No.

Supreme Court of the United States

PATRICK EMEKA IFEDIBA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX

COMES NOW PETITIONER Patrick Emeka Ifediba and submits the attached appendix pursuant to Supreme Court Rules.

Patrick Emeka Ifediba
Petitioner
35822-001
P.O. Box 1032
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Date:

APPENDIX A
ORDER & JUDGMENT OF THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
DATED 8-25-22

United States v. Ifediba

United States Court of Appeals for the Eleventh Circuit

August 25, 2022, Filed

No. 20-13218

Reporter
46 F.4th 1225 *; 2022 U.S. App. LEXIS 24078 **; 29 Fla. L. Weekly Fed. C 1656

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus PATRICK EMEKA IFEDIBA, NGOZI JUSTINA OZULIGBO, Defendants-Appellants.UNITED STATES OF AMERICA, Plaintiff-Appellee, versus NGOZI JUSTINA OZULIGBO, Defendant-Appellant.

Prior History: [**1] Appeals from the United States District Court for the Northern District of Alabama. D.C. Docket No. 2:18-cr-00103-RDP-GMB-1.

Appeals from the United States District Court for the Northern District of Alabama. D.C. Docket No. 2:18-cr-00103-RDP-GMB-4.

United States v. Ifediba, 2019 U.S. Dist. LEXIS 22472, 2019 WL 568586 (N.D. Ala., Feb. 12, 2019)

Disposition: AFFIRMED.

Counsel: For UNITED STATES OF AMERICA, Plaintiff - Appellee (20-13218): Melissa K. Atwood, Michael B. Billingsley, U.S. Attorney Service - Northern District of Alabama, U.S. Attorney's Office, BIRMINGHAM, AL.

For PATRICK EMEKA IFEDIBA, Defendant - Appellant (20-13218): Dennis J. Knizley, Law Office of Dennis J. Knizley, MOBILE, AL; Anthony Chuma Ifediba, Ifediba Law Group, PC, BIRMINGHAM, AL.

For NGOZI JUSTINA OZULIGBO, Defendant - Appellant (20-13218): John C. Robbins, Attorney, Robbins Law Firm, BIRMINGHAM, AL.

Judges: Before JILL PRYOR, BRANCH, and ED CARNES, Circuit Judges.

Opinion by: JILL PRYOR

Opinion

[*1230] JILL PRYOR, Circuit Judge:

Siblings Patrick Ifediba and Ngozi Justina Ozuligbo appeal their convictions for health care fraud and related crimes. Ifediba, a physician, operated a clinic called CCMC[1] and employed Ozuligbo, a licensed practical nurse, there. The evidence at trial showed that CCMC prescribed large quantities of opioids to patients who had no medical need for [**2] them and ran an allergy-testing and treatment scheme in which it required insured patients to undergo allergy testing and prescribed them medication despite their negative allergy tests. The clinic billed Medicare and private insurers for the tests and treatments.

Ifediba and Ozuligbo were indicted on substantive counts of health care fraud, conspiracy to commit health care fraud, money laundering of the clinic's unlawful proceeds and conspiracy to commit that crime. Ifediba was indicted for unlawfully distributing controlled substances for no legitimate medical purpose and for operating CCMC as a "pill mill" to distribute the controlled substances to patients who had no medical need for them.

Before trial, the court excluded Ifediba's evidence of good care he provided to [*1231] his patients

[1] In the record, CCMC is referred to both as "Care Complete Medical Clinic" and "Complete Care Medical Clinic."

because it was intended to prove that his medical practice was legitimate. It also excluded Ozuligbo's evidence that cultural norms of their Nigerian heritage required her to obey her older brother, Ifediba. During trial, the district court dismissed an alternate juror when it came to light that the alternate had independently researched the case outside of court and discussed the case with coworkers. Though [**3] Ifediba and Ozuligbo asked the court to question the remaining jurors individually to discover whether the alternate had discussed her research with them, the court instructed the jury collectively instead. The court denied the defense's motion for a mistral. After a three-week trial featuring testimony by CCMC patients, medical experts, and law enforcement officials, the jury convicted Ifediba and Ozuligbo on all counts. The court sentenced Ifediba to 360 months of imprisonment and Ozuligbo to 36 months.

Ifediba appeals the district court's exclusion of his good-care evidence and its decision to address the jury collectively rather than individually. He also challenges the sufficiency of the evidence supporting those of his substantive health care fraud convictions that were based on evidence from medical records rather than patient testimony. And he appeals his sentence by disputing the district court's drug-quantity calculation on which the sentence was based. Ozuligbo appeals the court's exclusion of her cultural-defense evidence and the sufficiency of the evidence supporting her health care fraud conspiracy conviction. After careful consideration and with the benefit of oral argument, [**4] we affirm.

I. BACKGROUND[2]

In this section, we briefly introduce CCMC's controlled-substances distribution practice before focusing on the clinic's allergy fraud scheme, which was the basis for the health care fraud convictions. We then discuss the juror misconduct issue that arose at trial and the district court's resolution of it. Finally, we describe the defendants' convictions and sentences.

A. CCMC Operated as a Pill Mill and Required Insured Patients to Undergo Allergy Testing and Treatment.

Ifediba and his wife, Uchenna Ifediba ("Uchenna"), also a physician, were the only physicians at CCMC. Neither Ifediba nor his wife specialized in pain-management medicine, but they wrote many prescriptions for controlled substances—opioids, like oxycodone and fentanyl, and benzodiazepines, like Xanax. CCMC attracted patients who were willing to wait over three hours in a dirty, crowded waiting room to receive prescriptions for controlled substances. The clinic stayed open until 10:00 PM to accommodate them. After law enforcement received tips that CCMC was prescribing controlled substances to people who did not need them, the clinic became the subject of a Drug Enforcement Agency ("DEA") investigation. [**5]

Besides its opioid distribution, CCMC roped patients who had insurance into an allergy fraud scheme. The allergy scheme began after Ifediba met Clement Ebio. Ebio connected CCMC with Allergy Services of North America ("ASNA") and coordinated a joint undertaking by the two organizations. ASNA would provide the allergy-testing equipment and immunotherapy treatments, and Ifediba, through CCMC, would bill patients' insurance for the allergy services.

[*1232] The scheme was a simple one. Every insured patient who came to CCMC had to fill out a questionnaire on allergy symptoms before seeing the doctor. No matter the patient's answers, an allergy technician performed a skin-prick allergy test on the patient. Regardless of whether the test results were positive or negative, Ifediba prescribed immunotherapy to treat allergies and directed the

[2] Because Ifediba and Ozuligbo challenge the sufficiency of the evidence supporting some of their convictions, we recite the facts in the light most favorable to the jury's verdict. *United States v. Monroe*, 866 F.2d 1357, 1365 (11th Cir. 1989).

technicians to order the medication. Some patients without allergies actually received immunotherapy treatment; others did not. Either way, CCMC billed insurers over $500 per test and over $2,000 per patient for immunotherapy. By contrast, CCMC did not perform allergy tests on uninsured patients.

Ozuligbo had been working as the clinic's office manager, but Ifediba [**6] told Ebio to hire her as an ASNA allergy technician. Ebio balked at the request because ASNA had enough technicians and Ozuligbo would be paid twice as much as the others. He eventually relented, however, accepting that bringing her on was part of the "cost of doing business" with Ifediba. Doc. 251 at 85.[3]

As an allergy technician employed by ASNA but working on-site at CCMC, Ozuligbo was responsible for patient intake, drawing blood, performing allergy testing, and administering immunotherapy. She determined which insured patients would be tested after contacting patients' insurers to confirm coverage of the allergy tests and treatment. When a patient came in for an appointment, Ozuligbo filled out the paperwork required for the allergy test. If the patient expressed reluctance about taking the test, Ozuligbo persuaded him. At least one reluctant patient understood the allergy test to be "part of the process to see Dr. Patrick [Ifediba]." Doc. 248 at 105. Ozuligbo performed the tests and recorded the results.

Medical records introduced at trial showed that even when patients tested negative for allergies, Ifediba prescribed immunotherapy, and Ozuligbo distributed it to patients. Ozuligbo [**7] filled out patient files noting that she gave those patients the immunotherapy injections that Ifediba had prescribed. Once, she added a note to a patient's file that the patient's symptoms had improved after immunotherapy when, in fact, the patient had tested negative for allergies and had not received immunotherapy at all.

Other patients also failed to receive the immunotherapy treatment their insurers paid for. For example, a CCMC employee told one patient who had tested negative for allergies to come to the clinic to receive his allergy shot. He refused to get the shot and told CCMC not to bill his insurance for it. CCMC nonetheless billed his insurer $2,660 for allergy treatment. And when investigators executed a search warrant on CCMC, it found under a table a big box of "unopened and unused" vials of allergy immunotherapy medicine, apparently discarded. *Id.* at 133.

Insurer Blue Cross Blue Shield of Alabama ("BCBS") noticed the unusually high volume of allergy-related claims coming from CCMC and announced that it would audit the clinic. In preparation for the audit, Ifediba told clinic staff, including Ozuligbo, to change patient records, turning negative allergy test results to [**8] positive and marking allergy symptoms on the patient questionnaires. Yet BCBS managed to uncover the fact that patients had not needed the allergy tests or treatment. It requested a refund of about $220,000 in benefits paid to CCMC for allergy services. It also informed the Federal Bureau of Investigation ("FBI") that CCMC could be committing health care fraud. Because the government was already investigating Ifediba's controlled-substance prescription [*1233] practices, the FBI joined the DEA's existing investigation.

Agents searched CCMC's premises and, on the same day, interviewed Ozuligbo at her home. By that time, she had stopped working at the clinic. Ozuligbo initially answered the agents' questions about her work at CCMC. But when they brought out patient records showing that she had logged immunotherapy injections for patients who had tested negative for allergies, she refused to speak further.

A grand jury indicted Ifediba and Uchenna, charging them with multiple counts of unlawfully distributing controlled substances outside the

[3] "Doc." numbers refer to the district court's docket entries.

course of professional practice and for no legitimate medical purpose. They were also indicted for conspiracy to distribute the controlled substances and [**9] for using and maintaining CCMC for the purpose of distributing controlled substances. All these charges concerned the prescribing of pain-management substances.

The indictment also charged Ifediba, Uchenna, Ozuligbo, and Ebio with conspiracy to commit health care fraud through the allergy fraud scheme and substantive counts of health care fraud based on the records of specific patients. It further charged that Ifediba, Uchenna, and Ozuligbo laundered the proceeds of the illegal scheme. Uchenna, who had suffered a severe stroke, was dismissed from the case as incompetent. Ebio pled guilty to one count of conspiracy to commit health care fraud and agreed to testify against Ifediba and Ozuligbo.

Before trial, the government filed three motions *in limine* to exclude evidence that Ifediba and Ozuligbo planned to present. Two motions sought to exclude evidence of Ifediba's "good care"—legitimate medical treatment that he had provided to some patients. The third motion sought to exclude Ozuligbo's evidence of Nigerian cultural norms requiring her to obey her older brother. Over the defendants' opposition, the district court granted the governments' motions, concluding that Ifediba's good-care [**10] evidence was improper character evidence in that he sought to establish his innocence by showing that he acted lawfully on some occasions. The court also ruled that Ozuligbo's cultural defense was irrelevant and failed to establish duress.

B. The Jury Heard Evidence of Health Care Fraud.

The trial featured testimony from former CCMC patients, undercover law enforcement officers who had posed as patients, CCMC staff, insurance fraud investigators, medical experts, and co-conspirator Ebio.[4] The government also presented patient records to prove health care fraud: allergy questionnaires where the patient indicated no allergy symptoms, allergy tests showing negative results, prescriptions for immunotherapy for patients with negative results, immunotherapy treatment logs for those same patients, and bills to the patients' insurers. These records were the main support for four of the health care fraud counts. The patients whose fraudulent treatment was the subject of those counts did not testify. Instead, Special Agent P.J. Bullock, an FBI investigator, testified about their medical records. Fraud investigators for the insurers confirmed that the insurers received the allergy claims in question. [**11]

Bullock testified about Patient B.B.,[5] who indicated on the clinic's allergy questionnaire [*1234] that he thought he suffered from allergies. He signed an allergy test consent form, which Ifediba signed as well, and was tested. The test came back negative, but B.B. received a prescription for immunotherapy, signed by Ifediba, anyway. B.B.'s allergy therapy log showed that Ozuligbo gave him an immunotherapy injection. Bullock testified that CCMC billed Medicare $525 for the allergy test and $2,660 for the allergy injection.

Patient D.C.'s records were much the same. They showed that Ifediba signed D.C.'s allergy testing consent form. Her allergy test came back negative. Yet Ifediba prescribed her immunotherapy. Her records show that she received five injections, three of which were administered by Ozuligbo. According to Bullock, CCMC billed Medicare $525 for the allergy test and $2,660 for the allergy injections.

The allergy questionnaire of Patient R.C. indicated

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[4] Because the appellants raise no challenge to the sufficiency of the evidence supporting their convictions for controlled-substances offenses, we will not discuss the evidence supporting those offenses in detail.

[5] To protect the patients' privacy, the indictment referred to them by their initials, and we follow its lead. *See United States v. Poh*, 963 F.3d 1207, 1215 n.5 (11th Cir. 2020).

that he did not believe he suffered from allergies. Uchenna signed his allergy test consent form, ordered his allergy test, and signed his prescription for immunotherapy. Bullock testified that Uchenna and Ifediba together billed [**12] R.C.'s private insurer a total of $525 for an allergy test and $2,660 for immunotherapy treatment.

Patient V.T.'s records told a different, but equally disturbing, story. Her insurer received no bill for an allergy test. The investigation revealed no prescription for immunotherapy and no allergy therapy log showing injections. Records documenting a February visit to CCMC lacked any information about V.T. at that visit: no vital signs, assessments, or medical plan. Yet CCMC billed V.T.'s private insurer $2,850 for allergy treatment at this visit. Bullock testified, "They billed the expensive immunotherapy, but [there was] no record of any tests and no billing of actual tests being conducted, just the medication." Doc. 248 at 163.

The government's medical expert, Dr. Jim Christensen, told the jury that it was "[a]bsolutely not" appropriate to test patients for allergies just because their health insurance would pay for the test. Doc. 250 at 94. The defense team's medical expert agreed. Christensen further testified that it was inappropriate to prescribe immunotherapy to someone who had tested negative for allergies: "A board-certified allergist will not prescribe when the tests are negative." [**13] *Id.* at 122.

C. A Juror Misconduct Issue Arose.

At the close of the government's evidence, both defendants moved for a judgment of acquittal, which the court denied. At that time, the district court learned of an issue with a juror. A "concerned citizen" had sent an email to the clerk's office informing the court that a juror had been "discussing the case in some detail with people she works with" and, contrary to the court's instructions, had "googled the case." Doc. 252 at 212-13. After discussing the matter with the parties, the court decided that it needed to identify the juror, "talk to her, and see if this is self-contained, if there's been some violation of [the court's] instructions." *Id.* at 214.

The next day, the court determined that the citizen's email was credible because it contained information that could only have come from someone with access to trial evidence. Having followed up with the tipster, the court identified the juror as one of the alternates. The court and the parties discussed different approaches for handling the matter. All agreed that, as an alternate, the juror should be dismissed and that, before dismissing her, the court should question her about whether [**14] she had shared any information from her independent research with other jurors. The parties agreed to the court's plan—to dismiss the alternate by telling her that she was no longer needed as an alternate juror and, [*1235] without mentioning the email, ask her "routine" "due diligence" questions about sharing outside information with other jurors. Doc. 253 at 6, 7. The attorneys would be allowed to request a sidebar during the questioning and pose new questions as desired.

The court, with the parties present, brought in the alternate juror and asked her if she was "aware of any incident of jurors deliberating about the case or doing any investigation beyond the evidence in this case." *Id.* at 12. She said she was not aware of any such incident. When the court asked the parties if they had any other questions for her, they said no, declining the opportunity for a sidebar.

After dismissing the alternate, the court asked the defendants if they were satisfied. Ifediba's counsel was "satisfied with the questioning" but nevertheless moved for a mistrial. Doc. 253 at 16. He contended that, because the alternate had been dishonest about having independently researched the case, it was "difficult to [**15] believe" that she had not shared her research with other jurors. *Id.* He said that "[T]here is a perception that my client cannot get a fair trial at this point." *Id.* The court, noting the lack of "positive evidence" that

controlled substances, in violation of 21 U.S.C. § 841(a)(1), as well as maintaining CCMC for unlawful distribution of controlled substances, in violation of 21 U.S.C. § 856.

The jury convicted Ozuligbo of conspiracy to commit health care fraud and substantive health care fraud. Ifediba and Ozuligbo were also found guilty of money laundering the proceeds of the illegal allergy scheme and conspiring to commit that crime.

The court sentenced Ifediba to 360 months of imprisonment and Ozuligbo to 36 months.

To determine Ifediba's sentence, the presentence investigation report ("PSR") set the base offense level for the controlled substances conspiracy at 36. Following § 2D1.1(c)(2) of the Sentencing Guidelines, the PSR calculated the quantity of illegal substances for which Ifediba was responsible, estimating the converted drug weight to be between 30,000 and 90,000 kilograms. **[**19]** This estimate came from an analysis of Alabama's Prescription Drug Monitoring Program ("PDMP") data spanning the charged conspiracy period from May 2013 to January 2016.[6] Ifediba objected to the PSR's drug quantity calculation.

Only Ifediba challenges the sentence imposed. At his sentencing hearings, held over the course of two days, Ifediba argued that the court should derive the drug quantity using only the prescriptions admitted into evidence at trial that the jury found to be unlawful. The drug quantity for these prescriptions totaled between 1,000 and 3,000 kilograms, which would lead to a base offense level of 30 under the guidelines. Ifediba contended that the court should not extrapolate from the prescriptions evaluated by the jury to assume that all the controlled substances prescribed during the conspiracy period were prescribed unlawfully.

The government presented an expert witness from the DEA, Paul Short, to elaborate **[*1237]** on his trial testimony regarding the PDMP records of CCMC patients. His analysis showed that Ifediba and Uchenna had prescribed 1,761 kilograms of converted drug weight to the 21 patients whose prescriptions the jury had found unlawful. Short also **[**20]** looked beyond those patients to the 1,850 patients to whom Ifediba alone had prescribed controlled substances during the two-and-a-half-year-long conspiracy. His analysis revealed that 96% of those patients had been prescribed at least one opioid. The PDMP data also indicated that Ifediba had prescribed the controlled-substances equivalent of 85,264 kilograms of converted drug weight. The government argued that the larger number required a base offense level of 36 under § 2D1.1(c)(2). The court agreed. After applying sentencing enhancements and using Ifediba's criminal history score of I, the district court calculated Ifediba's guidelines range as 360 months of imprisonment to imprisonment for life. The court sentenced Ifediba to 360 months.

Ifediba and Ozuligbo timely filed this appeal. Ifediba appeals the court's refusal to grant a mistrial and its decision to address the alternate juror's misconduct by instructing the jury collectively instead of questioning them individually. He also challenges the exclusion of his good-care evidence, the sufficiency of the evidence upholding his conviction on four counts of health care fraud, and his sentence. Ozuligbo challenges the exclusion of her cultural-defense **[**21]** evidence and the sufficiency of the evidence supporting her conviction for conspiracy to commit health care fraud.

II. STANDARDS OF REVIEW

We generally review a district court's evidentiary rulings for an abuse of discretion. *United States v.*

[6] The PDMP is a database that tracks all controlled substances prescribed to a patient in a state. *United States v. Akwuba*, 7 F.4th 1304, 1305 n.2 (11th Cir. 2021). It lists the type of controlled substance, the amount of the substance prescribed, and the name of the doctor who prescribed it. PDMP data is commonly used in pill mill cases like this one. *See, e.g., id.* at 1305, 1309-10.

Sarras, 575 F.3d 1191, 1209 n.24 (11th Cir. 2009). Whether the exclusion of the evidence violated a constitutional guarantee is a legal question that we review *de novo*. *Id.*

We review for an abuse of discretion a court's procedure for investigating juror misconduct. *United States v. Harris*, 908 F.2d 728, 733 (11th Cir. 1990). Similarly, we review the denial of a motion for a mistrial for an abuse of discretion. *United States v. Green*, 981 F.3d 945, 959 (11th Cir. 2020).

