Nos. 16-12978-FF & 16-13294-FF

In the United States Court of Appeals for the Eleventh Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWARD NEIL FELDMAN and KIM XUAN FELDMAN,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Tampa Division
Case No. 8:14-cr-521, Hon. James D. Whittemore

APPELLANT'S BRIEF OF KIM XUAN FELDMAN

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case.

1. Adams, Natalie Hirt – Assistant United States Attorney;
2. Belden, Doug, Hillsborough County Tax Collector – Claimant;
3. Bentley, A. Lee, III – United States Attorney;
4. Bui, Victoria – Claimant;
5. Burns, P.A. – Appellate counsel for Kim Xuan Feldman;
6. Burns, Thomas A. – Appellate counsel for Kim Xuan Feldman;
7. Camareno, Bryant R. – Counsel for Claimant Victoria Bui;
8. Cronin, Sean Patrick – Appellate counsel for Kim Xuan Feldman;
9. Ester, Jason Charles – Counsel for Diane Nelson, Pinellas County Tax Collector;
10. Feldman, Edward Neil – Defendant-Appellant;
11. Feldman, Kim Xuan – Defendant-Appellant;
12. Fitzgerald, Brian Thomas – Counsel for Doug Belden, Hillsborough County Tax Collector;
13. Gershow, Holly L. – Assistant United States Attorney;
14. Gonzalez, Ricky – Victim;
15. Hale, Shauna S. – Assistant United States Attorney;

16. Jung & Sisco, P.A. – Trial counsel for Edward Neil Feldman;

17. Law Office of Bryant R. Camareno – Counsel for Claimant Victoria Bui;

18. Law Office of David T. Weisbrod – Appellate counsel for Edward Neil Feldman;

19. Leeman, Michael V. – Assistant United States Attorney;

20. Mayes, Joey – Victim;

21. Nelson, Diane, Pinellas County Tax Collector – Claimant;

22. O'Donnell, Kaitlin R. – Assistant United States Attorney;

23. Porcelli, Hon. Anthony E. – United States Magistrate Judge;

24. Rhodes, David P. – Assistant United States Attorney, Chief, Appellate Division;

25. Saltzman, Adam M. – Assistant United States Attorney;

26. Sisco-Law – Trial counsel for Edward Neil Feldman;

27. Sisco, Dale R. – Trial counsel for Edward Neil Feldman;

28. Sisco, Paul M. – Trial counsel for Edward Neil Feldman;

29. Skinner, Kenneth Michael – Trial counsel for Edward Neil Feldman;

30. Stanton Cronin Law Group, PL – Appellate counsel for Kim Xuan Feldman;

31. Stanton, Michael – Appellate counsel for Kim Xuan Feldman;

32. Suess, Michelle R. – Trial counsel for Edward Neil Feldman;

33. Taylor, Timothy R. – Trial counsel for Kim Xuan Feldman;

34. Weisbrod, David T. – Appellate Counsel for Edward Neil Feldman;

35. Whittemore, Hon. James D. – United States District Judge;

36. Wren, Shannon – Victim.

No publicly traded company or corporation has an interest in the outcome of this appeal.

November 28, 2016

/s/ Michael Stanton
Michael Stanton

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant Kim Xuan Feldman requests oral argument.

This is a so-called "pill mill" appeal from convictions of a pain doctor, Edward Neil Feldman, and his wife, Mrs. Feldman. During the eleventh day of the previous jury trial, the prosecutor had asked Dr. Feldman an improper question, and the District Court granted a mistrial. This appeal arises from a second 17-day jury trial.

In addition to Dr. Feldman's issues, Mrs. Feldman's appeal involves the denial of a motion to sever the defendants' trials, the denial of a *Daubert* motion, the denial of a motion to dismiss the indictment based on double jeopardy, the denial of a mistrial regarding the prosecutor's closing argument, and sufficiency of the evidence. Oral argument will assist the Court.

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STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Mrs. Feldman adopts the appellant's brief of Dr. Feldman in its entirety.

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 18 U.S.C. § 3231 because Mrs. Feldman was indicted (Doc. 1) for violations of federal criminal law. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court entered a final judgment (Doc. 335), which Mrs. Feldman timely appealed (Doc. 343).

STATEMENT OF THE ISSUES[1]

1. Did the District Court abuse its discretion when it denied a motion to sever the defendants' trials, when Mrs. Feldman had nothing to do with Dr. Feldman's treatment of or prescriptions for three men who abused prescription drugs and died from overdoses?

2. Did the District Court abuse its discretion when it denied a *Daubert* motion to limit or exclude Dr. Kevin Chaitoff's testimony, who reviewed less than 1 percent of the approximately 3,200 patient files but extrapolated his opinions to the entirety of Dr. Feldman's practice?

3. Did the District Court err when it denied Mrs. Feldman's motion to dismiss the indictment on double jeopardy grounds, when the District Court never expressly determined if she was joining Dr. Feldman's motion for mistrial?

4. Did the District Court abuse its discretion when it denied a mistrial regarding the prosecutor's closing argument?

5. Was the evidence that Mrs. Feldman conspired with Dr. Feldman to distribute and dispense pain medications insufficient?

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[1] These issues are presented in chronological order as they occurred at trial. Their order does not reflect the issues' relative merits.

STATEMENT OF THE CASE

Course Of Proceedings

In an eight-count indictment, a grand jury charged Mrs. Feldman with five criminal offenses:

> **Count One:** Conspiracy to distribute and dispense pain medications (e.g., oxycodone, methadone, alprazolam, and diazepam) not for a legitimate medical purpose and not in the usual course of professional practice in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), (b)(2) and 846;
>
> **Count Five:** Conspiracy to knowingly conduct and attempt to conduct financial transactions involving the proceeds of unlawful activity in violation of 18 U.S.C. §§ 1956 & 1957;
>
> **Count Six:** Knowingly engaging and attempting to engage in monetary transactions in criminally derived property (i.e., $150,000 wire transfer to purchase 2711 Trilby Avenue) in violation of 18 U.S.C. §§ 1957 & 2;
>
> **Count Seven:** Knowingly engaging and attempting to engage in monetary transactions in criminally derived property (i.e., $150,000 wire transfer to purchase 6100 Park Boulevard) in violation of 18 U.S.C. §§ 1957 & 2;
>
> **Count Eight:** Knowingly engaging and attempting to engage in monetary transactions in criminally derived property (i.e., $187,689.50 wire transfer from Dr. Feldman's retirement account to Mrs. Feldman's retirement account) in violation of 18 U.S.C. §§ 1957 & 2.

Doc. 1 at 1-9.

Separately, the indictment charged Dr. Feldman alone with three deaths from prescription drug overdoses. Doc. 1 at 2-3. The indictment

also sought forfeiture from Dr. Feldman and Mrs. Feldman of any proceeds derived from their crimes. Doc. 1 at 9-12.

Before trial, Mrs. Feldman moved to sever her trial from Dr. Feldman's. Doc. 57. The Government opposed. Doc. 59. The District Court denied severance. Doc. 61. After trial, Mrs. Feldman renewed her request for severance. Doc. 296 at 3-4.

Dr. Feldman also filed a *Daubert* motion to exclude or limit Dr. Kevin Chaitoff's testimony. Doc. 63. Mrs. Feldman joined the motion. Docs. 99; 100; 115 at 1 n.1. The Government opposed. Doc. 71. After a hearing, the Magistrate Judge denied the motion without prejudice "at least to the extent that the opinion does not extrapolate from the reviewed files to a broader conclusion involving files not reviewed." Doc. 115 at 2. After trial, Mrs. Feldman renewed it. *See* Docs. 295; 296.

The Feldmans then moved in limine to exclude testimony or evidence regarding "pill mills" and lay medical opinions. Docs. 111; 112. On the first day of trial, the District Court orally granted the first motion on a provisional basis.[2] Doc. 121.

[2] After the District Court declared a mistrial, it then denied without prejudice the second motion as moot. Doc. 166.

On the eleventh day of the first trial, after the Government had rested and while Dr. Feldman was testifying in his own defense, the prosecutor asked Dr. Feldman whether his prior felony conviction was related to his medical practice; Dr. Feldman orally moved for a mistrial. *See* Docs. 157; 171 at 1. The District Court never expressly determined whether Mrs. Feldman was joining the motion. *See* Docs. 168 at 10-24; 169 at 1-29; 180 at 4. The District Court deferred ruling (Doc. 158), then orally granted a mistrial the next day (Docs. 159; 169 at 29-33).

Before the second trial, Mrs. Feldman moved to dismiss the indictment on double jeopardy grounds. Doc. 171. The Government opposed. Doc. 177. The District Court denied the motion. Doc. 180.

After the Government gave notice pursuant to Federal Rule of Evidence 404(b) that it intended to introduce into evidence Dr. Feldman's prior felony conviction and Department of Health complaints, Dr. Feldman moved in limine to exclude evidence or testimony regarding (1) Department of Health complaints and his prior felony conviction, and (2) Florida's prescription drug epidemic and "Pill Nation." Docs. 182; 218. The Government opposed. Docs. 198; 219. At trial, the District Court granted the first motion and repeatedly reaffirmed that ruling

(Docs. 357 at 20-22; 365 at 191-224; 372 at 185-87, 207-08), but denied the second motion (Doc. 357 at 12-13).

Mrs. Feldman also moved in limine to prevent DEA Agent Brian Zdrojewski from making hearsay statements. Doc. 236. The District Court granted that motion subject to any exceptions under Federal Rule of Evidence 803. Doc. 242.

