NO. 23-13478-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

JONATHAN DAVID GRENON,
Appellant.

On Appeal from the United States District Court
for the Southern District of Florida

INITIAL BRIEF OF THE APPELLANT

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THIS CASE IS ENTITLED TO PREFERENCE
(CRIMINAL APPEAL)

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Jonathan Grenon
Case No. 23-13478-G

Appellant files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Altonaga, Hon. Cecilia M., United States District Judge

Becerra, Hon. Jacqueline, United States Magistrate Judge

Caruso, Michael, Former Federal Public Defender

Damian, Hon. Melissa, United States Magistrate Judge

Della Fera, Richard Francis, Attorney

Donnelly, Paul Joseph, Attorney

Dopico, Hector, Interim Federal Public Defender

Fleischer Louis, Hon. Lauren, United States Magistrate Judge

Grenon, Jonathan David, Defendant/Appellant

Grenon, Jordan Paul, Co-Defendant

Grenon, Mark Scott, Co-Defendant

Grenon, Joseph Timothy, Co-Defendant

Gonzalez, Juan A., Former United States Attorney

Homer, Michael B. Assistant United States Attorney

Kay, Ashley Devon, Assistant Federal Public Defender

Lapointe, Markenzy, United States Attorney

Lopez, Bernardo, Assistant Federal Public Defender

Matzkin, Daniel, Assistant United States Attorney

McAliley, Hon. Chris M., United States Magistrate Judge

Otazo-Reyes, Hon. Alicia, United States Magistrate Judge

Padilla, Joaquin E., Assistant Federal Public Defender

Shipley, John Charlton Jr., Assistant United States Attorney

Torres, Hon. Edwin G., United States Magistrate Judge

United States of America, Plaintiff/Appellee

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STATEMENT REGARDING ORAL ARGUMENT

This appeal raises several issues of first impression in this Circuit including application of the Religious Freedom Restoration Act to a pro se litigant and application of a recent Supreme Court decision reversing decades of precedent removing deference to agency interpretation of federal law. Accordingly, appellant respectfully submits that oral argument is necessary to the just resolution of this appeal and will significantly enhance the decision making process.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction of this case pursuant to 18 U.S.C. § 3231 because the defendant was charged with an offense against the laws of the United States. The court of appeals has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give the courts of appeals jurisdiction over all final decisions and sentences of the district courts of the United States. The appeal was timely filed on October 13, 2023, from the final judgment and commitment order entered on October 6, 2023, that disposes of all claims between the parties to this cause. On the docket, the pro se notice of appeal was stamped filed on October 19, 2023 and entered on October 20, 2023, and thus the notice is clearly timely. But Mr. Grenon, a pro se prisoner, declared, under penalty of perjury, that he placed the notice of appeal in the jail's mail facility on October 13, 2023. DE 222. Under the mailbox rule, the notice of appeal is thus deemed to be filed on October 13, 2023. *See Adams v. United States*, 173 F.3d 1339, 1341(11th Cir. 1999).

STATEMENT OF THE ISSUES

I. Whether the district court erred as a matter of law by failing to apply the Religious Freedom Restoration Act to determine whether the government's actions in prosecuting Mr. Jonathan Grenon substantially burdened Mr. Grenon's religious exercise under the First Amendment?

II. Whether the District Court erred as a matter of law when it allowed Mr. Jonathan Grenon to represent himself in a federal criminal trial that resulted in a substantial sentence of 151 months where Mr. Grenon initially proceeded pro se but later expressly requested appointment of counsel and where key factors weighed heavily against allowing Mr. Grenon to represent himself at trial?

III. Whether the district court violated Mr. Grenon's statutory and constitutional rights to a speedy trial where Mr. Grenon's trial began more than two years after being

indicted and nearly three years after making his initial appearance?

IV. Whether the district court violated Article III of the U.S. Constitution and the Administrative Procedure Act by improperly deferring to the legal definitions and decisions of an administrative agency, the FDA, to form the basis for Mr. Grenon's convictions?

V. Whether Mr. Grenon's contempt convictions were based on unlawful court orders where the federal court impermissibly relied on the F.D.A.'s definition of key terms and where the federal court violated Mr. Grenon's Seventh Amendment right to a jury by adjudicating the civil matter against Mr. Grenon without a jury?

VI. Whether the district court imposed a procedurally unreasonable sentence when it failed to resolve the objections raised pro se by Mr. Jonathan Grenon at sentencing challenging whether the government had met its burden of proving the amount of loss and the number of victims involved in the offense and attributable to Mr.

Johnathan Grenon, and where the government failed to provide specific and reliable evidence to support the sentencing enhancements?

STATEMENT OF THE CASE

The appellant, Mr. Jonathan Grenon, was the defendant in the district court and will be referred to by name. The appellee, United States of America, will be referred to as the government. The record will be noted by reference to the volume number, document number, and page number of the Record on Appeal as prescribed by the rules of this Court.

The Appellant, Mr. Jonathan Grenon, is currently incarcerated serving a 151-month term of imprisonment.

COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

A federal grand jury in the Southern District of Florida charged Mr. Jonathan Grenon, along with his father and brothers, in a three-count indictment with one count of conspiracy to defraud and to commit offenses against the United States in violation of 18 U.S.C. § 371 (count one); one count of criminal contempt in violation of 18 U.S.C. § 401(3) for violating a temporary restraining order (count two); and one count of criminal contempt in violation of 18 U.S.C. § 401(3) for violating a preliminary injunction (count three). DE 16. Mr. Grenon and his co-defendants proceeded pro se and were convicted following a jury trial.

The district court sentenced Mr. Jonathan Grenon to a 151-month term of imprisonment. DE 219.

STATEMENT OF FACTS

Mr. Jonathan Grenon is a thirty-eight year-old native of Worcester, Massachusetts. Presentence Report (PSR) at ¶ 126. Mr. Grenon is a first-time offender who has never had any run-ins with the law. PSR ¶¶ 119-123. In fact, Mr. Grenon has never even had a traffic ticket. PSR ¶ 124.

Mr. Jonathan Grenon is one of eight siblings born to Mark Scott Grenon and Barbara Marie Grenon. PSR ¶¶ 126, 127. His father, Mark Scott Grenon, and two of his brothers, Jordan Paul Grenon and Joseph Timothy Grenon, are co-defendants in the instant case. DE16.

Mark Grenon and another individual, Jim Humble, who was not charged here, began the Genesis II Church of Health and Healing (Genesis Church) in 2010. 298 at 103, 106. The Church distributed a product it called Miracle Mineral Solution (MMS) which was discovered by Humble. *Id.* The FDA deemed MMS to be a drug under its regulation based on its own agency definitions. The FDA brought a civil action in federal court to prohibit the defendants and Genesis Church from distributing MMS. *See United States v. Genesis II Church of Healing et*

al., 20-cv-21601-KMW (S.D. Fla. 2020). The FDA deemed that the defendants were in violation of the court orders issued in that civil case and brought criminal charges against the defendants. Mr. Jonathan Grenon and his brother Jordan Grenon were arrested in the United States in September 2020. Father, Mark Grenon and brother, Joseph Grenon, were arrested in Colombia.

On April 22, 2021, a federal grand jury in the Southern District of Florida charged Mr. Jonathan Grenon, along with his father and brothers, in a three-count indictment with one count of conspiracy to defraud and to commit offenses against the United States in violation of 18 U.S.C. § 371 (count one); one count of criminal contempt in violation of 18 U.S.C. § 401(3) for violating a temporary restraining order (count two); and one count of criminal contempt in violation of 18 U.S.C. § 401(3) for violating a preliminary injunction (count three). DE 16. Mr. Jonathan Grenon and his brother Jordan initially elected to proceed pro se. The trial against the two was delayed while Mark and Joseph were extradited from Colombia in July of 2022.

The federal trial against Mr. Grenon and his co-defendants, his father Mark, and his two brothers Jordan Paul and Joseph Timothy,

began on July 17, 2023. DE 298. Mr. Grenon and his co-defendants proceeded pro se. During jury selection, Mr. Grenon and his co-defendants remained silent and failed to actively participate in the selection of the jury members. *Id.* at 8-59. After the prosecutor made the opening statement for the government, Mr. Grenon and his co-defendants failed to make an opening statement. *Id.* at 77.

Following the opening statement by the government, the district court addressed the jury. The district court sua sponte gave the jury the following instruction:

> Ladies and gentlemen, the First Amendment to the United States Constitution establishes certain rights which benefit everyone. A person has a right to believe any religion or no religion and express any point of view, but the First Amendment is not a defense is not a defense to the crimes charged in the indictment.

