No. _______________

In The Supreme Court of the United States

ROBERT KALABA, *Petitioner*,
v.

UNITED STATES OF AMERICA, *Respondent*.

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

PETITION FOR A WRIT OF CERTIORARI

Jane Fisher-Byrialsen, Esq.
Counsel of Record
Kaitlin F. Nares, Esq.
Associate Counsel of Record
Fisher & Byrialsen, PLLC
99 Park Avenue 26th Floor
New York, NY 10016
(T) (303) 256-6345
(F) (303) 954-0573

QUESTIONS PRESENTED

"[I]t is the duty of the Government to establish … guilt beyond a reasonable doubt. This notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790 (1952) (J. Frankfurter, dissent). The questions presented are:

1. Whether the record evidence was sufficient to convict Mr. Kalaba of Count One, Conspiracy to Distribute Narcotics, in violation of 21 U.S.C. § 841(b), 846.

2. Whether the record evidence was sufficient to convict Mr. Kalaba of Count Four, Conspiracy to Commit Money Laundering, in violation of 21 U.S.C. § 1956(h)

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Robert Kalaba was defendant in the district court and appellant in the court of appeals.

Respondent United States of America was plaintiff in the district court and appellee in the court of appeals.

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Robert Kalaba respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

CITATIONS TO OPINIONS BELOW

The decision of the District Court in the Southern District of New York, *United States v. Wiseberg*, 2015 U.S. Dist. LEXIS 136380 (S.D.N.Y. Sept. 10, 2015), is attached to this petition as Appendix A. The decision of the United States Court of Appeals for the Second Circuit, *United States v. Wiseberg*, 2018 U.S. App. LEXIS 6279 (2d Cir. N.Y. Mar. 14, 2018, No. 17-331), is attached to this petition as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was rendered on March 14, 2018. *United States v. Wiseberg*, 2018 U.S. App. LEXIS 6279 (2d Cir. N.Y. Mar. 14, 2018, No. 17-331). This petition for certiorari was filed within the time specified by the U.S. Supr. Ct. Rules. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STANDARD OF REVIEW APPLIED BELOW

The Second Circuit Court of Appeals applied a *de novo* standard in reviewing the sufficiency of the evidence.

RELEVANT CONSTITUTIONAL PROVISIONS

Though the issues presented challenge the sufficiency of the evidence, conviction based on circumstantial support that is equal, or nearly equal to a theory of innocence as a theory of guilt has a constitutional dimension. The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall…be deprived of life, liberty, or property, without due process of law..." "[I]t is the duty of the Government to establish … guilt beyond a reasonable doubt. This notion -- basic in our law and rightly one of the boasts of a free society -- is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790 (1952) (J. Frankfurter, dissent).

PRELIMINARY STATEMENT

It is a violation of the Fifth and Sixth Amendment to be convicted on circumstantial support that is equal, or nearly equal, to a theory of innocence as a theory of guilt.

Petitioner Robert Kalaba is now imprisoned for conspiring to distribute narcotics to patients without a legitimate medical need for their prescriptions and for conspiring to conceal the proceeds of the pharmaceutical business. Mr. Kalaba managed pharmacies in New York and New Jersey. The pharmacies filled prescriptions by mail order. Mr. Kalaba required all prescriptions to be verified prior to shipping drugs to patients. The verification process was similar to that of commercial chain pharmacies such as Duane Reade. Mr. Kalaba did not speak directly with any doctors or patients regarding patients' legitimate medical need for their prescriptions. No doctors testified at trial. No patients testified at trial. No medical records were admitted into evidence at trial. To this day, no one knows whether any patient actually lacked a legitimate medical need for their prescriptions. There was thus no actual proof that Mr. Kalaba had knowledge that either patients lacked a legitimate medical need, or knowledge that the doctors or pharmacists were acting other than in good faith in prescribing medicine or verifying prescriptions. Mr. Kalaba was convicted based only on circumstantial evidence. The only evidence remotely related to the charged conspiracy was Joel Shumrak's testimony that he ran his clinic as a "pill mill," video of Mr. Kalaba filling prescriptions while a pharmacist tech was present, and a recorded call by Mr. Kalaba that he knew multiple patients resided in the same residence. What the district and appellate courts neglected to do was balance this evidence against the weight of evidence that Mr. Kalaba required verifications, had no communication with physicians or patients, and his only communication with Joel Shumrak was to tell him that the pharmacy would not be filling his patient's prescriptions. The record evidence gave equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence. The Second Circuit in *United States v. Glenn*, 312 F.3d 58, 70 (2d Cir. 2002) held that a reasonable jury must necessarily entertain a reasonable doubt in such circumstances. The court similarly held in *United States v. Coplan*,

> the evidence with request to [defendant's] intent, viewed in the light most favorable to the Government, remains, at best, in equipoise. Because '[i]t would not satisfy the [Constitution] to have a jury determine that the defendant is *probably* guilty,' *Sullivan v. Louisiana*, 508 U.S. 275, 278, 1113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993), we conclude that [defendant's] conviction on Count One must be reversed.

703 F.3d 46, 69 (2d Cir. 2012) (emphasis in the original). Similar to both *Glenn* and *Coplan,* the questions presented here are whether the record evidence was sufficient to convict Mr. Kalaba of Conspiracy to Distribute Narcotics and Conspiracy to Commit Money Laundering when the circumstantial support of a theory of innocence was equal or nearly equal to a theory of guilt.

STATEMENT OF THE CASE

I. STATUTORY FRAMEWORK

Mr. Kalaba was convicted of Conspiracy to Distribute Narcotics in violation of 21 U.S.C. § 841. To prove conspiracy to distribute narcotics, the government was required to prove that Mr. Kalaba operated pharmacies in furtherance of a conspiracy "to dispense the controlled substances, or cause them to be dispensed, [1] other than for a legitimate medical purpose, [2] other than in good faith, *and* [3] not in the usual course of medical practice." (A-1537) (*emphasis added*).

Mr. Kalaba was also convicted of Conspiracy to Money Launder in violation of 21 U.S.C. § 1956(h). Conspiracy to money launder required that the government prove the following: (1) an underlying conspiracy, (2) Mr. Kalaba's knowledge of and agreement to join the underlying conspiracy, and (2) his agreement to conceal the nature, location, source, ownership and control of the proceeds of the conspiracy. (A-1557-1558); *accord* 18 U.S.C. § 1956(a)(1).