The Government moved in limine to prevent the Feldmans from seeking jury nullification in closing argument. Doc. 253. Immediately before closing arguments, the District Court orally denied that motion. Docs. 270; 373 at 76-84.

When the Government and defense rested, Dr. Feldman and Mrs. Feldman orally moved for judgments of acquittal, which the District Court denied. Docs. 250; 251; 266; 267; 268; 269.

After the prosecutor gave her closing argument, Dr. Feldman and Mrs. Feldman moved for a mistrial, which the District Court denied. Docs. 271; 272.

Upon conclusion of the 17-day trial, a jury returned guilty verdicts against Dr. Feldman and Mrs. Feldman on all counts. Docs. 280; 281. Mrs. Feldman filed a post-trial motion for judgment of acquittal and

new trial (Doc. 296), which also adopted Dr. Feldman's post-trial motion for judgment of acquittal and new trial (Doc. 295).

Mrs. Feldman now appeals her convictions, but not her sentences. *See* Doc. 343. She is currently incarcerated.

Statement Of Facts

A. The Motion To Sever The Defendants' Trials

Shortly after Mrs. Feldman was indicted, she moved to sever her trial from Dr. Feldman's trial. Doc. 57. Specifically, Mrs. Feldman argued that simultaneously trying her along with Counts Two, Three, and Four, which charged Dr. Feldman (not Mrs. Feldman) with distribution of controlled substances causing three deaths, would be unduly prejudicial to her. Doc. 57 at 1.

More specifically, Mrs. Feldman argued joinder under Federal Rule of Criminal Procedure 8(b) was improper because the overdose death counts were unrelated to the other counts, and severance was required under Rule 14(a) because trying the overdose death counts alongside Mrs. Feldman's trial would cause her substantial prejudice. Doc. 57 at 2-6.

With respect to Rule 14(a) severance and the overdose decedents, Mrs. Feldman argued there were "no allegations" she "had knowledge of . . . their medications nor was in any way connected to the distribution of any of their medications." Doc. 57 at 6. Mrs. Feldman also argued:

> The jury may see crime scene photographs of . . . these three individuals dead on the floor. A medical examiner will go over the deaths of all three individuals. The very nature of this subject matter is so stirring and emotional to a jury that it would cloud their decision making when deliberating on Kim Feldman. Given the complexity of all of the issues in this case, the prosecution of Counts Two, Three, and Four [i.e., the overdose deaths] carries with it a strong potential for jury confusion and creation of a "spillover" effect that could taint the jury's consideration of the other counts.

Doc. 57 at 6.

Dr. Feldman did not oppose separate trials. Doc. 57 at 6. The Government, however, opposed. Doc. 59. In particular, the Government explained that joinder under Rule 8(b) was proper "based on the four corners of the indictment" because Counts Two, Three, and Four were "based on the same series of acts or transactions" as the other counts. Doc. 59 at 6. Additionally, the Government argued severance under Rule 14(a) would be improper because there was no compelling prejudice to Mrs. Feldman, as this was a "conspiracy case where the joinder rules apply with particular force." Doc. 59 at 7-9.

The District Court denied the motion. Doc. 61. In particular, the District Court concluded Rule 8(b) joinder was proper because it agreed with the Government's argument that "Counts Two, Three and Four are 'substantive counts that flow from the drug conspiracy charged in Count One,' a plausible conclusion which can be deduced from the face of the Indictment." Doc. 61 at 2.

With respect to Rule 14(a) severance, the District Court ruled "any potential spill over effect from the evidence demonstrating that Edward Feldman caused the deaths of three individuals can be minimized, if not eliminated, by appropriate cautionary instructions." Doc. 61 at 4. Nevertheless, the District Court "forewarned" the Government to "marshal its case to avoid the introduction of inflammatory evidence" and to "alert defense counsel and the court before presenting any arguable inflammatory evidence in the presence of the jury." Doc. 61 at 4.

B. The *Daubert* Motion

Dr. Feldman filed a *Daubert* motion to exclude the Government's medical expert, Dr. Kevin Chaitoff, from testifying about "the standard of care," "so called 'red flags,'" the "cause of death for the patients identified in the indictment as 'J.M.' (Count Two), 'R.G.' (Count Three), and

S.W. (Count Four)," and the "cause of uncharged patient deaths." Doc. 63 at 1. Mrs. Feldman joined the motion. Docs. 99; 100; 115 at 1 n.1.

In particular, without disputing Dr. Chaitoff's qualifications or the relevance of his opinions, the *Daubert* motion argued Dr. Chaitoff's opinions were "predicated upon incomplete or inaccurate medical records," which presented a "substantial risk" he would offer "incorrect or misguided" opinions. Doc. 63 at 3. That followed because Dr. Chaitoff had reviewed only 48 patient files out of approximately 3,200 patient files—i.e., less than 1 percent. Doc. 63 at 6-7.

For the same reason, Dr. Feldman argued Dr. Chaitoff's opinions were inadmissible under state law, because Fla. Stat. § 766.102(5) required medical experts to review all patient files before testifying about the prevailing professional standard of care. Doc. 63 at 7-8.

Additionally, Dr. Feldman argued Federal Rule of Evidence 403 prevented Dr. Chaitoff from testifying about the victims' causes of death because his opinions were based on nothing more than *ipse dixit*. Doc. 63 at 8.

The Government opposed. Doc. 71. Notably, however, the Government acknowledged Dr. Chaitoff's limited review of files could not be

extrapolated to other patient files not reviewed: "to determine if the defendant's prescribing to Patient X was within the usual course of professional practice or for a legitimate medical purpose, the answer can only be found within Patient X's patient file, not within any other patient's file, or a combination thereof." Doc. 71 at 6.

The parties consented to refer the *Daubert* motion to a magistrate judge (Docs. 78; 79; 81), who convened a hearing (Doc. 80). At the hearing, Dr. Chaitoff testified. Doc. 109 at 11-94. Thereafter, the Magistrate Judge heard argument. Doc. 109 at 95-100. The Magistrate Judge orally denied the *Daubert* motion because he concluded Dr. Chaitoff's methodology was sound. Doc. 109 at 100. Nevertheless, the Magistrate Judge directed Dr. Chaitoff to prepare a supplemental report. Doc. 109 at 101.

In his written order, the Magistrate Judge clarified he was denying the *Daubert* motion "at least to the extent that the opinion does not extrapolate from the reviewed files to a broader conclusion involving files not reviewed." Doc. 115 at 2. In fact, the Magistrate Judge noted that "Dr. Chaitoff's testimony at the Daubert hearing appeared to resolve this issue, where he testified that a review of one patient's file

would not be sufficient to draw conclusions about another unreviewed patient's file." Doc. 115 at 2 n.3.

C. The Mistrial At The First Trial

At the first trial, Dr. Feldman testified in his own defense. *See* Doc. 168. During cross-examination, Mrs. Feldman's counsel asked Dr. Feldman whether he had been convicted of any felony: "Q. Dr. Feldman, have you ever been convicted of a felony? A. Yes. Q. How many? A. One." Doc. 168 at 9.

During redirect, the prosecutor immediately asked about the nature of this felony: "Q. Dr. Feldman, the felony that Mr. Taylor asked you that you were convicted of, that was related to your practice as a doctor, correct?" Doc. 168 at 10. Dr. Feldman objected. Doc. 168 at 10-11. The District Court sustained the objection and summoned the attorneys to sidebar. Doc. 168 at 11.

At sidebar, Dr. Feldman moved for a mistrial. Doc. 168 at 11. The District Court excused the jury and heard extensive argument from counsel. Doc. 168 at 12. During that argument, the District Court asked the prosecutor for legal support for her question: "If you have authority, I want it. If you don't have it, you shouldn't have asked the question."

Doc. 168 at 11. When the prosecutor failed to provide sufficient authority, the District Court mused aloud that he was miffed: "Well, it would seem to me you would have anticipated this." Doc. 168 at 15. The District Court then scolded the prosecutor for asking the question without supporting legal authority:

> This is the third week of this trial, untold resources both from the defense counsel and the U.S. Attorney's Office and all of the attendant agencies, the two expert witnesses, another expert witness who is en route, and judicial resources. All of that could have been avoided by thinking ahead and planning ahead and doing what's right instead of just jumping into the fire. The objective is not to obtain a conviction; the objective is to seek justice.

Doc. 168 at 21.

At any rate, during the extensive sidebar argument, the District Court never expressly determined whether Mrs. Feldman was joining in Dr. Feldman's objection or motion for mistrial. *See* Doc. 168 at 11-23. Instead, the District Court merely inquired whether Mrs. Feldman's counsel wished to provide any case law for consideration (Doc. 168 at 15), and Mrs. Feldman's counsel subsequently volunteered that a curative instruction would not remedy the prejudice to Dr. Feldman:

> MR. TAYLOR: Judge, Ms. Feldman has the same position as this is a conspiracy case with regard to that I agree

> that, I agree that I don't believe a curative instruction is going to—
>
> THE COURT: Well, I don't know how it prejudices your client, but it would only be admissible as to Dr. Feldman.

Doc. 168 at 16. The District Court then excused the jury for the evening, directed counsel to research the issue, and took the motion for mistrial under advisement. Doc. 168 at 21-23.