"We review *de novo* a challenge to the denial of a Rule 29 motion for a judgment of acquittal based on sufficiency of the evidence grounds." *United States v. Gonzalez*, 834 F.3d 1206, 1214 (11th Cir. 2016). We must review the evidence in the light most favorable to the jury's verdict and draw all inferences in its favor. *Id.*

A district court's determination of drug quantity is reviewed for clear error. *United States v. Reeves*, 742 F.3d 487, 506 (11th Cir. 2014).

III. ANALYSIS

We first discuss the district court's evidentiary rulings excluding Ifediba's good care evidence of proper medical treatment and Ozuligbo's cultural-defense evidence that Nigerian cultural norms required her to obey Ifediba as her older brother. Second, we examine the court's choice to address one juror's misconduct by collectively [**22] instructing the jury. Third, we review the trial evidence to determine whether it was sufficient to support Ifediba's convictions on four counts of substantive health care fraud and Ozuligbo's conviction for conspiracy to commit health care fraud. Fourth, and finally, we take up Ifediba's challenge to the drug-quantity calculation that the court used to sentence him.

A. The Court Properly Excluded Defense Evidence of Good Care and Cultural Norms.

Ifediba and Ozuligbo each challenge the district court's exclusion of certain evidence at trial.

[*1238] The district court excluded Ifediba's good-care evidence showing that he provided legitimate medical treatment to some patients. The court determined that this was merely an attempt to portray Ifediba as a person of good character by pointing to his prior good acts. Federal Rule of Evidence 404(a)(1) forbids such use of character evidence, and our precedent holds that "[e]vidence of good conduct is not admissible to negate criminal intent." *United States v. Camejo*, 929 F.2d 610, 613 (11th Cir. 1991). The district court did not abuse its discretion when it excluded the good-care evidence as inadmissible character evidence. *See id.*

Ifediba argues that the exclusion violated his constitutional right to present a complete defense to the charge [**23] of unlawful distribution of controlled substances. *See United States v. Hurn*, 368 F.3d 1359, 1362-63, 95 Fed. Appx. 1359 (11th Cir. 2004). According to Ifediba, the court should have admitted the good-care evidence because it "tend[ed] to place the story presented by the prosecution in a significantly different light, such that a reasonable jury might receive it differently." *Id.* at 1363. But the government never alleged that Ifediba unlawfully treated every patient who walked through CCMC's doors; indeed, it conceded that his treatment of some patients was legitimate. Thus, it was no defense that Ifediba lawfully treated some patients. The district court did not abuse its discretion by excluding such evidence as improper character evidence, and the exclusion did not violate Ifediba's constitutional right to present a defense.

Ozuligbo challenges the district court's exclusion of evidence supporting a defense to voluntary participation in the conspiracy based on the Nigerian cultural norms requiring her to be "subservient" to her older brother. Doc. 86 at 3. The district court did not abuse its discretion in excluding this evidence from trial. We have rejected a similar argument before. *See United*

States v. Almanzar, 634 F.3d 1214, 1223 (11th Cir. 2011). In *Almanzar*, a district court set aside the jury's guilty verdict because "cultural expectations" [**24] required the defendant to obey her male family members. *Id.* at 1221. Seeing error in the court's reliance on stereotypes, among other things, we vacated the judgment of acquittal and directed the court to reinstate the jury's verdict. *Id.* at 1223-24. Ozuligbo's argument here is no different, and we reject it.

B. The Court Acted Within Its Discretion in Addressing Juror Misconduct by Instructing the Jury Collectively.

When an allegation of juror misconduct arises, the court must determine whether the misconduct occurred and whether it was prejudicial. *Harris*, 908 F.2d at 733. But there is no bright-line rule requiring a district court "to investigate the internal workings of the jury whenever a defendant asserts juror misconduct." *United States v. Cuthel*, 903 F.2d 1381, 1382-83 (11th Cir. 1990). A district court has "broad discretion in deciding whether to interrogate jurors regarding alleged misconduct." *United States v. Barshov*, 733 F.2d 842, 850 (11th Cir. 1984). "[T]he investigative procedure to be used in checking for juror misconduct falls within the discretion of the district court." *United States v. Caldwell*, 776 F.2d 989, 997 (11th Cir. 1985). A court abuses its discretion and commits reversible error when it fails to investigate as thoroughly as the situation requires and the insufficient investigation prejudices the defendant. *See id.* at 1000; *Harris*, 908 F.2d at 733.

We evaluate the court's chosen investigative procedure based on where [**25] the juror misconduct falls along a "continuum [*1239] focusing on two factors." *Caldwell*, 776 F.2d at 998. "At one end of the spectrum the cases focus on the certainty that some impropriety has occurred." *Id.* "The more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate." *Id.* "At the other end of the continuum lies the seriousness of the accusation." *Id.* "The more serious the potential jury contamination, especially where alleged extrinsic influence is involved, the heavier the burden to investigate." *Id.* When a party makes a "colorable showing of extrinsic influence," the court must investigate to determine whether the influence was prejudicial. *Barshov*, 733 F.2d at 851. But "[t]he duty to investigate arises only when the party alleging misconduct makes an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *Id.*

At the more speculative end of the spectrum lies *Barshov*, a case in which a juror's son had spent time talking to the jurors during recesses and eating lunch with them. *Id.* The son had also spoken to defense counsel, the defendant's wife, and the prosecutor about the case. *Id.* After the jury returned a guilty verdict, defense counsel asked the court to interview [**26] each juror individually because of defense counsel's "suspicion" that the son had improperly influenced the jury with "extraneous, prejudicial information." *Id.* (internal quotation marks omitted). But counsel failed to support that suspicion with any evidence indicating "the improper conveyance of information to the jury." *Id.* at 852 (internal quotation marks omitted). The district court denied the motion, and we affirmed. *Id.* at 851. Because the defense failed to show—beyond speculation—that the son had "improper discussions" with the jurors or that his conduct "impugned in any way the integrity of the trial process," we held that the district court acted within its discretion in declining to interview each juror individually. *Id.* at 852.

At the other end of the spectrum, reflecting substantiated and serious outside influence, is an outside party's attempt to influence a juror, as seen in *United States v. Forrest*, 620 F.2d 446, 456-57 (5th Cir. 1980).[7] There, a husband and wife were

[7] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding all Fifth Circuit precedent handed down prior to October 1, 1981.

convicted of federal crimes related to receiving stolen property. *Id.* at 449. A juror's niece, a friend of one of the defendants, tried to persuade the juror to vote for acquittal. *Id.* at 456. The court excused the juror but allowed the trial to continue, and it ended with both defendants being convicted. *Id.* at 449, 457. On appeal, [**27] the husband argued that as a result of the outside influence, he did not receive a trial by a fair and impartial jury. *Id.* at 456. Noting that "[a]ny off-the-record contact with a jury is presumptively prejudicial," we determined that the government had failed to carry its burden of proving that "such a contact did not affect the jury." *Id.* at 457. Although the dismissed juror reported that the other jurors had no knowledge of the contact, her testimony was "insufficient" due to the seriousness of the misconduct as "[c]ontacts such as those that may have occurred in this case raise serious questions of prejudice." *Id.* at 457-58. We observed that "[o]nly the other jurors [could] enlighten us" as to whether the dismissed juror had spoken to them about the case. *Id.* at 457. We remanded the case so the court could question the jurors individually to determine whether the dismissed juror had discussed the case with them and shared "extraneous prejudicial material." *Id.* at 458.

Somewhere in the middle of spectrum, illustrating a somewhat substantiated and relatively serious allegation, sits *United [*1240] States v. Brantley*, 733 F.2d 1429 (11th Cir. 1984). In *Brantley*, after the jury returned guilty verdicts, one juror (Miller) told the court that, during deliberations, another juror (Blige) had "brought into the [**28] jury room the extrinsic fact that [a defendant] had been involved with drug smuggling before." *Id.* at 1439. At a hearing, Blige denied making the remark, and the court prevented defense counsel from questioning Miller or the other jurors. *Id.* Observing that Miller's "personal knowledge" lent credibility to her allegation, we held that the court's refusal to investigate it further was an abuse of discretion and remanded the case so the court could uncover whether the incident occurred and, if it did, whether there was a reasonable possibility of prejudice to the defendant. *Id.* at 1440-41.

Here, the court received a credible tip that the alternate juror had "googled the case" and discussed it with her coworkers. Doc. 252 at 212-13. When the court asked her if she was aware of any jurors independently researching the case or discussing it, she said no. The court dismissed the alternate. Even though the court had questioned the alternate according to the plan agreed upon by the parties, Ifediba moved for a mistrial, arguing that the alternate might have discussed her research with the other jurors. Though the tip did not say that the alternate had shared information with other jurors, Ifediba urged the court to [**29] ask each juror individually about participation in any discussions of outside information. Refusing to embark on a "witch hunt," the court instead chose to address the jurors collectively, reminding them of the court's instructions and asking them to report any improper discussions to the courtroom deputy. Doc. 253 at 33.

This incident falls at the less serious end of the spectrum of juror misconduct. To be sure, the alternate ignored the court's instructions to refrain from researching the case online or elsewhere. The tip that she had done so was substantiated given that the tipster knew details that could only have come from the trial. And outside research by a juror is prohibited because "[t]he sixth amendment guarantee of a trial by jury requires the jury verdict to be based on the evidence produced at trial." *United States v. Perkins*, 748 F.2d 1519, 1533 (11th Cir. 1984). The court appropriately dealt with the substantiated instance of misconduct by dismissing the alternate, thereby preventing her from playing any role in the verdict. Significantly, Ifediba's counsel agreed to the court's proposed method of questioning the alternate and declined the opportunity to request a sidebar during her questioning or ask further questions.

Ifediba's charge of further [**30] misconduct, however, was purely speculative. There was no evidence that the tainted alternate had improper

discussions with the rest of the panel. Ifediba's suspicion arose because, in response to the court's questioning, the alternate denied that she had violated the court's instructions. Her lack of candor caused Ifediba to posit that she had committed more serious misconduct by sharing outside information with the other jurors. Unlike the alleged improper discussions in *Brantley*, Ifediba's allegation was based not on personal knowledge, but on the "metaphysical possibility that [the alternate] may have discussed something" with other jurors. Doc. 253 at 25; *Brantley*, 733 F.2d at 1439. Because he presented no evidence to support his suspicion, it remained "mere speculation" and nothing more. *Barshov*, 733 F.2d at 851. Thus, just like in *Barshov*, the trial court had discretion to refrain from taking the extraordinary step of individually questioning the jurors to address the allegation of misconduct.

[*1241] Even so, the court took the additional step of instructing the remaining jurors collectively and obtaining their agreement to follow the court's instructions and report any violation of the instructions. *See Harris*, 908 F.2d at 734 ("The district court cured any possible taint [**31] by questioning the jurors on their ability to remain impartial and giving them an admonition to keep an open mind."). Given its speculative nature, the allegation of improper jury discussions did not require a more intensive investigation than the district court performed.

But even if the court should have questioned the jurors individually, Ifediba failed to show any prejudice to his defense or lack of integrity in the trial process.[8] *See Harris*, 908 F.2d at 733; *Barshov*, 733 F.2d at 852 ("In the absence of a colorable showing that the conduct complained of impugned in any way the integrity of the trial process, the district court was not required to make further inquiries or to conduct a hearing, and its refusal to do so did not constitute an abuse of discretion.").

Before concluding our discussion of this issue, we note our agreement with the district court that individual questioning of the jury is not to be undertaken lightly. It has the potential to "aggravate the situation" by drawing attention to misconduct. *Barshov*, 733 F.2d at 850 (internal quotation marks omitted). The district court in *United States v. Caldwell* declined to question a juror who had spoken with another juror accused of misconduct. *Caldwell*, 776 F.2d at 995. We found no abuse of discretion, recognizing the court's concern that [**32] "direct inquiry of any of the jurors by counsel might itself contaminate the jury panel." *Id.* The district court here shared that concern, warning counsel that "if we start questioning each juror one on one, they will believe we're accusing them." Doc. 253 at 33. Rather than risk "unintended consequences," the court made the reasoned decision to investigate the speculative allegation by addressing the jurors collectively and encouraging them to self-report any improper discussions to the courtroom deputy.[9] *Id.*; *see Harris*, 908 F.2d at 734 ("[T]he district court's limited hearing on the matter was appropriate because additional investigation might have over-emphasized the remark.").

To sum up, we see no abuse of discretion in the district court's handling of the juror misconduct. After all, "[t]he whole point of discretion is that there is [a] range of options open, which means

[8] In his brief, Ifediba failed to support with arguments and citations to authority his challenge to the district court's denial of a mistrial. Thus, we deem this issue abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). Were we to reach the merits, though, we would affirm the district court. "A defendant must show substantial prejudice to be granted a mistrial." *United States v. Barsoum*, 763 F.3d 1321, 1340 (11th Cir. 2014). Ifediba has failed to show any prejudice, therefore, we find no abuse of discretion in the district court's denial of his mistrial motion.

[9] The court had good reason to believe that the jurors would inform the courtroom deputy of any violations of the court's instructions. Earlier in the trial, individual jurors had approached the deputy and self-reported concerns about potential impropriety: a juror who worked at the post office had met someone named "Ebio" at work, another juror recognized a witness from church, and a third juror realized that CCMC was located across the street from a family member's office.

more than one choice is permissible." *United States v. Dominguez*, 226 F.3d 1235, 1247 (11th Cir. 2000). And we recognize that the district court has the "superior vantage point" from which to evaluate juror misconduct. *Caldwell*, 776. F.2d at 999. "The district court is in the best position to [*1242] make the necessary determinations. Having clothed the court with broad discretion, we will not now attempt to second-guess the evaluation [**33] and ultimate holding." *Barshov*, 733 F.2d at 851. We see no abuse of discretion here.

C. Sufficient Evidence Supported Ifediba and Ozuligbo's Convictions.

Sufficiency-of-the-evidence review requires us to examine "whether the evidence, when viewed in the light most favorable to the government, and accepting reasonable inferences and credibility choices by the fact-finder, would enable the trier of fact to find the defendant guilty beyond a reasonable doubt." *United States v. Monroe*, 866 F.2d 1357, 1365 (11th Cir. 1989). We will affirm a conviction unless there is "no reasonable construction of the evidence" from which the jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Garcia*, 405 F.3d 1260, 1269 (11th Cir. 2005).

1. Patient Records Were Sufficient to Support Ifediba's Convictions for Substantive Health Care Fraud.

The jury convicted Ifediba of 10 counts of substantive health care fraud, in violation of 18 U.S.C. § 1347(a). The statute provides:

> Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice—
>
> (1) to defraud any health care benefit program; or
>
> (2) to obtain, by means of false or fraudulent pre-tenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment [**34] for health care benefits, items, or services, shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 1347(a). Thus, to be convicted "in a health care fraud case, the defendant must be shown to have known that the claims submitted were, in fact, false." *United States v. Medina*, 485 F.3d 1291, 1297 (11th Cir. 2007). "A person makes a false claim if the treatments that were billed were not medically necessary or were not delivered to the patients." *United States v. Chalker*, 966 F.3d 1177, 1188 (11th Cir. 2020) (internal quotation marks omitted).

Ifediba challenges the sufficiency of the evidence supporting 4 of his 10 convictions for health care fraud. Each conviction arose from his or co-conspirator Uchenna's treatment of a particular patient, six of whom testified at trial. Ifediba challenges the convictions stemming from the treatment of the four patients who did not testify. He argues, without citation to authority, that documentary evidence alone was insufficient to establish health care fraud and that the government needed to present patient testimony to prove its case. But we reject his argument because documentary evidence and testimony from other witnesses sufficiently established that he knowingly made false representations to health care benefits providers to obtain money from health [**35] care benefit programs.

For each of the counts Ifediba challenges, patient files and billing records demonstrated that he or his co-conspirator, Uchenna, ordered treatment knowing that it was medically unnecessary. The jury heard that Ifediba ordered allergy tests for Patient B.B. and Patient D.C. According to their patient files, both patients tested negative for allergies, yet Ifediba prescribed them immunotherapy anyway. Patient R.C.'s allergy test was ordered by Uchenna, who [*1243] prescribed

immunotherapy despite a negative test result.[10] Patient V.T. received neither an allergy test nor an immunotherapy prescription, but her insurer received a bill for immunotherapy treatment from CCMC. These patients did not have allergies. Ifediba knew they did not have allergies because the tests that CCMC performed came back negative. Although the patients did not need what he prescribed, he nevertheless made fraudulent representations to the insurers that the patients needed allergy treatment. It is true that none of the four patients testified to that effect, but other witnesses did.

Testimonial evidence confirmed that Ifediba likely knew the treatment was unnecessary but billed insurers for it anyway. **[**36]** The government's medical expert, Dr. Jim Christensen, testified that it was "inappropriate" to prescribe immunotherapy to someone who tested negative for allergies. Doc. 250 at 99. This suggests that Ifediba knew that the allergy treatment was medically unnecessary, and the claims he submitted thus were false. Special Agent Bullock testified that Ifediba billed insurers $525 for an allergy test and $2,660 or $2,850 for immunotherapy. The testimony of fraud investigators for the insurers confirmed that CCMC submitted allergy-related claims for these patients. Further testimony showed that Ifediba personally signed all the bills charging Medicare and private insurers for the medically unnecessary treatment, thereby defrauding them through false claims.

The paper trail and testimony illustrating Ifediba's fraudulent representations are enough for a jury; live testimony from patients, while helpful, is not required. "[A] defendant's knowledge can be proven in more than one way." *United States v. Clay*, 832 F.3d 1259, 1311 (11th Cir. 2016). Nothing in our precedent requires that patients testify regarding the defendant's fraudulent representations to insurers to support a health care fraud conviction. *See generally id.* at 1294-1304, 1311 (upholding convictions for health **[**37]** care fraud based on Medicaid expense reports unsupported by patient testimony). And in this case, there was also testimony—not from patients but from Christensen, Bullock, and the insurers—supporting the healthcare fraud convictions. Evaluating the evidence, a reasonable jury could conclude that Ifediba committed health care fraud by knowingly prescribing medically unnecessary treatment and submitting false information to receive payment from healthcare benefit programs. We thus affirm the jury's verdict on the four counts of health care fraud.

2. Sufficient Evidence Supported Ozuligbo's Conviction for Conspiracy to Commit Health Care Fraud.

To sustain a conviction for conspiracy to commit health care fraud in violation of 18 U.S.C. §§ 1347 and 1349, the government must establish beyond a reasonable doubt that: "(1) a conspiracy existed to commit health care fraud under 18 U.S.C. § 1347; (2) [the defendant] knew of **[*1244]** the conspiracy; and (3) [the defendant] knowingly and voluntarily joined it." *Gonzalez*, 834 F.3d at 1214. Because the crime of conspiracy is "predominantly mental in composition," the government may prove these elements by circumstantial evidence and inferences therefrom. *United States v. Moran*, 778 F.3d 942, 960 (11th Cir. 2015) (internal quotation marks omitted). The government need not prove **[**38]** that the defendant knew all the details of the conspiracy; it need only prove "that the defendant knew of the essential nature of the conspiracy." *Gonzalez*, 834 F.3d at 1215 (internal quotation marks omitted). "[A] conspiracy conviction will be upheld when the circumstances

[10] Though Uchenna, not Ifediba, ordered the test and prescribed the medication for Patient R.C., the false claim provides support for Ifediba's conviction nonetheless. Ifediba does not challenge his conviction for conspiracy to commit health care fraud, and, as a co-conspirator, he is liable for the reasonably foreseeable crimes that his co-conspirators committed in furtherance of the conspiracy. *Chalker*, 966 F.3d at 1189 (citing *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946)). The fact that CCMC, through Ifediba himself or his wife, "would submit fraudulent claims as a consequence and in furtherance of this conspiracy is virtually the definition of 'reasonably foreseeable.'" *Id.* at 1189-90 (internal quotation marks and emphasis omitted).

surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to her." *United States v. Mateos*, 623 F.3d 1350, 1362 (11th Cir. 2010) (alterations adopted) (internal quotation marks omitted). "The Government can establish that a defendant voluntarily joined the conspiracy through proof of surrounding circumstances such as acts committed by the defendant which furthered the purpose of the conspiracy." *Gonzalez*, 834 F.3d at 1215 (internal quotation marks omitted).

