PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18-1881

UNITED STATES OF AMERICA

v.

MICHAEL LUDWIKOWSKI,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Criminal No. 1-16-cr-00513-001)
District Judge: Honorable Jerome B. Simandle

Argued June 18, 2019
Before: AMBRO, RESTREPO and FISHER,
Circuit Judges.

(Filed December 5, 2019)

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OPINION OF THE COURT

FISHER, *Circuit Judge*.

After Michael Ludwikowski went to the police station to report that he was receiving extortionate threats, the police questioned him extensively about why he was vulnerable to extortion. As it turned out, Ludwikowski, a pharmacist, had been filling fraudulent oxycodone prescriptions. He was later tried for distribution of a controlled substance. He moved to suppress the statements he made at the police station, arguing that they were inadmissible because no one read him his *Miranda* rights. The District Court denied the motion, and he was ultimately convicted.

Ludwikowski appeals the denial of his motion to suppress. After careful review, we conclude that he was not in custody and therefore no *Miranda* warnings

were needed. We also conclude that his other arguments are unpersuasive: his statements at the police station were not involuntary, and there was no plain error in the admission of expert testimony on the practice of pharmacy. We will therefore affirm.

I. Factual Background

Ludwikowski was a pharmacist who owned two independent pharmacies in Medford, New Jersey. Around March 2013, Ludwikowski told two of his customers, Matthew Lawson and Dontees Jones, that he could no longer fill their oxycodone prescriptions. On June 18, 2013, Ludwikowski received a series of threatening text messages saying things like: "THINK ABOUT IT, [YOU'RE] IN TOO DEEP . . . LOYALTY IS THE KEY, [THERE'S] NO I IN TEAM PLEASE CONSIDER MY WISHES OR [I'M] FORCED TO TAKE OTHER ROUTES IT MAY BE VERY DETRIMENTAL"; and "I GUESS WE'RE PLAYING HARDBALL I REALLY THINK [YOU] SHOULD SIT AND THINK GOT [A LOT OF] DIRT ON YOU MIKE AND BOY YOU GOT [A LOT] GOING ON. . . ." App. 639-46. Ludwikowski also received a letter hand-delivered at his pharmacy that said, "No one is safe unless you meet our [list] of demands, not your kids, family, you or [your employee] Dave." App. 74, 666. The letter demanded thousands of oxycodone and Adderall pills (listing dosages and types) and $20,000 in cash.

Ludwikowski contacted his uncle, a New York FBI agent, who in turn called the FBI's Trenton office.

Agent William Hyland, who picked up the case, spoke to Ludwikowski by phone on Friday and Saturday, June 21 and 22, 2013. Ludwikowski told Agent Hyland that "shady people . . . [came] to his pharmacy to pay cash to fill prescriptions for oxycodone," App. 75, and said his erstwhile customers Lawson and Jones might be the extorters. Agent Hyland also learned, from Detective Bill Knecht of the Medford Township Police Department, that there was an open investigation into possible criminal activity at Ludwikowski's pharmacy. Agent Hyland and Ludwikowski arranged that Ludwikowski would go to the Medford police station for an interview on Monday, June 24.

As planned, Ludwikowski drove to the police department on June 24. He was interviewed beginning around 10:15 a.m. and remained at the station until about 5:30 p.m. Because *Miranda v. Arizona*, 384 U.S. 436, 478-79 (1966), requires us to determine whether Ludwikowski was in custody given the totality of the circumstances, we recount the interview in some detail.

Detective Knecht and FBI Special Agent Stephen Montgomery interviewed Ludwikowski in a small eight-by-eight-foot room that contained a round table and three chairs. It had the atmosphere of a bare-bones conference room, with carpet on the floor and typical office furniture. Ludwikowski sat closest to the door and was not physically restrained. He was given water, which he drank, and offered pizza, which he refused. He went to the restroom, unaccompanied, at least three times. However, he asked permission before he

went. Out of the seven hours Ludwikowski was at the station, he was interviewed for about four. The interview took place in three phases, punctuated by breaks.

A. The First Phase

In the first portion of the interview, the officers obtained background information on Ludwikowski and learned about the threats he had been receiving. Ludwikowski told the officers that "the controlled substance thing"—by which he meant "[p]eople comin' in, trying to get drugs"—was "a long-term problem. We've been dealing with it for years." App. 326. He talked at length about a former employee, Krystal Wood, whom he had recently fired because of suspected drug abuse and theft. Discussion then turned to Jones and Lawson, the potential extorters. Ludwikowski described them coming in with prescriptions for different people and bringing in their friends. Ludwikowski said he and his employees were "naïve" and "filled [the prescriptions]." App. 426-27.

Just before the first break, Detective Knecht and Agent Montgomery spoke to each other briefly, and Agent Montgomery said to Ludwikowski, "We'll be right back. Excuse me. Do you need to use the bathroom or anything?" App. 450. Ludwikowski asked for a drink of water, and then he left the room and re-entered with water.

B. The Second Phase

The officers returned twenty minutes later, at which point their style of questioning shifted. Rather than listening to Ludwikowski and asking clarifying questions, as they had during the first phase, they asked pointed questions and suggested that Ludwikowski knew more than he was saying.

The officers went over the threatening text messages with Ludwikowski. Detective Knecht focused on the message that said, "I got a lot of dirt on you Mike." App. 469. When Ludwikowski posited that the "dirt" might be "a lie," Detective Knecht responded decisively, "No. Not a lie. . . . Mike. Mike. Stop. . . . Everybody's done somethin' [messed] up. Everybody's made mistakes. What goes through your mind immediately when they say, 'I got a lot of dirt on you, Mike'[?]" App. 470. Ludwikowski eventually answered, "[T]he only thing I kinda could've thought of was, was prescriptions." App. 471. Agent Montgomery replied, "Well, that's what we were thinking. . . . I mean we're all looking on this at its face." *Id.* Detective Knecht added, "It sounds like you might have been, you know, filling scripts for these guys; that would piss 'em off that you're not doin' it. . . . [Y]ou had been doing it for a couple of years. . . ." App. 472. Ludwikowski answered, "Probably . . . probably . . . probably." *Id.*

A few minutes later, Agent Montgomery said, "So, it, it appears on the surface that, you know, to us, you could've been working with these guys. . . . Now, we're giving you an opportunity now to tell us the truth."

App. 475-76. Ludwikowski answered, "I was not, I didn't have no involvement with anybody. . . ." App. 476. The officers also noted that Ludwikowski was making around $16,000 a month filling oxycodone prescriptions for cash; they said, "[T]hat would cause a lot of people not to ask questions because it's very lucrative. Okay?" App. 484. Ludwikowski responded, "I, I'd have to agree. Yeah." *Id.* Ludwikowski continued to focus on his former employee, Wood. In response, Detective Knecht said that law enforcement was "willing to do . . . whatever we need to do to help you and try to keep you and your family . . . safe," but that Ludwikowski needed to "[c]ut the [nonsense]. Alright?" App. 499.

The officers continued to probe whether Ludwikowski had been in business with his extorters, observing that they were "very specific . . . about what you've done." App. 524. The officers asked if anybody came in and said that Jones needed pills. When Ludwikowski said he did not know, Detective Knecht responded, "Well, that's, that doesn't seem like a very truthful answer. Okay?" App. 518.

After some time, Detective Knecht told Ludwikowski, "September of 2010, I opened an investigation on you" that led to the arrests of several people. App. 544. Ludwikowski said, "I never knew anybody got arrested." App. 546. Detective Knecht responded, "That's contrary to what we . . . know." *Id.* He went on to emphasize that Ludwikowski was a subject of the investigation and that Ludwikowski's past activities had gotten him in trouble:

> But the fact of the matter is, you're not aware of a lot of this Mike because you were a part of the investigation. You were somebody we were lookin' at and, and your involvement. Okay? Now, after you've been doin' this for the last two and a half, three years . . . it's come back to bite you in your ass because now you have somebody or a group of somebodys that are willing to do harm against you and your family. . . .

App. 548. Ludwikowski said, "I'm very, like I said, very naïve and, and trusting. . . ." App. 549. Detective Knecht responded, "You . . . say naïve and trusting . . . and I'll change it to greedy." *Id.* Ludwikowski responded, "Okay." *Id.* A few minutes later, the detective told Ludwikowski, "I find it hard to believe an educated guy . . . you went to college for how long . . . you run a business . . . I find it very hard to believe that . . . flags didn't go up and say . . . these . . . people are coming here for a reason?" App. 564-65.

Detective Knecht also told Ludwikowski that "taking these scripts, you know, and not doing the . . . checks that you should've done? It's not criminal. I'm not gonna arrest you for it, okay?" App. 589. Eventually, Agent Montgomery said, "We'll be right back, alright?" App. 604. As the officers left, Ludwikowski asked for another glass of water, which Detective Knecht brought about ten minutes later.

C. The Third Phase

The second break lasted ninety minutes. Then Detective Knecht returned alone and resumed the interview without any explanation for the delay. He asked, "Anything else you thought about while you're sittin' in here for the last little bit that we were out there?" App. 607. Ludwikowski answered, "I'm just freezing and I gotta go to the bathroom." *Id.* He smiled and laughed a little as he said it, then continued to answer Detective Knecht's questions in a relaxed body posture for a half hour before asking about the bathroom again.

The tone of the interview shifted again after the second break. Ludwikowski made a series of lengthy statements about his circumstances and motivations, becoming emotional at times. He said he stopped filling narcotics prescriptions because "the constant, every day, people comin' in . . . was relentless." App. 610. He said that "when my dad passed I had two hundred and some people that owed me money," and added, "I trusted too many people and it's definitely[] a lesson." App. 611-12. He said the oxycodone business was "the trend of what the pharmacy was about. You know, pharmacies were doin' it and doin' it and, you know . . . I just followed suit and I guess . . . I just didn't change quick enough." App. 624.

The third break began abruptly; an unidentified detective opened the door just as Ludwikowski was tearing up while saying, "I want my kids to be safe. . . ." App. 636. Detective Knecht said, "I'll be right back,"

and walked out. *Id.* He brought Ludwikowski more water and then left for nearly an hour. Upon his return, he again gave no explanation, but said he was ready to go to the pharmacy with Ludwikowski, as they had discussed. The two men left the station, and Ludwikowski drove himself to the pharmacy.

D. After the Interview

Ludwikowski called Agent Hyland the next day to report several more text messages, and Agent Hyland went to Ludwikowski's house to help him text with the unknown extorter. Ludwikowski also signed a form that day authorizing the FBI to record his telephone communications. The extortion was eventually solved: Dontees Jones and Matthew Lawson were charged and pled guilty.

II. Procedural History

In November 2016, over three years after the interview at the police station, Ludwikowski was indicted on six counts of drug distribution (21 U.S.C. § 841), two counts of maintaining premises for drug distribution (*id.* § 856), and conspiracy to distribute drugs (*id.* § 846). He filed a motion to suppress the statements he made after the first break during the June 24, 2013 interview, arguing that he was in custody and should have received *Miranda* warnings, and that his statements were involuntary. After a day-long evidentiary hearing, the District Court denied the motion.

Witnesses at Ludwikowski's subsequent 22-day jury trial included law enforcement officers, doctors whose prescription forms had been stolen to forge prescriptions, employees and others who were familiar with the operation of Ludwikowski's pharmacies, drug dealers and drug users who had filled prescriptions there, and an expert in the practice of pharmacy. A redacted version of the video of Ludwikowski's June 24, 2013 interview was entered into evidence and played for the jury.

The jury found Ludwikowski guilty of five of the six drug distribution charges and one of the two premises charges. It acquitted him of conspiracy. At sentencing, the District Court found by a preponderance of the evidence that Ludwikowski had acted in concert with others. It sentenced him based on hundreds of fraudulent prescriptions, rather than the five associated with the counts of conviction. By Ludwikowski's calculation, the consideration of the additional prescriptions put his sentence in the 151-188-month range, rather than the 51-63-month range. The court ultimately sentenced him to 180 months. He appeals.

III. Analysis[1]

A. On the Unique Facts of This Case, *Miranda* Warnings Were Unnecessary

Ludwikowski argues that the District Court erred in denying his motion to suppress the statements he made during his June 24, 2013 interview. He contends that his statements are inadmissible because he was in custody and therefore needed *Miranda* warnings, which he did not receive. We review *de novo* the question of "[w]hether a person was 'in custody' for the purposes of *Miranda*," and we review the underlying factual findings for clear error. *United States v. Jacobs*, 431 F.3d 99, 104 (3d Cir. 2005). Under the clear-error standard, we accept the District Court's findings unless we are "left with the definite and firm conviction that a mistake has been committed." *United States v. Howe*, 543 F.3d 128, 133 (3d Cir. 2008) (citation omitted).

Under the *Miranda* rule, "the privilege against self-incrimination is jeopardized"—and warnings are required—"when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning." 384 U.S. at 478-79. "'[C]ustody' is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion." *Howes v. Fields*,

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[1] The District Court had jurisdiction over Ludwikowski's offenses against the laws of the United States. 18 U.S.C. § 3231. This Court has jurisdiction over the District Court's final judgment and its judgment of sentence. 28 U.S.C. § 1291; 18 U.S.C. § 3742.

565 U.S. 499, 508-09 (2012). To determine whether an individual was in custody, we first establish "the circumstances surrounding the interrogation." *Jacobs*, 431 F.3d at 105 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 663 (2004)). Then we ask, as an objective matter, whether "a reasonable person [would] have felt that he or she was not at liberty to terminate the interrogation and leave." *Id.* (emphasis omitted) (quoting *Yarborough*, 541 U.S. at 663). In other words, was there a "restraint on freedom of movement of the degree associated with a formal arrest"? *Id.* (emphasis omitted) (quoting *Yarborough*, 541 U.S. at 663). This "freedom-of-movement test," however, "identifies only a necessary and not a sufficient condition for *Miranda* custody." *Howes*, 565 U.S. at 509 (quoting *Maryland v. Shatzer*, 559 U.S. 98, 112 (2010)). We must "ask[] the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.*

We are aided at the first step—establishing the circumstances surrounding Ludwikowski's interview—by the fulsome factual record created during the day-long hearing on the suppression motion. At that hearing, Detective Knecht and FBI Agents Montgomery and Hyland testified. In addition, the seven-hour video and transcript of Ludwikowski's interview were in evidence. At the end of the hearing, the District Court delivered extensive oral findings that were not clearly erroneous—that is, they do not leave us with

the firm impression that there has been a mistake. *See Howe*, 543 F.3d at 133.

The District Court noted two "basic considerations": first, that "it was [Ludwikowski's] choice and not someone else's to answer the questions so that the crime . . . could be solved," and second, that the extortion was in fact solved because of Ludwikowski's answers. App. 261-62. The court also found that "Ludwikowski certainly knew, before being interviewed on June 24th, that he would be asked for his interpretation of the threats he was reporting as well as exploring who could be issuing such threats." App. 259. The court "credit[ed] the testimony of Detective Knecht and Special Agent Montgomery, namely, they weren't laying some sort of trap to induce [Ludwikowski] to incriminate himself but rather they were trying to solve an ongoing and serious extortion." App. 260.