The following morning, the District Court heard extensive further argument from counsel. Doc. 169 at 1-29. Again, the District Court did not expressly determine whether Mrs. Feldman was joining Dr. Feldman's objection or motion for mistrial. *See* Doc. 169 at 1-29. Thereafter, the District Court declared a mistrial:

> I am therefore declaring a mistrial, with considerable reluctance considering the resources that have been devoted to this case by the government, by the defense, by the court, and these jurors. The record may not reflect, but it certainly should be apparent to those in attendance that I have anguished over this decision. I keep returning, however, to the same conclusion that there is no way to cure what has occurred. I'm not faulting anyone, it is what it is, it happened as it happened. But when all is said and done, whatever the verdict in this case, if it goes to trial, it should not be burdened with concerns about whether this defendant, Dr. Feldman, received a fair trial. Bring the jury in, please.

Doc. 169 at 29.

D. The Motion To Dismiss The Indictment On Double Jeopardy Grounds

Thereafter, Mrs. Feldman moved to dismiss the indictment on double jeopardy grounds. Doc. 171. Her motion explained, "When a mistrial has been declared, the Double Jeopardy Clause precludes a retrial of the defendant unless the defendant consented to the mistrial or unless the mistrial was compelled by "manifest necessity." Doc. 171 at 2-3 (citing *United States* v. *Dinitz*, 424 U.S. 600 (1976), *Arizona* v. *Washington*, 434 U.S. 497 (1978), and *Illinois* v. *Somerville*, 410 U.S. 458 (1973)). Applying that case law and Federal Rule of Criminal Procedure 26.3, Mrs. Feldman argued the District Court "never asked" her whether she "consented or objected to the mistrial," and there was no manifest necessity for a mistrial. Doc. 171 at 3.

The Government opposed her motion, primarily because "there was no objection from Kim Feldman." Doc. 177 at 2, 5-7. As such, the Government contended her consent to the mistrial was implicit. Doc. 177 at 4-5. Additionally, the Government contended the District Court had determined on the record that there was a manifest necessity for the mistrial. Doc. 177 at 3, 7.

Without a hearing, the District Court denied the motion. Doc. 180. The District Court acknowledged Mrs. Feldman was "correct that she was not expressly asked whether she consented or objected to the mistrial." Doc. 180 at 4. Nevertheless, the District Court explained it had offered Mrs. Feldman "several opportunities to comment on, object to, or suggest alternatives to a mistrial." Doc. 180 at 4. But she "never objected or voiced any concern about a mistrial." Doc. 180 at 3. For that reason, the District Court ruled it had "solicited" her views and therefore found her consent was implicit. *See* Doc. 180 at 4-5. Additionally, the District Court further concluded "a finding of manifest necessity [was] implicit in the deliberative remarks of the Court, and the record supports the declaration of a mistrial." Doc. 180 at 6.

E. The Second Trial

The second 17-day jury trial was primarily about Mrs. Feldman's husband, Dr. Feldman. Nevertheless, it is important to understand Dr. Chaitoff's and Dr. Thomas Simopoulos's expert medical testimony for context. Additionally, lay witnesses occasionally testified about Mrs. Feldman's supposed involvement in the charged crimes.

1. The Expert Medical Testimony

Dr. Chaitoff was an anesthesiologist and pain doctor. Doc. 358 at 48. He testified for three days. Docs. 358; 359; 360. He explained how "red flags" could indicate a patient was not being forthright, diverting their medications, or taking illegal medications. Doc. 358 at 90-92. Contrary to his prior concessions at the *Daubert* stage, Dr. Chaitoff also extrapolated his review of less than 1 percent of all patient files to the remaining 3,200 patient files:

> Q. So 30 patients out of nearly 3,000 patients. How was that near enough for you to determine whether or not this doctor was operating outside the usual course of medical practice?
>
> A. Well, number one, my methodology was random, so in randomly choosing these 30 patients. And again, I should preface this by saying whether I liked the file or I didn't like the file, I reviewed the file and gave my honest opinion. And I reviewed all 30 files in the same context.
>
> And it was interesting when I was able to sit down and write my conclusions on these 30 patients that nearly all of the 30 patients had identical circumstances, nearly all, by which they had presented to the Feldman clinic.
>
> Number two. Nearly all—in fact, I would say all of the 30 patients reviewed had inadequate documented histories. Similarly, nearly all, I mean 28 or 29 out of the 30 patients had near identical physical examinations. Nearly all of the patients had the same class of medications, controlled substances prescribed. Nearly all had urine drug tests that showed gross inconsistencies in the patient's history and

> were not discussed or recognized by the physician with the patient.
>
> So the methodology was random and the conclusions applied to all the patients. *So whether I reviewed 30 or I reviewed 3,200, I suspect my conclusions would have been identical.*

Doc. 358 at 111-12 (emphasis added).

In any event, based on his review of 48 patient files, Dr. Chaitoff concluded all of Dr. Feldman's patient files indicated "inadequate histories, inadequate physical examinations, lack of review of consultative reports, lack of referral to other medical providers, lack of documentation of considering any other intervention other than the use of controlled substances, [and] the lack of monitoring patients for compliance." Doc. 358 at 117. Accordingly, his "opinion almost universally was that the medications prescribed to all 30 patients was not for a legitimate medical purpose and that he was practicing outside of his practice of medicine." Doc. 358 at 117. And further review of an additional 18 patient files "only served to reinforce [his] initial opinion." Doc. 359 at 84-85; *see also* Doc. 360 at 3.

Dr. Chaitoff conceded Mrs. Feldman's name did not arise in any of the medical records he reviewed. Doc. 360 at 88. Dr. Chaitoff pointed

out, however, that Mrs. Feldman's name arose in his review of an undercover agent's visit with Dr. Feldman. Doc. 360 at 87-88.

Dr. Thomas Simopoulos, in contrast, testified in defense of Dr. Feldman's medical practices. Doc. 366 at 43-243; 371 at 1-122. Dr. Simopoulos was an anesthesiologist who practiced pain medicine and held impressive credentials. Doc. 366 at 44. Based on his review of the same materials as Dr. Chaitoff had reviewed, Dr. Simopoulos opined that Dr. Feldman was prescribing pain medications "within the usual course of professional practice" and for the "purpose of alleviating the documented patient symptom severity." Doc. 366 at 110.

2. The Lay Testimony About Mrs. Feldman

Compared to lay testimony concerning Dr. Feldman, the lay testimony about Mrs. Feldman was far more limited.

a. The Government Case

i. Lucille Cranston

For instance, Lucille Cranston testified Mrs. Feldman was in the examination room cutting fruit. Doc. 360 at 154.

ii. Detective Joseph Pittaluga

Detective Joseph Pittaluga testified that when he visited Dr. Feldman's office in an undercover capacity, he met Mrs. Feldman. Doc.

361 at 21. While examining Detective Pittaluga during that visit, Dr. Feldman said he needed to consult with Mrs. Feldman to determine whether he could also see Detective Pittaluga's "uncle." Doc. 361 at 4. Nevertheless, Detective Pittaluga interpreted that comment as merely concerning scheduling, not the merits of the "uncle's" medical condition. Doc. 361 at 25.

Detective Pittaluga also conceded Mrs. Feldman was not in the examination room while the exam took place, except she entered once to discuss a scheduling matter regarding another patient. Doc. 361 at 22-23. Finally, Detective Pittaluga acknowledged that when he sought to pay cash for prescriptions, Mrs. Feldman responded that was "bad." Doc. 361 at 29; *see also* U.S. Exs. 4A, 4B, 4C.

iii. Melinda Detwiler

Melinda Detwiler testified Mrs. Feldman acted as office manager and filled out prescription forms for Dr. Feldman's signature. Doc. 361 at 110-11. Ms. Detwiler also testified and Dr. Feldman and Mrs. Feldman both told employees to stop doing background checks "and leave it up to the doctor whether he wanted to discharge them because he was

losing too many patients and if he kept losing patients, then we wouldn't have a job." Doc. 361 at 123.

Additionally, Ms. Detwiler testified Dr. Feldman and Mrs. Feldman instructed employees to be on the lookout for undercover officers and to place sticky notes in their files. Doc. 361 at 126-28. Ms. Detwiler also testified Mrs. Feldman instructed employees to stop conducting urinalyses unless ordered by Dr. Feldman because "the urine test cost too much money" and were "showing that the patients were on other medications or not taking their medications." Doc. 361 at 132-33. Ms. Detwiler testified Mrs. Feldman told her "they were putting most of everything in her name or their children's names so if anything happened, it couldn't be taken away." Doc. 361 at 137.

Ms. Detwiler testified that after the DEA executed a search warrant on the medical practice, Mrs. Feldman thought she knew about it because she was "friendly with the law enforcement." Doc. 361 at 141. Ms. Detwiler testified that when a patient saw another doctor in Dr. Feldman's practice, who then lowered his or her medications prescribed by Dr. Feldman, the patient could complain to Mrs. Feldman, who would contact Dr. Feldman, who would tell the patient to take the med-

ications for a month until he could see him or her again. Doc. 361 at 186-87.

iv. April Dixon

April Dixon testified Mrs. Feldman would wear a white coat at the clinic, but conceded she never treated patients like a doctor or nurse would. Doc. 361 at 193; 362 at 15-16. Ms. Dixon also testified that Dr. Feldman and Mrs. Feldman told staff they stopped seeing out-of-state patients because it drew too much attention to the office and to be on the lookout for undercover officers. Doc. 361 at 196-97.