II. PROCEEDINGS BELOW

A. Background

Mr. Kalaba managed pharmacies in New York and New Jersey. The pharmacies fulfilled mail order prescriptions for patients principally residing in Florida and a few other states. (A-1673-1803). Prescriptions were verified prior to the pharmacy shipping drugs to patients. (A-128-129, 143). The verifications used were comparable to chain pharmacies such as Duane Reade. (A-1290-1291). Patients were also required to submit a letter of medical necessity listing their diagnoses prior to their prescriptions being filled. (A-174). The physicians who wrote prescriptions filled by the pharmacy all had valid medical licenses, the pharmacists had valid DEA licenses, and the pharmacists were authorized to prescribe controlled substances. (A-1112). Mr. Kalaba's salary was paid out of an account called Sunpark Pharmacy. This account was also used to pay for overhead associated with the pharmacies including over the counter medication, pharmacist and pharmacy tech pay checks, and reimbursements for out of pocket expenses. Mr. Kalaba had no knowledge of and was not paid out of any other account run by Paul Wiseberg.

B. Proceedings in the District Court

1. Charges Brought After Two-Year DEA Investigation; No Patients or Doctors Arrested

Mr. Kalaba was arrested and indicted on October 23, 2013 in the Southern District of New York. (A-26-37). On August 4, 2015, the government filed a superseding indictment, which accused Mr. Kalaba of the following: Count One, conspiracy to violate the narcotics laws of the United States; Count Two, conspiracy to illegally distribute promethazine with codeine; Count Three, conspiracy to use invalid DEA registration numbers and to fraudulently obtain a controlled substance; and Count Four, conspiracy to commit money laundering. (A-38-46). Prior to the commencement of his trial, Mr. Kalaba plead guilty to Count Two of the superseding indictment, the conspiracy to illegally distribute promethazine with codeine. (SPA-1). At trial, Mr. Kalaba conceded Count Three, that he and his co-defendants had conspired to use invalid DEA registration numbers to fraudulently obtain a controlled substance. In regards to Count One, conspiracy to distribute narcotics, and Count Four, conspiracy to money launder, the central contested issues at trial were (1) whether the target of the conspiracy was to distribute controlled substances to patients without a legitimate medical necessity for the medication, for purposes other than good faith, and not in the usual course of medical practice; (2) whether Mr. Kalaba knew of the conspiracy and agreed to participate; and (3) whether Mr. Kalaba agreed to conspire to conceal the proceeds of an illegal narcotics transaction. (A- 1629-1672). No patients or doctors were arrested in this matter.

2. The Trial Based on Circumstantial Evidence

Trial commenced on October 5, 2015 before Honorable Analise Torres. The relevant circumstantial evidence presented was as follows:

(i). <u>Government Cooperator Testifies that Pharmacy Verified Every Prescription</u>

Cooperator, Kellan Bishop, testified for the government. Kellan Bishop was a pharmacy technician for Plainfield Pharmacy. Mr. Bishop testified to the stringent validation procedures that Mr. Kalaba put into place wherein every single prescription was verified before mailing the medication to the patients:

> Well, we would get soft copies the previous night via facsimile of the prescription. The next morning we would receive the hard copies which was the actual physical copies via the mail. And I would call and verify them with the doctor's offices. And then if they were okay to go I would go ahead and fill them.
>
> ….

> I would basically call down there. And I would ask the corresponding questions. I'd have to fill out who I verified it with, where that person worked-- well what position the person worked in the doctor's office. Some of the stuff was pretty self-explanatory as far as if they submitted a driver's license and things of that nature because we had copies of that. I would ask if they have a follow-up visit, things of that-- things like that.

(A-128-129, 143). This verification process was performed for every prescription. (A-353). Mr. Bishop also confirmed that every patient was required to receive a letter of medical necessity listing their diagnoses prior to their prescriptions being filled. (A-174).

On two different occasions, inspectors came to Plainfield Pharmacy. On the second visit, Mr. Kalaba informed Mr. Bishop over the phone that he was to cooperate fully with the investigators. (A-362). Notwithstanding, Mr. Bishop chose on his own to lie to the investigators about not knowing how to work the computers and about the pharmacy not filling out-of-state prescriptions. (A-362, 369-370).

Mr. Bishop testified that it would not be odd for patients who suffered from chronic pain to have their prescriptions renewed monthly. (A-420-421). Mr. Bishop also testified to Plainfield's valid concern that their mailed prescriptions could be stolen and that it would not be odd for a pharmacy to disguise the contents of packages. (A-421-422). Moreover, Mr. Bishop agreed that it would be added protection to cut UPS drivers out of the process by delivering the prescriptions directly to a UPS facility. (A-422).

(ii). DEA Agent Confirms Controlled Substances Can Be Dispensed By Pharmacies if Prescriptions Verified and if Legitimate Medical Need

Diversion Investigator Richard D'Aoust of the DEA testified for the government. Investigator D'Aoust confirmed that schedule II controlled substances can be dispensed by a pharmacy, however such a pharmacy can only fill a prescription for a legitimate medical need and that the prescription has to be verified. (A-489).

(iii). Clinic Owner of Self-Described "Pill-Mill" Held Himself Out to Public and Pharmacies as Legitimate Clinic Owner; Had No Contact with Mr. Kalaba Other than Mr. Kalaba Refusing to Fill Clinic's Prescriptions; Could Not Identify Mr. Kalaba in Courtroom

Cooperator, Joel Shumrak, testified for the government. Joel Shumrak owned the Pain Center of Broward. Patients from Mr. Shumrak's clinics had prescriptions filled by Plainfield Pharmacy. Mr. Shumrak did not identify Mr. Kalaba when asked if he saw anyone in the courtroom that he worked with as part of the conspiracy. (A-554). Mr. Shumrak testified that he never met Mr. Kalaba face-to-face and spoke on the phone with Mr. Kalaba only a couple of times to complain that Mr. Kalaba would no longer fill prescriptions for patients at his clinic. (A-626).

Mr. Shumrak was holding himself out as the owner of a legitimate pain management clinic that treated legitimate patients. (A-696). That is how he presented himself and the Pain Center of Broward to the outside world. (A-696). Mr. Shumrak testified that he was a one-man show, that he controlled his clinic and did not have a partnership with anyone else. (A-701). Mr. Shumrak told investigators that he was running a legitimate pain management clinic that treated legitimate patients. (A-701). Mr. Shumrak utilized consultants to assist him in setting up the clinic in an appropriate manner and to determine that Mr. Shumrak was operating his clinic in an appropriate manner. (A-732-733).

