No. 23-_____

In the Supreme Court of the United States

DR. ROGER DALE ANDERSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Ruan v. United States*, 142 S. Ct. 2370 (2022), this Court held that a physician may be convicted under 21 U.S.C. § 841(a)(1), of the Controlled Substances Act ("CSA"), only if the government proves that the physician "knew or intended that his or her conduct was unauthorized." *Id.* at 2382. Following remand, *United States v. Xiulu Ruan*, 56 F.4th 1291, 1300-02 (11th Cir. 2023) was decided before Petitioner's appeal, where the Sixth Circuit held that the jury instructions were sufficient despite lack of reference to the CSA's "authorization" requirement. *See*, Petitioner's Appendix ("App.") at 1a-34a. The Sixth Circuit's opinion is in conflict with this Court's opinion in *Ruan*, as well as the Tenth Circuit's opinion in *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023). A spit between circuits has formed which will continue to grow.

The question presented, on which the circuits are divided, is whether a CSA jury instruction may omit the statute's "except as authorized" requirement contrary to the express wording of the CSA, 21 U.S.C. § 801 et seq., reinforced by *Ruan*.

LIST OF PROCEEDINGS

United States v. Anderson, No. 2:19-cr-00067-ALM-1,
United States Southern District of Ohio

Verdict: March 5, 2023

Judgment: January 14, 2021.

United States v. Anderson, No. 21-3073,
United States Court of Appeals for the Sixth Circuit.

Judgment entered on April 17, 2023.

Rehearing denied: June 6, 2023.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

SIXTH CIRCUIT OPINION

S.D. OHIO ORDERS, VERDICT, JUDGMENT

SIXTH CIRCUIT REHEARING ORDER

TABLE OF CONTENTS – Continued

Page

OTHER DOCUMENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

STATUTES

REGULATIONS

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 67 F.4th 755. *See*, Petitioner's Appendix ("App."), App.1a. The order of the Sixth Circuit denying rehearing is not reported. App.62a.

JURISDICTION

The Sixth Circuit's judgment was entered on April 17, 2023. App.1a. The court denied rehearing on June 6, 2023. App.62a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1), CSA 841(a)(1)
Unlawful acts A

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

21 U.S.C. § 846
Attempt and conspiracy

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 C.F.R. § 1306.04(a)
Purpose of issue of prescription

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.

STATEMENT OF THE CASE

Petitioner filed his opening brief before the Sixth Circuit on November 8, 2021. The government then filed their responsive brief on February 9, 2022, before Petitioner filed his reply brief on March 2, 2022. Because Petitioner challenged the 21 U.S.C. § 841 jury instructions given at his trial, the Sixth Circuit suspended review of the briefings pending the Supreme Court's decision in *Ruan v. United States*, 142 S. Ct. 2370 (2022). *See*, Doc. 40.

After *Ruan* was decided, the Sixth Circuit affirmed Petitioner's unlawful prescribing convictions under § 841, finding that, taken as a whole, the jury instructions given at his trial "substantially covered" the *mens rea* requirement set forth by this Court in *Ruan*. *See*, App.12a-18a. Yet, those jury instructions replaced

the CSA's "without authorization" requirement with the "ambiguous," *Ruan*, 142 S. Ct. at 2377, language of 21 C.F.R. § 1306.04(a), *see*, App.12a-13a. The Sixth Circuit's decision stands in direct conflict with the Tenth Circuit's opinion following remand in *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023). There, the Tenth Circuit held that all of Dr. Shakeel Khan's convictions flowing from § 841 must be vacated because the jury instructions at his trial replaced the statutory requirement of, "except as authorized," with the "ambiguous" language from § 1306.04(a), "outside the usual course of professional practice and without a legitimate medical purpose." *Id.* at 1316-17, 1321-22.

This split in § 841 instructions extends further. The Eleventh and Fifth Circuit have also affirmed § 841 convictions where the trial court failed to instruct the jury that the prescription must be unauthorized. *Ruan*, 56 F.4th at 1300-02; *United States v. Germeil*, 2023 WL 1991723, at *8-10 (11th Cir. Feb. 14, 2023); *United States v. Heaton*, 59 F.4th 1226, 1241 (11th Cir. 2023); *United States v. Maltbia*, 2023 WL 1838783, at *5 (11th Cir. Feb. 9, 2023), *cert. petition filed*, No. 22-7531 (U.S. May 11, 2023); *United States v. Mencia*, 2022 WL 17336503, at *14 (11th Cir. Nov. 30, 2022); *United States v. Ajayi*, 64 F.4th 243, 247-48 (5th Cir. 2023).

Although over one year has passed since *Ruan* was decided, the lower federal courts continue to uphold instructions that substitute the language of 21 C.F.R. § 1306.04(a) for the "except as authorized" language required by this Court. Pet. 16.[1] The problem with this approach is that the regulation, 21 C.F.R. § 1306.04, is the interpretation of the phrase "usual course of professional practice," without reference to the requirement that a physician "knowingly" issued an unauthorized prescription creates a crime congress did not intend. Absent the "authorization requirement," a physician will face conviction for simply engaging in conduct that differs from what other physicians might regard as "legitimate". Resolving this circuit split is of extreme import to both doctors and patients. Physicians are a notoriously risk adverse group. The current split in circuits ensures that physicians operate within a sphere of uncertainty every time they pick up their prescription pad. This uncertainty translates into overly conservative treatment and the result is suffering, pain, and even suicide. This is especially true in the Sixth Circuit, where unlike in *Ruan*, 56 F.4th at 1298, physician convictions under § 841 are sustained in the absence of the required *mens rea*, *Ruan*, 142 S. Ct. at 2382, by reference to deliberate ignorance jury instructions—an instruction intended to reduce the government's burden to prove that a defendant acted knowingly. *United States v. Anderson*, 67 F.4th 755, 764-66 (6th Cir. 2023).

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[1] This petition uses "Pet." to refer to the petition for a writ of certiorari in *Ruan v. United States*, No. 22-1175.

The petition for a writ of certiorari should be granted, and this Court must act to provide clear direction to physicians and pain management patients.

A. Statutory and Regulatory Framework

The CSA makes it unlawful for "any person knowingly or intentionally . . . to manufacture, distribute, or dispense" a controlled substance," "[e]xcept as authorized by this subchapter." 21 U.S.C. § 841(a)(1). "[T]his subchapter" authorizes persons who have registered with the Attorney General to dispense controlled substances "to the extent authorized by their registration." *Id.* § 822(b). The CSA also directs the Attorney General to accept the registration of a medical doctor or other practitioner if he is "authorized to dispense . . . controlled substances under the laws of the State in which he practices." *Id.* § 823(g)(1). The regulation, 21 C.F.R. § 1306.04(a) provides, in pertinent part:

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.

B. Factual Background

Petitioner, Dr. Roger Dale Anderson, practiced as a licensed physician in Marietta, Ohio, where he specialized in infectious diseases and internal medicine. *Anderson*, 67 F.4th at 759. Dr. Anderson would divide his time between Marietta Memorial Hospital, where he treated both inpatients and outpatients, and Marietta Medical, an independent practice he founded focusing on infectious diseases. *Id.* While treating patients at both sites, Dr. Anderson would prescribe

controlled substances under his registration with the Drug Enforcement Administration (DEA). *Id.*

The DEA received a tip from a local pharmacist in early 2015, claiming that Dr. Anderson was treating patients who had been discharged by other physicians for non-compliance, prompting the DEA to launch an investigation into his practice. *Id.* Then, in February 2016, the DEA executed a search warrant and seized various documents from Marietta Medical, including medical files, prescriptions, and appointment and payment records. *Id.* Dr. Anderson was eventually indicted by a federal grand jury in March 2019, charging him with fourteen counts: one count of conspiracy to distribute controlled substances, 21 U.S.C. § 846; nine counts of unlawful distribution of controlled substances, 21 U.S.C. § 841(a)(1); one count of conspiracy to commit healthcare fraud, 18 U.S.C. § 1349; and three counts of healthcare fraud, 18 U.S.C. § 1347. *Id.* The Government voluntarily dismissed one count of the § 841 charges, as well as the conspiracy to commit health care fraud count and two of the substantive health care fraud counts. *Id.* at 768, 770.

The Government's case was centered on the CSA charges against Dr. Anderson, and the non-CSA charge relied on the underlying facts of the CSA charges. *See*, Doc. 1 ¶¶ 48-59 (conspiracy to dispense and distribute controlled substances), ¶ 60 (illegal dispensing of controlled substances), ¶¶ 68-73 (health care fraud). The government therefore argued to the jury that all its indicted charges were supported because Dr. Anderson prescribed outside the usual course of professional practice and not for a legitimate medical purpose. *See*, *e.g.*, Tr. 57, PgID #: 398; 82, PgID #: 1128; 89, PgID #: 2398 ("Roger Anderson acted outside the

course of professional practice, and his prescriptions were without a legitimate medical purpose. That's the core of the case"); 89, PgID #: 2402; 89, PgID #: 2403; 89, PgID #: 2416-17. Incredibly, the words "without authorization," or even just "authorization," were entirely omitted from the government's summation.

The district court also instructed the jury based on 21 C.F.R. § 1306.04(a), telling the jury, with respect to both Section 841(a)(1) and Section 846, that it was unlawful for Dr. Anderson to prescribe "outside the usual course of professional medical practice" or without a "legitimate medical purpose." *See*, Tr. 89, PgID #: 2470-78 (the only instance of "authorized" being: "Federal law authorizes registered medical practitioners to dispense a controlled substance by issuing a lawful prescription"). But the district court denied Dr. Anderson's requested good faith instruction, which he argued was necessary to protect him from being convicted for mere medical malpractice, the standard for negligence used in civil trials; instead, opting to provide a deliberate ignorance instruction to the jury. The instructions therefore read:

> First, the defendant knowingly or intentionally dispensed or distributed a Schedule II controlled substance, including fentanyl, Adderall, oxycodone and hydrocodone; and,
>
> Second, that the defendant, Dr. Anderson, prescribed the drug without a legitimate medical purpose and outside the course of professional practice.

Tr. 89, PgID #: 2474.

Although knowledge of the defendant cannot be established merely by demonstrating he was careless,

knowledge may be inferred if the defendant deliberately blinded himself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substance was distributed or dispensed without a legitimate medical purpose in the usual course of professional practice, then you may find that the defendant knew that this was the case. But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed other than for a legitimate medical purpose while acting in the usual course of professional practice, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part are not the same as knowledge and are not enough to find him guilty on this count. Tr. 89, PgID #: 2476-77.

Dr. Anderson was convicted on all ten counts, and sentenced to 96 months of imprisonment, to run concurrently on each of the counts. *See*, Doc. 68.

C. Appellate Proceedings

Petitioner appealed, raising, among other issues, whether the trial court erred in denying a defense requested instruction on "good faith". *Anderson*, 67 F.4th at 764-66. At the time briefing was completed, the binding precedent in the Circuit was *Godofsky*, which held that the subjective good faith of the defendant was irrelevant to the "except as authorized" clause for physicians tried under 841(a). *Id.*

However, after briefing in the case was completed, this Court decided *United States v. Godofsky*,

943 F.3d 1011 (6th Cir. 2019), holding that the *mens rea* standard of "knowingly or intentionally" applies to the entirety of 841(a) – including the "except as authorized" clause. 142 S. Ct. at 2375. In its order, Sixth Circuit recognized this change in the law but declined to follow it. Opinion and Order, App.14a. At the time of the opinion, only one Circuit, the Eleventh, addressed whether a good faith instruction can comport with *Ruan*. *United States v. Ruan*, 56 F4th 1291 (11th Cir. 2023).

The Eleventh Circuit remanded *Ruan* back to the district court concluding that the totality of the jury instructions failed to "convey that a subjective analysis was required for the 'except as authorized' clause of 841. *Id*. From there, the Sixth Circuit determined that a "properly qualified subjective good faith instruction performs the same function as the "knowledge or intent" requirement identified by the Supreme Court". Opinion and Order at 11. Of course, such an assumption was never made by this court in *Ruan* or any other case.

The Sixth Circuit ultimately held that the "instruction given to the jury substantially covers the holding of *Ruan*, by referring continuously to the "knowledge of the defendant", his "deliberate ignorance," and if he "knew" that the prescriptions were dispensed illegitimately. Opinion and Order, App.12a-18a. In affirming the instruction, the Sixth Circuit incorporated the "deliberate ignorance" instruction, a wholly separate and distinct instruction, into the elements of the § 841 offense. *Id*.

Judge Helene N. White dissented from the Court's analysis of the requested instruction and the elements of the offense. Opinion and Order. App.30a. Judge

White determined that the second element's instruction identified no *mens rea* requirement. Judge White correctly pointed out that this Court's opinion in *Ruan* "teaches that the second element too must be performed knowingly and intentionally". 142 S. Ct. at 2375. Further, Judge White was unconvinced that the "deliberate ignorance" instruction could save a faulty instruction that is inconsistent with this Court's precedent. Opinion and Order, App.30a.

"Yet, the second element does not depend on perceiving or ignoring probabilities. [Petitioner] either understood and intended to prescri[be] controlled substances without a legitimate medical purpose in the usual course of professional practice, or he did not. That is, the instruction does not further clarify that both elements require the "knowledge or intent" *mens rea.* Telling the jury that carelessness, negligence, or foolishness is insufficient is not tantamount to instructing what mental state is required." App.31a-32a..

The dissent then went one step further and stated that the "good faith" instruction proposed by Dr. Anderson comports with *Ruan* and is near identical to the instruction given in *United States v. Godofsky,* 943 F.3d 1011, 1019 (6th Cir. 2019). Opinion and Order p. 22.

Finally, Judge White was unconvinced that Petitioner conceded the improper 841(a) instruction given that he objected to the Court's instruction and filed briefing on appeal prior to this Court's decision in *Ruan*. Opinion and Order, App.34a fn.1.

REASONS FOR GRANTING THE PETITION

The *Ruan* decision is a narrow but important decision that emphasizes the role of scienter in separating innocent from criminal conduct.[2] This Court's decision corrected years of conflicting and eroding standards for what the government must prove to secure a conviction in 841(a)(1) prosecutions against doctors or other prescribing practitioners.[3]

In the wake of *Ruan*, a physician should not be convicted for innovative, mistaken, negligent, or less-than-careful prescribing. By affirming a conviction where a jury was not instructed on the proper *mens rea* under the CSA, which requires a controlled substance prescription to be issued "without authorization," the 6th Circuit has eviscerated the meaning and intent of this important decision.

It has further widened the divide between circuits. The impact of the 6th Circuit's decision leaves a chilling impact on the practice of medicine and has impacted the treatment of legitimate pain as a risk adverse population of physicians have elected to cease prescribing necessary medications for fear of criminal conviction.

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[2] *Ruan v. United States*: *"Bad Doctors," Bad Law, and the Promise of Decriminalizing Medical Care*, 2022 CATO SUP. CT. REV. 271.

[3] *Id.*

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND IS DIFFICULT TO RECONCILE WITH DECISIONS OF THIS COURT

A. The Courts of Appeals Are Deeply Divided on the Meaning of the Phrase "Legitimate Medical Purpose in the Usual Course of Professional Practice"

Following the *Ruan* decision, the deep divide in lower courts has not resolved, rather division has widened. As of the filing date of this brief, the Second Circuit, Third Circuit, and the Seventh Circuit have not addressed *Ruan*'s impact, with the remaining Circuits coming to drastically different conclusions. Some have elected to sustain instructions that substantiate the language of 21 C.F.R. § 1306.04(a) for the "except as authorized" language required by this Court's decision. *See*, 142. S. Ct. at 2375. This permits a regulatory agency to create a criminal offense that Congress itself did not envision.[4] Others have vacated convictions and strictly followed this Court's decision.

The Eleventh Circuit was the first to act post-*Ruan* on remand. *Ruan*, 56 F.4th at 1298. In vacating some of *Ruan*'s convictions, the court observed that, absent a specific subjective intent component, reference to "objective good faith" connotes both objective and subjective good faith, and an instruction lacking a subjective good faith distinction is reversible error. *Id*. at 1297. Interestingly, however, the Eleventh Circuit did not reverse *Ruan*'s conspiracy conviction under 21 U.S.C. § 846. *Id*. at 1299. The Eleventh

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[4] Pet. No. 22-1175.

Circuit reasoned that even if the definition of unlawful distribution was in error it "would have no effect on the jury's analysis for the conspiracy counts". *Id.* at 1299. Despite a lack of any language in the 846 instruction, the Eleventh Circuit determined that the jury was "already required" to find that the defendant acted with subjective knowledge. *Id.* The jury was instructed that the government must prove:

> (1) There was an agreement between two or more people to commit a crime;
>
> (2) The defendant knew about the agreement; and
>
> (3) The defendant voluntarily joined the agreement.

Id.

Predicated on a faulty 841(a) instruction, and with no reference to the subjective knowledge of the defendant, the Eleventh Circuit still determined that Defendant's conspiracy conviction must be affirmed.