The court found that there were never more than two questioners in the room with Ludwikowski; no one blocked his exit; and officers used some "salty language," but nothing out of the ordinary for a police department. App. 260-61. The meeting, overall, was "businesslike" in tone. App. 262. "There was no posturing or shouting or pounding fists on the table or any display of emphatic behavior." App. 261. The court noted that seven hours is "a long time," but added that there were two breaks, and that Ludwikowski had his cell phone and his normal clothes. App. 262. Finally, the court observed that Ludwikowski "never indicated once that he did not want to answer questions. Instead he gave hesitant answers or inconsistent answers. His

demeanor on tape was that of a person who was deflecting the questions or pretending not to know the answers." App. 262-63.

With "the scene . . . set," *Jacobs*, 431 F.3d at 105 (quoting *Yarborough*, 541 U.S. at 663), we move to the second step of the *Miranda* analysis and ask whether a reasonable person in Ludwikowski's circumstances would have felt free to go. Numerous factors help answer this question: the interview's location, physical surroundings, and duration; whether he voluntarily participated; whether he was physically restrained; whether other coercive tactics were used, such as hostile tones of voice or the display of weapons; and whether the interviewee was released when the questioning was over. *Id.*; *United States v. Willaman*, 437 F.3d 354, 359-60 (3d Cir. 2006). We also consider whether the questioner believed the interviewee was guilty; whether the interviewee was specifically told he was not under arrest; and whether he agreed to meet knowing that he would be questioned about a criminal offense. *Jacobs*, 431 F.3d at 105-06. However, the "freedom-of-movement test" delineated by these factors "identifies only a necessary and not a sufficient condition for *Miranda* custody." *Howes*, 565 U.S. at 509 (quoting *Shatzer*, 559 U.S. at 112). We must "ask[] the additional question whether the relevant environment presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.*

Ludwikowski argues that the District Court applied the wrong rule when analyzing whether a

reasonable person would have felt free to leave. He points to the court's statement that "there's an objective and subjective element of [the custody analysis]." Appellant's Br. 36 (quoting App. 243). Ludwikowski is correct that the custody test is objective. *See Jacobs*, 431 F.3d at 105. The District Court may have been referring to the fact that some of the factors are framed in a subjective fashion, such as what the officers believed about the individual's guilt or innocence. *See id.* Regardless, it applied the test correctly, carefully considering the custody factors in light of the evidence before it. As we now explain, we agree with its conclusion that Ludwikowski was not in custody.

To start, Ludwikowski was not physically restrained. *Howes*, 565 U.S. at 509, 515. He did not feel "obligated to come to . . . the questioning," *Jacobs*, 431 F.3d at 105; rather, he went to the station to discuss the extortion because he feared for his family's safety. At the end of the interview, he was released and left in his own car. *See Howes*, 565 U.S. at 509; *see also Jacobs*, 431 F.3d at 106-07 (unhindered release at end of questioning can be "an indicator of what the circumstances during the questioning would have made a reasonable person believe"). And, given the circumstances, we agree with the District Court's finding that Ludwikowski knew he would be questioned about the reasons behind the extortionate threats, including his own possibly criminal activities at the pharmacy. *See id.* at 106. All of these factors tend to show he was not in custody.

Other factors seem, initially, to weigh in the opposite direction. But upon deeper consideration, these factors, too, demonstrate that Ludwikowski was not in custody. For example, Ludwikowski was interviewed at the station house, where the pressures associated with custodial interrogation are "most apt to exist." *Jacobs*, 431 F.3d at 105 (quoting *Steigler v. Anderson*, 496 F.2d 793, 799 (3d Cir. 1974)). Even so, he was not "whisked" to the station after an arrest, as in the classic *Miranda* scenario. *Howes*, 565 U.S. at 511. Rather, he arranged to go to the station voluntarily and had three days to think about the coming encounter with law enforcement. And, while the door to the interview room was kept closed after the first break, it was not locked. In these circumstances, the station-house location does not weigh in favor of custody.

The officers told Ludwikowski they thought he might be filling fraudulent prescriptions—and when officers have "more cause for believing the suspect committed the crime," there is a "greater tendency to bear down in interrogation and create the kind of atmosphere of significant restraint that triggers *Miranda*." *Jacobs*, 431 F.3d at 105 (quoting *Steigler*, 496 F.2d at 799). Here, though, the officers were trying to get to the bottom of the extortion, so they needed to question Ludwikowski about the subject of the threats. Therefore, the questions about oxycodone distribution do not show the coercion associated with custody.

The interrogation was lengthy, whether we consider the time of the active questioning (about four hours) or the total time at the station (about seven).

See Howes, 565 U.S. at 509. This factor could indicate that Ludwikowski was in custody, but, as the District Court found, "[m]uch of [the interview] was devoted to trying to identify who was the extorter and why [they would] be doing it," so the interview would have been shorter if Ludwikowski had been more responsive. App. 267. Ludwikowski criticizes the District Court's finding that the two breaks reduced the length of the active questioning and thus weighed against a finding of custody. He argues that the breaks were actually coercive because the officers gave him no warning before the breaks began, no indication of how long the breaks might last, and no explanation when they returned. However, Ludwikowski exaggerates or misreads these facts. While the officers departed the room relatively abruptly, they excused themselves before two of the breaks. App. 450 ("We'll be right back. Excuse me. Do you need to use the bathroom or anything?"); App. 604 ("We'll be back, alright?"). Ludwikowski was left alone, but not incommunicado; unlike a suspect, he had his phone, which he perused and used to make a call. In sum, the length of the interrogation, including the breaks, does not show that Ludwikowski was in custody.[2]

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[2] Ludwikowski argues that the final break was gratuitous because the officers had no more questions for him after they returned. Thus, he argues, the break was merely a chance to "leav[e] [him] to contemplate his fears alone for another hour." Appellant's Br. 28. Ludwikowski cites no evidence to support his contention that the break was needless, and it is equally possible that the officers were continuing their investigative activities.

Along similar lines, Ludwikowski points out that he told Detective Knecht, after the second break, that he was "freezing" and had to go to the bathroom. App. 607. He asserts that because he did "not feel[] free even to seek an escort to the bathroom," he also did not believe he was at liberty to end the questioning and leave. Appellant's Br. 27-28. But the video shows that Ludwikowski smiled and laughed a little as he made this comment, and that he continued to answer questions in a relaxed body posture for a half hour before asking again about the bathroom. Given that he did not appear at all distressed, his argument about this exchange is unpersuasive.

Considering all these factors, the District Court did not err in concluding that a reasonable person in Ludwikowski's situation would have felt free to go. But even if we concluded the opposite, our analysis would not end there: constraints on freedom of movement are a necessary but not sufficient condition of custody. The individual must also be subject to "the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Howes*, 565 U.S. at 509. In the "paradigmatic *Miranda* situation"—when an individual is "arrested in his home or on the street and whisked to a police station for questioning"—he is subject to "the shock that very often accompanies arrest," and he may feel pressured to speak in the hope that doing so will lead to his release or, down the road, to more lenient treatment. *Id.* at 511-12. Ludwikowski, by contrast, needed to report and end the extortion while simultaneously concealing his own bad acts. The

Constitution does not protect him from that kind of pressure.

Our conclusion is bolstered by examining a Fourth Circuit case where the defendant, like Ludwikowski, simultaneously tried to get help and conceal his own wrongdoing. In that case, the defendant, Jamison, wanted to hide that he had accidentally shot himself because he was a felon who was not permitted to possess a firearm. *United States v. Jamison*, 509 F.3d 623, 625 (4th Cir. 2007). The police began investigating in the emergency room, and when Jamison changed his story about how he had been injured, they questioned him closely and repeatedly about what had happened. *Id.* at 626. Jamison was later charged with being a felon in possession in violation of 18 U.S.C. § 922(g). He moved to suppress the statements he made at the hospital, arguing (like Ludwikowski) that he was in custody and should have received *Miranda* warnings. *Id.* at 627-28.

The Fourth Circuit began by pointing out that *Miranda* itself did not purport to make any rule governing "general questioning of citizens in the fact-finding process." *Id.* at 631 (quoting *Miranda*, 384 U.S. at 477). Thus, the Court observed, "*Miranda* and its progeny do not equate police investigation of criminal acts with police coercion. This distinction is especially salient when the victim or suspect initiates the encounter with the police." *Id.* The Court held that "a reasonable person," "after providing shifting explanations" of the crime he was reporting, "would expect the police to question him further, lest they expend

energy investigating false leads." *Id.* at 632. The Court ruled that the "most substantial restrictions of Jamison's freedom of movement" were "[t]he fact of [his] injury, the trappings of his treatment, and the routine aspects of the investigation he initiated." *Id.* at 633. These restrictions "far outstripp[ed] whatever additional impingement on his freedom to leave was presented by the officers during the ongoing police investigation into his shooting." *Id.* Therefore, a reasonable person would have felt free to terminate the police encounter; Jamison was not in custody and no *Miranda* warning was needed. *Id.* at 632.

Although *Jamison* is not exactly like this case, there are important parallels. Jamison was restricted by his need for emergency medical treatment; Ludwikowski was constrained by the need to involve law enforcement to keep his family safe. Both Jamison and Ludwikowski, having initiated police investigations, could have reasonably expected the officers to investigate diligently and question them closely. Therefore, like Jamison, Ludwikowski was not in custody.

We emphasize that we apply the law only to the precise facts before us: the defendant was the victim of one crime and the perpetrator of another, intertwined crime; he reached out to police for help; and he engaged with the police in both an offensive and a defensive posture, reporting one crime while at the same time trying to conceal the other. Our analysis would have no bearing on a case lacking these facts.

B. Ludwikowski's Statements Were Voluntary

Ludwikowski next argues that his incriminating statements should have been suppressed because he did not make them voluntarily. The issue is not resolved by virtue of our conclusion that Ludwikowski was not in custody. In "special circumstances," a confession might be involuntary even if the person giving it is not in custody. *Beckwith v. United States*, 425 U.S. 341, 347-48 (1976); *see also United States v. Swint*, 15 F.3d 286, 288-89 (3d Cir. 1994) (treating custody and voluntariness as separate inquiries). This case, however, is not the outlier contemplated in *Beckwith*; Ludwikowski's statements were voluntary.

The Government has the burden to prove, by a preponderance of the evidence, that Ludwikowski's statements were voluntary —that is, "the product of an essentially free and unconstrained choice." *Swint*, 15 F.3d at 289 (quoting *U.S. ex rel. Hayward v. Johnson*, 508 F.2d 322, 326 (3d Cir. 1975)). There can be no involuntary confession absent "coercive police activity." *Jacobs*, 431 F.3d at 108. We consider the officers' tactics, including "the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep." *Halsey v. Pfeiffer*, 750 F.3d 273, 303 (3d Cir. 2014) (quoting *Miller v. Fenton*, 796 F.2d 598, 604 (3d Cir. 1986)). We also consider the defendant's characteristics, including his "youth . . . ; his lack of education or his low intelligence; the lack of any advice . . . of his constitutional rights," *id.* (quoting *Miller*, 796 F.2d at 604), and his "background and experience, including

prior dealings with the criminal justice system," *Jacobs*, 431 F.3d at 108. All these factors assist in answering "the ultimate question[:] . . . 'whether the defendant's will was overborne when he confessed.'" *Halsey*, 750 F.3d at 304 (quoting *Miller*, 796 F.2d at 604).

At the outset, the District Court did not erroneously shift the burden of proof to Ludwikowski, as he argues. The court stated, at the suppression hearing, "Well, there's no *per se* rule that says the defendant has to testify as to his feeling of coercion . . . but I'm just thinking unless the agents say, yes, we forced him . . . against his will to speak . . . , I just don't know how the defendant would prevail. . . ." App. 65. While we do not agree with these musings,[3] they did not lead to any error of law. The court later stated in its oral ruling that the Government had the burden to show the confession was voluntary, and it specifically ruled that the Government met that burden.

Ludwikowski argues that his will was overborne because he believed his freedom was constrained during the questioning. As we have explained, we disagree with the premise of this argument: a reasonable person would have understood he could leave. Moreover,

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[3] Defendants certainly can prevail on the voluntariness issue without testifying. *See*, *e.g.*, *Jacobs*, 431 F.3d at 108-12 (statements were involuntary; no indication that defendant testified); *Swint*, 15 F.3d at 290-92 (same). The testimony of law enforcement, the video of an interrogation, and a defendant's background and characteristics could combine to show—even without the defendant's own testimony—that his will was overborne.

Ludwikowski's calm demeanor and calculated answers belie his argument that he subjectively felt his freedom was constrained. Nor did the situation bear the hallmarks of coercion: the officers' conduct was not physically threatening, the door to the conference room was not locked, Ludwikowski was not deprived of food, and he had his cell phone.

Ludwikowski next contends that he was particularly vulnerable, as a victim of extortion, and that his questioners exploited those vulnerabilities in a coercive fashion. We do not doubt that Ludwikowski was genuinely fearful for his family's safety, and hence emotionally vulnerable. But we do not agree that his questioners used the situation coercively. Rather, they attempted to solve the extortion in the face of Ludwikowski's "hesitant" and "inconsistent" answers. App. 262-63 (finding that Ludwikowski's "demeanor on tape was that of a person who was deflecting the questions or pretending not to know the answers").

Finally, Ludwikowski argues his statements were involuntary because he did not know he was the focus of a criminal investigation. He cites cases where officers misled defendants regarding the circumstances of their questioning, but those cases are distinguishable. In *Jacobs*, the defendant had been a confidential FBI informant for ten years when she was summoned to the office by her handler, where she made a series of statements. 431 F.3d at 102, 104. We concluded the statements were involuntary because she was laboring under a misapprehension: the handler did not tell her she had been terminated as an informant. *Id.* at 107.

Similarly, in *Swint*, the defendant went to the district attorney's office to "make an off-the-record proffer" regarding a possible plea agreement, a practice that was common in the county. 15 F.3d at 287. But the Government baited and switched the defendant: federal agents participated in the conversation, and discussion was not limited to his proffer. *Id.* at 290. Ludwikowski, unlike the *Jacobs* and *Swint* defendants, was not deceived or misled.[4]

We conclude by observing that Ludwikowski is mature and educated, a sophisticated business owner who was in sound mental and physical health at the time of the questioning. *See Halsey*, 750 F.3d at 306 (concluding there was a genuine issue of material fact regarding voluntariness where, among other factors, defendant was "a man of limited intelligence and little education"). Ludwikowski's statements at the police station were voluntary.

C. There Was No Plain Error in the Admission of the Expert's Testimony

A medical professional like Ludwikowski may be convicted under 21 U.S.C. § 841 if he dispenses a controlled substance "outside the usual course of professional practice." *United States v. Moore*, 423 U.S. 122,

[4] Ludwikowski argues that, as in *Jacobs*, his continuing cooperation with law enforcement shows he did not know he was the subject of a criminal investigation. Unlike the *Jacobs* defendant, however, Ludwikowski continued to cooperate because the extortion needed to be solved, not because he was misled by law enforcement.

124 (1975). As part of its proof of this charge, the Government called Anthony Alexander as an expert witness on professional practice in the pharmacy field. Ludwikowski argues that the District Court erred by not excluding the expert's testimony about New Jersey pharmacy regulations, as well as his testimony about best practices and his own practices. Ludwikowski did not object at trial, so the plain-error standard applies: we will exercise our discretion to address an error only if it is plain, affects substantial rights, and "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson v. United States*, 520 U.S. 461, 467 (1997) (internal quotation marks, citations, and alterations omitted).