DE 298 at 78.

The government only called two witnesses. FDA agent Jose Rivera testified on behalf of the government. *Id.* at 81. Agent Rivera testified that Miracle Mineral Solution (MMS) was a mixture of sodium chloride and acid activator, which form chlorine dioxide. *Id.* at 82. Agent Rivera then testified that chlorine dioxide is an industrial bleach use for bleaching wood and textiles and in industrial water treatment. *Id.* at 83.

He also testified that the FDA had not approved MMS or chlorine dioxide for any use. *Id.* Agent Rivera testified that the FDA had issued a letter warning the public warning that "Miracle treatment turns into potent bleach" and warning consumers "not to drink a product sold on the internet as a medical treatment." *Id.* at 84.

Agent Rivera testified that he went on the Genesis Church website and that the website sold MMS and included claims that MMS "could cure 95 percent of the world's diseases to include cancer, Alzheimer's, autism, multiple sclerosis." *Id.* at 85-86. Agent Rivera identified Mr. Jonathan Grenon and his co-defendants as the individuals who ran the Genesis Church website based on content from the website. *Id.*

Agent Rivera testified that he conducted an undercover purchase of MMS. DE 298 at 110. After receiving the MMS, agent Rivera testified that he emailed back and forth with Jordan Grenon, telling Jordan Grenon that his wife was using the MMS to treat cancer. Id. at 127-130.

Agent Rivera then testified that a review of the Genesis Church emails revealed tens of thousands of orders and shipments of MMS, totaling over $1 million. *Id.* at 134. The emails also revealed complaints

from customers, including complaints of sickness and hospitalization. *Id.* at 135, 137-151.

Agent Rivera also testified that a district judge in the Southern District of Florida issued a temporary restraining order and a preliminary injunction against the defendants. *Id.* at 152-157. The agent testified that, in response to the orders, Mark Grenon sent a twenty-three-page letter to the Court rejecting the orders. Id. at 159-160, Gov't Ex. #55. The government also introduced another letter dated April 21, 2020 and signed by all four defendants complaining about the orders issued by the district court in the civil case. *Id.* at 161-162, Gov't Ex. 56.

The agent testified that the defendants defied the injunctive orders by failing to remove the information on the Genesis Church website, touting MMS as a cure-all, and by continuing to distribute MMS. Id. at 166. Agent Rivera ordered some MMS and he received a shipment that included MMS and the activator. The shipment was sent free of charge from Jonathan Grenon's residence in Bradenton, Florida. *Id.* at 171.

Based on the receipt of the free shipment of MMC, the government arrested Mr. Jonathan Grenon and the other defendants. *Id.* at 173-174. The government arrested Mr. Jonathan Grenon in his residence and the

government searched the residence the same day as the arrest. *Id.* at 174-175. The search revealed substantial amounts of MMS and $40,000 in cash. It should be noted that throughout the entire testimony of Agent Rivera and the admission of all of the government's evidence, Mr. Jonathan Grenon, who had no legal training, and the other defendants remained silent and failed to make any evidentiary objections. As a result, the district court allowed all of the testimony and evidence to come in. There was also no cross-examination of Agent Rivera. *Id.* at 189-190.

Dr. Arthur Simone testified for the government. DE 299 at 5. Dr. Simone testified that he is the Senior Medical Advisor in the Office of Unapproved Drugs and Lifelong Compliance at the Food and Drug Administration. *Id.* The court accepted the government's tender of Dr. Simone as "an expert in the application of the FDCA as it relates to the distribution of potential new drugs and the misbranding of drugs." *Id.* at 11-12.

Dr. Simone testified that MMS met the FDA definition of a drug based on the claims made that MMS was intended to treat, cure, prevent or mitigate several diseases including cancer, Ebola, autism, COVID-19 and Alzheimer's. *Id.* at 17-19. Dr. Simone testified that MMS was not

safe and effective for its labeled uses and was thus a "new drug." *Id.* at 25.

Dr. Simone testified that if someone has a product that is deemed a new drug, they have to get FDA approval to do anything with that drug. *Id.* at 25-26. Dr. Simone testified as followed regarding MMS:

> [MMS] is an unapproved new drug for any of the intended uses that were mentioned previously. It is an unapproved new drug for any clinical use whatsoever. And because it's not a drug that is being studied in one of those clinical trials, it's not something that would be permitted to be shipped across state lines for research purposes even.

Id. at 29-30.

Following the testimony of Dr. Simone, the government rested its case. *Id.* at 38. The Court then asked the defendants if they had any motions. *Id.* at 38-39. There was no response. The Court then asked each defendant if he wished to testify. Again, there was no response. *Id.* at 39. The Court then asked the defendants if they had any witnesses. Again, there was no response.

As with the rest of the trial proceedings, the defendants were not involved in the wording of the instructions to the jury. The government requested that the Court repeat its statement regarding the First Amendment given at the start of trial as an instruction to the jury. DE

299 at 42-43. As requested by the Government, the district court repeated the instruction it gave the jury at the start of the trial regarding the First Amendment and expressly stating the First Amendment was "not a defense to the crimes charged." *Id*. at 62.

At the very start of its closing argument, the government stressed the instruction given by the Court, and requested by the government, that "there is no First Amendment defense for the kind of criminal activity charged in this indictment." *Id*. at 66. As with the rest of the trial, the defendants did not respond when the court asked if they wanted to make a closing argument. Id. at 85. Following deliberations, the jury found the Defendants guilty of all the charges. *Id*. at 88.

The presentence report (PSR) prepared by the probation office calculated the Sentencing Guidelines for the offense as an offense level of 34 and a criminal history category of I yields an advisory sentencing range of 151-188 months.

At the sentencing hearing, Mr. Jonathan Grenon represented himself. DE 267. Mr. Jonathan Grenon made several objections at the sentencing hearing. Specifically, Mr. Grenon argued that the government failed to meet its burden of proof with regard to the amount

of loss and the number of victims. DE 267 at 7-8. Nevertheless, the district court never addressed those objections and sentenced Mr. Grenon to a 151-month term of imprisonment at the low end of the advisory sentencing range as calculated in the PSR. *Id*. at 16-17. That term consisted of a 60-month term of imprisonment as to Count 1 and concurrent 91-month terms as to counts 2 and 3, to be served consecutive to the 60 months on count 1. *Id*. at 17.

STANDARDS OF REVIEW

This Court generally reviews a district court's failure to dismiss an indictment for abuse of discretion. *United States v. Farias*, 836 F.3d 1315, 1323 (11th Cir. 2016). Whether the government's actions in prosecuting a defendant comports with the Religious Freedom Restoration Act is a pure question of law reviewed *de novo*. *United States v. Grady*, 18 F.4th 1275, 1285 (11th Cir. 2021).

Whether a criminal defendant's waiver of his Sixth Amendment right to counsel was knowing and voluntary is a mixed question of law and fact that this Court reviews *de novo*. *United States v Hakim*, 30 F.4th 1310, 1318 (11th Cir. 2022). Whether a defendant's statutory and Constitutional right to speedy trial is violated is a mixed question of law

and fact. Legal conclusions are reviewed de novo and factual findings are reviewed for clear error. *United States v. Vargas*, 97 F.4th 1277, 1286 (11th Cir. 2024).

An error raised for the first time on appeal is reviewed for plain error. *United States v. Quinones*, 97 F.3d 473, 475 (11th Cir. 1996); *United States v. Wiggins*, 131 F.3d 1440, 1441-1442 (11th Cir. 1997). Under the plain error doctrine, "there must be error, the error must be plain, and the error must affect substantial rights." *United States v. Knowles*, 66 F.3d 1146, 1157 (11th Cir. 1995) (citing *United States v. Olano*, 507 U.S. 725, 732-36, 113 S. Ct. 1770 (1993)). "If these three prongs are met, [the court of appeals has] the discretion to correct the error, and [it] should do so if that error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Vazquez*, 53 F.3d 1216, 1221 (11th Cir. 1995) (quoting *Olano*, 507 U.S. at 736, 113 S. Ct. at 1779). It is enough that the error be plain at the time of appeal. *Dell v. United States*, 710 F.3d 1267, 1276 (11th Cir. 2013)

In reviewing a criminal sentence, this Court will first review whether the district court properly applied the Sentencing Guidelines, then whether the sentence is reasonable in the context of the factors

outlined in 18 U.S.C. § 3553(a). *United States v. Williams*, 435 F.3d 1350, 1353 (11th Cir. 2006). This Court reviews the reasonableness of a sentence under an abuse of discretion standard based on a totality of the circumstances. *See Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 596-597 (2007).