There was more than sufficient evidence to demonstrate that CCMC defrauded insurers through an allergy fraud scheme. The only question is whether Ozuligbo was a knowing and voluntary participant in the conspiracy. Ozuligbo argues that the government established neither her knowledge of the conspiracy nor her voluntary participation in it. Rather than a co-conspirator, she asserts that she was "merely an employee." Ozuligbo's Brief at 20. The evidence showed otherwise.

To begin with, patient [**39] medical records illustrated that Ozuligbo knew of the conspiracy to provide immunotherapy treatment to patients who had tested negative for allergies. She gave patients allergy tests, signing her name to the test records. She recorded the negative results but also recorded that she administered immunotherapy to them. Her initials were on Patient D.C.'s allergy log listing the three injections she purportedly gave this patient who tested negative for allergies. Patient B.B.'s allergy log also showed a negative test followed by immunotherapy treatment. For another patient—who had also tested negative for allergies—she noted that the patient said the immunotherapy was alleviating her symptoms. But the patient testified that she never had allergies, never received an injection, and never said that the injections were helping her.

These medical records further show that Ozuligbo participated in the conspiracy by filing paperwork for treatments that were medically unnecessary and treatments that were not delivered to the patients. *See Chalker*, 966 F.3d at 1188. The evidence that Ozuligbo filled out fraudulent paperwork supports the inference that Ozuligbo "played a daily and active role in furthering the unlawful [**40] objectives" of the conspiracy. *Gonzalez*, 834 F.3d at 1217 (upholding the conviction of a defendant who filled out fraudulent logs indicating that she gave patients medically unnecessary treatment).

Then, too, Ozuligbo was hired under unusual circumstances, suggesting that she was a knowing participant in the conspiracy. Ifediba pressured Ebio to hire her as an ASNA allergy technician even though ASNA already had enough technicians. And Ozuligbo knew that ASNA was paying her "double the money that [the] other technicians were making." Doc. 251 at 175. The jury could infer that Ozuligbo understood her special treatment to be part of a larger scheme that gave her brother the leverage to insist on her employment and benefits.

[*1245] Ozuligbo knew that the larger scheme included CCMC's practice of testing every insured patient, and her participation in the practice shows that she knew about and participated in the conspiracy to commit health care fraud. Christensen, the government's medical expert, told the jury that it was neither medically necessary nor appropriate to test patients for allergies based solely on the fact that their health insurance would cover it. But this is precisely what CCMC did. It had a "blanket practice" [**41] of performing allergy tests on all insured patients after first confirming coverage with their insurers. Doc. 247 at 195. It did not test cash-paying patients for allergies. In addition to testing the patients, Ozuligbo was responsible for calling their insurers and confirming coverage of allergy-related claims. Although confirming insurance coverage, standing alone, could be innocent behavior, the fact "[t]hat a purported medical care clinic" performed allergy tests on every insured patient who walked through its door "is, to put it charitably, a most unusual arrangement." *Gonzalez*, 834 F.3d at 1215.

And when patients or fellow technicians objected to the unusual arrangement, Ozuligbo furthered the conspiracy by convincing them to go along with it despite their misgivings. Ebio testified that "there were some patients that did not want to get tested, but when they were referred back to either Dr. Ifediba or his sister, Justina [Ozuligbo], the patient would then accept the testing." Doc. 251 at 96. A fellow technician, noticing that patients were being pressured into taking the allergy tests, voiced her concerns about the practice to Ozuligbo. Listen to Ifediba, Ozuligbo told the technician, "You just need to [**42] do what you got to do." Doc. 250 at 151. The jury could reasonably conclude from this evidence that Ozuligbo persuaded patients and technicians to acquiesce to the medically unnecessary allergy testing because she knew about the conspiracy and voluntarily participated in it.

But the evidence does not end there. Ozuligbo's conversation with Special Agent Bullock supports an inference that she knew about the nature of the conspiracy and participated in it. Bullock arranged to meet Ozuligbo at her house for an interview. Standing in her driveway, Ozuligbo told Bullock that she performed allergy tests and provided immunotherapy at CCMC when she used to work there. She told him that CCMC "only did allergy testing and immunotherapy for patients with insurance" because "it was expensive and cash-paying patients wouldn't pay for it." Doc. 247 at 49. Bullock showed her some positive allergy tests that she had performed, and Ozuligbo confirmed her handwriting on the tests. Unprompted, she told Bullock that, if the tests were negative, the patients would not get immunotherapy. Bullock showed her a negative test, which Ozuligbo confirmed she had administered and marked as negative. He then showed [**43] her that same patient's therapy log indicating that Ozuligbo had given the patient four injections of allergy medication. She said that she probably needed an attorney. On the verge of tears, she told him, "I left there to get away from that craziness and all the crazy patients, and now I work for peanuts." *Id.* at 58.

From this evidence, the jury readily could have found that Ozuligbo knowingly participated in a conspiracy to bill for medical services that were not actually medically necessary or delivered to the patients. The entire exchange supports an inference that Ozuligbo knew she had participated in a conspiracy. She told Bullock that CCMC did not order immunotherapy for patients who tested negative for allergies but, when confronted with evidence that she had done just that, backed away. The jury, looking at Ozuligbo's conduct [*1246] and the circumstances at CCMC, could conclude that she knew about and participated in the conspiracy to commit health care fraud. Having examined the evidence that supports her conspiracy conviction and found it to be sufficient, we reject her challenge and affirm her conviction.

D. Ifediba's Sentence Was Procedurally Reasonable.

When we review for clear [**44] error the district court's determination of the drug quantity, we will leave the finding in place unless it leaves us with a "definite and firm conviction that a mistake has been committed." *United States v. Rothenberg*, 610 F.3d 621, 624 (11th Cir. 2010) (internal quotation marks omitted). The government bears the burden of establishing drug quantity by a preponderance of evidence. *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir. 2005).

Drug distribution in the medical context requires proof that the prescription was not for a legitimate medical purpose or that the prescription was not made in the usual course of professional practice. *See United States v. Joseph*, 709 F.3d 1082, 1102 (11th Cir. 2013). When there is no drug seizure that readily demonstrates the scale of the offense, the district court must approximate the drug quantity based on "fair, accurate, and conservative estimates" of the quantity. *United States v. Zapata*, 139 F.3d 1355, 1359 (11th Cir. 1998); U.S. Sent'g Guidelines Manual § 2D1.1 cmt. n.5 (U.S. Sent'g Comm'n 2018). That estimate cannot be

speculative; it must be in line with the average frequency and amount of a defendant's drug sales over a given period. *United States v. Frazier*, 89 F.3d 1501, 1506 (11th Cir. 1996).

Ifediba challenges the procedural reasonableness of his sentence for conspiracy to distribute controlled substances, arguing that the district court erred in attributing 85,264 kilograms of converted drug weight to him.[1] He argues that the court's estimate of the quantity was wrong because [**45] "[d]rug distribution in cases involving physicians [is] totally different." Ifediba's Brief at 27. In such cases, he contends, the court should not extrapolate from the "cherry-picked" prescriptions found unlawful at trial but should instead determine whether each prescription written by the defendant was unlawful or legitimate. Doc. 242 at 32. We disagree.

The court based its drug quantity finding on "reliable and specific evidence"—analysis of the PDMP data of the Schedule II controlled substances Ifediba prescribed during the conspiracy period. *United States v. Cobb*, 842 F.3d 1213, 1219 (11th Cir. 2016). The court acknowledged the possibility that some of those prescriptions could have been written for a legitimate medical purpose but concluded that the broader pill mill conspiracy to distribute controlled substances supported an inference that most of the prescriptions were [*1247] unlawful. The court noted the trial evidence illustrating that CCMC supplied controlled substances to people who had no medical need for them: "[W]e had evidence from witnesses who basically said the word on the street was that if you lost your dealer, you could go to this clinic and get what you were looking for on the streets." Doc. 242 at 42. Evidence also demonstrated [**46] that Uchenna wrote her share of "bad prescriptions," CCMC provided an "exponentially higher amount of prescriptions" than other clinics of its size, and the clinic likely engaged in unlawful drug distribution before and after the conspiracy period. Doc. 331 at 12, 19.

Similarly, in *United States v. Azmat*, 805 F.3d 1018, 1047 (11th Cir. 2015), we found no error in a drug-quantity estimate based on all the prescriptions written by the defendant doctor. The government did not have to prove that each prescription was unlawful because "[t]he trial evidence showed that [the clinic] was a pill mill that did not serve a legitimate medical purpose. . . . Abundant evidence showed that [the defendant] was aware of its illegitimacy." *Id.* Here, Ifediba ran CCMC as a pill mill and was aware of its illegitimacy. The district court did not clearly err in attributing to him a drug quantity based on specific data from the controlled substances he prescribed. We affirm his sentence.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court on all grounds.

AFFIRMED.

End of Document

[1] A procedurally sound sentence is substantively unreasonable if it is not justified by the totality of the circumstances and the sentencing factors set out in 18 U.S.C. § 3553(a). *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). The factors require the sentencing court to consider, among other things, the nature and circumstances of the offense, the history and characteristics of the defendant, the kinds of sentences available, the applicable guidelines range, the pertinent policy statements of the Sentencing Commission, the need to avoid unwarranted sentence disparities among similar defendants, and the need to provide restitution to victims. 18 U.S.C. § 3553(a)(1), (3)-(7). *United States v. Trailer*, 827 F.3d 933, 936 n.2 (11th Cir. 2016). Because Ifediba failed to challenge the substantive reasonableness of his sentence, however, we consider that challenge abandoned. *See Sapuppo*, 739 F.3d. at 680.

APPENDIX B
JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
ENTERED 8-24-20

UNITED STATES DISTRICT COURT
Northern District of Alabama

UNITED STATES OF AMERICA

v. Case Number 2:18-CR-103-RDP-GMB-1

PATRICK EMEKA IFEDIBA,

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, PATRICK EMEKA IFEDIBA, was represented by Derrick K. Collins, Anthony C. Ifediba, and Dennis J. Knizley.

The defendant was found guilty on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9,10,11,13,14,15,16,17,18,19,20, 21,22,23,24,25,26,27,33,34,35,36,40,41,42,43, and 44 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following counts, involving the indicated offenses:

Title & Section	Nature of Offense	Count Numbers
18 U.S.C. § 1349	Conspiracy to Commit Healthcare Fraud	1
18 U.S.C. § 1347	Healthcare Fraud	2 through 11
21 U.S.C. §§ 846,841(a)(1) and (b)(1)(C)	Conspiracy to Distribute Controlled Substances	13
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Distribution of Controlled Substances	14 through 27
21 U.S.C. § 856(a)(1)	Maintaining a Place for the Distribution of Controlled Substances	33
18 U.S.C. § 1956(h)	Conspiracy to Commit Money Laundering	34
18 U.S.C. § 1956(a)(1)(B)(i)	Money Laundering	35,36, and 40
18 U.S.C. § 1957	Money Laundering	41 through 44

As pronounced on August 18, 2020, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $3500.00, for Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 33, 34, 35, 36, 40, 41, 42, 43, and 44, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 24th day of August, 2020.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of THREE HUNDRED SIXTY (360) months: ONE HUNDRED TWENTY (120) months as to Counts 1 through 11, 13 through 27, 33 through 36, and 40 through 44, to be served separately and concurrently with each other, plus TWO HUNDRED FORTY (240) months as to Counts 13 and 14, to be served separately and concurrently with each other but consecutively to all remaining counts and any other sentence.

The Court recommends to the Bureau of Prisons that the defendant be assigned to an institution as close as possible to Birmingham, Alabama.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 months as to all counts to be served separately and concurrently with each other. The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced (if placed on probation) or released from custody (if supervised release is ordered), unless the probation officer instructs you to report to a different probation office or within a different time frame.
2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when to report to the probation officer, and you must report to the probation officer as instructed.
3) You must not commit another federal, state, or local crime.
4) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers). Revocation of supervision is mandatory for possession of a firearm.
5) You must not unlawfully possess a controlled substance.
6) You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. You must contribute to the cost of drug testing unless the probation officer determines you do not have the ability to do so. Based upon a court order entered during the period of supervision for good cause shown or resulting from a positive drug test or evidence of excessive use of alcohol, you shall be placed in the Substance Abuse Intervention Program (SAIP) (or comparable program in another district).
7) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
8) You must follow the instructions of the probation officer related to the conditions of supervision.
9) You must answer truthfully the questions asked by the probation officer.
10) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change. (If you have been convicted of a crime of violence or a drug trafficking offense, the probation office is responsible for complying with the notice provisions of 18 U.S.C. § 4042(b) and (c) if you change your residence.)
11) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
12) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as the position or the job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
13) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
14) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
15) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
16) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk, and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
17) You must fully and truthfully disclose financial information as requested by the probation officer related to the conditions of supervision. Financial information may include, but is not limited to, authorization for release of credit information, bank records, income tax returns, documentation of income and expenses, and other financial information regarding personal or business assets, debts, obligations, and/or agreements in which the defendant has a business involvement or financial interest.
18) You must support all dependents.

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

CONTINUATION OF STANDARD CONDITIONS OF SUPERVISED RELEASE

19) You must comply with the probation office's Policies and Procedures Concerning Court-Ordered Financial Obligations to satisfy the balance of any monetary obligation resulting from the sentence imposed in the case. Further, you must notify the probation officer of any change in your economic circumstances that might affect your ability to pay a fine, restitution, or assessment fee. If you become more than 60 days delinquent in payments of financial obligations, you may be: (a) required to attend a financial education or employment preparation program under the administrative supervision of the probation officer; (b) placed on home detention subject to location monitoring for a maximum period of 90 days under the administrative supervision of the probation officer (and you must pay the cost of monitoring unless the probation officer determines you do not have the ability to do so); and/or (c) placed in a community corrections center for up to 180 days under the administrative supervision of the probation officer (and you must pay the cost of subsistence unless the probation officer determines you do not have the ability to do so).

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) You must cooperate in the collection of DNA under the administrative supervision of the probation officer.
2) The requirement that you submit to mandatory drug testing is suspended based upon the court's determination that you pose a low risk of future substance abuse.
3) You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664.
4) You must not incur any new debts (other than normal debts for existing utilities, rental expenses, or mortgage payments), increase existing credit lines, or open any new lines of credit without the permission approval of the probation officer unless and until all court-ordered financial obligations have been paid in full. New debt includes contracts which obligate payments, credit agreements, and loans, including those with friends and family members.
5) You must maintain a single checking and/or savings account in your own legal name. You must deposit all personal income and monetary gains into the account(s) and must pay all personal expenses from this account.
6) You must not obtain or maintain employment in any occupation, business or profession in which you will prescribe medications or act as a physician. The Court finds that: 1) a reasonably direct relationship exists between your business, occupation, or employment and the conduct constituting the offense; and (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, you will continue to engage in unlawful conduct similar to that of which you were convicted. This condition is imposed for the term of probation or supervised release, or forever, which is the minimum time frame necessary to protect the public.

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

RESTITUTION AND FORFEITURE

RESTITUTION

The court, pursuant to the Victim and Witness Restitution Act, finds that the following are victims of defendant's criminal conduct and have sustained loss in the indicated amounts and orders restitution by the defendant as follows:

Name & address of payees	Amount
Medicare CMS Division of Accounting Operations P.O. Box 7520 Baltimore, MD 21244	$659,837.41
BlueCross BlueShield of Alabama ATTN: Blake Henson (Director, Network Integrity) 450 Riverchase Parkway E. Birmingham, AL 35244	$768,631.58
United Healthcare Lockbox 945931 3585 Atlanta Ave. Hapeville, GA 30354-1705 RE: USA v. Patrick Emeka Ifediba, 2:18cr103-RDP/PICTS 13286588	$313,019.51
Viva Health ATTN: Matthew Peterson, Compliance Manager 417 20th Street N., Suite #1100 Birmingham, AL 35203	$1,180,701.17

Payments shall be made, without interest, to Clerk, U.S. District Court, for transfer to the payees.

The court further finds that, per 18 U.S.C. § 3663A, payments of restitution without interest in the total amount of $2,922,189.67 shall be ordered in this case. However, pursuant to 18 U.S.C. § 3664(h), since more than one defendant contributed to the loss of the victims, the court may apportion liability among the defendants to reflect the level of contribution to the victims' losses and economic circumstances of each defendant. Accordingly, the court hereby orders **Patrick Emeka Ifediba** to pay $2,922,189.67 in restitution in this case. The court further orders that **Patrick Emeka Ifediba** shall be jointly and severally liable for $392,845.94 of the $2,922,189.67 sum with all other defendants convicted in this case, and solely liable for the remaining $2,529,343.73.

Restitution shall be due and payable immediately. Any payment schedule represents a minimum payment obligation and does not preclude the United States Attorney's Office from pursuing any other means by which to satisfy the defendant's full and immediately enforceable financial obligation under applicable federal and/or state law.

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

Because there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here.

Note: Each victim's recovery is limited to the amount of their loss, and the defendant's liability to a victim for restitution ceases if and when the victim receives full restitution.

FORFEITURE

NOTE: The Court orders criminal forfeiture, and a separate Final Order of Forfeiture will be issued. The Court strongly urges that any proceeds collected as a result of the Final Order of Forfeiture be applied toward the amount of restitution ordered in this case in accordance with the Attorney General's Guidelines and Procedures for Restoration of Forfeited Property to Crime Victims via Restitution in lieu of Remission.

APPENDIX C

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA ENTERED 8-27-20

UNITED STATES DISTRICT COURT
Northern District of Alabama

UNITED STATES OF AMERICA

v. Case Number 2:18-CR-103-RDP-GMB-1

PATRICK EMEKA IFEDIBA,

Defendant.

AMENDED JUDGMENT IN A CRIMINAL CASE[1]
(For Offenses Committed On or After November 1, 1987)

The defendant, PATRICK EMEKA IFEDIBA, was represented by Derrick K. Collins, Anthony C. Ifediba, and Dennis J. Knizley.

The defendant was found guilty on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9,10,11,13,14,15,16,17,18,19,20, 21,22,23,24,25,26,27,33,34,35,36,40,41,42,43, and 44 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following counts, involving the indicated offenses:

Title & Section	Nature of Offense	Count Numbers
18 U.S.C. § 1349	Conspiracy to Commit Healthcare Fraud	1
18 U.S.C. § 1347	Healthcare Fraud	2 through 11
21 U.S.C. §§ 846,841(a)(1) and (b)(1)(C)	Conspiracy to Distribute Controlled Substances	13
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Distribution of Controlled Substances	14 through 27
21 U.S.C. § 856(a)(1)	Maintaining a Place for the Distribution of Controlled Substances	33
18 U.S.C. § 1956(h)	Conspiracy to Commit Money Laundering	34
18 U.S.C. § 1956(a)(1)(B)(I)	Money Laundering	35,36, and 40
18 U.S.C. § 1957	Money Laundering	41 through 44

As pronounced on August 18, 2020, the defendant is sentenced as provided in pages 2 through 7 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $3500.00, for Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 33, 34, 35, 36, 40, 41, 42, 43, and 44, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 27th day of August, 2020.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

1. The Judgment is amended to correct the Restitution section only. All other provisions of the Judgment remain in effect as previously ordered.

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of THREE HUNDRED SIXTY (360) months: ONE HUNDRED TWENTY (120) months as to Counts 1 through 11, 13 through 27, 33 through 36, and 40 through 44, to be served separately and concurrently with each other, plus TWO HUNDRED FORTY (240) months as to Counts 13 and 14, to be served separately and concurrently with each other but consecutively to all remaining counts and any other sentence.

The Court recommends to the Bureau of Prisons that the defendant be assigned to an institution as close as possible to Birmingham, Alabama.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____
_____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 36 months as to all counts to be served separately and concurrently with each other. The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced (if placed on probation) or released from custody (if supervised release is ordered), unless the probation officer instructs you to report to a different probation office or within a different time frame.
2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when to report to the probation officer, and you must report to the probation officer as instructed.
3) You must not commit another federal, state, or local crime.
4) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers). Revocation of supervision is mandatory for possession of a firearm.
5) You must not unlawfully possess a controlled substance.
6) You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. You must contribute to the cost of drug testing unless the probation officer determines you do not have the ability to do so. Based upon a court order entered during the period of supervision for good cause shown or resulting from a positive drug test or evidence of excessive use of alcohol, you shall be placed in the Substance Abuse Intervention Program (SAIP) (or comparable program in another district).
7) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
8) You must follow the instructions of the probation officer related to the conditions of supervision.
9) You must answer truthfully the questions asked by the probation officer.
10) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change. (If you have been convicted of a crime of violence or a drug trafficking offense, the probation office is responsible for complying with the notice provisions of 18 U.S.C. § 4042(b) and (c) if you change your residence.)
11) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
12) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as the position or the job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
13) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
14) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
15) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
16) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk, and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
17) You must fully and truthfully disclose financial information as requested by the probation officer related to the conditions of supervision. Financial information may include, but is not limited to, authorization for release of credit information, bank records, income tax returns, documentation of income and expenses, and other financial information regarding personal or business assets, debts, obligations, and/or agreements in which the defendant has a business involvement or financial interest.
18) You must support all dependents.

