No. 22-10336

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

CLINTON BATTLE,
Defendant-Appellant

On Appeal from the United States District Court
for the Northern District of Texas
Fort Worth Division

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v. No. 22-10336

CLINTON BATTLE,

Defendant-Appellant

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America.
2. Leigha Amy Simonton.
3. Matthew Weybrecht.
4. Chapman Law Group.
5. Clinton Battle.
6. Ronald W. Chapman II.

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REQUEST FOR ORAL ARGUMENT

The defendant-appellant, CLINTON BATTLE, respectfully requests oral argument. This appeal raises multiple legal and factual issues as Mr. Battle was not provided a fair trial. Oral discussion of the facts and the applicable precedent would greatly benefit the Court.

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STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under Section 1291, Title 28, United States Code, as an appeal from a final judgment of conviction and sentence in the United States District Court for the Northern District of Texas, Fort Worth Division and under Section 3742, Title 18, United States Code, as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. Notice of appeal was timely filed in accordance with Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

ISSUE ONE: Whether the district court improperly admitted Mr. Blanchard's out-of-court statement as a statement made by a co-conspirator in furtherance of a conspiracy under Fed. R. Evid. Rule 801(d)(2)(E) thereby adversely affecting the defendant's substantial rights.

ISSUE TWO: Whether there was a variance between the conspiracy alleged in the Government's indictment and the evidence presented at trial thereby adversely affecting the defendant's substantial rights.

ISSUE THREE: Whether the defendant's constitutional rights to Due Process and Equal Protection were violated by the district court's rigid and unreasonable time restrictions at trial thereby adversely affecting the defendant's substantial rights.

STATEMENT OF THE CASE

A. Proceedings:

The Government filed a Superseding Indictment against Dr. Battle alleging he unlawfully conspired to distribute controlled substances (Count 1) in violation of 21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2)), unlawfully distributed controlled substances (Counts 2 through 5) in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2), and 18 U.S.C. § 2, conspired to commit mail fraud (Count 18) in violation of 18 U.S.C. § 1349 (18 U.S.C. § 1341), committed mail fraud (Counts 19 through 24) in violation of 18 U.S.C. §§ 1341 and 2, and committed aggravated identity theft (Count 25) in violation of 18 U.S.C. §§ 1028A and 2. ROA.78-96.

At the close of trial, the jury returned its verdict finding Dr. Battle guilty on Counts one (1) and three (3) for conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846, and distribution of a controlled substance in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E) and (b)(2), and 18 U.S.C. § 2. ROA.78. Dr. Battle also entered into a Rule 11 plea agreement with the Government and pled guilty to conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349. ROA.3879-3880. He was sentenced to a total of one hundred forty-four (144) months in prison. ROA.739.

Dr. Battle now files this Brief appealing his conviction and resulting sentence.

B. Statement of Facts:

i. Fort Worth and Arlington Clinics

Dr. Battle was a physician licensed by the Texas Medical Board to practice medicine in the State of Texas. ROA.78. He was the owner of the Fort Worth Clinic, located in Fort Worth, Texas, which he opened in 1981. ROA.941. Given his success treating patients, his Fort Worth Clinic became increasingly busy forcing him to open a second clinic in 2009. *Id*. This clinic was called the Arlington Clinic and was located in Arlington, Texas. *Id*. Dr. Battle's continued success also required him to hire additional employees. One of these employees, Donna Green (Ms. Green), was hired around 2016 to work as a nurse practitioner in the Arlington Clinic. *Id*. at 30. Another employee, Yajaira Lopez (Ms. Lopez), was hired to work as a medical assistant at both Dr. Battle's Fort Worth and Arlington Clinics. ROA.79. Before both these employees were hired, Dr. Battle also hired Kendrea Thompson Blanchard (Ms. Blanchard) around 2005 to work as a nurse at the Fort Worth Clinic. ROA.942.

ii. The Superseding Indictment

As part of his practice, Dr. Battle received his registration with the United States Drug Enforcement Administration ("DEA") to prescribe controlled substances prescriptions. ROA.78. Nonetheless, the Government claimed that Dr. Battle conspired with others, including Ms. Green, Ms. Lopez, Ms. Blanchard, and

her husband, Michael Blanchard (Mr. Blanchard), to unlawfully distribute controlled substances (Count 1) in violation of 21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2)). *Id*. at 1-19. Specifically, the Government claimed that Dr. Battle and the alleged co-conspirators distributed Hydrocodone, Tylenol with Codeine, Xanax, Phentermine, and Tramadol without a legitimate medical purpose outside the course of professional practice. *Id*. The Government's Superseding Indictment also alleged that Dr. Battle was guilty of the substantive crime of unlawfully distributing these same controlled substances (Counts 2 through 5) in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2), and 18 U.S.C. § 2. ROA.89-90. *Id*.

It was also alleged that Dr. Battle conspired to commit mail fraud (Count 18) in violation of 18 U.S.C. § 1349 (18 U.S.C. § 1341), and that he was also guilty of the substantive crime of mail fraud (Count 19 through 24) in violation of 18 U.S.C. §§ 1341 and 2. *Id*. That is, the Government claimed Dr. Battle and his co-conspirators submitted fraudulent patient claims to health insurers for medical services that were not rendered or that were rendered but mischaracterized and billed at a higher rate than what an insurer would pay had they known the true nature of the treatment. *Id*. The Superseding Indictment also claimed Dr. Battle committed aggravated identity theft (Count 25) in violation of 18 U.S.C. §§ 1028A and 2. *Id*. Specifically, the Government alleged that Dr. Battle and others, aiding and abetting

each other, unlawfully used the means of identification of a patient while committing mail fraud described in Count 18.

Besides Dr. Battle, the Superseding Indictment named two (2) co-defendants: Ms. Green and Ms. Lopez. *Id*.

iii. The District Court's Time Limitations

Before trial began and before the parties filed their witness and exhibit lists, the district court distributed its Order on Trial Time Limitations under Section VII of the Court's Civil Justice Expense and Delay Reduction Plan. ROA.370-371; ROA.800-823. This Order allowed the Government fifteen (15) hours to put on its case, including cross-examination and rebuttal. *Id*. Unfortunately, the defendants were not as fortunate and were allotted ten (10) hours to put on their case, including cross-examination to be split up among each of the three (3) co-defendants. *Id*. The Court's focus on an expeditious trial was further supported at trial as well.

As one example, when the district court was attempting to determine whether a conspiracy existed and whether a co-conspirator's out-of-court statements were made in furtherance of a conspiracy, the Court grew increasingly impatient and was disinterested in hearing defense counsel's objections. ROA.1502-1503 38 ("We're not going to take a deposition. This is enough. Go take a seat."; "…but I'm not going

to go into the rest of this, I don't have the time for it."; "And you can pick up any evidence form book and it will tell you that. I'm tired of arguing.").[1]

iv. Co-Defendants Agree to a Plea Agreement Before Trial

Before the commencement of trial, on October 21, 2020, Ms. Lopez entered into a plea agreement with the Government, pleading guilty to submitting false statements relating to health care matters in violation of 18 U.S.C. § 1035. On June 28, 2021, Ms. Green also entered into a plea agreement with the Government, in which she plead guilty to acquiring a controlled substance through misrepresentation in violation of 21 U.S.C. § 843(a)(3).

