APPENDIX

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APPENDIX A

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAMI GHANEM,

Defendant-Appellant.

No. 22-50266
D.C. No. 2:15-cr-00704-FLA-1

OPINION

Appeal from the United States District Court for the Central District of California
Fernando L. Aenlle-Rocha, District Judge, Presiding

Argued and Submitted June 7, 2024
Pasadena, California

Filed July 17, 2025

Before: Richard R. Clifton, Daniel P. Collins, and Kenneth K. Lee, Circuit Judges.

Opinion by Judge Collins;
Concurrence by Judge Collins

SUMMARY*

Criminal Law

The panel affirmed the 360-month sentence imposed at resentencing on six counts to which Rami Ghanem pleaded guilty in a case in which Ghanem sought to export military equipment from the United States to Libya.

The district court resentenced Ghanem on remand after this court vacated his jury conviction for conspiring to acquire, transport, and use surface-to-air missiles in violation of 18 U.S.C. § 2332g.

The panel rejected all of Ghanem's arguments that the district court committed significant procedural error at resentencing. The panel held that the district court applied the correct legal standards in declining to reduce Ghanem's offense level under U.S.S.G. § 3E1.1 for acceptance of responsibility, and did not clearly err in finding that evidence of Ghanem's failure to accept responsibility outweighed his guilty plea and truthful admissions. As to the district court's decision to depart and vary from the Sentencing Guidelines range, the panel held that (1) the district court adequately explained its sentencing decision, (2) the district court did not fail to address Ghanem's argument that a significant upward deviation from the guidelines was inconsistent with the need to avoid unwarranted sentencing disparities among similarly situated defendants, (3) no special procedural limitations apply to the consideration of large enhancements based on conduct underlying dismissed charges, and (4) because § 2332g applies extraterritorially to Ghanem's overseas conduct, the district court did not err "by relying on foreign conduct that may not even have been criminal."

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

Rejecting Ghanem's argument that the sentence is substantively unreasonable, the panel held that the district court did not abuse its discretion in concluding that a 360-month sentence was warranted under the 18 U.S.C. § 3553(a) factors.

The panel rejected Ghanem's arguments that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, his sentence violates the Fifth Amendment Due Process Clause and the Sixth Amendment right to a jury trial.

Concurring, Judge Collins wrote separately to point out how this case illustrates a troubling feature of the precedent this court must apply. Under the statutes enacted by Congress and under the Sixth Amendment as construed in Part I of the opinion in *Booker v. United States*, 543 U.S. 220 (2005), Ghanem's sentence is patently unlawful, because the facts necessary to justify exceeding the guidelines range were found by the district judge rather than established by a jury verdict or by the defendant's admissions. But the panel must uphold the sentence because Part II of *Booker* eliminated the predicate for Ghanem's Sixth Amendment claim by deleting two of the Sentencing Reform Act's provisions and then adding a new, judge-made "reasonableness" review requirement.

COUNSEL

A. Carley Palmer (argued) and Annamartine Salick, Assistant United States Attorneys; Bram M. Alden, Assistant United States Attorney, Chief; Criminal Appeals Section; E. Martin Estrada, United States Attorney; Office of the United States Attorney, United States Department of Justice, Los Angeles, California; for Plaintiff-Appellee.

Benjamin L. Coleman (argued), Benjamin L. Coleman Law PC, San Diego, California, for Defendant-Appellant.

OPINION

COLLINS, Circuit Judge:

After undercover federal agents conducted a sting operation in which Defendant Rami Ghanem sought to export military equipment from the United States to Libya, Ghanem pleaded guilty to two counts of violating the Arms Export Control Act ("AECA"), *see* 22 U.S.C. § 2778; one count of conspiring to violate the AECA and its regulations, *see* 18 U.S.C. § 371; one count of unlawful smuggling, *see* 18 U.S.C. § 554; and two counts of money laundering, *see* 18 U.S.C. § 1956(a)(2)(A). But Ghanem proceeded to trial on a remaining charge that he had conspired to acquire, transport, and use surface-to-air anti-aircraft missiles (again for use in Libya) in violation of 18 U.S.C. § 2332g, which carries a 25-year mandatory minimum. Ghanem was found guilty and was sentenced to 360 months of imprisonment, which was within the applicable guidelines range of 292–365 months. The 360-month total sentence rested on two independent concurrent groups of sentences: (1) a 360-month sentence for the § 2332g count alone; and (2) a package of concurrent and consecutive sentences on the remaining six counts that also yielded an aggregate 360-month sentence. On appeal, we vacated Ghanem's § 2332g conviction due to a defective jury instruction on venue, and we remanded for resentencing. *United States v. Ghanem*, 993 F.3d 1113 (9th Cir. 2021). At resentencing on the remaining six counts, the district court calculated the guidelines range as now being 78–97 months. Nonetheless, the court ultimately adopted the same above-described second package of sentences as before, and Ghanem was once again sentenced to 360 months of imprisonment.

Ghanem appeals, challenging his sentence on multiple grounds. We affirm.

I

A

Defendant Rami Ghanem, a Jordanian-born naturalized U.S. citizen, first came to the attention of federal authorities in May 2014, shortly after he sent an email to a "Los Angeles-based manufacturer of military equipment" seeking to establish, as he put it, a "cooperative relationship to supply our customers in Jordan (military and security) with your line of products." Federal authorities quickly verified that Ghanem lacked any license from the U.S. to engage in international arms transactions, and they decided to investigate further.

Shortly thereafter, an undercover federal agent, posing as a business owner who sold weapons on the "black market," began contacting Ghanem. They had a series of telephone conversations over the ensuing months, and they met in person in Athens, Greece on March 10 and 11, 2015. In telephone conversations in August 2015, they discussed their first planned shipment, which would involve shipping pistols, rifles, ammunition, and "night vision" goggles or scopes to Libya. They agreed that the shipment would be falsely labeled, ultimately deciding to list the contents in the shipping documents as "industrial equipment." On December 8, 2015, Ghanem arrived at a warehouse in Athens to inspect the planned shipment, but upon arrival he was instead arrested by Greek authorities. These authorities seized two cell phones that were in Ghanem's possession, and they conducted a later search of his Athens hotel room that yielded multiple other electronic devices containing a wealth of information about Ghanem's arms-trafficking activities.

Two weeks later, Ghanem was indicted in the Central District of California on four charges arising from the planned weapons sale. Ghanem was subsequently extradited from Greece and was arraigned in the Central District in April 2016. A superseding indictment

adding three additional charges was filed in March 2017. On the day before his scheduled trial in October 2018, Ghanem pleaded guilty, without a plea agreement, to all four of the counts in the original indictment and to two of the three counts in the superseding indictment.

Count one of the original indictment charged Ghanem with attempted export of various munitions without the necessary license, in violation of the AECA, 22 U.S.C. § 2778(b)(2), (c). At the plea hearing, the factual basis for this charge was that Ghanem, with the intent to accomplish the unlicensed export to Libya, "took a substantial step toward actually exporting" the designated "pistols, rifles, ammunition, and night-vision goggles" by causing a co- conspirator on September 2, 2015 "to wire $89,971 from a bank account in Jordan" to the undercover agent's bank account in the Central District. Based on the same wire transfer and on Ghanem's agreement to falsely identify the shipment on the export documents, Ghanem also pleaded guilty to a violation of 18 U.S.C. § 554(a), namely, his attempted buying of such items for subsequent unlawful export in violation of the AECA (count two). Counts three and four alleged two counts of money laundering in violation of 18 U.S.C. § 1956(a)(2)(A), namely the transferring of funds from outside the United States to an account inside the United States with the intent to promote the violations alleged in counts one and two. The factual basis for Ghanem's plea to these charges was the above-mentioned wire transfer (count three) and a subsequent wire transfer in the same amount on October 22, 2015 (count four).

Count one of the superseding indictment alleged a conspiracy, in violation of 18 U.S.C. § 371, to violate (1) the AECA's requirement, in 22 U.S.C. § 2778(b)(1), to obtain a license before engaging in "brokering activities" involving designated defense articles; (2) the AECA's

prohibition on unlicensed export of such defense articles in violation of 22 U.S.C. § 2778(b)(2); and (3) the prohibition, in the AECA's implementing regulations, on making certain proposals to export such defense articles without a license, *see* 22 C.F.R. § 126.1(e)(1). At the plea hearing, Ghanem agreed that he "became a member of the conspiracy knowing of these objects." The indictment alleged 44 overt acts in support of this conspiracy, but Ghanem's plea to this count was taken based on only one of them, namely, that on March 11, 2015, he met with the undercover agent for the purpose of purchasing and exporting, without the required license, "PVS-27 night-vision weapon sights." Count two of the superseding indictment charged Ghanem with engaging in brokering activities with respect to 100 different types of defense articles, without the required license, in violation of 22 U.S.C. § 2778(b)(1)(A)(ii). In articulating a factual basis for this charge, the prosecutor only identified one such category that Ghanem had brokered, namely, "12.7 millimeter NSVT machine guns."

B

The third and last count of the superseding indictment alleged a conspiracy to acquire, transfer, and use surface-to-air missiles designed to destroy aircraft ("SAMs"), in violation of 18 U.S.C. § 2332g. Ghanem proceeded to trial on this charge. The evidence at trial showed that Ghanem, while working for a Jordanian company called "Gateway to MENA" (referring to the Middle East and North Africa), was involved in several transactions involving SAMs.

For example, Ghanem arranged in 2015 for SAMs to be transferred to "Libya Dawn," an insurgent group that claimed to be the government of Libya and that was fighting against the U.S.-recognized government. In connection with this transaction, Ghanem worked with another employee of Gateway to MENA in preparing an "end-user certificate," which is a

document needed in international arms transactions to identify the ultimate user of the weapons involved. Ghanem handwrote a draft of the document, purporting to be from the unrecognized, insurgent Libyan government, and later sent an official-looking version to a Ukrainian state-owned arms company with a cover letter asking about purchasing the items listed. Among the items requested were 50 "Igla" SAMs and five Igla launchers. Around the same time, he sent a photograph of a SAMs launcher to a Georgian weapons broker, who worked through a company registered in Belize. About a week later, the Georgian responded by sending back both Ghanem's end-user certificate listing the SAMs and launcher, as well an invoice for $297,000 from his Belize-registered company, ostensibly for 1200 computer hard drives. A federal agent opined that this invoice was not, in fact, for hard drives, but for the purchase of weapons associated with the fraudulent end-user certificate.

A few weeks after that, Ghanem also had a series of email exchanges with the Georgian broker about hiring a crew to operate Igla SAMs and other equipment in Libya. In the same time frame, Ghanem also communicated with a retired general from the Jordanian army about Ghanem's efforts to acquire crew members to operate Iglas in Libya. In one such email to the retired general, Ghanem attached a $409,000 invoice for "training" from the Georgian's Belize company, and Ghanem explained that it would cover a variety of systems, including Iglas. The general responded by stating that he thought, based on the cost of each item (including the $30,000 he attributed to the Igla crews), the total invoice should only be for $398,000. Shortly thereafter, $398,000 was wired from Gateway to MENA to the Georgian's Belize company.

Two months later, in April 2015, Ghanem had a further email exchange with the Georgian broker, in which Ghanem complained about changes in pricing for the Igla

operators. Ghanem told the broker, "[w]e agreed on the following: One operator for Igla[.] [H]e gets 10,000 for 2 months and they get as a bonus 50,000 for each plan[e] he sh[o]t[]down." Later that month, Ghanem communicated by email with the Jordanian retired general about passports and travel arrangements to Libya for two SAMs operators and a third person who recruited them. Ghanem then reached out directly to the recruiter about the travel arrangements. Deposition testimony from these two SAMs operators and the recruiter was played at trial. One of the operators described the SAMs as being "Strela systems" rather than "Igla systems," although he acknowledged that the two were "almost identical." The recruiter explained that the Igla systems they saw in Libya were inoperable but that the Strela systems were in "very good condition." The recruiter also confirmed Ghanem's role in arranging travel and payment for the operators, and he specifically confirmed that Ghanem agreed to pay a $50,000 bonus for each aircraft shot down. However, the recruiter testified that, to his knowledge, neither of the operators shot down any aircraft.

The jury convicted Ghanem on the § 2332g charge. In August 2019, the district court sentenced Ghanem to 360 months of imprisonment. Specifically, Ghanem was sentenced to 240 months of imprisonment on count one of the indictment (the § 2778(b)(2) munitions export charge), to run consecutively with 120 months of imprisonment on count two (the § 554(a) smuggling charge). As to the remaining counts of conviction, which all ran concurrently, Ghanem was sentenced to 240 months on each of the two § 1956(a)(2)(A) money laundering charges (counts three and four of the indictment), 60 months on the § 371 conspiracy charge (count one of the superseding indictment), 240 months on the § 2778(b)(1)(A)(ii) brokering charge (count two of the superseding indictment), and 360 months on the § 2332g charge (count three of the superseding indictment). This total

sentence was five years above the statutory mandatory minimum for the § 2332g charge, *see* 18 U.S.C. § 2332g(c)(1), and within the applicable guidelines range, which was 292–365 months.