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

CONTINUATION OF STANDARD CONDITIONS OF SUPERVISED RELEASE

19) You must comply with the probation office's Policies and Procedures Concerning Court-Ordered Financial Obligations to satisfy the balance of any monetary obligation resulting from the sentence imposed in the case. Further, you must notify the probation officer of any change in your economic circumstances that might affect your ability to pay a fine, restitution, or assessment fee. If you become more than 60 days delinquent in payments of financial obligations, you may be: (a) required to attend a financial education or employment preparation program under the administrative supervision of the probation officer; (b) placed on home detention subject to location monitoring for a maximum period of 90 days under the administrative supervision of the probation officer (and you must pay the cost of monitoring unless the probation officer determines you do not have the ability to do so); and/or (c) placed in a community corrections center for up to 180 days under the administrative supervision of the probation officer (and you must pay the cost of subsistence unless the probation officer determines you do not have the ability to do so).

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) You must cooperate in the collection of DNA under the administrative supervision of the probation officer.
2) The requirement that you submit to mandatory drug testing is suspended based upon the court's determination that you pose a low risk of future substance abuse.
3) You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664.
4) You must not incur any new debts (other than normal debts for existing utilities, rental expenses, or mortgage payments), increase existing credit lines, or open any new lines of credit without the permission approval of the probation officer unless and until all court-ordered financial obligations have been paid in full. New debt includes contracts which obligate payments, credit agreements, and loans, including those with friends and family members.
5) You must maintain a single checking and/or savings account in your own legal name. You must deposit all personal income and monetary gains into the account(s) and must pay all personal expenses from this account.
6) You must not obtain or maintain employment in any occupation, business or profession in which you will prescribe medications or act as a physician. The Court finds that: 1) a reasonably direct relationship exists between your business, occupation, or employment and the conduct constituting the offense; and (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, you will continue to engage in unlawful conduct similar to that of which you were convicted. This condition is imposed for the term of probation or supervised release, or forever, which is the minimum time frame necessary to protect the public.

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

RESTITUTION AND FORFEITURE

RESTITUTION

The court, pursuant to the Victim and Witness Restitution Act, finds that the following are victims of defendant's criminal conduct and have sustained loss in the indicated amounts and orders restitution by the defendant as follows:

Name & address of payees	Amount
Medicare CMS Division of Accounting Operations P.O. Box 7520 Baltimore, MD 21244	$659,837.41
BlueCross BlueShield of Alabama ATTN: Blake Henson (Director, Network Integrity) 450 Riverchase Parkway E. Birmingham, AL 35244	$768,631.58
United Healthcare Lockbox 945931 3585 Atlanta Ave. Hapeville, GA 30354-1705 RE: USA v. Patrick Emeka Ifediba, 2:18cr103-RDP/PICTS 13286588	$313,019.51
Viva Health ATTN: Matthew Peterson, Compliance Manager 417 20th Street N., Suite #1100 Birmingham, AL 35203	$1,180,701.17

Payments shall be made, without interest, to Clerk, U.S. District Court, for transfer to the payees.

The court further finds that, per 18 U.S.C. § 3663A, payments of restitution without interest in the total amount of $2,922,189.67 shall be ordered in this case. However, pursuant to 18 U.S.C. § 3664(h), since more than one defendant contributed to the loss of the victims, the court may apportion liability among the defendants to reflect the level of contribution to the victims' losses and economic circumstances of each defendant. Accordingly, the court hereby orders **Patrick Emeka Ifediba** to pay $2,922,189.67 in restitution in this case. The court further orders that **Patrick Emeka Ifediba** shall be jointly and severally liable for $392,845.94 of the $2,922,189.67 sum with convicted co-defendants, Ngozi Justina Ozuligbo and Clement Essien Ebio, and solely liable for the remaining $2,529,343.73.

Restitution shall be due and payable immediately. Any payment schedule represents a minimum payment obligation and does not preclude the United States Attorney's Office from pursuing any other means by which to satisfy the defendant's full and immediately enforceable financial obligation under applicable federal and/or state law.

Defendant: PATRICK EMEKA IFEDIBA
Case Number: 2:18-CR-103-RDP-GMB-1

Because there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified here.

Note: Each victim's recovery is limited to the amount of their loss, and the defendant's liability to a victim for restitution ceases if and when the victim receives full restitution.

FORFEITURE

NOTE: The Court orders criminal forfeiture, and a separate Final Order of Forfeiture will be issued. The Court strongly urges that any proceeds collected as a result of the Final Order of Forfeiture be applied toward the amount of restitution ordered in this case in accordance with the Attorney General's Guidelines and Procedures for Restoration of Forfeited Property to Crime Victims via Restitution in lieu of Remission.

APPENDIX D
USDC ORDER GRANTING & DENYING GOVT 404(B) MOTION
ENTERED 2-12-19

United States v. Ifediba

United States District Court for the Northern District of Alabama, Southern Division

February 12, 2019, Decided; February 12, 2019, Filed

Case No.: 2:18-cr-00103-RDP-JEO

Reporter
2019 U.S. Dist. LEXIS 22472 *; 2019 WL 568586

UNITED STATES OF AMERICA, v. PATRICK EMEKA IFEDIBA, and JUSTINA NGOZI OZULIGBO, Defendants.

Subsequent History: Later proceeding at United States v. Ifediba, 2019 U.S. Dist. LEXIS 104708, 2019 WL 2578123 (N.D. Ala., June 24, 2019)

Later proceeding at United States v. Ifediba, 2019 U.S. Dist. LEXIS 104710, 2019 WL 2578124 (N.D. Ala., June 24, 2019)

Motion granted by, in part, Motion denied by, in part United States v. Ifediba, 2019 U.S. Dist. LEXIS 116826, 2019 WL 3082662 (N.D. Ala., July 15, 2019)

Motion for new trial denied by United States v. Ifediba, 2019 U.S. Dist. LEXIS 202027, 2019 WL 6219209 (N.D. Ala., Nov. 21, 2019)

Summary judgment granted by, Dismissed by United States v. Ifediba, 2021 U.S. Dist. LEXIS 154754, 2021 WL 3633462 (N.D. Ala., Aug. 17, 2021)

Decision reached on appeal by United States v. Ifediba, 2022 U.S. App. LEXIS 24078 (11th Cir. Ala., Aug. 25, 2022)

Counsel: [*1] For Patrick Emeka Ifediba, Defendant: Derrick K Collins, DERRICK COLLINS, ATTORNEY AT LAW, Birmingham, AL; Emory Anthony, Jr, EMORY ANTHONY, JR. ATTORNEY AT LAW, Birmingham, AL.

For Clement Essien Ebio, Defendant: Jeffery L Dummier, LAW OFFICES OF JEFFERY L DUMMIER LLC, Birmingham, AL; Michael P Hanle, JAFFE HANLE WHISONANT & KNIGHT PC, Birmingham, AL.

For Ngozi Justina Ozuligbo, Defendant: Donald L Colee, Jr, LEAD ATTORNEY, DONALD COLEE ATTORNEY AT LAW, Birmingham, AL.

For USA, Plaintiff: Jay E Town, US Attorney, Leonard James Weil, Jr, Mohammad Khatib, LEAD ATTORNEYS, U.S. ATTORNEY'S OFFICE Birmingham, AL; US Probation, LEAD ATTORNEY, UNITED STATES PROBATION OFFICE, Birmingham, AL; USM, LEAD ATTORNEY, UNITED STATES MARSHAL, Birmingham, AL.

Judges: R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE.

Opinion by: R. DAVID PROCTOR

Opinion

MEMORANDUM OPINION

This case is before the court on the United States' 404(b) Notice and Notice of Intent to Use Evidence (Doc. # 85). In that notice, the Government states its intent to introduce evidence concerning certain financial matters and a bankruptcy proceeding involving Defendant Patrick Ifediba ("Ifediba") and evidence that he engaged in unwanted sexual advances and other sexual [*2] conduct with his patients at his medical office. The court held a conference on the matter with counsel on February 8, 2019. For the reasons stated on the record at the conference and in this Memorandum Opinion, the court concludes as follows: (1) that some of the

financial and bankruptcy-related evidence the Government intends to offer is inadmissible and (2) that the evidence of Ifediba's sexual conduct may be offered, if at all, only as rebuttal evidence in the event Ifediba puts certain matters at issue in his own case in chief.

I. The Bankruptcy-Related Evidence

The financial and bankruptcy-related evidence the Government intends to offer may be summarized as follows:

1. Evidence that Ifediba defaulted on approximately $2.5 million in loans from BB&T Bank in March 2010 and that BB&T thereafter obtained a judgment against Ifediba for approximately $3.7 million in November 2012, due to his failure to repay the loans.

2. Evidence that after failing to respond to discovery requests BB&T had issued seeking to identify additional assets to satisfy the judgment, Ifediba filed a Chapter 7 bankruptcy petition in April 2013.

3. Evidence that in April 2013 Ifediba changed the name of his clinic [*3] and opened several new bank accounts for himself, his clinic, "Happy Monica" (a shell company owned by Ifediba's mother), and his mother Benedeth Ifediba—all of which he controlled.

4. Evidence concerning Ifediba's 2014 sworn deposition testimony in the bankruptcy proceedings, which the Government contends contained false statements. The deposition testimony concerned the March 2010 "sale" of Ifediba's clinic's real property to Happy Monica for approximately one-third of the property's appraised value, whether Ifediba knew who "Benedeth Ifediba" (his mother) was, and whether the clinic property was in fact "sold" to Happy Monica. The deposition testimony also concerned a series of fund transfers totaling nearly $2 million Ifediba made to Nigeria between March 2010 and November 2012.

5. Evidence that BB&T settled its case with Ifediba for approximately 12% of the judgment value and that Ifediba paid the settlement using proceeds from the alleged crimes in this case.

6. Testimony proffered by co-Defendant Clement Ebio that Ifediba admitted his bankruptcy was a fraud and he had moved the $2 million to Nigeria before filing his bankruptcy petition and falsely claimed that the money was used [*4] as a ransom payment for a kidnapped sister.

The Government contends the above evidence is either inextricably intertwined evidence to which Rule 404(b) does not apply or admissible under Rule 404(b) in any event. *See United States v. McNair*, 605 F.3d 1152, 1203 (11th Cir. 2010) ("Rule 404(b) does not exclude evidence that is 'inextricably intertwined' with evidence of the charged offense."); Fed. R. Evid. 404(b)(2) (stating that prior act evidence "may be admissible for" the purpose of "proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident").

The Government asserts the healthcare fraud and money laundering conspiracies alleged in this case began in May 2013. There is nothing before the court to suggest that the $2 million transfer to Nigeria, which occurred before the alleged conspiracy period, is connected to any of the property or funds used in or derived from the healthcare conspiracy; therefore, that evidence is not inextricably intertwined with the charged crimes. The court also finds that evidence of the fund transfer is inadmissible under Rule 404(b) because the risk that the jury will consider the evidence for the prohibited propensity purpose substantially outweighs its limited probative value.

However, the court finds that the other bankruptcy-related [*5] evidence is either inextricably intertwined evidence or admissible under Rule 404(b) in any event. The bankruptcy petition was filed shortly before the conspiracy period commenced, and the Government contends Ifediba's allegedly false deposition testimony

during the bankruptcy proceedings (which also occurred during the alleged conspiracy period) was designed to hide money from BB&T at the time Ifediba was (1) engaged in an illegal money-making healthcare-fraud scheme and (2) laundering the proceeds from those activities. That evidence is therefore inextricably intertwined with Ifediba's alleged conspiracy to acquire and conceal his clinic's allegedly ill-gotten gains. And, the evidence of Ifediba's loan default and the subsequent judgment in favor of BB&T is necessary background information that explains why Ifediba filed for bankruptcy and why BB&T was trying to collect money from Ifediba.

The evidence of Ifediba's deposition testimony concerning the sale of his clinic property to Happy Monica and subsequent "rent" payments to Happy Monica is also inextricably intertwined with the charged conduct, as it tends to show how Ifediba managed the premises the Government contends he later used to carry [*6] out the alleged conspiracy, and that he maintained control over those premises at all relevant times. Finally, the fact that he used proceeds derived from his allegedly criminal activity to settle BB&T's claim against him—and managed to convince BB&T to settle for 12% of what it was owed, thus freeing up more alleged criminal proceeds for other uses—is inextricably intertwined with the money laundering charges the Government seeks to prove. The bankruptcy-related evidence, with the exception of the $2 million fund transfer to Nigeria, is therefore admissible.

II. The Sexual Conduct Evidence

The Government also gave notice of its intent to offer testimony from former patients and staff members of Ifediba concerning sexual conduct he engaged in at his medical office. The Government contends this testimony will provide additional evidence that the controlled substances Ifediba prescribed were not for a legitimate medical purpose in the context of a bona fide doctor-patient relationship. The Government expects Ifediba to contend in his case in chief that he prescribed controlled substances for legitimate medical purposes in the usual course of a professional medical practice.

At the conference, [*7] the court informed counsel that it viewed this evidence as relevant to rebutting any evidence the Defense might offer to establish that Ifediba's prescribing practices were made in the course of a legitimate professional practice of medicine. The Government agreed to proffer the evidence of Ifediba's sexual behavior only as rebuttal evidence, if at all, in the event Ifediba contends that his prescribing of pain medicine was for legitimate medical purposes. Therefore, the court will consider the admissibility of this evidence prior to any rebuttal case (if the Government seeks to offer it as rebuttal evidence), and will at that time have a better context to rule on any Defense objections to its admissibility.

DONE and ORDERED this February 12, 2019.

/s/ R. David Proctor

R. DAVID PROCTOR

UNITED STATES DISTRICT JUDGE

End of Document

APPENDIX E
USDC ORDER DENYING DEFENDANT'S 404(B) EVID OF GOOD CARE
ENTERED 6-24-19

United States v. Ifediba

United States District Court for the Northern District of Alabama, Southern Division

June 24, 2019, Filed

CASE NO. 2:18-CR-0103-RDP-JEO

Reporter
2019 U.S. Dist. LEXIS 104708 *; 2019 WL 2578123

UNITED STATES OF AMERICA, vs. PATRICK EMEKA IFEDIBA; NGOZI JUSTINA OZULIGBO, Defendants.

Prior History: United States v. Ifediba, 2019 U.S. Dist. LEXIS 22472 (N.D. Ala., Feb. 12, 2019)

Counsel: [*1] For Patrick Emeka Ifediba, Defendant: Derrick K Collins, DERRICK COLLINS, ATTORNEY AT LAW, Birmingham, AL; Emory Anthony, Jr, EMORY ANTHONY, JR. ATTORNEY AT LAW, Birmingham, AL.

For Clement Essien Ebio, Defendant: Jeffery L Dummier, LAW OFFICES OF JEFFERY L DUMMIER LLC, Birmingham, AL; Michael P Hanle, JAFFE HANLE WHISONANT & KNIGHT PC, Birmingham, AL.

For Ngozi Justina Ozuligbo, Defendant: Donald L Colee, Jr, LEAD ATTORNEY, DONALD COLEE ATTORNEY AT LAW, Birmingham, AL.

For USA, Plaintiff: Jay E Town, US Attorney, Leonard James Weil, Jr, LEAD ATTORNEYS, US ATTORNEY'S OFFICE, Birmingham, AL; US Probation, LEAD ATTORNEY, UNITED STATES PROBATION OFFICE, Robert Vance Bldg., Birmingham, AL; USM, LEAD ATTORNEY, UNITED STATES MARSHAL, Birmingham, AL; Mohammad Khatib, LEAD ATTORNEY, UNITED STATES ATTORNEY'S OFFICE, Birmingham, AL.

Judges: R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE.

Opinion by: R. DAVID PROCTOR

Opinion

MEMORANDUM OPINION

The court previously granted the Government's Motion in Limine (Doc. 71) to Exclude Evidence of "Good Care" and of Patients' Positive Experiences at Care Complete Medical Clinic. (Doc. 103.) This Memorandum Opinion supplements the court's reasons for granting the motion, in addition to the [*2] reasons stated at the pretrial conference on February 5, 2019. (Doc. 103.)

The Government seeks to exclude as irrelevant "any evidence . . . that Care Complete Medical Clinic provided legitimate medical care to patients who are not the basis of any charge in the indictment;" and "any evidence that some patients . . . had a positive experience at Care Complete Medical Clinic." (*Id.* at 1.)

> In general, the term "in limine" "refer[s] to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984). A ruling on evidence in limine "aid[s] the trial process by enabling the Court to rule in advance of trial on the relevance of certain forecasted evidence, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial. [It] also may save the parties time, effort and cost in preparing and presenting their cases." *Bowden ex rel. Bowden v. Wal-Mart*

> *Stores, Inc.*, No. CIV. A. 99-D-880-E, 2001 U.S. Dist. LEXIS 7213, 2001 WL 617521, *1 (M.D. Ala. Feb. 20, 2001) (internal citations and quotations omitted). Nevertheless, "it is the better practice to wait until trial to rule on objections when admissibility substantially depends upon what facts may be developed there. [*3] Thus, the motion in limine is an effective approach only if the evidence at issue is clearly inadmissible." *Id.* (citations omitted).

Murphy v. Precise, No. 1:16-CV-0143-SLB-DAB, 2017 U.S. Dist. LEXIS 197798, 2017 WL 6002581, *1 (M.D. Ala. Dec. 1, 2017).

Among other things, the Indictment charges defendants with health care fraud and conspiracy to commit health care fraud. Defendant Patrick Emeka Ifediba is charged with unlawfully distributing and dispensing controlled substances. Both defendants are charged with money laundering.

The Government asks the court to exclude "evidence that other patients — none of whom form the basis of any charge in the indictment — received legally prescribed controlled substances and/or medically necessary allergy tests and treatment," on the ground that such evidence is "irrelevant and impermissible 'good character' evidence." (Doc. 71 at 3.) Defendant Ngozi Justina Ozuligbo contends:

> "[E]vidence as to proper treatment she provided would be relevant to determine whether or not her actions on other occasions may have been intentional or simply negligent or reckless acts. The fact she may have been involved in thousands of allergy test for which only ten or whatever number were improper would be relevant to a jury's consideration as to [*4] whether she had a fraudulent intent, or was simply making negligent, or reckless acts in the performance of her services as a nurse in the Complete Medical Care Clinic. The jury should be allowed to hear testimony from persons that Defendant Ozuligbo saw many patients. Defendant Ozuligbo performed allergy tests as they should have been done for valid reasons and that her actions were not fraudulent in nature on those occasions. The evidence of proper care would be relevant towards the issues of fraudulent intent which the Government must prove beyond a reasonable doubt. To limit the Defendant and her ability to present such evidence denies her the ability to present a proper defense to the specific fraudulent intentions the Government contends exist.

(Doc. 86 at 2-3.) Dr. Ifediba argues, vaguely, that he might offer evidence of undefined specific acts that "negates the alleged elements of the alleged conspiracy," and "relevant" evidence that "disprov[es] a material element of the alleged charges," including "character evidence." (Doc. 87 at 1-2.) Neither defendant has described or submitted the evidence of "good care" that he or she intends to offer.

> The general rule precluding introduction [*5] of character evidence to show a person's predisposition to commit (or not commit) a crime is clear. Fed. R. Evid. 404(a)(1) expressly provides that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." As such, the government generally cannot introduce evidence attempting to show that a defendant was predisposed to commit a crime, *see United States v. Brannan*, 562 F.3d 1300, 1308 (11th Cir. 2009), nor can a defendant present evidence of generally good conduct in an attempt to negate the government's showing of criminal intent, *United States v. Ellisor*, 522 F.3d 1255, 1270-71 (11th Cir. 2008).