SUMMARY OF THE ARGUMENTS

ONE. The Religious Freedom Restoration Act (RFRA) requires a district court to go through a specific analysis to determine whether the given prosecution unduly burdens the defendant's right to freely exercise his religious beliefs. Mr. Grenon's pro se motion to dismiss the charges against him because the prosecution violated his right to religious freedom placed the district court on notice that it needed to follow the analysis required by the RFRA. The court failed to perform that analysis. Instead, the court did the exact opposite and instructed the jury that Mr. Grenon's right to religious freedom was not a defense to the charges. That requires reversal of the convictions.

TWO. Mr. Grenon initially proceeded pro se in the prosecution against him. However, he later requested that counsel be appointed to represent him at trial. That fails to provide the requisite clear and

unequivocal intent to proceed pro se. In addition, Mr. Grenon's lack of legal education, lack of experience with the justice system, lack of knowledge of criminal law and procedure, lack of time consulting with an attorney and just the substantial consequences he faced, all weighed heavily against a finding that his waiver of a Sixth Amendment right to counsel was knowing.

THREE. Mr. Grenon's trial began more than two years after being indicted and nearly three years after making his initial appearance in federal court. That violated both his statutory and constitutional rights to a speedy trial. Although the speedy trial statute allows for a reasonable stay of the statute while a co-defendant is being extradited, the two-year plus delay was not reasonable. The length of the delay also triggers a presumption of prejudice under the Sixth Amendment and all the factors support a reversal of the convictions based on the speedy trial violations.

FOUR. The Supreme Court recently overturned decades of precedent and held that a federal court violates Article III of the U.S. Constitution by deferring to an agencies interpretation and definition of federal law. Here, Mr. Grenon's convictions were based on the FDA's definition of

what constitutes a drug. In prosecuting Mr. Grenon and instructing the jury, the district court improperly deferred to the agency's definition in violation of Article III.

FIVE. Mr. Grenon, proceeding pro se at sentencing, argued that the government had failed to meet its burden of proving loss amount and number of victims, which substantially enhanced his sentencing range under the Sentencing Guidelines. That objection required the district court to resolve those disputes. The court failed to resolve the disputes. Also, the record shows that the government failed to present specific and reliable evidence to support those enhancements. As such, the sentence imposed by the district court was unreasonable and must be reversed.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The district court erred as a matter of law by failing to apply the Religious Freedom Restoration Act to determine whether the government's actions in prosecuting Mr. Jonathan Grenon substantially burdened Mr. Grenon's religious exercise under the First Amendment.

At the start of the prosecution against him, Mr. Grenon filed a motion to dismiss the prosecution against him because the prosecution violated his freedom to freely exercise his religious beliefs under the First Amendment. The district court summarily dismissed the motion. At the start of the criminal trial against Mr. Grenon, the district court *sua sponte* instructed the jury that Mr. Jonathan Grenon's religious beliefs were irrelevant and provided no defense against the charges. Pursuant to a request from the Government, the district court repeated that instruction to the jury as part of the legal instructions to the jury prior to jury deliberation. In addition, the Government focused on that instruction in its closing argument, hammering home the point that Mr.

Jonathan Grenon's religious beliefs were irrelevant and provided no defense against the charges.

The Religious Freedom Restoration Act (RFRA) provides that the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000nn-1(a). "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). The RFRA contains an exception to the broad ban which provides that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000nn-1(b).

The RFRA may provide a defense against criminal prosecution. *United States v. Grady*, 18 F.4th 1275, 1285 (11th Cir. 2021). Based on the language of RFRA, this Court has established a two-step analysis for a district court to determine whether a criminal prosecution constitutes a violation of RFRA. *Id.* First, the accused has to show that he was

exercising, or seeking to exercise, a sincerely held religious belief, and that the government substantially burdened his religious exercise by prosecuting him. *See id.* The burden then shifts to the government to demonstrate that it has a compelling interest in the prosecuting the accused and that criminal prosecution is the least-restrictive means of furthering that interest. *See id.*

Here, the district court failed to engage in the requisite analysis. At his initial appearance in the MDFL, Mr. Grenon argued that the prosecution violated his First Amendment right to religious freedom. *See United States v. Grenon,* 8:20-mj-01657-AAS, DE 19 at 22 (M.D.FL July 9, 2020). On April 22, 2021, a federal grand jury in the Southern District of Florida filed a three-count indictment against Mr. Jonathan Grenon and his co-defendants. DE 16. On April 26, 2021, the same he was arraigned on the indictment, Mr. Jonathan Grenon and his co-defendant filed a pro se motion to dismiss the charges against them. DE 20. The motion was a short and simple four-page motion that contained twelve separately numbered declarations in support of their motion to dismiss the charges against them. The declaration numbered 8 included declarations by the defendants that "Our Religious freedoms have been

violated," and "Our Freedom of speech violated." DE 20. Some of the other declarations in the motion are more typically associated with what might be called a sovereign-citizen defense.

Just two days later, on April 28, 2021, the district court summarily denied the motion without any analysis or reasoning and without a hearing or even requesting a response by the government. DE 24. In addition, the order denying motion contained the following directive:

> In addition, given the bizarre contents of the Motion, the Government is directed to file, by no later than May 3, 2021, notice indicating whether it will be seeking psychiatric or psychological examinations, pursuant to 18 U.S.C. section 4247(b) and (c), of Defendants, Jonathan David Grenon and Jordan Paul Grenon, and the scheduling of competency hearing of these Defendants under 18 U.S.C. section 4241(a).

DE 24.

On May 5, 2023, the government filed a motion in limine. DE 155. As part of that motion, the government asked the court to prevent the Defendants from "presenting argument or evidence to the jury that is irrelevant to the charges against them or based upon legally insufficient defenses." DE 155. In part, the government requested, "[s]pecifically, the government seeks to exclude: (1) argument or evidence in furtherance of a defense under the Free Exercise Clause of the First Amendment of

the U.S. Constitution; (2) argument or evidence in furtherance of a defense under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq*." *Id.* With regard to the RFRA, the government argued that the Defendants' religious believes were not sincerely held. *Id.* at 10-14. However, the government relied solely on statements made by Mark Grenon and cited no statements made by Mr. Jonathan Grenon. The Government also argued that its prosecution of the defendants, which eventually deprived Mr. Grenon of his liberty for 155 months, was the least restrictive means of furthering a compelling government interest. *Id.* at 14-16. The Court again failed to conduct the requisite RFRA analysis.

On June 12, 2023, the district court granted the government's motion in part and denied it in part. DE 165. With regard to the First Amendment issue, the district court denied the government's motion because the government sought a blanket prohibition and failed to specify what evidence it sought to keep out. *Id.* at 12. With regard to the RFRA, the court only granted the request that any claim regarding the RFRA was purely a legal claim to be decided by the Court and not the jury. *Id.* at 4-6. As part of its ruling, the district court stated that

"Defendants have not sought to raise a defense under RFRA, whether by filing a motion to dismiss the Indictment under Federal Rule of Criminal Procedure 12(b) or otherwise." *Id.* at 5. The district court never mentioned the April 26, 2021 pro se motion, in which Mr. Jonathan Grenon and his co-defendants moved to dismiss the charges against them. DE 20.

The federal trial against Mr. Jonathan Grenon and his co-defendants, his father Mark, and his two brothers Jordan Paul and Joseph Timothy, began on July 17, 2023. DE 298. Mr. Grenon and his co-defendants proceeded pro se.

Following the opening statement by the government, the district court addressed the jury. The district court *sua sponte*, gave the jury the following instruction:

> Ladies and gentlemen, the First Amendment to the United States Constitution establishes certain rights which benefit everyone. A person has a right to believe any religion or no religion and express any point of view, but the First Amendment is not a defense is not a defense to the crimes charged in the indictment.

DE 298 at 78. Following the conclusion of the government's case, the government requested that the district court include in its jury instructions, the instruction the court gave at the start of the trial

regarding the First Amendment. As requested by the Government, the district court repeated the instruction it gave the jury at the start of the trial regarding the First Amendment, again stressing that "the First Amendment is not a defense to the crimes charged." DE 299 at 62.

At the very start of its closing argument, the government stressed the instruction given by the Court, and requested by the government, that "there is no First Amendment defense for the kind of criminal activity charged in this indictment." *Id.* at 66.