Ms. Dixon testified Mrs. Feldman was responsible for depositing cash and filling out prescriptions for Dr. Feldman's signature. Doc. 361 at 199. Ms. Dixon testified that whenever a patient complained that another doctor in Dr. Feldman's practice discharged him or her or lowered his or her medications, Mrs. Feldman would try to remedy the situation by talking to Dr. Feldman. Doc. 361 at 201-02. Ms. Dixon testified Mrs. Feldman instructed staff not to perform urinalyses because the clinic was losing too many patients. Doc. 361 at 205-06. But Ms. Dixon testified she never saw any document or heard any statement indicating Dr.

Feldman and Mrs. Feldman were doing something illegal or trying to hide something. Doc. 362 at 19.

v. Charlene Riffle

Charlene Riffle, who appeared to be drunk or high while on the stand, testified Mrs. Feldman encouraged her to bring friends so the clinic could build its clientele and transcribed prescriptions while Dr. Feldman ate fruit. Doc. 362 at 139-43.

vi. Aimee Martin

Aimee Martin, a former doctor, related that when she ran out of medications one month, Mrs. Feldman refused to give her medications early but suggested she could use her husband's medications. Doc. 363 at 65, 135. Although Ms. Martin spoke with Dr. Feldman about how to stay off the DEA's radar, she did not have those conversations with Mrs. Feldman. Doc. 363 at 61.

vii. Rachel Cservak

Rachel Cservak testified Mrs. Feldman told her the clinic was discharging too many patients so staff should not to do urinalyses so frequently and instead do them only when Dr. Feldman ordered them. Doc. 363 at 169-71. Mrs. Feldman said this because she was concerned about losing money. Doc. 363 at 171.

viii. Detective John Barna

John Barna testified that Mrs. Feldman engaged in numerous transactions with proceeds from the clinic. Doc. 364 at 127-64; Doc. 365 at 4-104.

ix. Holly Jones

Holly Jones testified Mrs. Feldman interrupted her meeting with Dr. Feldman about the clinic's lease to ask how long they would be because Dr. Feldman had patients to see. Doc. 365 at 145-46.

b. The Defense Case

i. Eleanor Alvarez

Eleanor Alvarez testified Mrs. Feldman never asked staff to stop using E-FORCSE and was a part-time employee who would "stop by." Doc. 368 at 197, 202-03. Mrs. Feldman never treated patients or discussed their discharges. Doc. 368 at 203. Although Mrs. Feldman wore a white coat and had an office at the clinic, Ms. Alvarez did not recall her asking staff to be on the lookout for law enforcement or to place sticky notes in suspected undercover patients. Doc. 368 at 213.

ii. Janice Boyle

Janice Boyle testified Mrs. Feldman did not treat or discharge patients; instead, she was in charge of deposits at the end of the day. Doc.

368 at 228-29. The clinic employed Mrs. Feldman "less than part time." Doc. 368 at 230-31.

iii. Perry Gruman

Perry Gruman, an attorney, testified Dr. Feldman, not Mrs. Feldman, retained him to prepare a standard prenuptial agreement. Doc. 366 at 31-32. Dr. Feldman and Mrs. Feldman never discussed a fear of arrest or DEA investigation. Doc. 366 at 32-33, 40-41.

iv. Dr. Dale Dacus

Dr. Dale Dacus, who worked in Dr. Feldman's clinic, testified Mrs. Feldman was employed solely in an administrative capacity and never discussed patient treatment or discharges, or doing anything illegal. Doc. 371 at 187-88.

v. Dr. Edward Feldman

Dr. Feldman testified Mrs. Feldman made no clinical decisions about patient treatment; instead, she was employed in an administrative capacity. Doc. 372 at 20-22, 44. Dr. Feldman also testified Mrs. Feldman had nothing to do with the clinic's decision not to accept insurance. Doc. 372 at 35. Despite wearing a white coat, Mrs. Feldman never acted like a doctor; it was just to look professional. Doc. 372 at 36-37.

vi. Kim Xuan Feldman

Mrs. Feldman exercised her Fifth Amendment privilege to not testify in her own defense. Doc. 372 at 206-07.

3. The Extensive Testimony About Drug Overdose Deaths

The Government presented extensive testimony regarding the three drug overdose deaths. *See, e.g.*, Doc. 365 at 105-18 (death of Ricky Gonzalez); Doc. 365 at 119-33 (death of Shannon Wren); Doc. 365 at 167-89 (death of Joey Mayes); Doc. 367 at 4-20, 59-63, 94-98, 127-224 (deaths of Joey Mayes, Ricky Gonzalez, and Shannon Wren); Doc. 368 at 16-102 (deaths of Joey Mayes and Shannon Wren). Similarly, there was also extensive testimony regarding these drug overdose deaths during the defense case. *See, e.g.*, Doc. 371 at 44-56, 123-71 (deaths of Joey Mayes, Ricky Gonzalez, and Shannon Wren).

4. The Oral Motions For Judgment Of Acquittal

When the Government rested, Dr. Feldman and Mrs. Feldman orally moved for judgment of acquittal. Doc. 368 at 113-30, 134-52. Most of Dr. Feldman's argument addressed whether the evidence of drug overdose deaths, which was charged against him alone in Counts Two, Three, and Four, was sufficient. *See* Doc. 368 at 113-30. In contrast,

with respect to the conspiracy charged in Count One, Mrs. Feldman argued Dr. Chaitoff never testified about her intent, if any, and explained "there is absolutely no evidence to indicate that Kim Feldman had anything to do with the prescribing of the medications or had any knowledge of the prescribing of the medications or knew what that meant." Doc. 368 at 135-36. With respect to the financial transactions charged in Counts Five, Six, Seven, and Eight, Mrs. Feldman argued the evidence was insufficient because they were parasitic on Count One: "if Kim Feldman did not know that those proceeds were not the product of an unlawful or illegal practice, then those counts must fall as well." Doc. 368 at 139-40.

The District Court denied the motions. Doc. 368 at 130-34, 152-57. In doing so, the District Court asked the prosecutor who else it believed had conspired with Dr. Feldman and Mrs. Feldman, and the prosecutor pointed only to Aimee Martin. Doc. 368 at 145-47. The District Court also explained its ruling as to Mrs. Feldman at length:

> With respect to Kim Feldman's involvement in the conspiracy alleged in Count One, I find the evidence is, albeit weak, sufficient to demonstrate that she participated as a knowing and willful member of this conspiracy. While she was not prescribing medicines and did not handle any of the medicines—at least the evidence demonstrates that she did

not—there are statements attributed to her evidencing knowledge that the activities of Dr. Feldman were illegal and would get the attention, if you will, of the DEA.

The comments attributed to her concerning the scheduling of the undercover's uncle, that certainly is not enough. But her concern about law enforcement presence, as shared by other witnesses, is sufficient to allow the jury to find beyond a reasonable doubt that she was a knowing participant in the conspiracy.

Her instructions to put sticky notes on the files if the staff suspected an undercover agent was involved, her conversation with Aimee Martin about staying off DEA radar, that statement was attributed to Aimee Martin, not Kim Feldman, but she participated in that discussion.[3]

The parking in the back when law enforcement was present, her concern about Dr. Feldman being arrested and transferring assets into her name, her instructions to staff to stop doing the PDMPs and the UAs and stop discharging patients—those are tools used by physicians to uncover diversion and when you decrease the use of those tools to increase your profit margin, as the testimony demonstrated Kim Feldman was interested in doing, that is an inference that she understood that controlled substances were being prescribed for other than legitimate medical purposes.

When Aimee Martin asked her for more pills, she did say no. I don't recall, candidly, whether in this trial Aimee

[3] In fact, the District Court misremembered the "DEA radar" testimony, because Ms. Martin testified Mrs. Feldman did not participate in that discussion. Doc. 363 at 61 ("Q. When you say you would have conversations with 'them' about staying under the [DEA] radar, who do you mean by that? A. As far as the numbers of medication, I believe only discussing that with Dr. Feldman, not with Kim."). Instead, Ms. Martin's conversations with Mrs. Feldman concerned nothing more than "filling out different forms that were required." Doc. 363 at 63.

Martin told us that Kim told her to take her husband's—I know she did in the first trial, Ms. Hale; did she say that in this trial?

MS. HALE: Yes, sir.

THE COURT: Mr. Taylor?

MR. TAYLOR: Yes, Your Honor, she did.

THE COURT: That's fine. All that shows is that—it's just one more inference that she had knowledge—although it cuts both ways. I don't find that that statement is in and of itself sufficient; it's just additional circumstantial evidence of her involvement in the practice. It's a weak case, but sufficient to go to the jury on Count One. I'll deny the motion.

With respect to Count Five, the monetary transaction conspiracy, I'll deny the motion. The jury could infer from her participation in the practice and her instructions and directives to the various staff members that she knew these proceeds were derived from an unlawful activity, that is the distribution of controlled substances not for a legitimate medical purpose and not in the usual course of professional practice.

Much of the evidence that supports Count One as to Kim Feldman likewise supports her guilty as to Count Five. In addition, of course, Dr. Feldman's knowledge as to Count One follows with respect to Count Five. And I find that the evidence is sufficient with respect to Counts One and Five that both defendants conspired as alleged in the indictment such that a reasonable jury could find beyond a reasonable doubt that they were each guilty of the conspiracies charged.

Of course the testimony was that both of the defendants instructed the staff members to put sticky notes on the files if undercover activities were suspected. There was testimony about looking out for patients with ball caps and

> sunglasses on, indicative of presumably undercover activities in the minds of the defendants.
>
> There was evidence that Dr. Feldman took greater care with respect to suspected undercovers to perform a more thorough physical exam and took care not to prescribe controlled substances but alternatively Naproxen, noncontrolled substances.
>
> It follows that the evidence is therefore sufficient to support Counts Six, Seven, and Eight with respect to the monetary transactions. All of the defendants' motions on Rule 29 are therefore denied.