Ludwikowski is correct that an expert may "not testify as to the governing law of the case." *Berckeley Inv. Grp., Ltd. v. Colkitt*, 455 F.3d 195, 217 (3d Cir. 2006). And, if we were to explicitly rule upon the nature of the "usual course of professional practice" standard, we would likely agree with our sister Circuits that the plain language of the standard shows it to be an objective one, not defined by a particular practitioner's habits. *United States v. Smith*, 573 F.3d 639, 647-48 (8th Cir. 2009); *United States v. Hurwitz*, 459 F.3d 463, 478-80 (4th Cir. 2006). But whatever the merits of his legal arguments, Ludwikowski cannot meet the demanding plain-error standard.

First, the expert's references to regulations did not affect his substantial rights—that is, they did not affect the outcome of the proceedings. *See United States v. Olano*, 507 U.S. 725, 734 (1993). The violation of

professional standards is so clear in this case that expert testimony is unnecessary. *See United States v. Pellmann*, 668 F.3d 918, 926 (7th Cir. 2012) (expert opinion unnecessary where doctor "personally administered [painkillers] in multiple, private houses and hotel rooms . . . for long-term treatment of a condition he was unqualified to diagnose"); *United States v. Word*, 806 F.2d 658, 663-64 (6th Cir. 1986) (expert opinion unnecessary where doctor "[wrote] prescriptions in return for sums of money ranging from $200 to $1,000 . . . ; [gave] a patient an option as to what name a prescription for a powerful pain killer should be written in; . . . [and wrote] prescriptions at service stations, in a van, or in restrooms").

Ludwikowski filled narcotics prescriptions without verification or a log, including for customers who came to the pharmacy high. When customers made mistakes on prescriptions they forged, Ludwikowski helped them fix the errors. A customer who described himself as a drug addict obtained oxycodone from Ludwikowski six days a week—usually twice a day, but on one noteworthy day, five times. The prescriptions this customer brought to Ludwikowski bore numerous different names. The jury did not need an expert to explain that this conduct violated professional standards. Therefore, the expert's references to New Jersey regulations did not affect the outcome of the proceedings.

Nor does the expert's testimony about best practices, or his own salutary habits, meet the plain-error standard, because the testimony did not "seriously

affect[] the fairness, integrity, or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 467 (internal quotation marks, citations, and alterations omitted). Ludwikowski's trial strategy was to undermine the expert by repeatedly highlighting where his best practices went beyond what was required. *See*, *e.g.*, App. 3637 ("I'm not asking what you would do. Obviously you're a meticulous guy. . . . What do the pharmacy rules and regs require the pharmacist to do . . . ?"). The strategy was successful: the expert admitted numerous times that the regulations do not require the level of diligence he himself would undertake. In other words, defense counsel not only failed to object to the supposedly inadmissible testimony—he reinforced and capitalized on the testimony to further his trial strategy. Given his cross-examination of the expert, the jury was well equipped to determine whether Ludwikowski distributed substances outside the usual course of professional practice. Under these circumstances, the supposed error did not compromise the fairness or integrity of the trial, and we therefore decline to reach the merits of Ludwikowski's arguments.[5]

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[5] Ludwikowski also argues that the District Court erred in basing his sentence partly on acquitted conduct. As he concedes, we must affirm. *United States v. Watts*, 519 U.S. 148, 149 (1997) (reversing decisions holding that "sentencing courts could not consider conduct of the defendants underlying charges of which they had been acquitted") (per curiam). Ludwikowski offers this argument to preserve it should the Supreme Court revisit the issue during the pendency of this appeal.

IV. Conclusion

For these reasons, we will affirm the denial of Ludwikowski's suppression motion and the admission of expert testimony.

UNITED STATES DISTRICT COURT
District of New Jersey

UNITED STATES
OF AMERICA

v.

MICHAEL LUDWIKOWSKI

Defendant.

CASE NUMBER
1:16-CR-00513-JBS-1

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On
or After November 1, 1987)

(Filed Apr. 13, 2018)

The defendant, MICHAEL LUDWIKOWSKI, was represented by EDWIN JOSEPH JACOBS and PATRICK JOYCE.

The defendant has been found not guilty on count(s) 1, 3, 9, 10 of the REDACTED INDICTMENT and is discharged as to such count(s).

The defendant was found guilty on count(s) 2, 4, 5, 6, 7, & 8 by a jury verdict on 8/22/2017 after a plea of not guilty. Accordingly, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date of Offense	Count Number(s)
21 USC 856	Maintaining a Premises for the Illegal Distribution of Controlled Substance	3/08 thu 8/13	2
21 USC 841(a)(1) and (b)(1)(C)	Illegal Distribution and Dispensing, and Possession with Intent to Distribute and Dispense, a Controlled Substance; Attempt; Aiding and Abetting	4/12 thru 11/12	4-8

As pronounced on April 12, 2018, the defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must pay to the United States a special assessment of $600.00 for count(s) 2, 4, 5, 6, 7, 8, which shall be due immediately. Said special assessment shall be made payable to the Clerk, U.S. District Court.

It is further 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 any material change in economic circumstances.

Signed this 13th day of April, 2018.

/s/ Jerome B. Simandle

Jerome B. Simandle
Senior U.S. District Judge

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 180 months, on each of Counts Two, Four, Five, Six, Seven, and Eight, to be served concurrently with each other, to the extent necessary to produce a total term of 180 months.

The Court makes the following recommendations to the Bureau of Prisons: That the defendant be designated to a facility for service of this sentence as near as possible to his home address. It is also recommended that the defendant be provided mental health services.

The defendant will surrender for service of sentence at the institution designated by the Bureau of Prisons no later than noon on July 2, 2018.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ To _____
At_____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 5 years. This term consists of terms of 3 years on Count Two, and 5 years on Counts Four, Five, Six, Seven and Eight, all such terms to run concurrently.

Within 72 hours of release from custody of the Bureau of Prisons, you must report in person to the Probation Office in the district to which you are released.

While on supervised release, you must not commit another federal, state, or local crime, must refrain from any unlawful use of a controlled substance and must comply with the mandatory and standard conditions that have been adopted by this court as set forth below.

You must submit to one drug test within 15 days of commencement of supervised release and at least two tests thereafter as determined by the probation officer.

You must cooperate in the collection of DNA as directed by the probation officer

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it is a condition of supervised release that you pay any such fine, assessments, costs, and restitution that remains unpaid at the commencement of the term of supervised release.

You must comply with the following special conditions:

ALCOHOL/DRUG TESTING AND TREATMENT

You must refrain from the illegal possession and use of drugs, including prescription medication not prescribed in your name, and the use of alcohol, and must submit to urinalysis or other forms of testing to ensure compliance. It is further ordered that you must submit to evaluation and treatment, on an outpatient or inpatient basis, as approved by the U.S. Probation Office. You must abide by the rules of any program and must remain in treatment until satisfactorily discharged by the Court. You must alert all medical professionals of any prior substance abuse history, including any prior history of prescription drug abuse. The U.S. Probation Office will supervise your compliance with this condition.

COMMUNITY SERVICE (1,000 hours over 5 years)

You must contribute 1000 hours of community service work over a period of 5 years, from the date supervision commences. Such service will be without compensation, with the specific work placement to be approved by the U.S. Probation Office.

FINANCIAL DISCLOSURE

Upon request, you must provide the U.S. Probation Office with full disclosure of your financial records, including co-mingled income, expenses, assets and liabilities, to include yearly income tax returns. With the exception of the financial accounts reported and noted within the presentence report, you are prohibited from maintaining and/or opening any additional individual and/or joint checking, savings, or other financial accounts, for either personal or business purposes, without the knowledge and approval of the U.S. Probation Office. You must cooperate with the U.S. Probation Officer in the investigation of your financial dealings and must provide truthful monthly statements of your income. You must cooperate in the signing of any authorization to release information forms permitting the U.S. Probation Office access to your financial records.

MENTAL HEALTH TREATMENT

You must undergo treatment in a mental health program approved by the U.S. Probation Office until discharged by the Court. As necessary, said treatment may also encompass treatment for gambling, domestic violence and/or anger management, as approved by the U.S. Probation Office, until discharged by the Court. The U.S. Probation Office will supervise your compliance with this condition.

NEW DEBT RESTRICTIONS

You are prohibited from incurring any new credit charges, opening additional lines of credit, or

incurring any new monetary loan, obligation, or debt, by whatever name known, without the approval of the U.S. Probation Office. You must not encumber or liquidate interest in any assets unless it is in direct service of the fine and/or restitution obligation or otherwise has the expressed approval of the Court.

OCCUPATIONAL RESTRICTIONS

As a further special condition of supervised release, you must refrain from work as a pharmacist.

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 fulltime 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.

STANDARD CONDITIONS OF SUPERVISION

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

For Official Use Only - - - U. S. Probation Office

Upon a finding of a violation of probation or supervised release, I understand that the Court may (1) revoke supervision or (2) extend the term of supervision and/or modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions, and have been provided a copy of them.

You shall carry out all rules, in addition to the above, as prescribed by the Chief U.S. Probation Officer, or any of his associate Probation Officers.

(Signed) _____

Defendant Date

_____

U.S. Probation Officer/ Designated Witness Date

FINE

The defendant shall pay a fine of $12,000.00.

This amount is the total of the fines imposed on individual counts, as follows: Count Two $2,000.00, Count Four $2,000.00, Count Five $2,000.00, Count Six $2,000.00, Count Seven $2,000.00, Count Eight $2,000.00

This fine, is due immediately. It is recommended that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program (IFRP). If the defendant participates in the IFRP, the fine shall be paid from those funds at a rate equivalent to $25 every 3 months. In the event the fine is not paid prior to the commencement of supervision, the defendant shall satisfy the amount due in monthly installments of no less than $250.00, to commence 30 days after release from confinement.

The Court determines that the defendant does not have the ability to pay interest and therefore waives the interest requirement pursuant to 18 U.S.C. § 3612(f)(3).

If the fine is not paid, the court may sentence the defendant to any sentence which might have been originally imposed. See 18 U.S.C. § 3614.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during 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.

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.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	**CRIMINAL NUMBER:**
-vs-	**16-513 (JBS)**
MICHAEL LUDWIKOWSKI,	**SENTENCE**
Defendant.	

Mitchell H. Cohen United States Courthouse
One John F. Gerry Plaza
Camden, New Jersey 08101
Thursday, April 12, 2018

BEFORE:

THE HONORABLE JEROME B. SIMANDLE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

Craig Carpenito, United States Attorney
By: Jason M. Richardson
Assistant United States Attorney

JACOBS & BARBONE, ESQUIRES
BY: Edwin J. Jacobs, Jr., Esquire
Patrick C. Joyce, Esquire
Attorneys for the Defendant
Michael Ludwikowski

Certified as true and correct as required by Title 28, U.S.C., Section 753.

/S/ Lisa Marcus, CCR, CRR

[2] DEPUTY CLERK: All rise.

THE COURT: Be seated, please.

Good morning.

MR. JACOBS: Good morning, Judge.

THE COURT: Good morning. Welcome.

MR. RICHARDSON: Good morning, your Honor.

THE COURT: This is the case of United States vs. Michael Ludwikowski, Criminal Number 16-513.

And I'll ask counsel to please enter your appearances for today's sentencing.

MR. RICHARDSON: Good morning, your Honor.

Jason Richardson, Assistant U.S. Attorney, appearing on behalf of the government. With me at counsel table is DEA Diversion Investigator Jason Martino.

MR. JACOBS: Edwin Jacobs for the defense. And with me is my associate Patrick Joyce, who will be addressing the Court today.

MR. JOYCE: Good morning, your Honor.

THE COURT: Okay. I want to thank both sides for your thorough sentencing memos. I have the government's memo of December 27th, and a binder of

exhibits to accompany that memo that came in the other day.

And I hope you have received the binder.

MR. JACOBS: We did, we got it yesterday, reviewed it, and made no complaints about the late delivery, Judge.

[3] THE COURT: Okay. And I have the defendant's sentencing memorandum together with all of the letters, which many people took a great deal of time to write and compose. They're very thoughtful. Each one is a little different. There's certain common themes, too. I read them all. And it helps me because it gives me a more complete picture of Mr. Ludwikowski as a family person and a member of his community, as well as a pharmacist. And so I wanted to thank the defense team for bringing them to my attention.

I wanted to thank all of the writers, if any of them are present, who took the time to tell me more about Mr. Ludwikowski.

And, of course, there's the final presentence report dated December 20, 2017.

And I'll be hearing objections by the defense to two of the Guideline calculations that deal with the quantity of drugs and the enhancement of role.

Are those the only two issues?

MR. JOYCE: That is correct, Judge. Obviously, the variance.

THE COURT: And the variance after.

Also the probation department supplemented some of the financial information.

Mr. Leakan, who is present, prepared a memo dated March 15th and sent a copy, it's a two-page memo, he sent [4] copies to Mr. Jacobs and Mr. Richardson. I hope you received that. I think it answers some of the questions that were raised by the financial information that had been gathered before.

And so is that it, do I have everything?

MR. RICHARDSON: I believe so, your Honor.

MR. JOYCE: Yes, Judge.

THE COURT: Okay. Then the first step of sentencing is to determine the Guideline range.

There's an objection to the calculation in Paragraph 110 of the presentence investigation that places this case into Offense Level 34 under 2D1.1(a)(5) and 2D1.1(c)(3). And the burden would be on the government to sustain this enhancement. And Mr. Richardson certainly has addressed it in his sentencing memo. But I'd like to ask Mr. Richardson to focus on the numbers that you're advocating, reminding the record and me of why you have confidence that these are based upon fraudulent prescriptions, how the number is only a fraction of the fraudulent prescriptions that were

actually being filled in the pharmacy and how to deal with the fact that for these fraudulent prescriptions, many that were filled in Ludwikowski's name using his initials, were actually filled by Goldfield who had permission to use Ludwikowski's initials, so that Ludwikowski may not have touched or even seen many of the fraudulent prescriptions personally, plus any other issues [5] that you feel the need to bring to my attention. And if you're prepared to, you know, cite to the documents that are in your book, they're not – some are cited, some aren't in the sentencing memo, then you have that opportunity as well. Okay?

MR. RICHARDSON: Yes, your Honor.

So to remind the Court and the record of the prescriptions that we're talking about, we'll start with Exhibit 2070A, and that was a document put together and testified to by Mr. Short from the Drug Enforcement Administration unit that was able to compile records using the Pharmaserv data that was seized from Olde Medford Pharmacy. And if you look at that data, and as he discussed, the oxycodone 30 milligram tablets, which are Class II drugs, there were 3,724 total prescriptions for 455,526 individual pills of oxycodone that were dispensed during the time period of April 9, 2008, and August 1, 2013, and that is the time period alleged in the conspiracy. You'll also notice from that that oxycodone 30 outstrips the next ten drugs that were dispensed from the pharmacy. So that's the universe of oxycodone pills that went out the door.

And the methodology from there –

THE COURT: You mean it outstrips the next ten added together?

MR. RICHARDSON: Yes. Thank you, Judge. It [6] outstrips the next ten added together that those are the – that's the universe of pills that went out the door.

And from that we looked at the fraudulent prescriptions that were admitted into evidence, seized from the pharmacy and admitted into evidence. And you will recall that during the testimony of Mr. Jones, Mr. Lawson, Mr. Clark, Ms. Vaites, they all went through various names and aliases which they used to present fraudulent prescriptions that were filled at Olde Medford.