The well-established law in this Circuit is that pleadings by pro se criminal defendants, especially those who are imprisoned, are to be liberally construed by the court. *See Tattenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998); *Fernandez v. United States*, 941 F.2d 1488, 1491 (11th Cir. 1991). In fact, "Federal courts have long recognized that they have an obligation to look behind the label of a motion filed by a *pro se* inmate and determine whether the motion is, in effect, cognizable under a different remedial statutory framework." *United States v. Jordan*, 915 F.2d 622, 624-625 (11th Cir. 1990) (citing *Andrews v. United States*, 373 U.S. 334 (1963)).

Here, Mr. Jonathan Grenon proceeded pro se and he was ordered detained. While imprisoned and immediately after the indictment was filed against him, Mr. Jonathan Grenon filed a pro se motion to dismiss the charges against him. DE 20. The motion clearly and unequivocally argued that his "Religious freedoms have been violated," and that his "Freedom of speech [has been] violated." DE 20. As an imprisoned pro se criminal defendant, the district court should have liberally construed that filing to include a claim that his prosecution was barred by the RFRA. *See Tattenbaum*, 148 F.3d at 1263; *Fernandez*, 941 F.2d at 1491; *Jordan*, 915 F.2d at 624-625. The district court was at that point required to engage in the analysis required by the RFRA to determine if the prosecution against Mr. Grenon was barred by the RFRA. *See Grady*, 18 F.4th at 1285. Instead, however, the district court merely summarily denied the motion. DE 24.

Liberally construed, Mr. Grenon's pro se motion is sufficient to meet the initial prong required by the RFRA, since he is claiming the exercise of a sincerely held religious belief that is being substantially burdened by the government through its criminal prosecution. *See Grady*, 18 F.4th at 1285; *see also Davila v. Gladden*, 777 F.3d 1198, 1204 (11th Cir. 2015).

The government should have been required to prove that it has a compelling interest and that prosecuting Mr. Grenon in federal court and imprisoning him for 151 months is the least-restrictive means of furthering that interest. *See id.* "The least-restrictive means standard is exceptionally demanding, and it requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party. If a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Grady*, 18 F.4th at 1285 (quoting *Holt v. Hobbs*, 574 U.S. 352, 364-65 (2015)).

The Court had another chance to remedy its mistake when the government filed its motion in limine bring the RFRA and its requirements to the Court's attention. But, the court erroneously ruled that Mr. Grenon had not raised a religious freedom defense, when in fact, a liberal reading of his pro se motion to dismiss the charges against him raised such a claim. Finally, the Court compounded its error by *sua sponte* instructing the jury at the start of trial that the First Amendment and religious freedom did not provide a defense for Mr. Grenon. That

error was further compounded when the Court gave that same erroneous instruction in its final instruction to the jury.

The district court's actions in failing to follow to the strict requirements of RFRA deprived Mr. Grenon of his ability to proclaim adherence to sincerely held religious beliefs as a defense to his actions. The district court further erred by erroneously instructing the jury that Mr. Grenon's adherence to his sincerely held religious beliefs were not a defense. Those errors require a complete reversal of his convictions.

II. The District Court erred as a matter of law when it allowed Mr. Jonathan Grenon to represent himself in a federal criminal trial that resulted in a substantial sentence of 151 months where Mr. Grenon initially proceeded pro se but later expressly requested appointment of counsel and where key factors weighed heavily against allowing Mr. Grenon to represent himself at trial.

Mr. Jonathan Grenon proceeded *pro se* in the district court despite the fact that the district court questioned Mr. Grenon's competence and

that Mr. Grenon subsequently expressly requested that counsel be appointed to represent him. There was no clear and unequivocal desire to proceed *pro se*. Even if Mr. Grenon's actions can be seen as the equivalent of such a request, the court was still tasked with ensuring that the request to represent himself, which also meant that he was waiving his Sixth Amendment right to counsel, was made with sufficient knowledge. Here, Mr. Jonathan Grenon, a first-time offender with no legal experience, no formal legal training, no demonstrable knowledge of legal rules or procedure, and facing complex and serious charges, which resulted in a substantial federal sentence, should not have been allowed to be deprived of his Sixth Amendment right to counsel and proceed *pro se* in the district court.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. "The Sixth Amendment secures to a defendant who faces incarceration the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar,* 541 U.S. 77, 87 (2004); *accord United States v Hakim*, 30 F.4th 1310, 1321 (11th Cir. 2022). However, the Sixth Amendment also implicitly provides a criminal defendant with the right

to represent himself at trial. *Faretta v. California*, 422 U.S. 806, 817-819 (1975). "Because the constitutional rights to counsel and to self-representation cannot be exercised at once, a defendant can exercise one only if he waives the other." *Hakim*, 30 F.4th at 1322.

"Because self-representation necessarily entails the waiver of the sixth amendment right to counsel, a trial court can commit reversible constitutional error by either improperly granting a request to proceed pro se – and thereby depriving the individual of his right to counsel – or by denying a proper assertion of the right to represent oneself, and thereby violating *Faretta*." *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990). In recognition of the thin line that a district court must traverse . . . this Court has required an individual to clearly and unequivocally assert the desire to represent himself." *Id.*; *Fitzpatrick v. Wainwright*, 800 F.2d 1057, 1064 (11th Cir. 1989). The waiver of the right to counsel must be knowing, intelligent, and voluntary. *United States v. Owen,* 963 F.3d 1040, 1048 (11th Cir. 2020) (citing *United States v. Fant*, 890 F.2d 408, 409 (11th Cir. 1989)). The government bears the burden of proving the validity of the waiver of the right to counsel. *Id.* This Court has held that an uncooperative defendant's actions may be

seen as the equivalent of a clear and unequivocal request to represent himself at trial when he rejects the only counsel he is entitled to have. *See United States v Garey,* 540 F.3d 1253, 1264-65 (11th Cir. 2008) (en banc). But, that limited doctrine does not apply here.

Here, Mr. Jonathan Grenon initially proceeded pro se. On April 26, 2021, Mr. Jonathan Grenon and his co-defendant filed a pro se motion to dismiss the charges against him. DE 20. On April 28, 2021, the district court summarily denied the motion. DE 24. In addition, the order called the filing bizarre, questioned Mr. Grenon's competency to stand trial, and ordered the government to initiate a competency procedure. *Id*. Yet, two days after that the Court set a hearing to possibly allow Mr. Grenon to represent himself. DE 21. The Court appointed the Federal Public Defender as stand-by counsel. DE 29. On May 3, 2021, the district court held a hearing and allowed Mr. Grenon to proceed pro se. DE 32, 34. In the order, the district court noted that it found that Mr. Grenon "does not have the skill or training to represent himself," and yet court concluded that the request was "knowing and voluntary." DE 34.

Mr. Grenon proceeded pro se for over a year through a long delay while co-defendants were extradited from Colombia. On August 17, 2022,

Mr. Grenon filed a motion with the district court requesting that counsel be appointed to represent him. DE 91. On August 24, 2022, the district court denied the motion for appointment counsel and required Mr. Grenon to retain counsel or continue pro se. DE 103. The competency evaluation regarding Mr. Grenon was finally filed on October 18, 2022. DE 126.

On July 17, 2023, the jury trial against Mr. Grenon began. DE 181. Mr. Grenon proceeded pro se. He took no action in the selection. He did not make an opening statement. He did not object to any the admission of any evidence or testimony. He did not cross-examine witnesses. He did not make any motions following the government's case-in-chief. He did not put on any evidence. He did not take any action with regard to the formulation of the jury instructions. The jury found Mr. Grenon guilty of all charges against him.

Mr. Grenon's actions cannot be seen as a clear and unambiguous request to proceed pro se. The Court allowed Mr. Grenon to proceed pro se while at the same time questioning his competency. After proceeding pro se for over a year, he expressly requested the appointment of counsel. DE 91. The court rejected his request because Mr. Grenon chose to stand

mute as to his finances. DE 103. But, that is an insufficient basis for that denial. Federal Rules do not require a statement by the defendant. Rather the rule clearly states that a "defendant who is unable to obtain counsel is entitled to have counsel appointed." Fed. R. Crim. P. 44. Here, Mr. Grenon had been imprisoned for over a year. In addition, the government had investigated Mr. Grenon's assets as part of the offense. The evidence before the Court clearly showed that Mr. Grenon was unable to retain counsel and thus entitled to have counsel appointed. At the very least, Mr. Grenon's motion for appointment of counsel makes clear that there was no clear and unequivocal intent to represent himself at trial. As such, Mr. Grenon was deprived of his Sixth Amendment right to counsel and his convictions must be vacated. *See Hakim*, 30 F.4th at 1322.