Dr. Battle was the only defendant who proceeded to trial, which started on June 28, 2021. Sealed, Volume 3 Transcript of *Voir Dire*. However, he eventually entered a Rule 11 plea agreement with the Government at the close of trial solely pertaining to the charge of conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349 (Count 18). ROA.3879-3889.

[1] Judge Pittman's observations at the pre-trial conference confirm that while he took inventory of his commitments and schedule in crafting his time limitations, he failed to consider the case at hand and how long it would take for Dr. Battle to receive a fair trial that accords with his Due Process under the U.S. Constitution. *See* ROA.800 (Judge Pittman stating: "Okay. I have, perhaps, some bad news, but it's news we're going to have to live with, and, Mr. Weybrecht, you may have to make a Hobson's choice. But after much deliberation and discussion and trying to balance my schedule, the Court's schedule with other matters that I have going, including a vacation and a big injunction hearing involving the Biden administration in the State of Texas, I've come to the conclusion that this matter needs to be tried in 25 hours. And I intend to give the Government 15 hours to put on its case, and I intend to give the defendants 10 hours. And I know, Mr. Weybrecht, you're thinking there's no way possible that I can put on my case in 25 hours. Let me roll this out. I would highly, highly consider a request by the Government to settle -- to settle -- I've had my mother-in-law in town for a week.").

v. Kendra Blanchard's Testimony at Trial

At trial, as part of the Prosecution's case-in-chief, it called Kendra Blanchard (Ms. Blanchard) to testify on the alleged conspiracy between herself, her husband, Michael Blanchard (Mr. Blanchard), and Dr. Battle. ROA.1465-1744. Specifically, she testified that Dr. Battle and her husband had an agreement under which he would provide Dr. Battle with a list of names to call in prescriptions for and in return Mr. Blanchard would give him cocaine. ROA.1504, 1508-1513. (testifying "A: Yes. One day my husband and I had got into an argument, and so forth, and he told me, he said, That's why Dr. Battle and I have a deal, he called in prescriptions for me and I give him cocaine."). Ms. Blanchard testified that while this agreement started with her husband and Dr. Battle, she eventually found out about it from her husband, and she later helped by calling in prescriptions for her husband too. *Id*. Ms. Blanchard also testified that approximately twenty-five (25) to thirty percent (30%) of the prescriptions that her and her husband filled were done without Dr. Battle knowing. *Id*. at 48-49. Her testimony also confirmed that while the Government claimed Ms. Green and Ms. Lopez were part of this conspiracy, the two (2) of them were not involved and unaware of this alleged agreement, but instead, were supposedly involved in another agreement with Dr. Battle whereby they would receive cash for prescriptions/controlled substances. ROA.1610-1613.

The Prosecution also had DEA Diversion Investigators and Analysists testify, two (2) expert witness who were physicians, and two (2) former employees of Dr. Battle's. ROA.916-1084, 1085-1300, 1465-1744, 1745-1955. In response, as part of his defense, Dr. Battle called patients as well as an expert physician to testify on the treatment/controlled substances he provided to patients. ROA.1745-1955, 1998-2148. At the close of trial, Dr. Battle moved for a judgment of acquittal or a new trial, which the district court ultimately denied. ROA.558-568; ROA.614-619.

vi. The Jury's Verdict

The jury returned their verdict and judgment was entered finding Dr. Battle guilty on Counts one (1) and three (3) for conspiracy to distribute a controlled substance in violation of 21 U.S.C. § 846 and distribution of a controlled substance in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E) and (b)(2), and 18 U.S.C. § 2. ROA.738. Dr. Battle was sentenced to a total of one hundred forty-four (144) months in prison. *Id*. at 2. He now files this Brief appealing his conviction and resulting sentence.

SUMMARY OF THE ARGUMENT

Dr. Battle's convictions for conspiring to unlawfully distribute controlled substances in violation of 21 U.S.C. § 846 and the substantive crime of distributing controlled substances in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2) should be reversed. Specifically, the district court's improper admission of Mr. Blanchard's out-of-court statement wherein he allegedly gave Dr. Battle cocaine in exchange for his prescribing of controlled substances adversely affected Dr. Battle's substantial rights thereby prejudicing the outcome of his trial. Dr. Battle was also prejudiced by the material variance between the one (1) conspiracy alleged in the Government's Superseding Indictment and the two (2) conspiracies proven at trial. This is because this variance allowed the jury to bootstrap the allegations of one (1) conspiracy with the allegations in the other and use evidence related to one of the conspiracies to resolve any lingering doubts related to other charges. Finally, Dr. Battle's convictions should also be reversed because the district court's unreasonable time limitations deprived him of his rights to Due Process and Equal Protection under the U.S. Constitution. Indeed, under these unreasonable time constraints, Dr. Battle was not afforded the fair trial that so many other criminal defendants receive before their right to liberty is taken. Therefore, his substantial rights were prejudiced, and his convictions should be reversed.

ARGUMENT

There are three separate bases under which Dr. Battle's convictions should be reversed. First, the district court improperly admitted an out-of-court statement from Mr. Blanchard under Fed. R. Evid. 801(d)(2)(E) as a statement made by a co-conspirator in furtherance of a conspiracy. Second, the evidence the Government presented at trial supports that there were two (2) separate conspiracies instead of the one (1) conspiracy it alleged in its Superseding Indictment thereby resulting in a material variance. For both these bases, reversal is required because Dr. Battle's substantial rights were adversely affected. Third, the district court violated Dr. Battle's constitutional rights to Due Process and Equal Protection further requiring reversal of his convictions.

I. The District Court Improperly Admitted Michael Blanchard's Narrative of Past Conduct as a Statement by a Co-Conspirator in Furtherance of a Conspiracy Under Rule 801(d)(2)(E)

Standard of Review

A district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Hall*, 500 F.3d 439, 443 (5th Cir. 2007). Where a district court abuses its discretion and makes an incorrect evidentiary ruling, a defendant must show such error affected his substantial rights for reversal of his conviction. *Id.* (clarifying "[t]he error will not require reversal if 'beyond a reasonable doubt the error complained of did not contribute to the verdict obtained.'"); *see also United*

States v. Cornett, 195 F.3d 776, 785 (5th Cir. 1999) (holding "[u]nder a harmless error analysis, the issue is whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (quotations and citation omitted)). As in this case, where trial counsel objects to the district court's evidentiary ruling, ROA.1492, this Court reviews for harmless error. *Id.*; *Cf. Ebron*, 683 F.3d 105, 135 (5th Cir. 2012) (holding that where counsel failed to object to a challenged statement at trial the Court's review is for plain error).

Argument

For a statement to be admissible under Fed. R. Evid. 801(d)(2)(E), the proponent must prove, by a preponderance of the evidence, that 1) there was a conspiracy, 2) the statement was made by a co-conspirator of the party, 3) the statement was made during the conspiracy, and 4) the statement was made in furtherance of the conspiracy. *United States v. Delgado*, 401 F.3d 290, 297 (5th Cir. 2005); *United States v. Ebron*, 683 F.3d 105, 135-36 (5th Cir. 2012) (holding "[t]o be in furtherance of the conspiracy, the statement must advance the ultimate objects of the conspiracy.").