And then Investigator Martino later testified in terms of the tally of prescriptions that were identified in those names through the seized prescriptions but also the Pharmaserv data as having been filled. Investigator Martino testified during trial regarding that issue and came up with the conservative number of 366 prescriptions for Mr. Jones, 124 prescriptions for Mr. Lawson, and 320 prescriptions for Mr. Clark, and those were the numbers in which were used to come up with the base offense level found in Paragraph 110 once the conversions of the drugs are taken into consideration and that's what leads to the total of when it's converted, 23,151 the equivalent of marijuana – excuse me, the marijuana equivalent.

THE COURT: Kilograms.

MR. RICHARDSON: Yes, sir, kilograms.

THE COURT: 23,000 kilograms of marijuana is the [7] equivalent of the fraudulent prescriptions that were sold to Jones, Lawson, and Clark?

MR. RICHARDSON: Correct.

But there's more, and these documents are also in the binder. You will recall that part of the data that was seized from the pharmacy included the prescriptions filled by a doctor. And when you look at those – we heard testimony from Dr. Minoff, Dr. Patel, Dr. Meltzer, and Dr. Dombrowski, and they each came and testified they did not write prescriptions, didn't recognize the names on Government's Exhibits, that's the 2080 series, they didn't recognize the names. And what we learned through the trial is that Mr. Jones, Mr. Lawson, Mr. Clark, and others, Mr. Pryor, couldn't remember the names, all of the names that they used, so we did not include those in the drug amount. But all of these doctors, the four doctors who came in and testified, testified that they didn't write prescriptions for any of these people. So it is a more expansive list but the witnesses couldn't remember what names that they used but these were fraudulent prescriptions that were passed at Olde Medford Pharmacy.

THE COURT: And those are summarized in your sentencing memo as well?

MR. RICHARDSON: Yes, your Honor.

THE COURT: On which page?

MR. RICHARDSON: That is Page 6, your Honor. And if [8] you look at those, there are a total of 73,786 oxycodone 30 milligram pills that were dispensed based on the numbers in those exhibits.

THE COURT: Well, that's only as to Dr. Baird, who is a fifth doctor.

MR. RICHARDSON: Oh, I'm sorry.

THE COURT: I think when you add up everything in that paragraph, that is Dombrowski, Meltzer, Minoff, Patel, and Baird, it comes to roughly 314,000 pills.

MR. RICHARDSON: I did miss that, your Honor. Thank you. I didn't include Dr. Baird because we didn't hear from Dr. Baird. But we had evidence that the Baird – the witnesses testified that they heard from, and I don't remember if it was Mr. Ludwikowski or Mr. Goldfield, that the Baird scripts were not good, they weren't accepting them any longer.

THE COURT: I'm sorry, strike the 314,000. My math is wrong, it is too high. It's 27 – I'm going to just use round numbers because it won't matter in the end. 27,000 for Patel, 19,000 for Minoff, 47,900, call it 48,000 for Meltzer, 46,700, we'll call it 46,000 for Dombrowski, and 73,000 for Baird. 213,000. Doing it in my head I did a 100,000 pill error. But it's 213,000 roughly representing pills from prescriptions that are known to be fraudulent because the doctors had no patients of those names and it matched up with the names of

witnesses at trial who said that they presented [9] such fraudulent prescriptions.

MR. RICHARDSON: Yes. Well, the witnesses testified they presented fraudulent prescriptions using these doctors, they could not remember every name that they used so they couldn't look at this list and say every name – they couldn't remember every name on this list. But the doctors then say we didn't write for any of these people and nobody ever called us from this pharmacy. You'll recall, I believe it was Dr. Minoff who was the OB/GYN who said he's never written oxycodone 30 milligram prescriptions in his career.

THE COURT: Meaning that every patient by whatever name that had Dr. Minoff on the prescription pad was a fraudulent prescription.

MR. RICHARDSON: Correct.

THE COURT: Okay.

MR. RICHARDSON: You also inquired or would like me to address the fact that Mr. Goldfield had access to the computer system and his initials didn't appear till sometime after he started working at the pharmacy.

One, I would note for the Court that it was Mr. Ludwikowski who set up that system. It was also testified to by several witnesses, Mr. Jones, Mr. Lawson, Mr. Clark that they all started passing fraudulent prescriptions at the pharmacy well before Mr. Goldfield starting working there, and it was a system that was

in place to accept these fraudulent [10] prescriptions from about 2009, the start of the conspiracy.

The Court will recall the testimony of Mr. Ramsey, a pharmacist who worked at Olde Medford Pharmacy right after Mr. Ludwikowski started, opened the pharmacy, he described it as dead from the first couple months of '08 that he worked there and then it started to pick up in '09, it picked up in part because of these fraudulent prescriptions coming in the door.

THE COURT: And the orders that you've documented from McKesson that were placed by Mr. Ludwikowski jumped between '08 and '09 –

MR. RICHARDSON: Correct.

THE COURT: – by about 50 fold, I think.

MR. RICHARDSON: That's correct, Judge. And that I'm referring to Government's Exhibit 250 which shows the comparison of oxycodone 30 milligram purchases for Olde Medford Pharmacy and it also includes the defendant – later on the defendant's other pharmacy as well. And you could see in those slides that it increases every year and it well outstrips other pharmacies in the zip code, Medford zip code, as well as the State of New Jersey and the U.S. average. So clearly the data, the documentary evidence supports Mr. Ramsey's observations that business picked up when they started accepting these fraudulent scripts.

Mr. Ramsey also testified, as you'll recall, that when [11] he would get the fraudulent scripts, he

would question them or present them to Mr. Ludwikowski and he told him to fill them. So you have Mr. Ramsey who was not a charged individual in this case coming in and talking about the practices that were set up by the defendant. And the fact that the defendant did not touch all of the prescriptions is of no moment because they are reasonably foreseeable that this practice was going to continue because that is the policy and the practice and procedure that he set up. He established it. He instructed not only Mr. Ramsey, he told Mr. Goldfield, and then he told Ms. Wood all varying things regarding these prescriptions and filling them.

You'll recall Mr. Pryor, who came in from Bayside, testified that he would bring fraudulent prescriptions up there and give them to the defendant. And later on after Mr. Goldfield was hired, he'd give them to Mr. Goldfield. If Mr. Goldfield – Mr. Ludwikowski were still in the pharmacy, then they'd get filled and if not, they wouldn't get filled. So clearly this activity continued once the other people were hired.

And when you look at the defendant's role as being the pharmacist in charge, he is ultimately responsible for safeguarding these prescriptions to make sure these highly addictive drugs only go out for a medically necessary purpose. All of that, the conduct is reasonably foreseeable and [12] therefore it should be considered as relevant conduct.

THE COURT: Now, there came a time when two of the customers turned on Mr. Ludwikowski and they participated in the extortion. I'm talking about, of

course, Jones and Lawson. Does that negate that they had been conspirators?

MR. RICHARDSON: Well, they turned on Mr. Ludwikowski when he stopped filling their prescriptions. And we spent a lot of time both on direct and cross with the letter and the text messages that were received and sent between Mr. Lawson and Mr. Ludwikowski. And the letter that was received, I failed to include it in the binder, I believe. I'm going to hand counsel and remind counsel of Government Exhibit 11.

If I may approach, your Honor?

THE COURT: Yes.

(Hands up document)

MR. RICHARDSON: This is the – you'll remember that this is the threat letter that was delivered, or extortion letter that was delivered to Mr. Ludwikowski written by Mr. Lawson. But in the letter "I know what you've been doing for years," and that corroborates all of the other evidence in terms of how long they have been going to Olde Medford to obtain these fraudulent prescriptions.

The defendant's own statements, which are cited in my memo to your Honor, you'll recall the interview that the defendant provided that also corroborates this, "people have [13] been getting these for years. We've had this problem with African-Americans coming to Olde Medford for years to get these things." Later on the defendant says "if they're going to get them, I might as well be the one giving it to them,"

clearly implicitly corroborating that he has been supplying Jones and Lawson's fraudulent prescriptions. And in fact you'll recall in that interview he turned over the license of Jones and Lawson, he knew exactly who these people were because of the length of time they had been working together. That's the letter from Mr. Lawson. I excerpted one of the text messages that was gone over and testified.

May I approach again?

THE COURT: Yes.

(Hands up document)

THE COURT: Was this document marked before?

MR. RICHARDSON: Yes, Judge, I believe it's 102. I'm looking down – no, that's not it. This was admitted into evidence and I don't remember what the exhibit number is and the copy I have doesn't have it on there.

But this was testified to by Mr. – Special Agent Hyland was questioned by Mr. Jacobs regarding this text message and then later on Mr. Jones was cross-examined – he presented testimony both on direct and cross-examination.

THE COURT: Okay. So this is a document, says in the lower right 102, and it's excerpts from text messages of [14] June 18, 2013, and you've added some red underlines.

MR. RICHARDSON: Yes, Judge. And this is one of the trial exhibits and there it talks about the relationship and the length of time of the relationship. Now, as the Court is aware, it doesn't come out and say you've been doing this since you started supplying us in 2009 going forward, you can't stop now, but there are more references to the amount of time that they were together.

Mr. Jones certainly testified that he had an ongoing relationship with Mr. Ludwikowski and that's why they provided him gifts, and he tried to keep other people away from the pharmacy because he didn't want to ruin the good thing that they had going on.

So I believe based on what was presented at trial and the fact that Mr. Ludwikowski started this scheme, I believe that the numbers as calculated are clearly supported by the weight of the evidence and we would ask that you find – that you overrule the defense's objection to the finding by probation at Paragraph 110.

THE COURT: Now, in a moment the defense will be arguing that none of this should count as relevant conduct because the jury acquitted Mr. Ludwikowski of the charge of conspiracy, and both sides acknowledge that the law permits even acquitted conduct to be counted if it's proved by the preponderance of the evidence, that is, the preponderance of [15] reliable evidence and that is if the Judge so finds. I may call upon you later to address this 1B1.3(a)(2) issue,

the relevant conduct, the same course or common scheme.

MR. RICHARDSON: May I raise a thought, your Honor?

THE COURT: Yes.

MR. RICHARDSON: So I understand that that sets up, but I believe because he was maintaining a drug premises, you have to use the drug tables to figure out what the actual Guideline offense level is. And if he is maintaining that drug premises from 2009, which is what the evidence shows from Mr. Clark, Mr. Lawson, Mr. Jones, and even the defendant's own words where he indicated that he provided oxycodone 30 milligram tablets to Patrick Clark when he was high, that all of the conduct with Jones and Lawson and Clark would establish that same base offense level of a 34 under either theory, whether you use the maintaining a premises or whether you're using the conduct of the conspiracy as relevant conduct, even though he was acquitted under it.

THE COURT: And the transactions at issue for just those three all occurred at those premises.

MR. RICHARDSON: Correct.

THE COURT: All right. Thank you very much.

Mr. Joyce?

MR. JOYCE: Judge, thank you.

Your Honor precisely hit on the defense's position. [16] There's three specific points I want to make with respect to this relevant conduct argument because I do realize even acquitted conduct can be taken into account.

First, before I do that, if I can bring your Honor's attention to you pointed out Paragraph 110 in the PSR, but also I would ask your Honor to look at Paragraph 74 and Paragraph 88. Specifically in Paragraph 88, the last sentence, and it's pretty clear that the government's position is to link Mr. Ludwikowski to some – almost 1,000 prescriptions and 115,000 pills, approximately, based on "as Ludwikowski conspired to distribute the equivalent of 10,000 but less than 30,000 kilograms of marijuana." In other words, their entire basis for this calculation is based on a conspiracy, which we now know Mike received an absolute acquittal on.

Let me –

THE COURT: Well, the 114,000 figure, though, is only those prescriptions dispensed in Ludwikowski's name.

MR. JOYCE: Correct.

THE COURT: It doesn't include those dispensed in Goldfield's name or whatever else was going on.

MR. JOYCE: That's correct. I do realize there's two tables within Paragraph 74, I will address

that in a moment when I get into my Goldfield argument.

But, first, since it was brought up by Mr. Richardson, [17] let me just address –

THE COURT: Well, let me ask it this way.

MR. JOYCE: Okay.

THE COURT: Mr. Ludwikowski was the owner, the sole proprietor of the Olde Medford Pharmacy business, he received the income from it, he set up the procedures there, he was the one that was experienced in the pharmaceutical industry before, having worked at at least three other drugstore employers, it was his capital that went into it, he promoted the business, he's the one who hired every employee and determined their hours, and the evidence was pretty strong that this was his system and that the system was in place before Goldfield showed up. Why shouldn't he be held responsible for the conduct that occurred under the system that he set up in the pharmacy that he owned for which he was also legally responsible for every narcotic transaction?

MR. JOYCE: So two points to that. The first is, and I think you're hinting at or getting at, the financial aspect of this. The testimony at the trial, if you recall, was that Mike never shared in a penny of the profits or revenue or sales from the street sales of these pills.

THE COURT: That's correct.

MR. JOYCE: Collectively Jones, Lawson, Clark estimated some $3 million was made by their street sales, all tax free, by the way, but none of it was provided to [18] Mr. Ludwikowski. What Mike did get was the $190 going rate for the prescription. And in fact we saw a lot of prescriptions where that was the amount charged. We also saw prescriptions from other pharmacies, larger chain pharmacies.

You recall the photographs from the execution of the search warrant of Patrick Clark's house, the government had the pill bottles lined up and you've seen other prescriptions. Mr. Ludwikowski was actually charging less than the going rate that other larger chain pharmacies were at the time for those pills, sort of one of the benefits and reasons why people go to privately owned pharmacies is because they can offer competitive pricing, and that's exactly what Mr. Ludwikowski did.

THE COURT: What was the market price then? I don't remember what was on the Clark pill bottles.

MR. JOYCE: Pharmacies such as the ShopRites, the Walmarts of the world, the larger chains, the Walgreens, they were north of $190, in the low 200s, Judge, that's my recollection of the photographs of the pill bottles and the other prescriptions. Mike offered his customers a lower price. He did receive the $190, but none of the street sales, none of the profits of the Jones, Lawson, Clark, Vaites, Mr. Roepke was

referenced somewhat during the trial, shared none of those profits.

THE COURT: That's correct, and I agree with you on [19] that. But wasn't there already quite a lot of profit in each oxycodone prescription that he filled? Wasn't there testimony that this prescription of oxycodone 30 would cost him $26 and it was filled for 180, 190?

MR. JOYCE: There were certainly funds earned by the pharmacy.

THE COURT: Well, it's a 500 percent markup, isn't it?

MR. JOYCE: He was charging the 190, yes.

THE COURT: And this was his number one drug by far, in fact it dwarfed the next ten by far.

MR. JOYCE: For a period of time, yes, Judge. I mean, there's exhibits that show that, yes.

If you recall, though, during the testimony of Mr. Jones, I believe it was, your Honor asked Mr. Jones, I don't remember if it came from direct or cross, but I distinctly remember your Honor asked Mr. Jones, look, Mr. Jones, when you had purchased these pills, whether it be cash, credit, check, however you paid for them, were you provided a receipt for these purposes? And Mr. Jones said, yes, Judge, for each and every time I purchased these pills, I was provided a legitimate receipt by the pharmacy, by Mr. Ludwikowski, Mr.

Goldfield, or otherwise. In other words, these were legitimate transactions. So, you know, Mr. Ludwikowski could have been making much more by charging [20] what the larger chain pharmacies were but he did not do that, he charged his going rate of the 190.