Even if this Court finds a clear and unambiguous desire to represent himself, there remains a question of whether the "expressed desire to represent himself was made with the requisite knowledge." *Hakim*, 30 F.4th at 1322. To that end, this Court looks to eight general factors to determine whether an unambiguous expression of self-

representation also constitute a knowing and voluntary waiver of the right to counsel:

> (1)the defendant's age, educational background, and physical and mental health; (2) the extent of the defendant's contact with lawyers prior to trial; (3) the defendant's knowledge of the nature of the charges, possible defenses, and penalties; (4) the defendant's understanding of rules and procedure, evidence, and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether standby counsel was appointed, and the extent to which that counsel aided the defendant; (7) mistreatment or coercion of the defendant; and (8) whether the defendant was trying to manipulate the events of the trial.

Hakim, 30 F.4th at 1322 (quoting *Owen*, 963 F.3d at 1049).

First, the district court's order itself finds that Mr. Grenon lacks the "skill or training to represent himself." DE 34. Such a finding prevents a holding that any request to proceed pro se, and the waiver of the right to counsel, is knowing. In addition, looking at the eight factors required by this Court to ensure a knowing and voluntary waiver, it is clear that the district court erred when she allowed Mr. Johnathan Grenon to proceed pro se during the trial that resulted in a conviction and a 151-month term of imprisonment for a first time offender.

Age, Education and Health. There was nothing before the district court to even suggest that Mr. Grenon's education would have

prepared him to represent himself in a criminal trial in federal court that resulted in a substantial sentence of 151 months' imprisonment. That substantial lack of education weighs against a finding that Mr. Grenon's waiver of his Sixth Amendment right to counsel was knowing and voluntary.

Contact with Lawyer. Mr. Grenon initially wished to proceed pro se. As such, Mr. Grenon had very little to no contact with a lawyer prior to trial even after he requested appointed counsel. This factor also weighs against a finding that Mr. Grenon's waiver of his Sixth Amendment right to counsel was knowing and voluntary.

Knowledge of Charges, Penalties and Possible Defenses. The district court informed Mr. Grenon of the nature of the charges against him and the possible penalties he was facing. But the record is completely devoid of anything that would even suggest that Mr. Grenon was aware of any possible defenses against those charges. In fact, the filings made by Mr. Grenon and the possible defenses raised were, as the district court described, nonsensical. In addition, the court itself questioned Mr. Grenon competency to stand trial for most of the time he was allowed to proceed pro se. This factor also weighs heavily against a

finding that Mr. Grenon's waiver of his Sixth Amendment right to counsel was knowing and voluntary.

Rules of Procedure, Evidence and Courtroom Decorum. Although Mr. Grenon behaved and acted in a very respectful manner at trial, there is nothing in the record to demonstrate that he had any knowledge of the Federal Rules of Procedure or Evidence.

Experience with Criminal Trials. Mr. Jonathan Grenon was a first-time offender who had absolutely no prior contact with the criminal justice system let alone any experience with criminal trials. He had never even had to contest a traffic ticket. This factor also weighs very heavily against a finding that Mr. Grenon's waiver of his Sixth Amendment right to counsel was knowing and voluntary.

Standby Counsel. The district court appointed standby counsel for Mr. Grenon. Appointed standby counsel did not assist Mr. Grenon with the preparation of the case or during trial and sentencing.

Mistreatment or Coercion. There was no evidence that Mr. Grenon was mistreated or forced into waiving counsel. Mr. Grenon's father and two brothers also proceeded pro se at trial and sentencing.

While that may have played a part in Mr. Grenon's decision, there is nothing in the record showing that he was coerced into waiving counsel.

Manipulation of trail. There is nothing in the record to suggest that Mr. Grenon was attempting to manipulate the events in the trial. In fact, Mr. Grenon objected to the lengthy delays in going to trial and requested appointment of counsel a year before trial started.

The district court should have found that any waiver of the Sixth Amendment right to counsel was not knowing and voluntary. Mr. Grenon lacked any knowledge and experience with the law, the criminal justice system, and criminal trials. He was a first-time offender with no specific training or education in the law. Given the fact that the trial resulted in Mr. Grenon's imprisonment for over twelve years, the district court should have not allowed Mr. Grenon to proceed pro se. Because Mr. Grenon was improperly denied his sixth amendment right to counsel, his convictions must be vacated.

III. The district court violated Mr. Grenon's statutory and constitutional rights to a speedy trial where Mr. Grenon's trial began more than two years

after being indicted and nearly three years after making his initial appearance.

Mr. Jonathan Grenon was arrested on the underlying offense on September 3, 2020 and he made his initial appearance on September 4, 2020. DE 9. A federal grand jury filed a three-count indictment against Mr. Grenon on April 22, 2021, DE 16, and he was arraigned on that indictment on April 26, 2021, DE 17. Yet, the trial against Mr. Grenon did not start until July 17, 2023. DE 181. The complete jury trial, including jury selection, government's case, jury instruction, deliberation, and verdict, lasted less than two day. That delay of more than two years violated Mr. Grenon's right to a speedy trial and requires reversal of his convictions.

The Sixth Amendment to the United States Constitution guarantees an accused the right to a speedy trial. U.S. Const., amend. VI. In federal prosecutions, speedy trial rights are also governed by the Speedy Trial Act of 1974. See 18 U.S.C. §§ 3161, *et seq*. Specifically, the Act requires that an indictment "shall be filed within thirty days from the date on which the individual was arrested." 18 U.S.C. § 3161(b). Again, Mr. Jonathan Grenon was arrested on September 3, 2020 and he

made his initial appearance on September 4, 2020. DE 9. A federal grand jury filed a three-count indictment against Mr. Grenon on April 22, 2021, DE 16. The Speedy Trial Act also requires a trial to commence within seventy days of the filing of the indictment. 18 U.S.C. § 3161(c)(1). Here, Mr. Grenon's trial commenced more than two years after the filing of the indictment against Mr. Grenon.

The delay was largely attributed to the fact that two co-defendants were arrested in Colombia and the government was seeking their extradition to the United States pursuant to a treaty with Colombia. In fact, the Speedy Trail Act expressly provides that the time for filing an indictment or commencing a trial excludes "a reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted." 18 U.S.C. § 3161(h)(6). This Court has long upheld the validity of that provision noting "the utility of multi-defendant trials to effectuate the prompt efficient disposition of criminal justice." *United States v. Varella*, 692 F.2d 1352, 1359 (11th Cir. 1982). The Court accepted the reasoning that the Speedy Trail Act should not force the government to prosecute defendants separately for fear of a speedy trial dismissal. *See id.*

But that staying provision is not unlimited. Even as far back a Varella, this Court noted that, the rule was aimed at "multiple defendant cases, such as major narcotics conspiracies." *Varella*, 692 F.2d at 1359. That makes sense since it is in those difficult and likely lengthy trials that judicial resources would be most at risk by duplicating efforts in multiple trials. There is also the likelihood that sensitive evidence, such as testimony from those within the drug conspiracies, might be compromised if the individual was required to testify at multiple trials. Here, there were no such concerns. The trial lasted less than two days from jury selection to verdict and the government only called two witnesses. Very little additional judicial resources would have been exhausted if the Court held one trial for the two co-defendants arrested in the United States and then another trial for the two co-defendants arrested in Colombia.

In addition, the express language of the statute only excludes "a reasonable period of delay." 18 U.S.C. § 3161(h)(6). In *Varella*, for example, a four-month delay was seen as reasonable and thus excludable under the Act. *Varella*, 692 F.2d at 1359. In contrast, the delay here exceeded two years. Given that the trial here lasted less than two days

and the government only called two government employee witnesses, the balance between judicial resources and Mr. Grenon's rights under the Speedy Trial Act weighs heavily in favor of finding that the two-year delay was not reasonable.

Joseph Grenon was extradited and made his initial appearance on December 23, 2021. DE 47. Mark Grenon was extradited and made his initial appearance on July 28, 2022. DE 75. Thus, any stays based on § 3161(h)(6) should ended on July 28, 2022. Mr. Grenon continually objected to the extensions of trial dates and on August 22, 2022, he filed a motion to dismiss based on a failure to provide a speedy trial almost a year before the start of his trial. DE 105. On September 19, 2022, the district court summarily denied the motion. DE 117. The competency evaluation regarding Mr. Grenon was finally filed on October 18, 2022. DE 126. Even assuming that the extradition of co-defendants and the competency evaluation properly stayed the speedy time, there was nothing left to allow the trial to be delayed until July of 2023. The Speedy Trial Act was clearly violated.