There, this Court held an inmate's statement that he had "punished" (i.e., murdered) another inmate was not made in furtherance of a conspiracy to commit murder, but rather was a narrative of past conduct that was inadmissible under Rule 801(d)(2)(E). *Id.* (rejecting the government's argument the statement was made to

further the ultimate objective of the conspiracy by instilling fear into another inmate thereby encouraging his silence). The inmate's statement was nonetheless admissible, however, because it was considered a statement against his penal interest under Rule 804(b)(3), and because it was also likely an "excited utterance" under Rule 803(2). *Id.* (finding the temporal proximity between the murder and the inmate's statement, as well as the rambling nature in which the statement was delivered, likely made the statement an excited utterance).

In this case, the district court found, by a preponderance of the evidence, that a conspiracy existed between Dr. Battle, Ms. Blanchard, and her husband, Mr. Blanchard, wherein Mr. Blanchard gave Dr. Battle cocaine in exchange for prescribing controlled substances at his direction. ROA.1504-1508. The district court also held that Mr. Blanchard's out-of-court statements, which formed the basis of Ms. Blanchard's testimony at trial, were made in furtherance of this alleged conspiracy and therefore admissible under Rule 801(d)(2)(E). *Id*. In doing so, however, the district court improperly admitted a crucial out-of-court statement from Mr. Blanchard that was not made in furtherance of the alleged conspiracy, but instead, was a narrative of past conduct.

For instance, while the following two (2) statements from Mr. Blanchard were in furtherance of the alleged conspiracy: **(1)** "A: Because when I would get home my husband would ask me, Did you take care of those prescriptions, did Dr. Battle

give you those prescriptions to take care of for me?" ROA.1505, and; **(2)** "A: Oh, okay. Yeah, because my husband would ask me, Did you take care of those prescriptions, did Dr. Battle give you the list, did you take care of those prescriptions for me?" *Id*. at 45; this third **(3)** statement that follows was not: "A: Yes. One day my husband and I had got into an argument, and so forth, and he told me, he said, That's why Dr. Battle and I have a deal, he called in prescriptions for me and I give him cocaine." *Id*. at 40. Instead, under this Court's precedent, this statement was a narrative of past conduct and therefore inadmissible under Rule 801(d)(2)(E).

To be sure, consider the Court's decision in *United States v. Cornett*, 195 F.3d at 787-86. There, the Government sought to admit "Exhibit 1.165", which was a recording that included a discussion between one of the co-conspirator's girlfriends and the Government's cooperating witness. *Id.* at 780 (observing in the recording the girlfriend was lamenting over her exclusion from some drug related activities implicated in the charged conspiracy). This Court found that the statements in the recording were a narrative of past conduct and thus inadmissible under Rule 801(d)(2)(e). *Id.* at 784-85 (holding "[w]hile this may be the kind of conversation that touches upon the conspiracy, it cannot fairly be said that it furthered the conspiracy and thus its admissibility was not authorized by Rule 801(d)(2)(e).").
Specifically, the Court found that the variety of topics discussed in the recording, of

which the conversation on past events of the conspiracy composed a minor segment, weighed against admissibility. *Id.*

In this case, Ms. Blanchard testified that Mr. Blanchard's statement on the exchange of cocaine was made in the context of a broader argument between the two. ROA.1504. In this way, like in *Cornett,* there were undoubtedly a variety of topics discussed, and within this broader argument, Mr. Blanchard narrated past events in an alleged conspiracy between him and Dr. Battle. *See* 195 F.3d at 784-85. As such, just as in *Cornett,* Mr. Blanchard's statement describing his alleged exchange of cocaine with Dr. Battle was a narrative of past conduct and inadmissible under Rule 801(d)(2)(E).

The Court's decision in *Ebron* further weighs against admissibility. 683 F.3d at 136. Recall, there, this Court held an inmate's statement on the murder of another inmate was considered a narrative of past conduct and not a statement in furtherance of a conspiracy. *Id.* In both *Ebron* and this case, both statements concerned past conduct and were made to individuals (i.e., inmate in *Ebron* and Ms. Blanchard in this case) who had no prior involvement in the alleged conspiracy. *See Id.* Both these statements therefore had no effect in furthering the objectives of the conspiracy. *Id*. Instead, just as in *Ebron*, when Mr. Blanchard's statement is read in context, it is merely a narrative of past conduct. *Id.* (holding "[r]ead in context, Bacote's [inmate's] statement is merely a narrative of past conduct. As such, it cannot be

interpreted as "in furtherance" of the conspiracy to kill Barnes. It therefore could not have been admitted under Rule 801(d)(2)(E).").

Unlike *Ebron*, however, Mr. Blanchard's statement is not otherwise admissible as a statement against his penal interest or an excited utterance. 683 F.3d at 135-36. Taking these in reverse order, in *Ebron,* the inmate's statement was considered an excited utterance given the temporal proximity between his statement on the murder of another inmate and the actual murder. *Id*. Here, if Mr. Blanchard had in fact given Dr. Battle cocaine, this act is much further removed from his statement to Ms. Blanchard regarding the cocaine as compared to *Ebron*.[2] *See* ROA.1504. Therefore, Mr. Blanchard's statement is not admissible as an excited utterance under Fed. R. Evid. Rule 803(2). *Cf. Ebron*, 683 F.3d at 136.

Mr. Blanchard's statement is also not admissible under Fed. R. Evid. 804(b)(3) as a statement against his penal interest. This Court has held the general test for the admissibility of statements against one's penal interest requires: 1) the declarant to be unavailable; 2) the statement to so far tend to subject the declarant to criminal liability that a reasonable person in his position would not have made the statement unless he believed it to be true; and 3) the statement to be corroborated by

[2] *See* Fed. R. Evid. 803, advisory committee's note (citing 6 Wigmore § 1747 at 135) (explaining the excited utterance exception exists because "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication."). Here, Mr. Blanchard's statement was well removed from the event (i.e., alleged exchange of cocaine) and therefore his capacity for reflection was not temporarily suspended. *See* ROA.1504.

circumstances clearly indicating its trustworthiness. *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1098 (5th Cir. 1981). Collectively, these three factors are known as the *Alvarez* test. *Id.* at 1098-1102. Regarding this third factor, the Supreme Court has emphasized that there must be specific "indicia of reliability" in order to usurp a defendant's right under the confrontation clause of the U.S. Constitution and admit a person's out-of-court statement without his presence at trial. *Id.* (citing *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). These indicia include an adequate opportunity for the defendant to cross-examine the individual prior to trial and the circumstantial guarantees of reliability that traditionally have been associated with the exceptions to the hearsay rule (i.e., spontaneity, sense of impending death). *Id.* (observing "[e]vidence that seems likely to fall afoul of the confrontation clause will most often fail to qualify for admission under any recognized hearsay exception.").[3]

In applying the *Alvarez* test, this Court has further clarified that an out-of-court statement against one's penal interest may not be analyzed in a vacuum. *See Sarmiento-Perez*, 633 F.2d at 1102. There, this Court held that while the relevant out-of-court statement, when considered in a vacuum, was "an explicit confession

[3] *See Sarmiento-Perez*, 633 F.2d at 1100 (holding "[t]he admission under Rule 804(b)(3) of against-interest-of-declarant hearsay statements that inculpate a criminal defendant results in the diminution of rights traditionally viewed as essential and fundamental components of an accused person's right of confrontation. Therefore, sixth amendment values demand that the threshold measure of admissibility under Rule 804(b)(3) the *Alvarez* test be applied in light of the "close examination" called for in *Chambers v. Mississippi*, *supra. Ohio v. Roberts*, -- - U.S. at -- , 100 S. Ct. at 2538. (citation omitted)).

of criminal activity" and thus "clearly and directly implicates [] [the declarant] in a crime and is, in this regard, against his penal interest", the Court nonetheless held the statement was "not sufficiently contrary to [] [the declarant's] penal interest for the purposes of Rule 804(b)(3). *Id.* at 1102. That is, upon further inspection, the Court explained the circumstances surrounding the statement significantly undermined its reliability, making the statement inadmissible under Rule 804(b)(3). *Id.* Specifically, the Court found the statement was not a spontaneous statement, but rather was calculated to curry favor from the officer's arresting the declarant. *Id.* (finding that while the declarant's statement implicated himself in criminal activity his statement also implicated others in an attempt to alleviate his culpability).