To address this issue, and this really gets me to Mr. Goldfield, but the Indictment period is from about April 2008 to March – I'm sorry, August of 2013, about a five-year period, Judge. And I think dates are important here because your Honor touched upon it and you posed a question to the government, but what we have here is a two-and-a-half year period, about 28 months or so, of a period of time where Mr. Goldfield is filling prescriptions under the M.L. initials because his name is not set up in the system yet. He's initially hired in November of 2009, thereabouts, it's not until March of 2012 that his initials, the D.G. initials are put into the system. And so I appreciate the government's response to the question but I don't think they really answered the question, which is this, I think is what your Honor posed, how are you going to hold or how do you want me to hold Mike accountable for all of these pills when we have a two-and-a-half year window right smack dab in the middle of this conspiracy time frame where we don't know who was filling the prescriptions, let alone preponderance of the evidence, we don't know who was filling the prescriptions. Was it David Goldfield under the M.L. initials or was it in fact Mike under his own initials?

THE COURT: Well, if it's part of a common scheme[21] that Mr. Ludwikowski put into place and

supervised, if that's true, then why wouldn't they be counted to Mr. Ludwikowski as well as Mr. Goldfield?

MR. JOYCE: So I'll address the common scheme. And if I could address that with relation to Jones, Lawson, and Clark first, then I will with respect to Goldfield.

THE COURT: Because again, there's no evidence that I can recall that Goldfield was trying to undermine Ludwikowski or that he was trying to fool Mr. Ludwikowski about what he was doing or that he had some kind of sideline selling oxycodone right under Mr. Ludwikowski's innocent gaze.

Do you agree?

MR. JOYCE: Mr. Goldfield was a licensed pharmacist in his own right who has in fact pled to the conspiracy, among other counts, the substantive counts that he was indicted for. A licensed pharmacist in his own right. I don't mean to make an argument that passes the buck here, but Mr. Goldfield had every ability to, if he questioned prescriptions that he was filling under the M.L. initials, to adequately question them and call the doctor or check with Mike. That didn't happen either because the testimony was, and the evidence has shown, that no doctors were contacted. But my point here is that –

THE COURT: Well, none were contacted by Mr. Ludwikowski either.

MR. JOYCE: That's accurate. That was the evidence [22] at trial, yes. But my point here is that Mr. Goldfield –

THE COURT: But he came from pharmacies where it was routine practice when you had a flaky looking prescription, you called the doctor. And some of these were almost unintelligible, not just because of bad handwriting but because they had been washed.

MR. JOYCE: That's accurate, Judge, by professional– specifically Clark, who purported to be an expert professional script washer. And we saw the photographs of scripts from his residence with the oils and the different washing techniques that he used along with his girlfriend.

To link Mike into a common scheme with Mr. Goldfield, Judge, I think is a reach even by a preponderance of the evidence standard. Mr. Goldfield was also left alone much of the time in the pharmacy to fill the prescriptions. If you recall, Mike was at the time during this indictment period going through a number of personal issues, specifically a pretty bitter divorce in 2010 and his father's illness in 2012, around June of 2012, that he passed away from shortly thereafter, in addition to his compounding responsibilities at the pharmacy.

Mike had additional responsibilities at the pharmacy in running it other than simply just filling oxycodone. It cannot be said that Mike spent his entire day just filling oxycodone 30 milligram prescriptions to feed this, what the [23] government purports to be

conspiracy to fill these pills, these prescriptions. Mr. Ludwikowski had other responsibilities at the pharmacy. In fact he had all of the other responsibilities. And yes, he stretched himself thin. He also owned multiple pharmacies at the same time as well, that he was trying to keep under control.

Yes, Judge, should he have been more attentive to prescriptions that were being filled and who was filling them? Absolutely. But to link him into a common scheme with Goldfield who, again, is a pharmacist in his own right, certainly has the ability to use his own professional judgment and who was by and large left on his own to fill the prescriptions, again, whether or not it's under the M.L. initials or the D.G. initials, there's a disconnect there, Judge. And even by a preponderance of the evidence, I think he –

THE COURT: That would assume that Mr. Ludwikowski was absent, that he really wasn't participating that much in the pharmacy, that he wasn't keeping track of the records, that he wasn't, for instance, reviewing what all of these prescriptions were that were being filled under his initials.

But you've supplied me with about 50 letters of customers of the pharmacy and each and every one has a common theme that he was so caring and attentive, knew them by name. They would come in and chat with him, they loved hearing about [24] his family. He was there. There's not one writer that says there came a time when he wasn't there anymore and I thought something must be wrong.

MR. JOYCE: There's no question he was the owner of Olde Medford Pharmacy and the pharmacist in charge on paper. There's no question he was physically there, Judge, at times at the pharmacy. But my point is with the personal –

THE COURT: But he was very engaged. I mean, I credit these letter writers, they're very sincere people. They admired him. They still do. They like him.

MR. JOYCE: They do, Judge. Some of them are here today to speak on his behalf today, which we'll get to.

But physically, yes, he was there. But when it comes to Mr. Goldfield and specific scripts that we're talking about, the oxy 30 scripts, Judge, again, there's a disconnect there how to link Mike into nearly 115,000 pills when we have two-and-a-half years where Goldfield is filling scripts under the M.L. initials. In other words, where is the evidence, let alone by the preponderance, that Mr. Ludwikowski filled 115,000 pills, nearly 900 – nearly 1,000 prescriptions in this alleged indictment period? We don't know the answer to that question. I don't think it's one the government has answered. He specifically posed that to them.

If I can just address the two exhibits that were handed up.

[25] THE COURT: Is there any objection to, regarding the total number of fraudulent prescriptions

that the government has posited based upon the trial evidence regardless of who might be held responsible?

MR. JOYCE: Right, so there's no objection to the number cited. I don't think the trial ever bore out, and you can correct me if I'm wrong, Judge, but I don't think the trial ever bore out a complete universe of total prescriptions, I think the government was a little bit fuzzy on the exact specific number. But as it's listed in 74, Paragraph 74, the numbers, no, I have no reason to object to that number as being inadequate or wildly inadequate. But what I do object to is attributing that number to Mr. Ludwikowski.

THE COURT: Well, that number is a much larger number than what's being attributed to Mr. Ludwikowski. Correct? The total Olde Medford numbers – let's see.

MR. JOYCE: If you sort of do some math and add up – (Brief Pause)

THE COURT: Well, the total was 3,724 fraudulent prescriptions, that's from Exhibit 2070A, that's what Mr. Richardson started with this morning, and that's only counting Olde Medford Pharmacy. But the total from April 9, 2008, until August 1, 2013, was 3,724 fraudulent prescriptions for a total of 455,000 pills. What the government seeks to [26] hold the defendant responsible for is about one fourth of those, which figure is 114,000.

MR. JOYCE: Which, by the way, would place him in a Base Offense Level of 34.

THE COURT: Right.

MR. JOYCE: Which the recommended range is 151 to 188, that is some – that's substantial time, Judge, by my calculation some 14, 15 years, that doesn't even account for the level adjustment enhancement, which I'm sure we'll get into, but grossly over – that number grossly overstates the offense here, Judge.

You have someone who was a victim of two violent extortion attempts on both his life and his kids' well-being was threatened as well. Again, those specific threats, if you look at Government Exhibit 11 that was handed up, "I know what you've been doing." You've. Not we. And again, that was written by Lawson. "You've been doing." This is written as an outsider, Judge. This is written as not a coconspirator but someone who is on the outside of whatever alleged agreement that there is in place.

If you look at these text messages, 102 at the bottom right-hand corner, 102, bring your attention to the left-hand side, again, this is from Jones to Mr. Ludwikowski, "you have been doing it for many years. You can't drop the ball." Not we. Not we've been doing this for many years. You. You, [27] Mike, you've been doing this. You know what you've been doing. The right-hand side, "why did you stop helping my brother." Again, no references to we. Jones is an outsider. This is written as an outsider, not a coconspirator.

And in fact the jury agreed with that. This has always been a case about implicit – the government was

trying to convince a jury there was an implicit agreement, not an explicit agreement but an implicit agreement. Witness after government witness took the stand both at the grand jury and the trial and totally debunked that theory. In other words, they testified to the opposite of that, they said, no, we never had an agreement with Mike. We never had a discussion with Mike. He never shared in the proceeds of our illegal activity in the millions of dollars with Mike. The jury agreed with that and he was acquitted of Count One.

THE COURT: And I believe Goldfield gave such testimony that there was never a conversation between him and Mr. Ludwikowski.

MR. JOYCE: That is accurate as well, Judge.

THE COURT: And so he said, no, we didn't have an agreement. On the other hand, all the rest of his testimony talked about how he conformed his practice in the pharmacy to what Mr. Ludwikowski had asked him to do, which is fill these prescriptions.

MR. JOYCE: And there's no question that Mike should [28] have been more attentive to the procedures in his pharmacy at the time; we acknowledge that. But again, you have someone who is undergoing immense personal burdens and professional burdens both, with two personal issues that have already been pointed out, his other responsibilities at his other pharmacies, and his other responsibilities at that pharmacy, compounding specifically. He was the only one who compounded at that pharmacy. When you talk

about those letters that individuals wrote, some of those deal with specific compounded medications. That's what Mike was doing. He was taking his time. So the result of this is letters just like that to fill their specific compounding needs. And some of those are reflected in the letters.

THE COURT: You're correct.

MR. JOYCE: Yeah.

THE COURT: I didn't count them up but most sounded like everyday customers over-the-counter who would see him, they'd see his father, and so on.

But getting back to a point that you just raised that I'd like to hear more about, you said that Level 34, if that ends up being the level, overstates the seriousness of what was going on here. And I understand the argument, you've laid it out well in your brief. Isn't there, though, a question that these aren't just pills going out the door, these were largely pills that were going out the door in the hands of [29] drug distributors and into the streets with a high markup because they were illegal at that point and they were addictive. And the addiction – we heard from a couple of addicts as witnesses who will pay almost anything to get their hands on oxycodone 30. If you measured the moral fault of someone who's selling these drugs, don't you have to take into account the multiplier that happens once they get to the street and why it is that this kind of conduct is illegal to begin with?

MR. JOYCE: I see where you're going, Judge. I think this also has to do with sort of a variance argument, too, with respect to general deterrence that is going to be forthcoming.

But to get back to your point and answer your question, none of that was known to Mr. Ludwikowski. In other words, again, Jones, Lawson, Clark, Goldfield, Wood, none of them had discussions with Mike that, hey, by the way, we're taking these prescriptions and we're going to be distributing them on the street to addicts; using this high markup, we're going to be making $3 million over the course of these years. All of this was unknown to Mr. Ludwikowski.

THE COURT: Weren't there times when some of those individuals were filling two prescriptions in a single day, the same person?

MR. JOYCE: There was evidence that various names – [30] various names were being used by the same individual on multiple dates, yes.

THE COURT: And didn't that become a subject that your client and Goldfield joked about, this was Darryl 1 and Darryl 2 hanging out at the pharmacy?

MR. JOYCE: With respect to those two initials, the evidence, as I recall it, was Mike had no participation in creating those names. Those were nicknames created by his father Teddy and Mr. Goldfield, again, without Mike's knowledge at the time. Whether or not he referred to them thereafter, I think in his statement was he recognized who Darryl 1 and

Darryl 2 were. But Mike played no part in the formulation of those nicknames for these two individuals who I believe are Jones and Lawson.

THE COURT: Right, they were Jones and Lawson.

MR. JOYCE: Right. But he played no part in certainly joking with Mr. Goldfield about that or creating those nicknames.

THE COURT: I believe I'm remembering Goldfield's testimony was different, that your client knew who Goldfield was talking about when he talked about Darryl 1 and Darryl 2, and certainly that your client witnessed Jones and Lawson filling multiple prescriptions in very short periods of time under all sorts of names.

MR. JOYCE: And there's been evidence to support [31] that, Judge, I will recognize that, through documents. I realize –

THE COURT: So how could he not know these were being distributed back on the street?

MR. JOYCE: Judge, these were a handful of individuals. We can count them up. Jones. Lawson. Clark. Four, five individuals in comparison to the thousands of patrons, customers that Olde Medford Pharmacy serviced. So you're talking about a fraction of individuals in terms of the overall, what I'll call clientele of the business.

So we recognize that there's no evidence about a discussion that this was going on, we're selling these pills on the street, we're making this much money. It would be somewhat unfair to hold Mr. Ludwikowski responsible for what is a small, small fraction of individuals that were coming into his pharmacy. A vast majority of his patrons were being serviced with legitimate prescriptions for legitimate medicine, Judge, that they needed.

THE COURT: All right. Is there anything that you would like to add about – oh, I had one more question. I'm sorry.

Mr. Richardson reminds us that one of the convictions here was for maintaining a drug premises, your client was convicted of that. I think the proof was more than clear that he was the boss, these were his premises.

[32] MR. JOYCE: We did not object to that either, Judge, the plus two level enhancement for that.

THE COURT: But doesn't that also add weight to the notion that there was a common scheme for distribution?

MR. JOYCE: As I noted, we did not object to that. He stands convicted of Count Two, which was the maintaining for Olde Medford. He is going to be, most likely, be receiving a plus two level enhancement for that conviction. Regardless of what initial base offense you put him in, he's going to be receiving, I think, a plus two for that, in other words, Mike is being

punished for that. And sort of baked into that conviction is the underlying premise that prescriptions were filled, common sense tells us you can't get to that conviction without prescriptions being filled. I understand that. He's receiving punishment for that conviction, it's going to raise his level by two.

THE COURT: But isn't it also determining some essential facts as to whether or not there was a common pattern, practice, scheme, whatever you want to call it, at Olde Medford Pharmacy with regard to illegal distribution of oxycodone 30?

MR. JOYCE: As I said, I don't think I can reasonably argue that it doesn't because baked into it is this underlying premise that there were prescriptions being filled there. The question is who do we attribute them to, Mr. Goldfield or [33] Mr. Ludwikowski? And the government has failed to attribute the 115,000 pills to Mr. Ludwikowski.

Judge, what this really is, I think, is an attempt by the government to sort of double dip and double punish Mike for both the plus two for the maintaining, which again is going to happen, we have not objected to it, and also to them, again, holding him accountable for 1,000 prescriptions and 115,000 pills putting him at a base 34. So it's really an attempt by the government to sort of double dip here. He's going to be getting a punishment as a plus two for that maintaining conviction. And what they want to do is not only take that into account but then add on top of that these 115,000 pills. Again, it grossly overstates, I would submit, the

conduct here, the acquitted conduct here – I'm sorry, the convicted conduct.

THE COURT: Okay. I think you've answered all my questions. Anything further about quantity?

MR. JOYCE: Nothing about quantity, Judge.

Just so it's clear in my mind, we will get to the objection for the leader?

THE COURT: Yes.

MR. JOYCE: Okay.

THE COURT: Okay. Mr. Richardson?

MR. RICHARDSON: Some quick follow-up, your Honor. I wanted to address the payments issue and the sharing [34] of profits. And while the evidence bore out at trial that Mr. Jones, Mr. Lawson, and Mr. Clark did not share the money that they made on the street, the evidence at trial indicated that all of these sales were cash payments. That I believe it was Ms. Wood and Mr. Goldfield who testified that they were hitting no sale on the register for some of these so they would not show up with receipts. I don't believe there was any testimony in the record about the actual receipt. But what we saw a lot of, especially from Mr. Jones' residence and his – the evidence that was turned in by a prior girlfriend, were pharmacy labels, Olde Medford Pharmacy label receipts that shows the cost of $190.