Mr. Shumrak instructed his staff to verify that the prescriptions sent to Plainfield Pharmacy from his clinic were valid. (A-746). Mr. Shumrak confirmed that the prescriptions from his clinic were issued by doctors who examined the patients. (A-746).

When Mr. Shumrak learned of Mr. Kalaba and his co-defendants' arrests, he told a government cooperator over the phone that it was not true that Plainfield pharmacists were wrongfully dispensing medication because the doctors gave the patients their prescriptions. (A-749). According to Mr. Shumrak, there were a lot of patients at his clinic over the years who actually were in severe chronic pain and that these people really needed medication. (A-779). Mr. Shumrak did not want drugs dispensed to people who did not need them. (A-790-791).

Mr. Shumrak testified that the DEA was waging a war on oxycodone and other drugs in the State of Florida at the time he was running his pain clinic. (A-823). According to Mr. Shumrak, this caused real, legitimate patients to not be able to fill their prescriptions at CVS, Walgreens, or other big chain pharmacies. (A-824).

(iv). Government Expert Testifies that Filing Mail-Order Prescriptions is not Illegal; No Set Definition for Legitimate Medical Purpose; No Set Standard for How a Pharmacy Must Verify Prescriptions

William Winsley, retired former pharmacist and executive director of the Ohio Board of Pharmacy, testified for the government. Mr. Winsley testified that filling mail-order prescriptions is not illegal under the laws of the State of Florida or State of New Jersey. (A-994-995).

According to Mr. Winsley, there is no per se definition of the term "legitimate medical purpose" or course of professional practice. (A-996). Mr. Winsley further testified that there are no federal rules, promulgated by the DEA, that specify what must be done to make sure that a prescription is written for a legitimate medical purpose. (A-1001). Mr. Winsley confirmed that the types of verifications performed at Plainfield Pharmacy, in addition to requiring a letter of medical necessity, a patient agreement, and an incident log, are additional steps a pharmacy can do to try to meet its corresponding liability under the law, however, none are required for filling mail order prescriptions under the law. (A-1011-1013). Mr. Winsley confirmed that the law does not require a pharmacist or a pharmacy staff to do everything possible to insure the legitimacy of prescriptions received at the pharmacy. (A-1013).

(v). Contractor from DEA's Asset Forfeiture Unit Did Not Review Any Patient Files; Confirmed Pharmacists and Physicians Had Valid Licenses

Carlos Aquino, a contracting employee with the DEA's Asset Forfeiture Unit, performed two inspections at Plainfield Pharmacy. Mr. Aquino was hired on behalf of NuCare, a wholesale drug distributor, to conduct an inspection of Plainfield Pharmacy on December 16, 2011. (A-1102). Daniel Podell, Plainfield Pharmacy pharmacist-in-charge, and Kellan Bishop, Plainfield Pharmacy pharmacy technician, were present. (A-1102). On August 7, 2013, Mr. Aquino again inspected Plainfield Pharmacy on behalf of Rochester Drug Cooperative, another wholesale drug distributor. (A-1102). Lawrence Zaslow, then pharmacist-in-charge, Kellan Bishop, and Mr. Kalaba were present. (A-1102). Mr. Aquino confirmed, that on his second visit to Plainfield Pharmacy, the physicians who wrote prescriptions all had valid medical licenses, the pharmacists had valid DEA licenses, and the pharmacists were authorized to prescribe controlled substances. (A-1112). Mr. Aquino did not review any patient medical files and therefore did not know if any of the patients lacked a medical need for the prescriptions. (A-1112-1113).

(vi). IRS Criminal Investigator Found Only One Account Accessible by Mr. Kalaba

IRS Criminal Investigator, Adrian Davila, testified for the government. Mr. Davila investigated the financial transactions of bank accounts related to Plainfield, Family, and Santa Marina Pharmacies. Mr. Davila testified about three accounts run by Paul Wiseberg related to

Plainfield Pharmacy: one account predominantly was for cash or money orders, one account was for insurance payments, and one account was for lottery deposits. (A-1126). An additional account, Sun Park Pharmacy/Sun Park Professional Systems, was accessible by Mr. Kalaba. (A-1170). Mr. Davila was not aware that this account was used to pay Mr. Kalaba for payroll and for out-of-pocket business expenses. (A-1170). Mr. Davila testified that there was nothing strange about the repayment of loans from the pharmacy to Mr. Wiseberg for his initial investment in the pharmacy. (A-1174-1175).

(vii). Pharmacist-In-Charge Testifies that Mr. Kalaba's Required Verifications were Comparable to Chain Pharmacies Like Duane Reade; Nothing Unusual Verifying Prescriptions with Clinic Staff Rather than Physician

David Fam, former pharmacist-in-charge for Santa Marina Pharmacy, testified for the defense. Mr. Fam testified about the verifications that he used for every prescription he filled. Mr. Fam testified that he would validate the physician's DEA numbers using the DEA validation website to make sure it was active. (A-1277). The purpose of the check was to make sure that the physician was legally permitted to prescribe controlled substances. (A-1277). Mr. Fam never found any of the physicians to have any violations. (A-1278). Mr. Fam testified that he would verify every prescription by calling the physician's office and verifying the (1) medication, (2) strength of the dose, (3) quantity, (4) directions, (5) diagnosis of the patient and (6) when a follow-up was scheduled to take place. (A-1277). Santa Marina Pharmacy would also report prescriptions that were filled to the New Jersey Prescription Monitoring Program. (A-1286). Mr. Fam was responsible for ordering controlled and non-controlled substances for Santa Marina Pharmacy from distributors. (A-1304).

Prior to working for Santa Marina Pharmacy, Mr. Fam worked for Duane Reade as a supervising pharmacist. (A-1273). Mr. Fam confirmed that the verifications used at Santa Marina were comparable to Duane Reade. (A-1290-1291). In fact, Mr. Fam found Santa Marina Pharmacy to require more documentation and record keeping than Duane Reade. (A-1291). He testified that it was not unusual when he was at Duane Reade to talk to a physician's staff rather than the physician directly in verifying prescriptions. (A-1266).