C

On appeal, we vacated Ghanem's § 2332g conviction on the ground that the jury had received improper instructions with respect to the disputed issue of venue. *Ghanem*, 993 F.3d at 1130, 1133–34. On remand, the Government agreed to dismiss the § 2332g charge without prejudice. Because the district judge who presided at Ghanem's trial had retired, a different judge presided at Ghanem's resentencing.

The Probation Office's presentence investigation report ("PSR") calculated Ghanem's sentencing guidelines range as follows. The PSR noted that, under United States Sentencing Guidelines ("U.S.S.G.") § 2S1.1(a)(1), the base offense level for the money laundering counts would be determined by the offense level for the arms-trafficking counts, which, under U.S.S.G. § 2M5.2(a)(1), was 26. The PSR then added two levels because Ghanem was convicted under 18 U.S.C. § 1956. *See* U.S.S.G. § 2S1.1(b)(2)(B). The result was an offense level of 28 for the money laundering counts, and because all of the offenses grouped together under U.S.S.G. § 3D1.2, that became the final offense level under the PSR's calculations. Because Ghanem had no criminal history, his criminal history category was I, and his resulting sentencing range was 78–97 months. However, the probation officer recommended that the district court depart or vary upward from the guidelines and impose an aggregate sentence of 240 months.

In his sentencing papers, Ghanem argued that he should receive a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1, which would yield a guidelines range

of 63–78 months, and he sought a within-range sentence of 77 months. The Government sought an aggregate sentence of 360 months, arguing that, despite the vacatur of the jury verdict, Ghanem's relevant "conduct remains exactly the same" as at the first sentencing and that "[t]he appropriate sentence for that conduct also remains the same."

At Ghanem's resentencing hearing, the district court "decline[d] to apply the two-level downward adjustment for acceptance of responsibility." The district court therefore agreed with the PSR's calculation of the guidelines range as being 78–97 months. The district court nonetheless sentenced Ghanem to an aggregate term of 360 months of incarceration, to be followed by a three-year term of supervised release. Specifically, with the exception of deleting the prior concurrent sentence on the now-vacated § 2332g charge, the district court imposed the exact same term of imprisonment on each of the remaining six counts as had been imposed at the previous sentencing: 240 months on the § 2778(b)(2) munitions export charge, followed by a consecutive 120-month sentence on the § 554(a) smuggling charge; concurrent sentences of 240 months on each of the money laundering charges; a concurrent sentence of 60 months on the conspiracy charge; and a concurrent sentence of 240 months on the § 2778(b)(1)(A)(ii) brokering charge.

In imposing this above-guidelines sentence, the court stated that there were grounds for both an upward departure and an upward variance. The district court noted at the outset that it was allowed to consider the conduct underlying the vacated § 2332g count, either for purposes of choosing a sentence within the guidelines range or for purposes of deciding whether to depart or vary from that range. *See* U.S.S.G. § 1B1.4 (citing 18 U.S.C. § 3661); *see also* U.S.S.G. § 5K2.21. The court therefore concluded that Ghanem's "relevant conduct remains unchanged from the time that Judge Otero, the trial judge, imposed sentence in

2019." As specific grounds for departure, the court pointed first to application note 2 to § 2M5.2, which authorizes an upward departure when certain aggravating features, such as the "volume of commerce involved," are "present in an extreme form." U.S.S.G. § 2M5.2, cmt. n.2. It also cited § 5K2.14, which allows for an upward departure when "national security . . . was significantly endangered." U.S.S.G. § 5K2.14.

In finding these departure grounds applicable here, and in deciding to vary from the guidelines under 18 U.S.C. § 3553, the court emphasized what it considered to be the "extreme facts" of this case. As the court found, Ghanem had made his living for several years as a "black market arms trafficker," dealing in a variety of "weapons of war, including trading in machine guns and assault rifles and rockets and mortars and rocket-propelled grenades and anti-tank weapons." The district court summarized the above-described two main transactions that were a focus of the charges, namely, the planned shipment of various arms from Greece to Libya through an undercover federal agent and the deal with the Georgian broker concerning the delivery and operation of SAMs in Libya. The district court also cited several additional examples of Ghanem's black-market arms-trafficking activities. These included Ghanem's efforts in September 2013 "to acquire surface-to-air missiles and missile launchers on behalf of a foreign government" that would be "covertly supplied" to, *inter alia*, "the Kurdish region of Iraq," and Ghanem's "repeated offers to a foreign government" in July 2014 "to sell weapons, including 400 Strela . . . surface-to-air missiles" that Ghanem said were "available for immediate shipment." The district court also alluded to evidence showing that Ghanem had mentioned, in his discussions with the undercover agent, that he was able to deliver arms on a massive scale, including a deal involving "100 million" rounds of AK-47 ammunition; that Ghanem at one point sought from the agent "as many as you have" of a

variety of heavy arms; and that Ghanem also bragged to the agent about his ties to various governments and militias, including Hezbollah.

The district court stated that, in undertaking his black-market arms-trafficking, Ghanem was "indifferent to the consequences of his actions" and "was motivated solely by profit." According to the court, "Ghanem's own words, written and spoken, demonstrated a lack of respect for human life." The court further found that "Ghanem's conduct unequivocally endangered the security and foreign policy interests of the United States as well as the safety and security of far less stable nations."

The district court described Ghanem's personal history, medical problems, and various letters submitted on his behalf, and the court stated that it had considered this "personal history and background in determining the appropriate sentence." Despite these considerations, the district court concluded that "a significant upward variance and departure is warranted given the extremely serious and callous nature, breadth, volume, duration, planning, and sophistication of Mr. Ghanem's offenses, and the threat to the security and foreign policy interest of the United States and the security of more vulnerable nations." The court also rejected Ghanem's argument that a 360-month sentence would produce unwarranted sentencing disparities. *Cf*. 18 U.S.C. § 3553(a)(6).

Ghanem timely appealed his sentence. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II

Before reviewing the substantive reasonableness of Ghanem's sentence, "we first consider whether the district court committed significant procedural error," *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc), "such as failing to calculate (or improperly

calculating) the [g]uidelines range, treating the [g]uidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the [g]uidelines range," *Gall v. United States*, 552 U.S. 38, 51 (2007). Ghanem asserts a variety of procedural challenges on appeal, but none of them are meritorious.[1]

A

Because the federal sentencing guidelines are "the starting point and the initial benchmark" in "all sentencing proceedings," we first address Ghanem's contention that the district court committed the procedural error of failing to "correctly calculat[e] the applicable [g]uidelines range." *Gall*, 552 U.S. at 49. Specifically, Ghanem contends that the district court erred in failing to reduce his offense level by two levels under U.S.S.G. § 3E1.1 for acceptance of responsibility. "A district court's decision about whether a defendant has accepted responsibility is a factual determination reviewed for clear error," *United States v. Rosas*, 615 F.3d 1058, 1066 (9th Cir. 2010) (citation omitted), but we "review de novo whether the district court misapprehended the law with respect to the acceptance of responsibility reduction," *United States v. Green*, 940 F.3d 1038, 1041 (9th Cir. 2019) (citation omitted). Applying these standards, we uphold the district court's decision not to apply the two-level adjustment.

[1] We generally review procedural challenges to a sentence for abuse of discretion, and we review the factual determinations underlying a sentence for clear error. *United States v. Spangle*, 626 F.3d 488, 497 (9th Cir. 2010). The Government argues, however, that most of Ghanem's procedural claims "were not raised before the district court and are therefore reviewed for plain error only." Ghanem vigorously disagrees, contending that he adequately preserved all of his claims of error in the district court. We need not resolve this issue. Even applying *arguendo* the more favorable standards of review that Ghanem advocates, we conclude that his procedural claims all fail.

1

Before turning to Ghanem's particular arguments on this score, we first summarize the district court's stated reasons for denying an adjustment for acceptance of responsibility.

In addressing this issue, the court first examined several of the "considerations" that the guidelines' commentary identifies, in application note 1, as being relevant to the issue of acceptance of responsibility. *See* U.S.S.G. § 3E1.1, cmt. n.1. The court concluded that Ghanem's "decision to plead guilty does not demonstrate timeliness in accepting responsibility" because "he did so on the eve of trial after several years of litigation." The court also stated that Ghanem "did not voluntarily terminate his criminal conduct," did not make voluntary restitution, or "voluntarily surrender to authorities or assist authorities in the recovery of the fruits and instrumentalities of his offenses," and that he "declined to speak about the offense" with the probation officer who was preparing his presentence report.

Having ticked through the various factors in application note 1, the court then turned to application note 3 to § 3E1.1. Paraphrasing that note, the district court stated that "entry of a guilty plea prior to commencement of trial and truthfully admitting the conduct comprising the offenses of conviction, combined with truthfully admitting or not falsely denying additional relevant conduct, is evidence of acceptance of responsibility," but that "this evidence may be outweighed by conduct that is inconsistent with acceptance of responsibility." The district court then held that, based on its "review of this file," Ghanem had not "accepted true responsibility for the full scope of his conduct." Rather, the court explained, he had "minimized his involvement," by arguing, for example, that "he was not an international arms dealer" and that his foreign conduct merely involved discussions of deals with "foreign governments" that never "materialized." Finally, the court noted that Ghanem

had "declined to speak with the Probation Office about the offenses to which he pleaded guilty."

2

At the outset, Ghanem argues that the district court applied the wrong legal standards in assessing acceptance of responsibility, because it failed to start from the premise that "a guilty plea supported by truthful admissions by the defendant creates a presumption that the defendant will receive the acceptance-of-responsibility reduction." *Green*, 940 F.3d at 1042. We disagree.

In stating that the guidelines "suggest" such a presumption, we relied in *Green* on application note 3. *See* 940 F.3d at 1042 (citing U.S.S.G. § 3E1.1, cmt. n.3 and *United States v. Vance*, 62 F.3d 1152, 1158 (9th Cir. 1995) (also relying upon U.S.S.G. § 3E1.1, cmt. n.3)). That application note states, in full:

> Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (*see* Application Note 1(A)), *will constitute significant evidence* of acceptance of responsibility for the purposes of subsection (a). However, this evidence *may be outweighed* by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

U.S.S.G. § 3E1.1, cmt. n.3 (emphasis added). Here, as noted, the district court specifically cited this note and paraphrased all three of its sentences, sometimes replicating verbatim entire phrases. In nonetheless arguing that the court failed to apply the note's standards, Ghanem

emphasizes that, in its paraphrase of the first sentence, the district court omitted the word "significant" and instead said only that a guilty plea accompanied by truthful admissions "is *evidence* of acceptance of responsibility" (emphasis added). Considering the district court's comments in full context, we reject Ghanem's effort to attach talismanic significance to the omission of this one word. The overall thrust of the court's recitation reflects its awareness that the central question was whether there was "conduct of [Ghanem] that is inconsistent with . . . acceptance of responsibility" and that "outweighs" the showing otherwise established by his guilty plea and truthful admission to the factual basis for the convictions. *Id*. We are therefore satisfied that the court applied the correct legal standards under *Green*.

Moreover, we discern no clear error in the district court's ultimate finding that there was sufficient countervailing evidence that Ghanem had failed to accept responsibility. Conduct that is "inconsistent" with acceptance of responsibility "can include, for example, falsely denying, or frivolously contesting, relevant conduct that the court determines to be true." *Green*, 940 F.3d at 1042–43 (simplified). Another "example of inconsistent conduct that weighs against a finding of acceptance of responsibility is a defendant's attempt to minimize his own involvement in the offense," including "through his lawyer." *United States v. Scrivener*, 189 F.3d 944, 948 (9th Cir. 1999). Here, the district court pointed to such evidence in the record, specifically noting that Ghanem's counsel at the first sentencing had "minimized Mr. Ghanem's involvement" by "argu[ing] that he was *not* an international arms dealer" (emphasis added), and that Ghanem's papers in connection with the resentencing similarly argued that "virtually[] all of his foreign conduct involved discussions" about arms deals "almost none of [which] ever materialized." The district court did not clearly err in rejecting this minimization, which was flatly inconsistent with its findings that Ghanem's offenses of

conviction were part of a pattern of black-market arms dealing that had gone on for several years. And those latter findings are amply supported by the record evidence we have summarized above, including Ghanem's own many statements to the undercover federal agent about his activities. *See supra* at 13–14.

Ghanem further argues that the district court erred by reciting and relying upon additional factors that did not properly bear on whether he had accepted responsibility. We reject this contention. As we have explained, prior to turning to application note 3, the district court began by ticking through the various "considerations" that are enumerated in application note 1 as being potentially reflective of acceptance of responsibility, including "voluntary termination [of] criminal conduct" or "voluntary payment of restitution." *See* U.S.S.G. § 3E1.1, cmt. n.1(A)–(H). As the district court recognized as it worked through this checklist, most of these considerations were inapplicable here. We do not construe the district court's discussion on this score as signaling that the court was thereby *faulting* Ghanem and weighing the absence of such factors affirmatively against him. Rather, the court was simply noting the absence of these particular types of "evidence supporting the defendant's claim of acceptance, but that is not the same thing as treating [that absence] as a factor weighing against him." *Vance*, 62 F.3d at 1157. Having thus recognized that the affirmative evidence of acceptance of responsibility came down simply to Ghanem's guilty plea to all remaining charges and his associated admissions, the district court then turned to application note 3, which addresses how to analyze that issue. While the district court's examination of the various considerations listed in application note 1 was perhaps

unnecessary, we cannot say that it introduced prejudicial error into the court's analysis of the acceptance-of-responsibility issue.[2]

The district court did not commit clear error in declining to apply an adjustment for acceptance of responsibility. It therefore correctly determined that the applicable guidelines range was 78–97 months.