Mr. Ludwikowski was responsible for putting Mr. Goldfield's initials in the computer. He cannot now come back and say he didn't know what was going on because he told Investigator Martino during the December 10th search – excuse me. Yes, December 10th search that, you know, he fell into the norm of the area that he would fill a high number of oxycodone prescriptions even if it were the same individual multiple times a day. That it was the normal practice at Olde Medford to fill prescriptions for the same individual passing prescriptions with different names on each blank. The same individual entered Olde Medford multiple times a day to fill prescriptions despite the name on the prescription changing. On several occasions –

[35] THE COURT: Mr. Ludwikowski made those statements?

MR. RICHARDSON: Yes. And Investigator Martino testified to those statements during trial. On several occasions Mr. Ludwikowski told Investigator Martino and others prescriptions would not be filled out properly and he would correct the error himself. That other times patients would have a prescription that was improperly filled out, they would leave and then return with a corrected prescription, which is corroborated by what Mr. Jones said he would do, he would go out into his car and would rewrite the prescription and go back in. Mr. Ludwikowski further told Mr. Martino on December 10th that regulars – he thought regulars were working with bad doctors to get these prescriptions. And he knew they were passing multiple prescriptions in a day or during a week. And

that when it was suggested to him that he probably did this because of greed, he said, yes, but later says he was looking to give his customers a hassle-free environment.

As to Mr. Goldfield, I would refer the Court to Mr. Goldfield's testimony on Page 1799 starting at Line 4:

QUESTION: Did you raise any question with Mr. Ludwikowski?

ANSWER: I did, you know, I asked Michael but I couldn't, you know, it's his pharmacy and I had to be there.

QUESTION: Did you have a choice to get up and leave, [36] did you feel?

ANSWER: If I wanted to, he would have gladly said then, you know, you can go if this is not something you are going to do and but I had nowhere to go, nowhere. I mean, I would have literally wound up on the street or in a shelter for that matter.

QUESTION: Were you surprised by what you saw given the prior work history that you had with Mr. Ludwikowski?

ANSWER: Yes.

QUESTION: Why is that?

ANSWER: Well, because it was always – I mean, Michael, you know, himself is always very exacting and, you know, he paid attention to detail like no one I had ever seen. There – that's one of the reasons

they were perhaps grooming him at Eckard's for a higher position, but Michael was very hands-on all the time.

As to Mr. Jones and Lawson, I would refer the Court to Mr. Ludwikowski's statement, which Detective Knecht testified that he and Special Agent Montgomery took on June 24, 2013, at Page 134:

Mr. Ludwikowski identifies Matthew Lawson.

Detective Knecht asks: How long have they been going there for?

Mr. Ludwikowski: For years. It's been, you know, they've been coming around for years.

[37] Later on Page 139:

Mr. Ludwikowski speaking: Yeah. Yeah. Yeah. It could be – it could be weekly. It could be two, two times a week. They could bring people three times a week that they'd be – they could be, you know, it could be going for a month.

What do you mean they could bring, be bringing in people?

Well, I'm saying it could, it could go back and look, yeah, but it's, you know, that they weren't coming in for prescriptions, they were bringing people in.

You'll recall that he talks about negative word of mouth and that's why all of the people were coming to the pharmacy bringing these fraudulent prescriptions.

And to address the issue of when this stopped, leading up to the threat letters, Mr. Ludwikowski's speaking on Page 330:

Well, I stopped it, you know, many reasons, you know. One, you know, I didn't feel like dealing with the constant everyday people coming in, you know. I tried to not be there just to not deal with it, you know. And it was, it was relentless and it's still, it's still a freaking relentless.

Talking about the fraudulent prescriptions coming into the pharmacy.

Page 344, Detective Knecht speaking:

So if you have this business coming in, they're giving [38] you $190 a shot, you know, a few times a day, how do you turn that away?

Mr. Ludwikowski: Well, you can't. But that's, you know, that was the trend of what pharmacy was about. You know, pharmacies were doing it and doing it and, you know, I just followed suit and I guess of what everyone else I thought I was doing, I guess I didn't change quickly enough.

He set up the – he, Mr. Ludwikowski, set up this criminal scheme and brought people on the system with it. The drugs that were proved that Mr. Lawson, Mr. Jones, and Mr. Clark brought at trial are certainly reasonably foreseeable for Mr. Ludwikowski and we ask that you hold him accountable as written.

THE COURT: All right. I think I need to correct something that I may have said about the total number of fraudulent prescriptions at Olde Medford Pharmacy.

Exhibit 2070A is the total number of all prescriptions for oxycodone 30, isn't that right?

MR. RICHARDSON: Yes, your Honor.

THE COURT: So some of those were legitimate.

MR. RICHARDSON: Yes, your Honor.

THE COURT: And some were fraudulent.

MR. RICHARDSON: Yes, your Honor.

THE COURT: Okay. And so that's not the universe of fraudulent prescriptions.

[39] MR. RICHARDSON: That is the total universe of prescriptions.

THE COURT: Okay. When we get to Paragraph 73 of the presentence report, the total number of fraudulent prescriptions was 1,955 at Olde Medford Pharmacy. See that in about Line 9 of Paragraph 73?

MR. RICHARDSON: Yes, your Honor.

THE COURT: And of the fraudulent prescriptions you're seeking to hold the defendant responsible for the Paragraph 74 chart, 114,960, which would be slightly fewer than 1,000 prescriptions of 120 pills each. Wouldn't that be right? In other words, about half

of the fraudulent prescriptions you're trying to put onto Mr. Ludwikowski?

MR. RICHARDSON: Yes, your Honor, those – the prescriptions that are in Paragraph 74 are the ones that our methodology was – we identified those based on the testimony of the witnesses and the aliases that they gave that they would remember using to generate those numbers for those individuals. The Roepke prescriptions were identified and testified to by Cheryl Vaites regarding the prescriptions she brought up there with other individuals over the time period.

THE COURT: Okay. And for those four individuals we could add up the column but that's the number of fraudulent prescriptions that were revealed in the trial testimony and in the charts –

[40] MR. RICHARDSON: Correct.

THE COURT: – attributable just to those four customers.

MR. RICHARDSON: Correct.

THE COURT: I get 948 fraudulent prescriptions that are attributable, in the government's view, to Mr. Ludwikowski, when I add up Jones, Lawson, Clark, and Roepke. Correct? For a total of 114,960 pills.

MR. RICHARDSON: I believe the total is 958 prescriptions.

THE COURT: 958. Okay. Well, neither of us is very good at math, I just got 938. 366 plus 124 plus 320 plus 148 and I get 938.

Do you agree?

MR. RICHARDSON: I still get 958, your Honor.

THE COURT: Okay. Then I will accede to the calculated 958.

MR. JOYCE: Judge, I get 958 as well.

THE COURT: Okay. Thank you. And I should go back to fourth grade, I guess.

But 958 represents 114,960 pills and the 958 represents just about exactly 50 percent of 1,955 prescriptions, fraudulent prescriptions for Olde Medford Pharmacy.

Now, the case law permits some sort of estimation for drug quantity and you cited the cases of the Third Circuit and [41] the Supreme Court that support that methodology. We also have a very wide range within Level 34, and this figure that ends up being the marijuana equivalent is about the middle of that broad range, the range is 10,000 to 30,000 kilograms of marijuana equivalent and the government's figure is at 23,000. And so even if the estimate is off by some percentage, 30 percent either way, it would still be in the same range.

Does everyone agree so far?

MR. RICHARDSON: Yes, your Honor.

MR. JOYCE: Yes, Judge.

THE COURT: Okay. Anything else or shall I rule at this time?

MR. JOYCE: Judge, if I could briefly address two points brought up by Mr. Richardson?

THE COURT: Okay.

MR. JOYCE: First is with respect to the cash payment issue, and then I want to address the Goldfield testimony that was read into the record.

With respect to the cash payments, Judge, the simple fact that the testimony was, and as Mr. Richardson pointed out, that cash payments were received sort of includes with it some sort of nefarious implication. That's not the case here.

Mr. Ludwikowski has been very transparent with probation this entire time, has provided tax return information, did not assert any Fifth Amendment privilege in [42] that process, which he has an absolute right to do, all of the income received by Olde Medford Pharmacy was legitimate income that was reported by Mr. Ludwikowski. There's been no allegation, as far as I know, that any of that is nefarious. So while it may have been paid with cash, all of it was reported by Mr. Ludwikowski and he shared the same with probation.

With respect to Mr. Goldfield –

THE COURT: And I think that every transaction was put on the books.

MR. JOYCE: And it was.

THE COURT: I mean, otherwise, we wouldn't have this database to draw on.

MR. JOYCE: These were legitimate transactions, Judge, as I pointed out earlier. Receipts provided. Income documented. There's no back door deals where money was pocketed with cash payments. These were legitimate transactions, Judge, which goes to show you in Mr. Ludwikowski's mind, goes to sort of cut across the grain that he somehow knew that this overall larger conspiracy was going on and that these pills were being sold and he was directing Goldfield to fill these when on the back end he's documenting everything as he should be. Sort of the two can't go together but we know that that's what occurred. He provided receipts, documented the income, showed it on his tax [43] returns, provided it to probation. So how do you square up those two sort of ideas? When you go – and my position is you can't.

THE COURT: Well, he knew he had to account for every pill of this controlled substance and if he didn't mark it down, then he was going to be in trouble that way. Isn't that correct?

MR. JOYCE: It is. But when the testimony was, and Mr. Richardson points out, that a lot of these purchases were made with cash. Well, by extension it becomes very easy for someone, an individual to pocket

that cash. That's the implication there, it becomes very easy for someone to pocket that cash and not report it or somehow hide those transactions.

THE COURT: I'm not assuming that at all.

MR. JOYCE: Okay.

THE COURT: And I don't think that there's evidence here that there is some secret cash drawer somewhere that went to Mr. Ludwikowski, not at all.

What I understood the government's argument to be, though, is that this is further indicia that these were going to be street drugs. There's a lot of cash sloshing around. Nothing is put on a credit card. Real names aren't being used. It's cash.

MR. JOYCE: And, see, I would argue the opposite, [44] that although it's cash or credit, it doesn't matter the form it takes when it comes in.

THE COURT: Well, if it's a credit card, you know who is presenting it.

MR. JOYCE: But the fact of the matter is whether it's cash or not, records were kept.

THE COURT: Yes.

MR. JOYCE: Who was purchasing, how much they were paying, here's my income, I'm reporting it, nothing nefarious or hidden by the defendant about that. So to me, I submit that that cuts across this argument of a common scheme and overall conspiracy being in cahoots with Goldfield, Wood, you know,

naming any of the coconspirators, alleged coconspirators here.

With respect to the common scheme and Mr. Goldfield's testimony, because some of it was read into the record, what I did not hear, though, Judge, maybe I'm wrong on this and you can correct me if I am wrong, but what I did not hear is indication from Mr. Goldfield or testimony from Goldfield under oath that he was directed or told or instructed by Mr. Ludwikowski in any way to fill a specific prescription or oxy prescriptions in general. It was alluded to, but what is devoid in this record, I don't think Mr. Richardson can point to it, is testimony that Mr. Goldfield was directed or told in any way to fill these prescriptions, any prescriptions, let [45] alone fraudulent oxy 30s, which is at issue here.

THE COURT: Thank you.

MR. JOYCE: Thank you.

THE COURT: All right. My oral Opinion will be as follows.

One of the first determinations with regard to the Sentencing Guidelines in a case involving distribution of this type, is to determine the quantity and type of substance.

Here there's no dispute that we're talking about one type of substance, which is oxycodone 30, which is a Schedule II controlled substance. And the question is what is the quantity of oxycodone 30 that's attributable to the defendant.

The defendant was acquitted of conspiracy and convicted in Count Two of maintaining a premises for the illegal distribution of a controlled substance, and he was also convicted in Counts Four through Eight, that is, five additional counts, of illegal distribution and dispensing and possession with intent to distribute and dispense a controlled substance in violation of federal law.

The defense has taken issue with the presentence investigation and report that suggests that the quantity that should be attributable to the defendant is derived from fraudulent prescriptions for approximately 114,000 oxycodone 30 pills. The defense has said that the government should prove and the Court should only count those prescriptions for [46] which there's evidence that the defendant himself knew that they were fraudulent, physically filled them, and received payment for them, in other words, that he and he alone was the person. And the defense points out that the acquittal on the conspiracy charge means that the jury was not persuaded that the essential elements of conspiracy had been proved beyond a reasonable doubt, which is correct as a matter of law.

Now, the Court in sentencing under the Guidelines, takes into account the conduct of conviction, in this case maintaining premises for distribution of a controlled substance, as well as the individual counts of conviction for the five discrete transactions for which the defendant was found guilty by the jury, and the Court also is to take into account relevant conduct. The concept of relevant conduct has been laid out in the

Guidelines under Guideline 1B1.3(a)(2), which would include as relevant conduct crimes that were committed in the same course of conduct or common scheme or plan as the counts of conviction. In other words, if there is a course of conduct or common scheme or plan in which Mr. Ludwikowski was a participant, then it is possible to count as relevant conduct the other similar transactions that were part of the same course of conduct whether done by Mr. Ludwikowski or by someone else in a manner that was reasonably foreseeable to him or directed by him.

So first I must reject the notion that the acquittal on [47] conspiracy precludes the application of the doctrine of relevant conduct. If relevant conduct is proved by a preponderance of the evidence, then it is countable. In this case I find that the government has proved by a preponderance of reliable evidence that there was a course of conduct initiated by the defendant in his premises at Olde Medford Pharmacy, which was to distribute oxycodone 30 even to those who were presenting fraudulent prescriptions for it. This has been shown by the testimony of the witnesses at trial including David Goldfield, who was hired by, acted at the direction of Mr. Ludwikowski, as well as the cooperating witnesses, Jones, Lawson, Clark, Cheryl Vaites, others. It's demonstrated by Mr. Ludwikowski's own statements when he was being questioned on June 24th, as well as statements that he made at the time of his arrest, which Mr. Richardson has alluded to in the record. Most importantly, this is not something that can be laid off on Goldfield or others, because it

was shortly after Mr. Ludwikowski purchased the premises and opened his business in 2008, a year before Goldfield was even hired, that sales of oxycodone by Ludwikowski in this pharmacy went through the roof. As the evidence at trial demonstrated, the quantities of oxycodone between the year 2008 and 2009 increased by a factor of about 50. Overall, during the period of the Indictment, the sales of oxycodone 30 at Olde Medford Pharmacy were far more than filled at any [48] other pharmacy in Burlington County and much more than the average for all pharmacies in Burlington County. Within the pharmacy itself oxycodone 30 prescriptions exceeded the aggregate total of the next ten prescription drugs that were being dispensed, by a wide margin.

So I do find that the system was well in place in 2009 when the defendant was the sole pharmacist. He had a first assistant at that time who testified at trial, Ramsey. Ramsey testified that the defendant had instructed him to fill the questionable prescriptions that were coming in. Goldfield testified to the same thing, including the fact that he was quite surprised that Ludwikowski, who he knew to be so detail oriented, was being so sloppy and lax with regard to this one overreaching and prominent aspect of the business, which was filling oxycodone 30 prescriptions, mostly to a small group of impossibly frequent customers who knew him personally and whom he knew and recognized.