(viii). Clinic Employee Confirmed Patients Had Legitimate Medical Need, Were Properly Examined, and Prescriptions were Valid; Patients were Drug Tested

Donna Tiwari, employee for Medical Specialists, testified for the defense. Plainfield Pharmacy filled prescriptions for patients from Medical Specialists. Ms. Tiwari checked in patients for the clinic. (A-1373). Ms. Tiwari testified that each patient would see a counselor as well as a physician on each visit. (A-1373-1374). The purpose of the counselor was to talk to each patient about the prescribed medication, how the medication was affecting the patient, and how they were feeling. (A-1374). A patient would speak with the counselor and be examined by the physician every 28 days. (A-1362). Ms. Tiwari confirmed that each patient would be tested, through urinalysis, to make sure they were taking the medication that was prescribed. (A-1360-1361). Ms. Tiwari indicated that Medical Specialists started referring patients to Plainfield Pharmacy due to a shortage of medication in local Florida pharmacies. (A-1383-1384).

3. Mr. Kalaba was Convicted Despite the Circumstantial Support Being Equal or Nearly Equal to a Theory of Innocence as a Theory of Guilt

On October 22, 2015, Mr. Robert Kalaba was convicted of Conspiracy to Distribute Narcotics in violation of 21 U.S.C. § 841(b), 846 (Count One); Conspiracy to Use Invalid Registration Number, Fraudulently Obtaining a Controlled Substances and Furnishing False Information to the DEA in violation of 21 U.S.C. § 843(a), 846 (Count Three); and Conspiracy to Commit Money Laundering in violation of 21 U.S.C. § 1956(h) (Count Four), following a jury trial. (SPA-1).

4. District Court Affirmed Trial Verdict Despite Insufficient Evidence; Does Not Address Mr. Kalaba's Equipoise Argument

The issues addressed in this brief were raised in Mr. Kalaba's Motion pursuant to Rule 29(c) of the *Federal Rules of Criminal Procedure* for a judgment of acquittal filed on January 29, 2016. (A-1629-1672). Relief was denied. The decision of the District Court in the Southern District of New York, *United States v. Wiseberg*, 2015 U.S. Dist. LEXIS 136380 (S.D.N.Y. Sept. 10, 2015), is attached to this petition as Appendix A.

5. Mr. Kalaba is Currently Incarcerated Waiting For Justice

On January 24, 2017, the Honorable Analisa Torres sentenced Mr. Kalaba to 84 months imprisonment followed by three-years supervised release. (SPA-1). Mr. Kalaba is currently serving his sentence.

C. Appellate Court Affirms Conviction Despite Insufficient Evidence; Does Not Address Mr. Kalaba's Equipoise Argument

On July 6, 2017, Mr. Kalaba filed a brief, as appellant, in the United States Court of Appeals for the Second Circuit. Mr. Kalaba also filed a reply to the government's opposition brief, arguing that the government's statements of fact were misleading and should be viewed with skepticism and that the evidence was insufficient to support Mr. Kalaba's convictions. Relief was ultimately denied. The decision of the United States Court of Appeals for the Second Circuit, *United States v. Wiseberg*, 2018 U.S. App. LEXIS 6279 (2d Cir. N.Y. Mar. 14, 2018, No. 17-331), is attached to this petition as Appendix B.

REASONS THE WRIT SHOULD BE GRANTED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall…be deprived of life, liberty, or property, without due process of law..." It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'" *United States v Booker*, 543 US 220, 230 (2005) quoting *In re Winship,* 397 U.S. 358, 364 (1970). Because the "Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated," the Constitution requires a jury verdict of guilty beyond a reasonable doubt. *Glenn*, 312 F3d at 64 quoting *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). "It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty . . . ." *Sullivan*, 508 U.S. at 278 (emphasis in the original). Several Circuits, including the First, Second, Fifth, Eighth and Eleventh, have held that if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, then a reasonable jury must necessarily entertain a reasonable doubt. *See E.g., Glenn*, 312 F3d at 70; *see also E.g. United States v. Huezo*, 546 F.3d 174, 193 (2d Cir. 2008); *United States v Hawkins,* 547 F3d 66, 71 (2d Cir. 2008); *United States v. Hassan*, 578 F.3d 108, 122 (2d Cir. 2008); *Coplan,* 703 F.3d at 69; *United States v. Monfort,* 603 F App'x 40, 42 (2d Cir 2015); *United States v. Andujar,* 49 F.3d 16, 20 (1st Cir. 1995); *United States v. Sanchez*, 961 F.2d 1169, 1173 (5th Cir. 1992); *United States v. Lopez,* 74 F.3d 575, 577 (5th Cir. 1996), *United States v. Wright*, 835 F.2d 1245, n.1 1249 (8th Cir. 1987); *Crosby v. Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982). Mr. Kalaba's conviction, based on circumstantial support equal or nearly equal to a theory of innocence as a theory of guilt, violates the Fifth Amendment due process clause. The Second Circuit contravened its own "equipoise rule" when affirming Mr. Kalaba's conviction based on equal or nearly equal circumstantial support of a theory of innocence as a theory of guilt.

I. REVIEW SHOULD BE GRANTED BECAUSE MR. KALABA'S DUE PROCESS RIGHTS WERE VIOLATED BY A CONVICTION BASED ON INSUFFICIENT CIRCUMSTANTIAL SUPPORT HE KNEW PATIENT'S LACKED A MEDICAL NECESSITY; KNEW PHARMACISTS WERE FILLING OR PHYSICIANS PRESCRIBING PRESCRIPTIONS OUTSIDE THE COURSE OF PROFESSIONAL PRACTICE; AND THAT HE AGREED TO JOIN A CONSPIRACY

With regard to Count One, Conspiracy to Distribute Narcotics, the central contested issue at trial was (1) whether the object of the conspiracy was to dispense controlled substances other than for a legitimate medical purpose, other than in good faith, and not in the usual course of medical practice and (2) whether Mr. Kalaba knew of and agreed to participate in the conspiracy. The record evidence in this case did nothing more than raise a mere suspicion of guilt and provided equal or greater support for the competing inference of innocence. The government did not call any doctors or patients at trial to testify as to the legitimacy of patients' medical needs, nor did the government admit any patient medical records. Circumstantial evidence alone was not sufficient to support each element of the drug distribution conspiracy beyond a reasonable doubt. Therefore, no reasonable juror could have found guilt beyond a reasonable doubt. The Second Circuit did not follow its own "equipoise rule" set forth in *Glenn*, 312 F.3d at 70 in affirming Mr. Kalaba's conviction.