B

Ghanem's remaining procedural challenges all relate to the district court's decision to depart and vary from the guidelines range. We conclude that these challenges also fail.

First, Ghanem contends that the district court procedurally erred by "fail[ing] adequately to explain the sentence selected, including any deviation from the [g]uidelines range." *United States v. Taylor*, 78 F.4th 1132, 1136 (9th Cir. 2023) (citation omitted). However, "[a] district court need not provide a lengthy explanation of the [sentencing] factors in order for its explanation to be sufficient." *United States v. Ali*, 620 F.3d 1062, 1074 (9th Cir. 2010). Instead, it need only "set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *Rita v. United States*, 551 U.S. 338, 356 (2007). Under that standard, the district court's explanation was sufficient.

Here, the district court stated that it was relying upon the same scope of relevant conduct as at the prior sentencing, including Ghanem's involvement in a deal for delivery and

[2] The only factor from application note 1 that the district court referenced in its analysis under application note 3 was Ghanem's declining to speak with the probation office. But given the district court's earlier express acknowledgement that Ghanem did so "on the advice of [c]ounsel, which, of course, he is entitled to follow and invoke," we view this comment in context as simply reiterating the lack of additional affirmative evidence of acceptance of responsibility beyond Ghanem's guilty plea and associated admissions. *See Vance*, 62 F.3d at 1157 (stating that "[a] defendant's refusal to discuss the offense conduct with the probation officer may reduce the amount of evidence supporting the defendant's claim of acceptance").

operation of SAMs in Libya. The court summarized the basic facts concerning that deal, including Ghanem's offer of a $50,000 bonus for each aircraft shot down by the SAMs operators. It also outlined Ghanem's actions in arranging the deal with the undercover agent to send arms to Libya in 2015, as well as other examples that underscored the breadth and scope of Ghanem's arms-trafficking activities. In light of this review of the facts concerning Ghanem's relevant conduct, which we have summarized above, *see supra* at 13–14, the district court concluded that its "significant upward variance and departure is warranted" in light of the nature and scope of Ghanem's activities and the harm to the national security and foreign policy interests of the United States. The court also considered mitigating factors, including Ghanem's medical problems and statements from his family, but the court explained that these were significantly outweighed by the gravity of Ghanem's conduct. The extent of the deviation from the guidelines range was also adequately explained: the district court expressly stated that the relevant conduct had not changed from the prior sentencing, and the variance the court selected effectively replicated the prior sentence.

Second, Ghanem argues that the district court failed to address his argument that a significant upward deviation from the guidelines was inconsistent with 18 U.S.C. § 3553(a)(6), which requires courts to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." The record refutes this contention. Ghanem's sentencing-disparity argument below relied heavily on the contention that other arms-trafficking defendants had received less severe sentences, and he cited as examples the published decisions in *United States v. Pedrioli*, 978 F.2d 457 (9th Cir. 1992), and *United States v. Tsai*, 954 F.2d 155 (3d Cir. 1992). Although the district court did not explicitly use the phrase "sentencing disparities" in explaining its

sentence, it specifically explained why it believed that the circumstances of *Pedrioli* and *Tsai* were distinguishable from Ghanem's case. As the district court explained, *Pedrioli* involved a defendant who unlawfully exported a total of around 800 guns during a two-year period, *see* 978 F.2d at 458, which was substantially less serious than Ghanem's conduct. Likewise, although *Tsai* involved military equipment, the district court noted that the scale of the defendant's activities was not comparable. *See Tsai*, 954 F.2d at 165–66 ("No evidence suggests that the volume and scope of exports involved in this case were extremely large.").

Third, Ghanem argues that, even if consideration of the conduct underlying a dismissed charge is constitutionally permissible at a sentencing on the remaining charges, such consideration should be disallowed as *procedurally* unreasonable where "the sentencing enhancement [is] 'a tail which wags the dog of the substantive offense.'" *United States v. Watts*, 519 U.S. 148, 156 n.2 (1997) (quoting *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986)); *see also id*. at 156–57 (reserving the question, on which the circuits were then split, "as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence"). We disagree.

As we recently held, en banc, the advisory nature of the guidelines after *United States v. Booker*, 543 U.S. 220 (2005), vitiates any argument for imposing, as a matter of due process, any special procedural rules concerning "large enhancements," and we therefore overruled our prior caselaw holding that sentencing courts must "make factual findings by clear and convincing evidence 'when a sentencing factor has an extremely disproportionate effect on the sentence relative to the conviction.'" *United States v. Lucas*, 101 F.4th 1158, 1159, 1163

(9th Cir. 2024) (en banc) (citation omitted).[3] Rather, *Lucas* held, "challenges to 'large enhancements . . . should be viewed through the lens of *Booker* reasonableness rather than that of due process.'" *Id*. at 1163 (quoting *United States v. Grubbs*, 585 F.3d 793, 802–03 (4th Cir. 2009), and *United States v. Brika*, 487 F.3d 450, 462 (6th Cir. 2007)). Although *Lucas* focused on whether a heightened pleading standard was required as a matter of due process, its logic applies equally here. The concern about a factor's disproportionate impact on the sentence is ultimately one of *substantive* reasonableness, and should be reviewed under that rubric. *See Brika*, 487 F.3d at 462 (confirming that the relevant "*Booker* reasonableness" review asks whether the large enhancement renders the sentence "*substantively* unreasonable" (emphasis added)); *see also Lucas*, 101 F.4th at 1163 (endorsing *Brika*). We thus reject Ghanem's contention that special procedural limitations apply to the consideration of large enhancements based on conduct underlying dismissed charges.[4]

Fourth, Ghanem argues that the district court erred "by relying on foreign conduct that may not have even been criminal." Ghanem relies on *United States v. Chao Fan Xu*, 706 F.3d 965 (9th Cir. 2013), which held that, under the circumstances of that case, the district court procedurally erred in basing the defendant's guidelines offense level on foreign fraudulent conduct that did not violate extraterritorially applicable U.S. law. *Id*. at 992–93.[5] This principle has no application to the district court's consideration of the conduct underlying the dismissed § 2332g charge, because we explicitly held, in Ghanem's prior

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[3] *Lucas* thus squarely forecloses Ghanem's further argument that a clear-and-convincing evidence standard should have been applied here.

[4] We address Ghanem's substantive reasonableness arguments in section III, *infra*. We address his Sixth Amendment challenge in section IV, *infra*.

[5] *Chao Fan Xu*'s predicate holding that the overseas fraudulent activity did not violate an extraterritorially applicable U.S. law was based on its categorical conclusion that the RICO statute does not apply extraterritorially. *See* 706 F.3d at 974–75. However, *Chao Fan Xu* was expressly abrogated on that point in *RJR Nabisco v. European Community*, 579 U.S. 325, 335 (2016).

appeal, that this statute *does* apply extraterritorially to Ghanem's overseas conduct. *See Ghanem*, 993 F.3d at 1131–32. Moreover, *Chao Fan Xu*'s limitations on consideration of foreign conduct in setting the guidelines offense level for an offense under a statute that does not apply extraterritorially do not support Ghanem's view that unlawful foreign acts—such as black-market arms dealing using front corporations and fraudulent documents—may not be considered at sentencing at all. Such a categorical limitation would be hard to square with 18 U.S.C. § 3661, which states that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

Accordingly, we reject all of Ghanem's arguments that the district court "committed significant procedural error." *Carty*, 520 F.3d at 993.

III

Ghanem also argues that the district court's 360-month sentence was substantively unreasonable. We review this issue only for abuse of discretion, *see United States v. Brown*, 42 F.4th 1142, 1145 (9th Cir. 2022), meaning that "we may reverse if, upon reviewing the record, we have a definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors," *United States v. Ressam*, 679 F.3d 1069, 1087 (9th Cir. 2012) (en banc) (citation omitted). We find no abuse of discretion here.

"Congress has instructed sentencing courts to impose sentences that are 'sufficient, *but not greater than necessary*, to comply with' (among other things) certain basic objectives, including the need for "just punishment, deterrence, protection of the public, and

rehabilitation." *Holguin-Hernandez v. United States*, 589 U.S. 169, 173 (2020) (quoting 18 U.S.C. § 3553(a)(2) (further citation and internal quotation marks omitted)). In assessing whether the district court's sentence reflects a substantively unreasonable weighing of the sentencing factors listed in § 3553(a), we must "take into account the totality of the circumstances, including the extent of any variance from the [g]uidelines range." *Gall*, 552 U.S. at 51. Where, as here, there was a substantial departure from the guidelines range, our reasonableness review requires that we "give due deference to the district court's decision that the § 3553(a) factors, on [the] whole, justify the extent of the variance." *Id*.; *see also United States v. Gutierrez-Sanchez*, 587 F.3d 904, 908 (9th Cir. 2009) ("The weight to be given the various [§ 3553(a)] factors in a particular case is for the discretion of the district court.").

Under these standards, we conclude that the district court did not abuse its discretion in concluding that a 360-month sentence was warranted under the § 3553(a) factors. The district court permissibly put great weight on the fact that the offense conduct, which specifically concerned planned unlawful arms exports to Libya, was part of a broader pattern of high-volume, black-market arms-trafficking. That trafficking included Ghanem's dealings with a Georgian arms broker to send SAMs to, and operate them in, Libya. The court properly considered that Ghanem had acted with a callous "lack of respect for human life" and that he had "turned a blind eye to the ultimate destination of the arms he brokered and sold and was indifferent as to whether those weapons were obtained by terrorist organizations or used against civilian targets." The court further stated that, by sending arms to "less stable nations" such as Libya and doing so without regard to whether they landed in the hands of terrorists, Ghanem's "conduct unequivocally endangered the security and foreign policy interests of the United States." The court expressly considered mitigating considerations such

as Ghanem's medical conditions and the support of his family members, but found them to be outweighed by the other considerations it had identified. These reasons for substantially varying from the guidelines range reflect a reasonable weighing of the guidelines factor, *see* 18 U.S.C. § 3553(a)(4), in light of the "nature and circumstances of the offense," the defendant's "history and characteristics," the "seriousness of the offense," and the need for "adequate deterrence," *see id*. § 3553(a)(1), (2)(A)–(B).

Contrary to what Ghanem suggests, the district court did not simply disregard the guidelines factor and arbitrarily pick a sentence that was untethered to any objective benchmark. As we have explained, the district court viewed the relevant conduct as being the same as at the prior sentencing. The district court had before it the entire record of the trial, and it found by a preponderance of the evidence that Ghanem had been involved in the delivery and operation of SAMs in Libya that underlay the now-vacated conviction under § 2332g. Congress's assessment is that such conduct merits at least a 25-year sentence, *see* 18 U.S.C. § 2332g(c)(1), but the district court was not bound by that congressional judgment here (given that Ghanem's § 2332g conviction was set aside due to improper venue). But in light of that judgment, we are hard-pressed to say that, under the extreme circumstances of this case, the district court abused its discretion in deciding to fix the extent of its variance from the guidelines range by deciding simply to replicate the prior sentence. Given the facts of this case, and the deference owed to the district court, we conclude that the district court's "justification is sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50.[6]

[6] Nor do we view this case as an impermissible example of a sentencing factor serving as a "tail which wags the dog of the substantive offense." *McMillan*, 477 U.S. at 88. To treat the guidelines range as the "dog" and all of the other considerations noted by the district court as a "tail" would be inconsistent with the established rule that

Ghanem is also wrong in asserting that the district court's sentence fails to give appropriate weight to the need to avoid unwarranted sentencing disparities. 18 U.S.C. § 3553(a)(6). The district court essentially concluded that, due to the unique and extreme facts of this case, a 360-month sentence would not produce an *unwarranted* sentencing disparity when compared with other defendants convicted of arms-export and money-laundering offenses. On this record, that judgment was not an abuse of discretion. Moreover, even if the disparity in this case "were assumed to be unwarranted, . . . that factor alone would not render [Ghanem's] sentence[] unreasonable; the need to avoid unwarranted sentencing disparities is only one factor a district court is to consider in imposing a sentence." *United States v. Marcial-Santiago*, 447 F.3d 715, 719 (9th Cir. 2006).

IV

Finally, Ghanem argues that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny, his sentence is unconstitutional in violation of the Fifth Amendment Due Process Clause and the Sixth Amendment right to a jury trial.