Doc. 368 at 153-57.

After resting the defense case, Dr. Feldman and Mrs. Feldman renewed and supplemented those motions, and the District Court renewed its rulings. Doc. 373 at 12-31. The Government did not present any rebuttal case. Doc. 373 at 9.

5. The Prosecutor's Closing Argument

During her closing argument, the prosecutor repeatedly argued facts outside the evidence, injected new legal theories, inflamed the jury, and offered personal opinions.

a. Argument Regarding Facts Outside Of Evidence

The prosecutor repeatedly argued facts outside the evidence in at least four respects:

First, over objection, the prosecutor contended Jenelle Mayes had testified Dr. Feldman prescribed her brother Xanax and methadone, who was "surprised" when she accused him of doing so:

> So Jennelle Mayes testifies that she decides to go to this doctor who was prescribing to her brother shortly before he died because of what she knew him to be. And when the defendant Dr. Feldman is attempting to ask her if she wanted methadone and Xanax, she said no because of what had happened to her brother. And the defendant's response was, Well who would do that? Who? You. You would do that, Dr. Feldman. He was surprised himself that someone would prescribe a patient methadone and Xanax together.

Doc. 373 at 126.

In fact, that is not how Ms. Mayes had testified before the jury. Instead, she had merely testified as follows:

> Q. Ms. Mayes, before we took our break, we were talking about a conversation that you recalled having with Dr. Feldman where you brother came up. Do you recall that?
>
> A. Yes.
>
> Q. And what led to that conversation?
>
> A. Him trying to prescribe me methadone.
>
> Q. Who is him?
>
> A. Dr. Feldman.
>
> Q. And what was your response to Dr. Feldman when he wanted to prescribe you methadone?

> A. I didn't want to take methadone; my little brother had just passed away from methadone and Xanax.
>
> Q. And when you said that, what was Dr. Feldman's response to you?
>
> A. Who would prescribe him both of those at once.

Doc. 362 at 181-82.[4]

Second, over objection, the prosecutor argued the defense's medical examiner, Dr. Vernard Adams, had testified differently about causes of death in other cases before he had joined the private sector. Doc. 373 at 133-34. Again, the District Court had previously sustained an objection to that question. Doc. 371 at 163-64.

Third, without objection, the prosecutor implied there were many actions the Department of Health could have taken against Dr. Feldman. Doc. 373 at 223 ("[t]here are a lot of things like what the Department of Health should or should not have done that can be an issue for

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[4] During a proffer outside the jury's presence, Ms. Mayes gave a different answer whether Dr. Feldman had said anything about Xanax:

> A. No. At first he was just I guess trying to get me on methadone for breakthrough pain instead of the 15s or whatever. And I told him, "I would never take methadone, my little brother died of methadone and Xanax." "Who would prescribe him that combination together?" And I just looked at him and said, "You." And he really didn't say anything about it.

Doc. 362 at 166-67. Perhaps the prosecutor was referring to this answer, which was not given to the jury and therefore not in evidence.

another four weeks of trial"). Again, the District Court had repeatedly ruled the Department of Health complaints could not come into evidence. *See* Docs. 357 at 20-22; 365 at 191-224; 372 at 185-87, 207-08.

Fourth, without objection, the prosecutor twice argued Mrs. Feldman had spoken with Ms. Martin about how to stay off the DEA radar by prescribing fewer doses. Doc. 373 at 120, 123. But Ms. Martin had actually testified Mrs. Feldman did not participate in that discussion. Doc. 363 at 61 ("Q. When you say you would have conversations with 'them' about staying under the [DEA] radar, who do you mean by that? A. As far as the numbers of medication, I believe only discussing that with Dr. Feldman, not with Kim."); *see also supra* note 3.

b. Argument Regarding New Legal Theory Of Conviction Outside Four Corners Of The Indictment

On a separate front, the prosecutor's closing argument also injected a new legal theory of conviction into the case, which happened to rest outside the four corners of the indictment. *See* Doc. 1. Specifically, over objection, the prosecutor argued Mrs. Feldman had violated a supposed

IRS reporting requirement by failing to disclose her foreign bank accounts.[5] Doc. 373 at 136-37.

c. Argument That Inflamed The Jury And Offered Personal "Expert" Opinion

Without objection, the prosecutor also tried to inflame the jury and inject her personal "expert" opinion when she commented that a drug overdose victim had died because he "had a butt-load of [medi]cations in his system." Doc. 373 at 132. No expert medical testimony had referred to a "butt-load" as a medical term of art or as a uniform measure of doses or dosages. And no lay witness had used that particular term, either.

d. Motions For Mistrials

Dr. Feldman and Mrs. Feldman moved for mistrials on several of these bases. Doc. 373 at 143-44. With respect to arguing facts outside

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[5] There was no evidentiary basis for this argument, because Stephen Osher had testified he was not aware whether Mrs. Feldman held foreign bank accounts. *See* Doc. 368 at 178-80; *see also* Doc. 373 at 143-46. Additionally, the prosecutor described this reporting requirement as applying only to U.S. citizens, but the testimony indicated Mrs. Feldman was a citizen of Canada. *Compare* Doc. 365 at 72, *with* Doc. 368 at 179. Finally, and perhaps most importantly, the statute the prosecutor cited, 31 U.S.C. § 5316, does not impose any requirement to report foreign bank accounts. *See* Doc. 368 at 179. Instead, it requires reports regarding the exportation and importation of monetary instruments in certain circumstances. *See* 31 U.S.C. § 5316.

the evidence, the District Court denied a mistrial and abdicated responsibility for controlling the scope of argument to the jury:

> If I sustain an objection [about arguing facts outside of evidence], that suggests that I am commenting on the evidence and agreeing with counsel. If I overrule, that doesn't mean the same thing, I typically don't even rule on that type of objection unless it's grossly at odds with the evidence.

Doc. 373 at 143. Additionally, despite finding the prosecutor's closing argument "entirely inappropriate" with respect to implying a conviction could be based on the new legal theory of violation of a reporting requirement, the District Court denied the motions for mistrial and offered to give a "cautionary instruction." Doc. 373 at 145-46.

6. The Post-Trial Motions

Dr. Feldman and Mrs. Feldman filed post-trial motions for judgment of acquittal and new trial. Docs. 295; 296. Mrs. Feldman renewed her motion to sever, her objections to the prosecutor's closing argument, and her insufficiency argument. Doc. 296 at 3-6. She also adopted Dr. Feldman's post-trial motion (*see* Doc. 296 at 7), which argued among other things that Dr. Chaitoff's expert testimony violated *Daubert*:

> The expert opinion provided by Dr. Chaitoff that Defendant's actions fell outside the usual course of the professional practice of medicine and were not for legitimate medical purposes is impermissible *ipse dixit* under *Daubert*. The

> Government invited Dr. Chaitoff to become a member of their investigative team, spoon fed him data in a piecemeal fashion designed to support the prosecution hypotheses, and ignored data from more than half of the alleged conspiracy period. Dr. Chaitoff offered no literature or other guidance to support his opinions; couched his opinions with the preface, "In my practice . . ."; and condemned as illegitimate the treatment of walk-in patients, the acceptance of cash payment, and the use of advertising; even though that conduct is not prohibited and, in some cases, specifically permitted by Florida Statutes.

Doc. 295 at 6.

Standard Of Review

1. The denial of a motion to sever defendants' trials is reviewed for clear abuse of discretion. *United States* v. *Ramirez*, 426 F.3d 1344, 1352 (11th Cir. 2005).

2. The denial of a *Daubert* motion is reviewed for abuse of discretion that resulted in manifest error. *United States* v. *Frazier*, 387 F.3d 1244, 1258 (11th Cir. 2004) (en banc).

3. The denial of a motion to dismiss an indictment on double jeopardy grounds is a question of law reviewed de novo. *United States* v. *Nyhuis*, 8 F.3d 731, 734 (11th Cir. 1993).

4. The denial of a mistrial regarding a prosecutor's closing argument is reviewed for abuse of discretion. *United States* v. *Thompson*, 422 F.3d 1285, 1297 (11th Cir. 2005).

5. "We review de novo a District Court's denial of judgment of acquittal on sufficiency of evidence grounds, considering the evidence in the light most favorable to the Government, and drawing all reasonable inferences and credibility choices in the Government's favor." *United States* v. *Capers*, 708 F.3d 1286, 1296-97 (11th Cir. 2013).

SUMMARY OF THE ARGUMENT

1. The District Court abused its discretion when it denied a motion to sever the defendants' trials. Although joinder was proper under Rule 8(b), the District Court should have severed the defendants' trials under Rule 14(a) because Mrs. Feldman suffered extensive spillover prejudice from the extensive testimony regarding the drug overdose deaths, which rendered the jury verdict unreliable. The Court should therefore vacate the convictions and remand for a new trial.

2. The District Court abused its discretion when it denied a *Daubert* motion to limit or exclude Dr. Kevin Chaitoff's testimony. Dr. Chaitoff did precisely what he and the Government promised he would

not do: i.e., extrapolate his opinion beyond the 48 patient files he reviewed to all 3,200 patient files. The methodology underlying this testimony was unreliable under *Daubert* and should have been excluded. And its introduction caused a substantial prejudicial effect, because the jury may have (improperly) inferred that Mrs. Feldman was more likely to be aware Dr. Feldman was prescribing pain medications improperly if he was doing so for all 3,200 patients. The Court should therefore vacate the convictions and remand for a new trial.

