APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0071p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES ALVIN CHANEY, M.D. (17-6239/6351); LESA L. CHANEY (17-6167/6314); ACE CLINIQUE OF MEDICINE, LLC (17-6240/6315),

Defendants-Appellants.

Nos. 17-6167/6239/6240/6314/6315/6351

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
No. 6:14-cr-00037—Gregory F. Van Tatenhove, District Judge.

Argued: January 16, 2019

Decided and Filed: April 11, 2019

Before: COLE, Chief Judge; SUHRHEINRICH and MOORE, Circuit Judges.

COUNSEL

ARGUED: Robert L. Abell, ROBERT ABELL LAW, Lexington, Kentucky, for Appellant Lesa Chaney. Christy J. Love, LOVE LAW FIRM, PLLC, London, Kentucky for Appellants James Chaney and Ace Clinique of Medicine, LLC. Amanda B. Harris, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Robert L. Abell, ROBERT ABELL LAW, Lexington, Kentucky, for Appellant Lesa Chaney. Christy J. Love, LOVE LAW FIRM, PLLC, London, Kentucky for Appellants James Chaney and Ace Clinique of Medicine, LLC. Amanda B. Harris, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., Charles P. Wisdom, Jr., Roger West, UNITED STATES ATTORNEY'S OFFICE, Lexington, Kentucky, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. James Alvin Chaney ("Ace") and Lesa Chaney owned and operated a highly profitable clinic in Hazard, Kentucky called Ace Clinique of Medicine. Eventually, the clinic attracted suspicion that it was a "pill mill": a clinic that distributes addictive prescription pills without a legitimate medical purpose. Law enforcement obtained a warrant and searched Ace Clinique's files, where they discovered evidence of many crimes—some related to the suspected pill-mill operation, and some distinct. The Chaneys and Ace Clinique were charged, convicted by a jury, and sentenced. They raise on appeal four issues: (1) the constitutionality of the warrant that allowed the search of the clinic; (2) the sufficiency of the evidence at trial; (3) whether jury misconduct occurred and whether it warrants a new trial; and (4) whether the district court correctly calculated the guidelines range at sentencing. For the reasons discussed below, we **AFFIRM** the district court on all grounds.

I. BACKGROUND

Ace and Lesa Chaney are a married couple who owned and operated Ace Clinique of Medicine, LLC, in Hazard, Kentucky. R. 190 (Second Superseding Indictment at 1–2) (Page ID #1877–78). Ace was a licensed physician in Kentucky; Lesa was the President and Chief Executive Officer of Ace Clinique. *Id.*

The government started paying attention to Ace Clinique and the Chaneys in June 2010. R. 71-2 (Warrant One at 5) (Page ID #658). An anonymous caller contacted Chris Johnson, an investigator for the Kentucky Cabinet for Health and Family Services, and told him that Ace pre-signed prescriptions for use at Ace Clinique while absent. *Id.* Johnson, assisted by state law enforcement, investigated the claims. *Id.*

The investigation revealed that Ace was out of town on the same day that several prescriptions signed by Ace and dated that day were filled at a nearby pharmacy. *Id.* at 5–6 (Page ID #658–59). Officers interviewed Ace Clinique employees, who admitted to using pre-

signed prescription blanks, and the employees showed the officers three partial prescription pads of pre-signed blanks. *Id.* at 6–7 (Page ID #659–60). The state officers contacted the DEA, and investigators conducted multiple interviews of people who had worked for or with Ace Clinique, as well as former patients. *Id.* at 21–37 (Page ID #674–91). The investigation led to warrants to search Ace Clinique and the Chaneys' home and airplane hangar for evidence of violations of 21 U.S.C. § 841(a)(1), which proscribes knowing or intentional distribution of controlled substances, and 18 U.S.C. § 1956(h), which proscribes conspiracies to commit money laundering. R. 71-2 (Warrant One) (Page ID #653).[1]

Eventually, a grand jury issued a 256-count indictment that charged Ace, Lesa, and Ace Clinique with various offenses. R. 190 (Second Superseding Indictment) (Page ID #1877–1920). The charges fell into three general categories: controlled substance charges (Counts 1–64), money laundering charges (Counts 65 and 235–55), and fraud charges (Counts 66–234 and 256). *See* Appellee Br. at 4–6.[2]

The defendants sought to suppress evidence seized pursuant to the warrants, but had only partial success. R. 71 (Joint Mot. to Suppress) (Page ID #611); R. 159 (May 26, 2015 Order at 24) (Page ID #1760). The evidence seized from the airplane hangar was suppressed, as was evidence seized from the clinic that dated to any time before March 2006. R. 159 (May 26, 2015 Order at 24) (Page ID #1760). The district court rejected the defendants' arguments that the warrants' enumeration of "patient files" as an item to be seized was overly broad and insufficiently particular. *Id.* at 10 (Page ID #1746).

A 25-day trial followed. Ultimately, the jury returned a mixed verdict. R. 281 (Verdict Form) (Page ID #2954–2984); *see also* Appellee Br. at 4–6.