In this case, Mr. Blanchard's statements should not be held admissible as a statement against his penal interest under Rule 804(b)(3). First, Dr. Battle did not have an opportunity to cross-examine Mr. Blanchard at trial, or prior to trial, thereby implicating the concerns surrounding confrontation the Supreme Court has cautioned against. *Dutton*, 400 U.S. at 89. Second, though Mr. Blanchard's statement was not made in custody, like in *Sarmiento-Perez*, the circumstances surrounding his statement nonetheless make it inadmissible. That is, Mr. Blanchard clearly made this statement to get his wife to help him in distributing controlled substances. To be sure, by fabricating a conspiracy that he and Dr. Battle were involved in, he tried to make his wife feel more comfortable in joining a "conspiracy" that was already

operating without problems (i.e., as opposed to the increased uncertainty involved in a conspiracy with no track record of success). Indeed, by communicating that Mr. Blanchard was involved in this alleged conspiracy with a doctor (i.e., Dr. Battle), it provided a degree of credibility and safety, thereby further encouraging Ms. Blanchard's involvement. *See e.g.*, *United States v. Palumbo*, 639 F.2d 123, 132 (3d Cir. 1980) (denying admissibility under Rule 804(b)(3) and observing "[t]he naming of another as a compatriot will often be accompanied by motivations which undermine the trustworthiness of the assertion."). Look no further than the fact that Ms. Blanchard did in fact start to help her husband in distributing controlled substances. ROA.1504 (asking Ms. Blanchard "Q: And then after that he [Mr. Blanchard] asked you to help him? A: Yes… Q: And what did you do to assist? A: I would call in prescriptions."). Therefore, just as in *Sarmiento-Perez,* Mr. Blanchard's statement is inadmissible as a statement against his penal interest under Rule 804(b)(3).

Given the district court improperly admitted Mr. Blanchard's out-of-court statement, Dr. Battle must show his substantial rights were prejudiced for reversal of his conviction. *See Hall*, 500 F.3d at 443 (clarifying improperly admitted statement will not require reversal if "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained."); *see also Cornett,* 195 F.3d at 785 (holding under harmless error analysis a defendant's substantial rights

are affected where "…the guilty verdict actually rendered in this trial was surely unattributable to the error.").

Here, Ms. Blanchard's testimony on her husband's statement that he provided Dr. Battle with cocaine gave the jury something to sink their teeth into as to why Dr. Battle would be prescribing controlled substances at the direction of her husband. ROA.1504. Without this testimony, there is a critical disconnect in the alleged conspiracy making it significantly more difficult for the jury to accept that Dr. Battle was prescribing controlled substances at the direction of Mr. Blanchard where he received no benefit. Certainly, given this critical disconnect, it is entirely plausible that the jury could have concluded this alleged conspiracy was only comprised of Ms. Blanchard and her husband; especially since Ms. Blanchard testified that at least twenty-five (25) to thirty percent (30%) of the conspiracy was performed without Dr. Battle's knowledge. ROA.1513. Without Mr. Blanchard's out-of-court statement on the cocaine, the jury easily could have believed that rater than twenty-five (25) to thirty percent (30%), the entire conspiracy (i.e., one hundred percent (100%)), was simply done behind Dr. Battle's back without him knowing. Further, given that the Government argued to the jury there was simply one overarching conspiracy, it is plausible – even likely – that once this critical disconnect in Ms. Blanchard's testimony surfaced, the jury would have seriously questioned whether Dr. Battle was involved in any part of the alleged conspiracy to unlawfully distribute controlled

substances in violation of 21 U.S.C. § 846, and further, whether he was even guilty of the underlying substantive crimes (i.e., 21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2)). *See* ROA.2131 (arguing "[t]here's one conspiracy here and Dr. Battle is at the center of it all."). It was the Government that decided to charge Dr. Battle in a single conspiracy, and it now must face the weight of that decision. ROA.78-101.

Indeed, in *Cornett*, this Court found that the defendant's substantial rights were prejudiced where the district court improperly admitted a narrative of past conduct given the "thin" evidence against him, including the lack of direct evidence tying the defendant to the conspiracy. 195 F.3d at 785 (holding "…there was no direct evidence that [] [defendant] had seen the money or had knowledge of its source."). As in *Cornett*, here too, there is "thin" evidence tying Dr. Battle to this alleged conspiracy with Mr. and Ms. Blanchard. *Id.* Indeed, without Ms. Blanchard's testimony, there is nothing implicating Dr. Battle's involvement. *See* Volumes 4-8. And review of Ms. Blanchard's testimony further confirms that Mr. Blanchard's improperly admitted statement was the only way in which she could testify that she had knowledge of the fact that her husband was allegedly giving Dr. Battle cocaine. ROA.1473-1626. In fact, at no point during her testimony did Ms. Blanchard testify that she saw her husband give Dr. Battle cocaine. *Id*. at 40-162. Clearly, without this improper statement, Ms. Blanchard would not have been able to inform the jury of the supposed cocaine her husband allegedly gave Dr. Battle, thereby significantly

undermining the Prosecution's claim Dr. Battle was in fact part of this conspiracy. Just as in *Cornett*, therefore, there is no direct evidence tying Dr. Battle to this alleged conspiracy and his substantial rights were prejudiced by the district court's improper admission of Mr. Blanchard's out-of-court statement.

The Court's decision in *United States v. Sumlin* is also instructive. 489 F.3d 683 (5th Cir. 2007). Although the case did not involve an improperly admitted statement under Rule 801(d)(2)(E), it did involve improperly admitted testimony under Fed. R. Evid. 404(b). *Id.* at 689-91. This Court held an Officer's testimony was inadmissible as extrinsic evidence of another act because it failed the two-step *Beechum* test used to determine admissibility under Rule 404(b). *Id.* at 690. Specifically, the Court held the testimony failed the first prong of *Beechum* because there was insufficient evidence to prove the defendant committed the alleged extrinsic offense. *Id.* at 691 (holding "…the officer's casual testimony… was clearly insufficient to prove any of the other essential elements of unlawful drug transportation."). This Court further held the district court's improper admission of the Officer's testimony prejudiced the defendant's substantial rights, and in doing so, observed "'[t]he danger of unfair prejudice from admission of the drug-related evidence . . . [is] great,' because a drug offense is the kind of crime for which the jury may feel the defendant should be punished, regardless of his guilt as to the charged offense." (citations omitted)). *Id.*

As in *Sumlin*, Mr. Blanchard's improperly admitted out-of-court statement was drug-related evidence (i.e., transfer of cocaine to Dr. Battle). *See* ROA.1504. Therefore, the danger of unfair prejudice is great, and the jury likely felt Dr. Battle should be punished, regardless of his guilt as to the charged offenses (i.e., 21 U.S.C. § 846, 21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2)). *See Sumlin*, 489 F.3d at 691.[4] Dr. Battle's substantial rights were therefore prejudiced by the district court's improper admission of Mr. Blanchard's statement.