3. The District Court erred when it denied Mrs. Feldman's motion to dismiss the indictment on double jeopardy grounds. The District Court did not expressly comply with Federal Rule of Criminal Procedure 26.3, and it cannot be said on this record that Mrs. Feldman implicitly consented to a mistrial or that the District Court implicitly found there was a manifest necessity for one. The Court should therefore reverse the convictions and remand for entry of judgment in favor of Mrs. Feldman.

4. The District Court abused its discretion when it denied a mistrial regarding the prosecutor's closing argument. The prosecutor argued numerous facts outside of evidence, presented a new legal theo-

ry of conviction outside the four corners of the indictment, inflamed the jury, and offered her personal "expert" opinion. Individually and cumulatively, these errors were harmful. The Court should therefore vacate the convictions and remand for a new trial.

5. The evidence that Mrs. Feldman conspired with Dr. Feldman in Count One was insufficient because it gave equal or nearly equal circumstantial support to a theory of guilt (i.e., that Mrs. Feldman knew Dr. Feldman was prescribing medications improperly) and a theory of innocence (i.e., that Mrs. Feldman never knew Dr. Feldman was prescribing medications improperly). For the same reason, Counts Five, Six, Seven, and Eight fail as well, because they presuppose Mrs. Feldman knew the transactions involved criminally derived proceeds. The Court should therefore reverse the convictions and remand for entry of judgment in favor of Mrs. Feldman.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED THE MOTION TO SEVER THE DEFENDANTS' TRIALS

Mrs. Feldman acknowledges joinder in the indictment was proper under Federal Rule of Criminal Procedure 8(b). Nevertheless, it was an

abuse of discretion when the District Court denied her motion to sever her trial under Rule 14(a).

Rule 14(a) provides, "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." Fed. R. Crim. P. 14(a).

To show reversible error, a defendant must first demonstrate he or she was "somehow prejudiced by a joint trial." *United States* v. *Blankenship*, 382 F.3d 1110, 1122 (11th Cir. 2004) (citing *Zafiro* v. *United States*, 506 U.S. 534, 538 (1993)). That exists here because Mrs. Feldman was prejudiced by the introduction into evidence of extensive testimony spanning many days regarding the three overdose deaths, with which she had no involvement.

Because Mrs. Feldman "suffered prejudice under step one of the *Zafiro* test," the second step is to determine "whether severance (or a mistrial) is the proper remedy for that prejudice." *Id.* At the second step, district courts should sever defendants' trials whenever there exists a "'serious risk that a joint trial would compromise a specific trial right of

one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.'" *Id.* at 1123 (quoting *Zafiro*, 506 U.S. at 539). Otherwise, severance is not a permissible remedy, and such defendants are entitled only to curative instructions. *Id.*

"The first scenario for mandatory severance (or mistrial) described by [*Zafiro*] exists only where a joint trial leads to the denial of a constitutional right."[6] *Id.* The second scenario involving "unreliable" jury verdicts is less clear, but tends to involve three situations. *Id.*

First, "severance is mandated where compelling evidence that is not admissible against one or more of the co-defendants is to be introduced against another co-defendant."[7] *Id.* Second, severance is mandated "in an extremely narrow range of cases in which the sheer number of defendants and charges with different standards of proof and culpability, along with the massive volume of evidence, makes it nearly impossible for a jury to juggle everything properly and assess the guilt or innocence of each defendant independently." *Id.* at 1124. Third, severance is mandated "where one defendant is being charged with a crime that, while somehow related to the other defendants or their overall criminal

[6] This first scenario does not apply in this case.

[7] Only the first situation applies here; the second and third do not.

scheme, is significantly different from those of the other defendants." *Id.* at 1125.

As mentioned, the jury verdict against Mrs. Feldman is "unreliable" because the introduction into evidence of substantial "compelling" testimony regarding the three overdose deaths of Ricky Gonzalez, Shannon Wren, and Joey Mayes caused her defense to suffer "spillover" prejudice. The jury saw crime scene photographs of the victims dead on the floor (U.S. Exs. 14-19C)—including a touching note from Mr. Wren's wife (Doc. 365 at 121)—and family members, law enforcement, and medical examiners testified extensively about the deaths (*e.g.*, Doc. 365 at 105-33, 167-89; 367 at 4-20, 59-63, 94-98, 127-224; 368 at 16-102; 371 at 44-56, 123-71). The very nature of this subject matter was so stirring and emotional that it necessarily clouded the jury's decisionmaking when deliberating about Mrs. Feldman.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED THE *DAUBERT* MOTION TO LIMIT OR EXCLUDE DR. KEVIN CHAITOFF'S TESTIMONY

It was an abuse of discretion when the District Court denied the *Daubert* motion to limit or exclude Dr. Chaitoff's testimony.

A. Before Admitting Expert Testimony, Federal Rule Of Evidence 702 Demands A Rigorous Three-Part Inquiry

In determining the admissibility of expert testimony under Federal Rule of Evidence 702, district courts must "'engage in a rigorous three-part inquiry'" that considers whether:

> "(1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue."

United States v. *Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc) (citation omitted). "'While there is inevitably some overlap among the basic requirements—qualification, reliability, and helpfulness—they remain distinct concepts and the courts must take care not to conflate them.'" *Id.*

B. As Part Of That Three-Part Inquiry, *Daubert* Requires District Courts To Assess The Reliability Of An Expert's Methodology

Below, Mrs. Feldman did not challenge Dr. Chaitoff's qualifications under prong one or the helpfulness of his testimony to the jury under prong three. *See* Doc. 63 at 5. Instead, Mrs. Feldman challenged

the reliability of Dr. Chaitoff's methodology under prong two. *See* Doc. 63 at 5-7.

In prong two, when evaluating the reliability of expert medical testimony under *Daubert*, this Court considers:

> (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community.

Frazier, 387 F.3d at 1262 (citation and punctuation omitted). "These factors are illustrative, not exhaustive; not all of them will apply in every case, and in some cases other factors will be equally important in evaluating the reliability of proffered expert opinion." *Id.* For instance, it is important to determine whether an expert's opinion is "based on sufficient facts or data." Fed. R. Evid. 702(b).

The question here, therefore, is primarily whether a doctor may, after reviewing less than 1 percent of a clinic's 3,200 patient files, extrapolate his opinion to the entirety of that medical practice. The Magistrate Judge said no (Docs. 109 at 98; 115 at 2 & n.3), and the Government and Dr. Chaitoff had conceded as much at the *Daubert* hearing (Docs. 71 at 6; 109 at 56-57; 115 at 2 n.3), but at trial Dr. Chaitoff nev-

ertheless did precisely what he and the Government promised not to (Doc. 358 at 112 ("So whether I reviewed 30 or I reviewed 3,200, I suspect my conclusions would have been identical.")).

C. Dr. Chaitoff's Methodology Was Unreliable Because He Reviewed Less Than 1 Percent Of Dr. Feldman's Patient Files, But Extrapolated His Opinions To The Remaining 3,200 Patient Files

Dr. Chaitoff's methodology was unreliable because there was too great an analytical gap between his data and his opinion when he extrapolated his review of 30 or 48 patient files to all 3,200 patient files.

"[E]ven when an expert is using reliable principles and methods, and is extrapolating from reliable existing data, '[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" *Frazier*, 387 F.3d at 1275 n.10 (Tjoflat, J., concurring) (quoting *Gen. Elec. Co.* v. *Joiner*, 522 U.S. 136, 146 (1997)).

The analytical gap between the data and Dr. Chaitoff's opinion is approximately 3,150 patient files, which represents almost 99 percent of all patient files. It is hard to imagine a larger analytical gap. As such, Dr. Chaitoff's extrapolation amounted to nothing more than his "*ipse dixit*," which *Daubert* forbids. *Gen. Elec. Co.*, 522 U.S. at 146.

D. The Refusal To Limit Or Exclude Dr. Chaitoff's Testimony Caused Mrs. Feldman To Suffer A Substantial Prejudicial Effect

Mrs. Feldman is entitled to a new trial because the District Court's refusal to exclude or limit Dr. Chaitoff's opinion regarding Dr. Feldman's 3,200 patient files caused her to suffer a "substantial prejudicial effect." *Maiz* v. *Virani*, 253 F. 3d 641, 667 (11th Cir. 2001).

Because the jury heard testimony that Dr. Feldman was apparently prescribing pain medications not for a legitimate medical purpose and not in the usual course of professional practice for all 3,200 of his patients, the jury may have (unreasonably) inferred that Mrs. Feldman was more likely to be aware of that fact. Accordingly, "the error 'probably had a substantial influence on the jury's verdict.'" *Proctor* v. *Fluor Enters.*, 494 F.3d 1337, 1352 (11th Cir. 2007) (ordering new trial).

III. The District Court Abused Its Discretion When It Denied The Motion To Dismiss The Indictment On Double Jeopardy Grounds

It was an abuse of discretion when the District Court denied the motion to dismiss the indictment on double jeopardy grounds.

The Double Jeopardy Clause provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

U.S. Const. amend. V. After a mistrial, the Double Jeopardy Clause precludes retrial unless the defendant consented to the mistrial, see *United States* v. *Dinitz*, 424 U.S. 600, 608 (1976), or it was compelled by "manifest necessity,"[8] *Arizona* v. *Washington*, 434 U.S. 497, 505-07 (1978). To procedurally effectuate these constitutional requirements, Federal Rule of Criminal Procedure 26.3 provides, "Before ordering a mistrial, the court must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." Fed. R. Crim. P. 26.3.