In addition to a violation of the Speedy Trail Act, the two-year delay in bringing Mr. Grenon to trial violated his Sixth Amendment right

to a speedy trial. This Court has adopted the four-part test set out by the Supreme Court to determine whether a constitutional speedy trial violation has occurred: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant. *Barker v. Wingo*, 407 U.S. 514, 530 ( ); see also *Varella*, 692 F.2d at 1359 (applying *Barker* analysis). Delays longer than year are presumed to be prejudicial.

Here, there was a two-year delay triggering a presumption of prejudice. As noted above, to the extent the delay was based on the extradition of two co-defendant, the length of the delay exceeded a reasonable period of time. In addition, both defendants were extradited and made first appearances more than a year before the start of trial. Thus, the presumption of prejudice still applies. Mr. Grenon promptly asserted his right to a speedy trial. Under a review of all four Barker factors, Mr. Grenon's Sixth Amendment right to a speedy trial was violated and his convictions must be vacated and reversed.

IV. The district court violated Article III of the U.S. Constitution and the Administrative Procedures Act by improperly deferring to the legal

definitions and decisions of an administrative agency, the FDA, to form the basis for Mr. Grenon's convictions.

The Federal Judiciary is assigned the responsibility of adjudicating cases and controversies. U.S. Const. Art. III. With regard to actions arising out of actions overseen by a federal administrative agency, federal law, the Administrative Procedures Act, provides that "[t]o the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706. Recently, the Supreme Court overruled decades-long precedent Chevron. *See Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2273 (June 28, 2024). In doing so, the Supreme Court made clear that it was error for a federal court to defer to a legal interpretation or decision of an administrative agency, and that the court must make those legal decisions independent of agency interpretation. *Id.*

Here, Mr. Grenon's convictions are based on legal decisions and determinations and decisions made by the FDA. The district court

deferred to those legal decisions and determinations. Because that deference violated the Court's duty under Article III and the APA, his convictions must be vacated and reversed.

Count one charged Mr. Grenon and his co-defendants with conspiracy to defraud and commit offenses against the United States in violation of 18 U.S.C. § 371. DE 16. As instructed by the Court, the Count charged conspiracy to commit three separate objects. "Count 1 charges that the Defendants conspired to defraud the United States, and also conspired to commit two substantive federal crimes: Distributing an unapproved new drug and distributing a misbranded drug." DE 299 at 52. The Court explained that the government only had to prove one object of the conspiracy, but that the jury "must all agree about which objects the Defendants conspired to commit." *Id*. The jury found Mr. Grenon guilty as to each object of the conspiracy.

With regard to the first object of the conspiracy, defrauding the United States, the court instructed the jury as follows:

> To "defraud" the FDA, for purposes of this charge, means to interfere with any of the FDA's lawful functions by deceit, craft or trickery, even if the FDA does not suffer a loss of money or property. The FDA had broad authority to regulate drugs in the United States in order to protect the health and safety of consumers. This broad authority includes the lawful

> functions to: Regulate an interstate distribution of drugs and their components; ensure that drugs are safe and effective for their intended uses; prevent the unlawful sale and distribution of drugs not approved for sale and distribution in the United States; ensure that drugs are manufactured only in duly registered facilities.

DE 299 at 52-53. With regard to the second object, that the defendants conspired to distribute an unapproved new drug, the Court instructed the jury, in part, as follows:

> The Government alleges that Miracle Mineral Solution was a "new drug," as that term is defined later in these instructions, and that the FDA had not approved Miracle Mineral Solution for introduction or delivery into interstate commerce. Defendants can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt: One, that the Defendants caused a new drug to be introduced or delivered into introduction into interstate commerce; Two, the new drug was, at the time, an unapproved new drug as defined below; and Three, that the Defendants acted with intent to defraud or mislead.

Id. at 53-54. The Court then defined the terms "drug" and "new drug." *Id*. at 54-56. And then the Court instructed the jury that "an 'unapproved new drug' is a drug for which FDA has no approved a New Drug Application, Abbreviated New Drug Application or Investigational New Drug Application." *Id*. at 56.

With regard to the third object of distributing a misbranded drug, the court instructed the jury that "the Defendants can be found guilty of

this crime only if all the following facts are proved beyond a reasonable doubt: One, that Defendants caused a drug to be introduced or delivered for introduction into interstate commerce; two, that the drug was misbranded; and three, that the defendants acted with the intent to defraud or mislead. DE 299 at 58. The Court further instructed the jury that a drug could be misbranded either if "its labelling lacks adequate directions for use" or if it is "manufactured, prepared, propagated, compounded or processed in an establishment not duly registered under the FDCA." *Id.* at 58-59.

Here, "new drug" as used in this case was a definition passed by Congress. 21 U.S.C. § 321(p). However, the FDA defined what is meant by "intended uses." 21 C.F.R. § 201.128. That is crucial because the crux of the prosecution against Mr. Grenon was that he and his co-defendants distributed MMS for a specific "intended use." That is what made their actions a federal crime. The federal statute defined drug to include "articles intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in man or other animals." 21 U.S.C. § 321(g)(1)(B). But it was the definition of "intended use," as defined by the FDA, that allowed for a wide enough net to capture Mr. Grenon's actions.

This definition permeated the entire prosecution against Mr. Grenon. As to the first object of the conspiracy, the reason that Mr. Grenon was seen as interfering with the FDA's lawful functions was because MMS was seen as a drug within the FDA's purview, and the reason MMS fell within the FDA's purview as a drug was because of the "intended use" of the MMS as described in the Genesis Church website and other literature. Similarly, object two, which focused on the distribution of a "new drug," was likewise dependent on the "intended use" of the MMS, which made it a drug. The fact that it was a drug then made it applicable as a new drug if it met certain criteria. § 321(p). As to the third object, again the "intended use" of the MMS is what made it a drug, which was required before Mr. Grenon could be convicted of conspiring to distribute a "misbranded drug." In addition, the "misbranding" part of the offense was dependent on whether there were adequate directions for use. The term "adequate directions for use" was also defined by the FDA. *See* 21 C.F.R. § 201.5.

The district court deferred completely to the definitions of key legal terms by the FDA. The lynch pin of conspiracy charged in count one is the definition of "intended uses." That is what converts MMS into a drug

to be regulated by the FDA and all three objects of the count one conspiracy are dependent on that definition. Pursuant to *Loper*, the conviction on count one is invalid.

Counts two and three are likewise dependent on that definition. The United States of America filed a civil action against Mr. Grenon and his co-defendants in federal court. *See United States v. Genesis II Church of Healing et al.*, 20-cv-21601-KMW (S.D. Fla. 2020). Counts two and three charge Mr. Grenon with willfully violating the orders resulting from that civil action. DE 16.

In its complaint, the federal government noted that the action was brought pursuant to the FDCA, 21 U.S.C. § 332(a). *Id.* at CvDE 1. Section 332(a) in turn provides the district court with jurisdiction "to restrain violations of section 331 of this act. 21 U.S.C. § 332(a). The government then alleged the following specific violations: "A. Violating 21 U.S.C. § 331(d), by introducing or delivering for introduction into interstate commerce unapproved new drugs; B. Violating 21 U.S.C. § 331(a) by introducing or delivering for introduction into interstate commerce drugs that are misbranded; C. Violating 21 U.S.C. § 331(k), by causing drugs to become misbranded within the meaning of 21 U.S.C. §

352(a) and (f)(1), while they are held for sale after shipment of one or more of their components in interstate commerce. *Id.* All of the charges in the civil action require the movement of "drugs" in interstate commerce. As noted above, what makes the MMS in the case a drug subject to regulation by the FDA is the "intended use"of the MMS. 21 U.S.C. § 321(g)(1)(B). And the legal meaning of "intended uses" is solely defined by the FDA. 21 C.F.R. § 201.128.

The default judgment against the defendants expressly relied on the definition of "intended uses" in 21 C.F.R. § 201.128 to meet the statutory of "drug" under 21 U.S.C. § 321(g)(1)(B). CvDE 76 at 6. That finding that MMS was a "drug" subject to regulation by the FDA then became the basis for the default judgment. *Id.* at 6-17. That, in turn became the basis for the temporary restraining order, CvDE 4, and the order of permanent injunction, CvDE 77.

All three counts of conviction are based on a definition of a federal statute that was defined by the FDA and the Court deferred completely to the agencies definition. *See* 21 U.S.C. § 321(g)(1)(B); 21 C.F.R. § 201.128. That violated Article III of the United States Constitution and

the APA. *See Loper*, 144 S. Ct. at 2273. Accordingly, Mr. Grenon's convictions must be vacated and reversed.