A. The Circumstantial Evidence, Based Merely on Conjecture and Surmise Was Insufficient to Prove Every Element of the Drug Distribution Conspiracy

In the Second Circuit, "in order to a prove conspiracy, the government must present some evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it."

United States v. Giraldo, 80 F.3d 667, 673 (2d Cir. 1996) (internal citations and quotations omitted). Indeed, "[b]oth the existence of the conspiracy and the defendant's participation in it with the requisite criminal intent may be established through circumstantial evidence." *United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998). However, a particular defendant's membership in a conspiracy "requires proof of purposeful behavior aimed at furthering the goals of the conspiracy." *United States v. Desimone*, 119 F.3d 217, 223 (2d Cir. 1997) (internal citations omitted). Therefore, an individual defendant's membership in a conspiracy may not be established simply by the fact he knows that a crime is being committed. *Desimone*, 119 F.3d at 223. Nor is a defendant's "mere association with those implicated in an unlawful undertaking [sufficient] to prove knowing involvement." *United States v. Nusraty*, 867 F.2d 759, 764 (2d Cir. 1989). In the absence of an explicit agreement to join a conspiracy, the Second Circuit has typically looked for evidence that the defendant, in addition to knowing the essential nature of the plan, has "associated himself with the venture in some fashion, participated in it as something that he wished to bring about, or sought by his action to make it succeed." *United States v. Vargas,* 986 F.2d 35, 39 (2d Cir. 1993) (internal citation and quotation omitted).

In this case, the government failed to present sufficient evidence that (1) a conspiracy to distribute controlled substances to persons without a legitimate medical need took place, (2) that Mr. Kalaba knew anything about the conspiracy and (3) that he agreed to join. The government's mere inferences of guilt were insufficient to sustain a conviction.

To prove conspiracy to distribute narcotics, the government was required to prove that Mr. Kalaba operated pharmacies in furtherance of a conspiracy "to dispense the controlled substances, or cause them to be dispensed, [1] other than for a legitimate medical purpose, [2] other than in good faith, ***and*** [3] not in the usual course of medical practice." (A-1537) (*emphasis added*). The government was thus required to prove, beyond a reasonable doubt, all three elements.

To prove the illegal distribution conspiracy, the government had to establish a link between the targeted patients and Mr. Kalaba's knowledge that they lacked a legitimate medical need. It is undisputed that Mr. Kalaba was not a physician prescribing medication or the pharmacist filling prescriptions. There was no testimony presented at trial that any physician was prescribing medication without a legitimate medical purpose, let alone testimony that Mr. Kalaba knew this to be true. The same can be said for pharmacists filling prescriptions. There was no evidence, whatsoever, that any patient lacked a medical necessity for their prescription. There was no evidence that Mr. Kalaba had direct contact with patients or otherwise had first-hand knowledge about their medical conditions. Rather, the physicians, and to some extent, the pharmacists verifying prescriptions, were the ones that would know whether the patients lacked a legitimate medical need. However, Plainfield, Family, and Santa Marina Pharmacies properly verified every prescription with clinic staff. (A-128-129, 143, 174, 353, 1277). Since all prescriptions were verified, the only way to know about the patient's medical needs was whether Mr. Kalaba knew the treating physicians turned a blind eye. However, there was no testimony of this. Therefore, the government could only rely on circumstantial evidence to create inferences that patients lacked medical necessity and physicians and pharmacists knowingly turned a blind eye. However, no category of evidence, independently or in combination, established that any patient lacked a medical necessity and that any physician prescribed, or pharmacist filled, a prescription not in good faith or not for a legitimate medical purpose. Such circumstantial evidence was insufficient to prove, beyond a reasonable doubt, each element of the drug distribution conspiracy.

(i). Insufficient Proof of Lack of Medical Necessity Because No Patients or Doctors Were Arrested, Each Prescription Had a Letter of Medical Necessity, Each Prescription was Verified, and Neither Mr. Kalaba Nor the DEA Communicated Directly with Patients

It is undisputed that Plainfield, Family, and Santa Marina Pharmacies engaged in a mail order business that distributed Schedule II controlled substances and that mail order distribution is legal. Mr. Kalaba sought to provide a service and product to those customers that legitimately needed their prescribed medication. The record was void of direct evidence of a conspiracy to target persons without a legitimate medical need. Rather, the government introduced circumstantial evidence about the characteristics and demographics of the patients. According to the government, if it could be inferred these patients did not need medication, then the fact that the pharmacies filled their prescriptions proved conspiratorial intent. The government's inferences, however, were tenuous and amounted to mere suspicion and surmise about the patients' actual medical conditions.

The government introduced evidence that a small percentage of patients had identification cards from states outside of Florida and the even smaller percentage of patients residing in the same residence. (A-140-145, 153-154, 156-179). However, knowledge of where the patients lived proved nothing about the patients' medical conditions. The same is true for testimony that patients were willing to wait weeks for their prescriptions. (A-313-317). The government also solicited testimony from Joel Shumrak that his clinic, the Pain Center of Broward, was a "pill mill," "where doctors really don't give you a full examination and prescribe oxycodone and others." (A-553). However, Mr. Shumrak failed to name a single patient from his clinic that did not have a legitimate medical need, a single doctor that was suspended from practice, or a single doctor that filled a prescription not for a legitimate medical purpose. Based on this limited testimony, it was too far of a leap to link the Pain Center of Broward's lack of "full examinations" to proof that its patients actually lacked medical necessity. Further farfetched, was the leap that the Pain Center of Broward's lack of "full examinations" proved that the target of the conspiracy was to supply patients that lacked medical necessity. Mr. Shumrak also testified that his clinic's patients came from all over the United States, "forty-five percent" from outside the state of Florida. (A-561-564). None of his testimony was supported by documented proof. To the contrary, from November 1, 2011 through October 23, 2013, Plainfield Pharmacy only filled 26 individuals from the Pain Center of Broward that resided outside Florida. (A-1673-1803). Knowledge that 26 patients resided outside of Florida was insufficient to establish that the intent of the conspiracy was to target persons without medical necessity. Singularly, and in total, the testimony above amounted to mere conjecture or surmise that at most was merely suggestive of guilt.