Later Eleventh Circuit opinions doubled down on this approach. *United States v. Germeil*, 2023 WL 1991723, at *8-10 (11th Cir. Feb. 14, 2023); *United States v. Heaton*, 59 F.4th 1226, 1241 (11th Cir. 2023); *United States v. Maltbia*, 2023 WL 1838783, at *5 (11th Cir. Feb. 9, 2023), *cert. petition filed*, No. 22-7531 (U.S. May 11, 2023); *United States v. Mencia*, 2022 WL 17336503, at *14 (11th Cir. Nov. 30, 2022).

Following the Eleventh Circuit's decision in *Ruan*, the Sixth Circuit came to an even harsher conclusion, incorporating a deliberate ignorance instruction to save a faulty 841(a) instruction. *See*, *Anderson,* 67 F.4th at 764-66. The Sixth Circuit later doubled down

on its holding in *Andersen*, deciding *United States v. Sakkai*, 2023 U.S. App. LEXIS 13489 (6th Cir. 2023), and again upheld a jury instruction that only applied the applicable *mens rea* to the distribution and not the lack of authorization. *Id.* at 17. *Sakkai* was given the same "deliberate ignorance" instruction as in *Anderson* which omitted the "authorization" requirement inconsistent with this Court's holding in *Ruan*.

The Fifth Circuit quickly followed suit. In *United States v. Ajayi*, 64 F.4th 243 (5th Cir. 2023), the Fifth Circuit affirmed conviction of a pharmacist where the jury charge read: "to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction, and outside the scope of professional practice or not for a legitimate medical purpose". *Id.* at 247. This instruction would permit conviction where the pharmacist intended to deliver but where the delivery was also not for a legitimate medical purpose. The district court did not apply the *mens rea* to the second prong as *Ruan* requires.

Later the Fifth Circuit went further and determined that even where a district court blatantly stated the wrong *mens rea* element, relief was not appropriate. The Fifth Circuit in *United States v. Capistrano*, 2023 U.S. App. LEXIS 19003 (5th Cir. 2023), under plain error review, determined that the district court's instructions incorrectly stated the law by omitting the *mens rea* element. *Id.* at 13. Moreover, the trial court misread the instruction holding the defendant to an objective standard and not a subjective standard. *See*, *Id.* The Fifth Circuit did not reverse, holding "an instruction that omits an element of the offense does not necessarily render a criminal trial

fundamentally unfair or an unreliable vehicle for determining guilt or innocence". *Id*.

The Ninth and Tenth Circuits have chosen to follow this Court's decision in *Ruan*. In *United States v. Kabov*, 2023 U.S. App. LEXIS 18214 (9th Cir. 2023), the Ninth Circuit vacated the defendant's convictions for importation of controlled substances and remanded to apply *Rehaif* and *Ruan* in the first instance. *Id*. at 16. In *United States v. Henson*, 2023 U.S. App. LEXIS 5075 (10th Cir. 2023), after this Court vacated the judgment, the Tenth Circuit remanded the case with instructions to vacate all of Dr. Hensen's controlled substance convictions. *Id*. at 3-4.

In *United States v. Kahn*, 58 F.4th 1308 (2023), the Tenth Circuit, strictly following this Court's decision in *Ruan*, vacated Dr. Kahn's controlled substance convictions and remanded for a new trial. The district court in Kahn instructed the jury: "Defendant Kahn knowingly or intentionally distributed or dispensed the controlled substance outside the usual course of professional medical practice or without a legitimate medical purpose". Kahn also received a subjective good faith instruction. *Id*. at 1313.

"The good faith defense requires the jury to determine whether Defendant Shakeel Kahn acted in an honest effort to prescribe for patients' medical conditions in accordance with generally recognized and accepted standards of practice." *Id*.

The Tenth Circuit went even further and determined that Kahn's convictions for violations of 21 U.S.C. § 843(b), 18 U.S.C. § 926(c)(1), 21 U.S.C. §§ 848 (a)9,(b), and (c) and 18 U.S.C. § 1957 were predicated, at least in part, on one or more of the erroneous

instructions. The Court vacated all of Dr. Kahn's convictions. *Id*. 1321.

The split amongst the circuits has continued to gain increasing attention. As one district court recently declared, "[i]t is far above this Court's pay grade to resolve a Circuit split-if, indeed, there is one." *United States v. Lamartiniere*, 2023 WL 2645343, at 2 (M.D. La. Mar. 27, 2023). The division will widen drastically when the Second Circuit, Third Circuit, Fourth Circuit, and Seventh Circuit choose their side.

The implications for controlled substance prescribers, pharmacists, and pain patients are drastic. Without a clear *mens rea* standard, and without clear resolution of the circuit conflict, physicians not knowing the limits of their liability will adopt ever more conservative approaches to treatment and may avoid prescribing altogether.

B. The Court of Appeals Decision Is Difficult to Square with This Court's Case Law

The Sixth Circuit's decision in the instant case is not only difficult to square with this Court's case law, its utterly impossible. Here the district court instructed that the elements were: "First, the defendant knowingly or intentionally dispensed or distributed a Schedule II controlled substance . . . ; and, Second, that the defendant, Dr. Anderson prescribed the drug without a legitimate medical purpose and outside the course of professional practice." *Anderson*, 67 F.4th at 766. The court further told the jury that it could convict if the defendant "deliberately ignored a high probability that the controlled substance was distributed or dispensed without a legitimate medical purpose in the usual course of professional practice"

or "was aware of a high probability that the controlled substances were distributed or dispensed other than for a legitimate medical purpose while acting in the usual course of professional practice." *Id.* These instructions replaced the authorization requirement with the language of 21 C.F.R. § 1306.04(a) and still the Sixth Circuit held that they comport with *Ruan*. *Id.* One member of the panel dissented, determining that "the second element's instruction identified no mens rea requirement," and that it did not "comport with *Ruan*". *Id.* at 12-13 (White, J. concurring in part and dissenting in part).

In *Ruan*, the Court confirmed that the CSA makes it unlawful to distribute or dispense controlled substances "[e]xcept as authorized by this subchapter," 21 U.S.C. § 841(a)(1), and "this subchapter" authorizes persons registered by the Attorney General, like physicians, to distribute or dispense controlled substances "to the extent authorized by their registration," 21 U.S.C. § 822(b). *See*, 142 S. Ct. at 2376-78. The statute does not say that it is unlawful to prescribe "outside the course of professional practice" or not for a "legitimate medical purpose." 21 U.S.C. § 841(a)(1). But this did not stop the Sixth Circuit, it simply bypassed the "except as authorized" requirement in the CSA, substituting the language of 21 C.F.R. § 1306.04(a) for the text of the CSA. *See*, *Anderson*, 67 F.4th at 764-66. This substitution is unconstitutional because the Attorney General's rulemaking authority under the CSA, *see*, 21 U.S.C. §§ 821, 871(b), does not give him the power revise criminal laws that were enacted by Congress—and, if the Attorney General had this type of authority, then it would be an unconstitutional delegation of Congress' power to enact

laws. *See*, *Gundy v. United States*, 139 S. Ct. 2116, 2144-45 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.) ("To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing—to unit[e] the legislative and executive powers . . . in the same person—would be to mark the end of any meaningful enforcement of our separation of powers and invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands."); *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., respecting denial of certiorari) ("[T]he rule of lenity . . . vindicates the principle that only the legislature may define crimes and fix punishments. Congress cannot, through ambiguity, effectively leave that function to the courts—much less to the administrative bureaucracy."); *Loving v. United States*, 517 U.S. 748, 768 (1996) ("We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes violation of regulations a criminal offense . . . (emphasis added)).

Courts should also not defer to an agency's interpretation of what statutes mean; instead, a court should hew closely to the text of a statute. *See*, *e.g.*, *Buffington v. McDonough*, 143 S. Ct. 14, 22 (2022) (Gorsuch, J., dissenting) ("We should acknowledge forthrightly that *Chevron* did not undo, and could not have undone, the judicial duty to provide an independent judgment of the law's meaning in the cases that come before the Nation's courts. Someday soon I hope we might."); *Becerra v. Empire Health Found., for Valley Hosp. Med. Ctr.*, 142 S. Ct. 2354, 2368-69

(2022) (Kavanaugh, J., dissenting) ("[T]his case is resolved by the most fundamental principle of statutory interpretation: Read the statute."); *Michigan v. EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring) ("*Chevron* deference precludes judges from exercising [their independent] judgment, forcing them to abandon what they believe is the best reading of an ambiguous statute in favor of an agency's construction. It thus wrests from Courts the ultimate interpretative authority to say what the law is and hands it over to the Executive."); *see*, *United States v. Apel*, 571 U.S. 359, 369 (2014) (addressing United States Attorneys' Manual and opinions of the Air Force Judge Advocate General, and stating, "we have never held that the Government's reading of a criminal statute is entitled to any deference"); *see also*, *Abramski v. United States*, 573 U.S. 169, 191 (2014) (addressing ATF circular and prior version of ATF form, and stating, "[t]he critical point is that criminal laws are for courts, not the Government, to construe" (citing *Apel*, 571 U.S. at 369)).

The Sixth Circuit's substitution of 21 C.F.R. § 1306.04(a) is made all the more problematic given that the regulatory language is "ambiguous" and "open to varying constructions." *See*, *Ruan,* 142 S. Ct. at 2377. "A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a). When is a course of treatment "usual"? Does it require at least 50.1% of providers to adopt or use the treatment? Does a course of treatment become illegitimate if used in conjunction with other medications? If the government can prosecute and

convict a physician, branding them as a "drug dealer" simply because that physician knows that most, or maybe just many, other doctors disagree with them, 21 C.F.R. § 1306.04(a) just reestablishes the very problem this Court sought to resolve in *Ruan*. Indeed, in *Ruan*, the Court was emphatic that even though the government may rely on "circumstantial evidence . . . by reference to objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice,'" the ultimate question—the one the jury must be asked to decide—is whether "a defendant knew or intended that his or her conduct was unauthorized." *Ruan,* 142 S. Ct. at 2382.

The Sixth Circuit ignored the principles set forth by this Court in *Ruan*. Instead, in its view, Dr. Anderson was justly convicted for prescribing "without a legitimate medical purpose and outside the course of professional practice." *Anderson*, 67 F.4th at 766. Whatever those terms mean, to whichever lay jurors are deciding a physician's fate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

SIXTH CIRCUIT OPINION

S.D. OHIO ORDERS, VERDICT, JUDGMENT

SIXTH CIRCUIT REHEARING ORDER

APPENDIX TABLE OF CONTENTS (Cont.)

OTHER DOCUMENTS

OPINION, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (APRIL 17, 2023)

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7 F.4th 755

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROGER DALE ANDERSON,

Defendant-Appellant.

No. 21-3073

Appeal from the United States District Court
for the Southern District of Ohio at Columbus.
No. 2:19-cr-00067-1—
Algenon L. Marbley, District Judge.

Before: GIBBONS, WHITE, and READLER,
Circuit Judges.

OPINION

PER CURIAM.

Dr. Roger Anderson was convicted of one count of conspiracy to distribute controlled substances, eight counts of unlawful distribution of controlled

substances, and one count of healthcare fraud after an eight-day jury trial. On appeal, he challenges the sufficiency of the evidence supporting his convictions, the district court's refusal to give a good faith jury instruction, and the admission of the government's expert's testimony. For the reasons that follow, we affirm.

I.

A.

Dr. Roger Anderson practiced as a licensed physician in Marietta, Ohio, where he specialized in infectious diseases and internal medicine. He split his time between Marietta Memorial Hospital, where he practiced both inpatient and outpatient medicine, and Marietta Medical, an independent practice he founded focusing on infectious diseases. As a physician registered with the Drug Enforcement Agency ("DEA"), Anderson was authorized to prescribe Category II through V controlled substances.

In early 2015, the DEA received a tip from a local pharmacist that Anderson was seeing patients who had been discharged by other physicians for non-compliance reasons. The pharmacist was one of several in the area who had grown concerned about Anderson's prescribing practices relating to pain medications. This tip prompted the DEA to launch an investigation into Anderson. During its investigation, the DEA received information from the State Medical Board of Ohio about suspicious prescriptions that Anderson had written. The Board expressed concern that Anderson was not prescribing in the usual course of practice or for a legitimate medical purpose. Sepa-

rately, one of Anderson's patients contacted the local sheriff's office, voicing his concern that he sometimes would not get to see Anderson at his appointments and would occasionally retrieve his prescriptions from the receptionist rather than from Anderson himself. The sheriff's office put the patient in touch with the DEA.

The DEA asked, and the patient agreed, to become a confidential source. Outfitted with a recording device, the confidential source visited Anderson's practice a total of eight times. In the first encounter, the confidential source told Anderson that he was "in full-blown withdrawal," but Anderson nevertheless wrote him a prescription for Vicodin. DE 86, Trial Tr. V, Page ID 1951. In a subsequent visit, the confidential source picked up a prescription for Vicodin without having first seen Anderson.

In February 2016, the DEA executed a search warrant and seized various documents from Marietta Medical, including medical files, prescriptions, and appointment and payment records. In March 2019, a federal grand jury returned a fourteen-count indictment against Anderson. The indictment charged Anderson with: one count of conspiracy to distribute controlled substances, 21 U.S.C. § 846; nine counts of unlawful distribution of controlled substances, 21 U.S.C. §§ 841 (a)(1); one count of conspiracy to commit healthcare fraud, 18 U.S.C. § 1349; and three counts of healthcare fraud, 18 U.S.C. § 1347. Anderson elected to proceed to trial.[1]

---

[1] The government dismissed one count of unlawful distribution of controlled substances, the conspiracy to commit healthcare fraud count, and two counts of healthcare fraud prior to trial.

B.

Before trial, the government disclosed that it would call Dr. Timothy E. King, a physician specializing in pain medicine with board certifications in anesthesiology, pain management, and addiction science, to provide expert testimony on "whether [Anderson]'s medical records are consistent with the usual course of medical practice and whether the prescribing of controlled substances by [Anderson] was for legitimate medical purposes." DE 16, Resp., Page ID 81; *see also* DE 24, Hr'g Tr., Page ID 134. Anderson filed a motion *in limine* seeking to exclude King's proposed testimony on the grounds that it "lack[ed] a clear methodology or established standards" and because the government would be unable to "establish a foundation" for his testimony at trial. DE 13, Mot. in Limine, Page ID 70. The government responded in opposition, and the district court held a *Daubert*[2] hearing.

At the *Daubert* hearing, King testified about his methodology. He explained that he had reviewed the files of fifty of Anderson's patients and created a spreadsheet containing each patient's relevant medical history. King then compared this information to the following standards of care: "Establishment of an objective medical diagnosis"; "Documentation of a pertinent clinical history"; "Performance of a pertinent and targeted physical examination"; "Presence of an adequate and thorough clinical workup"; "Delineation

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[2] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589, 597 (1993) (holding that district courts have a "gatekeeping role" in ensuring that "any and all scientific testimony or evidence admitted is not only relevant, but reliable").

of mental health risk factors"; "Delineation of co-morbid risk factors"; "Documentation of a defined treatment plan"; "Consideration of high-risk drug combinations (*i.e.* polypharmacy)"; "Consideration of risks associated with high dose opiates"; "Appropriate use of urine drug testing (UDT)"; "Appropriate use of (state provided) prescription drug monitoring data (PDMP)"; "Documentation of objective improvement in pain and function"; "Documentation and enforcement of drug related misbehavior"; and "Ongoing clinical evaluation, risk assessment, and patient monitoring." DE 16-2, King Aff., Page ID 99-101. King explained that these standards of care were a "compendium of . . . categories" formulated by the Federation of State Medical Boards, the American Board of Anesthesiology, the American Board of Pain Medicine, and other organizations. DE 24, Hr'g Tr., Page ID 177.

King testified that, after comparing the patient data to the standards of care, he created a narrative report in which he opined on whether the patients had been prescribed controlled substances for a legitimate medical purpose and within the usual course of professional practice. Of the fifty patients whose files he reviewed, twenty-eight were prescribed controlled substances. Anderson responded that although "this kind of testimony has been offered in other cases," King's methodology had not been peer-reviewed or verified by other physicians and was therefore unreliable. *Id.* at Page ID 208. Anderson also argued that King could not properly take a small subset of his patients and extrapolate across his entire medical practice.

The district court issued a written opinion after the *Daubert* hearing, denying Anderson's motion *in*

limine. It found that King's proposed testimony met the threshold of reliability set forth in Rule 702 of the Federal Rules of Evidence and *Daubert*. The district court stated that any concerns about King's methodology could be addressed on cross-examination and noted that courts have frequently admitted similar expert testimony regarding whether prescriptions were prescribed for a legitimate medical purpose.

C.

At trial, the government called twenty-four witnesses, including former patients and employees of Marietta Medical, local pharmacists, King, DEA employees assigned to investigate Anderson, and individuals associated with Medicare and Medicaid. Anderson called no witnesses of his own.