To the extent that Ghanem argues that there is something uniquely suspect about relying on conduct underlying a *dismissed* charge, his argument cannot be squared with *Watts*. There, the Court held that conduct underlying a charge of which the defendant was *acquitted* may be considered at sentencing, where the burden of proof is only a preponderance of the evidence. *Watts*, 519 U.S. at 156– 57; *see also United States v. Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) ("We hold that *Booker* has not abrogated the previously

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the "[g]uidelines factor" should not "be given more or less weight than any other." *Carty*, 520 F.3d at 991. In all events, the district court did not abuse its discretion in deciding that, when considered against the surrounding context of uncharged or dismissed conduct, the guidelines range calculation substantially understated the seriousness of Ghanem's offense conduct.

prevailing constitutional jurisprudence that allowed sentencing courts to consider conduct underlying acquitted criminal charges."). Ghanem has presented no argument as to why conduct underlying a dismissed charge should be treated with *more* solicitude than conduct underlying a charge rejected by acquittal. *See United States v. Bridgewater*, 950 F.3d 928, 938 (7th Cir. 2020) ("A district court may consider a wide range of conduct at sentencing, including acquitted conduct and dismissed offenses." (citation omitted)).

Ghanem also argues, however, for a broader Sixth Amendment rule that would equally apply to conduct underlying acquittals and dismissed charges and, indeed, to any conduct not found by a jury or admitted by the defendant. Specifically, Ghanem urges us to adopt Justice Scalia's view that "any fact *necessary* to prevent a sentence from being substantively unreasonable [under *Booker*]— thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury." *Jones v. United States*, 574 U.S. 948, 949–50 (2014) (Scalia, J., dissenting from the denial of certiorari) (emphasis added).[7] Given the loadbearing weight that we have placed on the district court's factual findings in concluding that Ghanem's sentence is substantively reasonable, his sentence here would violate the Sixth Amendment under Justice Scalia's view.

But Justice Scalia's position has not commanded a majority of the Supreme Court, and this court has squarely rejected it:

> The defendants have adopted an argument that Justice Scalia, writing separately, has encouraged litigants to raise in several recent Supreme Court

[7] *See also Gall*, 552 U.S. at 60 (Scalia, J., concurring) ("The door therefore remains open for a defendant to demonstrate that his sentence, whether inside or outside the advisory [g]uidelines range, would not have been upheld but for the existence of a fact found by the sentencing judge and not by the jury."); *Rita*, 551 U.S. at 374 (Scalia, J., concurring in part and concurring in the judgment) (arguing that the Sixth Amendment would be violated by a sentence that survives *Booker* reasonableness review only by virtue of the district court's reliance on facts that had neither been found by a jury nor admitted by the defendant).

> sentencing decisions. . . . Defendants argue that in their case, the relevant maximum sentence is not the maximum established by the [criminal] statutes, but rather the maximum of what we would consider "reasonable" when reviewing their sentences under § 3553(a) if we were to rely solely on the facts found by the jury. . . .
>
> We reject the defendants' argument, and join the Fourth, Sixth, and Seventh Circuits in holding that "this argument is too creative for the law as it stands." . . . In *Booker*, the Supreme Court rendered the [g]uidelines advisory, permitting a district court to impose a sentence anywhere within the range established by the statute of conviction without violating the Sixth Amendment. The mere fact that, on appeal, we review the sentence imposed for "reasonableness" does not lower the relevant *statutory* maximum below that set by the United States Code.

United States v. Treadwell, 593 F.3d 990, 1017 (9th Cir. 2010) (citation omitted), *abrogated on other grounds by United States v. Miller*, 953 F.3d 1095, 1102 (9th Cir. 2020).

* * *

For the foregoing reasons, we affirm Ghanem's sentence.

AFFIRMED.

COLLINS, Circuit Judge, concurring:

In upholding Ghanem's sentence in this case, my opinion for the panel faithfully applies current precedent concerning the review of federal sentences. I write separately only to point out how this case starkly illustrates a very troubling feature of the precedent we must apply.

In *Booker v. United States*, 543 U.S. 220 (2005), a five-Justice majority of the Supreme Court held, in an opinion by Justice Stevens, that the following core holding of *Apprendi v.*

New Jersey, 530 U.S. 466 (2000), applied to the application of the federal sentencing guidelines: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *Booker*, 543 U.S. at 244. Put another way, the jury trial right in "the Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant." *Id*. at 245 (further opin. for the Court by Breyer, J.) (citation omitted) (summarizing the holding of Justice Stevens's opinion for the Court).

Having found that the guidelines violated the Sixth Amendment to the extent that they relied on judicial fact-finding to increase the maximum permissible sentence, the Court then confronted the question of the proper "remedy" for this Sixth Amendment violation. *Id*. at 245. In an opinion for the Court by Justice Breyer, a different five-Justice majority (consisting of the four dissenters to *Booker*'s Sixth Amendment holding plus Justice Ginsburg) settled on the following remedy:

> We answer the question of remedy by finding the provision of the federal sentencing statute that makes the [g]uidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp. IV), incompatible with today's constitutional holding. We conclude that this provision must be severed and excised, as must one other statutory section, § 3742(e) (2000 ed. and Supp. IV), which depends upon the [g]uidelines' mandatory nature. So modified, the federal sentencing statute, *see* Sentencing Reform Act of 1984 (Sentencing Act), as amended, 18 U.S.C. § 3551 *et seq.*, 28 U.S.C. § 991 *et seq.*, makes

> the [g]uidelines effectively advisory. It requires a sentencing court to consider [g]uidelines ranges, *see* 18 U.S.C. § 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, *see* § 3553(a).

543 U.S. at 245–46. Having excised § 3742(e)'s instruction that the threshold decision to depart from the guidelines should be reviewed de novo, the Court instead adopted an across-the-board instruction to review all sentences for "reasonableness." *Id*. at 262. The Court also expressly declined to limit its remedy to those cases in which the application of the guidelines would violate the Sixth Amendment and to thereby "leave the [g]uidelines as binding in other cases." *Id*. at 266. Accordingly, the Court held that its remedial revision of the statute would apply systemically in all cases. *Id*.

As applied to the facts of this case, the two portions of the *Booker* opinion produce a disturbing incongruity. Under Justice Stevens's majority opinion in *Booker* (which, for convenience, I will call "*Booker* Part I"), Ghanem has a constitutional right under the Sixth Amendment to have a jury find any fact that would increase his sentence beyond what is allowed under the guidelines regime in light of "the facts established by [his] plea of guilty or a jury verdict." *Booker*, 543 U.S. at 244. Here, there are no facts established by a "jury verdict," because the jury's conviction of Ghanem on the § 2332g charge was vacated on appeal. Moreover, as the panel opinion explains, *see* Opin. at 6–8, the "facts established by [Ghanem's] plea of guilty" are quite limited. *Booker*, 543 U.S. at 244. Those discrete facts support, at most, a guidelines range of 78–97 months, and therefore any upward departure from that range would require additional fact-finding that, under *Booker* Part I, only a jury may make. Thus, under *Booker* Part I, it would be a flagrant violation of Ghanem's Sixth Amendment rights to allow a district judge to make the findings necessary to raise Ghanem's

sentence above the 97-month cap that applies under the mandatory guidelines system created by Congress.

But under Justice Breyer's further majority opinion (which I will call "*Booker* Part II"), the "remedy" for this violation of Ghanem's Sixth Amendment rights is to eliminate the very feature of the guidelines *that gives rise to that Sixth Amendment right*—namely, the mandatory nature of the guidelines. That is, the "remedy" for the Sixth Amendment violation that would result from allowing the district judge to find the facts that would waive the guidelines' 97-month cap in Ghanem's case is simply to waive that cap in *all* cases—thereby allowing the district judge to freely impose a 360-month sentence that is more than triple the top of the guidelines range. The logic of this syllogism is difficult to follow: it effectively eliminates the Sixth Amendment violation by getting rid of the relevant Sixth Amendment right. That is akin to "curing" a patient's illness by killing the patient—that certainly gets rid of the illness, but it loses sight of what is at stake.

One can understand why the four dissenters from *Booker* Part I—who rejected the premise that there was a right to jury fact-finding in connection with the operation of the guidelines system—would prefer this so-called "remedy" to the alternative remedy that would "engraft" *Booker* Part I's "constitutional requirement" of jury fact-finding "onto th[e] statutory scheme" that Congress created. *Booker*, 543 U.S. at 265. And one can likewise understand how four of the Justices in the *Booker* Part I majority concluded that the *Booker* Part II remedy was flawed because, *inter alia*, it "effectively eliminated the very constitutional right *Apprendi* sought to vindicate." *Id*. at 302 (Stevens, J., dissenting); *see also id*. at 313 (Thomas, J., dissenting) (agreeing with much of the analysis in Justice Stevens's dissent). Only one Justice—Justice Ginsburg—joined *both* parts of *Booker*, but she did not write separately

to explain how to reconcile the right recognized in *Booker* Part I with the effective elimination of that right in *Booker* Part II. *See* Susan R. Klein, *The Return of Judicial Discretion in Criminal Sentencing*, 39 VALPARAISO U. L. REV. 693, 695 (2005) (describing Justice Ginsburg's joinder in "both competing majority opinions in *Booker*" as "inexplicabl[e]").

We are thus left with a situation in which, under the statutes enacted by Congress and under the Sixth Amendment as construed in *Booker* Part I, Ghanem's sentence in this case is patently unlawful. But we must nonetheless uphold it because *Booker* Part II eliminated the predicate for Ghanem's Sixth Amendment claim by "engag[ing] in a wholesale rewriting" of the Sentencing Reform Act by facially deleting two of the Act's provisions and then adding—again, across the board—a new, judge-made "reasonableness" review requirement. *Booker*, 543 U.S. at 284 (Stevens, J., dissenting); *see also id*. at 272 (objecting that the *Booker* Part II majority had effectively "repeal[ed] these two statutory provisions"). Justice Stevens's dissent explained at length why the *Booker* Part II remedy was wholly unprecedented, could not be justified by the severability doctrines the majority invoked, and was, at bottom, "an exercise of legislative, rather than judicial, power." *Id*. at 274–91. And, as the facts of this case make clear, the two parts of *Booker* are logically irreconcilable.

As a judge on a court that is "inferior" to the "one supreme Court," *see* U.S. CONST. art. III § 1, I am constrained to follow the clear holding of *Booker* Part II, no matter how flawed it may seem, and I have faithfully done so. But I cannot help but note that, in applying *Booker* Part II, I have been required to affirm a sentence that even the Government's lawyer candidly conceded at oral argument was "absolutely" unlawful under the statute as written by Congress. Only the Supreme Court has the authority, if it sees fit, to address this disquieting anomaly.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
OCT 16 2025
MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAMI GHANEM,

Defendant-Appellant.

No. 22-50266

D.C. No. 2:15-cr-00704-FLA-1
Central District of California
Los Angeles

ORDER

Before: CLIFTON, COLLINS, and LEE, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing. Judge Collins and Judge Lee have voted to deny the petition for rehearing en banc, and Judge Clifton so recommends. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See FED. R. APP. P. 40. Accordingly, Defendant-Appellant's petition for panel rehearing and for rehearing en banc (Dkt. Entry No. 55) is

DENIED.

APPENDIX C

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RAMI GHANEM, AKA Rami Najm Asad-Ghanem,

Defendant-Appellant.

No. 19-50278

D.C. No. 2:15-cr-00704-SJO-1

OPINION

Appeal from the United States District Court for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted February 12, 2021
Pasadena, California

Filed April 12, 2021

Before: Danny J. Boggs,* Milan D. Smith, Jr., and Mary H. Murguia, Circuit Judges

Opinion by Judge Boggs

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* The Honorable Danny J. Boggs, Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY[**]

Criminal Law

The panel vacated a conviction for conspiracy to violate 18 U.S.C. § 2332g, which prohibits illicit dealings in guided surface-to-air missiles; vacated the sentence; and remanded for further proceedings.

In an undercover sting operation, the Department of Homeland Security captured the defendant, a naturalized United States citizen, in Greece, and the government obtained an indictment against him in the Central District of California. Neither party disputes that all of the defendant's alleged conduct took place outside the United States.

The defendant contends that because he was "arrested" in Greece and "first brought" to the Eastern District of New York, venue under 18 U.S.C. § 3238 would lie only in the Eastern District of New York and was improper in the Central District of California.

The panel held that under Fed. R. Crim. P. 12, the defendant, who did not bring a pre-trial motion alleging improper venue, waived that venue challenge. The panel explained that because the venue defect is apparent from the face of the indictment, his first objection to venue—in his motion for acquittal after the close of the government's case—was untimely.

The panel held that the defendant preserved his challenge to the propriety of the district court's jury instruction—that "[a]rrests, restraint or detention in a foreign country were irrelevant to [the jury's] determination of whether venue is appropriate in this district." The panel wrote that according to this court's precedent, the defendant's Rule 12 waiver of venue did not preclude his separate jury-instruction challenge.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel reviewed de novo whether the instruction correctly stated the law, and explained that if a jury could reasonably find that the defendant's arrest in Greece was connected to the alleged § 2332g offense, the district court's instruction that foreign arrest, restraint, or detention was irrelevant to the jury's determination would have misstated the law. The panel held that the instruction was erroneous because (1) the government has conceded in the district court that the conduct for which the defendant was arrested was very similar to that for which he was charged in the count at issue, (2) government agents were actively investigating the defendant at the time of his arrest for the conduct that would later be the basis of that count, and (3) the facts support a view that the government tried to manipulate venue in this case. The panel concluded that the error was harmful because a reasonable juror could have found it more likely than not that the defendant's restraint in Greece really was in connection with the alleged § 2332g offense.

