeply disturbed by the "monstrous" decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character." *Id.* at 687-88.

Given the dissenting opinion of *Alvarez-Machain*, Mr. Odoni respectfully submits that the majority's holding was inconsistent with prior precedent of the Supreme Court and resulted in a rule that allows for the violation of otherwise binding extradition treaties. Should this Court decline to find that Article XI of the U.S.-Dominican Extradition Treaty exempts the Treaty from the *Ker-Frisbie* doctrine, Mr. Odoni would respectfully request this Court to reconsider the *Ker-Frisbie* doctrine. Mr. Odoni certainly recognizes that *Alvarez-Machain* and *Ker-Frisbie* remain binding precedent. He includes the arguments in this subsection, however, in good-faith and for purposes of preserving the record.

IV.

THE DISTRICT COURT'S IMPOSITION OF THE 160 MONTH SENTENCE WAS UNREASONABLE AND CONTRARY TO THE SENTENCING CONSIDERATIONS SET FORTH IN 18 U.S.C. § 3553(a).

Mr. Odoni's 160 month sentence is substantively unreasonable given the totality of the circumstances. In imposing a sentence of such length, the district

court failed to adequately consider the many mitigating 18 U.S.C. § 3553(a) sentencing factors that were of relevance in this case, particularly Mr. Odoni's life history, his diminished role in the offense, and the proportionality of his sentence in comparison to the sentences imposed on the much more culpable purported co-conspirators. In the end, the 160 month sentence was greater than necessary to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553.

A. Procedural and Substantive Sentencing Error

In reviewing a sentence on appeal, this Court conducts a twofold analysis. *United States v. Alfaro-Moncada*, 607 F.3d 720, 734 (11th Cir. 2010). First, the Court reviews the sentence to determine if the district court made any procedural errors, including treating the Guidelines as mandatory or relying on clearly erroneous facts to determine the sentence. *Id.* Second, if the district court did not commit any procedural errors, the Court reviews the sentence to ensure that it is substantively reasonable under the totality of the circumstances. *Id* at 735.

While the Guidelines are not the only consideration that the district court must take into account at sentencing, the Guidelines are certainly central to the sentencing process. The Supreme Court has, thereby, recognized that "as a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark" at sentencing. *Gall v. United States*, 552 U.S. 38, 49. After properly calculating the Guidelines range, the district court

must then make an individualized assessment of the case and consider each of the factors set forth in 18 U.S.C. § 3553(a) before deciding upon a sentence. *Id.* at 49-51. Those factors include:

> (1) the nature and circumstances of the offense;
> (2) the history and characteristics of the defendant;
> (3) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment;
> (4) the need to protect the public; and
> (5) the Guidelines range, as well as
> (6) the kinds of sentences available;
> (7) the need to avoid sentencing disparities among similar defendants who have been found guilty; and
> (8) the need to provide restitution to victims of the offense.

United States v. Martin, 455 F.3d 1227, 1236 (11th Cir. 2006) (citations omitted).

B. Mr. Odoni's 160 Month Sentence was Substantively Unreasonable

Given the totality of the circumstances of this case, the district court committed substantive error in imposing Mr. Odoni's 160 month sentence. This Court has held that, "[i]n assessing the [sentencing] factors, the district court is 'to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.'" *Alfaro-Moncada*, 607 F.3d at 735 *quoting Gall*, 552 U.S. at 52. The district court failed to comply with that directive in the instant case.

At sentencing, the Government acknowledged that Mr. Odoni was "a lesser player" in comparison to the other defendants in the case. (Doc 902:41.) To be sure, Mr. Odoni was by far the least culpable of the defendants. Nevertheless, with the exception of Paul Gunter, all of the defendants who have been sentenced in this case to date have received sentences substantially below that of Mr. Odoni. Shoss and Loisel, who were responsible for the hijacking of the shell corporations, received sentences of one year and one day and 18 months, respectively. Zibiah Gunter, who gained more from the scheme than Mr. Odoni ever did and whose level of culpability exceeded that of Mr. Odoni, saw her case dismissed through pretrial diversion. Richard Pope, whose level of culpability towered over that of Mr. Odoni, received a term of imprisonment that was nearly one third as long as the term Mr. Odoni received. Furthermore, though the roles of Preston Valentine and Sean McCart in the relevant conduct were strikingly similar to the role Mr. Odoni played, Valentine and McCart were never even charged with a criminal offense.

While Mr. Odoni recognizes that various circumstances, including poor health and cooperation with the Government, contributed to the lesser sentences imposed on some of the various co-defendants, the vast disparity that has resulted between Mr. Odoni's sentence and the sentences of his more culpable co-defendants is simply unfounded. Given that Mr. Odoni received a sentence far

greater than any of the more culpable co-defendants (with the exception of Paul Gunter), the imposition of the 160 month sentence resulted in an unjust sentencing disparity that was clearly inconsistent with 18 U.S.C. § 3553(a).

As to the extrinsic § 3553(a) factors, the 160 month sentence was also not needed to provide just punishment, to protect the public, or to promote respect for the law. Mr. Odoni was an educated and successful businessman whose purported role in the relevant conduct, even when considered in a light most favorable to the Government, was minimal. At the time he was taken from his home in the Dominican Republic, Mr. Odoni had a newlywed wife and an unborn child. Mr. Odoni is now 56 years-old. Under the totality of the circumstances, Mr. Odoni will be of very little risk to reoffend and will be of an even lesser risk to the public upon his release from prison, particularly given that he will be deported from the United States.

Given the forgoing mitigating factors, the imposition of the 160 month sentence was unreasonable in this case. Mr. Odoni's sentence was far greater than necessary to fulfill the purposes of sentencing set out in 18 U.S.C. § 3553, most notably the need to avoid undue sentencing disparities. As a result, should this Court decline to grant a judgment of acquittal or new trial, Mr. Odoni would ask this Court to reverse and vacate the district court's judgment and remand this case for resentencing.

CONCLUSION

Based on the foregoing, Appellant Simon Odoni, respectfully requests that this Honorable Court reverse the judgment and sentence and remand this case to the district court with instructions to enter a judgment of acquittal on all of the charges against him in this case. In the alternative, Mr. Odoni would ask this Court to remand this case with instructions to conduct a new trial or, as a second alternative, to conduct a new sentencing hearing.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

The undersigned certifies that, pursuant to 11th Cir. R. 28-1, this Brief complies with the type-volume limitation of and FED. R. APP. P. 32(a)(7)(B) because it contains 13,821 words, excluding the parts exempted by FED. R. APP. P. 32(a)(7)(B)(iii). Microsoft Word software was used to count the words in the foregoing Brief. This Brief, likewise, complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the typestyle requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman font.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed using the CM/ECF system, which will send a notice of electronic filing to all counsel of record, on this 4th day of March, 2014.

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I FURTHER CERTIFY that seven hard copies of the foregoing brief were furnished to the Clerk of this Court by mail on this 4th day of March, 2014.

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