Former Patients. The jury heard from several of Anderson's former patients, including JB. JB testified that she began to see Anderson in 2014, when she was pregnant with her first son. She recalled that during her first visit, Anderson walked into the patient room and did not ask her any questions except "what are you here for?" DE 83, Trial Tr. II, Page ID 1224. When JB told Anderson that she wanted a particular opioid, he prescribed it for her "no questions asked." *Id.* She further testified that, at the time, she "was an intravenous user . . . which was very obvious" because her "face would be picked up" and she had "marks all over [her] arms." *Id.* at Page ID 1227. Further, although Anderson knew she was pregnant, he did not cut JB off pain medications until she was eight-and-a-half months pregnant, when she had a "basketball belly." *Id.* at Page ID 1236-37. JB testified that medications prescribed by Anderson were the

"easiest prescriptions I've ever got." *Id.* at Page ID 1237.

Another former patient, the confidential source recruited by the DEA, also testified against Anderson. He testified that, during his first appointment, he explained what medications he needed, and Anderson began writing out the prescriptions as he was speaking. Anderson did not give the patient a physical exam or otherwise ask about his medical history beyond what the patient volunteered. When the patient offered to have his medical records transferred to Marietta Medical, Anderson responded that doing so would be unnecessary. The patient returned about once a month to pick up prescriptions but did not always see Anderson. Other patients confirmed that physical examinations were performed rarely, if at all.

Patients also testified that when they ran out of medication, they would simply text or call Anderson requesting a new prescription. JB, for example, recalled that she once texted Anderson and informed him, falsely, that a friend had stolen her prescription, and requested a new prescription. Anderson told her to meet him at his office that night. She met him at 11:30 p.m., and Anderson "just wrote [her] the prescription" without asking any questions. DE 83, Trial Tr. II, Page ID 1226. Anderson also freely granted his patients' requests for stronger doses of medication.

Former Employees. The government also presented the testimony of several of Anderson's former employees. Teddy Tackett, Anderson's property manager, testified that Anderson frequently left signed prescriptions for his staff to pass out to patients the next day. Anderson did so without having seen the patients, as Tackett testified that if Anderson had seen a

patient the previous night, he would have given the prescription to the patient directly. Tackett also described the atmosphere at Marietta Medical as "chaos" due to Anderson's unpredictable hours and tardiness and large numbers of patients waiting for medications. DE 84, Trial Tr. III, Page ID 1335, 1337. Mollie Reed, the receptionist, testified that sometimes "[t]here would be patients spilling out into the steps, the street area waiting, smoking cigarettes. It was a crazy time." DE 87, Trial Tr. VI, Page ID 2112.

Pharmacists. Several area pharmacists testified regarding Anderson's prescribing practices. Glenn Norosky, a pharmacist at Rite Aid, testified that patients sometimes attempted to refill their prescriptions too early; when Norosky refused to refill them, Anderson occasionally called him asking why he did not fill their prescriptions. Norosky noted that he found it "odd" that whenever he tried calling Anderson's office, he could never reach Anderson but Anderson would always be able to reach Norosky. DE 85 Trial Tr. IV, Page ID 1538-39. Norosky also testified that he filed two suspicious-prescribing reports against Anderson. He filed the first report after noticing that Anderson was writing an increasing number of prescriptions for opiates for young patients, many of whom were unfamiliar to Norosky.

Shawndra Parks, another local pharmacist, echoed concerns that Anderson was prescribing higher doses of pain medication to an increasing number of younger patients, a practice she characterized as a "red flag." DE 88, Trial Tr. VII, Page ID 2331. Christine Dearth, a pharmacist at CVS, testified that other pharmacists noticed Anderson's suspicious prescribing patterns

and agreed as a group to stop filling prescriptions for pain medications written by Anderson.

Dr. King. As he did at the *Daubert* hearing, King testified that he had reviewed fifty patient files taken from Marietta Medical. With respect to the twenty-eight patients who were prescribed controlled substances, King expressed the general opinion that Anderson "was not prescribing within the usual course of medical practice," DE 84, Trial Tr. III, Page ID 1490, and therefore that the controlled substances that Anderson prescribed lacked a legitimate medical purpose, *id.* at Page ID 1491-92. King explained that for these patients, Anderson failed to obtain an objective and legitimate medical diagnosis, perform a physical examination and workup to identify risk factors, formulate an appropriate treatment plan incorporating treatments other than controlled substances, and enforce compliance measures such as urine drug screenings and monitoring for aberrant behaviors.

King opined specifically on Anderson's prescribing practices with respect to each of the eight patients whose prescriptions formed the basis of the unlawful distribution counts. He testified that in his opinion, each of the patients had been prescribed controlled substances outside the usual course of professional practice and without a legitimate medical purpose. For example, King testified that patient KB had a "grossly abnormal urine drug screen" indicating the absence of two drugs he was being prescribed by Anderson—oxycodone and Adderall—and the presence of two drugs he was not prescribed—gabapentin, which increases the euphoric sensation of controlled substances, and a Norco-like medication. DE 84, Trial

Tr. III, Page ID 1497-1501. King testified that there was no indication that Anderson spoke with KB about the abnormal drug screen, and that KB's medical file was essentially blank.

Witnesses Affiliated with Medicare and Medicaid and Fraud Investigations. The jury also heard testimony about Anderson's noncompliance with Medicare and Medicaid requirements and the impact of Anderson's prescribing practices on those programs. Heather Hire, a Medicaid administrator for the state, testified that Medicaid providers such as Anderson agree to render only medical services that are necessary and in compliance with federal law. She explained that Medicaid would not pay for services that were rendered in contravention of state or federal law. An employee of an entity that contracts with the Centers for Medicare and Medicaid Services to investigate fraud and waste testified that Medicare providers must render services in accordance with federal law. She testified that Medicare would not pay for services or medications it knew were medically unnecessary or were prescribed in violation of state or federal law.

Joseph DiSalvio, Jr., a special agent investigator for the Ohio Attorney General's Medicaid Fraud Control Unit, identified twelve Medicaid patients among the twenty-eight patients who had been prescribed opiates whose files were examined by King. In total, Medicaid paid $13,097.88 for Schedule II through V substances for these twelve patients. Andrew Ranck, a CPA who performs audits for Medicare, testified that from 2013 to 2016, the impact to Medicare of prescriptions written by Anderson was $7,488.91.

D.

At the charge conference, the government sought to remove a good faith instruction pertaining to the unlawful distribution of controlled substances counts from its earlier-proposed jury instructions. That instruction read, in relevant part:

> If a doctor dispenses a drug in good faith in medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of medical practice. That is, he has dispensed the drug lawfully.
>
> Good faith in this context means good intentions in the honest exercise of best professional judgment as to a patient's need. It means the doctor acted in accordance with what he believed to be proper medical practice. If you find the defendant acted in good faith in dispensing the drugs, then you must find him not guilty.

DE 26, Proposed Jury Instr., Page ID 240.

The government argued that there was no basis to issue this instruction under *United States v. Godofsky*, 943 F.3d 1011 (6th Cir. 2019). *Godofsky*, the government argued, held that a physician's "subjective good faith" is irrelevant and that, in any case, Anderson had not elicited sufficient evidence at trial regarding his own good faith, either through a proffer or through direct or cross-examination. DE 88, Trial Tr. VII, Page ID 2305, 2309. Anderson objected, arguing that *Godofsky* was inapposite because the defendant there *did* receive a good faith instruction and the case on appeal instead centered on whether

it was an objective good faith instruction or a subjective good faith instruction.

The district court took the matter under advisement. The next day, the district court determined that "it would be error for the Court to include the good faith defense language" because "*Godofsky* is virtually on all fours with our case." DE 89, Trial Tr. VIII, Page ID 2388. To Anderson's benefit, the district court noted that another set of instructions he planned to give the jury "maybe subsumes the good faith defense—or the good faith defense is subsumed in it." *Id.* at Page ID 2390. Accordingly, the district court removed the two paragraphs regarding good faith from the final jury instructions.

E.

Anderson moved for a judgment of acquittal after the government presented its case, and the district court denied the motion. The jury convicted Anderson on all ten counts, and Anderson appealed.

II.

A.

Anderson first argues that the district court abused its discretion in declining to give the proposed good faith instruction for the charges of unlawful distribution under 21 U.S.C. § 841(a).[3] "We review a challenge to the trial court's denial of a requested jury instruction for abuse of discretion and will

[3] When Anderson objected to the government's effort to withdraw the instruction, the district court treated the instruction as if offered by Anderson.

reverse only if the denied instruction was: '(1) a correct statement of the law, (2) not substantially covered by the charge actually delivered to the jury, and (3) concern[ed] a point so important in the trial that the failure to give it substantially impair[ed] the defendant's defense.'" *Godofsky*, 943 F.3d at 1019 (quoting *United States v. Volkman*, 797 F.3d 377, 385 (6th Cir. 2015)).

1.

We first consider whether the government's withdrawn jury instruction was a correct statement of the law. As judicial interpretation of § 841 has evolved in recent years, we briefly review its development.

The Controlled Substances Act prohibits "any person," "[e]xcept as authorized[,]" from "knowingly or intentionally" manufacturing, distributing, dispensing, or possessing controlled substances. 21 U.S.C. § 841(a). Because doctors and physicians regularly prescribe controlled substances, the "except as authorized" clause has greater relevance when a physician is charged with improperly exercising that power. *See United States v. Moore*, 423 U.S. 122, 131-32 (1975). A doctor's prescription is authorized within the meaning of § 841(a) when it is made "for a legitimate medical purpose . . . in the usual course of his professional practice." 21 C.F.R. § 1306.04(a). "How to properly capture § 841(a)'s elements in a jury instruction—especially the 'except as authorized' proviso and the guidance provided by § 1306.04(a)—is a difficult question we have addressed before." *United States v. Fabode*, Case No. 21-1491, 2022 WL 16825408, at *6 (6th Cir. Nov. 8, 2022).

At the time briefing in this case was completed, the binding precedent in this circuit was *Godofsky*. *Godofsky* held that the subjective good faith of the defendant was irrelevant to the "except as authorized" clause for physicians tried under § 841(a). *See* 943 F.3d at 1026-27. However, after briefing in this case was completed, the Supreme Court decided *Ruan v. United States*, 142 S. Ct. 2370 (2022), holding that the mens rea standard of "knowingly or intentionally" applies to the entirety of § 841(a)—including the "except as authorized" clause. 142 S. Ct. at 2375. That is, "once a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove beyond a reasonable doubt that the defendant *knowingly or intentionally* acted in an unauthorized manner." *Id.* at 2376 (emphasis added). To prove this subjective standard of knowledge or intent, however, the parties can present circumstantial evidence of "objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice.'" *Id.* at 2382 (quoting 21 C.F.R. § 1306.04(a)).

In light of *Ruan*, we must consider whether the good faith instruction that Anderson requested is a correct statement of the law. After all, Anderson did not ask the district court to instruct the jury that it must find that he *knowingly* or *intentionally* prescribed controlled substances without authorization. Instead, Anderson requested a good faith instruction that mentioned neither knowledge nor intent.[4] And the

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[4] The good faith instruction that Anderson requested is reproduced here:

If a doctor dispenses a drug in <u>good faith</u> in medically treating a patient, then the doctor has dispensed the drug for a legitimate

Supreme Court gave limited counsel in *Ruan* regarding good faith instructions, stating only that "§ 841, like many criminal statutes, uses the familiar *mens rea* words 'knowingly or intentionally.' It nowhere uses words such as 'good faith,' 'objectively,' 'reasonable,' or 'honest effort.'" *Ruan*, 142 S. Ct. at 2381.

Only one circuit, the Eleventh, has addressed whether a good faith instruction can comport with *Ruan*. After *Ruan* was decided and remanded, the Eleventh Circuit addressed the issue of whether a good faith instruction adequately informs a jury of the "knowledge or intent" requirement. *United States v. Ruan*, 56 F.4th 1291 (11th Cir. 2023) ("*Ruan III*"). The opinion first distinguished between subjective and objective good faith instructions. It noted that "[w]ithout further qualification, the phrase 'good faith' encompasses both subjective and objective good faith" and then concluded that "only the subjective version is appropriate." *Id.* at 1297. The court then remanded the case to the district court, concluding that the totality of the jury instructions failed to "convey that a subjective analysis was required for the 'except as authorized'" clause of § 841. *Id. Ruan III*, although it lacks perfect clarity, implies that a properly qualified subjective good faith instruction performs the same

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medical purpose in the usual course of medical practice. That is, he has dispensed the drug lawfully.

Good faith in this context means good intentions in the honest exercise of best professional judgment as to a patient's need. It means the doctor acted in accordance with what he believed to be proper medical practice. If you find the defendant acted in good faith in dispensing the drugs, then you must find him not guilty.

DE 26, Proposed Jury Instr., Page ID 240.

function as the "knowledge or intent" requirement identified by the Supreme Court.

The proposed good faith instruction did not contain any "further qualification" that made clear Anderson's subjective good faith was the relevant inquiry. *See Ruan III*, 56 F.4th at 1297. This is unsurprising, as Anderson conceded he wanted the jury to consider his objective good faith. To the extent Anderson appeals the district court "declin[ing] to instruct the jury on the defense of objective 'good faith,'" the proposed jury instruction was not a correct statement of law. Opening Br. at 12.

But assuming that the proposed good faith instruction concerns subjective good faith, we need not explore further whether there is any meaningful distinction between "subjective good faith" and "knowledge or intent." Rather, we examine whether the instructions given here comport with *Ruan*'s directive and substantially cover the requested instruction.

2.

In charging the jury on the crime of distributing a controlled substance under § 841, the district court first explained the elements of the crime:

> First, the defendant knowingly or intentionally dispensed or distributed a Schedule II controlled substance, including fentanyl, Adderall, oxycodone and hydrocone; and,
>
> Second, that the defendant, Dr. Anderson, prescribed the drug without a legitimate medical purpose and outside the course of professional practice.

DE 89, Trial Tr. VIII, Page ID 2474. The court then gave "more detailed instructions on some of these terms." *Id.* In describing terms related to the second element, it explained that:

> Although knowledge of the defendant cannot be established merely by demonstrating he was careless, knowledge may be inferred if the defendant deliberately blinded himself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substance was distributed or dispensed without a legitimate medical purpose in the usual course of professional practice, then you may find that the defendant knew this was the case.

Id. at Page ID 2476-77. The instruction given to the jury specifically covers the holding of *Ruan*, by referring continuously to the "knowledge of the defendant," his "deliberate ignorance," and if he "knew" that the prescriptions were dispensed illegitimately. *Id.* Such terms go beyond an objective view of the "usual course of professional practice" and instead direct the jury's attention to Anderson's subjective mindset in issuing the prescriptions.

The court goes on to further emphasize that knowledge, and no lesser level of culpability, is required to find Anderson guilty on this element:

> But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled sub-

> stances were distributed or dispensed other than for a legitimate medical purpose while acting in the usual course of professional practice, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part are not the same as knowledge and are not enough to find him guilty on this count.

Id. at Page ID 2477 (emphasis added). The instructions given by the court, though not expressed in the way Anderson requested, substantially cover the concept of knowledge through the description of deliberate ignorance and the juxtaposition of "knowledge" with "[c]arelessness, negligence, or foolishness." *Id.*; *cf. United States v. Damra*, 621 F.3d 474, 502 (6th Cir. 2010) (finding that, in the tax evasion context, a good faith instruction was substantially covered by the court's instruction that the defendant had to have acted voluntarily and deliberately to violate known law to be found guilty). Because the jury instructions given in Anderson's case appear to comport with *Ruan* and to substantially cover the requested instruction, we reject Anderson's argument that the district court abused its discretion in failing to give a good faith instruction.

B.

We next address Anderson's evidentiary challenge. Anderson contends that the district court abandoned its gatekeeping function by admitting King's expert testimony. He asserts that King did not disclose his methodology in his reports, that his methodology has not been peer-reviewed, and that his expert opinion

amounted to "scientific guesswork." CA6 R. 26, Corr. Appellant Br., at 42. We disagree.

"For expert testimony to be admissible, the court must find the expert to be: (1) qualified; (2) her testimony to be relevant; and (3) her testimony to be reliable." *United States v. LaVictor*, 848 F.3d 428, 441 (6th Cir. 2017) (citing *Daubert*, 509 U.S. at 589). District courts perform "a gatekeeping role in screening the reliability of expert testimony." *Tamraz v. Lincoln Elec. Co.*, 620 F.3d 665, 668 (6th Cir. 2010) (internal quotation marks omitted). "We review a district court's decision to admit or exclude expert testimony for abuse of discretion." *United States v. Gardner*, 32 F.4th 504, 519 (6th Cir. 2022).