On plain error review, the panel disposed of the defendant's arguments (1) that § 2332g(b)(2)'s assertion of jurisdiction over him as a United States national does not apply to a conspiracy charge under § 2332g(c), or (2) that, if it does as a matter of correct statutory interpretation, then Congress does not have authority to legislate extraterritorially on the basis of only United States nationality.

The panel held that the defendant waived his claim based on the doctrine of specialty by failing to raise it before trial without good cause.

The panel declined to order dismissal of the § 2332(g) charge based on the defendant's due-process challenges. The panel noted that citizenship alone is a sufficient connection with the United States to permit the application of its criminal laws to a citizen's conduct overseas. Lacking sufficient briefing, the panel deemed waived on appeal the

defendant's due-process argument that he "justifiably relied on" an agreement he made with the Greek government not to appeal his extradition on the condition that he would be prosecuted only for the charges for which it surrendered him to the United States. The panel likewise deemed waived on appeal the defendant's argument that the government's ex parte request to the Greek government to consent to his prosecution for violating § 2332g violated due process because he lacked counsel or an opportunity to be heard.

COUNSEL

Benjamin L. Coleman (argued), Coleman & Balogh LLP, San Diego, California, for Defendant-Appellant.

Alexander P. Robbins (argued), Assistant United States Attorney; L. Ashley Aull, Chief, Criminal Appeals Section; Nicola T. Hanna, United States Attorney; United States Attorney's Office, Los Angeles, California; for Plaintiff-Appellee.

OPINION

BOGGS, Circuit Judge:

Rami Ghanem, a Jordanian-born, naturalized United States citizen, is an international arms dealer. The Department of Homeland Security captured him in Greece in an undercover sting operation, and the government obtained an indictment against him in the Central District of California in Los Angeles. After his extradition from Athens to Los Angeles (by way of New York), the government then brought additional arms-dealing charges against him, including 18 U.S.C. § 2332g, which carries a 25-year minimum sentence. Mr. Ghanem pleaded

guilty to all but that one charge, which he tried to a jury. After the jury convicted him, the district court sentenced him to 30 years of imprisonment.

But the government tried Mr. Ghanem in the wrong place. When he landed at John F. Kennedy International Airport, in custody, venue was laid in the Eastern District of New York for the § 2332g charge even though the government had not yet brought it. The government later asked for an erroneous jury instruction on venue, which the court gave, over Mr. Ghanem's objection. Although Mr. Ghanem had waived his challenge to the indictment for improper venue by failing to bring it before the pretrial-motions deadline, under our precedent he was still entitled to a correct instruction on venue. The error was harmful, and we must therefore vacate his conviction.

I. Background

A. Arrest, Extradition, and Indictment

While living in Egypt, Mr. Ghanem ran a Jordanian company called Gateway to MENA (short for "Middle East and Northern Africa"), which dealt in military supplies and offered what he termed logistics services. His wares included body armor, a wide variety of weapons both small and large, ammunition, gadgets for electronic warfare, and so on. But his trade was not entirely on the up-and-up. He would smuggle armaments under false customs declarations, calling them "juice" or "fruits," and bribe officials for (or outright forge) the end-user certificates necessary for legal shipment of weapons.

Eventually, Mr. Ghanem's dealings came to the attention of Homeland Security Investigations (HSI). In 2014, an HSI undercover agent contacted Mr. Ghanem and began gathering evidence against him through email, Skype chats, and in-person meetings. In the meantime, in May 2015, a HSI special agent based in Los Angeles got a warrant to search Mr.

Ghanem's Gmail account. By August 2015, Mr. Ghanem had placed an order through the undercover agent to illicitly export dozens of weapons, thousands of rounds of ammo, and three night-vision devices from the United States to Libya. On December 8, 2015, the undercover agent brought Mr. Ghanem to a warehouse in Athens, Greece, ostensibly to inspect the shipment as it was en route to Libya. Having been alerted by the United States, Greek authorities arrested him at the warehouse. Greek authorities seized numerous electronic devices from Mr. Ghanem's person and hotel room. The United States government would later take possession of those devices and examine them forensically.

Later that December, Mr. Ghanem was indicted in the Central District of California, where the shipment of purported weapons from the undercover agent had originated. The indictment alleged one count of violating the Arms Export Control Act (specifically, 22 U.S.C. § 2778(b)(2)), one count of smuggling, in violation of 18 U.S.C. § 554, and two counts of money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A).

In April 2016, Mr. Ghanem was extradited from Greece. Mr. Ghanem claims that he agreed not to appeal his extradition on the condition that he reserved his specialty rights—that is, to be prosecuted only for the charges specified in his extradition order. On April 25, 2016, the United States Marshals took him, in custody, by plane from Greece to JFK Airport in Queens, New York. After changing planes, he flew to Santa Ana, California. From there, he was detained in the Central District of California until trial.

On March 24, 2017, the government obtained a superseding indictment in the Central District of California, which added three new counts against Mr. Ghanem. (It obtained from the Greek government an extension of his extradition order—that is, permission to try him for these additional offenses beyond those listed in the original order.) The first new count

was for conspiracy to violate the Arms Export Control Act, in violation of 18 U.S.C. § 371. The second was an additional substantive count of violating the Arms Export Control Act (specifically, 22 U.S.C. § 2778(b)(1)). And the third was for violating 18 U.S.C. § 2332g—the charge at issue on appeal.

Section 2332g, broadly, prohibits illicit dealings in guided surface-to-air missiles. Subsection (a) lists the specific banned conduct, subsection (b) specifies five so-called "jurisdictional" conditions, at least one of which must be met for the conduct in subsection (a) to be criminal. And subsection (c) provides that "[a]ny person who violates, or attempts or conspires to violate, subsection (a) . . . shall be sentenced to a term of imprisonment not less than 25 years or to imprisonment for life."

Mr. Ghanem was charged with a conspiracy to violate subsection (a), and the jurisdictional hook alleged was his United States citizenship. In particular, he was charged with trying to procure or offering to sell Igla and Strela surface-to-air missiles and missile launchers. And from March to June of 2015, he allegedly sought operators for an Igla missile system, negotiated these operators' salaries (including bonuses for actually shooting down planes), and procured their travel to Libya.

B. The Proceedings Below

After the superseding indictment, there was extensive pretrial discovery (including three overseas depositions presided over by the district judge himself in Israel and Georgia) as well as several motions. Mr. Ghanem moved for a bill of particulars as to the § 2332g charge and to dismiss the indictment for alleged violations of due process—but, relevant here, he did not move to dismiss the indictment for improper venue. The district court denied those motions.

After the pretrial-motions deadline, the government moved the district court to take judicial notice of Mr. Ghanem's location at the time of his arraignment on count 3 of the superseding indictment. The court granted that motion. Finally, shortly before trial, Mr. Ghanem pleaded guilty to the other six counts against him, leaving only the § 2332g count for trial.

After the close of the government's eight-day case-in-chief, Mr. Ghanem moved under Federal Rule of Criminal Procedure 29 for a judgment of acquittal, raising the venue problem for the first time. The government responded that Mr. Ghanem had waived his venue objection by failing to raise it before the pretrial motions deadline under Federal Rule of Criminal Procedure 12(c). In the alternative, the government argued that venue was proper under 18 U.S.C. § 3238 because Mr. Ghanem was detained in the Central District of California when he was indicted and arraigned on the § 2332g charge; thus, it was there that he was first restrained of his liberty *in connection with that offense*. The district court denied the Rule 29 motion without elaborating on its reasoning.

In the meantime, the parties had been conferring on jury instructions. The government objected to Mr. Ghanem's proposed venue instruction and proposed one of its own. A few versions later, defense counsel eventually expressed no objection to the government's proposed venue instruction, which read, in relevant part: "The government must also show by a preponderance of the evidence that defendant was arrested, or first restrained of his liberty, in connection with this offense in the Central District of California." But after argument on the Rule 29 motion, the government expressed concern that Mr. Ghanem would argue his venue theory to the jury. The district court suggested that the government propose a jury instruction, which it did: "Arrests, restraint or detention in a

foreign country is irrelevant to your determination of whether venue is appropriate in this district."

After the defense's brief case, the district court heard argument on the government's proposed addition to the venue instruction. The government argued that Mr. Ghanem would mislead the jury by arguing that his arrest in Greece was in connection with the offense currently on trial. Mr. Ghanem objected to the instruction, contending that the government was well aware of any of his dealings in surface-to-air missiles by the time he was arrested. The district court found that the defense's argument would mislead the jury and agreed to give the government's revised instruction.

So instructed, the jury returned a unanimous guilty verdict after several hours of deliberations. Mr. Ghanem moved for a new trial under Federal Rule of Criminal Procedure 33 or to dismiss the indictment on several grounds, including improper venue, constructive amendment of the indictment, that the 25-year mandatory minimum sentence was cruel and unusual punishment, and the court's lack of jurisdiction under the extradition treaty between Greece and the United States. The district court denied these motions, holding that the venue and jurisdiction arguments were waived as untimely and also ruling against Mr. Ghanem on the merits.

Convicted of all seven counts, Mr. Ghanem's provisional offense level under the Sentencing Guidelines was 43. During the sentencing hearing, the district court sustained an objection by Mr. Ghanem, which brought the total offense level to 40. With a criminal history category of I, his Guidelines range was 292 to 365 months of imprisonment. The district court sentenced Mr. Ghanem, within that range, to 360 months.

This timely appeal followed.

II. Venue and Waiver

A. Background Principles

A criminal defendant enjoys the constitutional right to a trial in the correct place. U.S. Const. art. III, § 2, cl. 3; amend. VI. Normally that place is the state and district where the crime was committed. *Ibid.* But for crimes committed outside the country, the Constitution vests Congress with the power to determine the venue for trial. U.S. Const. art. III, § 2, cl. 3. In turn, Congress has determined that the trial for such a crime "shall be in the district in which the offender . . . is arrested or is first brought." 18 U.S.C. § 3238.

Neither party disputes that all Mr. Ghanem's alleged conduct took place outside the United States, so that § 3238 applies. Rather, Mr. Ghanem contends that he was "arrested" in Greece and "first brought" to the Eastern District of New York. Because Greece is, of course, not in the United States, venue under § 3238 would then lie only in the Eastern District of New York. Thus, Mr. Ghanem argues, venue was improper in the Central District of California, and we should vacate his conviction.

But the government contends that Mr. Ghanem waived his venue objection. This is because "a motion alleging a defect in instituting the prosecution, including . . . improper venue," must be made before trial if its basis is "then reasonably available" and it "can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(A)(i). A motion that does not meet that deadline is untimely, "[b]ut a court may consider [it] if the [movant] shows good cause." Fed. R. Crim. P. 12(c)(3). And we have held that a failure to timely raise a pretrial objection required by Rule 12, "absent a showing of good cause," constitutes a waiver—we will not review the objection, even for plain error. *United States v. Guerrero*, 921 F.3d 895, 898 (9th Cir. 2019) (per curiam).

B. Apparency of a Venue Defect

There is good cause for a failure to raise a venue challenge before trial if no venue defect was "apparent on the face of the indictment." *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1060 (9th Cir. 2000). In such a case, the earliest a defendant can raise the issue is in a Rule 29 motion for a judgment of acquittal at the close of the government's case-in-chief. A venue objection made then is therefore timely. *Ibid.*

An indictment does not have an apparent venue defect if "it allege[s] facts which, if proven, would have sustained venue" in the district of trial. *Ibid.* In this analysis, we consider only the allegations in the indictment, and we take them as true. *United States v. Mendoza*, 108 F.3d 1155, 1156 (9th Cir. 1997). Moreover, we must consider venue for each count separately, even if the same conduct is charged in multiple counts. *See United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994) ("The court must conduct a separate venue analysis for the substantive crimes and the conspiracy, even if the substantive crimes are committed in furtherance of the conspiracy.").

Here, a venue defect is apparent from the face of the indictment. The only mention of the Central District of California in count 3 of the first superseding indictment is a statement that Mr. Ghanem "is currently located in the Central District of California." No overt act in count 3 is alleged to have occurred in any particular place, and no other facts are alleged in that count that would support venue under any of the venue statutes. *See* 18 U.S.C. §§ 3232–39; Fed. R. Crim. P. 18 ("Unless a statute or [the] rules permit otherwise, the government must prosecute an offense in a district where the offense was committed."). Because mere

presence in the district at the time of indictment does not support venue, count 3's defect was apparent.[1]

Lacking good cause, Mr. Ghanem's first objection to venue—in his motion for acquittal after the close of the government's case—was untimely, and he therefore waived that venue challenge.

III. The Jury Instruction on Venue

Mr. Ghanem also challenges the propriety of the district court's venue instruction—that "[a]rrests, restraint or detention in a foreign country is irrelevant to [the jury's] determination of whether venue is appropriate in this district."