The record evidence related to "lack of medical purpose" was thus tenuous and not sufficient to support reasonable doubt. There were no patient files admitted into evidence nor was a single doctor called to the stand. Rather, the only evidence related to the patients' actual medical conditions came from Donna Tiwari, who testified that each patient from Medical Specialists was examined every 28 days, would see a counselor as well as a physician on each visit, and were tested to make sure they were taking the medication that was prescribed. (A-1373-1374, 1380, 1382). While it is theoretically possible, or a "permissible inference," that some patients may not have had a legitimate medical need for the oxycodone they were prescribed, "it is not enough that the inferences in the government's favor are permissible." *Martinez*, 54 F.3d at 1042-43. There are pharmacies operating across the country that likely, but unknowingly, fill prescriptions for patients that lack medical necessity. Plainfield, Family, and Santa Marina pharmacies were no different. In this case, the record was insufficient to establish that the target of the conspiracy was to distribute narcotics to those without a legitimate medical need. Rather, the circumstantial evidence is consistent with the defense's theory that due to the DEA crackdown on controlled substances in Florida, the pharmacies capitalized on an opportunity to fill prescriptions for an underserved, but nonetheless legitimate, segment of the pharmaceutical market. The evidence was equally consistent that the pharmacies operated as a legitimate business, providing a service and product to customers that needed their prescription medication.

While it is theoretically possible, or a "permissible inference," that some patients may not have had a legitimate medical need for the oxycodone they were prescribed, "it is not enough that the inferences in the government's favor are permissible." *United States v. Martinez,* 54 F.3d 104, 1042-43 (2d. Cir. 1995). The evidence must be sufficient to establish that the target of the conspiracy was to distribute narcotics to those without a legitimate medical need. In this case, the evidence was equally consistent with the competing theory that the pharmacies operated as a legitimate business, providing a service and product to customers that needed their prescription medication by mail order.

(ii). Overwhelming Proof that Pharmacy Staff Acted in Good Faith and in the Usual Course of Medical Practice; Pharmacists Were Licensed; Each Prescription was Verified; Doctors Were Licensed; No Doctors Were Arrested

The record is void of direct evidence of conspiratorial intent for physicians to prescribe medication, and pharmacists to fill prescriptions, other than in good faith, and outside the course of medical practice. To the contrary, the record evidence in this case made clear that the doctors were fully licensed and examined each patient, and the pharmacy staff, in distributing the controlled substances, followed the same, or stricter, verification checks as Duane Reade and the big box pharmacies. (A-128-129, 143, 174, 353, 746, 1277-78, 1362). Every patient was seen by a doctor and diagnosed with a medical condition. The doctors were licensed. The prescriptions were verified. Added protections, such as an incident log, medical necessity form, and patient agreement, were put in place. In fact, Government Cooperator Kellan Bishop was responsible for verifying prescriptions with clinics and he testified that every single prescription was verified before mailing to the patients. (A-128-129, 143, 353). Mr. Bishop also confirmed that every patient was required to receive a letter of medical necessity listing their diagnoses prior to their prescriptions being filled. (A-174).

According to Mr. Winsley, former executive director of the Ohio Board of Pharmacy, there is no per se definition of the term "legitimate medical purpose" or course of professional practice. (A-996). Mr. Winsley further testified that there are no federal rules, promulgated by the DEA, that specify what must be done to make sure that a prescription is written for a legitimate medical purpose. (A-1001). Mr. Winsley confirmed that the types of verifications performed at Plainfield Pharmacy, in addition to requiring a letter of medical necessity, a patient agreement, and an incident log, are additional steps a pharmacy can do to try to meet its corresponding liability under the law, however, none are required for filling mail order prescriptions under the law. (A-1011-1013). According to Mr. Winsley, the law does not require a pharmacist or a pharmacy staff to do everything possible to insure the legitimacy of prescriptions received at the pharmacy. (A-1013). Based on Mr. Winsley's testimony, Plainfield, Family, and Santa Marina Pharmacies were taking more than necessary steps to distribute controlled substances in good faith.

According to the Court's jury instructions,

> In determining whether a pharmacist acted without a legitimate medical purpose, you should examine all of the pharmacist's actions and the circumstances surrounding them. For example, if a pharmacy fills a prescription for the purpose of improving a patient's health or addressing a legitimate medical need, you may consider this as proof that the pharmacist was dispensing the drug lawfully, in the usual course of professional medical practice, and for a legitimate medical purpose.

(A-1536). There was no testimony presented that the pharmacists at Plainfield, Family, or Santa Marina Pharmacies filled prescriptions for reasons other than to act in the course of medical practice and address a legitimate medical need. In fact, Mr. Fam, pharmacist-in-charge at Santa Marina

Pharmacy, complied with the New Jersey Prescription Monitoring Program, verified that no physicians had any violations, and that every prescription was verified by confirming with clinic staff the (1) medication, (2) strength of the dose, (3) quantity, (4) directions, (5) diagnosis of the patient and (6) when a follow-up scheduled to take place. (A-1276-1278, 1286). Mr. Fam was also responsible for ordering controlled and noncontrolled substances for Santa Marina Pharmacy from distributors. (A-1304). Mr. Fam previously worked for Duane Reade as a supervising pharmacist. (A-1273). Mr. Fam confirmed that these verifications were comparable to Duane Reade. (A-1290-1291). There is no dispute that Mr. Fam was acting in good faith and in the course of medical practice. No physicians testified. However, Donna Tiwari, employee for Medical Specialists, testified that each patient would see a counselor *as well as* a physician every 28 days. (A-1362, 1373-1374). The purpose of the counselor was to talk to each patient about the prescribed medication, how the medication was affecting the patient, and how they were feeling. (A-1374). Ms. Tiwari confirmed that each patient would be tested, through urinalysis, to make sure they were taking the medication that was prescribed. (A-1360-1361). Ms. Tiwari indicated that Medical Specialists started referring patients to Plainfield Pharmacy due to a shortage of medication in local Florida pharmacies. (A-1383-1384). The government failed to present any evidence at trial to contradict Ms. Tiwari's testimony.

The only testimony presented at trial related to lack of good faith and lack of professional conduct was the bombastic claims of Joel Shumrak that his clinic was a "pill mill." No evidence was presented that corroborated Mr. Shumrak's testimony. The record is wholly insufficient to prove beyond a reasonable doubt that the intent behind the conspiracy was to have physicians prescribe, and pharmacists fill, medication for persons without a legitimate medical need, other than in good faith, and not in the course of medical practice. No reasonable juror could find that any physician or any pharmacist in this case was acting other than in good faith and not in the course of professional practice.