The defendant was the person in charge of the business, he was also the one legally responsible, most

importantly, he put into place the scheme, and he abandoned the safeguards that he had practiced at prior pharmacies as standard operating procedures when he opened Olde Medford. He also put into place the practice of Goldfield filling certain prescriptions and using Ludwikowski's initials. This went on for 28 months, as Mr. Joyce indicated during those [49] 28 months, both men worked in the pharmacy. Ludwikowski was a hands-on pharmacist. It's true that in certain periods of time he may have been distracted by personal things going on in his life and didn't pay as much attention as he would have liked to.

On the other hand, he continued to be a detail oriented pharmacist who is giving a great deal of personal attention to his customers. He also knew Jones and Lawson who were his customers before Goldfield ever came and who testified, and Ludwikowski confirmed, that they had been coming for years, that this was nothing new, that is the filling of the fraudulent oxycodone prescriptions. And there was ample proof that the defendant knew that Jones, Lawson, Clark were presenting prescriptions under false names. They would fill multiple prescriptions, sometimes even on the same day, as Mr. Ludwikowski admitted in one of his statements when the extortion was being perpetrated by Jones and Lawson. And I don't accept the argument that this was just another type of prescription in a very busy pharmacy with thousands of customers. And I reject the argument that it's wrong to focus upon Jones, Lawson, Clark, and Roepke because how is Mr.

Ludwikowski supposed to keep track of such a micro slice of his clientele.

Well, Jones in this period of time filled 366 prescriptions with Ludwikowski; Lawson filled 124; Clark [50] filled 320; Roepke filled 148, as set forth in Paragraph 74, the total of those and just for these persons and just at Olde Medford Pharmacy was 114,960 oxycodone 30 pills. So I agree with the calculation in the report.

There's no evidence anywhere that Goldfield was somehow acting on Goldfield's own behalf and concealing any of these transactions from Ludwikowski. To the contrary, it was Ludwikowski that ran the business, set up the system, had Goldfield filling prescriptions since Goldfield was also a pharmacist. Sometimes it was Ludwikowski, sometimes it was Goldfield who would deal with the individuals. But what made it, again, part of the common scheme was that everybody knew what was going on, and it was the defendant who profited from it and encouraged it to happen. His profits were approximately $150 on every prescription and so there was a financial motive.

It is true that the defendant saw to it that records were kept of the transactions, in other words, it was entered into the pharmacy's database, false names and all, the fact that the prescriptions were being filled and dispensed. There's testimony that even when it was a cash transaction, a receipt was given. That was, I believe, Jones' answer to one of my questions. I do find, though, that that doesn't negate the defendant's

knowledge of the criminality of these transactions. He had to account for each oxycodone 30 pill [51] that was dispensed. His records had to make sense or he'd be readily detected violating the law in that regard. What he did was made these look like legitimate transactions with real people and real prescriptions that were being filled. In fact they were fraudulent.

And so within the pharmacy the numbers break down like this. There was 3,724 total prescriptions for oxycodone 30 during this period of time from April of '08 to August of 2013 accounting for 455,000 pills. This comes from Exhibit 2070A. The total number of fraudulent prescriptions was approximately half of that number, that is proven fraudulent prescriptions, 1,955. And that's from a sample that includes only these four persons and their aliases, Jones, Lawson, Clark, and Roepke. There is certainly testimony beyond that of others who were filling fraudulent prescriptions who aren't counted among these four and their aliases. But for purposes of sentencing the total number of fraudulent prescriptions is 1,955, even though that is undeniably an undercount.

The Court finds that it is fair and reasonable to attribute 958 of these fraudulent prescriptions to the defendant. These were either personally filled by him or were filled under the common scheme by Mr. Goldfield in Mr. Ludwikowski's name with Ludwikowski's knowledge and permission, again, with Mr. Ludwikowski's well-known customers. And therefore the Court agrees with the [52] computation in Paragraph 110 of the presentence report that this is the equivalent of

23,151 kilograms of marijuana for purposes of the sentencing.

There's a way of double-checking on this information. We know that there are five doctors who testified, namely Doctors Minoff, Patel, Meltzer, Dombrowski, and Baird, and that fraudulent prescriptions in the names of these doctors total 213,000 pills, so that accounts for approximately all of the fraudulent prescriptions that we are counting here today. The 1,955 fraudulent prescriptions are within the false prescriptions that were written on stolen or altered prescription pads of those five doctors. And I sat through the trial and I credit the testimony of each of those doctors that they never wrote such prescriptions for such patients in those names, including one or two doctors who testified that they never wrote any prescription for oxycodone 30 in their life. So again, that shows an extremely high concentration of fraudulent prescriptions coming from a handful of doctors presented by a handful of fraudulent customers and it was the most prominent feature of Olde Medford Pharmacy's dispensing in terms of numbers. That Olde Medford Pharmacy's purchases dwarfed all other pharmacies for relevant comparison purposes is shown in the Exhibit 2050 series and I credit that information, I believe there's no dispute about that. Olde Medford Pharmacy quickly reigned as the champion of oxycodone [53] prescriptions by a wide margin.

And so in overruling the defendant's objection, I'm finding that the relevant conduct figures are as I described, that the government has proved them several

ways over. There was confirmation, of course, of the prior dealings between Jones and Ludwikowski in the extortion note itself, "got a lot of dirt on you, Mike," and also in the text messages that were being exchanged as part of that extortion. Mr. Ludwikowski knew exactly what was being talked about and what was being threatened. And although in the early stages of his interview on June 24th with the police at the Medford department, he pretended to be ignorant, he eventually opened up and connected these dots of why these men were trying to extort him, namely, they had been his best customers for fraudulent oxycodone 30 and then he cut them off.

I'm not going to repeat all the evidence that's in the record, if a transcript is ordered, I can add to these findings. But there was so much confirmatory evidence, including testimony that Jones, for instance, would come into the pharmacy with a poorly written prescription, the defendant would send him back out. Jones would rewrite it in his car, come back 20 minutes later presenting a doctored up prescription and the defendant would fill it, no questions asked. That testimony I also credit making it crystal clear that the defendant knew directly that the prescriptions were [54] fraudulent and that Jones in that case was the author of it and not some doctor.

I also don't see Goldfield's testimony as somehow ambiguous. He was asked, and I credit his testimony, that he questioned these prescriptions in the early days with Michael. He said I asked Michael, but essentially I had to be there, I needed a job, I had no place else to

go. He told me to fill the prescriptions. Goldfield said it was surprising to him. He knew Ludwikowski from their prior employment together. He knew that Ludwikowski was so detailed and so by the book that he was pretty surprised at how he was going to be running this pharmacy with regard to these oxycodone prescriptions. That comes from the earliest days of Goldfield on board and discovering Ludwikowski's scheme was already in place, no questions asked.

And so I do find that the probation department's presentence investigation is correct with regard to the amount that Mr. Ludwikowski should be held accountable for. And this is ultimately in several places and the calculation appears in Paragraph 110 and it's in the range between 10,000 and 30,000 equivalent kilograms of marijuana, it's placed under 2D1.1(a)(5) and (c)(3), and it's Level 34.

Are there any questions about these findings? Have I overlooked any argument?

MR. RICHARDSON: No, your Honor.

[55] MR. JOYCE: No, Judge.

THE COURT: Okay. Let's move to the second issue, which is whether two points should be added for being a supervisor under 3B1.1(c). The basis for that in the presentence report was spelled out in Paragraphs 49 and 50 and the conclusion is in Paragraph 113 that there should be such an enhancement.

Mr. Joyce?

MR. JOYCE: Yes, Judge. Thank you.

You pointed out the operative paragraphs in the PSR. I'll just address – first I'll briefly address the Jones/Lawson.

I think it's pretty clear that there was no supervision or direction to those individuals. In fact the exact opposite both by way of the text messages and the letter, as I've already pointed out, it's "you've been doing" not we. What this is really about is supervision over Ms. Wood and Mr. Goldfield.

I'll address Ms. Wood first. Judge, this is an admitted drug addict, as you know, who Mike provided a chance to by providing her employment in an attempt to allow her to get back on her feet and get her life back together. He provided an opportunity to her. He provided a certain level of trust to Ms. Wood. That trust was betrayed numerous times. The testimony was she stole merchandise from him. She

* * *

[121] In the first step we determined the advisory Guideline range, recognizing that it's not binding upon the Court but it is the place where sentencing starts and it's a factor to take into account.

Second, we consider any motions for departures whether upward or downward from the advisory Guideline range.

And, third, we consider all of the factors under 3553(a) of the criminal code, including the Guidelines,

in order to determine whether there should be a variance, a variance being a sentence outside of the advisory Guideline range.

And so in this case I determined the advisory Guideline range, hearing several objections by the defendant, sustaining one of them as to the double counting aspect of one of the enhancements. I determined the quantity, which largely drives the Guideline range, overruling the defendant's objection as to that for reasons stated in my oral Opinion and I won't repeat all of those here. And I found, as the presentence report does, that the enhancement for the betrayal of a position of trust was also appropriate. So the Total Offense Conduct Score was 38 and the Criminal History Category was I. The recommended Guideline range became 235 to 240 months of imprisonment together with supervised release. Supervised release is statutorily up to three years on Count Two, which is the maintaining premises for purposes of drug distribution, [122] and at least three years and not more than life on Counts Four through Eight, which are the drug distribution counts themselves.

There's also a recommended fine range that accompanies these Guidelines, which would be 25,000 to $5.5 million, it's a very broad range. The Court in imposing a fine has to make a projection of the defendant's ability to pay a fine, and I've done that in this case. Significantly, there is no restitution element of this case, there's no identified financial victim, so whatever financial burden I impose will go toward the fine.

This makes it more possible to speak of the imposition of the fine. Why don't I take that up first.

This was very much a financially motivated series of crimes extending over a period of years and, indeed, they produced a lot of money for the defendant as the sole owner of Olde Medford Pharmacy. The 900 plus oxycodone prescriptions that he was directly responsible for resulted in a profit of $150 per prescription or roughly $140,000 in excess profits to him based upon his sale, the filling of fraudulent prescriptions. When you add in all the other fraudulent prescriptions that were filled at his pharmacy under his direction and on his watch that have not been counted for these purposes, the total benefit financially is easily a quarter million dollars for Mr. Ludwikowski. So it is a crime that cries out for a financial punishment when there's this [123] kind of financial gain.

Defendant is not without assets. He also is an intelligent and hard working man who has the ability to work in the future when he is done with his imprisonment. And he also has children to support, although they'll be significantly older by the time that he is out of prison.

Taking all these things into account, and recognizing that he lacks the ability to pay a significant fine within the recommended Guideline range, I'm nonetheless going to impose a fine of $12,000 or approximately one half of the low edge of the range. And the $12,000 fine would be due and payable immediately. His payment of a fine would, of course, be a condition

of his supervised release. And I'll set a minimum payment schedule at this time of not less than $250 a month, and that would make it possible for this $12,000 fine to be paid within the period of his supervised release, which is going to be five years on Counts Four through Eight and three years on Count Two concurrent with each other.

And before we go forward, is there any objection to the $250 a month minimum subject to adjustment based upon conditions when he is on supervised release?

MR. JOYCE: I have none, Judge.

MR. RICHARDSON: No, your Honor.

THE COURT: So that will be made part of the Judgment.

[124] So returning to the determination of sentence.

The advisory Guideline range yields a recommendation that he be imprisoned for 235 to 240 months.

There are no motions for downward departure at step two.

And at step three a number of reasons have been raised for a variance.

On the positive side for Mr. Ludwikowski, one doesn't have to look far to find the positives. These were evident to his family, his friends, his customers. It was even evident in some of the testimony in which

he could be viewed as quite charitable, is one way of looking at it, for hiring and keeping someone like David Goldfield and hiring and keeping as long as he did someone like Krystal Wood, and it was probably consistent in one sense with his urge to help others. He hired Goldfield and Wood despite knowing their many frailties and failings and entrusted them in Olde Medford Pharmacy with important responsibilities in filling prescriptions.

The flip side is he hired these two people knowing that they each had such a checkered record that they probably couldn't be employed anymore in a well run, decent pharmacy. The evidence shows he didn't intend to have them work in a well run, decent pharmacy because he wasn't setting Olde Medford Pharmacy up to run that way. It had already been set up in order to become an oxycodone pill mill before either of [125] them started their employment. His efforts to blame them for filling fraudulent prescriptions and ignoring rudimentary checks and balances on dispensing oxycodone reveals the disposition of someone who tries to blame others for exactly what he set into motion and expected to happen.

But more to the point of considering Mr. Ludwikowski, the letters that I received that are part of the defendant's submission are extremely impressive. He's gone out of his way to help his customers. He has been extremely compassionate toward his ex-wife despite what must have been a horrible divorce. He has been nothing but loving and caring toward his children. He has taken good care of his mother and his now

deceased father. He has been active in the community in his children's sports. Every letter, I believe, is a combination of words such as caring, competent, dedicated to service, professional, and that's why his business was as successful as it was. Customers became friends. All of that is unusual in today's day and age, although less unusual in a small town where people tend to get to know one another. He worked hard through this career. He put himself through school. He achieved a licensure in pharmacy. He had a series of jobs and was entrusted with responsibility. Along the way he was highly thought of in his previous employment. People who worked with him in those other pharmacies saw him as being detail oriented, by the books, and someone who was on his way [126] up in the pharmacy world.

He opened his own pharmacy. In fact, he was the owner or part owner in as many as, I think it was four pharmacies. He was ambitious and certainly worked hard. I have no reason to doubt he worked six or seven days a week. And I certainly believe that he would run medicine to someone's house at night if they needed it or even if their regular pharmacy was closed and he was able to step in and help. It shows a high degree of caring about others in his community. I usually don't get to say this about defendants and that's what makes this case unusual. No one could look at his record, other than his ownership and running of the Olde Medford Pharmacy, and conclude that he was a bad person or sociopath or anything of the effect. It seems just the opposite, that many whose path he crossed

thought highly of him, and the longer they knew him, the better they liked him, up to and including his ex-mother-in-law and father-in-law.

So in sentencing the whole person I'm not persuaded that Mr. Ludwikowski is public enemy number one. That's why I'm required to take into account his background, history, characteristics and weigh that with all of the other factors that also help to determine a just sentence, such as the seriousness of the offense, his role in it, the need to deter him and to deter others, the need to promote respect for the law, the need for his rehabilitation, and the need to treat [127] similarly situated defendants in a way that promotes a rough equity in the sentences that are imposed in a particular case, and also comparing this case with others across the board. And I will speak to each of those items.

The nature and seriousness of the offense is the most serious negative factor in this sentencing. Mr. Ludwikowski, even under what I think is a conservative estimate of what he should be held responsible for, participated in or supervised directly the distribution of over 100,000 oxycodone 30 tablets.

There was testimony that this is the favored oxycodone version of addicted people. It also has terrific painkilling qualities. It's a legitimate drug prescribed through pharmacies, that in the right moderate quantities under close doctor's care can help someone through a period of pain and hopefully without addicting them. But the addictive qualities of oxycodone are

well-known, and someone who starts to depend on it will often find because of the way it works on the body, on the brain in mechanisms that are still under investigation, become more addicting and crave even more. We heard testimony in this case of addicts who were consuming a dozen pills a day or even more. They had to get their hands on this drug and they would present false and fraudulent prescriptions.