Accordingly, Dr. Battle's convictions under 21 U.S.C. § 846 and 21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2) should be reversed given the district court's improper admission of Mr. Blanchard's out-of-court statement under Rule 801(d)(2)(E).

[4] This is especially true for a drug as infamous as cocaine, which can elicit a visceral and emotional reaction from jurors due to the negative connotations associated with it; both in the news and in the media.

II. There Was a Material Variance Between the Alleged Conspiracy in the Indictment and the Number of Conspiracies Proven at Trial

Standard of Review

A material variance occurs "where the proof at trial depicts a scenario that differs materially from the scenario charged in the indictment but does not modify an essential element of the charged offense." *United States v. Delgado*, 401 F.3d 290, 295 (5th Cir. 2005). This Court determines whether a variance occurred by comparing the evidence presented at trial with the language of the indictment. *See United States v. Medina*, 161 F.3d 867, 872 (5th Cir. 1998). Where a variance does occur, the Court reverses only if the variance prejudiced the defendant's substantial rights. *United States v. Mitchell*, 484 F.3d 762, 769 (5th Cir. 2007). As in this case, where trial counsel preserves this issue, ROA.558-568, the Court employs a harmless-error analysis. *Id.*; *Cf. United States v. Rice*, 431 Fed. Appx. 289, 293 (noting where the issue of variance is not preserved it is reviewed for plain error).

Argument

To analyze a potential variance between the indictment and proof at trial, the Court counts the number of conspiracies that were proven at trial. *United States v. Morris*, 46 F.3d 410, 415 (5th Cir. 1995). The evidence is viewed in a light most favorable to the Government, and the Court will only find a variance if the evidence and all reasonable inferences preclude reasonable jurors from finding a single conspiracy beyond a reasonable doubt. *Id.* at 415. In its analysis, this Court considers

three principal factors: (1) the existence of a common goal; (2) the nature of the scheme; and (3) the overlapping of the participants in the various dealings. *Id*.

Although the Government tried to sell the jury on the fact that there was one unified conspiracy comprising of Dr. Battle, Ms. Green, Ms. Lopez, and Mr. and Ms. Blanchard, the evidence presented at trial supports there were two (2) distinct conspiracies. ROA.78-101; *see also* ROA.2131 (arguing "[t]here's one conspiracy here and Dr. Battle is at the center of it all."). One of these conspiracies was the "Office Visit Conspiracy", which included Ms. Green and Ms. Lopez and was aimed at securing cash for office visits. The second conspiracy was the "Street Dealing Conspiracy", which included Mr. and Ms. Blanchard and was aimed at obtaining profits or street drugs. *See* ROA.1523, 147 (Ms. Blanchard testifying that Ms. Green and Ms. Lopez was not part of the "Street Dealing Conspiracy" but rather it was simply her, her husband, Mr. Blanchard, and Dr. Battle).

On their face, the disconnect between these two (2) conspiracies is evident given the absence of a common goal. Instead, while the "Office Visit Conspiracy" was purely cash-driven, the "Street Dealing Conspiracy" was focused on illicit substances. ROA.1501, 1611. This divergence of a common goals is further evidenced given the conspiracies were intended to enrich different people. *Id*. Specifically, the "Office Visit Conspiracy" was allegedly intended to enrich Ms. Green and Ms. Lopez, whereas the "Street Dealing Conspiracy" was intended to

enrich Mr. and Ms. Blanchard. *Id*. at 37-58, 147; *Cf. Morris*, 46 F.3d at 415 (finding a single conspiracy where the overall objective or goal was for everyone in the conspiracy to profit). Even if Dr. Battle were to concede, *pro arguendo,* that the Government had carried its burden and proven he was enriched as part of the "Office Visit Conspiracy", given the improperly admitted out-of-court statement from Mr. Blanchard, the Government failed to establish that he was part of the "Street Dealing Conspiracy".[5] *Cf. United States v. Elam*, 678 F.2d 1234, 1247 (5th Cir. 1982) (finding a single conspiracy where even though co-conspirators performed discrete tasks and were unaware of the roles of others, the co-conspirators were working toward a unified goal that enriched everyone).

The evidence at trial also supports that the nature of these two (2) conspiracies were different. Under this second factor, this Court has explained a single conspiracy exists:

> [w]here the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme or to the overall success of the venture, where there are several parts inherent in a larger common plan, or where the character of the property involved or the nature of the activity is such that knowledge on the part of one member concerning the existence and function of other members of the same scheme is necessarily implied due to the overlapping nature of the various roles of the participants, the existence of a single conspiracy will be inferred.

[5] As discussed in the previous section, because the Government chose to charge one conspiracy, the improper admission of Mr. Blanchard's out-of-court statement means the Government also failed to prove Dr. Battle was part of the "Office Visit Conspiracy" because his substantial rights were adversely affected.

Id. at 1246 (citations omitted); *see also United States v. Perez*, 489 F.2d 51, 62 (5th Cir. 1973) (holding "if [an] agreement contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, then such agreement constitutes a single conspiracy.").

In this case, it is clear that the success of the "Office Visit Conspiracy" was wholly independent from the success of the "Street Dealing Conspiracy. In jumping ahead to the third factor, the Government failed to prove there was any overlap in the participants involved in either conspiracy.[6] As such, it is difficult to imagine how one conspiracy was reliant on the other. That these two (2) conspiracies were distinct from one another is further supported by the fact that, according to Ms. Blanchard, her and her husband were able to seamlessly peel off into their own conspiracy without Dr. Battle, Ms. Green or Ms. Lopez noticing. *See* ROA.1513-1514. Moreover, once Mr. and Ms. Blanchard peeled off into their own conspiracy, there was no evidence at trial demonstrating that the profits/success of the "Office Visit Conspiracy" were adversely affected; further confirming the success of these conspiracies were independent from one another. *Cf. Elam*, 678 F.2d at 1246-47

[6] As discussed, in light of the improperly admitted out-of-court statement from Mr. Blanchard, the Government failed to prove that Dr. Battle was part of the "Street Dealing Conspiracy" and "Office Visit Conspiracy". Further, Ms. Blanchard testified that Ms. Green and Ms. Lopez were not involved in the "Street Dealing Conspiracy" which only comprised of her and her husband. *See* ROA.1501, 1611.

(holding there is ample evidence showing interrelationships among defendants and others, as well as joint activities and similar methods of operation to support jury's finding of a single conspiracy); *Cf. United States v. Perez*, 489 F.2d 51, 62 (5th Cir. 1973) (finding "…there was direct, positive testimony, if credited, from which the jury could find that each of the defendants, appellants here, were participants in one (1) overall conspiracy."); *Cf. United States v. Guerrero*, 1997 U.S. App. LEXIS 41892, at *17-18 (5th Cir. Oct. 22, 1997) (finding "…the Government has produced sufficient evidence for the jury to find beyond a reasonable doubt that the success of the conspiracy depended on the continued participation of the defendants. They operated in different roles in the conspiracy in order to accomplish the common goal: to maintain a steady supply of marijuana to sell at a profit.").