B. Mr. Kalaba Convicted on Insufficient Evidence that He Knew About the Conspiracy and Agreed to Join; Circumstantial Evidence Amounted to Mere Conjecture and Surmise

A conspiracy conviction cannot be sustained unless the government established beyond a reasonable doubt that the defendant had the specific intent to violate the substantive statute. *See Salinas v. United States*, 522 US 52, 64-65 (1997). It is undisputed that the government lacked direct proof of Mr. Kalaba agreeing to engage in a conspiracy. Proving a person's state of mind through circumstantial evidence is difficult and can commonly be wrong. If wrong, the consequences are devastating. In this case, the circumstantial evidence presented was equally supportive of a theory of innocence as a theory of guilt that Mr. Kalaba knew about, and agreed to engage in, a conspiracy to illegally distribute narcotics.

(i) Insufficient Proof that Mr. Kalaba Knew About the Conspiracy; No Direct Evidence; Circumstantial Evidence Equally Supportive of Theory of Innocence as Theory of Guilt

First and foremost, the government cannot prove what does not exist. Therefore, the government cannot prove the necessary link between Mr. Kalaba and knowledge of lack of medical necessity, lack of good faith, or lack of professional conduct if no such evidence exists. Secondly, the record is equally consistent with the theory that Mr. Kalaba took advantage of an underserved, but legitimate, market of people unable to get their prescriptions filled in Florida due to the DEA crackdown by managing a mail order pharmacy. Under this theory, the government cannot prove conspiratorial intent for Mr. Kalaba to target patients that lacked medical necessity and were prescribed medication not in the usual course of professional conduct.

"[T]o convict the defendants of unlawful distribution of controlled substances, the jury must have found that they *knew or reasonably should have known* that the doctors and pharmacists were distributing controlled substances outside the usual course of professional practice and without a legitimate medical purpose — or, in other words, that these professionals acted in 'bad faith.'" *United States v. Quinones*, 635 F.3d 590, 595 (2d Cir 2011); *see United States v. Moore*, 423 U.S. 122, 124 (1975); *see also* 21 C.F.R. § 1306.04(a). In this case, the government's proof that Mr. Kalaba agreed to participate in the conspiracy was tenuous at best, creating a mere inference of guilt. The government did not admit any evidence that Mr. Kalaba spoke with any patients or doctors about the patients' medical conditions. There was no proof that Mr. Kalaba knew of any doctors whose licenses had been suspended or any pharmacists not registered with the DEA. There was no proof that Mr. Kalaba knew of any pharmacist blatantly violating federal or state law. Mr. Kalaba was not present for any meetings with Paul Wiseberg and any clinic owners or pharmacists about the opening of pharmacies. Furthermore, as discussed above, any knowledge Mr. Kalaba had about the residencies of the patients or how long they were willing to wait for their prescriptions proved nothing about their actual medical conditions. Mr. Shumrak's characterization of his clinic as a "pill mill" also proved nothing about Mr. Kalaba's knowledge of the conspiracy because Mr. Shumrak admittedly held himself out to the outside world, including Mr. Kalaba, as a legitimate business owner of a legitimate clinic. (A-626, 696). The record was thus insufficient to show Mr. Kalaba knew about a conspiracy to distribute narcotics to persons without a legitimate medical need, for a purpose other than in good faith, and not in the usual course of medical practice.

Despite the government's attempt to argue the opposite, the evidence was consistent with the innocent reason to target the market of legitimate people unable to fill their prescriptions in Florida due to the DEA crackdown. This theory explains why Plainfield increased its distribution after starting mail order. Similarly, due to the DEA crackdown, there was no need for Plainfield to take insurance as there were plenty of underserved patients willing to pay cash. For this reason, Mr. Kalaba's statements calling Paul Wiseberg "greedy" is not unreasonable and not indicative of a greater conspiratorial intent. The government cannot rely on the fact that Mr. Kalaba knew multiple patients resided in the same residence alone in establishing conspiratorial intent. This is because it says nothing about those patients' medical necessity or the legitimacy of their prescriptions. The same can be said about Mr. Kalaba being present at Plainfield on a Saturday. The government's cooperator, Kellan Bishop, testified that Mr. Kalaba was present on a Saturday to avoid a pharmacist who refused to fill prescriptions. (A. 256-68, 281-90). Mr. Bishop's testimony was not corroborated. Mr. Bishop recorded the events that took place that Saturday but it did not show Robert Kalaba physically filling any prescription bottles. (A-258-61). The video alone did not prove the necessary elements to sustain a conviction on Count One. Without knowledge that patients lacked a medical necessity and physicians and pharmacists lacked good faith and lacked professional conduct, a conviction cannot stand.

(ii). Insufficient Proof Mr. Kalaba Agreed to Join the Conspiracy; No Direct Evidence; Mr. Kalaba Not Part of Any Meetings; Circumstantial Evidence Consistent with Theory of Innocence

There was insufficient proof that Mr. Kalaba agreed to join a conspiracy.

Mr. Kalaba was not captured on any video or recording agreeing to join in the conspiracy, let alone any evidence that supports Mr. Kalaba's tacit acceptance of the conspiracy. The government made every attempt to elicit statements made by Mr. Kalaba to create an inference of guilt. However, these statements were either taken out of context, were uncorroborated, or were not indicative of guilt. Other circumstantial evidence the government presented at trial, including Mr. Kalaba's felony record, evidence of his uncontested conviction of Count Two, evidence of his misstatements on wholesale applications and to DEA investigators, his financial records, and his presence at Plainfield Pharmacy on a Saturday, singularly and in total, did not establish his agreement to join a conspiracy beyond a reasonable doubt. It is important to note that though Mr. Kalaba had a felony record, he was not barred from managing a pharmacy. It is also important to note that as a novice to pharmacy management, Mr. Kalaba made mistakes and had misunderstandings about the law. Mr. Kalaba also admittedly worked in New Jersey while on supervised release, a violation with probation, but not proof of a conspiracy to distribute narcotics. Overtime, Mr. Kalaba began to run his pharmacies efficiently by verifying every prescription and regularly reporting to the prescription monitoring program. According to the jury instructions, "guilty knowledge may not be established by demonstrating that the defendant was *merely negligent, foolish, or mistaken*, and you may not rely on willful blindness as the basis for treating the defendant as though he was aware of the existence of a fact if you find that the defendant actually believed that the fact did not exist." (A-1545) (*emphasis added*). No matter how the government spun it, Mr. Kalaba's mistakes and misunderstandings about the law and foolish conduct to conceal his employment from probation created only a mere suspicion of guilt and did not prove, beyond a reasonable doubt, his agreement to join a conspiracy.