Anderson first argues that the district court abused its discretion in admitting King's testimony because King's narrative reports "contained bare conclusions" without providing "any citation or basis in medical or scientific reasoning." CA6 R. 26, Corr. Appellant Br., at 27. But during the *Daubert* hearing, King provided detailed testimony about the sources on which he relied and the manner in which he determined whether the patients whose files he reviewed were prescribed controlled substances in the usual course of professional practice and for a legitimate medical purpose. King further testified that he put each patient's medical record into a "forensic chronology" and then compared that chronology to the fifteen standards of care commonly applied to pain management practices. DE 24, Hr'g Tr., Page ID 143-44. From there, King prepared a "forensic summary" describing whether each of the fifteen standards had been properly addressed for each patient. *Id.* at Page ID 145. Anderson's argument

about the scientific inadequacy of King's reports is without merit.

Next, Anderson contends that the district court abdicated its gatekeeping function by failing to make any findings about the reliability of this methodology. However, this assertion is belied by the record. The district court issued a thorough written opinion in which it determined that "Dr. King's proposed expert testimony meets the reliability standard under Rule 702 and *Daubert*." DE 29, Op. and Order, Page ID 265. The district court also noted that King had submitted a declaration explaining that he relied on "generally accepted methodologies" and standards recognized by professional medical organizations. *Id.* at Page ID 265-66. The district court therefore fulfilled its duty to determine "whether the reasoning or methodology underlying the testimony is scientifically valid." *Newell Rubbermaid, Inc. v. Raymond Corp.*, 676 F.3d 521, 527 (6th Cir. 2012) (quoting *Daubert*, 509 U.S. at 592-93).

Anderson also assails King's fifteen standards of care, arguing that they are not contained in any textbook, peer-reviewed publication, or other scholarly resource. the specific combination of standards King formulated has not been peer reviewed, King testified that the standards themselves were drawn from "peer-reviewed medical literature, . . . protocols, papers and recommendations put forth by our professional organizations." DE 24, Hr'g Tr., Page ID 146 (emphasis added). The district court also rejected this argument, observing that courts frequently admit expert testimony on the question of whether medications were prescribed with a legitimate medical purpose. We agree and note that the Eleventh Circuit has previously rejected a

challenge to the reliability of expert methodology based in part on a model policy from the Federation of State Medical Boards, which formed the primary basis of Dr. King's standards of care. *See United States v. Azmat*, 805 F.3d 1018, 1040 (11th Cir. 2015); *see also* DE 24, Hr'g Tr., at Page ID 177.

We also reject Anderson's argument that King's testimony amounted to "scientific guesswork." CA6 R. 26, Corr. Appellant Br., at 42. As the district court noted in its opinion, King has "provided expert testimony in a number of other cases on similar issues and has never had his testimony excluded at trial." DE 29, Op. and Order, Page ID 266. Furthermore, we have previously affirmed admission of expert testimony similar to that provided by King. *See Volkman*, 797 F.3d at 388 (expert testified "about a patient's condition and the prescriptions [the defendant] dispensed, [and] the Government would ask the expert whether he or she had an opinion as to whether the prescriptions fell within the scope of legitimate medical practice").

Finally, although Anderson devotes several pages of his briefing to challenging King's conclusions regarding the patients whose files he examined, we find that these arguments go "to the accuracy of the conclusions, not to the reliability of the testimony." *In re Scrap Metal Antitrust Litig.*, 527 F.3d 517, 530 (6th Cir. 2008). As we have stated, "[t]he task for the district court in deciding whether an expert's opinion is reliable is not to determine whether it is correct, but rather to determine whether it rests upon a reliable foundation, as opposed to, say, unsupported speculation." *Id.* at 529-30. The district court did so here. Any other concerns about the reliability of

King's testimony were properly addressed through cross-examination and opportunity to present a defense case. *See Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

Accordingly, we reject Anderson's challenge to the admission of King's expert testimony.

C.

Finally, we address Anderson's sufficiency-of-the-evidence challenges. "We review a challenge to the sufficiency of the evidence in a criminal case de novo." *United States v. Woods*, 14 F.4th 544, 551 (6th Cir. 2021). In doing so, we ask "whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Sadler*, 24 F.4th 515, 539 (6th Cir. 2022) (citation omitted). "All reasonable inferences must be made to support the jury verdict," *LaVictor*, 848 F.3d at 456, so the defendant "bears a very heavy burden" on a sufficiency-of-the-evidence challenge, *United States v. Hills*, 27 F.4th 1155, 1172 (6th Cir. 2022).

1.

Anderson first challenges his convictions for conspiracy to distribute controlled substances and unlawfully distributing controlled substances. He contends that the evidence presented at trial showed that he committed mere malpractice and that, at worst, he practiced "with sloppy documentation or in

a hurried fashion." CA6 R. 26, Corr. Appellant Br., at 52, 55. We conclude that sufficient evidence supported Anderson's convictions.

The indictment charged Anderson with nine counts of unlawful distribution of controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C). The government voluntarily dismissed one count prior to trial, and the jury ultimately convicted Anderson of the remaining eight counts. "In order to obtain a conviction under 21 U.S.C. § 841(a)(1) against a licensed physician . . . the government must show: '(1) That defendant distributed a controlled substance; (2) That he acted intentionally or knowingly; and (3) That defendant prescribed the drug without a legitimate medical purpose and outside the course of professional practice.'" *United States v. Johnson*, 71 F.3d 539, 542 (6th Cir. 1995) (citation omitted).

The evidence at trial was sufficient to support Anderson's convictions for unlawful distribution of controlled substances. The jury heard testimony from two of Anderson's former patients who testified that they either showed signs of or admitted to addiction when they came to him asking for pain medications. JB, for example, testified that she showed "obvious" signs of being an intravenous drug user because her "face would be picked up" and she had marks on her arms, but that Anderson still prescribed her pain medications. DE 83, Trial Tr. II, Page ID 1227. Similarly, the DEA's confidential source testified that he told Anderson that he was "in full-blown withdrawal," but that Anderson still prescribed him medications. DE 86, Trial Tr. V, Page ID 1951. Patients also testified that they told Anderson which medications they wanted and that they would call or

text him when they ran out. Physical examinations were either infrequent, cursory, or non-existent. Based on this evidence, a rational juror could conclude that Anderson knowingly prescribed controlled substances without a legitimate medical purpose and outside the usual course of professional practice. *See United States v. Chaney*, 921 F.3d 572, 591 (6th Cir. 2019) (sustaining § 841(a) conviction where, among other evidence, former patient testified that "he was prescribed Percocet on his first visit to the clinic[and] that he was physically examined only once"); *Johnson*, 71 F.3d at 542 (rejecting sufficiency-of-the-evidence challenge to conviction under § 841(a) where some of the evidence showed that "defendant prescribed narcotics upon request and without medical examinations"); *see also United States v. Bek*, 493 F.3d 790, 799 (7th Cir. 2007) (upholding conviction under § 841(a) where evidence showed, among other things, that physician "disregard[ed] . . . blatant signs of drug abuse," and performed "uniform, superficial, and careless medical examinations").

King's expert testimony further established that Anderson's prescribing practices fell far short of professional practice. King based his testimony on his examination of patient files— including individuals whose prescriptions form the basis of the unlawful distribution counts— and observed that Anderson frequently failed to establish an objective and legitimate pain diagnosis, perform a physical examination, put together an appropriate treatment plan accounting for a patient's comorbidities, and enforce compliance measures. Based on these observations and his thirty years of experience, King concluded that Anderson was prescribing medications without a legitimate

medical purpose and outside the usual course of professional practice. The testimony on this point was extensive and not, as Anderson argues, evidence of "mere malpractice." CA6 R. 26, Corr. Appellant Br., at 52.

Anderson also contends that he always prescribed his patients controlled substances "to treat what he believed to be their legitimate medical complaint." *Id.* at 55. But a reasonable jury could conclude that he was not acting in "good faith and with all due care" when he prescribed opioids to patients who were "merely faking symptoms." *Chaney*, 921 F.3d at 590.

For these reasons, we reject Anderson's sufficiency-of-the-evidence challenge to his convictions for conspiracy to distribute and distribution of controlled substances.

2.

Anderson also challenges the sufficiency of the evidence supporting his conviction for healthcare fraud. He explains that it was the pharmacies, not he, who billed Medicare and Medicaid, and argues that he did not know how the prescriptions would be paid for, nor did he personally profit from the prescription reimbursements. We disagree.

The indictment charged Anderson with one count of conspiracy to commit healthcare fraud in violation of 18 U.S.C. § 1349 and three counts of healthcare fraud in violation of 18 U.S.C. § 1347. Prior to trial, the government voluntarily dismissed the conspiracy count and two healthcare fraud counts; the jury convicted Anderson on the remaining healthcare fraud

count. To prove a violation of § 1347, the government was required to prove that Anderson "(1) knowingly devised a scheme or artifice to defraud a health care benefit program in connection with the delivery of or payment for health care benefits, items, or services; (2) executed or attempted to execute this scheme or artifice to defraud; and (3) acted with intent to defraud." *United States v. Semrau*, 693 F.3d 510, 524 (6th Cir. 2012) (quoting *United States v. Martinez*, 588 F.3d 301, 314 (6th Cir. 2009)).

Direct evidence of fraudulent intent is not required. *United States v. Persaud*, 866 F.3d 371, 380 (6th Cir. 2017). "[A] jury may consider circumstantial evidence and infer intent from evidence of efforts to conceal the unlawful activity, from misrepresentations, from proof of knowledge, and from profits." *Id.* (quoting *United States v. Agbebiyi*, 575 F. App'x 624, 634 (6th Cir. 2014)). A defendant is guilty of healthcare fraud if he "contributed to the execution of the scheme with intent to defraud." *United States v. Hunt*, 521 F.3d 636, 645 (6th Cir. 2008).

The evidence presented at trial was sufficient to allow a rational juror to find beyond a reasonable doubt that Anderson caused claims to be submitted to Medicare and Medicaid for services that were medically unnecessary and in contravention of federal law. To become a provider for Medicare and Medicaid, Anderson was required to sign a provider agreement in which he agreed to render services in accordance with federal law. Witnesses affiliated with Medicare and Medicaid testified that neither program would pay for claims that were medically unnecessary or in contravention of federal law. The jury heard extensive testimony that Anderson prescribed controlled

substances to patients who filled those prescriptions at local pharmacies. King testified that, in his expert opinion, Anderson prescribed controlled substances without a legitimate medical purpose and outside the usual course of professional practice. Witnesses also testified about these prescriptions' monetary impact on Medicare and Medicaid. Viewing this evidence in the light most favorable to the government, the evidence was sufficient to convict Anderson of healthcare fraud.

Anderson asserts that his conviction was improper because it was the pharmacies, not he, that billed Medicare and Medicaid. This argument is unavailing. The district court correctly instructed the jury that it need not "find that [Anderson] personally committed the acts charged in the indictment[;]" rather, it could convict him "if he willfully caused an act to be done which would be a federal crime if directly performed by him or another." DE 89, Trial Tr. VIII, Page ID 2481. In *Hunt*, we upheld the healthcare fraud conviction of a physician who caused his associate to bill Medicare for ultrasound tests that had not been medically necessary. 521 F.3d at 640, 645-46. Similarly, in *United States v. Bertram*, 900 F.3d 743 (6th Cir. 2018), we upheld the healthcare fraud convictions of several defendants who started a urinalysis testing company and caused the testing laboratories to bill the insurer for tests that were not medically necessary. *Id.* at 747, 751.

Anderson argues that, because he did not know how the medications he prescribed would be paid for, he could not have knowingly devised a scheme to defraud Medicare and Medicaid. But the record indicates that Anderson *did* know how these medication

costs were covered. For example, JB, a patient of Anderson's whose prescription forms the basis of one of the unlawful distribution counts, testified that she received coverage for prescription drugs through Medicaid. JB testified that Anderson once changed her medication from one opiate to another, "explain-[ing] . . . that they would not—meaning the pharmacies would not cover it with my Medicaid, if it was—you know, if I filled it. It wasn't going to be filled without me going to a different pharmacy and paying cash money." DE 83, Trial Tr. II, Page ID 1243. A rational juror could therefore conclude that Anderson knew at least some of the prescriptions he wrote were being paid for by healthcare benefit programs.

Next, Anderson argues that he did not profit from the prescription reimbursements and therefore did not have the requisite intent to defraud. However, proof that a defendant profited from an alleged scheme to defraud is not required to obtain a conviction under § 1347; it is merely circumstantial evidence of intent to defraud. *See Persaud*, 866 F.3d at 380.

The government presented sufficient evidence of intent to defraud to convict Anderson of healthcare fraud. *See United States v. Webb*, 655 F.3d 1238, 1258 (11th Cir. 2011) (per curiam) (explaining that "the type of health care fraud here involved Webb's prescribing controlled substances for other than legitimate medical purposes, and having pharmacies submit claims for reimbursement to health insurers on the basis of his prescriptions"); *Bek*, 493 F.3d at 801 (affirming conviction for aiding and abetting healthcare fraud where trial testimony showed that defendant "was aware that he prescribed unnecessary

medication and that the health care benefit programs would ultimately pay some (or all) of the costs of those medically unnecessary drugs."). Therefore, we reject Anderson's challenge to the sufficiency of the evidence supporting his healthcare fraud conviction.

III.

For the foregoing reasons, we affirm.

OPINION OF JUSTICE WHITE, CONCURRING IN PART AND DISSENTING IN PART (APRIL 17, 2023)

HELENE N. WHITE, Circuit Judge, concurring in part and dissenting in part.

I concur in the affirmance of the admission of King's expert testimony and the rejection of Anderson's challenges to the sufficiency of the evidence. I dissent, however from Section II.A.2 of the majority opinion, which concludes that the jury instructions comport with *Ruan v. United States*, 142 S. Ct. 2370 (2022), and substantially covered Anderson's requested good-faith instruction.

When the district court charged the jury on the 21 U.S.C. § 841 count, it began by distinguishing between § 841's two elements. It instructed that, for a guilty verdict, the jury had to find, first, that Anderson had "knowingly or intentionally dispensed or distributed" the controlled substance and, second, that Anderson "prescribed the drug without a legitimate medical purpose and outside the course of professional practice." R.89, PID 2474. Unlike the instruction on the first element, the second element's instruction identified no *mens rea* requirement. The Supreme Court's *Ruan* opinion, however, teaches that the second element too must be performed knowingly or intentionally. 142 S. Ct. at 2375. Without such clarification, this charge by itself does not satisfy *Ruan*.

As the majority notes, the district court also gave a more detailed instruction in its discussion of deliberate indifference. It charged:

> Although knowledge of the defendant cannot be established merely by demonstrating he was careless, knowledge may be inferred if the defendant deliberately blinded himself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substance was distributed or dispensed without a legitimate medical purpose in the usual course of professional practice, then you may find that the defendant knew that this was the case. But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed other than for a legitimate medical purpose while acting in the usual course of professional practice, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part are not the same as knowledge and are not enough to find him guilty on this count.

R.89, PID 2476-77. This instruction comes close to, but falls short of, *Ruan*'s requirement.

The instruction tells the jury that it can infer knowledge if it finds that Anderson deliberately ignored obvious facts; it does not inform the jury that to return a guilty verdict it had to find that Anderson knew or intended that he was prescribing the controlled substances without a legitimate medical purpose outside the usual course of professional practice. Yet,

the second element does not depend on perceiving or ignoring probabilities. Anderson either understood and intended to prescribed controlled substances without a legitimate medical purpose in the usual course of professional practice, or he did not. That is, the instruction does not further clarify that both elements require the "knowledge or intent" *mens rea*. Telling the jury that carelessness, negligence, or foolishness is insufficient is not tantamount to instructing what mental state is required.

Accordingly, I part ways with the majority in that I do not read these two instructions, alone and in tandem, to comport with *Ruan*. But I also would go further than the majority and recognize that Anderson's requested good-faith instruction comports with *Ruan*. Anderson's requested instruction is near-identical to that in *United States v. Godofsky*, 943 F.3d 1011, 1019 (6th Cir. 2019). Anderson's requested good faith instruction reads:

> If a doctor dispenses a drug in <u>good faith</u> in medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of medical practice. That is, he has dispensed the drug lawfully.
>
> <u>Good faith</u> in this context means good intentions in the honest exercise of best professional judgment as to a patient's need. It means the doctor acted in accordance with what he believed to be proper medical practice. If you find the defendant acted in good faith in dispensing the drugs, then you must find him not guilty.

R.26, PID 240. The requested instruction in *Godofsky* reads:

> It is the theory of the defense that Dr. Godofsky treated his patients in good faith. If a physician dispenses a drug in good faith in the course of medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of accepted medical practice. That is, he has dispensed the drug lawfully.
>
> 'Good faith' in this context means good intentions and an honest exercise of professional judgment as to a patient's medical needs. It means that the defendant acted in accordance with what he reasonably believed to be proper medical practice. In considering whether the Defendant acted with a legitimate medical purpose in the course of usual professional practice, you should consider all of the Defendant's actions and the circumstances surrounding them. If you find that the Defendant acted in good faith in dispensing the drugs charged in these counts of the superseding indictment, then you must find the Defendant not guilty on those counts.