The analytical starting point is that "a violation of Rule 26.3—the failure to give the parties an opportunity to comment, object, or suggest alternatives before declaring a mistrial—is one factor to be considered in determining whether a trial judge exercised sound discretion," and the failure to comply "strongly suggests that the trial judge did not exercise sound discretion." *United States* v. *Berroa*, 374 F.3d 1053, 1058-59 (11th Cir. 2004). "While it is favored that the trial court make mani-

[8] "While 'manifest necessity' is not subject to precise formulation, it is described as a 'high degree of necessity.'" *United States* v. *Hoa Quoc Ta*, 221 Fed. App'x 938, 943 (11th Cir. 2007).

fest necessity determinations explicit in the record, the trial court is not required to make such statements." *United States* v. *Hoa Quoc Ta*, 221 Fed. App'x 938, 944 (11th Cir. 2007).[9]

The District Court acknowledged it never "expressly" complied with Rule 26.3 by determining Mrs. Feldman's position or making a finding on the record of manifest necessity. Doc. 180 at 4. The questions, therefore, are whether Mrs. Feldman "implicit[ly]" consented to a mistrial and, if not, whether the District Court "implicit[ly]" made the appropriate finding of manifest necessity. Doc. 180 at 6.

On this record, it is not possible to determine Mrs. Feldman implicitly consented. The most that could be said is that her counsel agreed with Dr. Feldman's counsel that the prejudice to Dr. Feldman could not be cured with an instruction.

As to manifest necessity, the District Court admittedly did not act "irrationally" or "abruptly" in declaring a mistrial (*see, e.g.*, Doc. 169 at 18-19 ("I don't think I have ever anguished over an evidentiary matter in a criminal trial in the 26 years I've been a judge as much as I have in

[9] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

this one and that tells me that there is prejudicial error in this case that a curative instruction will not cure.")), which is often a hallmark of an abuse of discretion, *Hoa Quoc Ta*, 221 Fed. App'x at 945. Nevertheless, in opposing the mistrial, the Government offered persuasive reasons why a cautionary instruction would have remedied any prejudice. *See* Doc. 154 at 4-6. Numerous cases from this Court support that position.[10] Because a cautionary instruction would have sufficed, there was no manifest necessity to declare a mistrial.[11]

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[10] *E.g.*, *United States* v. *Chastain*, 198 F.3d 1338, 1352 (11th Cir. 1999); *United States* v. *LeQuire*, 943 F.2d 1554, 1571-72 (11th Cir. 1991); *United States* v. *Georgalis*, 631 F.2d 1199, 1203 (5th Cir. 1980); *United States* v. *Bernes*, 602 F.2d 716, 721-22 (5th Cir. 1979); *see also United States* v. *Hobson*, 102 Fed. App'x 430, 430 (5th Cir. 2004).

[11] Moreover, the Government is judicially estopped from taking a contrary position on appeal. "Judicial estoppel is an equitable doctrine that precludes a party from 'asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.'" *Barger* v. *City of Cartersville*, 348 F.3d 1289, 1293 (11th Cir. 2003). "The doctrine exists 'to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *Id.* Below, the Government argument there was no manifest necessity for a mistrial because a cautionary instruction would have sufficed. Doc. 154 at 4-6.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED A MISTRIAL REGARDING THE PROSECUTOR'S CLOSING ARGUMENT

During her closing argument, the prosecutor repeatedly argued facts outside of evidence, injected new legal theories outside the four corners of the indictment, offered her personal "expert" opinion, and inflamed the jury. The District Court abused its discretion when it overruled Mrs. Feldman's objections and denied her motion for mistrial.

A. Improper Closing Arguments Warrant Reversal When Harmful

"Remarks made in the course of a prosecutor's closing argument will warrant reversal if the challenged remarks are (1) improper and (2) prejudicial to a substantial right of the defendant." *United States* v. *Boyd*, 131 F.3d 951, 955 (11th Cir. 1997) (citing *United States* v. *Blakey*, 14 F.3d 1557, 1560 (11th Cir. 1994)); *accord Lopez*, 590 F.3d at 1256 (citing *United States* v. *Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006)). "'A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different.'" *Lopez*, 590 F.3d at 1256 (quoting *Eckhardt*, 466 F.3d at 947). If "'the record contains sufficient

independent evidence of guilt,'" however, "'any error is harmless.'" *Id.* (quoting *Eckhardt*, 466 F.3d at 947).

B. Closing Argument Is Improper When It Goes Outside The Evidence, Presents New Legal Theories Of Conviction Not Charged In The Indictment, Inflames The Jury, Or Offers "Expert" Opinions

Generally, a prosecutor's closing argument is improper when it goes outside the evidence, inflames the jury, or offers personal "expert" opinions.

For example, "statements by the prosecutor which [inflame] the jury, [vouch] for the credibility of witnesses, or [offer] the prosecutor's personal opinion as to the defendant's guilt [are] improper." *United States* v. *Robinson*, 485 U.S. 25, 33 n.5 (1988) (citing *Darden* v. *Wainwright*, 477 U.S. 168 (1986), and *United States* v. *Young*, 470 U.S. 1 (1985)).

Furthermore, a prosecutor's argument "that [goes] outside the evidence" and "impugn[s] [the defendant's] character with an inaccurate characterization . . . is clearly improper . . . because it encourage[s] the jury to convict [the defendant] based on facts not admitted as evidence." *Blakey*, 14 F.3d at 1560 (citing *Hutchins* v. *Wainwright*, 715 F.2d 512, 516 (11th Cir. 1983)); *accord United States* v. *Johns*, 734 F.2d 657, 666

(11th Cir. 1997). Accordingly, "a prosecutor may not make suggestions, insinuations, and assertions calculated to mislead the jury," *Blakey*, 14 F.3d at 1560, or emotionally appeal to its "role as the conscience of the community," *United States* v. *Martinez-Medina*, 279 F.3d 105, 119 (1st Cir. 2002).[12]

C. The Prosecutor's Closing Argument Was Improper

Judged by those metrics, the prosecutor's closing argument was improper in many respects.

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[12] A prosecutor's closing argument that "[appeals] to the jury's emotions and role as the conscience of the community" is "plainly improper." *Martinez-Medina*, 279 F.3d at 119 ("the prosecutor's characterization of the defendants as 'hunting each other like animals' and killing one another 'with no mercy'" was "inflammatory and improper"); *accord Blakey*, 14 F.3d at 1559, 1562 (vacating for a new trial because prosecutor called the defendant a "'professional criminal'"); *Hall* v. *United States*, 419 F.2d 582, 587 (5th Cir. 1969) ("[t]he description of appellant as a 'hoodlum'" was the "type of shorthand characterization of an accused, not based on evidence, [that] is especially likely to stick in the mind of the jury and influence its deliberations"); *United States* v. *Hands*, 184 F.3d 1322, 1332-33 (11th Cir. 1999) (prosecutor's references to the defendant as "'wicked,'" "'vicious,'" a "'maniac,'" and a "'drug-dealing monster'" were "improper because they were calculated to enflame the jury, and to persuade the jurors to render a decision based on their emotional response to [the defendant's] behavior, rather than the evidence introduced at trial" (internal punctuation and citations omitted)); *Boyd*, 131 F.3d at 955 (prosecutor's statement that defendants "don't care [about] the pain and the misery and the hurt and the death that they cause because they only want . . . money for themselves" was improper).

1. The Prosecutor Argued Numerous Facts Not In Evidence

The prosecutor repeatedly argued facts outside the evidence in at least four respects:

a. Jenelle Mayes

First, over objection, the prosecutor contended Jenelle Mayes had testified Dr. Feldman prescribed her brother Xanax and methadone and was "surprised" when she accused him of doing so. Doc. 373 at 126. In fact, that is not how Ms. Mayes had testified before the jury. *See supra* Statement Of The Facts E.6.a.

This prejudiced Mrs. Feldman because, contrary to the prosecutor's express concession (Doc. 362 at 175), it allowed the prosecutor to argue the combination of Xanax and methadone killed Mr. Mayes, which triggered an additional spillover effect from the overdose deaths.

b. Dr. Vernard Adams

Second, over objection, the prosecutor argued the defense's medical examiner, Dr. Vernard Adams, had testified differently about causes of death in other cases before he had joined the private sector. Doc. 373 at 133-34. Again, the District Court had previously sustained an objection to that question. Doc. 371 at 163-64.

This prejudiced Mrs. Feldman because it involved a spillover effect from the overdose deaths, and it improperly impeached a critical defense expert witness.

c. Department Of Health Complaints

Third, without objection, the prosecutor implied there were many actions the Department of Health could have taken against Dr. Feldman. Doc. 373 at 223 ("[t]here are a lot of things like what the Department of Health should or should not have done that can be an issue for another four weeks of trial"). Again, the District Court had repeatedly ruled the Department of Health complaints could not come into evidence. *See* Docs. 357 at 20-22; 365 at 191-224; 372 at 185-87, 207-08.

This prejudiced Mrs. Feldman, because it implied she may have had another source of knowledge that Dr. Feldman was prescribing medications improperly.

d. DEA Radar

Fourth, without objection, the prosecutor twice argued Mrs. Feldman had spoken with Ms. Martin about how to stay off the DEA radar by prescribing fewer doses. Doc. 373 at 120, 123. But Ms. Martin had actually testified Mrs. Feldman did not participate in that discussion.