United States v. Rutgerson, 822 F.3d 1223, 1239 (11th Cir. 2016). Therefore, "generally, evidence of good conduct is not admissible to negate criminal intent." *United States v. Moreira*, 605 Fed. Appx. 852, 859 (11th Cir. 2015) (quoting *United States v. Camejo*, 929 F.2d 610, 613 (11th Cir.1991))

(internal quotations omitted). "A defendant is not permitted to portray himself as a good character through the use of prior 'good acts,' and evidence of noncriminal conduct to negate the inference of criminal conduct is generally irrelevant." *United States v. Lepore*, No. 1:15-CR-367-WSD-JKL, 2016 U.S. Dist. LEXIS 113681, 2016 WL 4473125, *6 (N.D. Ga. Aug. 25, 2016) (quoting *Camejo*, 929 F.2d at 613 and *United States v. Grimm*, 568 F.2d 1136, 1138 (5th Cir. 1978); citing *United States v. Scarpa*, 897 F.2d 63, 70 (2d Cir. 1990) ("A defendant may not seek to establish his innocence, however, through proof of the absence of criminal acts on specific occasions.")); *see also Moreira*, 605 Fed. Appx. at 859 ("The Government did not charge and did not argue that there was no [*6] legitimate business conducted at Anna Nursing. Thus, evidence that some of the claims filed by Anna Nursing may have been for services legitimately provided to eligible patients without the payment of kickbacks was irrelevant."); *United States v. Hung Thien Ly*, 543 Fed. Appx. 944, 946 (11th Cir. 2013) ("The district court did not abuse its discretion in precluding Ly from introducing evidence that he discharged other patients who allegedly violated his screening protocols. This evidence is not probative of his intent with respect to the patients who received the drugs covered by the indictment.").

The Government's Motion in Limine was therefore due to be granted. Defendants shall not offer evidence of good care and positive experiences of patients at CCMC other than those instances specifically set forth in the Indictment. Defendants may retain the right to make an offer of proof, outside the presence of the jury, based on unexpected developments during the trial.

/s/ R. David Proctor

R. DAVID PROCTOR

UNITED STATES DISTRICT JUDGE

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APPENDIX F
USDC ORDER GRANTING DEFENSE EXPERT TESTIMONY
ENTERED 7-15-19

United States v. Ifediba

United States District Court for the Northern District of Alabama, Southern Division

July 15, 2019, Decided; July 15, 2019, Filed

Case No.: 2:18-cr-00103-RDP-JEO

Reporter
2019 U.S. Dist. LEXIS 116826 *; 2019 WL 3082662

UNITED STATES OF AMERICA, v. PATRICK EMEKA IFEDIBA and NGOZI JUSTINA OZULIGBO, Defendants.

Prior History: United States v. Ifediba, 2019 U.S. Dist. LEXIS 22472 (N.D. Ala., Feb. 12, 2019)

Counsel: [*1] For Patrick Emeka Ifediba, Defendant: Derrick K Collins, Emory Anthony, Jr, DERRICK COLLINS, ATTORNEY AT LAW, Birmingham, AL.

For Clement Essien Ebio, Defendant: Jeffery L Dummier, Michael P Hanle, LAW OFFICES OF JEFFERY L DUMMIER LLC, Birmingham, AL.

For Defendant: Donald L Colee, Jr, LEAD ATTORNEY, DONALD COLEE ATTORNEY AT LAW, Birmingham, AL.

For USA, Plaintiff: Jay E Town, US Attorney, LEAD ATTORNEY, US ATTORNEY'S OFFICE, Birmingham, AL; US Probation, LEAD ATTORNEY, UNITED STATES PROBATION OFFICE, Birmingham, AL; USM, LEAD ATTORNEY, UNITED STATES MARSHAL, Birmingham, AL; Leonard James Weil, Jr, LEAD ATTORNEY, US ATTORNEY'S OFFICE, Birmingham, AL; Mohammad Khatib, LEAD ATTORNEY, UNITED STATES ATTORNEY'S OFFICE, Birmingham, Al.

Judges: R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE.

Opinion by: R. DAVID PROCTOR

Opinion

MEMORANDUM OPINION AND ORDER

This matter is before the court on the United States' Motion to Preclude the expert testimony of Dr. Daniel A. Schwarz (Doc. #151). Dr. Schwarz was designated as an expert by Defendant Ifebida. There are unique issues in this case based upon the timing of the expert disclosure by Ifebida. Although the Government objects to Dr. Schwarz's testimony, it has not filed a formal [*2] motion to exclude Schwarz's proposed testimony because the report was only produced on the Friday before trial started. The court allowed the late disclosure because the Government would have time to review the report and the court would have an opportunity to conduct a *Daubert* hearing to more thoroughly evaluate Schwarz's proposed testimony. (See Doc. # 162 at 3-4). The Government's objections to Dr. Schwarz's testimony were lodged after those events. For the reasons explained below, the motion (Doc. #151) is **GRANTED IN PART and DENIED IN PART.**

I. Legal Standard

Federal Rule of Evidence 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or

data;
(c) the testimony is the product of reliable principles and methods; and
(d) the expert has reliably applied the principles and methods to the facts of the case.

Under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and its progeny, Rule 702 requires district courts to perform a critical "gatekeeping" function concerning [*3] the admissibility of scientific and technical expert testimony. *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (*en banc*). To perform their role as gatekeeper, courts "engage in a rigorous three-part inquiry." *Id.* District courts must consider whether: "(1) the expert is *qualified* to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently *reliable* as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony *assists the trier of fact*, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." *Id.* (emphasis added) (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). Though there is some overlap among them, these three basic requirements -- qualification, reliability, and helpfulness -- are distinct concepts which the district court must be careful not to conflate. *Id.*

The proponent of expert testimony always bears the burden to show that the requirements of qualification, reliability, and helpfulness are met. *Id.* That remains true whether the proponent is the Government or the accused in a criminal case. *Id.* And in addition to Rule 702, Rule 403 also applies to expert testimony. *Id.* at 1263. Thus, expert testimony that [*4] is otherwise admissible under Rule 702 and *Daubert* may still be excluded under Rule 403 if the probative value of the testimony "is substantially outweighed by its potential to confuse or mislead the jury." *Id.*

A. Expert Qualifications

Experts may be qualified in various ways, including training, education, or experience in a given field. *Id.* at 1260-61. Often what is at issue under the qualification prong is not whether the proffered expert is qualified in the abstract, but whether his training, education, or experience qualify him to render an opinion on a *specific topic*. Particularly where an expert's qualifications rest on his experience (as opposed to scientific or technical training), the expert "must explain *how* that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." *Id.* at 1261. It is not enough for the court to simply take the expert's word for it. *Id.*

B. Reliability of the Expert's Opinion

Before admitting expert testimony, trial judges must determine that the testimony is (1) based on reliable facts or data; (2) the product of reliable principles and methods; and (3) based on a reliable application of those [*5] principles and methods to the facts of the case. Fed. R. Evid. 702. When evaluating scientific expert opinion, courts consider the following factors in making those determinations: "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." *Frazier*, 387 F.3d at 1262.

Those same criteria may also be used to evaluate the reliability of "non-scientific, experience-based testimony." *Id.* But importantly, "[t]hese factors are illustrative, not exhaustive; not all of them will apply in every case, and in some cases other factors will be equally important in evaluating the reliability of proffered expert opinion." *Id.* Sometimes these factors "will aid in determining reliability; sometimes other questions may be more useful." *Id.* The bottom line is that trial judges have

"considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Id.* "Exactly *how* reliability is evaluated may vary from case to case, but what remains constant is the [*6] requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at trial." *Id.*

C. Helpfulness to the Trier of Fact

Finally, expert testimony under Rule 702 must assist the trier of fact. Expert testimony is helpful to the trier of fact if it "concerns matters that are beyond the understanding of the average lay person." *Id.* Expert opinion generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *Id.* at 1262-63.

Additionally, expert testimony is only helpful to the trier of fact if there is "an appropriate 'fit' with respect to the offered opinion and the facts of the case." *McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004). In other words, "expert testimony must be relevant to the task at hand"; it must "logically advance[] a material aspect of the case." *Id.* at 1298-99 (internal quotation marks omitted). There is no "fit" when, for example, "a large analytical leap must be made between the facts and the opinion." *Id.* at 1299.

II. Analysis

Ifediba designated Dr. Schwarz as an expert to testify at his trial. One of the challenges in this case is that Dr. Schwarz's designation was very late. This was not the fault of Ifediba or his counsel. At least two experts previously [*7] designated by Ifebida changed their minds and elected not to testify at trial. In fact, the court continued this case from an earlier trial date (over the Government's strenuous objection) to allow Ifediba to find a new expert. On the eve of trial, Ifediba disclosed the report of Dr. Schwarz. The Report was three days late and not provided to the Government until 5:00 p.m. on the Friday before trial. Again, the Government objected to Ifebida's expert. The court concluded that a *Daubert* hearing should be conducted to (1) allow the court to exercise its gatekeeping function as to the admissibility of Dr. Schwarz's testimony and (2) permit the Government the opportunity to understand (and prepare for) the scope of Dr. Schwarz's testimony.

Based on his report and testimony at the Daubert hearing, Dr. Schwarz was proffered to testify regarding Ifediba's opioid prescribing practices. The Government opposed the admission of his testimony. The expert report submitted by Dr. Schwarz generally indicated that he would offer two main opinions.

First, in the patient files he reviewed, Dr. Schwarz opines he did not observe gross overprescribing, inappropriate increases in opioids, or many "Holy Trinity" [*8] prescriptions by Ifediba. What he instead saw was, according to him and unfortunately at that time, the average or near-average opioid prescriptions for primary care doctors "trying to treat patients with mild pain issues." In short, he concluded that Ifediba's prescribing practices were for a legitimate medical purpose and/or within the usual course of medical practice for a primary care physician at the relevant time using opioids to treat mild pain.

Second, Dr. Schwarz believes that the Government's expert, Dr. Kauffman, should not have evaluated Ifediba's prescribing practices based on the 2016 Board Rules and CDC guidance. In March 2016, the CDC issued new guidelines for prescribing opioids that, according to Dr. Schwarz, resulted in a significant change in the amount of opioids which should be prescribed. Dr. Schwarz also criticizes Dr. Kauffman as "showing more of reading/deskwork and not actual clinical or evidence-based pain management."

There is not an issue about Dr. Schwarz's qualifications. He graduated from the University of Illinois at Chicago Medical School in 1988. He

completed a surgery residency at the University of Toledo in 1993. He completed an addiction medicine [*9] fellowship, and since 2011, he has had a clinical practice in pain management and addiction medicine in both Michigan and Ohio. He is a board-certified addiction medicine physician. Dr. Schwarz thus appears qualified to testify regarding whether Ifebida's prescribing practices were for a legitimate medical purpose and/or within the usual course of medical practice for a primary care physician prescribing opioids to treat pain. Indeed, the parties have stipulated to Dr. Schwarz's qualifications, and the Government does not argue Dr. Schwarz's qualification. (*See* Doc. # 162 at 6).

The remaining questions are whether Dr. Schwarz's opinions are reliable (*i.e.*, has he used a proper methodology in reaching his opinions) and helpful (*i.e.*, does his proposed testimony "concern[] matters that are beyond the understanding of the average lay person." *United States v. Frazier*, 387 F.3d 1244, 1260-61 (11th Cir. 2004) (*en banc*)). Physicians' prescribing practices are generally beyond the understanding of the average lay person. So, at least to the extent relevant to the issues in the case, if otherwise admissible, the proffered opinions will likely be helpful the trier of fact.

The key issue to be resolved is whether Dr. Schwarz's opinion testimony is reliable. [*10] To determine whether Dr. Schwarz's opinions have a reliable basis and are the product of a reliable method, the court held a *Daubert* hearing on July 5, 2019.

Dr. Schwarz's report states that he reviewed 25[1] charts from Ifediba's practice which included the prescriptions charged in the indictment. Dr. Schwarz was instructed to disregard the additional file that was inadvertently sent. (Doc. # 162 at 7-10). Because the charts reviewed by Dr. Schwarz relate directly to the prescriptions charged in the indictment, they form a reliable basis for Dr. Schwarz to opine on whether Ifebida's prescribing practices were for a legitimate medical purpose and/or within the usual course of medical practice for a primary care physician.

Dr. Schwarz is familiar with the general, nationwide regulations applicable to pain management and prescription of opioids through his practice as an addiction medicine physician. For approximately five years, Schwarz also had an opportunity to lecture with a Division Director of the Drug Enforcement Agency in an effort to educate primary care physicians regarding the "dos and don'ts" of prescribing opioids. (Doc. # 162 at 17-18). However, he conceded he did not have familiarity [*11] with the particular prescribing standards applicable in Alabama. (Doc. # 162 at 11-12, 15-16). At the *Daubert* hearing, he was candid with the court and admitted that, with one exception[2], he had not reviewed the Alabama Board of Medical Examiners' rules regarding relevant aspects of the practice of medicine in this state. Obviously, to testify about any Alabama-specific standard of care in this case, an expert such as Dr. Schwarz would be required to know (and understand) Alabama-specific rules about practicing medicine. Although at the hearing Dr. Schwarz indicated that he could, prior to testifying, get up to speed on these rules, nothing in his report signaled that he would state any opinion in this area. The *Daubert* hearing was held during the second week of trial. It was too late to allow him to develop another line of opinion testimony because doing so after the *Daubert* hearing would not have permitted (1) the court the opportunity to perform its gatekeeping function (to make sure that any opinion testimony in that area was reliable and

[1] Dr. Schwarz initially reviewed one extra file, but the parties agree it is irrelevant to the issue in this case.

[2] Dr. Schwarz's report addresses Alabama State Board of Medical Examiners Rule and Regulations, 540-X-4-.09, "Requirements for the Use of Controlled Substances for the Treatment of Pain." That regulation recognizes and describes concerns (a) that under-prescribing due to "fears of investigation or sanction by federal, state and local regulatory agencies may [] result in inappropriate or inadequate treatment of chronic pain patients," and (b) "tolerance and physical dependence are normal consequences of sustained use of opioid analgesics and are not synonymous with addiction."

helpful) or (2) the Government a fair opportunity to adequately prepare for that opinion testimony.[3]

Nevertheless, the court concluded that **[*12]** Dr. Schwarz could offer opinion testimony as to whether Ifebida complied with a more general standard of care based upon the following: (1) whether in his opinion the prescriptions at issue in this case were written for a legitimate medical purpose; (2) whether the prescribing practices of Ifediba that are at issue in this case were undertaken in the usual course of professional practice; and (3) how 2016 CDC Guidelines bear upon these questions. However, the court concluded he cannot testify that any activities at issue were consistent with any Alabama standard of care (or another state's specific standard of care). And similarly, the court ruled Dr. Schwarz could not testify to some nebulous standard of care.

There are other matters the court permitted Dr. Schwarz to testify about. Through his practice and lecturing, Dr. Schwarz has familiarity with the concept of the "holy trinity." From approximately 2013 to 2016, the "holy trinity" consisted of (1) hydrocodone, (2) Xanax (a short acting benzodiazepine), and (2) Soma (a muscle relaxant). (Doc. # 162 at 23-24). He is also aware that there is a lag time between a pain specialist's or the DEA's knowledge that a particular new drug **[*13]** is associated with certain dangers before primary care physicians become familiar with those dangers and adjust their prescribing practices. (Doc. # 162 at 23-26).

For the time-period 2013 to 2016, Dr. Schwarz explained that the usual course of medical practice for a primary care physician to prescribe controlled substances involved an evaluation of (1) the onset or cause of the pain, (2) the quality or extent of the pain, and (3) the patient's goals. (Doc.# 162 at 38-39). To formulate his opinions regarding Ifebida's prescribing practices, Dr. Schwarz reviewed the applicable patient records and spoke to Ifediba regarding his physical examinations. (Doc. # 162 at 36-37). He also planned to review videotapes of the examinations of four undercover agents. (Doc. # 162 at 36-37).

"The court has considerable leeway in determining what is reliable, as long as it its determination is done in light of the *Daubert* factors." *United States v. Watkins*, 880 F.3d 1221, 1227 (11th Cir. 2018) (citing *Frazier*, 387 F.3d at 1262). "Exactly how reliability is evaluated may vary from case to case, but what remains constant is the requirement that the trial judge evaluate the reliability of the testimony before allowing its admission at trial." *Frazier*, 387 F.3d at 1262. "Rule 702 expressly contemplates that experts may be **[*14]** qualified based on experience." *Id.* at 1264.

The Government also expressed concern that there was a very late disclosure of Dr. Schwarz's opinions, but the court found that the limits placed upon Dr. Schwarz's testimony substantially cured any such prejudice. The court also found that any remaining concerns the Government had with respect to Dr. Schwarz's testimony go to the weight of Dr. Schwarz's testimony, rather than its admissibility. These are issues which counsel can explore on cross examination. *See Hendrix v. Evenflo Co.*, 255 F.R.D. 568, 585 (N.D. Fla. 2009) (quoting *Kannankeril v. Terminix Int'l. Inc.*, 128 F.3d 802, 809 (3d Cir. 1997)), *aff'd*, 609 F.3d 1183 (11th Cir. 2010) (so long as a proffered witness is "minimally qualified," a defendant's challenge to specific deficiencies in his or her experience goes "to credibility and weight, not admissibility."). The Government will be able to address any purported objectionable opinions through "[v]igorous cross-examination" and the "presentation of contrary evidence." *Daubert*, 509 U.S. at 596.

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[3] Indeed, at the July 5, 2019 *Daubert* hearing, the Government expressed concern regarding Dr. Schwarz's ability to opine as to the "very well documented and established standard of care as set forth by the Alabama Board of Medical Examiners that was in effect prior to 2013 and then slightly amended after 2013." (Doc. # 162 at 52). Counsel for the Government pointed out that Dr. Schwarz testified that he did not apply that standard.

III. Conclusion

For the reasons explained above, and consistent with the court's ruling in open court (Doc. # 162 at 54-82), the United States' motion to exclude the expert testimony of Dr. Schwarz is **GRANTED IN PART AND DENIED IN PART**. It is further **ORDERED** as follows:

1. Dr. Schwarz will be allowed to testify to -- from an opinion-based **[*15]** fact standpoint -- the elements in the CDC and/or DEA guidelines: (a) whether there was prescription practice for legitimate medical purposes, and (b) whether it was within the scope of professional medical practice.

2. Dr. Schwarz may not testify to any Alabama-specific standards.

3. Dr. Schwarz may not testify based on a comparison of Ifediba's conduct to a "lowest common denominator" standard of care in the community. Whether or not overprescribing occurred among other Alabama physicians at any point in time is not relevant to what happened in this case.

4. Dr. Schwarz will be allowed to testify to areas where he disagrees with the Government's expert, Dr. Kaufman and may comment upon and/or criticize his testimony as appropriate.

DONE and ORDERED this July 15, 2019.

/s/ R. David Proctor

R. DAVID PROCTOR

UNITED STATES DISTRICT JUDGE

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APPENDIX G
USDC ORDER RE FORFEITURE ISSUES
ENTERED 8-17-21

United States v. Ifediba

United States District Court for the Northern District of Alabama, Southern Division

August 17, 2021, Decided; August 17, 2021, Filed

Case No.: 2:18-CR-103-RDP-JEO-1

Reporter
2021 U.S. Dist. LEXIS 154754 *; 2021 WL 3633462

UNITED STATES OF AMERICA, v. PATRICK EMEKA IFEDIBA, Defendant.

Prior History: United States v. Ifediba, 2019 U.S. Dist. LEXIS 22472, 2019 WL 568586 (N.D. Ala., Feb. 12, 2019)

Counsel: |*1| For Patrick Emeka Ifediba, Defendant: Derrick K Collins, DERRICK COLLINS, ATTORNEY AT LAW, Birmingham, AL; Emory Anthony, Jr, EMORY ANTHONY, JR. ATTORNEY AT LAW, Birmingham, AL.

For USA, Plaintiff: Jay E Town, US Attorney, Leonard James Weil, Jr, LEAD ATTORNEYS, US ATTORNEY'S OFFICE, Birmingham, AL; US Probation, LEAD ATTORNEY, UNITED STATES PROBATION OFFICE, Robert Vance Bldg., Birmingham, AL; USM, LEAD ATTORNEY, UNITED STATES MARSHAL, Birmingham, AL; Mohammad Khatib, LEAD ATTORNEY, UNITED STATES ATTORNEY'S OFFICE, Birmingham, Al.