943 F.3d at 1022 (brackets omitted). The *Godofsky* Court recognized that this good-faith instruction "means an individual, personal, or subjective 'good faith,'" requiring jurors to "acquit him if they found that he might have held a personal belief that such prescriptions would benefit his patients." *Id.* at 1026. In *Godofsky*, we rejected this instruction as an incorrect statement of law. *Id.* at 1027. But *Ruan* shows that

the instruction accurately stated the law. That is, both instructions "perform[] the same function as the 'knowledge or intent' requirement identified" in *Ruan*. *See supra* Section II.A.1 (discussing *United States v. Ruan*, 56 F.4th 1291 (11th Cir. 2023)). As a result, I further disagree that the given instructions in Anderson's trial substantially cover Anderson's requested good-faith instruction.[1]

I respectfully dissent from Section II.A.2.

[1] I do not agree that Anderson conceded the issue. Anderson objected when the district court declined to give the requested instruction, and he filed his briefing on appeal prior to the Supreme Court's decision in *Ruan*.

JUDGMENT, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (APRIL 17, 2023)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROGER DALE ANDERSON,

Defendant-Appellant.

No. 21-3073

On Appeal from the United States District Court for the Southern District of Ohio at Columbus

Before: GIBBONS, WHITE, and NALBANDIAN, Circuit Judges.

THIS CAUSE was heard on the record from the district court and was submitted on the briefs without oral argument.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Clerk

JURY VERDICT, TRANSCRIPT OF JURY TRIAL PROCEEDINGS (MARCH 5, 2020)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

_____

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER DALE ANDERSON,

Defendant.

_____

Case No. 2:19-CR-67

Volume VIII of VIII

Before: Algenon L. MARBLEY,
United States District Judge.

(Thereupon, at 6:30 p.m., the following proceeding was held in open court with all counsel and defendant present.)

THE COURT: Ladies and gentlemen, it has come to the Court's understanding that of 6:25, you have reached a verdict.

JURY FOREPERSON: We have, Your Honor.

THE COURT: I'm going to ask that you provide the verdict forms to my courtroom deputy.

I will now publish your verdicts. I'm going to ask that the parties please stand. Counsel for the government as well.

Verdict Form 1. We the jury, in the above entitled case, unanimously find the defendant, Roger Dale Anderson, guilty of knowingly, intentionally, and unlawfully combining, conspiring, confederating, and agreeing with others in violation of 21 United States Code Section 846 to knowingly, intentionally, and unlawfully distribute and dispense, or cause to be distributed and dispensed through prescriptions, mixtures of substances containing a detectable amount of a Schedule II controlled substance, other than for a legitimate medical purpose in the usual course of professional practice in violation of 21 United States Code Section 841(a)(1) and (b)(1)(C), as charged in Count 1 of the indictment.

Count 2. We the jury, in the above entitled case, unanimously the defendant, Roger Dale Anderson, guilty of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 120 oxycodone, 5 milligrams, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 United States Code Section 841(a)(1) and (b)(1)(C), as charged in Count 2 of the indictment.

Count 3. We the jury, in the above entitled case, unanimously find the defendant, Roger Dale Anderson, guilty of knowingly and intentionally dispensing and distributing a quantity of a

Schedule II controlled substance, 150 Hydrocodone-Acetaminophen, 10/325-milligram, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 United States Code Section 841(a)(1) and (b)(1)(C) as charged in Count 3 of the indictment.

Count 4. We the jury, in the above entitled case, unanimously find the defendant, Roger Dale Anderson, guilty of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 90 Oxycodone-Acetaminophen, 5/325 milligrams, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 United States Code Section 841(a)(1) and (b)(1)(C) as charged in Count 4 of the indictment.

Count 5. We the jury, in the above entitled case, unanimously find the defendant, Roger Dale Anderson, guilty of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 185 Oxycodone-Acetaminophen, 10/325 milligrams, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 United States Code Section 841(a)(1) and (b)(1)(C) as charged in Count 5 the indictment.

Count 6. We the jury, in the above entitled case, unanimously find the defendant, Roger Dale Anderson, guilty of knowingly and intentionally dispensing and distributing a quantity of Schedule II controlled substance, 120 Hydrocodone-Acetaminophen, 10/325 milligram, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 United States

Code Section 841(a)(1) and (b)(1)(C) as charged in Count 6 of the indictment.

Count 7. We the jury, in the above entitled case, unanimously find the defendant, Roger Dale Anderson, guilty of knowingly and intentionally distributing and dispensing a quantity of a Schedule II controlled substance, 120 oxycodone, HCL, 10 milligram, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S. Code Section 841(a)(1) and (b)(1)(C) as charged in Count 7 of the indictment.

Count 8. We the jury, in the above entitled case, unanimously find the defendant, Roger Dale Anderson, guilty of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 120 Oxycodone-Acetaminophen, 7.5/325 milligram, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 United States Code Section 841(a)(1) and (b)(1)(C) as charged in Count 8 of the indictment.

Count 9. We the jury, in the above entitled case, unanimously find the defendant, Roger Dale Anderson, guilty of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 120 Hydrocodone-Acetaminophen, 10/325-milligram, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 United States Code Section 841(a)(1) and (b)(1)(C) as charged in Count 9 of the indictment.

Count 10. We the jury, in the above entitled case, unanimously find the defendant, Roger Dale Anderson, guilty of knowingly and willfully executing a scheme or artifice to defraud a health care benefit program as defined by 18 United States Code Section 24, in connection with delivery of or payment for health care benefits, items or services by causing the submission of claims to health care benefit programs for prescriptions that were issued in violation of law or otherwise outside the bounds of accepted medical practice in violation of 18 United States Code Section 1347, as charged in Count 10 of the indictment.

All of the verdict forms are signed by all 12 jurors in ink.

You may be seated.

Mr. Thomas, do you wish for a jury poll?

MR. THOMAS: Yes, Your Honor.

THE COURT: Juror No. 1, is this and were these your verdicts?

JUROR: Yes, Your Honor.

THE COURT: You can remain seated.

Juror No. 2, are these and were these your verdicts?

JUROR: They were, Your Honor.

THE COURT: Juror No. 3, are these and were these your verdicts?

JUROR: Yes, Your Honor.

THE COURT: Juror No. 4, are these and were these your verdicts?

JUROR: What does that mean?

THE COURT: Did you—is this what you decided?

JUROR: I signed it.

THE COURT: Yes. And it's a jury poll. The purpose of the jury poll, Juror No. 4, is to ask each individual juror if they agree with these verdicts, if these are their verdicts. I'm just asking. Did you agree with these verdicts? Are these your verdicts?

JUROR: Yes.

THE COURT: Juror No. 5, are these and were these your verdicts?

JUROR: Yes, Your Honor.

THE COURT: Juror No. 6, are these and were these your verdicts?

JUROR: Yes, sir.

THE COURT: Juror No. 7, are these and were these your verdicts?

JUROR: Yes.

THE COURT: Juror No. 8, are these and were these your verdicts?

JUROR: Yes, Your Honor.

THE COURT: Juror No. 9, are these and were these your verdicts?

JUROR: Yes, Your Honor.

THE COURT: Juror No. 10, are these and were these your verdicts?

JUROR: Yes, Your Honor.

THE COURT: Juror No. 11, are these and were these your verdicts?

JUROR: Yes, sir.

THE COURT: Juror No. 12, are these and were these your verdicts?

JUROR: Yes.

THE COURT: Ladies and gentlemen, you may retire to the jury room. I have something to bring to you that I'll bring to you within the next couple of minutes.

(Jury out at 6:41 p.m.)

THE COURT: Mr. Affeldt, are there any matters that we need to take up from the government at this time?

MR. AFFELDT: May I have one moment, Your Honor?

THE COURT: Yes.

MR. AFFELDT: No, Your Honor.

THE COURT: Mr. Thomas, are there any matters that we need to take up from the—

MR. THOMAS: I think we need to renew our Rule 29 motion. Other than that, no.

THE COURT: I'm sorry?

MR. THOMAS: I think we need to renew our Rule 29 motion.

THE COURT: For the same reasons as previously given, your Rule 29 motion is denied.

MR. THOMAS: Thank you, Your Honor. That's all we have.

THE COURT: All right. If there's nothing further, the Court is going to take back to the jury its certificates. I'm going to-and I'm assuming that Dr. Anderson will remain on bond pending his sentencing.

MR. AFFELDT: Your Honor, we have no objection other than that if not already conditioned, that he surrender his passport and that he also remain within the district.

THE COURT: Mr. Thomas, does Dr. Anderson have a passport?

MR. THOMAS: We surrendered it previously.

THE COURT: And I think that as a condition of his supervision he is restricted to travel outside of the district, right? He can't travel outside the district.

MR. THOMAS: I think that's right.

THE COURT: If it's not clear, then, as a condition of his release at this point, his presentence release, he'll be restricted to this district.

MR. THOMAS: Understood. Thank you, Your Honor.

(Proceedings concluded at 6:43 p.m.)

JURY VERDICT
(MARCH 5, 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER DALE ANDERSON,

Defendant.

Case No. 2:19-cr-67

Before: Algenon L. MARBLEY, Chief Judge.

VERDICT FORM
Count I

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly, intentionally, and unlawfully combining, conspiring, confederating, and agreeing with others in violation of 21 U.S.C. § 846 to knowingly, intentionally, and unlawfully distribute and dispense, or cause to be distributed and dispensed through prescriptions, mixtures of substances containing a detectable amount

of a Schedule II controlled substance, other than for a legitimate medical purpose in the usual course of professional practice, in violation of 21 U.S.C. § 841 (a)(1) and (b)(1)(C), as charged in Count 1 of the Indictment.

VERDICT FORM
Count II

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 120 Oxycodone 5mg, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), as charged in Count 2 of the Indictment.

VERDICT FORM
Count III

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 150 Hydrocodone-Acetaminophen 10/325 mg, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), as charged in Count 3 of the Indictment.

VERDICT FORM
Count IV

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 90 Oxycodone-Acetaminophen 5/325 mg, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), as charged in Count 4 of the Indictment.

VERDICT FORM
Count V

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 180 Oxycodone-Acetaminophen 10/325 mg, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), as charged in Count 5 of the Indictment.

VERDICT FORM
Count VI

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 120 Hydrocodone-Acetaminophen 10/325 mg, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), as charged in Count 6 of the Indictment.

VERDICT FORM
Count VII

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 120 Oxycodone HCL 10 mg, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), as charged in Count 7 of the Indictment.

VERDICT FORM
Count VIII

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 120 Oxycodone-Acetaminophen 7.5/325 mg, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), as charged in Count 8 of the Indictment.

VERDICT FORM
Count IX

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly and intentionally dispensing and distributing a quantity of a Schedule II controlled substance, 120 Hydrocodone-Acetaminophen 10/325 mg, not for a legitimate medical purpose in the usual course of professional practice in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C), as charged in Count 9 of the Indictment.

VERDICT FORM
Count X

We the jury, in the above entitled case, unanimously find the Defendant, Roger Dale Anderson

✓ Guilty

of knowingly and willfully executing a scheme or artifice to defraud a health care benefit program as defined by 18 U.S.C. § 24, in connection with the delivery or payment for, health care benefits, items or services by causing the submission of claims to health care benefit programs for prescriptions that were issued in violation of law or otherwise outside the bounds of accepted medical practice in violation of 18 U.S.C. § 1347, as charged in Count 10 of the Indictment.

Signed this 5 day of 3, 2020.

JUDGMENT IN A CRIMINAL CASE, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO (JANUARY 13, 2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA

v.

ROGER DALE ANDERSON

Case Number: CR-2-19-67
USM Number: 78202-061

Before: Algenon L. MARBLEY, U.S. District Judge

The Defendant:

☑ was found guilty on count(s) One (1) thru Ten (10) after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section
21 U.S.C. 846, 841(a)(1) and (b)(1)(C)

Nature of Offense:
Conspiracy to dispense and distribute controlled substances

Offense Ended: 3/29/2016

Count: One

The defendant is sentenced as provided in pages 2 through 1 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Date of Imposition of Judgment: 1/8/2021

/s/ Algenon L. Marbley
Signature of Judge

Algenon L. Marbley
U.S. District Judge
Name and Title of Judge

Date: Jan. 13, 2021

ADDITIONAL COUNTS OF CONVICTION

Title & Section: 21 U.S.C. 841(a)(1) and (b)(1)(C)

Nature of Offense:

Illegal dispensing of scheduled II controlled substances

Offense Ended	Count
6/18/2015	Two
3/3/2015	Three
4/28/2015	Four
4/16/2015	Five
l1/11/2014	Six
8/14/2015	Seven
5/15/2015	Eight
1/8/2016	Nine

Title & Section: 18 U.S.C. 1347 and 2

Nature of Offense: Health Care Fraud

Offense Ended	Count
10/21/2014	Ten

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Ninety-Six (96) months on each of counts 1 thru 10 to be served concurrently.

☑ The court makes the following recommendations to the Bureau of Prisons:

that the defendant participate in psychological and/or psychiatric counseling. Further, that the defendant be incarcerated at FPC Canaan, Waymart, PA. or as close as possible.

☑ The defendant shall surrender to the United States Marshal for this district:

on 3/5/2021

☑ as notified by the United States Marshal.

[. . .]

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of:

Three (3) Years on each of counts 1 thru 10 to run concurrently. As a special condition of supervised release the defendant shall provide access to his financial information and not obtain any new credit or make any major purchases until his financial obligations have been met in full, at the discretion of the probation officer.

2. The defendant shall obtain and maintain full-time employment

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse, (*check if applicable*)

4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)

5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)

[. . .]

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live

with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person

without first getting the permission of the probation officer.

9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).

11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these

conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS

Assessment: $ 1,000.00
JVTA Assessment*: ____
Fine: $ 4,000.00
Restitution: $ 22,627.89

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee

Medicare/CMS
Division of accounting operations
P.O. Box 7520
Baltimore, MD 21207-0520

Total Loss**: 9,938.51

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* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

Name of Payee

Medicaid
50 W. Town St., Ste 400
Columbus, OH 43215

Total Loss: $12,689.38

TOTALS: $22,627.89

☑ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☑ the interest requirement is waived for the

☑ fine

☑ restitution

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 27,627.89 due immediately, balance due . . .

[. . .]

F ☑ Special instructions regarding the payment of criminal monetary penalties:

While Incarcerated, if the defendant is working in a non-UNICOR or grade 5 UNICOR job, the defendant shall pay $25.00 per quarter toward his restitution obligation. If

working in a grade 1-4 UNICOR job, the defendant shall pay 50% of his monthly pay toward the restitution obligation. Any change in this schedule shall be made only by order of this Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

ORDER DENYING REHEARING, U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT (JUNE 6, 2023)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ROGER DALE ANDERSON,

Defendant-Appellant.

No. 21-3073

Before: GIBBONS, WHITE, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court.* No judge has requested a vote on the suggestion for rehearing en banc.

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* Judge Nalbandian recused himself from participation in this ruling.

Therefore, the petition is denied.

ENTERED BY ORDER OF
THE COURT

/s/ Deborah S. Hunt
Clerk

UNITED STATES PROPOSED JURY INSTRUCTIONS, U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO (FEBRUARY 4, 2020)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER DALE ANDERSON,

Defendant.

Case No. 2:19-CR-67

Before: Algenon L. MARBLEY,
United States District Judge.

The United States of America, by and through undersigned counsel, hereby submits the following proposed jury instructions, and requests leave to submit supplemental instructions as may be necessary and proper.

Respectfully submitted,

David M. Devillers
United States Attorney

/s/Kenneth F. Affeldt
Kenneth F. Affeldt (0052128)
Douglas W. Squires (0073524)
Assistant United States Attorneys

The following proposed General Instructions are requested, as set forth in the Sixth Circuit Pattern Jury Instructions:

1.01-1.09 General Principles

2.01 Introduction

2.04 On or About

2.08 Inferred State of Mind

2.09 Deliberate Ignorance

4.01A Causing an Act

7.01 Introduction

7.02A Defendant's Election Not to Testify or Present Evidence, if applicable

7.02B Defendant's Testimony, *if applicable*

7.03 Opinion Testimony

7.03A Witness Testifying to Both Facts and Opinion

7.05B Impeachment by A Witness Other Than Defendant by Prior Conviction, *if applicable*

7.06A Testimony of A Paid Informant

7.12 Summaries of Other Materials Not Admitted in Evidence, *if applicable*

7.12A Secondary-Evidence Summaries Admitted in Evidence, *if applicable*

7.13 Other Acts of Defendants, *if applicable*

7.20 Statement by Defendant

7.21 Stipulations

8.01-8.10 Deliberations and Verdict

The following Elements Instructions are also requested, as set forth in the Sixth Circuit Pattern Jury Instructions and supported by case law cited:

INSTRUCTION NO. 14.05

Conspiracy to Dispense and Distribute a Controlled Substance

Count 1 of the Indictment charges the defendant with conspiring to dispense and distribute a controlled substance in violation of Title 21, United States Code, § 846. It is a crime for two or more persons to conspire, or agree, to commit a drug crime, even if they never actually achieve their goal.