Although this error is reviewed for plain error, *Loper* makes clear that there is error that is plain and which affects Mr. Grenon's substantial right. *See United States v. Olano*, 507 U.S. 725, 732-36 (1993). In addition, the error seriously affects the fairness, integrity, and public reputation of judicial proceedings and requires reversal. *See Id.* at 736.

V. Mr. Grenon's contempt convictions are based on unlawful orders where the federal court impermissibly relied on the F.D.A.'s definition of key terms and where the federal court violated Mr. Grenon's Seventh Amendment right to a jury by adjudicating the civil matter against Mr. Grenon without a jury.

Mr. Jonathan Grenon was convicted on two counts of criminal contempt. DE 219. Specifically, Mr. Grenon was convicted of violating a temporary restraining order (count two) and a preliminary injunction (count three). *Id.* The district court sentenced Mr. Grenon to concurrent 91-month terms of imprisonment as to counts two and three. *Id.*

A court may punish by fine, imprisonment or both, a "disobedience or resistance" to its lawful order. 18 U.S.C. § 401(3). "A valid conviction for criminal contempt requires proof of all the following: (1) the court entered a lawful order of reasonable specificity; (2) the defendant violated that order; and (3) the defendant did so willfully." *United States v. Robinson*, 83 F.4th 868, 878 (11th Cir. 2023) (citing *United States v. Maynard*, 933 F.2d 918, 920 (11th Cir. 1991)).

Here, the temporary restraining order and preliminary injunction, which formed the basis for Mr. Grenon's convictions, were not lawfully entered order. Specifically, Mr. Grenon had a Seventh Amendment right to a jury trial to determine the civil complaint against him. Because the civil proceedings that resulted in the temporary restraining order and preliminary injunction violated Mr. Grenon's Seventh Amendment right to a jury trial, the orders resulting from those proceedings were not lawful.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S.

Const., amend. VII. The Seventh Amendment right to jury trial in civil cases "is not limited to the 'common-law forms of action recognized' when the Seventh Amendment was ratified." *S.E.C. v. Jarkesy*, 144 S. Ct. 2117, 2128 (June 27, 2024) (quoting *Curtis v. Loether*, 415 U.S. 189, 193 (1974)). "Actions by the Government to recover civil penalties under statutory provisions" are historically the type of actions "requiring trial by jury." *Id.* at 2129 (citing *Tull v. United States*, 481 U.S. 412, 418-419 (1987)). "A civil sanction that cannot fairly be said to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment." *Id.* (quoting *Austin v. United States*, 509 U.S. 602, 610 (1993)). Thus, an action seeking civil penalties that "are designed to punish and deter, not to compensate," implicates the Seventh Amendment right to trial by jury. *Id.*

Here, the United States of America filed a civil action against Mr. Grenon and his co-defendants in federal court. *See United States v. Genesis II Church of Healing et al.*, 20-cv-21601-KMW (S.D. Fla. 2020). In its complaint, the federal government sought the following relief: 1) injunctive relief against the defendants; 2) authorization for FDA to inspect the defendants' business and business records with the full cost

of those inspection to be paid by defendants; 3) payment by the defendants to all purchasers of their products; 4) retention of all documents related to the products in question; 5) order defendants to pay costs to the United States and any other equitable relief deemed proper. *Id*. at CvDE 1.

In its final order of permanent injunction, the district court first held that it had "jurisdiction over this action under 21 U.S.C. § 332(a) and 28 U.S.C. §§ 1331, 1337, and 1345." CvDE 77. Section 332(a) grants the district court jurisdiction to "restrain violations of section 331." 21 U.S.C. § 332(a). Section 1331 provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Section 1337 provides that "[t]he district courts shall have original jurisdiction of any civil action and proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C. § 1337(a). Finally, section 1345 gives the district court jurisdiction over all civil suits filed by the federal government. 28 U.S.C. § 1345.

In its final order, the district court enjoined the defendants from "labeling, holding, and/or distributing any drug." CvDE 77 at ¶¶ 7, 10. The court ordered the defendants to destroy all MMS products under the supervision and direction of the FDA. *Id*. at ¶ 8. The court ordered the defendants to hire an independent "auditor" at their expense who will determine whether any future actions by defendants fully comply with FDA regulations and to make detailed audit reports to the FDA. *Id*. at ¶ 9. The Court granted the FDA the authority to inspect the defendants' facilities and business records, *id*. at ¶¶ 13, 14, and ordered the defendants to "reimburse FDA for the costs of all FDA inspections, investigations, supervision, analyses, examinations, and reviews that FDA deems necessary to evaluate Defendants' compliance with any part of this Order." *Id*. at ¶ 15. The court also ordered that "Defendants shall pay equitable disgorgement to an escrow fund for the purpose of satisfying claims from all purchasers who purchased MMS from or through Defendants since January 1, 2010." *Id*. at ¶ 21. The court also ordered the defendants to reimburse the United States for attorneys' fees in any contempt action to enforce the order. *Id*. at ¶ 23.

The action filed by the federal government, the relief requested by the government, the jurisdiction invoked by the district court, and the relief granted by the district court all clearly demonstrate that the action sought punishment and deterrence against the defendants. As such, the action was one that clearly triggered the Seventh Amendment right to trial by jury. *See Jarkesy*, 144 S. Ct. at 2128-29; *see also Austin,* 509 U.S. at 610.

Mr. Grenon was not afforded a jury to decide the civil actions against him. As such, the civil judgments entered against him, which were the bases for his convictions on counts two and three, were structurally defective. *See Sullivan v. Louisiana*, 508 U.S. 275, 280-282 (1993).

As *Jarkesy* makes clear, there is error that is plain and which affects Mr. Grenon's substantial right. *See United States v. Olano*, 507 U.S. 725, 732-36 (1993). In addition, the error seriously affects the fairness, integrity, and public reputation of judicial proceedings and requires reversal. *Id*. at 736.

VI. The district court imposed a procedurally unreasonable sentence when it failed to resolve the objections raised pro se by Mr. Jonathan Grenon at sentencing challenging whether the government had met its burden of proving the amount of loss and the number of victims involved in the offense and attributable to Mr. Johnathan Grenon, and where the government failed to provide specific and reliable evidence to support the sentencing enhancements.

At sentencing, Mr. Grenon's sentencing range was enhanced based on a substantial, sixteen-level enhancement for the loss amount and three two-level enhancements for the number and types of victims. At the sentencing hearing, Mr. Grenon, proceeding *pro se*, objected to the amount of loss and the number and type of victims and argued that the government had failed to meet its burden of proof. The district court ignored Mr. Grenon's objections and imposed a sentence at the low end of the sentencing range as calculated in the PSR. Mr. Grenon again renewed his objections but to no avail. The district court's failure to

resolve the factual disputes raised by Mr. Grenon resulted in the imposition of a procedurally unreasonable sentence.

The Federal Rules of Criminal Procedure expressly require that "at sentencing, the court must- for any disputed portion of the presentence report or other controverted matter – rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will no consider the matter in sentencing." Fed. R. Crim. P. 32(i)(3)(B). "The Federal sentencing framework requires that district courts resolve factual disputes, calculate the guidelines range, consider the [18 U.S.C.] section 3553(a) factors, impose a reasonable sentence, and adequately explain the basis for the sentence imposed." *United States v. Steiger*, 99 F.4th 1316, 1324 (11th Cir. 2024). "The district court is required to resolve factual objections and legal issues and make 'explicit findings of fact and conclusions of law' to facilitate judicial review." *United States v. Christopher*, 923 F.2d 1545, 1556 (11th Cir. 1991) (quoting *United States v. Wise*, 881 F.2d 970, 973 (11th Cir. 1989)). Here, the district court failed to resolve the factual disputes and contested matters raised by Mr. Grenon at sentencing and

those contested matters were the basis for a substantial enhancement of Mr. Grenon's sentencing range and sentence.

The presentence report (PSR) prepared by the probation office calculated the Sentencing Guidelines for the offense as follows:

¶ 105	§ 2B1.1(a)(2) Base Offense Level	6
¶ 106	§ 2B1.1(c)(1)(I) Loss amount $1.5M < x < $3.5M	+16
¶ 107	§ 2B1.1(b)(2)(A)(i) ten or more victims	+ 2
¶ 108	§ 2B1.1(b)(9)(C) violation of court order	+2
¶ 109	§ 2B1.1(b)(10)(C) sophisticated means	+2
¶ 110	§ 2B1.1(b)(16) risk of death or serious injury	+2
¶ 111	§ 3A1.1(b)(1) vulnerable victim	+2
¶ 112	§ 3A1.1(b)(2) large number vulnerable victims	+2
¶ 118	Total Offense level	**34**

Mr. Jonathan Grenon was a first-time offender with zero criminal history points and a criminal history category of I. An offense level of 34 and a criminal history category of I yields an advisory sentencing range of 151-188 months.