A. Preservation Below

To preserve a jury-instruction objection, a party "must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." Fed. R. Crim. P. 30(d). Mr. Ghanem did so here—before the jury was instructed, his counsel objected to the government's proposed revision, contending that Mr. Ghanem's arrest in Greece was in connection with the surface-to-air missile charges and therefore he had not been first deprived of his liberty in California. And he continues to press on appeal the same argument he made below: that he was not "arrested" in the Central District of California because he was not first restrained of his liberty there. Rather, he was arrested in Greece in connection with

[1] Judge Boggs, speaking for himself only: I concur somewhat *dubitante*. All the acts charged in count 3 of the superseding indictment were also alleged in count 1, which was alleged to have occurred "within the Central District of California, and elsewhere" between September 4, 2013, and December 8, 2015. Likewise, count 2 alleged that Mr. Ghanem "engaged in negotiating and arranging contracts, purchases, sales, and transfers of defense articles, foreign defense articles, defense services, and foreign defense services" "within the Central District of California, and elsewhere" between those same dates. Those articles and services included Igla and Strela "surface-to-air missile launchers" and "missiles" as well as "[o]perators," "[t]echnicians," and "[t]rainers for Igla surface-to-air missile launchers." Those are exactly the articles and services at issue in count 3. Given the overlap in charged conduct and the government's use of the conjunctive "and" in its location allegations in counts 1 and 2, I am less certain that the venue defect in count 3 is "apparent."

the entire arms-trafficking scheme, including the alleged § 2332g offense, so his overseas arrest is relevant to the jury's venue determination. He therefore preserved that challenge, and we review de novo whether the instruction correctly stated the law. *United States v. Renzi*, 769 F.3d 731, 755 (9th Cir. 2014).

Additionally, according to our precedent, Mr. Ghanem's Rule 12 waiver of venue does not preclude his separate jury-instruction challenge.[2] *United States v. Casch*, 448 F.3d 1115, 1117–18 (9th Cir. 2006). In *Casch*, the defendant did not raise a venue challenge until his objection to a lack of a "jurisdictional element" in the jury instructions. *Casch*, No. 05-30270, Brief of Plaintiff-Appellee United States, 2005 WL 4668741, at *29–31 (Dec. 9, 2005). Even though he had waived his venue challenge under Rule 12, and despite the government's argument that waiver applied, *ibid.*, we did not find waiver of the jury-instruction challenge. Instead, we proceeded to the merits, and we found the district court's failure to instruct the jury on venue to be error, but we affirmed because the error was harmless. *Casch*, 448 F.3d at 1117–18.

B. Where Venue Lay Under § 3238

The parties do not dispute that the conduct charged in count 3 of the superseding indictment was committed "out of the jurisdiction of any particular State or district." 18 U.S.C. § 3238. Thus, the offense must be tried "in the district in which the offender . . . is arrested or is first brought." *Ibid.* The question becomes: which district or districts was Mr. Ghanem

[2] Several circuits have adopted a contrary rule. *See United States v. Perez*, 280 F.3d 318, 334 (3d Cir. 2002) ("An issue that has been waived because no one has objected to it should not at the same time be 'in issue' so as to require a jury instruction."); *see also United States v. Massa*, 686 F.2d 526, 530–31 (7th Cir. 1982); *United States v. Winship*, 724 F.2d 1116, 1125–26 (5th Cir. 1984); *United States v. Haire*, 371 F.3d 833, 840 (D.C. Cir. 2004), *vacated on other grounds*, 543 U.S. 1109 (2005) (mem.).

arrested in or first brought to? The answer turns on whether Mr. Ghanem's arrest in Greece was "in connection with" the § 2332g offense at issue in this appeal.

1. "First Brought"

The district a defendant is first brought to is the district into which the defendant first comes "[from outside the United States' jurisdiction] while in custody." *United States v. Liang*, 224 F.3d 1057, 1060 (9th Cir. 2000) (alteration in original) (quoting *United States v. Hilger*, 867 F.2d 566, 568 (9th Cir. 1989)). The "first brought" portion of § 3238 applies only if the defendant "is returned to the United States already in custody," *ibid.*, in connection with the offense at issue, *United States v. Layton*, 519 F. Supp. 942, 943 (N.D. Cal. 1981). Thus, if the defendant is *not* in custody in connection with that offense when he enters the United States, this provision does not apply. *See United States v. Erdos*, 474 F.2d 157, 160–61 (4th Cir. 1973) (holding that defendant was not in custody when plane to United States landed in Boston, hence venue did not lie in Massachusetts for overseas killing).

The length of time a defendant spends in the district to which he is first brought does not matter, nor does the purpose. *See Chandler v. United States*, 171 F.2d 921, 927, 932–33 (1st Cir. 1948) (holding that defendant was first brought to Massachusetts after plane transporting him, in custody, from Canada made emergency landing there); *United States v. Han*, 199 F. Supp. 3d 38, 49–50 (D.D.C. 2016) (holding that defendant was first brought to Hawai'i after plane transporting him, in custody, from American Samoa had layover in Honolulu). And flying through a district's airspace does not count; only landing there does. *United States v. Lozoya*, 982 F.3d 648, 652 (9th Cir. 2020) (en banc) ("Neither Article III nor the Sixth Amendment says that a state or district includes airspace, and there is, of course, no indication that the Framers intended as such."); *see also Chandler*, 171 F.2d at 932–33

(holding that defendant was not first brought to Maine even though plane carrying him, in custody, first crossed into United States airspace there).

2. "Arrested"

The district a defendant is arrested in is the one "where the defendant is *first restrained* of his liberty in connection with the offense charged." *Liang*, 224 F.3d at 1061 (quoting *Erdos*, 474 F.2d at 160). In contrast to the "first brought" provision, this portion of § 3238 applies only if the defendant is already *inside* a district when first restrained of liberty in connection with the offense. *Kerr v. Shine*, 136 F. 61, 65 (9th Cir. 1905) ("[T]he offender is to be tried in the district where he is apprehended; but, if he be taken into custody where no court has jurisdiction, he shall be tried in the district into which he is first brought."); *see also United States v. Townsend*, 219 F. 761, 762 (S.D.N.Y. 1915) ("The difference between 'brought' and 'found' is the difference between presence by involuntary and voluntary act.").

3. "In Connection With"

Here, it is undisputed that Mr. Ghanem was in custody when brought to the United States from Greece by air. And it is undisputed that he first landed in the Eastern District of New York before continuing on to the Central District of California.

What the parties dispute is whether Mr. Ghanem's custody at that time—resulting from his arrest in Greece—was in connection with the alleged § 2332g offense. If not, then he would have been arrested for that offense in the United States, and his arrest in Greece would have indeed been irrelevant to the jury's venue determination in the particular circumstances of this case. On the other hand, if a jury could have reasonably found that his arrest in Greece *was* in connection with the alleged § 2332g offense, then that finding would mean that he could *not* have been "arrested" under § 3238 for that offense in the Central

District of California. Thus, if a jury could reasonably find that Mr. Ghanem's arrest in Athens was connected to the alleged § 2332g offense, the district court's instruction that foreign arrests, restraint, or detention was irrelevant to the jury's determination would have misstated the law.

a. Precedent and Other Case Law

The precise contours of when a deprivation of liberty is in connection with an offense for the purposes of § 3238 have not been defined in this circuit. We therefore survey our cases and those of our sister circuits to ascertain these contours.

We start with *Liang*, which is binding on us. There, at the time the defendant was deprived of his liberty, his vessel had been interdicted and boarded—and he was taken into custody for suspected alien-smuggling—within the District of Guam. 224 F.3d at 1061. The government then took him to the District of the Northern Mariana Islands, where he was indicted several months later with three alien-smuggling offenses. *Ibid.* But because the defendant had been first detained in Guam, within the territory of the United States, we held that, for purposes of § 3238, he had been arrested there, not in the Northern Mariana Islands. *Ibid.* We therefore ordered his indictment dismissed for improper venue. *Ibid.*

In *Liang*, we quoted approvingly an out-of-circuit case, *United States v. Provoo*, 215 F.2d 531 (2d Cir. 1954). Distinctive in *Provoo* is that the government was already investigating treason allegations, with which the defendant was ultimately charged, even though the military was detaining him for alleged sodomy. The Army detained him for four months in Maryland before dropping the sodomy charge and taking the defendant to New York, where he was discharged from the service, handed over to the FBI, and charged with treason in the civilian courts. 215 F.2d at 538. The Second Circuit found that the Army's four-month

detention of the defendant at the behest of the Justice Department was effectively an arrest for treason in Maryland. *Ibid.* Thus, venue under § 3238 did not lie in New York, and the treason conviction was vacated.

We also looked in *Liang* to another Second Circuit case, *United States v. Catino*, 735 F.2d 718 (2d Cir. 1984). There, the defendant had been convicted of drug charges in the Southern District of New York but did not report for the start of his sentence, instead obtaining a passport under a false name and using it to travel to and from France. *Id.* at 719–20. French police eventually arrested him for heroin trafficking, and he was removed from France after serving a prison term there. *Id.* at 720–21. Upon his arrival in the Eastern District of New York, federal agents arrested him for additional drug charges based on his conduct while a fugitive. *Id.* at 721. But those charges were dropped, and he was taken to the Southern District of New York to begin serving his outstanding sentence on drug charges. *Ibid.*

While in custody in the Southern District, he was indicted for the domestic bail-jumping offense (for failing to report for the sentence he was currently serving). *Ibid.* Before his trial on that charge, a superseding indictment added a count of using a passport issued under a false name while in France. *Ibid.* The defendant moved to dismiss the superseding indictment, arguing that venue for the charge lay exclusively in the Eastern District, where he was "first brought" under § 3238. *Id.* at 723–24. The Second Circuit rejected this argument and held that the defendant's arrest in the Eastern District was for the subsequent drug-trafficking charges, not the overseas passport charge. *See id.* at 724. Rather, because the passport charge was added more than two years later for substantively different conduct than what led to his arrest upon returning from France, his first restraint of liberty in connection with the passport charge was actually in the Southern District, where he was

serving his existing sentence when the passport charge was brought. *Ibid.* ("We need not concern ourselves with the term 'first brought,' as that applies only in situations where the offender is returned to the United States already in custody.").

In *United States v. Holmes*, 670 F.3d 586 (4th Cir. 2012), the Fourth Circuit took what it called an "offense-specific" approach, which it contrasted to an "indictment-specific" approach. *Id.* at 594–96. There, the defendant had been arrested in the Eastern District of Virginia on charges of sexual assault against his stepdaughter at an air force base in Japan, but the indictment was dismissed because he was still on active duty in the military, prohibiting his prosecution by civilian authorities. *Id.* at 589 & n.1. After his discharge from the Air Force, the government refiled the same charges in the same district, and the defendant was arrested in North Carolina and taken to the Eastern District of Virginia. *Id.* at 589. That indictment was dismissed—incorrectly, as it would later turn out—for lack of venue in the Eastern District of Virginia, and the government refiled the same charges hours later in that same district now that the defendant was present there in custody. *Id.* at 590.

The defendant appealed his eventual conviction, arguing that North Carolina was his place of first arrest on the charges because his initial arrest in Virginia was void because he was still in the military. *Id.* at 593. In answering the question of where the defendant had been first arrested, the Fourth Circuit held that "the relevant inquiry is not the district of arrest for a specific indictment in a case's procedural history, but rather the district of arrest for th[e] specific offense, even if there is a subsequent dismissal of the original indictment or filing of a subsequent indictment regarding that offense." *Id.* at 595. It found this analysis to "comport[] with the purpose of establishing venue"—allowing it "to be definitively determined based on the static location of where a defendant is determined to be 'first

arrested or brought' with respect to the offense." *Ibid.* Otherwise there would need to be "reevaluation of [venue] at each stage of any subsequent procedural developments as with subsequent or superseding indictments for the same offense." *Ibid.* Following this approach, the Fourth Circuit held that, because the defendant had initially been arrested in the Eastern District of Virginia, even though that arrest was improper, venue there was proper because the third indictment contained the same two charges as the first. *Id.* at 596–97.

The Fifth Circuit took a different, arguably "indictment-specific" approach in *United States v. Wharton*, 320 F.3d 526 (5th Cir. 2003). There, the defendant was arrested in the Middle District of Florida after prosecutors had filed a complaint in the Western District of Louisiana for conspiracy to murder his wife in Haiti and insurance-fraud charges based on that murder. *Id.* at 536. He was taken to Louisiana; while detained there, the government obtained a superseding indictment charging him with the foreign murder of his wife. *Ibid.* Looking to *Catino* as analogous, the Fifth Circuit held that the defendant's later indictment and arrest on murder while detained in the Western District of Louisiana was sufficient to lay venue for murder there, even though his previous arrest in Florida had been for conspiracy to murder the same victim. *Id.* at 536–37.