A conspiracy is a kind of criminal partnership. For you to find the defendant guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

First, that two or more persons conspired, or agreed, to dispense and distribute a controlled substance.

Second, that the defendant knowingly and voluntarily joined the conspiracy.

Now I will give you more detailed instructions on some of these terms.

With regard to the first element—a criminal agreement—the government must prove that two or

more persons conspired, or agreed, to cooperate with each other dispense and distribute controlled substances.

This does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on all the details. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.

What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to dispense and distribute controlled substances. This is essential.

An agreement can be proved indirectly, by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

One more point about the agreement. The indictment accuses the defendant of conspiring to commit several drug crimes. The government does not have to prove that the defendant agreed to commit all these crimes. But the government must prove an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge.

With regard to the second element—the defendant's connection to the conspiracy—the government

must prove that the defendant knowingly and voluntarily joined that agreement.

The government must prove that the defendant knew the conspiracy's main purpose and voluntarily joined the conspiracy intending to help advance or achieve its goals or common plan to distribute a controlled substance outside the scope of professional practice and not for legitimate medical purpose.

This does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that he was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy, or that his connection to it was substantial. A slight role or connection may be enough.

Further, this does not require proof that the defendant knew the drug involved was a Schedule II controlled substance, like fentanyl, Adderall, oxycodone and hydrocodone. It is enough that the defendant knew that it was some kind of controlled substance. Nor does this require proof that the defendant knew how much of the Schedule II controlled substance, like fentanyl, Adderall, oxycodone and hydrocodone was involved. It is enough that the defendant knew that some quantity was involved.

But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding

whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew the conspiracy's main purpose was to distribute a controlled substance outside the scope of professional practice and not for a legitimate medical purpose. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find any one of these defendants guilty of the conspiracy charge.

Pattern Crim. Jury Instr. 6th Cir. 14.05 (2019 ed.)
United States v. Chaney, 921 F.3d 572, 589 (6th Cir. 2019)
United States v. Gonzalez-Pujol, 2016 WL 590219 at *2 (E.D.Ky. 2016)
United States v. Singleton, 626 Fed.App'x 589, 595 (6th Cir. 2015)

INSTRUCTION NO. 14.02

Illegal Dispensing of a Schedule II Controlled Substance

Counts 2 through 9 of the Indictment charge the defendant with illegal dispensing of a Schedule II controlled substance in violation of Title 21, United States Code, § 841.

The defendant is charged with the crime of distributing a Schedule II controlled substance, includ-

ing fentanyl, Adderall, oxycodone and hydrocodone, which are all controlled substances. For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

First the defendant knowingly or intentionally dispensed and/or distributed a Schedule II controlled substance, including fentanyl, Adderall, oxycodone and hydrocodone, and;

Second that the defendant prescribed the drug without a legitimate medical purpose and outside the course of professional practice.

Now I will give you more detailed instructions on some of these terms.

To prove that the defendant knowingly distributed a Schedule II controlled substance, the defendant did not have to know that the specific substance was a Schedule II controlled substance, like fentanyl, Adderall, oxycodone and hydrocodone. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much controlled substance he distributed. It is enough that the defendant knew that he distributed some quantity of a controlled substance.

The term "knowingly" means that the act was done voluntarily and intentionally, and not because of mistake or accident. Ordinarily, there is no way that another person's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking. But a defendant's state of mind can be proven indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant

did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

The term "distribute" means the defendant delivered or transferred a controlled substance. The term distribute includes the actual, constructive, or attempted transfer of a controlled substance.

The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance.

Federal law authorizes registered medical practitioners to dispense a controlled substance by issuing a lawful prescription. Registered practitioners are exempt from criminal liability if they distribute or dispense controlled substances for a legitimate medical purpose while acting in the usual course of professional practice.

The term "practitioner" means a physician or other person who is licensed, registered, or otherwise permitted by the United States or the jurisdiction in which he practices, to distribute or dispense a controlled substance in the usual course of professional practice.

If a doctor dispenses a drug in good faith in medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of medical practice. That is, he has dispensed the drug lawfully.

Good faith in this context means good intentions in the honest exercise of best professional judgment as to a patient's need. It means the doctor acted in

accordance with what he believed to be proper medical practice. If you find the defendant acted in good faith in dispensing the drugs, then you must find him not guilty.

You may also consider the natural and probable results of any acts that the defendant did or did not do, and whether it is reasonable to conclude beyond a reasonable doubt that the defendant intended those results. This, of course, is all for you to decide.

Although knowledge of the defendant cannot be established merely be demonstrating that he was careless, knowledge may be inferred if the defendant deliberately blinded himself to the existence of a fact.

No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substance were distributed or dispensed without a legitimate medical purpose in the usual course of a professional practice, then you may find that the defendant knew that this was the case. But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed other than for a legitimate medical purpose while acting in the usual course of professional practice and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part are not the same as knowledge, and are not enough to find him guilty on this count.

The term usual course of professional practice means that the practitioner has acted in accordance with a standard of medical practice generally recognized

and accepted in the United States. A physician's own individual treatment methods do not, by themselves, establish what constitutes a "usual course of professional practice." In making medical judgments concerning the appropriate treatment for an individual, however, physicians have discretion to choose among a wide range of available options.

To prove that the distribution was without a legitimate medical purpose and outside the course of professional practice, it is enough to prove that the defendant's reason for prescribing the opioid pain medication was something other than legitimate medical treatment. It is not enough that the patients had some "legitimate need" or condition that might justify the prescription of opioid pain medication. The physician's reason for prescribing opioids, not the defendant's condition, is the key factor. Expert testimony may, but is not required to show that the medical purpose was illegitimate. Rather, it is enough that the evidence of the circumstances surrounding a prescription allows an inference of an illegitimate medical purpose.

If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Pattern Crim. Jury Instr. 6th Cir. 14.02 (2019 ed.)

United States. v. Chaney, 921 F.3d 572, 589 (2020)

INSTRUCTIONS NO. 10.05 AND 3.01A

Conspiracy to Commit Health Care Fraud

Count 11 of the Indictment charges the defendant with conspiring to commit the crime of health care fraud in violation of Title 18, United States Code, § 1349. This charge makes it a crime for two or more people to conspire with one another to commit the crime of health care fraud. It is a crime for two or more persons to conspire, or agree, to commit a criminal act, even if they never actually achieve their goal.

A conspiracy is a kind of criminal partnership. For you to find the defendant guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

First, that two or more persons conspired, or agreed, to commit the crime of health care fraud.

Second, that the defendant knowingly and voluntarily joined the conspiracy.

You must be convinced that the government has proven all of these elements beyond a reasonable doubt in order to find the defendant guilty of the conspiracy charge.

Pattern Crim. Jury Instr. 6th Cir. 10.05 (2019 ed.)
Pattern Crim. Jury Instr. 6th Cir. 3.01A (2019 ed.).
United States v. Rogers, 769 F.3d 372, 382 (6th Cir.2014)

INSTRUCTION NO. 3.02

Conspiracy to Commit Health Care Fraud-Agreement

With regard to the first element—a criminal agreement—the government must prove that two or more persons conspired, or agreed, to cooperate with each other to commit the crime of health care fraud.

This does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on all the details. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.

What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to commit the crime of health care fraud. This is essential.

An agreement can be proved indirectly, by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

Pattern Crim. Jury Instr. 6th Cir. 3.02 (2019 ed.)

INSTRUCTION NO. 3.03

Conspiracy to Commit Health Care Fraud– Defendants' Connection to the Conspiracy

If you are convinced that there was a criminal agreement, then you must decide whether the government has proven that the defendant knowingly and voluntarily joined that agreement. To convict the defendant, the government must prove that he knew the conspiracy's main purpose, and that he voluntarily joined it intending to help advance or achieve its goals.

This does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that he was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy, or that his connection was substantial. A slight role or connection may be enough.

But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that a defendant joined a conspiracy. But without more they are not enough.

The defendant's knowledge can be proved indirectly by facts or circumstances which lead to a conclusion that he knew the conspiracy's main purpose.

But it is up to the government to convince you that such facts and circumstances existed in this particular case.

Pattern Crim. Jury Instr. 6th Cir. 3.03 (2019 ed.)

INSTRUCTION NO. 3.06

Conspiracy to Commit Health Care Fraud– Unindicted, Unnamed or Separately Tried Co-Conspirators

Now, some of the people who may have been involved in these events are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged and prosecuted, or tried together in one proceeding.

Nor is there any requirement that the names of the other conspirators be known. An indictment can charge a defendant with a conspiracy involving people whose names are not known, as long as the government can prove that the defendant conspired with one or more of them. Whether they are named or not does not matter.

Pattern Crim. Jury Instr. 6th Cir. 3.06 (2019 ed.)

INSTRUCTION NO. 10.05

Health Care Fraud

Counts 12 through 14 of the Indictment charge the defendant with individual counts of health care fraud in violation of Title 18, United States Code, § 1347. For you to find the defendant guilty of health care fraud, you must find that the government has

proven each of the following elements beyond a reasonable doubt:

First, that the defendant knowingly and willfully executed a scheme to defraud a health care benefit program—that is, the Ohio Bureau of Workers' Compensation, Medicare, and Medicaid in connection with the delivery of or payment for health care benefits, items, or services.

Second, that the scheme related to a material fact OR included a material misrepresentation or concealment of a material fact.

Third, that the defendant had the intent to defraud.

Now I will give you more detailed instructions on some of these terms.

A "health care benefit program" is any public or private plan or contract affecting interstate commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. A health care program affects commerce if the health care program had any impact on the movement of any money, goods, services or persons from one state to another. The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to any degree.

A "scheme to defraud" includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

The term "false or fraudulent pretenses, representations, or promises" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as half-truths and the knowing concealment of material facts.

An act is done "knowingly and willfully" if it is done voluntarily and intentionally, and not because of mistake or some other innocent reason.

A misrepresentation or concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

To act with "intent to defraud" means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself.

The government need not prove all of the details alleged in the Indictment about the precise nature and purpose of the scheme. The government need not prove that the defendant had actual knowledge of the statute or specific intent to commit a violation of the statute, that the health care benefit program suffered any financial loss, that the defendant engaged in interstate commerce or that the acts of the defendant affected interstate commerce.

If you are convinced that the government has proven all of the elements of health care fraud, say so by returning a guilty verdict on that charge. If you have a reasonable doubt about any of the elements,

then you must find the defendant not guilty of this charge.

Pattern Crim. Jury Instr. 6th Cir. 10.05 (2019 ed.)
Model Crim. Jury Instr. 3d Cir. 6.18.1347
Neder v. United States, 527, U.S. 1, 3, (1999)

PRE-TRIAL HEARING
ON GOOD FAITH INSTRUCTION
(MARCH 5, 2020)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

_____

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER DALE ANDERSON,

Defendant.

_____

Case No. 2:19-CR-67

Before: Algenon L. MARBLEY,
United States District Judge.

[Transcript; Page 1418]

Thereupon, the following proceeding was held in chambers with all counsel present:

THE COURT: I brought in counsel this morning because I indicated yesterday that I would study *Godofsky* and determine whether we should have the good faith defense language included in the instructions. I initially erred on the side of caution and included it both in Instruction No. 31 and 32 in the fraud-30 and 31. But after

studying it last night and this morning, I believe it would be error for the Court to include the good faith defense language in there. As *Godofsky* points out—*Godofsky* is virtually on all fours with our case.

The statutory exception to criminal liability was at the forefront of the jury instruction. For the jury to find *Godofsky* guilty, it was abundantly clear that they would have to find his prescriptions to be written outside the scope of professional medical practice and not for legitimate medical purpose. *Godofsky*'s argument that the jury was not informed of the exception ignores the plain language they were provided since the exception was included in the very first element of the crime charged. Moreover, the instruction given by the Court tracked nearly the identical language found later in the last sentence of *Godofsky*'s proposed instruction, language that set out what the government must prove.

And I think that the instruction was the defendant knowingly or intentionally distributed oxycodone by writing prescriptions outside the scope of professional medical practice and not for legitimate medical purpose and that the defendant knew at the time of distribution that the substance was a controlled substance.

Those are two of the same elements that they must prove in our case. So I'm willing to hear anything else that you—maybe you read *Godofsky* differently, Mr. Thomas. And, if so, you know, it's—I mean, they can't start until we start. I would rather not start—if you have a different reading than the Court, I'm willing to hear whatever

argument that you have, because my preference always is to give the theory of the case instruction for both the government and the defense. But it just so happens that the theory of the case of the government is always the elements set forth in the pattern instructions that are taken directly from the statute, whereas the theory of the case for the defense, because of the way our system is structured and because of the Fifth and Sixth Amendments, it may not necessarily be through the testimony of the defendant should the defendant not take the stand, or through any direct examination that you would do of your witness but through cross, which is perfectly legitimate.

I understand your point, but still I don't—I had based my ruling in part on the fact that you pointed out some evidence that you elicited and some testimony that you elicited, some evidence that you adduced during your cross, that would support your theory of the case. But it appears that *Godofsky* says that the instruction itself, which is the same instruction that I'm going give here, maybe subsumes the good faith defense—-or the good faith defense is subsumed in it.

MR. THOMAS: A couple points.

I'm sorry, Judge. Did I cut you off?

THE COURT: No, you didn't. Go ahead.

MR. THOMAS: I went back and studied it last night too. I heard the Court yesterday, and I obviously was concerned I might be in this situation this morning.

So a couple of points. Number one, there is an important procedural difference between the two cases, and that is sort of, ironically in this case, it was the government's request for jury instructions that triggered this. We'd been relying on that. That was pretrial. And while I understand the requests were preliminary in nature, I think it's a little bit of a unique situation here where it's the government that requested the good faith instruction. So I know that the final decision rests with the Court. But I think that's one distinguishing characteristic procedurally.

The facts are also distinguished here from *Godofsky* in a couple of ways. The government's theory in the *Godofsky*'s case is what I would characterize as a traditional pill mill prosecution. It's called a pain clinic. His patients come in. They pay cash. They either get diet drugs or pain pills and they go out the back door with their drugs. I understand the elements are the same. But what was alleged against Dr. *Godofsky* was quite different than here where the government's theory, I think, is going to be that there was this semi-legitimate medical practice, but then this illegal stuff happened within it. I'm confident opposing counsel will correct me on that if need be, but that's a second distinguishing characteristic.

And then the third thing I observed-to be blunt, I'm not much of an appellate practitioner anymore, Judge Marbley. I probably read that case five times yesterday. I imagine the Court did too. But what struck me from the *Godofsky* opinion was that the panel said we, the panel in *Godofsky*,

are giving an opinion on what they characterize as the subjective good faith instruction, and they were very specific about that.

THE COURT: They made a juxtaposition between subjective good faith and objective good faith.

MR. THOMAS: For the life of me, I couldn't understand the reason the court parsed it that way. But here, number one, this good faith argument is apparently consistent with the law. So it's not wrong on its face to give this instruction.

And so my final point is that in the *Godofsky* case, it was the defendant—it was Dr. Godofsky who was arguing it was error to not give the instruction. And subject to the—I don't even remember what the standard of review is, but whatever the standard of review is for not giving a jury instruction. We're in a bit of a different situation here. But we're asking you, Judge Marbley, have the discretion to give it under the circumstances. So I would say that's the fourth reason that giving the instruction would be appropriate.

Did I address your concerns?

THE COURT: Yes. I mean, I understand your issue. That's why I was kind of going back and forth because I believe—because on the other hand, in an abundance of caution, I can give it, probably. *Godofsky* doesn't say that necessarily that I would be wrong for giving it. It says that I would be right for not giving it.

MR. SQUIRES: Yeah, it does.

THE COURT: And, you know, then I kept coming back to the fact that you included it in the first one. The government included it in the first—wasn't it in the conspiracy?

MR. SQUIRES: It was included in 30 within the body of the illegal dispensing of controlled substances.

THE COURT: Similar to circumstances in *Godofsky*. As a practical matter, I would understand and respect an argument from the government that says, you know what, since it's not—since *Godofsky* doesn't say it would be error to include it, Judge, just keep it in and that way that forecloses a possible avenue of appeal because, as a practical matter, you may be able to persuade the jury that there's reasonable doubt here. But there is a significant amount of evidence which has been adduced, which, if believed, would be, in the Court's view, evidence of Dr. Anderson's guilt.

That's premised on whether it's believed. The jury could always not believe it, or you can create reasonable doubt. So that's why I wanted to bring everyone in and kind of discuss it, whether it makes sense to even take it out at this point because, you know, I know that sometimes you all think ahead and you think in terms of possible appeal issues. And that, as a practical approach, that may be one way to do it. But, as a pure matter of law, this is a sticky wicket for me. It's kind of you either do what's right or not wrong, it seems. And so I wanted the government's take.