At the sentencing hearing, Mr. Jonathan Grenon represented himself. DE 267. The government requested a sentence of 188 months, which was the top of the advisory sentencing range. *Id*. at 6.

Mr. Jonathan Grenon made several objections at the sentencing hearing. Specifically, Mr. Grenon argued that the government failed to meet its burden of proof with regard to the amount of loss and the number of victims. DE 267 at 7-8. Those factual objections called into question the 16-level enhancement for the amount of loss (¶ 106), the 2-level enhancement for ten or more victims (¶ 107), the 2-level enhancement for vulnerable victims (¶ 111), and the 2-level enhancement for large number of vulnerable victims (¶ 112). Absent those enhancements dealing with loss amount or number and kinds of victims, the final offense level would have been just and offense level of **12**. That in turn, would have resulted in an advisory sentencing range of just 10 to 16 months. Even the loss amount alone had the effect of enhancing the sentencing range from a range of 27-33 months (level 18) to 151-188 months (level 34). In addition to the objections as to loss amount and number of victims, the district court allowed Mr. Grenon to allocate and Mr. Grenon spoke at length about his religious faith and his family. *Id*. at 8-14.

Despite Mr. Grenon's clear objection to the sentencing calculations, specifically to the loss amount and number of victims, the district court treated it as if Mr. Grenon had not raised any objections:

> THE COURT: So you did not object to the pretrial, the PSI, the Presentence Investigation Report. That report places you at an offense level 34 under our advisory guidelines, that recommended sentence is a sentence of 151 to 188 months' imprisonment.

Id. at 15. In response, Mr. Grenon again renewed his objections. *Id*. at 16. The district court again ignored and never addressed those objections, much less resolve the objections. The court sentenced Mr. Grenon to a 151-month term of imprisonment at the low end of the advisory sentencing range as calculated in the PSR. *Id*. at 16-17.

It should be noted that the sentencing was held on Friday, October 6, 2023. DE 267. At the sentencing hearing, the government requested that the Court inquire as to whether Mr. Grenon had an opportunity to review the presentence report. *Id*. at 15. The Court inquired of the probation office as to when and how Mr. Grenon had been provided a copy of the presentence report. The probation officer replied that a copy of the presentence report was placed in a sealed envelope and with Mr. Grenon's name and "dropped off in the legal mailbox of the lobby" of the

Federal Detention Center on "Monday morning." *Id.* Even assuming that Mr. Grenon received the presentence report on the same day, Monday, which would have given him less than five days to review the presentence report. The Court never inquired of Mr. Grenon when he received the presentence report. The Federal rules require a presentence report to be disclosed to the defendant "at least 35 days before sentencing." Fed. R. Crim. P. 32(e)(2). A defendant then has 14 days within which to file written objections. Fed. R. Crim. P. 32(f)(1). Because Mr. Grenon, a pro se inmate, was not given adequate time to review the presentence report and file written objections, Mr. Grenon's *ore tenus* objections at sentencing were his earliest opportunity to note his objections and the district court erred in failing to address his objections and resolve the factual dispute.

The district court's failure to resolve the factual disputes was not harmless. The government bears the burden of proving by a preponderance of evidence the amount of loss attributable to a defendant. *United States v. Cavallo*, 790 F.3d 1202, 1232 (11th Cir. 2015). "The preponderance of the evidence standard is not toothless . . . [and] the district court must ensure that the Government carries its burden by

presenting reliable and specific evidence." *United States v. Almedina*, 686 F.3d 1312, 1315 (11th Cir. 2012). The sentencing Court cannot speculate about the amount of loss and the government must present reliable and specific evidence to support the amount of loss. *United States v. Barrington*, 648 F.3d 1178, 1197 (11th Cir. 2011).

Here, the government did not present any evidence on the amount o floss at sentencing or prior to sentencing. The Presentence report merely noted that Mr. Grenon was liable for a loss amount of $1,594,566.25. PSR ¶ 106. That same amount was attributable to all the defendants and the only source cited in the presentence report was the case agent. PSR ¶¶ 94, 99. That amount of loss barely meets the $1.5 million threshold required to support a 16-level enhancement. U.S.S.G. § 2B1.1(b)(1).

At trial, there was no specific evidence regarding the amount of loss. The closest that the government came to presenting some evidence of loss amount came during the testimony of Agent Rivera. DE 298 at 134. Specifically, Agent Rivera testified that there had "approximately" been "tens of thousands" of orders for MMS, and that the defendants made "approximately over 1 million" in total amount of money from selling

MMS "and its related products." *Id.* The government failed to introduce any hard evidence to substantiate the agent's guesstimate. The evidence presented at trial fails to meet the requisite standard of reliable and specific evidence needed to support a sentencing enhancement based on loss amount. Even if that evidence were somehow seen as sufficient, there is a difference in the enhancement based on loss that is over $1 million and an enhancement based on loss exceeding $1.5 million. Assuming the agent meant 1 million dollars, a loss of over $1 million supports a 14-level enhancement while a loss over $1.5 million supports a 16-level enhancement. A loss of just over $1 million, with no other changes, would leave the advisory sentencing range at 121-151 months. A sentence at the low end of that range would be almost three years less than what the district court imposed.

There is the added problem that in a jointly undertaken criminal activity, a district court cannot simply attribute something like loss amount to all the defendants. Again, Mr. Grenon was convicted of being part of a conspiracy.

Sentences for individuals convicted of a jointly undertaken criminal activity require a special determination as to the individual's scope of

liability. In order "to determine a defendant's liability for the acts of others, the district court **must first make individualized findings concerning the scope of criminal activity undertaken by a particular defendant**." *United States v. Ismond*, 993 F.2d 1498, 1499 (11th Cir. 1993) (emphasis added) (citing U.S.S.G. § 1B1.1.3, comment. (n.2)). "Only after the district court makes individualized findings concerning the scope of criminal activity the defendant undertook is the court to determine reasonable foreseeability." *United States v. Hunter*, 323 F.3d 1314, 1319 (11th Cir. 2003).

The Sentencing Commission has made clear that in a jointly undertaken criminal activity, a defendant may only be held liable for:

> all acts and omissions of others that were –
>
> (i) within the scope of the jointly undertaken criminal activity,
>
> (ii) in furtherance of that criminal activity, and
>
> (iii) reasonably foreseeable in connection with that criminal activity.

U.S.S.G. § 1B1.3(a)(1)(B) (Nov. 1, 2015). The Sentencing Commission noted that the clarifying amendment was necessary to make clear the

analysis the district court was required to go through before making a defendant responsible for the actions of others:

> The amendment makes clarifying revisions to § 1B1.3. It restructures the guideline and its commentary to set out more clearly the three-step analysis the court applies in determining whether a defendant is accountable for the conduct of others in a jointly undertaken criminal activity under § 1B1.13(a)(1)(B). The three-step analysis requires that the court (1) identify the scope of the jointly undertaken criminal activity; (2) determine whether the conduct of others in the jointly undertaken activity was in furtherance of that criminal activity; and (3) determine whether he conduct of others was reasonably foreseeable in connection with that criminal activity.

U.S.S.G. § 1B1.3(a)(1)(B) (Nov. 1, 2015), Reason for Amendment.

Here, that means that in determining loss amount for Mr. Jonathan Grenon, and the corresponding sentence enhancement, the district needed to determine the entire loss amount based on specific and reliable evidence, and then determine how much of that loss amount was attributable to Mr. Jonathan Grenon by applying the rubric under § 1B1.3.

Thus, the district court's failure to resolve the factual disputes raised by Mr. Grenon at sentencing was not harmless. That failure resulted in a procedurally unreasonable sentence. In addition, the government failed to meet its burden to provide reliable and specific

evidence to support the sentencing enhancements. That requires vacating the judgment of the district court and remanding the case for resentencing.

CONCLUSION

Based on the foregoing, this Court must vacate the judgment of the district court and remand the matter to the district court.

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation and typeface requirements of Fed. R. App. P. 32(a)(7)(B), because it contains 12,747 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook.

/s/ Bernardo Lopez
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CERTIFICATE OF SERVICE

I HEREBY certify that on this 26th day of August, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and sent four copies to the Clerk of the Court via third party commercial carrier for delivery within three days. I also certify that the foregoing document is being served this day via CM/ECF on Daniel Matzkin, Assistant United States Attorney, 99 N.E. 4th Street, Miami, Florida 33132.

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