We also note a well-reasoned district court case, *United States v. Hong Vo*, 978 F. Supp. 2d 49 (D.D.C. 2013). There, the court held that, "for venue to lie in a particular district under the first clause of section 3238, a defendant must have been arrested or first brought in [sic] that district for the *same criminal conduct* as that which *ultimately gives rise* to the offenses charged, even if the charges are filed elsewhere." *Id.* at 60 (emphases added). The principal defendant had been arrested in Colorado on one count of conspiracy to commit bribery and visa fraud overseas. *Id.* at 51. Later, she was taken to the District of Columbia and indicted on

substantive counts of bribery and visa fraud. *Id.* at 52. The court dismissed the District of Columbia indictment, holding that the defendant's arrest in Colorado was in connection with the bribery and visa-fraud charges because the object of the conspiracy for which she had been arrested there was to commit those offenses. *Id.* at 62. Considering much the same body of case law as we do now, the district court expressly rejected *Wharton*, noting that the Fifth Circuit "did not explain why, when the defendant was arrested in Florida, he was not restrained 'in connection with' the foreign murder charge given the close factual link" to the conspiracy and insurance-fraud charges. *Id.* at 61. The district court further highlighted that "the link . . . between the charges at issue and the defendant's arrest [was] stronger than that in *Wharton*." *Ibid.*

A second defendant in *Hong Vo* had also been arrested in Colorado as a material witness. *Id.* at 51. When cooperation negotiations with the government broke down a few weeks later, that defendant was charged with conspiracy and later charged in the District of Columbia with bribery and visa fraud as a coconspirator. *Id.* at 51–52. The district court held that this defendant had also been arrested in Colorado in connection with those crimes, even though at the moment of arrest, the defendant had not been charged with any offense. *Id.* at 64. The court based this ruling on the fact that the government had considered the second defendant "to be a coconspirator and a target of the investigation." *Ibid.*

b. Extracting Relevant Considerations

From our precedent and other case law, we can identify several factors indicating when an arrest meets the important condition of being in connection with a later-added offense.

i. Centrality of a Later-Added Charge to the Reason for Arrest

First, if the later-charged offense is central to the reason for the initial arrest, then that arrest is in connection with that later-charged offense. We see this principle used in our own precedent. In *Liang*, the defendant was detained in Guam because government agents found him smuggling people into the United States, and the charges later brought in the Northern Mariana Islands were for three counts of alien-smuggling. 224 F.3d at 1061. Thus, his initial arrest was connected to those later charges.

Likewise in other circuits. In *Holmes*, the defendant was first arrested for abusing his stepdaughter overseas, and the charges in the third indictment were for the same conduct. 670 F.3d at 588, 590. The Fourth Circuit held that the defendant's initial arrest was in connection with the offenses charged in the third indictment. *Id.* at 596. And in the *Hong Vo* district-court case within the D.C. Circuit, we see the same principle. The court there recognized the inherent connection between an arrest for conspiracy and later-added charges for the substantive offenses underlying that conspiracy. *See* 978 F. Supp. 2d at 60 ("[T]he required connection is present because Hong Vo's initial arrest was very closely related to the bribery and visa fraud counts: she was arrested on a charge of conspiracy to violate certain statutes and subsequently charged in a superseding indictment with overt acts violating those same statutes, all based on the same criminal scheme.").

In contrast, if the later-charged offense is less central to the reason for the arrest, then the arrest is less likely to be in connection with the later-charged offense. Thus, in *Catino*, where the reason for the defendant's initial arrest (drug importation) differed substantially from the defendant's later charge (passport fraud), venue was found to lie where the defendant was being detained once the later charge was brought. *See* 735 F.2d at 723–24. Of

course, it is true that the passport fraud in *Catino* was *related* to the drug-importation charge—the defendant there used the fraudulently obtained passport to travel in and out of France while smuggling heroin, *Id.* at 720. But "connections, like relations, 'stop nowhere.'" *Maracich v. Spears*, 570 U.S. 48, 59 (2013) (quoting *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995)). The key is the centrality of the later-charged offenses to the initial arrest. The passport fraud with which Mr. Catino was later charged was not at the heart of the ongoing heroin smuggling for which he was initially arrested at the airport.

The government points to *Wharton* in trying to show that the centrality of the later-added charge to the reason for arrest is immaterial. But, like the *Hong Vo* court, we disagree with the *Wharton* panel's reasoning. The plot to murder Mr. Wharton's wife was central to the insurance-fraud scheme—indeed, the initial indictment charged the defendant with conspiracy to kill his wife in Haiti. Indictment, *United States v. Wharton*, No. 5:00-cr-50066-DEW-RSP (W.D. La. Sept. 25, 2000), Dkt. No. 1. And the foreign-murder charge was not brought with the initial indictment because the Attorney General had not yet authorized it. Minute Entry, *Wharton*, No. 5:00-cr-50066-DEW-RSP (W.D. La. Nov. 2, 2000), Dkt. No. 22. We cannot accept that an arrest for conspiracy to kill a person is unrelated to a later-added substantive charge of killing that person.[3]

ii. Lapse of Time Between the Arrest and a Later-Added Charge

Besides the centrality of the conduct charged to the stated reason for arrest, another principle we may garner from the case law is that the length of time between the arrest and

[3] Nevertheless, we acknowledge that *Wharton*'s outcome was likely correct because the defendant had apparently waived his venue challenge—the Fifth Circuit follows a similar, if not identical, rule to ours on the waiver of venue. *See Wharton*, 320 F.3d at 537 n.9.

a later-added charge can indicate how connected the charge is to the arrest. A short gap often reflects a close connection between the initial arrest and later charge. *See Liang*, 224 F.3d at 1058 (less than two months between arrest and indictment); *Holmes*, 670 F.3d at 589–90 (seven months between first and second indictments); *Hong Vo*, 978 F. Supp. 2d at 51–52 (just over one month between arrests in Colorado and indictment in D.C.). *But see Wharton*, 320 F.3d at 536 (five months between arrest in Florida and superseding indictment adding murder charge in Louisiana). A long span of time tends to indicate the opposite. *See Catino*, 735 F.2d at 721, 724 (over two years between initial arrest for drug charges and later indictment for passport fraud; defendant still in custody for previously imposed prison sentence independent of either passport or new drug charges, not held on pretext).

iii. Government Conduct

The substantive and temporal relationships between the arrest and the later-charged offense are not all that matters. The court must still inquire into the government's conduct, which may indicate the purpose of the arrest. For example, in *Provoo*, the Army kept the defendant in custody nominally for sodomy, only to drop that charge and turn him over to civil authorities in a different district for treason allegations. Even though the alleged sodomy had no substantive relationship with the treason allegations, the Second Circuit held that it could not "blind [its] eyes to the fact that the real purpose in bringing [the defendant] to New York was to meet the wish of the Department of Justice to have him tried for treason under the indictment subsequently filed [t]here." 215 F.2d at 538.

Thus, evidence that a restraint of liberty is in connection with later-charged offenses includes active government investigation for those offenses at the time of the initial arrest. *See ibid.*; *accord Catino*, 735 F.2d at 720–21 (discussing the government's extradition request

based on charges of importing heroin and conspiracy to import heroin, not passport violations); *see also Hong Vo*, 978 F. Supp. 2d at 64. *Contra Wharton*, 320 F.3d at 536–37 (holding that Florida arrest for insurance fraud and conspiracy to murder was unconnected to later substantive murder charge). Such evidence would also include continuing to detain the defendant on the offense of arrest despite unjustifiably delaying proceedings on that crime. *See Provoo*, 215 F.2d at 538. And the government's deliberate attempts to manipulate venue, as in *Provoo*, should draw great skepticism toward its claim that an arrest and later-added charge are unrelated. *See ibid.*

c. The Government's Contrary Test

The government urges a different, bright-line rule. Under its test, Mr. Ghanem was first arrested for the § 2332g offense because he was in the Central District of California when the charge "came into being." But that test for whether an arrest is "in connection with" an offense is too narrow. And it comes with several problems.

First, it is foreclosed by our precedent. If the government's test were right, then *Liang* would have come out the other way. The charge there had not "come into being" until the defendant was in the District of the Northern Mariana Islands. 224 F.3d at 1058. Under the government's rule, venue would have lain there. But it did not—we held that the defendant was arrested in the District of Guam, where he was restrained of his liberty before he had been charged. *Id.* at 1062.

Second, the government has pointed to no case—in circuit or out—supporting the proposition that the government can bring a person into the country, already in custody on an offense committed abroad, and then select venue *afterward* using a superseding indictment for a related foreign crime. Even *Wharton*, to the extent that it used a test like the

government's, does not support this proposition. The defendant there was not arrested until he was already inside the United States. 320 F.3d at 530–31.

Third, the government's test would violate the constitutional allocation of the power to set venue. The Constitution gives Congress primacy in selecting venue for crimes committed overseas. U.S. Const. art. III, § 2, cl. 3. But a rule that the defendant is arrested for such a crime only in the district where he is detained when the government chooses to add a charge—such a rule would give the government unchecked power to select venue. It could lay proper venue simply by taking an in-custody defendant to the district of its choice and obtaining a new indictment there.

It is no response that § 3238 already gives the government considerable discretion in picking venue. True, the government can bring an out-of-country defendant to any district of its choice by flying him directly there while in custody, and venue would lie in that district. But the government cannot change its mind afterward, and its choice is constrained by practical and logistical concerns. And, more fundamentally, the point is that the government "must take the statute as [it] finds it," not "whittle away" its provisions "by a construction based on formalism rather than substance." *Liang*, 224 F.3d at 1061–62 (quoting *Provoo*, 215 F.2d at 539).

The government's "in connection with" test would do just that. That test would let the government take a defendant, already in custody in the Central District of California (whether brought there from outside the country or initially found and arrested there), to (say) Guam or Alaska, bring a superseding indictment there, and thereby lay venue. The constitutional purpose of our venue rules is to prevent exactly that from happening. Indeed, that was one of our grievances against George III—"For transporting us beyond seas to be tried for

pretended offences." The Declaration of Independence, para. 21 (U.S. 1776). A bright-line rule allowing such a result is unconstitutional.

d. Application

We turn now to the crux of the matter: whether Mr. Ghanem's arrest in Greece was in connection with the alleged § 2332g offense. We hold that a jury could have reasonably found that it was, even under the preponderance standard to which the government must prove venue, *United States v. Moran-Garcia*, 966 F.3d 966, 969 (9th Cir. 2020).

First, the government itself has conceded the alleged § 2332g offense to be extremely similar to the conduct for which Mr. Ghanem was initially arrested. True, it was neither the exact charge alleged in the original indictment, as was the case in *Holmes*, nor a substantive count underlying an inchoate offense, as in *Hong Vo*. But in arguing to admit Mr. Ghanem's plea colloquy on the other charges as evidence at trial, the government characterized the counts to which Mr. Ghanem had pleaded as "too similar in time and too similar in nature" to be excluded under Federal Rule of Evidence 403. Dist. Ct. Dkt. No. 427, at 14. It further described Mr. Ghanem as "engaged in overlapping conspiracies during a very discrete period of time, between the middle of 2014 on through 2015. During those conspiracies he engaged in the same type of conduct that he is alleged to have been committed [sic] with respect to" the § 2332g count. *Id.* at 14–15. What is more, the government filed a motion to join the original and superseding indictments, arguing:

> All of the charges in this case relate to defendant's work as an illicit broker of weapons, munitions and related services, and all are connected with defendant's common scheme of exporting, transferring, and brokering defense articles and defense services in violation of U.S. criminal law. There is a substantial overlap of evidence on

> the charges in each indictment, and of persons with whom defendant conspired to commit the offenses alleged in each indictment.

Dist. Ct. Dkt. No. 170, at 6. With these concessions, we are inclined to think that the alleged § 2332g offense is sufficiently central to the conduct for which Mr. Ghanem was initially arrested in Athens.

Second, the circumstances surrounding the arrest strongly suggest that the government was actively investigating Mr. Ghanem's alleged surface-to-air-missile activities in the months before his arrest in Greece.[4]

Evidence of Mr. Ghanem's alleged dealings in Igla and Strela missiles came to the government through several sources. In March 2015, an undercover government agent had a conversation with Mr. Ghanem involving Igla missiles. In May 2015, an investigator with the Department of Homeland Security obtained a warrant to search Mr. Ghanem's Gmail account. From that search, he was able to identify several emails that the government later offered as evidence against Mr. Ghanem.

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[4] The government's brief denies this, saying that "the evidence that defendant conspired to sell anti-aircraft missiles to Libyans was not discovered until after defendant had been arrested in the undercover operation. (GER 259, 292, 656, 687–688.)" Gov't Br. 36. ("GER" refers to "Government Excerpts of Record.") As the further discussion in this section will demonstrate, that proposition is inaccurate.

Moreover, the pages that the government's brief cites do not refute our finding. GER 259 is a page of trial transcript. There, HSI Special Agent Peterson describes government trial exhibit 201 as an email "sent from the defendant's gmail account . . . dated *May 14, 2016*" (emphasis added). But that is either a transcription error or an accurate transcription of the witness's factual error. The government submitted a copy of exhibit 201 along with its brief in this court. The exhibit plainly states "Sent: Tuesday, *May 6, 2014* 1:52 AM." (emphasis added). Also, as the government acknowledged in its brief, Mr. Ghanem had already been arrested in December 2015. It seems unlikely that in 2016 he still had access to his Gmail account from a California jail cell.

The other GER citations for the government's proposition refer to devices seized from Mr. Ghanem at his arrest. But the fact that the government found evidence on these devices does not negate that it had access to Mr. Ghanem's Gmail account months before the arrest.

For example, government trial exhibit 201 was an email from Mr. Ghanem, sent in May 2014, with a PDF attachment advertising his company. The attachment offered to manage "[a]ntiaircraft missile launching, artillery and antiaircraft systems" among other services. And alongside more modest wares such as metal detectors, gelatinized dynamite, and self-propelled Howitzers, the attachment specifically advertised a "9M-32M STRELA 2M Portable Anti-aircraft Missile System," a "9M-36 STRELA 3 Portable Anti-aircraft Missile System," a "9M-310 IGLA 1E Portable Anti-aircraft Missile System," and a "Set of Control equipment and Launch modules for the IGLA-type missile."