MR. SQUIRES: Your Honor, we think you're reading *Godofsky* exactly correct and we would prefer it out. Let's do it right, not wrong. And here's why.

The good faith defense improperly focuses the jury's directions from the doctor's acts to the patient's needs. And the patient's needs aren't part of the equation as to whether the elements we have to prove, he practiced within professional standards of conduct with medical necessity. That's key. We included *Godofsky* to flag the issue. There's good reason—there's some reason—there could be a reason, arguably, to keep it in, but there's more reasons to keep it out. It's that confusion to the jury. It could be confusion exacerbated in argument.

We know the judge is going to instruct them and they're going to listen to those instructions. But Counsel is trying to distinguish it's completely different. That's a pill mill.

THE COURT: I think that's a distinction without a difference.

MR. SQUIRES: I'll cut it out.

But the Court's read it right. It improperly shifts the focus, and we have a concern that it could be a path which would lead them from that correct instruction within 30.

THE COURT: You got any last word, Mr.—

MR. THOMAS: I will say that I've never been in a situation where the government requested a jury instruction and it sort of gets pulled out from under us. I know legally that can happen—

THE COURT: Let me explain this to you, though. As a matter of course, I almost never give the instructions that the two sides give me. I give the pattern jury instructions almost without exception. This is almost an outlier. There's no basis to rely on the instruction that was submitted pretrial.

Your theory of the case is not driven by what the government submits as its instructions. So your theory of the case is driven by your facts and what you believe your defense to be. So I just believe that under *Godofsky* that I should not—whether it would be error is not what animates me. What is correct does. And I think it would be incorrect to include them in either 30 or 31. I'm going to take those two paragraphs out. And then as soon as I physically take them out, I'll be out to begin our closing arguments.

MR. THOMAS: May I make a brief record just to preserve this?

THE COURT: Absolutely. And you do understand that your record is made with this discussion, but you may do so in any event.

MR. THOMAS: That's fine, Judge.

THE COURT: Go ahead and make your record just to be safe.

MR. THOMAS: It's my recollection that a written submission of the requested instruction is required to preserve that, and we're just—I'll just say for the record we're relying on the government's written submission. I don't think it's necessary for us to resubmit the instruction.

THE COURT: It might be a better way to you preserve it, however, to object to me taking it out. Because the government having submitted instructions is like you having submitted instructions. I'm not duty-bound-I require both sides to submit instructions. I'm not duty-bound to give any of the instructions that you submit. I don't think that you can rely on that to preserve your record. What you can do, however, to preserve it is object to me striking the good faith defense as you characterize it.

MR. THOMAS: Yes, sir, which is what I'm doing next. We object to the Court's striking of that, as was set forth in the government's request and the subsequent instructions that were distributed last night. I think the rules require me to object again after you give the instructions.

THE COURT: Yeah. What I do after I read the instructions, I'll come to the side before I excuse the jury and ask if there are any objections to the instructions as given-I ask two questions-as read, because if I misread them, you can make an objection then. And then, as a belt and suspenders approach, you can object again. But your record is preserved as of now.

MR. THOMAS: Got it. Do we approach to do that? THE COURT: No. I call for a sidebar.

MR. THOMAS: I think that covers the record piece of it. I do need a minute to actually delete some slides from my PowerPoint.

THE COURT: Okay.

MR. SQUIRES: Same here, Your Honor. Can we request just on those two instructions printed copies? That way we can follow along with you as you state it and are going to read. THE COURT: Yeah. I'm going to give you the right ones.

MR. SQUIRES: Thank you, sir.

MR. AFFELDT: Just one other point. Doug has graciously agreed to do both closings today.

THE COURT: Okay.

(End of chambers conference.)

JURY INSTRUCTIONS AS READ TO THE JURY, TRANSCRIPT (MARCH 5, 2020)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

_____

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROGER DALE ANDERSON,

Defendant.

_____

Case No. 2:19-CR-67

Before: Algenon L. MARBLEY,
United States District Judge.

THE COURT: Thank you.

Ladies and gentlemen, now it is time for me to instruct you on the law that you must follow in deciding this case.

I will start by explaining your duty as jurors and the general rules that apply in every criminal case. Then I will explain the elements, or parts, of the crime that the defendant is accused of committing. Then I will explain the defendant's position. Then I will explain some rules that you

must use in evaluating particular testimony and evidence. And last I will explain the rules that you must follow during your deliberations in the jury room and the possible verdicts that you may return. Please listen very carefully to everything I say.

You have two main duties as jurors. The first is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine. And nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

Your second duty is to take the law that I give you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of this trial to follow the instructions that I give you even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All of the instructions are important, and you should consider them together as a whole.

The lawyers have talked about the law during their closing arguments. But if what they said is different from what I say, you must follow what I say. What I say about the law controls. Please perform your duties fairly. Do not let bias, sympathy, or prejudice that you may feel toward one side or the other influence your decision in any way.

As you know, Dr. Anderson, the defendant, has pleaded not guilty to the crimes charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way the government tells the defendant what crimes he is accused of committing. It does not even raise any suspicion of guilt.

Instead, the defendant starts the trial with a clean slate, with no evidence all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption and convinces you beyond a reasonable doubt that he is guilty.

This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he is guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty.

The government must prove every element of the crimes charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based upon reason and common sense. It may arise from the evidence, from the lack of evidence, or from the nature of the evidence.

Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate

to rely and to act on it in making the most important decisions in your own lives. If you are convinced that the government has proved Dr. Anderson guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of the court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, and the stipulations to which the lawyers agreed.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their objections and questions are not evidence. My legal rulings are not evidence, and my comments and questions are not evidence.

During the trial I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

Make your decision based only on the evidence as I have defined it here and nothing else.

You are to consider only the evidence in this case. You should use your common sense in weighing the evidence.

Consider the evidence in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you're free to reach that conclusion.

In our lives, we often look at one fact and conclude from it that another fact exists. In law we call this an inference. A jury is allowed to make reasonable inferences, unless otherwise instructed. Any inferences you make must be reasonable and must be based on the evidence in this case.

The existence of an inference does not change or shift the burden of proof from the government to the defendant.

Now, some of you may have heard the terms direct evidence and circumstantial evidence. Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that she saw it raining outside, and you believe her, that would be direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial

evidence that you could conclude that it was raining outside.

It is your job to decide how much weight to give either to direct or circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

Another part of your job as jurors is to decide how credible or believable each witness was. That is your job, not mine. It is up to you to decide if a witness's testimony is believable and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

Let me suggest some things for you to consider in evaluating each witness's testimony.

Ask yourself if the witness was able to see or to hear clearly the events. Sometimes even an honest witness may not have been able to see or to hear what was happening or may make a mistake.

Ask yourself how good the witness's memory seemed to be. Did the witness seem to remember accurately what happened?

Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or to remember the events.

Ask yourself how the witness acted while testifying.

Did the witness appear to be honest? Or did the witness appear to be lying?

Ask yourself if the witness had any relationship to the government or to the defendant, or anything to gain or lose from the case that might influences the witness's testimony. Ask yourself if the witness had any bias or prejudice or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important or some unimportant detail. Ask yourself if it seemed like an innocent mistake or if it seemed deliberate.

And ask yourself how believable the witness's testimony was in light of all of the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witnessed the same event may not describe it exactly the same way.

These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people, and then decide what testimony you believe and how much weight you think it deserves.

One more point about witnesses. Sometimes jurors wonder whether the number of witnesses who testified makes any difference. Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were and how much weight you think their testimony deserves. Concentrate on that, not on the numbers.

There's one more general subject I want to talk to you about before I begin explaining the elements of the crime charged. The lawyers for both sides objected to some of the things that were said or done during this trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. These rules are designed to make sure that both sides receive a fair trial.

And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on rules of evidence, not on how I feel about this case. Remember, your decision must be based only on the evidence that you saw and heard here in open court.

That concludes my part of the instructions explaining your duties and general rules that apply in every criminal case. In a moment, I will explain the elements of the crime that the defendant is accused of committing. Before I do that, I want to emphasize that the defendant is only on trial for the particular crimes charged in the indictment. Your job is limited to deciding whether the government has proven the crimes charged.

Also keep in mind that whether anyone else should be prosecuted and convicted for these crimes is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide whether the government has proven Dr. Anderson guilty. Do not let the possible guilt of others influence your decision in any way.

The defendant has been charged with several crimes. The number of crimes is no evidence of guilt, and this should not influence your decision in any way. It is your duty to consider separately the evidence that relates to each charge, and to return a separate verdict for each one. For each charge, you must decide whether the government has presented proof beyond a reasonable doubt that Dr. Anderson is guilty of that particular charge.

Your decision on one charge, whether it's guilty or not guilty, should not influence your decision on any other charge.

Next I want to say a word about the dates mentioned in the indictment. The indictment

charges that the crimes happened, quote, on or about, quotes closed. The government does not have to prove that the crimes happened on that exact date, but the government must prove that the crimes happened reasonably close to that date.

Next I want to explain something about proving a defendant's state of mind. Ordinarily, there is no way that a defendant's state of mind can be proved directly because no one can read another person's mind and tell what that person is thinking.

But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

You may also consider the natural and probable results of any acts that the defendant knowingly did, and whether it is reasonable to conclude that the defendant intended these results. This, of course, is all for you to decide.

Next, I want to explain something about proving a defendant's knowledge. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the claims submitted to health care benefit programs were based on false or fraudulent pretenses, representations or promises, then you may find that he knew that the claims submitted

to health care benefit programs were based on false or fraudulent pretenses, representations, or promises.

But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the claims submitted to health care benefit programs were based on false or fraudulent pretenses, representations, or promises, and that the defendant deliberately closed his eyes to what was obvious.

Carelessness, or negligence, or foolishness on his part is not the same as knowledge and is not enough to convict. This, of course, is all for you to decide.

That concludes my part of the instructions explaining-I'm sorry. A defendant has an absolute right not to testify. The fact that he did not testify cannot be considered by you in any way. Do not even discuss it in your deliberations. Remember, it is up to the government to prove Dr. Anderson guilty beyond a reasonable doubt. It is not up to Dr. Anderson to prove that he is innocent.

You have heard the testimony of Dr. Timothy King who testified as an opinion witness. You do not have to accept Dr. King's opinions. In deciding how much weight to give them, you should consider the witness's qualifications and how he reached his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses. Remember that you alone decide how much of a witness's testimony

to believe and how much weight you think it deserves.

You have heard the testimony of witnesses who testified to both facts and opinions. Each of these types of testimony should be given the proper weight. As to the testimony on facts, consider the factors discussed earlier in these instructions for weighing the credibility of witnesses. As to the testimony on opinions, you do not have to accept the witness's opinion. In deciding how much weight to give it, you should consider the witness's qualifications and how he reached his conclusions along with the other factors discussed in these instructions for weighing the credibility of witnesses.

Remember that you alone decide how much of a witness's testimony to believe and how much weight you think it deserves.

You have heard the testimony of witnesses that before this trial were convicted of a crime. This earlier testimony was brought to your attention only as a way of helping you to decide how believable their testimony was. Do not use it for any other purpose. It is not evidence of anything else.

You have heard the testimony of a witness that he received money from the government in exchange for providing information. The use of paid informants is common and permissible. But you should consider the witness's testimony with more caution than the testimony of other witnesses. Consider whether his testimony may have been influenced by what the government

gave him. Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe his testimony beyond a reasonable doubt.

You have heard testimony of witnesses who were using illegal drugs during the time about which they testified. You could consider the witness's testimony with more caution than the testimony of other witnesses. An addict may have a constant need for drugs and for money to buy drugs, and may also have a greater fear of imprisonment because their supply of drugs may be cut off.

Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe their testimony beyond a reasonable doubt.

You have heard that the Court compelled the testimony of certain witnesses. You have also heard that this testimony cannot be used against them by the government except in a prosecution for perjury. You should consider these witnesses' testimony with more caution than the testimony of other witnesses. Consider whether their testimony may have been influenced by this grant of immunity.

Do not convict the defendant based on the unsupported testimony of such a witness, standing alone, unless you believe that testimony beyond a reasonable doubt.

During the testimony you've seen counsel use summaries, charts, drawings, calculations, or similar material which were offered to assist in the presentation and understanding of the evidence.

This material is not itself evidence and must not be considered as proof of any facts.

During the trial you have seen or heard summary evidence in the form of a chart, drawing, calculation, testimony, or similar material. This testimony was admitted into evidence, in addition to the material it summarizes, because it may assist you in understanding the evidence that has been presented. But the summary itself is not evidence of the material it summarizes, and is only as valid and reliable as the underlying material it summarizes.

You have heard testimony that the defendant committed acts other than the ones charged in the indictment. If you find the defendant did those acts, you can consider the evidence only as it relates to the government's claim of the defendant's knowledge or absence of mistake. You must not consider it for any other purpose.

Remember that the defendant is on trial here only for conspiracy to distribute controlled substances, illegally dispensing controlled substances, and health care fraud, not for the other acts. Do not return a guilty verdict unless the government proves the crime charged in the indictment beyond a reasonable doubt.

You have heard evidence that the defendant, Dr. Roger Dale Anderson, made a statement in which the government claims he admitted certain facts. It is for you to decide whether the defendant made that statement and, if so, how much weight it deserves. In making these decisions, you should consider all of the evidence about the

statement, including the circumstances under which the defendant allegedly made it. You may not convict the defendant solely upon his own uncorroborated statement or admission.

The government and the defendant have agreed, or stipulated, to certain facts. Therefore you must accept the stipulated facts as proved. And you will recall, ladies and gentlemen, yesterday, that I read to you the stipulated facts.

Ladies and gentlemen, this is a criminal trial. The United States has brought this prosecution against the defendant Dr. Roger Dale Anderson. The government alleges that Dr. Anderson conspired to dispense and distribute controlled substances, unlawfully dispensed controlled substances, and committed health care fraud.

In Count 1 of the indictment, Dr. Anderson is charged with conspiracy to dispense and to distribute controlled substances. In Counts 2 through 9, he is charged with unlawfully dispensing Schedule II controlled substances. And in Count 10, he is charged with health care fraud.

The government alleges that Dr. Anderson dispensed and conspired with others to dispense Schedule II controlled substances outside the scope of professional practice and not for legitimate medical purpose. The government further alleges the defendant defrauded a health care benefit program-Medicaid and Medicare-in connection with the delivery of or payment for health care benefits, items, or services.

The defendant, Dr. Anderson, has pleaded not guilty to the crimes charged in the indictment. The indictment is not any evidence at all of guilt. It is just a formal way the government tells the defendant what crimes he is accused of committing. It does not even raise any suspicion of guilt.

Count 1 of the indictment charges the defendant with conspiring to dispense and distribute a controlled substance in violation of Title 21, United States Code Section 846. It is a crime for two or more persons to conspire or agree to commit a drug crime, even if they never actually achieve their goal.

A conspiracy is a kind of criminal partnership. For you to find Dr. Anderson guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt.

First, that two or more persons conspired or agreed to dispense and distribute a controlled substance.

Second, that the defendant knowingly and voluntarily joined the conspiracy.

Now I will give you more detailed instructions on some of these terms. With regard to the first element, a criminal agreement, the government must prove that two or more persons conspired or agreed to cooperate with each other to dispense and distribute controlled substances.

This does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on

all the details. But proof that people simply met from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. These are things that you may consider in deciding whether the government has proved an agreement. But without more, they're not enough.

What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to dispense and distribute controlled substances. This is essential.

An agreement can be proved indirectly by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

One more point about the agreement. The indictment accuses Dr. Anderson of conspiring to commit several drug crimes. The government does not have to prove that

Dr. Anderson agreed to commit all of these crimes. But the government must prove an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge.

A conspiracy requires more than just a physician-patient or buyer-seller relationship between the defendant and another person. In addition, two people do not enter into a conspiracy to distribute and dispense a controlled substance simply because the patient or buyer resells the controlled substance to others, even if the physician or seller knows that the patient or buyer intends to

resell the controlled substance. The government must prove that the participants had the joint criminal objective of further distributing controlled substances to others.

With regard to the second element, the defendant's connection to the conspiracy, the government must prove that Dr. Anderson knowingly and voluntarily joined that agreement. The government must prove that Dr. Anderson knew the conspiracy's main purpose and voluntarily joined the conspiracy intending to help advance or achieve its goals or common plan to distribute a controlled substance outside the scope of professional practice and not for a legitimate medical purpose.

This does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that he was a member of it from the very beginning. Nor does it require proof that a defendant played a major role in the conspiracy or that his connection to it was substantial. A slight role or connection may be enough.

Further, this does not require proof that Dr. Anderson knew the drug involved was a Scheduled II controlled substance like fentanyl, Adderall, oxycodone or hydrocodone. It is enough that Dr. Anderson knew that it was some kind of controlled substance. Nor does this require proof that the defendant knew how much of the Scheduled II controlled substance like fentanyl, Adderall, oxycodone and hydrocodone was involved. It is enough that the defendant knew that some quantity was involved.