Judges: R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE.

Opinion by: R. DAVID PROCTOR

Opinion

MEMORANDUM OF OPINION AND ORDER

This matter is before the court on third-party Petitioners Anthony Ifediba's (acting as personal representative of the Estate of Benedeth Ifediba), Justina Ozuligbo Ngozi's (as an heir to the Estate), and Lesley Chisom Ifediba's petitions asserting third-party interests in certain properties under 21 U.S.C. § 853(n). (Docs. # 321, 323). Also before the court is the United States' Motion for Summary Judgment with respect to the properties discussed in the petitions. (Doc. # 361). The petitions and motion are fully briefed and ripe for review. (Docs. # 362, 369, 370). After careful consideration, |*2| and for the reasons discussed below, the United States' Motion (Doc. # 361) is due to be granted and the other petitions (Doc. # 321, 323) are due to be denied.

II. Factual Background [1]

On July 16, 2019, a jury found Defendant Dr. Patrick Ifediba guilty on forty-four (44) counts of conspiracy to commit money laundering, concealing money laundering, engaging in monetary transactions with property derived from specified unlawful activity, conspiracy to illegally distribute controlled substances, illegal distribution of controlled substances, maintaining drug-involved premises, and health care-fraud and conspiracy.[2] (Doc. # 173). On August 24, 2020, the

[1] The facts set out in this opinion are gleaned from the parties' submissions and the court's own examination of the evidentiary record. All reasonable doubts about the facts have been resolved in favor of Plaintiff. *See Info. Sys. & Networks Corp. v. City of Atlanta*, 281 F.3d 1220, 1224 (11th Cir. 2002). These are the "facts" for summary judgment purposes only. To the extent that Petitioners rely on allegations unsupported by the record or fail to support its factual assertions by pointing to the record, the court excludes such allegations from its consideration on the United States' Motion. *See Doe v. Drummond Co.*, 782 F.3d 576, 604 (11th Cir. 2015).

[2] *See* 18 U.S.C. § 1956(h), 18 U.S.C. § 1956(a)(1)(B)(i), 18 U.S.C. §

court issued a forfeiture order extinguishing Defendant's interest in several properties, including the contents of two annuities and interests in two parcels of real property contested in the petitions.[3] (Doc. # 291). The court found (and it is undisputed) that the properties (1) were used in connection and (2) were associated with Defendant's crimes and that he forfeited his interest to the United States.[4] (*Id.*).

Defendant's mother, Benedeth Ifediba, passed away on October 13, 2016. (Doc. # 323 at 1). Anthony Ifediba acts as the [*3] personal representative of the decedent's estate. (*Id.*). Following the court's forfeiture order, on October 14, 2020 and October 15, 2020, Petitioners filed petitions pursuant to 21 U.S.C. § 853(n) on behalf of individuals and the Estate asserting claims to two annuities and two parcels of real estate in the court's forfeiture order. (Docs. # 321, 323). Petitioners contend that their "interest, title, and claim" would have "matured on the death of their mother." (Doc. # 323 at 1-2).

Happy Monica LLC is an Alabama limited liability corporation founded on March 8, 2010. (Doc. # 172-180). Happy Monica LLC's articles of incorporation list Benedeth Ifediba as its agent, initial member, and manager. (*Id.*). In 2010, Defendant and Uchenna Ifediba sold property located at 1300 Bessemer Road to Happy Monica LLC and they executed a warranty deed granting title to Happy Monica LLC. (Doc. # 276-1). In Benedeth's 2014 tax returns, she claimed income from "Rental Real Estate Property" at "1300 Bessemer Rd." (369-1 at 2, 7). Anthony states that Benedeth "did not know or have the capability to understand any of the alleged criminal activity of" Defendant. (Doc. # 369-2 at 3).

Benedeth granted Defendant power of attorney [*4] on May 27, 2014. (Docs. # 361-14 at 24-28; 172-212 at 1-4). In December 2014, Defendant purchased Lincoln 0149 for $500,000 with a check he signed. (Doc. # 172-212 at 1). Benedeth was listed as the contract owner and Defendant was listed as the annuitant and beneficiary. (*Id.* at 2). On the same day he purchased Lincoln 0149, Defendant signed an indemnification agreement and affidavit regarding his power of attorney over Benedeth's investments. (Doc. # 361-14 at 28).

In January 2015, Defendant purchased Protective 1519 with three separate payments. (Doc. # 361-5; 361-14; 361-15). Similar to Lincoln 0149, Defendant listed Benedeth as the owner and himself as the annuitant and beneficiary. (Doc. # 172-212 at 5, 20, 24, 34, 38). According to the executed power of attorney, Defendant signed for Benedeth. (Doc. # 172-212 at 24). Prior to her death, Benedeth has "se[vere] medical problems," including a stroke, brain injury, seizures, and "[h]ypertensive [e]mergency." (Doc. # 369-2 at 3).

The parties agreed on a discovery and briefing schedule for these ancillary proceedings. (Doc. # 356). After the discovery period closed, the United States filed its motion under Federal Rule of Civil Procedure 56 and Rule of Criminal Procedure 32.2(c)(1)(B) asking the court to enter [*5] summary judgment with respect to the disputed properties. (Doc. # 362).

III. Standard of Review

Any third party to a criminal action may assert a legal interest in property which has been ordered

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1957, 21 U.S.C. § § 846, 841(a)(1) & (b)(1)(C), 21 U.S.C. § 856(a)(1), 18 U.S.C. § 1349, and 18 U.S.C § 1347. (Doc. # 291).

[3] The assets addressed in that Order (Doc. # 291) and in contest here are the Lincoln National Life Insurance Company Choice Plus Variable Annuity ("Lincoln 0149"), the contents described in the Protective Life Insurance Protective Variable Annuity Investor Series contract ("Protective 1519"), the real property located at 1300 Bessemer Road, Birmingham, Alabama 35208, and the real property located at 2020 5th Avenue, South, Unit 335, Birmingham Alabama 35223.

[4] To the extent that Petitioners attempt to challenge the court's findings that the properties were used in connection with Defendant's crimes, the Petitioners cannot "relitigate the merits of a forfeitability determination." *United States v. Davenport*, 668 F.3d 1316, 1321 (11th Cir. 2012). Thus, the only issue here are facts regarding Petitioners' interests.

forfeited to the United States through ancillary proceedings under 21 U.S.C. § 853(n) and Fed. R. Crim P. 32.2(c). *See United States v. Cone*, 627 F.3d 1356, 1358 (11th Cir. 2010); *United States v. Ramunno*, 599 F.3d 1269, 1273 (11th Cir. 2010). After discovery closes,[5] a party may move for summary judgment under Federal Rule of Civil Procedure 56. Fed. R. Crim. P 32.2(c)(1)(B); *see Pacheco v. Serendensky*, 393 F.3d 348, 352 (2d Cir. 2004).

Under Federal Rule of Civil Procedure 56, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). The moving party always bears the initial responsibility of informing the court of the basis for its motion and identifying the portions of the pleadings or filings that demonstrate the absence of a genuine issue of material fact. *Id.* at 323.

Once the moving party has met its burden with a "properly supported motion for summary judgment," Rule 56 requires the non-moving party to go beyond the pleadings -- by pointing to affidavits, or depositions, answers to interrogatories, and/or admissions on file — and designate specific facts showing that there is a genuine issue [*6] for trial. *Celotex*, 477 U.S. at 324; *Gargiulo v. G.M. Sales, Inc.*, 131 F.3d 995, 999 (11th Cir. 1997). Rule 56(c) does not allow a plaintiff to simply rest on the allegations made in the complaint; instead, as the party bearing the burden of proof at trial, he must provide at least some evidence to support each element essential to his case at trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).

The substantive law determines which facts are material. *See id.* 248. All reasonable doubts about the facts and all justifiable inferences are resolved in favor of the non-movant. *See Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306, 1314 (11th Cir. 2007); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115 (11th Cir. 1993). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted. *See id.* at 249.

"[A]t the summary judgment stage the judge's function is not [] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id.* "Essentially, the inquiry is 'whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Sawyer v. Sw. Airlines Co.*, 243 F. Supp. 2d 1257, 1262 (quoting *id.* at 251-52); *see also LaRoche v. Denny's, Inc.*, 62 F. Supp. 2d 1366, 1371 (S.D. Fla. 1999) ("The law is clear ... that suspicion, perception, opinion, and belief cannot be used to defeat a motion for summary [*7] judgment.").

As to issues on which the nonmovant would bear the burden of proof at trial, the Eleventh Circuit interprets *Celotex* as follows:

> [a] moving party is not required to support its motion with affidavits or other similar material negating the opponent's claim in order to discharge this initial responsibility. Instead, the moving party simply may show [ ]—that is, point[ ] out to the district court—that there is an absence of evidence to support the non-moving party's case. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial.

Fitzpatrick, 2 F.3d at 1115 (quoting *U.S. v. Four*

[5] The government can move before discovery to dismiss the third party for "lack of standing, for failure to state a claim, or for any other lawful reason." Fed. R. Crim. P. 32.2(c)(1)(A).

Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991)). And, where the moving party has met this initial burden by showing that there is an absence of evidence supporting the nonmoving party's case, the nonmoving party must

> respond in one of two ways. First, he or she may show that the record in fact contains supporting evidence, sufficient to withstand a directed verdict motion, which was "overlooked or ignored" by the moving party, who has thus failed to meet the initial burden of showing an absence of evidence. Second, he or she may come forward with additional evidence [*8] sufficient to withstand a directed verdict motion at trial based on the alleged evidentiary deficiency.

Id. (internal citations omitted).

IV. Analysis

The United States argues that Petitioners lack "statutory standing" to challenge forfeiture because they do not have a "legal interest" in the contested property as required under 21 U.S.C. § 853(n)(2). (*See* Doc. # 362). Alternately, the United States contends that even if Petitioners did have standing, their claims fail to satisfy the requirements to amend the court's forfeiture order under § 853(n)(6).[6] (*Id.*). Of course, if a party does not have standing, a court need not evaluate the claims on the merits. *United States v. Ramunno*, 599 F.3d 1269, 1272 (11th Cir. 2010) (holding that the "inquiry ends" with respect to (n)(6) determination if the petitioner does not have a legal interest); *United States v. Weiss*, 467 F.3d 1300, 1308 (11th Cir. 2006) (stating that courts cannot "consider claims" without Article III standing).

In response, Petitioners argue that, under 21 U.S.C. § 853(n)(2), they have standing to challenge the forfeiture of the real property and annuities because Benedeth had an interest in the properties. Further, Petitioners argue that its interests satisfy the requirements under § 853(n)(6).

After careful review, the court concludes the United States is due summary judgment because Petitioners' lack standing to challenge [*9] the court's forfeiture order of the disputed property. Accordingly, the petitions are due to be dismissed.

A. Real Estate

Petitioners must show that they have a "legal interest" in the real property at 1300 Bessemer under § 853(n)(2). They contend they do because Benedeth was the "sole member, the initial member, organizer, and manager of Happy Monica LLC." (Docs. # 369 at 5; 172-180 at 1). State law determines who has a legal interest in property. *United State v. Fleet*, 498 F.3d 1225, 1231 (11th Cir. 2007); *see United States v. Morales*, 36 F. Supp. 3d 1276, 1285 (M.D. Fla. 2014). Alabama law provides that an Alabama LLC member "has no interest in any specific property of" an LLC. *See* Ala. Code § 10A-5A-4.02. Thus, without a legal interest in property owned by an LLC, an LLC member lacks standing to contest forfeiture of that property. *United States v. Couch*, No. 15-0088-CF-B, 2017 U.S. Dist. LEXIS 149972, 2017 WL 4105769, at *2 (S.D. Ala. Sept. 15, 2017) ("Established case law has made clear that shareholders of a corporation and members of an LLC do not have standing to challenge the forfeiture of the entity's assets ... Individual members of a limited liability company have no individual vested rights in and to property owned by a limited liability company." (internal citations omitted)); *United States v. Magness*, 125 F. Supp. 3d. 447, 449 (W.D.N.Y. 2015) (fifty-percent owner of LLC lacked standing to file a claim contesting the forfeiture of half the LLC's assets).

[6] Section 853(n)(6) states that a court may amend its forfeiture order only after finding that a petitioner's legal interest is either "superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property" or that Petitioner "is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture." 21 U.S.C. § 853(n)(6)(A)-(B).

In 2010, Defendants granted title of 1300 Bessemer Road to [*10] Happy Monica, LLC. (Doc. # 276-1). So, it is undisputed that Happy Monica LLC holds legal title to 1300 Bessemer Road Property, not Benedeth. (Doc. # 369 at 5). Because Benedeth was the sole member, officer, organizer and manager of Happy Monica LLC, the Petitioners' interest ends (at most[7]) at Benedeth's interest in Happy Monica LLC. (Doc. # 362, 369 at 5, 10).

The only other fact in the record that Petitioners assert supporting their argument that they have a legal interest in 1300 Bessemer is that Benedeth's tax returns indicate that she received rental income from the property. (Doc. # 369-1 at 1-2). But, this fact has no legal significance. Alabama law states that the tax status of an LLC "shall not affect its status as a separate legal entity." Ala Code § 10-5A-1.04. In other words, whether an LLC member claims income related to the LLC does not alter the fact that an LLC maintains its property as a distinct entity. Petitioners have not provided any legal authority or factual support to the contrary. That Benedeth claimed taxes on income from the LLC does not mean that she had a legal interest in that property under Alabama law. Thus, summary judgment is due to be granted because Petitioners [*11] lack statutory standing to assert their claims. *See Anderson*, 477 U.S. at 249.

Similarly, Petitioner Lesley Ifediba alleges that the property at 2020 5th Avenue South has been her "primary residence" since June 26, 2015 and that she has "invested some of her own money in the purchase" of the property. (*See* Doc. # 323 at 2). But, Lesley does not provide any factual support for her assertion. Fed. R. Civ. P 56(e); *see Fitzpatrick*, 2 F.3d at 1115. Indeed, there are no facts in the record to support her assertion that she has a legal interest in the real property. Thus, summary judgment is due to be entered with respect to the claim involving 2020 5th Avenue South.

B. Annuities

The Government argues that Petitioners' claims with respect to the annuities at issue fail because Petitioners do not have a cognizable legal interest necessary to satisfy § 853(n)(2). (Doc. # 362 at 22-24). The United States also argues that, even if Petitioners do have standing, their claims to the annuities fail on the merits. (*Id.* at 24-33).

Petitioners assert they have a legal interest based on the fact that Benedeth was named as the owner of the annuities.[8] (Doc. # 321 at 1). However, being the named owner of the policy is insufficient to establish standing. *See United States v. $515,060.42*, 152 F.3d 491, 498 n.6 (6th Cir. 1998) ("[B]are legal title, in the [*12] absence of assertions of dominion, control or some other indicia of ownership of or interest in the seized property, is insufficient to confer standing to challenge a forfeiture.").

Further, "straw owners and persons who might have unknowingly been in possession of property that is seized do not necessarily suffer an injury that is sufficient to demonstrate standing." *United States v. Henry*, 621 F. App'x 968, 972 (11th Cir. 2015) (internal citations and quotation marks omitted). As the United States correctly argues, the record establishes that Benedeth was unaware of her ownership of the annuities. Defendant purchased the annuities, made himself the annuitant and beneficiary, and even exercised power of attorney over the accounts to the extent that Benedeth was involved at all. (Docs. # 361-14 at 24-28, 24, 34, 38; 172-212 at 1-4; 361-15). Petitioners do not put forth any facts in response to show a dispute regarding Benedeth's involvement in the annuities.[9]

[7] Petitioners assert that *their* "interest, title, and claim" would have "matured on the death of their mother." (*Id.* at 1-2). In other words, they have not asserted what *her* interests were before she passed.

[8] Petitioners do not specify whether they are arguing that this fact establishes Article III standing, satisfies the requirements of § 853(n)(2), or meets the requirements of § 853(n)(6).

[9] If the court were to reach the merits of Petitioners' claim (and, to be clear, it does not), it doubts the veracity of their claims. For example,

V. Conclusion

Because there are no facts in the Rule 56 record establishing that Petitioners have standing to contest the court's forfeiture order, their petitions (Docs. # 321, 323) are **DISMISSED** in all Defendants' actions and the United States' Motion for Summary Judgment (Doc. # **[*13]** 361) is **GRANTED** in all Defendants' actions.

DONE and **ORDERED** this August 17, 2021.

/s/ R. David Proctor

R. DAVID PROCTOR

UNITED STATES DISTRICT JUDGE

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there are no Rule 56 facts establishing that Benedeth was a bona fide purchaser or had a superior interest than Defendant. *See, e.g., United States v. Akhtar*, 2017 U.S. Dist. LEXIS 174850, 2017 WL 4778732, at *4 (E.D. Mich. Oct. 23, 2017) ("Petitioner's assertion that she is the true owner of the cash is similarly insufficient to establish superior title"), *aff'd*, 2018 U.S. App. LEXIS 26877, 2018 WL 5883930 (6th Cir. Sept. 19, 2018). Indeed, Petitioners contend (albeit inconsistently) that their interest materialized when she Benedeth passed away on October 14, 2016, which was over three years after Defendant began his criminal activity. *See* 21 U.S.C. § 853(c); *United States v. Eldick*, 223 F. App'x 837, 840-41 (11th Cir. 2007) ("Thus, the government's interest will be superior to that of anyone whose interest does not antedate the crime.").

APPENDIX H
USDC ORDER DENYING MOTION FOR NEW TRIAL
ENTERED 11-21-19

United States v. Ifediba

United States District Court for the Northern District of Alabama, Southern Division

November 21, 2019, Decided; November 21, 2019, Filed

Case No.: 2:18-cr-103-RDP-JEO

Reporter
2019 U.S. Dist. LEXIS 202027 *; 2019 WL 6219209

UNITED STATES OF AMERICA, Plaintiffs, v. PATRICK EMEKA IFEDIBA, and NGOZI JUSTINA OZULIGBO, Defendants.

Prior History: United States v. Ifediba, 2019 U.S. Dist. LEXIS 22472 (N.D. Ala., Feb. 12, 2019)

Counsel: [*1] For Patrick Emeka Ifediba, Defendant: Derrick K Collins, DERRICK COLLINS, ATTORNEY AT LAW, Birmingham, AL; Emory Anthony, Jr, EMORY ANTHONY, JR. ATTORNEY AT LAW, Birmingham, AL.

For Clement Essien Ebio, Defendant: Jeffery L Dummier, LAW OFFICES OF JEFFERY L DUMMIER LLC, Birmingham, AL; Michael P Hanle, JAFFE HANLE WHISONANT & KNIGHT PC, Birmingham, AL.

For Ngozi Justina Ozuligbo, Defendant: Donald L Colee, Jr, LEAD ATTORNEY, DONALD COLEE ATTORNEY AT LAW, Birmingham, AL.

For USA, Plaintiff: Jay E Town, US Attorney, Leonard James Weil, Jr, LEAD ATTORNEYS, US ATTORNEY'S OFFICE, Birmingham, AL; US Probation, LEAD ATTORNEY, UNITED STATES PROBATION OFFICE, Birmingham, AL; USM, LEAD ATTORNEY, UNITED STATES MARSHAL, Birmingham, AL; Mohammad Khatib, LEAD ATTORNEY, UNITED STATES ATTORNEY'S OFFICE, Birmingham, Al.

Judges: R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE.

Opinion by: R. DAVID PROCTOR

Opinion

MEMORANDUM OPINION

This matter is before the court on Motions for a New Trial (Docs. # 177, 179) filed by Defendant Patrick Emeka Ifediba and Defendant Ngozi Justina Ozuligbo. The Motions are fully briefed and ripe for review. (Docs. # 177, 179, 180). After careful review, the court concludes that the Motions are due to be denied. [*2]

I. Background

Defendants Patrick Emeka Ifediba and Uchenna Grace Ifediba (who was found incompetent and did not go to trial) were married and each a physician who specialized in internal medicine. (Doc. #1 at 1). Both Defendants were licensed to practice medicine in Alabama, and each obtained a Drug Enforcement Administration ("DEA") registration, which authorized them to prescribe controlled substances. (*Id.*). Defendant Patrick Ifediba formed and operated Care Complete Medical Clinic ("CCMC"), along with Uchenna Ifediba, as a private medical clinic. (*Id.* at 2). They provided medical services at CCMC, including pain management and allergy treatment. (Doc. # 1 at 2-3).