Regarding the third factor, as briefly touched upon, there was not an overlapping of participants in this case. On the one hand, as discussed, even if Dr. Battle conceded he was part of the "Office Visit Conspiracy" (which the Government failed to prove for the reasons examined), this conspiracy comprised of him, Ms. Green, and Ms. Lopez. ROA.1501-1502. Conversely, as discussed, given Mr. Blanchard's improperly admitted statement, the Government failed to prove Dr. Battle was part of the "Street Dealing Conspiracy", which solely comprised of Mr. and Ms. Blanchard. Given this lack of overlap, the Government failed to prove there was a single conspiracy, but rather presented evidence supporting there were two (2)

separate conspiracies. *Cf. Elam*, 678 F.2d at 1248-49 (observing the defendant was present at several meetings that related to all parts of the conspiracy, establishing a unified common goal and one (1) conspiracy); *United States v. Richerson*, 833 F.2d 1147, 1154 (5th Cir. 1987) (observing "[a] single conspiracy exists where a 'key man' is involved in and directs illegal activities, while various combinations of other participants exert individual efforts toward a common goal, and here, the defendant was that 'key man.'"); *United States v. Dawes*, 222 Fed. Appx. 399, 403 (5th Cir. 2007) (finding a conspiracy where there was a "key man" linking others involved in a conspiracy and directing illegal activities); *Morris*, 46 F.3d at 416 (finding the more interconnected the various relationships are, the more likely there is a single conspiracy).

Given there was a material variance between the Government's Superseding Indictment and the number of conspiracies it proved at trial, Dr. Battle must show his substantial rights were prejudiced to warrant reversal of his conviction. *Mitchell*, 484 F.3d at 769.

In this case, the prejudice to Dr. Battle is clear. Had the government pleaded two (2) separate conspiracies, he would have presented a severance argument pursuant to Fed. R. Crim. P. 14. However, given that the two (2) – very different – conspiracies were charged as one (1), Dr. Battle was prevented from properly and adequately defending himself. As an example, if the conspiracies were charged

separately, Dr. Battle would have asked for limiting instructions to minimize the jury bootstrapping the allegations of one conspiracy with the allegations in the other. Specifically, the district court could have – and should have – provided the jury with a limiting instruction not to consider evidence related to the "Street Dealing Conspiracy" when assessing whether the Government had proven the "Office Visit Conspiracy". Otherwise, the jury is allowed to – and undoubtedly did in this case – supplement a lack of evidence for one conspiracy with evidence that supported the other conspiracy.

For instance, if jurors did not believe that the "Office Visit Conspiracy" had been proven beyond a reasonable doubt, evidence regarding the "Street Dealing Conspiracy" (i.e., the exchange of cocaine) could have improperly persuaded the jurors to find Dr. Battle guilty, nonetheless. And of course, the inverse is true as well (i.e., insufficient evidence of the "Street Dealing Conspiracy" could have been supplemented with evidence of prescribing controlled substances for patients without examining them sufficiently under the "Office Visit Conspiracy"). *Cf. United States v. Guerra-Marez*, 928 F.2d 665, 672 (5th Cir. 1991) (holding there was no prejudicial variance because the trial judge's instructions safeguarded against the possibility of guilt transference from the variance in conspiracies).

Given the lack of limiting instructions in this case, *Cf. Guerra-Marez*, 928 F.2d at 672, as well as the highly prejudicial nature of drug-related evidence, which,

as this Court has observed, can cause a jury to feel a defendant should be punished regardless of his guilt to the charged offenses (i.e., "Office Visit Conspiracy"), *Sumlin*, 489 F.3d at 691, the material variance at Dr. Battles' trial undoubtedly adversely affected his substantial rights by portraying him in a grossly prejudicial light before the jury. *See United States v. Mize*, 814 F.3d 401, 412-13 (6th Cir. 2016) (finding prejudicial variance where evidence from a different conspiracy than alleged in the indictment was used to portray defendants in a grossly prejudicial light before the jury). This prejudice undoubtedly influenced the jury's verdict, not only for the conspiracy charges (i.e., 21 U.S.C. § 846), but also for the underlying substantive charges for the unlawful distribution of controlled substances (21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2)), given the jury was able to consider this inadmissible drug-related evidence encouraging them to punish Dr. Battle, regardless of whether he was guilty of these substantive crimes. *See Sumlin*, 489 F.3d at 691.[7]

Accordingly, there was a material variance between the conspiracy alleged in the Government's Superseding Indictment and its evidence presented at trial, and further, this variance prejudiced Dr. Battles' substantial rights. As such, Dr. Battles'

[7] As mentioned previously, this is especially true for drug-related evidence of cocaine given the highly unfavorable opinion the drug garners from the general public.

convictions under 21 U.S.C. § 846 and 21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2) should be reversed.

III. The District Court's Rigid and Unreasonable Time Limits Violated Dr. Battle's Constitutional Rights to Due Process and Equal Protection

Standard of Review

A trial judge has broad discretion in managing his docket to ensure the efficient use of a court's resources. *United States v. Colomb*, 419 F.3d 292, 299 (5th Cir. 2005). As such, while the Fifth Circuit has approved a district judge's use of time limits in civil cases, whether such time limits are permissible in criminal trials is more of an open question given such limits are at odds with a defendant's rights under the U.S. Constitution. *See United States v. Morrison*, 833 F.3d 491, 504-05 (5th Cir. 2016) (allowing the use of reasonable time limits with extreme caution where they do not unreasonably curtail a defendant's right to examine government witnesses and present an effective defense). Nonetheless, whether a civil or criminal case, this Court reviews a district court's management of its docket for abuse of discretion. *See Id*.; *see also United States v. Blackwell*, 459 F.3d 739, 752 (6th Cir. 2006) (holding allegations of the violation of a constitutional right are reviewed de novo and is not at odds with abuse-of-discretion standard because district courts do "not have the discretion to rest [their] evidentiary decisions on incorrect interpretations of the Constitution").

In reviewing claims of constitutional error, a court may reverse a defendant's conviction only if the error adversely affected the defendant's substantial rights. *See Del. v. Van Arsdall*, 475 U.S. 673, 681 (1986) (holding "…we have repeatedly reaffirmed the principle that an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt.").

Argument

In this case, the district court issued its time limitations prior to receiving the parties' exhibit and witness lists, and instead, solely considered its own commitments in crafting its restrictions. *See* ROA.800. As his basis for doing so, Judge Pittman referenced Section VII of the Court's Civil Justice Expense and Delay Reduction Plan. ROA.370-371. The limitations included: ten (10) minutes for *voir dire* for each party; ten (10) minutes for opening statements for each party; fifteen (15) minutes for closing arguments for each party; fifteen (15) hours for the Government's case-in-chief, including rebuttal; and ten (10) hours for the three (3) co-defendants to put on their case, including cross-examination. *Id*.