But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough even if he approved of what was happening or did not object to it. Similarly, just because a defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that the defendant joined the conspiracy. But, without more, they are not enough.

A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew the conspiracy's main purpose was to distribute a controlled substance outside the scope of professional practice and not for legitimate medical purpose. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find any one of these defendants guilty of the conspiracy charge.

Counts 2 through 9 of the indictment charge the defendant with illegal dispensing of a Schedule II controlled substance in violation of Title 21, United States Code Section 841.

The defendant is charged with the crime of distributing a Schedule II controlled substance, including fentanyl, Adderall, oxycodone and hydrocodone, which are all controlled substances. For you to find Dr. Anderson guilty of this crime, you must find that the government has proved

each and every one of the following elements beyond a reasonable doubt.

First, the defendant knowingly or intentionally dispensed or distributed a Schedule II controlled substance, including fentanyl, Adderall, oxycodone and hydrocodone; and,

Second, that the defendant, Dr. Anderson, prescribed the drug without a legitimate medical purpose and outside the course of professional practice.

Now I will give you more detailed instructions on some of these terms.

To prove that Dr. Anderson knowingly distributed a Schedule II controlled substance, the defendant did not have to know that the specific substance was a Schedule II controlled substance like fentanyl, Adderall, oxycodone and hydrocodone. It is enough that the defendant knew that it was some kind of controlled substance. Further, the defendant did not have to know how much controlled substance he distributed. It is enough that he knew that he distributed some quantity of a controlled substance.

The term knowingly means that the act was done voluntarily and intentionally and not because of mistake or accident. Ordinarily, there is no way that another person's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking. But a defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the

defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

The term distribute means the defendant delivered or transferred a controlled substance. The term distribute includes the actual, constructive, or attempted transfer of a controlled substance.

The term dispense means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administrating of a controlled substance.

Federal law authorizes registered medical practitioners to dispense a controlled substance by issuing a lawful prescription. Registered practitioners are exempt from criminal liability if they distribute or dispense controlled substances for a legitimate medical purpose while acting in the usual course of professional practice.

The term practitioner means a physician or other person who is licensed, registered, or otherwise permitted by the United States or the jurisdiction in which he practices, to distribute or dispense a controlled substance in the usual course of professional practice.

You may also consider the natural and probable results of any acts that the defendant did or did not do, and whether it is reasonable to conclude beyond a reasonable doubt that the defendant intended these results. This, of course, is all for you to decide.

Although knowledge of the defendant cannot be established merely by demonstrating he was careless, knowledge may be inferred if the defendant deliberately blinded himself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substance was distributed or dispensed without a legitimate medical purpose in the usual course of professional practice, then you may find that the defendant knew that this was the case. But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed other than for a legitimate medical purpose while acting in the usual course of professional practice, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part are not the same as knowledge and are not enough to find him guilty on this count.

The term usual course of professional practice means that the practitioner has acted in accordance with the standard of medical practice generally recognized and accepted in the United States. A physician's own individual treatment methods do not, by themselves, establish what constitutes a usual course of professional practice. In making medical judgments concerning the appropriate treatment for an individual, however, physicians have discretion to choose among a wide range of available options.

To prove that the distribution was without a legitimate medical purpose and outside the course of professional practice, it is enough to prove that the defendant's reason for prescribing the opioid pain medication was something other than legitimate medical treatment. It is not enough that the patients had some legitimate need or condition that might justify the prescription of opioid pain medication. The physician's reason for prescribing opioids, not the patient's condition, is the key factor. Expert testimony may, but is not required to show that the medical purpose was illegitimate. Rather, it is enough that the evidence of the circumstances surrounding a prescription allows an inference of an illegitimate medical purpose.

If you're convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

Count 10 of the indictment charges the defendant with health care fraud in violation of 18 United States Code Section 1347. For you to find Dr. Anderson guilty of health care fraud, you must find that the government has proved each of the following elements beyond a reasonable doubt.

First, that the defendant knowingly and willfully executed a scheme to defraud health care benefit programs, that is, Medicare and Medicaid, in connection with the delivery of or payment for health care benefits, items, or services.

Second, that the scheme related to a material fact or included a material misrepresentation or concealment of a material fact.

Third, that the defendant had the intent to defraud. Now I will give you more detailed instructions on some of these terms.

A health care benefit program is any public or private plan or contract affecting interstate commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity who is providing a medical benefit, item, or service for which payment may be made under the plan or contract. A health care program affects commerce if the health care program had any impact on the movement of any money, goods, services or persons from one state to another. The government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate commerce to any degree.

A scheme to defraud includes any plan or course of action by which someone intends to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises.

The term false or fraudulent pretenses, representations, or promises means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when made or made with reckless indifference to their truth. They include actual, direct false statements as well as

half-truths and the knowing concealment of material facts.

An act is done knowingly and willfully if it is done voluntarily and intentionally and not because of some mistake or other innocent reason.

A misrepresentation or concealment is material if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

To act with the intent to defraud means to act with an intent to deceive or cheat for the purpose of either causing a financial loss to another or bringing about a financial gain to oneself.

The government need not prove all of the details alleged in the indictment about the precise nature and purpose of the scheme. The government need not prove that Dr. Anderson had actual knowledge of the statute or specific intent to commit a violation of the statute, that the health care benefit program suffered any financial loss, that the defendant engaged in any interstate commerce, or that the acts of the defendant affected interstate commerce.

If you are convinced that the government has proven all of the elements of health care fraud, say so by returning a guilty verdict on that charge. If you have a reasonable doubt about any of the elements, then you must find that the defendant is not guilty of the charge.

For you to find the defendant Dr. Roger Dale Anderson guilty of unlawfully distributing Schedule II controlled substances or health care

fraud, it is not necessary for you to find that he personally committed the acts charged in the indictment. You may also find him guilty if he willfully caused an act to be done which would be a federal crime if directly performed by him or another.

But for you to find Dr. Anderson guilty of unlawfully distributing Schedule II controlled substances or health care fraud, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt.

First, that Dr. Anderson caused another person to commit the act of unlawfully distributing Schedule II controlled substances or health care fraud.

Second, if Dr. Anderson or another person had committed the act, it would have been the crime of unlawfully distributing Schedule II controlled substances or health care fraud; and,

Third, that Dr. Anderson willfully caused the act to be done.

Proof that Dr. Anderson may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You may consider this in deciding whether the government has proved that he caused the act to be done, but without more it is not enough. What the government must prove is that Dr. Anderson willfully did something to cause the act to be committed.

If you are convinced that the government has proved all of these elements, say so by returning

a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find Dr. Anderson guilty of unlawfully distributing Schedule II controlled substances or health care fraud.

That concludes the part of my instructions explaining the rules for considering the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room and your possible verdicts.

The first thing that you must do when you return to the jury room is to choose a foreperson. This person will help guide your discussions and deliberations and will speak for you here in open court.

Once you begin deliberating, do not talk to the courtroom deputy, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, that is, it must be signed by the foreperson, and hand them to the court security officer. The officer will give it to me, and I will respond as soon as possible. I may have to talk to the lawyers about what you have asked, and so it may take me some time to get back to you. Any questions or messages normally sent should be sent to me through your foreperson.

If you want to see any of the exhibits that were submitted into evidence, you will have those submitted—those exhibits with you in the jury room.

One more thing about messages. Do not ever write down or tell anyone, including me in any of those messages, how you stand on your votes. For instance, if you're split 6/6 or 8/4, or whatever your vote happens to be, do not advise the Court or anyone else. That must remain confidential until you are completed with your deliberations.

Your verdict, whether it is not guilty or guilty, must be unanimous as to each count. To find the defendant guilty of a particular count, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt. To find the defendant not guilty of a particular count, every one of you must agree that the government has failed to convince you beyond a reasonable doubt. Either way, guilty or not guilty, your verdict must be unanimous as to each count.

Now that all of the evidence is in and the arguments are completed, you're free to talk to each other about this case in the jury room. In fact, it is your duty to talk with each other about the evidence and to make every reasonable effort you can to reach unanimous agreement. Talk with each other. Listen carefully and respectfully to one another's views. Keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong. But do not ever change your mind just because other jurors see things differently or just to get the case over

with. In the end, your vote must be exactly that, your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should feel free to speak your minds.

Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proven the defendant guilty beyond a reasonable doubt.

If you find that the government has proved the defendant guilty, then it is my job to decide what the punishment should be. It would violate your oath as jurors to even consider the possible punishment in deciding your verdict.

Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt.

I have prepared verdict forms that you should use to record your verdicts. They're in the pocket part of this three-ring binder.

If you decide the government has proved the charges against Dr. Anderson beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved the charges against Dr. Anderson beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Each of you

should sign the forms, date them, and return them to me. And the signatures must be in ink.

I think that 38 has already been given.

Do you agree, Mr. Squires?

MR. SQUIRES: Yes, Your Honor. Thank you.

THE COURT: And you, Mr. Thomas?

MR. THOMAS: Yes, Your Honor. Thank you.

THE COURT: All right.

Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You must decide for yourselves if the government has proven Dr. Anderson guilty beyond a reasonable doubt.

The written form of the instructions on the law I have just given to you will be available to you in the jury room. You are invited to use these instructions in any way that will assist you in your deliberations and in arriving at a verdict.

These written instructions, which are in substantially the same language as I have given them to you verbally, represent the law that is applicable to the facts, as you find the facts to be.

There is an index at the beginning of these instructions that should help you locate any particular instruction. And I'm going to ask that in going through the instructions, you not take out any of the pages. Instead, just pass the instruction around to share them with each

other, to read them with one another so that no pages are lost or misplaced.

When you have reached a verdict and have filled out and signed the verdict forms, the foreperson shall notify the court security officer that the jury has reached its verdict.

You will have the verdict forms with you in the jury room. No inferences are to be drawn from the order in which the Court reads the verdict forms-I'm not going to read the verdict forms, but rather from the order in which they're placed or how they're written, you are to draw no inference from them.

When you have reached a verdict, complete the form. Remember all 12 members of the jury must agree upon your verdict and must sign the verdict in ink.

I cannot embody all the law in any single part of these instructions. In considering one portion, you must consider it in light of and in harmony with all of the instructions. I have instructed you on all of the law necessary for your deliberations. Whether certain instructions are applicable may depend on the conclusions you reach on the facts.

You must not be influenced by any consideration of sympathy or prejudice. It is your duty to weigh the evidence, to decide the disputed questions of fact, to apply the instruction to your findings, and to render your verdict accordingly. In fulfilling your duty as jurors, you must strive to arrive at a fair and just verdict.

Upon retiring, as I indicated first, select a foreperson. This person will help guide your deliberations. If you-as I've indicated, if you need to communicate with me, the foreperson will send a note to me.

Your initial conduct upon entering the jury room is important. It is not wise to insist upon a certain verdict immediately because your sense of pride may be aroused, and you may hesitate to give up your position if it is shown that it is not correct.

Consult with one another in the jury room and deliberate with a view to reaching an agreement, if you can do so without disturbing your individual judgment. Each of you must decide this case for yourself, but you should do so only after a discussion of the case with your fellow jurors. Do not hesitate to change an opinion if you're convinced that it is wrong. However, you should not surrender honest convictions concerning the weight of the evidence in order to be congenial or to reach a verdict solely because of the opinion of other jurors.

You are not to discuss this case other than with other jurors or to tell anyone how you would have voted until the jury has returned its verdict.

You will have in your possession the exhibits and the verdict forms. The foreperson will retain possession of these records, including the verdict form, and return them to the courtroom. Until your verdict is announced, you're not to disclose

to anyone the status of your deliberations or the nature of your verdict.

Can I see counsel at sidebar?

(The following proceeding was held at sidebar.)

THE COURT: First of all, any objections other than the objection that you made to the instruction that was not given?

MR. THOMAS: No, Your Honor.

MR. SQUIRES: There is exhibit—I'm sorry. Instruction No. 22, Your Honor. It's witness under compulsion by the Court. Somehow that slipped in. That's a witness under immunity. We did not have that in this case.

THE COURT: I'll just remove that. That's probably the easiest way. Because it's not going to apply to anyone. I'm also removing 38.

MR. SQUIRES: Thank you.

THE COURT: And I believe that 15 should be removed, special evidentiary matters. So I'm going to tell them that I have removed 15, 38 and 22.

MR. SQUIRES: Thank you, Your Honor.

THE COURT: And there were a couple of places where I had to make changes where, in 28, the Bureau of Worker's Comp somehow stayed in. And then somehow in these margins there were these numbers, and I don't know where they came from. I'm going to have-on page 33, there is a 4. And I'm going to have that deleted. And page 35 there was a 5.

So 15, 22, and 38 will come out, and I'll make those editorial corrections. And what I'm going to do is I'm going to excuse the jury now to go back and eat. Then, once they're done eating, the alternates are going to be excused and the jury will begin its deliberations in earnest. I'm going to give the alternates right now—I'm going to give them their certificates of participation since I won't have any chance to see them anymore.

Then what I want you all to do is to give Ms. Clark your cell numbers so that I can reach you if there's a question. You might have a chance to have lunch. I'm going to get out and try to have some lunch, too, since we haven't been eating lunch. We've just been inhaling our lunches.

Did you have something else, Mr. Thomas?

MR. THOMAS: As to 22, my recollection was the Court talked about a modification of 22, not striking it, when we were doing the charge conference.

MR. AFFELDT: What was initially in 22? Do you have that?

MS. MEDLEY: Yeah. I thought we replaced 22 with this instruction.

MR. AFFELDT: Testimony of witness under grant of immunity or reduced criminal liability.

THE COURT: Well, this is what we replaced it with apparently.

MR. SQUIRES: Yeah. It just doesn't apply. We were talking about—

THE COURT: Do you have the modifications that I made?

MS. MEDLEY: We modified a different one. This one we didn't modify. We just substituted.

MR. AFFELDT: Was 21 the one you modified?

MS. MEDLEY: The one we modified was of the addict—

THE COURT: Yeah, we modified that one.

So this one was one that we just put in. Do you disagree that there's a witness who—

MR. SQUIRES: Immunity granted by the Court? No.

MR. THOMAS: My interpretation of that instruction has been it's compelling—

THE COURT: You mean subpoenaed witness?

MR. THOMAS: Yeah.

THE COURT: But the second sentence of that—You have also heard that his testimony cannot be used against him by the government except in a prosecution for perjury-that doesn't apply.

MR. SQUIRES: That's formal immunity granted by the board—

MR. THOMAS: I understand. I respectfully object.

THE COURT: I'm willing to hear you out if there's a witness to whom this applies.

MR. THOMAS: We think it applies to Tackett and Reed, and I'll tell you why. They got use immunity because they both testified under proffer agreements. It's not transactional immunity, but it is use immunity.

MR. SQUIRES: The letter was clear. There was no immunity promised. It said it within the paragraphs. We didn't give use immunity. If fact, Tackett explained: Did I make you any promises as the prosecution? He said: No, Mr. Squires, you promised the exact opposite; I may be prosecuted.

I believe something similar with Ms. Reed, although less sophisticated.

THE COURT: They typically will go in if there is an agreement. And there was no agreement in this case. I'll note your objection, but I'm going to take out 22-15, 22, and 38. I'm just taking them out of the notebook.

MR. THOMAS: Note my objection.

THE COURT: The good faith objection is made. That objection is made.

Is there anything else?

MR. SQUIRES: No, Your Honor. Thank you.

(The following proceeding was held in open court.)

THE COURT: Ladies and gentlemen, you will note in the-as you go through the binder, there will not be an Instruction 15, 22, or 38. You are not to draw any conclusion from those. We agreed that those were not to come in.

Now, you may be excused, ladies and gentlemen, to repair to the jury room to have lunch with two of your new best friends who, after lunch, will be leaving you. And after they leave and after you've had lunch, you may begin your deliberations in earnest. The two alternate jurors will not

participate in the deliberations with you, nor will they participate in the selection of a foreperson, but they will have lunch with you.

I'd like to see the two alternates before you head out.

(Jury out at 12:36 p.m.)

THE COURT: I understand they have opted not to have lunch. They're just going to go about their business.

I want to thank both of you for your service and your willingness to participate. I know that being an alternate is like leaving the baby at the hospital, but that's the way our system is set up. I do, however, want to prevail upon you to understand that you still cannot discuss the case because it's possible—it hasn't happened in my 22 years but maybe once or twice, but it's possible that we may lose a juror during the deliberations, in which case we will bring one of you back and then the deliberations will begin anew. So that's why I can't have you discussing any aspect of the case with anyone else.

However, what I will ask you to do is to give to Ms. Evans your cell phone numbers, and, then, once the jury reaches its verdict, then either Ms. Clark or Ms. Evans will reach you and let you know what that verdict was, and then you can discuss this case and all of its nuances with whomever you please.

Thank you very much, sir, for your time and attentiveness. And thank you very much, ma'am. Thank you.

(Alternate jurors exited courtroom.)
(Proceedings concluded at 12:30 p.m.)