The government entered into evidence several other emails from Mr. Ghanem, sent in 2013 and 2014, concerning transactions involving Igla and Strela missiles. Not to mention emails either sent or received by Mr. Ghanem in March and April 2015 discussing the specific Igla-operator transaction charged in count 3 of the superseding indictment. Overall, the record makes clear that the government was aware of and investigating Mr. Ghanem's alleged missile transactions well before his arrest in Greece.

Given that active investigation, the government's one-year delay between Mr. Ghanem's arrest and the later indictment bringing the § 2332g charge does not significantly diminish the connection between the two. The government continued its investigation after the arrest—it performed a forensic analysis of the devices seized from Mr. Ghanem by the Greek authorities, and the same HSI special agent got another warrant to access Mr. Ghanem's Gmail account in September 2016. The government used that investigation time to bolster its § 2332g charge. In fact, emails from Mr. Ghanem's Gmail account from later than May 2015 were introduced against him at trial regarding the Igla-operator transaction. So, even though

it took somewhat longer for the government to bring the § 2332g charge than in many of the cases we surveyed above, the arrest and offense remain connected.

Third, the government also appears to have been aware of its venue problem. Count 3 of the superseding indictment expressly tried to tie venue to Mr. Ghanem's presence in the Central District of California at the time of indictment. And the government's inaccurate statement of the record on appeal, noted in the footnote above, further suggests its awareness of the potential defect in venue. Taken together, these facts all suggest that the government deliberately took advantage of its theory of venue to bring the § 2332g charge in the wrong district. The government's claim—that the arrest and later-added charge were unrelated—should therefore be viewed with great skepticism.

Thus, because (1) the government has conceded in the district court that the conduct for which Mr. Ghanem was arrested was very similar to that for which he was charged in count 3 of the superseding indictment, (2) government agents were actively investigating Mr. Ghanem at the time of his arrest for the conduct that would later be the basis of that count, and (3) the facts support a view that the government tried to manipulate venue in this case, we hold that the jury could have reasonably found it more likely than not that Mr. Ghanem's arrest in Greece was connected to his alleged violation of § 2332g. Thus, the district court's instruction—that foreign arrests, restraint, or detention were irrelevant to the jury's venue determination—was erroneous.

C. Harmfulness

Having found erroneous the instruction directing the jury to disregard foreign arrests, we now determine whether that error was harmful. *United States v. Kleinman*, 880 F.3d 1020, 1034 (9th Cir. 2017). It was.

Because the right to trial in the proper venue is constitutional, we deem an erroneous venue instruction harmful unless the government shows beyond a reasonable doubt that the error was harmless. *See id.* at 1034–35. That is, the government must show that there was no "reasonable possibility that the error materially affected the verdict." *United States v. Valle-Valdez*, 554 F.2d 911, 914–15 (9th Cir. 1977); *Chapman v. California*, 386 U.S. 18, 23–24 (1967).

If the court had not given the erroneous venue instruction, there is a reasonable likelihood that the jury may have acquitted Mr. Ghanem. Without the instruction, Mr. Ghanem would have been able to argue that the first restraint of his liberty in connection with the alleged violation of § 2332g was in Athens, not Los Angeles. Such a finding would preclude a finding that he was first arrested for the offense in the Central District of California, refuting the government's venue theory. And, as we just held, a reasonable juror could have found it more likely than not that his restraint in Greece really was in connection with the alleged § 2332g offense. That is enough to say that the error was harmful.

D. Some Remarks

We recognize the peculiarity of this result. An acquittal based on venue—to which jeopardy would attach—would have been a reasonable jury verdict (assuming proper instructions), but Mr. Ghanem was not entitled to a dismissal of the indictment under a Rule 29 motion. That strangeness arises from this case's particular legal posture. Mr. Ghanem waived his venue challenge because it was untimely, so he could not ask the district court to "take the venue issue from the jury and determine it as a matter of law," as was done in *United States v. Lukashov*, 694 F.3d 1107, 1120 (9th Cir. 2012). But, as noted above, our precedent

entitles a defendant, even one who has waived venue by untimeliness, to a correct jury instruction on the question. *See Casch*, 448 F.3d at 1117–18.

In future cases with similarly muddled postures, a district court might consider using a special-verdict form requiring a venue finding separate from substantive guilt. That would reduce a defendant's incentive to sandbag a venue defect by failing to raise the issue pretrial but then attempting to win an acquittal by later requesting a venue instruction.

IV. Other Claims on Appeal

We now dispose of Mr. Ghanem's remaining claims.[5]

A. Extraterritoriality

Mr. Ghanem argues that § 2332g(b)(2)'s assertion of jurisdiction over him as a United States national does not apply to a conspiracy charge under § 2332g(c) or that, if it does as a matter of correct statutory interpretation, then Congress does not have authority to legislate extraterritorially on the basis of only United States nationality. He did not preserve these claims below, so we review them for plain error.[6] *United States v. Lindsay*, 931 F.3d 852, 864 (9th Cir. 2019). To be plain, an error must be "clear" or "obvious." *United States v. Olano*, 507 U.S. 725, 734 (1993). It cannot be plain if "there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results." *United States v.*

[5] We note that we need not consider his other jury-instruction challenges. The most relief he could get on those grounds is vacatur of his conviction, which we already grant because of the erroneous venue instruction.

[6] Mr. Ghanem is incorrect in asserting that these claims automatically receive de novo review because they are "jurisdictional" and in asserting that his pretrial motion to dismiss the indictment preserved the issues. First, although the elements of § 2332g(b) are styled "jurisdictional," extraterritoriality is not a question of subject-matter jurisdiction—so long as he is charged with a federal crime, the district court has subject-matter jurisdiction to hear his case, whether or not the statute defining the crime was constitutionally enacted. 18 U.S.C. § 3231. So, unlike a dispute over subject-matter jurisdiction, Mr. Ghanem's extraterritoriality claims cannot be raised at every point in the proceedings. Second, his motion below did not contain the statutory and constitutional claims now raised—it asserted due-process claims based on the Fifth Amendment. So the statutory and constitutional claims were not preserved.

Gonzalez-Aparicio, 663 F.3d 419, 428 (9th Cir. 2011) (quoting *United States v. Charles*, 581 F.3d 927, 933–34 (9th Cir. 2009)).

The statute is clear that conduct listed in subsection (a) by a United States national outside of the United States violates § 2332g(a) and that a conspiracy to violate § 2332g(a) is punishable as provided in § 2332g(c)(1). Thus, a conspiracy to cause a United States national to perform conduct listed in subsection (a) outside the United States is punishable under subsection (c)(1). Here, Mr. Ghanem is a United States national, and the alleged conspiracy's object was for Mr. Ghanem, among others, to perform precisely the conduct listed in subsection (a). Thus, count 3 of the superseding indictment falls squarely within the scope of § 2332g(c)(1).

Mr. Ghanem advances the canon of constitutional avoidance to avoid this outcome, but that canon "comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction." *Nielsen v. Preap*, 139 S. Ct. 954, 972 (2019) (quoting *Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018)). Because the statute is unambiguous, we do not resort to the canon.

As for the argument that Congress does not have the constitutional authority to criminalize such conduct, the parties have provided no controlling authority on point, and the most closely analogous precedent is at least conflicting, if not mostly against Mr. Ghanem. *See, e.g.*, *United States v. Clark*, 435 F.3d 1100, 1114 (9th Cir. 2006) (upholding criminalization of foreign commercial sex acts with minors by United States nationals under Foreign Commerce Clause), *superseded on other grounds by statute as stated in United States v. Pepe*, 895 F.3d 679 (9th Cir. 2018); *Lindsay*, 931 F.3d at 862 (holding the same for foreign *non*commercial sex acts with minors by United States nationals but citing the "different

outcomes" on the question throughout the country). Thus, even if Congress could not criminalize Mr. Ghanem's alleged conduct here, the error below would not be plain.

B. The Doctrine of Specialty

As with his venue claim, Mr. Ghanem waived his claim based on the doctrine of specialty by failing to raise it before trial without good cause. Fed. R. Crim. P. 12(b)(3)(A), (c), (e); *United States v. Anderson*, 472 F.3d 662, 668–70 (9th Cir. 2006). The pretrial motion he cites as preserving his personal-jurisdiction challenge instead asserted a due-process claim. And his argument that the doctrine of specialty is a "jurisdictional" challenge that can be raised at any time under Rule 12(b)(2) is mistaken. Rule 12(b)(2) is limited to challenges based on subject-matter jurisdiction, not personal jurisdiction as the doctrine-of-specialty claim is. *See Anderson*, 472 F.3d at 668; *see also United States v. Isaac Marquez*, 594 F.3d 855, 858–60 (11th Cir. 2010). Last, neither *United States v. Liu*, 731 F.3d 982 (9th Cir. 2013), nor *Anderson* supports a finding of good cause here. *Liu* was not concerned with Rule 12 waiver. And *Anderson* involved a pro se defendant who had not received a copy of his extradition order until appeal, 472 F.3d at 670, in contrast with Mr. Ghanem, who is represented by counsel and received a copy of his extradition order well before trial.

C. Due Process

Mr. Ghanem contends that due process and fundamental fairness require the dismissal of count 3 of the superseding indictment. He preserved this claim below, so we review it de novo. *United States v. Morris*, 633 F.3d 885, 888 (9th Cir. 2011) (per curiam).

Mr. Ghanem is correct, of course, that a prosecution of extraterritorial conduct must provide due process. U.S. Const. amend. V. We have previously held that there must be a sufficient connection between the defendant and the United States that applying a criminal

law to his extraterritorial conduct "would not be arbitrary or fundamentally unfair." *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990). He urges that the only connection between him and the United States for purposes of § 2332g was his status as a naturalized citizen, and he contends that this connection is too weak to support due process.

We have already rejected that argument. Citizenship alone is a sufficient connection with the United States to permit the application of its criminal laws to a citizen's conduct overseas. *Clark*, 435 F.3d at 1108–09.

Mr. Ghanem also argues that he "justifiably relied on" an agreement he made with the Greek government not to appeal his extradition on the condition that he would be prosecuted only for the charges for which it surrendered him to the United States. Because the initial charges were for lesser crimes with Guidelines ranges of 78 to 97 months, he contends that the government's later addition of the § 2332g charge, with a potential Guidelines range of life imprisonment, violated his reliance interest in the agreement not to challenge extradition. The government responds that the Greek government later consented to Mr. Ghanem's prosecution for this offense.

Mr. Ghanem did not raise this argument in his pretrial motion to dismiss for due-process violations, and the government claims that it is waived. Despite the Supreme Court's pronouncement that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below," *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (alteration in original)

(quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)), our precedents are in apparent conflict over whether a particular argument supporting a claim can be waived.[7]

But we need not resolve that apparent conflict here because even if Mr. Ghanem preserved his argument, he provides no authority to support its merits. He cites only two cases, *Santobello v. New York*, 404 U.S. 257 (1971) (sans pincite), and *United States v. Shapiro*, 879 F.2d 468, 470–72 (9th Cir. 1989). These cases concern only whether the government may renege on a plea agreement with a defendant, not the due-process implications of the government's failure to abide by a foreign country's bargain. Nor does *United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995), cited in Mr. Ghanem's reply brief, bear on this question—*Barona* was about searches and seizures in foreign countries and whether they "shock the conscience" or fail to comply with foreign law. Lacking sufficient briefing on this due-process argument, we deem it waived on appeal and do not pass on its merits.

We likewise deem Mr. Ghanem's final due-process argument waived on appeal. He argues that the government's ex parte request to the Greek government to consent to his prosecution for violating § 2332g violated due process because he lacked counsel or an opportunity to be heard. But he cites only *Barona*, 56 F.3d at 1091, and *United States v. Hamilton*, 391 F.3d 1066, 1069–71 (9th Cir. 2004), in support. Neither case says anything

[7] *Compare Guerrero*, 921 F.3d at 898 ("Rule 12(c)(3)'s good-cause standard continues to apply when . . . the defendant attempts to raise new theories on appeal in support of a motion to suppress."), *and United States v. Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987) (per curiam) ("Just as a failure to file a timely motion to suppress evidence constitutes a waiver, so too does a failure to raise a particular ground in support of a motion to suppress."), *with United States v. Walton*, 881 F.3d 768, 771 (9th Cir. 2018) (reviewing de novo a sentencing claim for which the defendant presented a different argument on appeal from the one made in the district court); *United States v. Studhorse*, 883 F.3d 1198, 1203 n.3 (9th Cir. 2018) (same), *and United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (reviewing de novo denial of motion to dismiss indictment despite defendant's new argument on appeal).

about whether a criminal defendant is entitled to counsel or to notice of or an foreign countries.

We therefore decline to dismiss the § 2332g charge for a violation of due process.

V. Conclusion

We vacate Mr. Ghanem's conviction on count 3 of the superseding indictment, vacate his sentence, and remand for resentencing and further proceedings consistent with this opinion.

VACATED and REMANDED.