The body of law examining the constitutionality of time limitations in criminal trials has focused on a defendant's right to testify under the Fifth Amendment and a defendant's right to confront witnesses under the Sixth Amendment. *See Morrison*, 833 F.3d at 504-05 (collecting cases that discuss these constitutional challenges to

time limits); *see also United States v. Vest*, 116 F.3d 1179, 1187 (7th Cir. 1997) (discussing concerns with Confrontation Clause of Sixth Amendment where time limitation on cross-examination); *see Sims v. ANR Freight Sys.*, 77 F.3d 846, 849 (observing "…if the goal of expediency is given higher priority than the pursuit of justice, then the bench and the bar both will have failed in their duty to uphold the Constitution and the underlying principles upon which our profession is founded."); *see e.g.*, *United States v. Gray*, 105 F.3d 956 (5th Cir. 1997) (discussing concerns under Confrontation Clause of U.S. Constitution where time limits are imposed in criminal trials).

Despite these constitutional concerns, this Court, as well as others, *Vest,* 116 F.3d at 1187-89, have generally approved the use of time limits in criminal trials where they are reasonable and responsive to the unique circumstances in each criminal case. *United States v. Morrison*, 833 F.3d 491, 504 (5th Cir. 2016) (citing *United States v. Gray*, 105 F.3d 956, 963-65 (5th Cir. 997) (acknowledging "we have allowed time limits that do not unreasonably curtail a defendant's right to examine government witnesses and present an effective defense.")). The constitutional concerns, however, extend much further than this body of case law suggests.

The Supreme Court has clearly held that under the Due Process Clause of the Fifth Amendment, a defendant has a right to a fair trial. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-47 (2006). The Court has also recognized that a

defendant's right to effective assistance of counsel under the Sixth Amendment plays a critical role in ensuring a defendant receives a fair and just trial. *Id.*; *see also United States v. Russell*, 411 U.S. 423, 431-32 (1973) (emphasizing the importance of due process and suggesting an outrageous violation of such could bar the government from invoking judicial processes to obtain a conviction). A complete analysis of whether time limits are permissible, or reasonable, in criminal cases therefore requires an assessment of how such limits impact this right.

In this case, the district court's use of time limits was far from reasonable. Rather, these time limits were roundly unreasonable and violated Dr. Battle's right to a fair trial. To be sure, a survey of cases where this Court has approved the use of time limits in criminal trials reveals the limits imposed were carefully calculated and were made after the district court considered the prosecution's and defendant's cases-in-chief (i.e., witnesses and exhibits). For instance, in *Morrison*, the district court started trial by not imposing any time limits. 833 F.3d at 503. However, the district court grew increasingly dissatisfied at the pace of trial and halfway through the prosecution's case-in-chief it started to impose time limitations. *Id.* It did so by going through the witness lists and asking the parties how long their direct examination would take for each witness. *Id.* Afterwards, the district court imposed a time limit for direct examination based on the parties' estimates, giving the opposing side the same time for cross-examination. *Id.* On appeal, this Court left the

question of time limitations unanswered given counsel's failure to make an offer of proof sufficient to preserve the objection of limiting the defendant's own testimony. *Id.* at 505-06.

In another case, *Gray*, the district court informed the defendant and government immediately prior to opening statements that it would impose a time limitation of five (5) minutes on the prosecution's opening and three (3) minutes for each defendant's opening. *United States v. Gray*, 105 F.3d 956 (5th Cir. 1997). The district court also informed each party that its closing statements would be limited as well. *Id.* at *8-11 (later adding an additional three (3) minutes for each defendant after requesting additional time). On appeal, this Court held that the district court's time limits were reasonable given they reflected the complexities of the case. *Id.* ("[i]n the instant case, however, we note that the subject matter was not terribly complex; the only real issue facing the jury was whether the defendants had the requisite intent to defraud."); *but Cf. Sims v. ANR Freight System, Inc.*, 77 F.3d 846, 849 (5th Cir. 1996) (holding "[w]hen the manner of the presentation of information to a jury is judicially restricted to the extent that the information becomes incomprehensible then the essence of the trial itself has been destroyed."). There, though this Court found the district court's time limitations unreasonable, it ultimately did not remand the case for a new trial given the evidence was so overwhelming against the defendant that "there [] [was] no reasonable possibility

that the outcome would be different if the case were retried." [8] *Id.* at 849; *see also United States v. Vest*, 116 F.3d 1179, 1187 (7th Cir. 1997) (upholding time limit imposed by district court because "time limits were reasonably anchored to the defendant's own requests for time and to the amount of time the Government used on direct. The District Court's willingness to bend the time limits shows flexibility…").

Collectively, these cases demonstrate that, even in light of the grave constitutional concerns, time limits are permissible in criminal trials so long as they are reasonably calculated to reflect the intricacies involved in a criminal proceeding. In this case though, the district court's time limits fall short of this requirement. Specifically, unlike prior cases, the district court issued a blanket order limiting all aspects of Dr. Battles criminal trial. ROA.370-371 (limiting *voir dire*, opening and closing statements, and case-in-chiefs). This order was released to the parties on June 23, 2021. *Id*. Yet, the parties' exhibit, and witness lists were not submitted until the following day on June 24, 2021. *See* ROA.376-377, ROA.378-380, ROA.381-385, ROA.386-394, ROA.395-473, ROA.474-481, ROA.482-486. Clearly, the district court's order was not reasonably calculated and not responsive to reflect the unique

[8] In Dr. Battle's case, instead of overwhelming evidence, there is a dearth of evidence, including a lack of direct evidence, as previously discussed. *See* Def ['s] Reply at 22-24.

circumstances of Dr. Battle's case.[9] Indeed, while Judge Pittman considered his commitments while crafting his time limitations, he ignored the complexities present in Dr. Battle's case. ROA.800.

The Superseding Indictment alleged Dr. Battle conspired with two (2) co-conspirators to distribute controlled substances in violation of 21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2)), charged him with the substantive crime of the unlawful distribution of a controlled substance (21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2), and 18 U.S.C. § 2), acquiring a controlled substance through misrepresentation in violation of 21 U.S.C. § 843(a)(3), conspiracy to commit mail fraud in violation of 18 U.S.C. § 1349 (18 U.S.C. § 1341), the substantive crime of mail fraud (18 U.S.C. §§ 1341 and 2), and aggravated identity theft in violation of 18 U.S.C. §§ 1028A and 2. Given the extensive charges, spanned over roughly six (6) years (i.e., 2011 through April 2017), involving diverse actors in an alleged conspiracy, it is evident that this case was highly complex and required significant

[9] Judge Pittman's observations at the pre-trial conference confirm that while took inventory of his commitments and schedule in crafting his time limitations, he failed to consider the case at hand and how long it would take for Dr. Battle to receive a fair trial that accords with his Due Process under the U.S. Constitution. *See* ROA.800 (Judge Pittman stating: "Okay. I have, perhaps, some bad news, but it's news we're going to have to live with, and, Mr. Weybrecht, you may have to make a Hobson's choice. But after much deliberation and discussion and trying to balance my schedule, the Court's schedule with other matters that I have going, including a vacation and a big injunction hearing involving the Biden administration in the State of Texas, I've come to the conclusion that this matter needs to be tried in 25 hours. And I intend to give the Government 15 hours to put on its case, and I intend to give the defendants 10 hours. And I know, Mr. Weybrecht, you're thinking there's no way possible that I can put on my case in 25 hours. Let me roll this out. I would highly, highly consider a request by the Government to settle -- to settle -- I've had my mother-in-law in town for a week.").