Where did they present them? They drove all the way to Medford. Witness after witness talked of driving past ten [128] or 20 pharmacies just to get to Olde Medford Pharmacy. They did that because word of mouth said they don't check you there. You can hand them almost anything and you're going to get your prescription filled. They won't call the doctor to check. And that was the truth. Word of mouth in this case sent a great deal of business to Mr. Ludwikowski.

The distribution of oxycodone is tightly controlled by law. It's tightly controlled because it's a Schedule II substance. It is addictive. It's very powerful or even lethal if it's in the wrong hands for nonmedical reasons. And society depends upon its pharmacists to be the guardians, that is, the watchdogs to make sure that in the individual case at the end of the distribution process, this drug only goes to those people who have legitimate prescriptions based on legitimate medical needs.

And a pharmacist has a lot of tools at his or her disposal to perform this role. There's a state-wide database that began about 2012, we heard testimony

about that, where a pharmacist simply can type in the person's name and see if they've gotten other prescriptions from other pharmacies, and the quantities, all recorded in the database.

The pharmacy itself maintains the database so that it could be determined what are the quantities and the dates of the prescriptions so that over-prescribing can be detected.

The third mechanism was to avail oneself of calling a [129] doctor's office when facing a questionable situation. Is this person your patient? Did you prescribe this drug? I have a question, something here isn't squaring up. The testimony was uniformly that Mr. Ludwikowski never called any of the doctors' offices of all of the many hundreds of fraudulent prescriptions that were honored in that pharmacy. I believe the testimony also showed that there was no evidence he consulted the state-wide database that would have revealed multiple prescriptions to some of these fraudulent patients.

And, most of all, I guess the fourth mechanism that's available to a pharmacist is his own eyes. Looking at what's taking place right in front of him. What does this prescription look like? Who is this patient? Why are they standing around his pharmacy, congregating outdoors, waiting in their cars, having their friends come all to fill oxycodone 30? How is it that someone who presents a goofed up prescription and is sent away to fix it up can come back in 15 or 20 minutes with a fixed up prescription other than the person

making the changes themselves in the parking lot in their own car? That's what was going on. So it's extremely serious.

Mr. Ludwikowski is not being held responsible in this case for the further distribution activities of the people that he was dealing with, Dontees Jones, Mr. Lawson, Mr. Clark, Ms. Vaites, and the others, but for each of those [130] there was a multiplier out in the street, not only in terms of money, which this defendant never saw, he didn't receive any of the proceeds, but in terms of harm to the public when 120 oxycodone pills reach the streets and can be divided up and resold in order to provide this controlled substance to dozens of people from just that one prescription. You can quickly see what the multiplier is. So that's why it's a serious crime. Congress makes each of these offenses punishable by up to 20 years.

The next factor that I've considered is the need for specific deterrence. On the one hand, Mr. Ludwikowski has suffered a lot. He has been humiliated. He says that he is ashamed. He has brought dishonor to himself and, he says, to his family, his community. He has lost his license as a pharmacist. And although it's not final, I'm assuming that he's not appealing the decision of the Board of Pharmacy regarding his loss of license. It's not a Court's determination to decide loses their license, but I cannot imagine that Mr. Ludwikowski will ever be granted the privilege of being a pharmacist again. So he's lost a lot that way.

On the other hand, he had a lot. It's really hard to figure out why Mr. Ludwikowski would commit this financial crime other than being extremely greedy. The math is pretty compelling of how much extra money he could make, but he was [131] already making good money. He already had assets that were considerable. He worked hard. He was successful monetarily. But for some reason it wasn't enough. So this became the leading drug, the leading seller by far in his pharmacy. This was the spotlighted issue. This is why Olde Medford in a sleepy little town became a mecca for drug dealers and opiate abusers.

That he didn't need to do it but did it anyway suggests to me that there is still a need for specific deterrence of Mr. Ludwikowski. Even though he hadn't committed crimes before 2008, what he did after that just suggests that something is very much amiss. The point that the government has made through Mr. Richardson is that those who thought they knew Mr. Ludwikowski well didn't know the whole part of him because they didn't know about this. In fact, almost none of the letters I received talked about what Mr. Ludwikowski actually did. He apparently hasn't shared with very many people what the actual nature of this crime is. People said, well, they read something in the paper or they heard talk about this and that, he committed crimes as a pharmacist but I would still send my family there and I still trust him. Mr. Ludwikowski apparently has not revealed the enormity and significance of these crimes.

I don't think that Mr. Ludwikowski has come to grips with how serious his own criminal conduct was. He certainly [132] did not do that today in the letter that he read in or in his discussions with the probation department leading to the presentence investigation. Although I will say that the letter that he read is a step forward from his discussions with the probation department in those earlier discussions that occurred in September of 2017 after his conviction, where he tended to blame circumstances, blame everyone else. Today he's taking some very limited responsibility for certain conduct, that he could have been more careful, that he should have not trusted people. But that's not even half of the story. He set this up as a criminal enterprise distributing drugs. It succeeded wildly. It succeeded so well when he finally came to his senses and cut people off, that he himself became the victim of serious extortion threats.

General deterrence is also an important factor in this sentence. How many thousands of these prescriptions are presented every day across the country and how many of those are fraudulent? I don't know the answers to either question. But a pharmacist or pharmacist's assistant has to be extremely diligent before filling a prescription for an opiate. This would be further encouragement to comply with the law, to take the steps that are routinely undertaken by most pharmacists, which is to double-check, call the doctor when necessary, check the databases, and don't dispense if there's a question. Maybe that pharmacist will lose a customer, but we don't want [133] a situation where

the pharmacy that succeeds is the one that's the lowest common denominator or race to the bottom to fill these questionable prescriptions.

I'm not talking about punishing anyone for mistakes. I'm not even talking about punishing someone for gross negligence. The criminal code punishes willful conduct and that's what Mr. Ludwikowski has been found guilty of. What I am suggesting is that the sentence here needs to suffice to underscore the importance to pharmacists who have a special duty to society and a special privilege conferred upon them to do their job, to not take advantage of their special rank and privilege and to protect society, including, indeed, their own customers. And so this sentence will take that into account as well.

A sentence has to promote respect for the law. Again, Congress has made these significant crimes. The jury agreed with regard to just about everything the government presented. There was an acquittal on the conspiracy charge but, as I found with regard to relevant conduct, there's frankly no doubt in my mind that what Mr. Ludwikowski is being held responsible for in this sentencing was by a plan or design largely of his making and his supervision carried out by himself and others in his control. There was a disrespect for the law and that needs to be remedied, too.

Mr. Ludwikowski's rehabilitation is also to be taken [134] into account. Mr. Ludwikowski was in tears before me today at several points. And I was moved by it because he seems to be sincere in wanting

to pay back to society something to make up for what he has taken away. For example, he said he would like to teach other pharmacists so they could learn from his experience about this. He said that he sees oxycodone as a menace and wants to make sure everybody understands that. Well, I don't think he's ever going to be in a position to teach pharmacists again, but I am considering a sentence that would include significant community service. Mr. Ludwikowski, as I said in the more positive part of my remarks, is drawn largely toward serving others and so it's not a punishment as much as an opportunity to perform community service.

And what I'm going to be requiring as part of his sentence, in exchange also for a slight reduction in the term of imprisonment, is going to be not less than 1,000 hours of community service spread over the term of as much as five years, that is his supervision. 1,000 hours of community service is basically equivalent to half a year of full-time work. This is meant to be a significant requirement, it's probably the most community service that I've ever imposed. It will be community service that's administered by the probation department as part of the supervised release and it will be in a placement arranged by the probation department. Mr. Ludwikowski won't be arranging this but it will be [135] arranged for him and hopefully it will be work to hopefully use his skills for the benefit of society and at least to pay back a tiny fraction of the harm that he has done.

Finally, the sentence has to be proportionate to other sentences. I'm going to be sentencing others in

this case, including Goldfield who is coming up. It's hard to compare Ludwikowski with, for instance, Goldfield who hasn't yet been sentenced, that's one thing that makes it difficult. But, secondly, Goldfield was a very significant cooperator in this case. His testimony was important at the trial and I had the opportunity to observe it.

The same is true for Dontees Jones. And the machine gun aspect of it, I think, is something of a red herring. It didn't play into the case. Dontees Jones is not a nice person. It's the person that Mr. Ludwikowski chose to deal with at that time. And again, Dontees Jones was a significant cooperator in this case and was prepared to cooperate against Goldfield, too, if Goldfield had gone to trial. But it is a consideration that whatever Mr. Ludwikowski receives that it be explainable compared with other sentences of codefendants or fellow criminals.

Now, as part of the supervised release and the Court's goal of rehabilitation, we're going to make mental health treatment a part of that. I'm glad for Mr. Ludwikowski that he understands and appreciates that that will be a benefit to [136] him. He's suffering, and it will help him to put this behind him one day. This doesn't have to define the rest of his life. There'll also be financial disclosure under the standard condition. There'll be new debt restrictions while any portion of the fine remains unpaid. Hopefully, he'll be able to afford the mental health treatment but, if not, the probation department will pay for it.

We haven't discussed occupational restriction. Is there any objection to the Court imposing a special condition of supervised release that the defendant refrain from employment as a pharmacist?

MR. JOYCE: No, Judge, because of the ban.

THE COURT: All right. And even if for some reason the ban is lifted, it would still be part of this Judgment that he not be employed as a pharmacist during the period of supervised release and that's because there's a direct relationship between the defendant's occupation and the crime that he committed. The imposition of that restriction is reasonably necessary to protect the public. And the time frame is not undue, it's a five-year ban after he comes out of prison.

Finally, there has to be a special assessment of $600, which will be due immediately, that consists of $100 on each of the six counts of conviction.

Now, what is the sentence weighing all these factors [137] that is sufficient and not greater than necessary to achieve the purposes of sentencings?

The factors that pull toward a sentence within the Guideline range are the Guidelines themselves, the seriousness of the offense, the need for general deterrence, less so the need for specific deterrence. The factors that pull toward a more lenient sentence include his background, history, and characteristics generally, the good that he has done in his community in the past, his duties to his family as a father, the losses that he has suffered, including loss of license, and the

psychic suffering that he's been in since the time that he reported the extortion, I guess, in 2013 until now.

And so I do find that a Guideline sentence would overstate the proper balance and that a lesser sentence would be sufficient, but not much less. I am going to grant a variance; the variance helps me to achieve what I believe is a just sentence that takes all of this into account. And the sentence that the Court will impose is going to be a sentence of 15 years imprisonment, which is 180 months, to be followed by the five years of supervised release.

Are there any questions before I actually pronounce the sentence, or any arguments I failed to address?

MR. RICHARDSON: No, your Honor.

MR. JOYCE: Judge, just a question on the fine and the special assessment, because you indicated it's due [138] immediately. So I take it that –

THE COURT: Well, it's due immediately meaning interest will accrue unless I waive the interest. Are you asking interest be waived?

MR. JOYCE: I am, Judge.

THE COURT: Interest will be waived because of the lengthy term of his imprisonment. So it will be $12,000, it is due immediately, and it may be paid as a condition of his supervised release in installments of not less than $250 a month and interest is waived.

Mr. Leakan, may I consult with you for about one minute about something?

(The Court and Mr. Leakan confer)

THE COURT: Please stand for your sentence. The sentence will be as follows:

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that you, Michael Ludwikowski, are hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of 180 months on each of Counts Two, Four, Five, Six, Seven, and Eight to be served concurrently with each other to the extent necessary to produce a total term of 180 months.

Upon release from imprisonment, you'll be placed on supervised release for a term of five years. This term consists of terms of three years on Count Two and five years [139] on each of Counts Four, Five, Six, Seven, and Eight, all such terms to run concurrently for a total of five years. Within 72 hours of release from custody, you must report in person to the probation office in the district to which you are released. While on supervised release, you must not commit another federal, state, or local crime, you must not possess a firearm or other dangerous device, you must not possess an illegal controlled substance, and you must comply with the other standard conditions that have been adopted by this Court. You must submit to one drug test within 15 days of commencement of supervision and at least two tests thereafter as determined by the probation officer.

And you must comply with the following special conditions:

Alcohol and drug testing and treatment;

New debt restrictions;

Financial disclosure;

Mental health treatment;

Occupational restrictions, namely, as a further special condition of your release, you must refrain from employment as a pharmacist;

And, finally, community service in the amount of 1,000 hours to be completed at the direction of the probation office.

It is further ordered that you must pay to the United [140] States a total fine of $12,000 consisting of the following: On Count Two a fine of $2,000;

On Count Four a fine of $2,000;

On Count Five a fine of $2,000;

On Count Six a fine of $2,000;

On Count Seven a fine of $2,000;

On Count Eight a fine of $2,000.

The fine is due immediately. Interest is waived. The fine may be paid in installments of not less than $250 a month as a condition of supervised release. The Court also recommends that the defendant participate in the Bureau of Prisons Inmate Financial Responsibility Program and comply with all of the rules of that

program, including the contribution of not less than $25 a month toward his fine. You must notify the U.S. Attorney for this district within 30 days of any change of mailing or residence address that occurs while any portion of the fine remains unpaid.

It is further ordered you must pay to the United States a total special assessment of $600, which is due immediately, consisting of $100 on each of Counts Two, Four, Five, Six, Seven, and Eight.

You shall report to the institution designated by the Bureau of Prisons not later than noon, July 2, 2018. The Court will recommend designation of a facility by the Bureau of Prisons near to your home.

[141] And also the Court recommends that the Bureau of Prisons provide mental health treatment while you are incarcerated.

And that's the sentence of this Court.

I have to advise all defendants of the right to appeal.

You have a right to appeal from your conviction and sentence. If you're interested in appealing, then speak with your attorney who will file a Notice of Appeal with the Clerk of this Court in the event that you choose to appeal. Any such Notice of Appeal must be filed within 14 days of the date the Judgment is entered. I anticipate this Judgment will be entered tomorrow. If there is no Notice of Appeal filed within the

14-day period, then none can be filed thereafter because it would be too late.

Are there any questions about the sentence?

You may be seated.

MR. JOYCE: Judge, just a question. When it's entered tomorrow, it will be on the docket?

THE COURT: Yes.

MR. JOYCE: Okay.

MR. RICHARDSON: And bail will be continued until he surrenders himself, with all the conditions?

THE COURT: Yeah, that was my next question.

Any objection by either party to continuing the same conditions of bail that he's been under until he reports? And [142] I guess technically, reporting is another condition of bail.

MR. RICHARDSON: I have no objection to continuing Mr. Ludwikowski on bail until he reports.

MR. JOYCE: I have, obviously, no objection to that, Judge.

THE COURT: So bail will be continued with the additional condition Mr. Ludwikowski report to the designated institution on July 2nd.

Anything else?

MR. RICHARDSON: Nothing from the government. Thank you, Judge.

MR. JOYCE: Nothing further, Judge.

THE COURT: There may have been one flag here about forfeiture. Am I correct that there is no forfeiture issue in the case?

MR. RICHARDSON: There is no forfeiture issue, Judge.

THE COURT: Very well. Thank you for everyone who was here today.

I don't believe there are any counts to dismiss.

MR. RICHARDSON: There are none, your Honor.

MR. JOYCE: No.

THE COURT: And good luck to you and, of course, to your family.

Court's adjourned.

MR. JOYCE: Thank you, Judge.

[143] (Proceedings Concluded)