In contrast to the government's weak inferences, substantial evidence was presented at trial that Mr. Kalaba intended to manage Plainfield Pharmacy legitimately and only supply patients with legitimate medical needs. For example, Mr. Kalaba set into place verifications and protocols so that each prescription was verified as legitimate by the clinic, that the prescribing physician was licensed, and that the photo ID matched the prescription. (A-402-403). These protocols and verifications were similar to Duane Reade, as David Fam testified. (A-1290-1291). Despite recording every call Mr. Kalaba made for months on end, despite having Mr. Bishop work undercover in Plainfield Pharmacy for over 12 months interacting with Mr. Kalaba on an almost daily basis, despite the DEA's interviews with numerous Plainfield Pharmacy employees, there was no proof that Mr. Kalaba knew the target of the conspiracy was to distribute to patients that lacked a legitimate medical necessity. Therefore, the evidence the government presented was insufficient to prove a conspiracy and Mr. Kalaba's agreement to join.

The District and Appellate Court failed to analyze the weight of the evidence under equipoise, instead taking the government's mischaracterization of the facts at face value, in affirming Mr. Kalaba's conviction.

II. EVIDENCE THAT MR. KALABA HAD ACCESS TO ONE BANK ACCOUNT THAT PAID HIS SALARY, WAS INSUFFICIENT EVIDENCE TO CONVICT MR. KALABA OF CONSPIRACY TO COMMIT MONEY LAUNDERING

Having failed to sufficiently prove the underlying conspiracy, the government cannot then prove that Mr. Kalaba agreed to conceal the proceeds of a conspiracy that never existed. For this reason, Mr. Kalaba's conviction to Count Four cannot stand.

Conspiracy to money launder required that the government prove the following: (1) an underlying conspiracy, (2) Mr. Kalaba's knowledge of and agreement to join the underlying conspiracy, and (2) his agreement to conceal the nature, location, source, ownership and control of the proceeds of the conspiracy. (A-1557-1558); *accord* 18 U.S.C. § 1956(a)(1). The government's failure to prove all three elements beyond a reasonable doubt at trial required an acquittal. The government failed to establish, beyond a reasonable doubt, the existence of a conspiracy and Mr. Kalaba's knowledge of, and agreement to join. Proof of the underlying conspiracy and Mr. Kalaba's agreement to join was necessary to establish that any financial transactions associated with Plainfield, Family, and Santa Marina Pharmacies were related to illegal narcotics distribution. Without proof of the underlying conspiracy and Mr. Kalaba's agreement to join, the government could not prove the third element, concealment proceeds of the conspiracy.

Plainfield, Family, and Santa Marina Pharmacies were distributing high volumes of prescriptions. For this reason, the fact that the pharmacies *grossed* $2 million does not in itself indicate a conspiracy to money launder. Furthermore, the fact that $650,000 of the *gross* proceeds were put back into the pharmacies to purchase stock of more narcotics, pay employees, rent, and other costs of business is neither unusual nor indicative of a conspiracy to money launder. Moreover, the fact that Mr. Kalaba's wages and repayments for out-of-pocket expenses were deposited into the Sun Park Pharmacy account is not indicative of conspiracy to money launder.

IRS Criminal Investigator, Adrian Davila, provided the only testimony at trial related to concealment. Mr. Davila investigated the financial transactions of bank accounts related to Plainfield, Family, and Santa Marina Pharmacies. Mr. Kalaba was not paid in cash or money order, which would be difficult to trace. Rather, the government knew exactly what Mr. Kalaba earned because his wages and repayments for out-of-pocket expenses were deposited into the Sun Park Pharmacy/Sun Park Professional Systems account. Mr. Davila confirmed that there was nothing inherently illegal about having a bank account were wages were deposited and expenses were reimbursed. (A-170). According to the jury instructions, "if you find that the defendant knew of the agreed upon transaction but did not know that it was either designed to conceal or disguise the true origin of the property in question, you must find that this element has not been satisfied and find the defendant not guilty of this count." (A-1565). There was no proof presented by the government that Mr. Kalaba knew that the deposits into the Sun Park Pharmacy/ Sun Park Professional Systems account were related to illegal narcotics transactions or that the purpose of the Sun Park Pharmacy/ Sun Park Professional Systems account was meant to conceal or secrete such transactions.

Other accounts related to Plainfield pharmacy were managed by Paul Wiseberg and designated for specific purposes: one for cash and money orders, one for insurance, and one for lottery deposits. (A-1126). There was no evidence Mr. Kalaba had any control or access to these accounts. Notwithstanding, all deposits related to these accounts were easily tracked without any proof of concealment. Movement of funds from these accounts were also traceable. In fact, Mr. Davila testified that there was nothing strange about the repayment of loans from the pharmacy to Mr. Wiseberg personally for his initial investment in the pharmacy. (A-1174-1175). There was no evidence presented that Mr. Kalaba had access to these three accounts or knew the nature or contents of the accounts. The government thus failed to prove the existence of illegal narcotics transactions, or that Mr. Kalaba knew the financial transactions related to the pharmacies were designed to conceal the nature, location, source, ownership, and control of the illegal narcotics transactions.

It was a violation of Mr. Kalaba's due process rights to be convicted of conspiracy to money launder when the only evidence presented was his access to a single bank account which his salary came from.

CONCLUSION

This Court has previously expressed opinion that the Fifth Amendment due process clause constitutionally requires proof beyond a reasonable doubt. Though a defendant may be convicted on circumstantial evidence alone, such circumstantial evidence must be sufficient to prove every element of every charge beyond a reasonable doubt. Mr. Kalaba's convictions, based only on circumstantial evidence, were not supported by proof beyond a reasonable doubt. In fact, the evidence viewed in the light most favorable to the Government, remains, at best, in equipoise. Because it would not satisfy the Due Process Clause to have a jury determine that the defendant is *probably* guilty, this Court should grant this petition to review the constitutionality of Mr. Kalaba's convictions.

Respectfully submitted,
/S/ JANE FISHER-BYRIALSEN, ESQ.
Jane Fisher-Byrialsen, Esq.
Counsel of Record
/S/ KAITLIN F. NARES, ESQ.
Associate Counsel of Record
Fisher & Byrialsen, PLLC
99 Park Avenue- 26th Floor
New York, New York 10016
(T) (303) 256-6345
(F) (303) 954-0573