factual development. *See* ROA.58-62 (Government's motion to declare this case complex); ROA.78-96; *Cf. United States v. Gray*, 105 F.3d 956 (5th Cir. 1997) (upholding a time limit where the subject matter was not terribly complex and the only issue facing the jury was whether defendants had requisite intent to defraud). Indeed, the impact on Dr. Battle's trial counsel's effectiveness was clearly evident. *See* ROA.941 (trial counsel lamenting to the jury "I don't have much time, so I want to get straight to some of the things that I think the evidence is going to show you… This is a complex case…"); *see* ROA.800 (acknowledging the unreasonable and overly rigid time limitations presents counsel with a "Hobson's choice"). Clearly, Dr. Battle's right to a fair trial was violated by the district court's unreasonable time limitations. *See Gonzalez-Lopez*, 548 U.S. at 145-47; *see also Russell*, 411 U.S. at 431-32. Further, given the absence of a fair trial, Dr. Battle's substantial rights were adversely affected in that he was unable to appropriately defend himself, thereby undermining the essence of a trial itself: to get to the truth. *See Sims*, 77 F.3d at 849 (holding "[w]hen the manner of the presentation of information to a jury is judicially restricted to the extent that the information becomes incomprehensible then the essence of the trial itself has been destroyed.").

In light of the significant prejudice described above, not only should the jury's verdict finding Dr. Battle guilty of 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1), (b)(1)(E), and (b)(2), and 18 U.S.C. § 2 be reversed, but his guilty plea for conspiracy

to commit mail fraud in violation of 18 U.S.C. § 1349 should be reversed as well. ROA.3879-3889. This is because Dr. Battle made a tactical decision to plead guilty to conspiracy to commit mail fraud given the limited and unfair trial he was awarded. *See United States v. Guerrero*, 546 F.3d 328, 335 (5th Cir. 2008) (holding for plea agreements to be enforceable they must be entered into knowingly and voluntarily). Had Dr. Battle been awarded a fair trial that afforded him due process and appropriately uncovered the truth, *Sims*, 77 F.3d at 849, he would have had more faith in the jury rendering a fair verdict and not have pleaded guilty. As a result, his plea agreement was entered into unknowingly and involuntarily and is therefore invalid. *See United States v. Collins*, 972 F.2d 1385, 1396 (5th Cir. 1992) (acknowledging that a violation of due process may bar the government from invoking the judicial process to obtain a conviction).

In this case, however, the analysis should not stop here. In imposing its time limitations for Dr. Battle's criminal trial, the district court cited to Section VII of the Court's Civil Justice Expense and Delay Reduction Plan. ROA.370-371. In doing so, the district court took a practice wherein courts responsibly calculated reasonable time limitations in criminal trials, and instead, used a statute that Congress intended to apply to civil cases to impose unreasonable time limitations on Dr. Battle, thereby violating his right to a fair trial. *See Gonzalez-Lopez*, 548 U.S. at 145-47; *see also Russell*, 411 U.S. at 431-32. The use of this statute in criminal cases, however,

unfairly discriminates against defendants in heavily populated districts where there is a greater volume of cases and/or other commitments, thereby violating the Equal Protections Clause of the Fifth Amendment.[10] *See Sims*, 77 F.3d at 849 (recognizing the necessity for speed within the judicial system but yielding to constitutional concerns). Congress likely realized this when it passed Section VII of the Court's Civil Justice Expense and Delay Reduction Plan, which ostensibly, is only supposed to apply to civil cases – look no further than the title of the Plan.

When confronted with an Equal Protections issue, one (1) of three (3) methods of review are used: 1) strict scrutiny, 2) intermediate scrutiny, or 3) rational basis scrutiny. *See Craig v. Boren*, 429 U.S. 190 (1976). The Supreme Court has confirmed that fundamental rights, which include the deprivation of life, liberty, or property, are subject to strict scrutiny and must be treated with the utmost respect. *See Obergefell v. Hodges*, 576 U.S. 644, 663-66 (2015) (holding "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution."). Under strict scrutiny, a law must have been passed to further a compelling governmental interest, and further, the law must have been narrowly tailored to achieve the compelling interest. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003) (holding "[t]his [strict scrutiny] means that such classifications are

[10] This is because it is defendants who are situated in populated districts where their constitutional right to a fair trial will be sacrificed due to a court's full docket.

constitutional only if they are narrowly tailored to further compelling governmental interests.").

In this case, given Dr. Battle is a criminal defendant and he was deprived of his right to liberty, the Court should analyze his Equal Protections claim under strict scrutiny. *See Obergefell*, 576 U.S. at 663-66. As this Court has acknowledged, there is a compelling interest in providing district courts with wide latitude in managing their dockets. *See Morrison*, 833 F.3d at 504-05. This is, at least in part, why this Court reviews a district court's decisions in managing its docket for abuse of discretion. *Id.* However, it seems relevant that by advancing this interest and allowing district judges to impose unreasonable time limitations under Section VII of the Court's Civil Justice Expense and Delay Reduction Plan, it cuts against one of the most significant tenets of the judicial system: the perception of fairness. *See BP Exploration & Prod. v. Claimant ID 100246928*, 920 F.3d 209 (2019), 210 (recognizing the importance of promoting the perception of a fair and just judicial system). Indeed, the Rules of Professional Conduct that govern the legal profession call for a judge to avoid all impropriety and/or the appearance of impropriety.[11]

Most importantly, the district court's use of Section VII of the Court's Civil Justice Expense and Delay Reduction Plan is not narrowly tailored to achieve its

[11] Code of Conduct for United States Judges, Canon 2A (March 12, 2019), https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

compelling interest of managing its docket. First, this statute can be further narrowed to only apply to civil cases – as Congress intended – thereby not adversely affecting criminal defendants and violating their constitutional rights. *See* 28 U.S.C. § 471 ("The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and in-expensive resolutions of civil disputes."). Further, this Court, as well as many others, already permit time limitations in criminal cases where they are reasonable. *See Morrison*, 833 F.3d at 504-05 (collecting cases that discuss these constitutional challenges to time limits); *see also Vest*, 116 F.3d at 1187. Extending this practice under the Civil Justice Expense and Delay Reduction Plan to permit unreasonable time limitations that do not carefully consider the unique circumstances in a criminal case broadens a practice that is already narrowly tailored and appropriately balances a court's need for expediency with the rights afforded to a criminal defendant under the U.S. Constitution. And most importantly, as evidenced above, the use of the Plan to impose unreasonable time limits can – as it has in this case – adversely affect a criminal defendant's substantial rights.

Accordingly, Dr. Battle's substantial rights were adversely affected and his convictions under 21 U.S.C. § 846 and 21 U.S.C. §§ 841(a)(1), (b)(1)(E), and (b)(2) should be reversed given the district court's unreasonable time limitations which violated his constitutional rights to Due Process and Equal Protection.

CONCLUSION

For the foregoing reasons, Dr. Battle respectfully requests the Court adopt the appropriate remedies discussed throughout.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2022, I presented the foregoing paper to the Clerk of the Court for filing and uploading to the ECF system, which will send notification of such filing to the attorneys of record listed herein.

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CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this brief complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

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