Doc. 363 at 61 ("Q. When you say you would have conversations with 'them' about staying under the [DEA] radar, who do you mean by that? A. As far as the numbers of medication, I believe only discussing that with Dr. Feldman, not with Kim."); *see also supra* note 3.

This caused obvious and substantial prejudice to Mrs. Feldman, because it implied Mrs. Feldman had actual knowledge that Dr. Feldman was prescribing medications improperly, and that she and Dr. Feldman were trying to conceal their activities.

2. The Prosecutor Argued A New Legal Theory Of Conviction Not Charged In The Indictment

On a separate front, the prosecutor's closing argument also injected a new legal theory of conviction into the case, which happened to rest outside the four corners of the indictment. *See* Doc. 1. Specifically, over objection, the prosecutor argued Mrs. Feldman had violated a supposed IRS reporting requirement by failing to disclose her foreign bank accounts. Doc. 373 at 136-37.

This argument had no evidentiary basis because Mr. Osher had testified he was not aware whether Mrs. Feldman held foreign bank accounts. *See* Doc. 368 at 178-80; *see also* Doc. 373 at 143-46. Additionally, the prosecutor described this reporting requirement as applying only

to U.S. citizens, but the testimony indicated Mrs. Feldman was a citizen of Canada. *Compare* Doc. 365 at 72, *with* Doc. 368 at 179. Finally, and perhaps most importantly, the statute the prosecutor cited, 31 U.S.C. § 5316, does not impose any requirement to report foreign bank accounts. *See* Doc. 368 at 179. Instead, it requires reports regarding the exportation and importation of monetary instruments in certain circumstances. *See* 31 U.S.C. § 5316. This argument caused harmful prejudice because, among other things, the verdict form required the jury to make a finding about violation of reporting requirements. Doc. 281 at 2.

3. The Prosecutor Inflamed The Jury And Offered Her Personal "Expert" Opinion

Without objection, the prosecutor also tried to inflame the jury and inject her personal "expert" opinion when she commented that a drug overdose victim had died because he "had a butt-load of [medi]cations in his system." Doc. 373 at 132. No expert medical testimony had described a "butt-load" as a medical term of art or as a uniform measure of doses or dosages. And no lay witness had used that particular term, either.

This prejudiced Mrs. Feldman, because it suggested Dr. Feldman was prescribing pain medications in absurdly high doses and dosages.

Indeed, this comment implied that even a layperson like Mrs. Feldman might could have determined on her own, perhaps through a Google search, that no reasonable doctor would prescribe such high doses and dosages. And, because Mrs. Feldman transcribed many prescriptions for Dr. Feldman's signature, it therefore suggested Mrs. Feldman had knowledge that Dr. Feldman was prescribing medications improperly.

D. This Improper Closing Argument Was Harmful

Whether viewed individually or cumulatively, the prosecutor's improper comments during closing argument prejudiced Mrs. Feldman's substantial rights and deprived her of a fair trial. *E.g.*, *Blakey*, 14 F.3d at 1561 ("[s]tanding alone none of the comments in this case would require reversal, but taken together, their cumulative effect presents a different problem"). Accordingly, this Court should vacate Mrs. Feldman's convictions and grant her a new trial. *See id.* at 1562 (vacating conviction and ordering new trial because prosecutor called the defendant a "'professional criminal'").

V. THE EVIDENCE THAT MRS. FELDMAN CONSPIRED WITH DR. FELDMAN TO DISTRIBUTE AND DISPENSE PAIN MEDICATIONS WAS INSUFFICIENT

The Government did not prove Mrs. Feldman was guilty of Counts One, Five, Six, Seven, or Eight beyond a reasonable doubt.

A. Evidence Is Insufficient Unless Reasonable Jurors Could Have Reached A Conclusion Of Guilt Beyond A Reasonable Doubt

It does "not satisfy the [Constitution] to have a jury determine that the defendant is *probably* guilty." *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993) (emphasis in original). Rather, the question is "whether a reasonable juror could have reached a conclusion of guilt beyond a reasonable doubt." *United States* v. *Faust*, 456 F.3d 1342, 1345 (11th Cir. 2006). By definition, "a reasonable jury must necessarily entertain a reasonable doubt" "if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged." *Cosby* v. *Jones*, 682 F.2d 1373, 1383 (11th Cir. 1982).

B. The Evidence Was Insufficient To Prove Mrs. Feldman Was Guilty Of Counts One, Five, Six, Seven, Or Eight Beyond A Reasonable Doubt

Under the *Cosby* test, insufficient evidence supported Mrs. Feldman's convictions for conspiracy to distribute and dispense pain medica-

tions not for a legitimate medical purpose and not in the usual course of professional practice (Count One). Because that evidence was insufficient, it necessarily follows that Mrs. Feldman's parasitic convictions for conspiracy to knowingly conduct and attempt to conduct financial transactions involving the proceeds of unlawful activity (Count Five) and engaging in substantive financial transactions (Counts Six, Seven, and Eight) were likewise supported by insufficient evidence.

1. The Government Did Not Prove Count One Beyond A Reasonable Doubt Because No Evidence Proved Mrs. Feldman Knew Dr. Feldman Was Prescribing Improperly

Among other elements, to prove the conspiracy charged in Count One, the Government needed to prove the "circumstances" of Mrs. Feldman's involvement in Dr. Feldman's clinic were "so obvious" that "knowledge" that Dr. Feldman was prescribing "for other than legitimate medical purposes in the usual course of professional practice" could "fairly be attributed" to her. *United States* v. *Azmat*, 805 F.3d 1018, 1035 (11th Cir. 2015); *United States* v. *Ignasiak*, 667 F.3d 1217, 1227 (11th Cir. 2012).

Measured by that standard, under *Cosby*, the evidence in support of Count One was insufficient, even when viewed in the light most fa-

vorable to the prosecution, because it gave equal or nearly equal circumstantial support to a theory of guilt (i.e., that Mrs. Feldman knew Dr. Feldman was prescribing medications improperly) and a theory of innocence (i.e., that Mrs. Feldman never knew Dr. Feldman was prescribing medications improperly).

It is easy to dispense with a great deal of the lay testimony supposedly implicating Mrs. Feldman. Simply put, it is not against the law (yet) to cut fruit in a doctor's office (*e.g.*, Doc. 360 at 154), to assist a doctor with scheduling (*e.g.*, Doc. 361 at 22-23), to wear a white coat when employed by a doctor's office (*e.g.*, 361 at 193), to address patient complaints (*e.g.*, Doc. 361 at 201-02), or to encourage referral business (*e.g.*, Doc. 362 at 139-43). And, obviously, none of those facts could establish Mrs. Feldman's knowledge about the propriety of Dr. Feldman's prescriptions: Mrs. Feldman was not a doctor or nurse, had no medical training, and was not involved in patient triage or treatment. *E.g.*, Doc. 361 at 193; 362 at 15-16.

Other testimony about Mrs. Feldman perhaps presents more complications, but it still remains insufficient. It is true that Mrs. Feldman (1) directed staff not to perform urinalyses unless ordered by a doctor,

(2) instructed employees to be on the lookout for undercover officers and place sticky notes in their files, and (3) confided in Ms. Detwiler that Dr. Feldman was "putting most of everything in her name or their children's names so if anything happened, it couldn't be taken away." Doc. 361 at 137. But even viewing that testimony in the light most favorable to the prosecution, it still gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence under *Cosby*.

For instance, the concern Mrs. Feldman repeatedly expressed about staff not performing urinalyses indiscriminately was a financial one (i.e., it cost too much), not a criminal one. With respect to cautioning staff to be on the lookout for undercover officers and placing sticky notes in their files, even for innocent individuals, it is more than understandable to be on high alert in the presence of law enforcement, especially when operating in a highly regulated industry. *Cf. United States* v. *Tapia*, 912 F.2d 1367, 1371 (11th Cir. 1990) (being "visibly nervous or shaken during a confrontation with a state trooper" failed to establish probable cause to search). And Mrs. Feldman's statement about transferring assets in case "anything happened" could have just as easily

meant if Dr. Feldman passed away or was unable to continue practicing medicine due to a disability.

Finally, there is simply no evidentiary basis for concluding Mrs. Feldman discussed how to stay off the DEA radar with Dr. Martin. *See supra* note 3.

Accordingly, because the circumstantial support for guilt or innocence was in equipoise, under *Cosby*, the Government necessarily did not submit sufficient proof of Count One beyond a reasonable doubt.

2. The Government Did Not Prove Counts Five, Six, Seven, And Eight For The Same Reasons

For the same reasons, there was not sufficient evidence that when Mrs. Feldman was engaging in financial transactions (i.e., Counts Five, Six, Seven, and Eight), she knew they involved criminal proceeds. Specifically, the Government had to prove Mrs. Feldman conspired, engaged, and attempted to engage in financial transactions "knowing that the property involved . . . represent[ed] the proceeds of some form of unlawful activity." 18 U.S.C. § 1956(a)(1); *accord* 18 U.S.C. § 1957(a) ("knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity"). Absent evidence of Mrs. Feld-

man's knowledge that the proceeds were criminally derived, any other evidence in support of Counts Five, Six, Seven, and Eight was necessarily insufficient.

CONCLUSION

For the foregoing reasons, the Court should either reverse the judgment and remand for entry of judgment in favor of Mrs. Feldman or vacate the judgment and remand for a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 12,626 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

November 28, 2016

/s/ Michael Stanton
Michael Stanton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 28th day of November, 2016, to:

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