Defendant Clement Essien Ebio, an alleged co-conspirator who also did not go to trial, was the owner of RCM Medical Billing, LLC and RCM Medical Group (collectively "RCM"), both of which provided medical billing and medical practice management services to CCMC. (*Id.* at 2-3). Defendant Ebio also served as the regional

manager of a Georgia allergy services company. (*Id.* at 2). Defendant Ngozi Justin Ozuligbo was a licensed practical nurse, who worked at CCMC. (*Id.*). She is the sister of Defendant Patrick Ifediba and was employed, at times, as a CCMC [*3] employee, and at other times as a Georgia Allergy Services company employee. (*Id.*).

Beginning in February 2015 and spanning over the course of eight months, four undercover agents working with the DEA visited CCMC in Birmingham, Alabama. The undercover agents posed as patients and visited CCMC as part of a DEA investigation into Defendants Patrick and Uchenna Ifediba's controlled substance prescription practices. On March 29, 2018, after a three-year investigation, Defendants Patrick Ifediba, Uchenna Ifediba, Ngozi Justina Ozuligbo, and Clement Ebio were charged in a forty-four (44) count indictment.[1] (*See id.*).

The indictment alleges that from January 1, 2013, and continuing through April 28, 2016, Defendants Patrick and Uchenna Ifediba conspired to operate the CCMC as a "pill mill" in violation of the Controlled Substances Act. (*Id.* at 21-27). The indictment also contains a number of substantive counts alleging that Defendant Patrick Ifediba unlawfully distributed controlled substances. (*Id.*). The indictment alleges that Defendant Ozuligbo defrauded patients, participated in money laundering, and conspired to defraud various medical insurance companies. (*Id.*).

The trial of Defendant Ifediba and [*4] Defendant Ozuligbo began on June 24, 2019. The Government's case in chief included forty-five witnesses and over 350 exhibits. The Government rested its case-in-chief on July 8, 2019. Subsequently, Defendants made oral motions for judgments of acquittal.

Following the Governments case in chief, Defendant Ifediba presented his case. He called nine witnesses, including two experts. Defendant Ifediba rested on July 10, 2019. Both Defendants renewed their motions for acquittal. Defendant Ifediba's motion was denied. However, on motion from the Government, the Court dismissed Count Eleven against Defendant Ozuligbo. (Doc. # 170). As to the remaining counts against her, the court denied her motion for acquittal. On July 15, 2019, the jury received the case. On July 17, 2019 the jury convicted Defendants Ifediba and Ozuligbo on all remaining counts. Both Defendants filed timely motions seeking new trials under Federal Rule of Criminal Procedure 33. (Docs. # 177, 179).

II. Legal Standard

Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, the court is empowered to vacate a judgment and grant a new trial "if the interests of justice so require[]." FED. R. CRIM. P. 33(b)(2). There are two grounds on which a court may grant a motion for a new trial: (1) when there is newly discovered evidence; [*5] or (2) if it is in the interest of justice. *United States v. Campa*, 459 F.3d 1121, 1151 (11th Cir. 2006). The decision whether to grant or deny such a motion rests in the sound discretion of the trial court. *United States v. Champion*, 813 F.2d 1154, 1170 (11th Cir. 1987). The trial court may grant a motion for a new trial even where the defect does not constitute reversible error, or even when there is no legal error at all. *United States v. Vicaria*, 12 F.3d 195, 198-99 (11th Cir. 1994). Rather, the court "has very broad discretion in deciding whether there has been a miscarriage of justice." *United States v. Hall*, 854 F.2d 1269, 1271 (11th Cir. 1988). Indeed, the power of a district court to grant a new trial "is not limited to cases where the district court concludes that its prior ruling, upon which it bases the new trial, was legally erroneous. *Vicaria*, 12 F.3d at

[1] Defendant Uchenna Ifediba and Defendant Clement Essein Ebio were charged in the indictment, but they were not Defendants in the 2019 trial. (Doc. #1 at 1-2). On July 18, 2019, the Government moved to dismiss the indictment against Defendant Uchenna Ifediba due to competency issues. (Docs. # 40, 46). On July 20, 2019, the court dismissed the indictment against her without prejudice. (Doc. # 57). Defendant Ebio and the Government reached a plea agreement on July 20, 2018. (*See* Doc. # 60).

198-99. In addition, the cumulative effect of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible. *United States v. Thomas*, 62 F.3d 1332, 1343 (11th Cir. 1995).

"In evaluating a motion for a new trial, [a] district court need not view the evidence in the light most favorable to the verdict." *United States v. Ward*, 274 F.3d 1320, 1323 (11th Cir. 2001) (citations and internal quotations omitted). However, "[t]he court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable. The evidence must preponderate heavily against the verdict, [*6] such that it would be a miscarriage of justice to let the verdict stand." *Martinez*, 763 F.2d at 1312-13. Importantly, motions for new trials should be granted "sparingly," and only in "those really 'exceptional cases.'" *Id.* at 1313 (internal citations omitted).

III. Analysis

Defendant Ifediba claims a new trial is warranted for four reasons: (1) the court made erroneous evidentiary rulings; (2) the evidence was insufficient; (3) the court gave erroneous jury instructions; and (4) it was improper to join his co-defendant, Ngozi Justina Ozuligbo, for purposes of trial. (Doc. # 177). Defendant Ozuligbo joins Defendant Ifediba in his second objection and challenges the sufficiency of the evidence. (Doc. # 179). The court addresses each argument, in turn.

a. Evidentiary Rulings

To successfully challenge a verdict on the basis of a district court's incorrect evidentiary ruling, a party must: (1) "demonstrate either that his claim was adequately preserved or that the ruling constituted plain error"; (2) "establish that the district court abused its discretion in interpreting or applying an evidentiary rule"; and (3) "establish that this error affected ... a substantial right." *United States v. Stephens*, 365 F.3d 967, 974 (11th Cir. 2004) (citations and internal quotations omitted).

"[C]riminal [*7] defendants must be afforded the opportunity to present evidence in their favor." *United States v. Hurn*, 368 F.3d 1359, 1362, 95 Fed. Appx. 1359 (11th Cir. 2004). A district court's exclusion of a defendant's otherwise admissible evidence violates the constitutional rights to Compulsory Process and Due Process in four circumstances.

> First, a defendant must generally be permitted to introduce evidence directly pertaining to any of the actual elements of the charged offense or an affirmative defense. Second, a defendant must generally be permitted to introduce evidence pertaining to collateral matters that, through a reasonable chain of inferences, could make the existence of one or more of the elements of the charged offense or an affirmative defense more or less certain. Third, a defendant generally has the right to introduce evidence that is not itself tied to any of the elements of a crime or affirmative defense, but that could have a substantial impact on the credibility of an important government witness. Finally, a defendant must generally be permitted to introduce evidence that, while not directly or indirectly relevant to any of the elements of the charged events, nevertheless tends to place the story presented by the prosecution in a significantly different [*8] light, such that a reasonable jury might receive it differently.

Hurn, 368 F.3d at 1363 (internal footnotes omitted).

Defendant Ifediba argues that evidence was erroneously admitted or excluded regarding: (1) peer comparison data; (2) revocation of his DEA registration; (3) pharmacy compliance with prescriptions; and (4) sanctions (or lack thereof) by the Alabama Board of Medical Examiners. (Doc. # 177 at ¶4).

i. Peer Comparison Data

Defendant Ifediba argues the court erroneously admitted peer comparison charts at trial. (*Id.*). After review, the court concludes that it did not err in admitting the Viva Health peer comparison chart, or otherwise. The peer comparison charts were used by the Government to illustrate the disparity between the value of claims from other allergy specialists in comparison with Defendant Ifediba's submitted claims. (*Id.*). Defendant Ifediba argues the charts were prejudicial and "had nothing to do with the issue of conspiracy to commit fraud . . . ." (*Id.*). In presenting this argument, Defendant Ifediba cites no any legal authority, nor does he provide any additional rationale to support his argument.

In response, the Government notes that the peer comparison charts were provided to [*9] Defendant Ifediba on February 11, 2019, four months prior to trial, and he did not object to the admissibility of the exhibits in any of his pre-trial motions *in limine*. (Doc. # 180 at 7). Moreover, at trial, Defendant Ifediba only objected to the admissibility of one peer comparison exhibit pertaining to one health insurance company, Viva Health. (*Id.*).

The peer comparison charts were used by the Government to illustrate disparities in medical billing and the number of patients seen by the Defendant. This critical information was relevant to the Government's theory at trial. In fact, the use of peer-comparison charts at trial to illustrate disparities in medical billing is a common practice. *United States v. Richardson*, 233 F.3d 1285, 1293 (11th Cir. 2000) (stating "[s]ummary charts are permitted generally by Federal Rule of Evidence 1006 and the decision whether to use them lies within the district court's discretion."); *United States v. Rutigliano*, 614 F. App'x 542, 544-45 (2d Cir. 2015) ("[P]ermitting the government to introduce charts comparing disability applications prepared by [Defendant] for himself and others, and charts showing the disparity in disability rates by [others]."); *United States v. Casamento*, 887 F.2d 1141, 1151 (2d Cir. 1989) ("This court has long approved the use of charts in complex trials."); *United States v. Pinto*, 850 F.2d 927, 935-36 (2d Cir. 1988) (approving Government's use of summary charts at trial). In his Motion, Defendant [*10] Ifediba merely regurgitates the same arguments he made at trial. (*See* Doc. # 177). Just as at trial, and for the reasons already stated, the court finds no error in admitting the Viva Health peer comparison charts.

Even if the Viva Health chart had not been admitted, there was overwhelming evidence of Defendant Ifediba's guilt. Thus, even if the chart was not due to be admitted (and, to be clear, it was clearly admissible) admission of the Viva Health chart was "harmless beyond a reasonable doubt." *United States v. Emmanuel*, 565 F.3d 1324, 1336 (11th Cir. 2009). "The inquiry under the harmless error doctrine is whether there was "a reasonable possibility that the evidence complained of might have contributed to the conviction." *United States v. Cruz*, 765 F.2d 1020, 1025 (11th Cir. 1985) (citing *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963)). Here, the evidence presented against Defendant Ifediba at the three-week trial was sufficient to negate any reasonable doubt that the admission of the Viva Health comparison chart contributed to his conviction. *Cruz*, 765 F.2d at 1025 (holding that "the other evidence against [Defendants] was sufficient to negate any reasonable doubt whether the erroneous admission of the [evidence] contributed to their convictions.").

Because Defendant Ifediba failed to object to the other charts before or during trial, the appropriate standard of review [*11] for the rest of the peer comparison charts is "plain error only." *United States v. Emmanuel*, 565 F.3d 1324, 1336 (11th Cir. 2009); *United States v. Turner*, 474 F.3d 1265, 1275 (11th Cir. 2007) ("[I]t is well-settled that where . . . a defendant fails to preserve an evidentiary ruling by contemporaneously objecting,

our review is only for plain error."). To prevail on plain error review, a party must, as an initial matter, establish three conditions. "First, there must be an error that has not been intentionally relinquished or abandoned. Second, the error must be plain—that is to say, clear or obvious. Third, the error must have affected the defendant's substantial rights." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904, 201 L. Ed. 2d 376 (2018) (quoting *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1343, 194 L. Ed. 2d 444 (2016)). If the first three conditions are met, a court "may exercise its discretion to notice a forfeited error, but only if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Hernandez*, 906 F.3d 1367, 1370 (11th Cir. 2018) (quoting *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005)). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9, 124 S. Ct. 2333, 159 L. Ed. 2d 157 (2004)). Here, we do not struggle to conclude that the four prongs are not satisfied.

The court's first step under the plain error analysis is to determine if there was an error that has not been "intentionally relinquished or abandoned." *Rosales-Mireles*, 138 S. Ct. at 1904. Here, there was not. There was no deviation from a legal rule. Rather, the use of peer comparison **[*12]** charts is a common practice and is generally permitted by the Federal Rules of Evidence. *See Richardson*, 233 F.3d at 1293; FED. R. EVID. 1006. At the second step, the court notes that there was no obvious error by the court in allowing the admission of the peer comparison charts. Third, the admission of the charts did not affect Defendant Ifediba's substantial rights. Indeed, even in the absence of the peer comparison charts, the voluminous amount of evidence presented by the Government likely would have resulted in Defendant Ifediba's conviction. (*See* Doc. # 172, Exh. 1-504). Finally, as the first three prongs were not met, the court need not consider whether the admission of the peer comparison charts "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Hernandez*, 906 F.3d at 1370 (citations omitted). But, in an abundance of caution, the court notes that the admission of the charts in no way compromised the fairness of the proceedings. Defendant argues that the charts were prejudicial and that the "only purpose of the[] comparisons was to prejudice the jury with the issue of money made by the Defendant and number of patients seen by the Defendant during the three years of the conspiracy." (Doc. # 177 at ¶4). Aside **[*13]** from calling out "prejudice," Defendant Ifediba does not state how the information on the charts was unfairly prejudicial. Therefore, after a thorough analysis, the court concludes that it did not err in admitting the peer comparison charts, Viva Health or otherwise.

ii. DEA Registration

Next, Defendant Ifediba argues the court precluded him from presenting evidence that the DEA did not pursue administrative action to revoke his DEA registration.[2] (Doc. # 177 at ¶5). Defendant Ifediba contends that he "should have been given the opportunity in the trial to rebut the issue that [he] was prescribing scheduled drugs that were a threat to patients[]" by showing "the DEA's office did not attempt to suspend the Defendant's privilege to prescribe certain drugs." (*Id.*).

In response, the Government argues that Defendant's Ifediba's DEA licensure is entirely unrelated to whether he violated the Controlled Substances Act. (Doc. # 180 at 8-9). What is more, the Government characterizes Defendant's rationale as "preposterous" because "[D]efendant's own pain management expert[] testified at trial that at least one of the prescription cocktails [Defendant] Ifediba issued to an undercover agent was an **[*14]** ***overdose waiting to happen***." (Doc. # 180 at 9

[2] Defendant Ifediba's DEA Registration gave him the authority to prescribe Schedule II — V controlled substances. (Doc. # 177 at ¶5).

(emphasis in original)).

Here, the court concludes that interests of justice do not require a new trial for Defendant Ifediba. First, the court was right—evidence that the DEA did not pursue administrative action against him at some point in time does not mean that he did not violate the Controlled Substances Act. Second, notwithstanding the court's ruling, during opening statements defense counsel told the jury that Defendant Ifediba had a "license" from the DEA that was maintained before, during, and after the charged conspiracy. In fact, he presented evidence about his active DEA registration during trial. And, defense counsel re-visited the issue of Defendant's licensure during his cross-examination of DEA Diversion Investigator, Kenneth Wade Green. The interests of justice do not require a new trial because the court's ruling was correct, and, in any event, Defendant Ifediba presented evidence of his licensure during the trial. Putting aside whether the cross examination of Green skirted the line of the court's prior ruling in this lengthy trial, the point is that Defendant presented this evidence, even if it is irrelevant.

iii. Prescriptions [*15]

Defendant Ifediba argues the court erred by not allowing him to present evidence "that the [prescription] medication was for a legitimate purpose" and that "no pharmacy refused to fill the prescription of the patients other than the undercover officers." (Doc. # 177 at ¶5). Further, Defendant Ifediba contends that the court erred by precluding him from presenting evidence that "pharmacists have a corresponding duty under the Controlled Substances Act to dispense controlled substances in good faith . . . ." (Doc. # 180, at 10 (citing Doc. # 177 at ¶5)).

Contrary to Defendant's assertions, evidence of the Controlled Substances Act's good faith dispensing oath was presented at trial in at least two instances. In the first, on direct examination, the Government questioned Andrew Wallace, a former Walgreens pharmacist, about a pharmacist's good faith dispensing oath. In the second, defense counsel cross-examined Wallace and "delved into a pharmacist's good faith dispensing oath at length." (Doc. # 180 at 11).

Similarly, evidence of a pharmacy refusing to fill Defendant Ifediba's prescriptions at trial was presented to the jury. Defendant Ifediba's motion argues that, "[t]he law put[s] a responsibility [*16] on the pharmacy not to fill a prescription that is not for medical purposes" and "Defendant should have been allowed to present evidence that no pharmacy refused to fill the prescription of the patients other than the undercover officers." (Doc. # 177 at 3). Defendant Ifediba's argument is foreclosed by the testimony of DEA Task Force Officer Kira McWaine. Officer McWaine testified that during the course of her investigation of Defendant Ifediba, multiple pharmacies refused to fill Defendant Ifediba's prescriptions. Officer McWaine's testimony was further corroborated by the testimony of several of Defendant Ifediba's former patients, who were not undercover agents, as well as the Walgreen's pharmacist, Andrew Wallace.

Accordingly, Defendant Ifediba's Motion for a new trial on this ground is based on a flawed account of the evidence presented at trial, and is due to be denied.

iv. Sanctions by the Alabama Board of Medical Examiners

Next, Defendant Ifediba argues that he "was unlawfully prevented from [presenting] evidence [to] the jury that [he] was exonerated by the Alabama Board of Medical Examiners . . ." (Doc. # 177 at ¶9). Once again, Defendant Ifediba's perception of his "exoneration" [*17] is at best a mischaracterization.

To say that Defendant Ifediba was exonerated is, in fact, an inaccurate account of the Alabama Board of Medical Examiners administrative process. The

Board did allow Defendant Ifediba to maintain a medical license and his prescribing authority. However, the Board restricted his prescribing protocols and required him to take remedial action. This was not an "exoneration," as Defendant Ifediba claims. Moreover, the court considered Defendant Ifediba's arguments on this issue at a pre-trial conference on the Government's Motion *in limine*. (Doc. # 94). The court rejected Defendant Ifediba's arguments regarding his "exoneration," and simultaneously precluded the Government from presenting the Board's video-recorded interview of Defendant Ifediba, in which they vehemently denounced his prescribing practices.

Although Defendant Ifediba was prohibited from presenting this evidence at trial, he did not heed the direction of the court. Rather, Defendant Ifediba elicited testimony from multiple witnesses regarding the status of his medical license and prescribing authority. Here, again, Defendant Ifediba seeks to eat his cake and have it too. The court was right [*18] to preclude the testimony. He simply cannot argue that he was prejudiced by the court's decisions when he indirectly elicited the very evidence the court ordered him to keep out. Therefore, this portion of Defendant Ifediba's Motion is due to be denied.

b. Alleged Insufficiency of Evidence

Defendants Ifediba and Ozuligbo each allege that there was insufficient evidence to support their convictions. When considering the sufficiency of the evidence, "[t]he jury is free to choose between or among the reasonable conclusions to be drawn from the evidence presented at trial, and the court must accept all reasonable inferences and credibility determination made by the jury." *United States v. Sellers*, 871 F.2d 1019, 1021 (11th Cir. 1989) (internal citations omitted). When a defendant challenges the sufficiency of evidence in a motion for a new trial, the court "need not view the evidence in the light most favorable to the verdict" and "[i]t may weigh the evidence and consider the credibility of witnesses." *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985). Yet, "the court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable . . . . [] a conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable [*19] construction of the evidence." *United States v. Tate*, 586 F.3d 936, 944 (11th. Cir. 2009) (internal quotations omitted). Indeed, a new trial should be granted only if the evidence "preponderate[s] heavily against the verdict, such that it would be [a] miscarriage of justice to let the verdict stand." *United States v. Cox*, 995 F.2d 1041, 1043 (11th Cir. 1993). Motions for a new trial based on the sufficiency of the evidence are to be granted "sparingly and with caution" and only in "exceptional circumstances." *United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985).

i. ALBME Rules

Defendant Ifediba argues, for the first time,[3] that the Unites States convicted him on a standard of proof based on the regulations promulgated by the Alabama Board of Medical Examiners (i.e., the Alabama standard of care) and not the Federal DEA standard of care. (Doc. # 177 at ¶8). Specifically, Defendant Ifediba argues that the federal DEA standard of "beyond a reasonable doubt" and "for a legitimate purpose and in the ordinary course of professional practice" was the correct standard of care. (*Id.*). However, Defendant Ifediba's arguments are off the mark. When Congress enacted the Controlled Substances Act, it allowed the states to define the applicable standard of care. *United States v. Tobin*, 676 F.3d 1264, 1273-78 (11th Cir. 2012) ("When Congress enacted the [Controlled

[3] Because Defendant Ifediba is raising this argument for the first time in a Rule 33(a) motion, the court reviews the unpreserved objection for plain error. *United States v. Tobin*, 676 F.3d 1264, 1273 (11th Cir. 2012) ("An unpreserved objection to a district court decision, such as an evidentiary ruling or its response to a jury question, is reviewed for plain error."), *United States v. Dunlap*, 279 F.3d 965, 966-67 (11th Cir. 2002).

Substances Act], it thus manifested its intent to leave it to [*20] the states to define the applicable standards of professional practice."), *abrogated on other grounds by United States v. Davila*, 569 U.S. 597, 133 S. Ct. 2139, 186 L. Ed. 2d 139 (2013).

Defendant Ifediba's argument fails. There was no prejudice to Defendant Ifediba based on evidence presented or argument about the Alabama standards of care. Therefore, the interests of justice do not warrant a new trial on these grounds.

ii. Absence of an Applicable Standard of Care

Defendant Ifediba argues that prior to March 2016, there was not a criminal standard of care governing the conduct of medical doctors prescribing controlled substances. (Doc. # 177 at ¶10). Specifically, Defendant Ifediba states "there was no standard [of care] for Morphine Equivalency Dosage, nor a [c]riminal [s]tandard of [c]are for which medical doctors were to proscribe their conduct and therefore the Defendant was denied his right to substantive and procedural Due Process of Law Ex Post Facto." (*Id.*).

Although Defendant Ifediba's brief is unclear, the court construes his request for a new trial based on an "ex post facto" criminalization of his prescribing practices. (*Id.*). First, the court notes that while Defendant Ifediba makes this blanket assertion, he has not provided any citation to relevant [*21] authority to support it. Nor has he responded to the Government's point that "[c]arried to its logical extreme, [this argument] would require the court to find that no amount of evidence of improper prescribing could be offered at trial to convict him" and "[i]t would also mean that every single pill mill trial . . . based on prescriptions written prior to March 2016 and resulting in conviction is unconstitutional." (Doc. #180 at 15-16).

The court agrees with the Government. The standard of review requires that "the court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable . . . . [A] conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence." *Tate*, 586 F.3d at 944 (11th Cir. 2009) (internal quotations omitted). Moreover, this argument was presented to the jury during the three-week trial. And the court did permit evidence, in the form of expert testimony, that the CDC guidelines were changed in 2016. In fact, both experts who testified on this subject matter agreed that, although the guidelines changed in 2016, even before that date prescriptions issued by a physician had to [*22] be written for a legitimate medical purpose and within the scope of professional practice.

When considering the appropriate standard of review and the evidence presented to the jury on this issue, there was overwhelming evidence of Defendant's guilt. Thus, his conviction must be upheld.

iii. Defendant Ozuligbo's Participation in Health Care Fraud

Defendant Ozuligbo's Motion for a New Trial is premised on the same arguments made in her oral Rule 29(a) motion presented at trial. The court provides a brief review of Defendant Ozuligbo's oral Rule 29(a) Motion, the Government's rebuttal, and the court's subsequent rulings.

On July 8, 2011 Defendant Ozuligbo argued that she was entitled to Judgment of Acquittal on all counts. *See* FED. R. CRIM. P. 29(a). Regarding the Conspiracy charge alleged in Count One,[4] Defendant Ozuligbo argued that the government failed to prove any knowledge on her part that the orders she received for allergy testing were not orders based on Defendant Ifediba's training and

[4] In Count One of the Indictment, the Government alleged that Defendants Patrick Ifediba, Uchenna Grace Ifediba, Clement Ebio, and Ngozi Ozuligbo knowingly and willfully, combined, conspired, and agreed to commit the offense of health care fraud in violation of 18 U.S.C. §1349. (Doc. # 1 at 12).

experience as a doctor. However, there was evidence presented to the contrary. For example, there was testimony that a front office employee at CCMC confronted Defendant Ozuligbo about the allergy tests and she told the employee to "just [*23] do her job." The court found there was evidence presented such that a jury could have found Defendant Ozuligbo guilty under a reasonable construction of the evidence, and the Rule 29(a) Motion as to Count one was denied.

In Counts Two through Eleven[5] the government alleged that Defendants Patrick Ifediba, Uchenna Ifediba, Clement Ebio, and Ngozi Ozuligbo:

> [D]evised and intended to devise, and participated in, a scheme and artifice: (a) to defraud health care benefit programs, namely Medicare and Private Insurers, as to material matters in connection with the delivery of and payment for health care benefits, items and services; and (b) to obtain money from Medicare and Private Insurers by means of false and fraudulent pretenses, representations, promises, and by concealment of material facts in connection with the delivery of and payment for health care benefits, items, and services.

(Doc. #1 at 19). Specifically, Counts Two through Eleven involve services allegedly performed on individual patients. Defendant Ozuligbo argued that there was no evidence she submitted any fraudulent information to Medicare or private insurers. Moreover, she argued that there was no evidence that services claimed to [*24] be performed were not performed. For example, Defendant Ozuligbo argued that the Government did not present evidence indicating that an allergy test was billed, but not administered. She also argued that there was no evidence presented that she ever tested or injected the patients listed in Counts Three Four, Six, and Eleven.

In response, the Government argued that Defendant Ozuligbo was not charged with actually administering shots or allergy tests; rather, she was charged with knowingly executing a scheme and artifice to defraud health care benefits programs. Thus, she did not have to be personally involved with each person listed in Counts Three, Four, Six, and Eleven, because it was her participation in the scheme that matters. As there was evidence presented to the jury that Defendant administered an allergy test and/or injection to the patients listed in Counts Two, Five, Seven, Eight, Nine, and Ten, the court denied her Rule 29(a) Motion as to those counts. However, the court asked the government to submit additional briefing regarding the charges contained in Counts Three, Four, Six, and Eleven—where it was not alleged that she was personally involved in the offensive conduct. Specifically, [*25] the court requested the Government to address Defendant Ozuligbo's culpability for health care fraud where there was no evidence presented that she administered an allergy test and/or injection to the individuals named in Counts Three, Four, Six, and Eleven.

On July 11, 2019, after taking Defendant Ozuligbo's Rule 29(a) Motion for Counts Three, Four, Six, and Eleven under advisement, and after considering the Government's briefing on the *Pinkerton* theory of liability, the court heard arguments on Defendant Ozuligbo's Rule 29(a) Motion and renewed Motion for Judgment of Acquittal. At the conference, the court orally denied her Rule 29(a) Motion on Counts Three, Four, and Six. The court determined that a jury could find there was sufficient evidence that she engaged in a conspiracy, that the crimes at issue were committed during the scope of the conspiracy, and that it was reasonably foreseeable that her co-conspirators would commit the offensive conduct at issue as a consequence of the conspiracy. And, based upon that evidence, there is a basis to hold Defendant Ozuligbo vicariously liable under the *Pinkerton* doctrine for the substantive offenses committed by other defendants, even if there was insufficient evidence [*26] that she herself participated in the substantive acts that met each of

[5] On motion of the Government, the court dismissed Count 11 of the Indictment as to Defendant Ozuligbo only. (Doc. # 170).

the elements of those charges.[6]

Finally, as to Counts Thirty-Four and Forty,[7] which pertain to money laundering charges, Defendant Ozuligbo argued that there was no evidence presented to the jury that showed she knew the money collected at CCMC was in any way a product or a source of unlawful activity. In response, the Government argued that to be convicted of money laundering, it is unnecessary for it to show the individual actually participated in the underlying unlawful activity. Rather, all that is required for a money laundering conviction is a defendant's knowledge that the laundered funds are the proceeds of criminal activity. The Government argued that the evidence presented at trial was sufficient to show that Defendant Ozuligbo knew the funds were proceeds of criminal activity. Further, the Government presented evidence that Defendant Ozuligbo was a licensed practical nurse ("LPN"), who at times worked as the front office manager at CCMC. The Government argued that based upon the evidence presented at trial it would have been obvious to anyone holding the titles of LPN and front office manager at CCMC that **[*27]** the patients were coming to the practice primarily to get opioids, and that opioids were being distributed for other than legitimate medical purposes.

In support of this argument, the Government notes that among other things "the defendant told the FBI the reasons she left the clinic was to get away from all that craziness." The government argued that this statement evidences that Defendant Ozuligbo knew the clinic was a pill mill and the money collected at the clinic were proceeds of illegal activity. The court agreed with the Government's argument and found that sufficient evidence had been admitted for the jury to conclude that Defendant Ozuligbo conspired to commit money laundering, and actually participated in money laundering.

In Defendant Ozuligbo's Rule 33 Motion, she does not cite to any legal authority. (*Id.*) Rather, she merely argues that there is a lack of substantial evidence from which a reasonable fact finder could find guilt beyond a reasonable doubt. The court disagrees.

When considering the appropriate standard of review on a Rule 33 motion, "a conviction must be upheld unless the jury could not have found the defendant guilty under any reasonable construction of the evidence." *Tate*, 586 F.3d at 944. **[*28]** Thus, Defendant's Ozuligbo's "belief" that the verdict is not supported by substantial evidence cuts no ice. As previously discussed in regard to Defendant Ozuligbo's Rule 29(a) Motion, the record contains substantial evidence that she committed (or was criminally responsible for) each of the charged offenses. (*See* Docs. # 1, 180 at 3); *Tate*, 586 F.3d at 944 (holding Defendant's argument that there was a lack of substantial evidence was unpersuasive, because the record contained substantial evidence of each of the charged offenses). Therefore, Defendant Ozuligbo's Rule 33 Motion is due to be denied.

c. Alleged Erroneous Jury Instruction

Defendant Ifediba revives his argument that a new trial is necessary because the court erroneously "instruct[ed] the jury that it could convict the Defendant on there [*sic*] layman's view [of the evidence]," even though "the Government and Defendant had to use expert testimony[] to establish [the] required standard of medical care."[8]

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[6] At the July 11, 2019 status conference, the court also orally denied, Defendant Ozuligbo's Renewed Motion for Judgment of Acquittal as to Count One, Two, Five, Seven, Eight, Nine, Ten, Thirty-Four, and Forty, for the same reasons as her Rule 29(a) Motion was denied.

[7] In Count Thirty-Four, the Government alleged that Defendants Patrick Ifediba and Ngozi Ozuligbo knowingly conspired to commit offenses against the United States in violation of 18 U.S.C. §§ 1956(a)(1)(B)(i), 1957. In Count Forty, the Government alleges that Defendants Patrick Ifediba and Ngozi Ozuligbo participated in money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i).

[8] Defendant Ifediba also argues he "was denied procedural Due Process of Law when the jury was not allowed to *reconcile* the expert testimony." (Doc. # 177 at ¶11) (emphasis added). The quoted

(Doc. # 177 at ¶12). Defendant Ifediba also made this argument during the July 11, 2019 conference. At the conference, the court considered Defendant Ifediba's objection and overruled it.

The Eleventh Circuit has stated that "[g]enerally district [*29] courts 'have broad discretion in formulating jury instructions provided that the charge as a whole accurately reflects the law and the facts,'" and "we will not reverse a conviction on the basis of a jury charge unless 'the issues of law were presented inaccurately, or the charge improperly guided the jury in such a substantial was as to violate due process.'" *United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000) (quoting *United States v. Arias*, 984 F.2d 1139, 1143 (11th Cir. 1993)); *see Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1196 (11th Cir. 2004) (affirming denial of motion for new trial where the appellate court was not left with substantial and ineradicable doubt that the jury was misled by the instruction given); *Christopher v. Cutter Laboratories*, 53 F.3d 1184, 1190 (11th Cir. 1995) ("A district court has broad discretion in formulating jury instructions.").

Not surprisingly, "[m]otions for new trial on the basis of erroneous and prejudicial jury instructions are committed to the discretion of the trial court and reviewed to ascertain whether there has been a clear abuse of that discretion." *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313 (11th Cir. 2000) (citing *Christopher v. Cutter Laboratories*, 53 F.3d 1184, 1190 (11th Cir. 1995)). "The court should order a new trial where [the jury] instructions do not accurately reflect the law, and the instructions as a whole do not correctly instruct the jury so that [the court is] left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *United States v. AseraCare Inc.*, 153 F. Supp. 3d 1372, 1384 (N.D. Ala. 2015) (quoting *Broaddus v. Fla. Power Corp.*, 145 F.3d 1283, 1288 (11th Cir. 1998) (internal [*30] quotations omitted)). Where an error in the jury instructions did not influence the verdict, it is harmless and does not warrant a new trial. *Phillips v. Irvin*, 2007 U.S. Dist. LEXIS 64962, 2007 WL 2570756, at *9 (S.D. Ala. Aug. 30, 2007)

Specifically, the jury charge Defendant Ifediba objects to reads as follows:

> You have heard from a number of medical experts during this trial. However, expert medical testimony is not essential to your consideration of this case, because a jury may find that a doctor violated the Controlled Substances Act from evidence received from lay witnesses surrounding the facts and circumstances of the prescriptions.
>
> Experts can reasonably disagree with each other regarding whether a prescription was written within or outside the usual course of professional practice. However, their disagreement does not mean you cannot consider other evidence and testimony which you heard during trial to form your own finding as to whether a prescription was written within or outside the usual course of professional practice.

(Doc. # 169 at 7).

Here, the jury instruction at issue is a correct statement of the law. *See, e.g., United States v. Enmon*, 686 F. App'x 769, 777 (11th Cir. 2017) (rejecting an objection to a jury instruction that measured the conduct of a physician objectively based on layman's standards); *United States v. Joseph*, 709 F.3d 1082, 1100 (11th Cir. 2013) ("Expert medical [*31] testimony is not [] necessary to sustain a conviction under the [Controlled Substances] Act because a jury may find that a doctor violated the Act from evidence received from lay witnesses surrounding the facts and circumstances of the prescriptions.") (internal quotations omitted). Defendant Ifediba has not provided any case law or rationale for his redundant

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text is the full extent of Defendant's objection. (*Id.*). He does not provide any explanation for the alleged "reconcil[ing]" error, nor does he provide citations to case law or relevant authority. (*Id.*). The court finds that this ground for a new trial is not properly stated and, in any event, is without merit. It is due to be denied.

argument that the court improperly instructed the jury. (Doc. # 177 at 12). As such, he has failed to meet his heavy burden and his motion for a new trial, on the basis of erroneous jury instructions, is denied.

d. Alleged Improper Joinder

Finally, Defendant Ifediba argues that the court erred by permitting him to be tried with his sister, Defendant Ozuligbo. Defendant Ifediba argues that his sister "attacked [him] as the person who is responsible for the allergy fraud and in closing stated Defendant [Ifediba] and Ebio conspired to commit health care fraud and not [Defendant Ozuligbo]." (Doc. # 177 at ¶6). Further, Defendant Ifediba maintains "these attacks during trial . . . denied [] [him] the right to a fair trial and aided the Government in proving their case against [] [him]." (*Id.*). Defendant Ifediba raises his severance **[*32]** and improper joinder complaints for the first-time post-verdict. Thus, the proper standard of review is plain error.

Federal Rule of Criminal Procedure 8(b) permits the joinder of defendants "if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses" and "[t]he defendants may be charged in one or more counts together or separately." FED. R. CRIM. P. 8(b). In the Eleventh Circuit, "the general rule is that Defendants indicted together should be tried together, especially in conspiracy cases." *United States v. Chavez*, 584 F.3d 1354, 1360 (11th Cir. 2009); *United States v. Cassano*, 132 F.3d 646 (11th Cir. 1998); *United States v. Jacoby*, 955 F.2d 1527 (11th Cir. 1992); *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985).

Notwithstanding the general rule, Rule 14(a) permits a severance of Defendants for trial if their joinder "appears to prejudice a defendant." FED. R. CRIM. P. 14(a). The law in this area is well developed. To succeed on appeal, the Defendant must carry the heavy burden of demonstrating the lack of a fair trial due to actual, compelling prejudice. *Chavez*, 584 F.3d at 1360; *United States v. Gari*, 572 F.3d 1352 (11th Cir. 2009); *United States v. Novaton*, 271 F.3d 968 (11th Cir. 2001); *United States v. Cobb*, 185 F.3d 1193 (11th Cir. 1999).

Severance motions are rarely granted, and if they are granted, it is generally for the following reason(s):

> (1) where the Defendants rely upon mutually antagonistic defenses; (2) where one Defendant would exculpate the moving Defendant in a separate trial, but will not testify in a joint setting; (3) where inculpatory **[*33]** evidence will be admitted against one Defendant that is not admissible against the other; (4) Where a cumulative and prejudicial "spill over" effect may prevent the jury from sifting through the evidence to make an individualized determination as to each Defendant.

Chavez, 584 F.3d at 1360-61 (internal citations and quotations omitted). Although Defendant Ifediba does not specify which ground he relies on, it appears that his argument is premised on the belief that his defenses and Defendant Ozuligbo's defenses were mutually antagonistic. (Doc. # 177 at ¶6) ("Defendant during the trial was attacked by the co-defendant . . . These attacks . . . denied Defendant the right to a fair trial . . . .").

Contrary to Defendant Ifediba's arguments, it is well settled that mutually antagonistic defenses are not *per se* prejudicial and "defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Zafiro v. United States*, 506 U.S. 534, 540, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). Moreover, Rule 14 does not require severance even if prejudice is shown; rather, the rule leaves the tailoring of the relief to be granted, if any, to the district court's sound discretion. *Id.* at 538-39.

Here, Defendant has failed to carry the "heavy burden of demonstrating the lack of a fair **[*34]**

trial due to actual, compelling prejudice." *See Chavez*, 584 F.3d at 1360. Not only is there a lack of compelling prejudice, Defendant has failed to demonstrate any evidence of prejudice. At trial, the Government alleged that multiple individuals, including Defendants Ifediba and Ozuligbo, were guilty of the allergy fraud scheme. During the trial, the United Stated offered evidence against both defendants. The jury found both Defendants guilty of the health care fraud and money laundering offenses. As such, Defendant's Ozuligbo's defenses at trial plainly did not result in prejudice for Defendant Ifediba.

What is more, even if there was some risk of prejudice at trial, the court proffered curative limiting instructions to the jury that removed any risk of prejudice.[9] First, the court properly instructed the jury that the Government had "the burden of proving the Defendant guilty beyond a reasonable doubt." (Doc. # 169 at 2). The jury was instructed that it was required to "consider the evidence and law separately as to each Defendant [and for] each count." (*Id.* at 10). Further, the court stated, "[i]f you find a Defendant guilty or not guilty of one crime, then it must not affect your verdict for any other crime or the [*35] other Defendant." (*Id.*). Finally, the court admonished the jury that closing arguments were not to be considered evidence. (*Id.* at 33). Therefore, even if there was some risk of prejudice based upon counsel's argument, the courts limiting instructions cured any possibility of prejudice. Accordingly, Defendant Ifediba's motion for a new trial, on erroneous jury instructions grounds, is denied.

IV. Conclusion

For the reasons stated above, Defendant Ifediba's Motion for a New Trial (Doc. # 177) and Defendant Ozuligbo's Motion for a New Trial (Doc. #179) are **DENIED**.

DONE and **ORDERED** this November 21, 2019.

/s/ R. David Proctor

R. DAVID PROCTOR

UNITED STATES DISTRICT JUDGE

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[9] In *Zafiro v. United States*, the Supreme Court held that the following instructions, given by the district court, sufficed to cure any possibility of prejudice. 506 U.S. 534, 541, 113 S. Ct. 933, 122 L. Ed. 2d 317 (1993). "The District Court properly instructed the jury that the Government had the burden of proving beyond a reasonable doubt that each defendant committed the crimes with which he or she was charged." *Id.* (internal citations and quotations omitted). Then the court "instructed the jury that it must give separate consideration to each individual defendant and to each separate charge against him. Each defendant is entitled to have his or her case determined from his or her own conduct and from the evidence [that] may be applicable to him or to her." *Id.* Additionally, "the District Court admonished the jury that opening and closing arguments are [*36] not evidence and that it should draw no inferences from a defendant's exercise of the right to silence. *Id.*