---

[1]The description and list of items to be seized is identical in each of the three warrants, as are the portions of the affidavit discussed herein. *See generally* R. 125 (R. & R. at 3–19) (Page ID #1231–47). Therefore we do not distinguish among the warrants.

[2]Counts 69, 84, 101, 196, 205, 216, and 219 were dismissed by the government. Appellee Br. at 4–6.

The defendants argue now that the trial was infected by jury misconduct. During the trial, an alternate juror reported to court staff some "concerns about how serious[ly] the jury was taking their duty," and the staff reported those concerns to the district court. R. 371 (Sept. 30, 2016 Op. at 18) (Page ID #5925) (alteration in original) (quoting R. 291 (Apr. 20, 2016 Tr. at 3) (Page ID #3028)). The district court told the jury that if any issues related to the jury instructions arose they should report those to the court, but the court did not tell counsel that a juror had raised concerns. *Id.* at 19 (Page ID #5926). After the entry of the verdict, the same alternate juror—who did not participate in deliberations—contacted defense counsel to complain of misconduct; defense counsel contacted the court, and the court conducted an *in camera* interview with the alternate. R. 371 (Sept. 30, 2016 Op. at 20) (Page ID #5927). The defendants moved for a new trial following the interview, but the district court denied their motions. R. 297 (Mot. for New Trial [Lesa]) (Page ID #3246); R. 299 (Mot. for New Trial [Ace]) (Page ID #3279); R. 371 (Sept. 30, 2016 Op. & Order) (Page ID #5908).

Prior to sentencing, the district court conducted a two-day evidentiary hearing regarding the drug quantity and loss amount that would be used to calculate the sentencing guidelines range. R. 459 (Aug. 17, 2017 Tr. at 1) (Page ID #9443); R. 460 (Aug. 18, 2017 Tr. at 1) (Page ID #9572). Put simply, the defendants argued that drug quantity and loss amount should be calculated from the counts of conviction only; the government argued that every Schedule II or III prescription drug Ace prescribed during the relevant time period and every billing to Medicaid from Ace Clinique or a pharmacy filling an Ace Clinique prescription should be used to calculate drug quantity and loss amount. R. 460 (Aug. 18, 2017 Tr. at 44–66) (Page ID #9615–37); R. 459 (Aug. 17, 2017 Tr. at 10–11, 64–66) (Page ID #9452–53, 9506–08).

The Presentence Report ("PSR") for each defendant used the government's method to calculate a guidelines range, and the defendants objected. At sentencing, the district court refused to adopt wholesale either proposed method and instead found that 60 percent of the drugs and billings the government used to calculate drug quantity and loss amount were fraudulent. R. 508 (Sentencing Tr. at 25–29) (Page ID #10066–69). The district court varied downward from the guidelines-recommended life sentences for Ace and Lesa and sentenced Ace to a total sentence of 180 months in custody and Lesa to a total sentence of 80 months in custody. *Id.* at

86–87, 98–99 (Page ID #10126–27, 10138–39). Ace Clinique was sentenced to five years' probation. *Id.* at 103 (Page ID #10143).

These appeals followed.

II. DISCUSSION

A. The Search Warrant

All defendants appeal the district court's determination that the search warrants were constitutional. They focus their appeals on the warrants' enumeration of "patient files" as an item to be seized. When considering a motion to suppress, we review a district court's legal conclusions de novo and its findings of fact for clear error. *United States v. Richards*, 659 F.3d 527, 536 (6th Cir. 2011).

1. Background: The Warrant and Motions to Suppress

On September 9, 2013, the government applied for and was granted three search warrants: one to search the premises of Ace Clinique of Medicine, one to search James and Lesa Chaney's home, and one to search their airplane hangar. R. 71-2 (Warrant One) (Page ID #653); R. 71-3 (Warrant Two) (Page ID #700); R. 71-4 (Warrant Three) (Page ID #745). All three warrants expressly incorporate a detailed affidavit describing Special Agent Thad Lambdin's investigation of Ace Clinique and the Chaneys.

Each warrant contains a list of items to be seized. The list opens with the preamble: "The items to be seized are evidence of violations of Title 21, United States Code Sections 841(a)(1), 846 and 856, as well as Title 18 United States Code, Section 1956(h)." R. 71-2 (Warrant One at 46) (Page ID #698). The warrants then list various sorts of items, including "[p]atient files for patients." R. 71-2 (Warrant One at 47) (Page ID #699). The agents who executed the warrant to search the clinic seized nearly all the patient files. R. 317 (Mar. 23, 2016 Trial Tr. at 31) (Page ID #3839).

The defendants moved to suppress evidence seized from the searches. R. 71 (Joint Mot. to Suppress) (Page ID #611). They argued the warrants were insufficiently particular and were

overbroad, among other things. R. 71-1 (Mem. in Supp. of Mot. to Suppress at 19) (Page ID #635). The district court referred the motion to a magistrate judge, who recommended suppression of evidence that existed prior to March 2006 and of evidence seized from the airplane hangar, but otherwise rejected the defendants' arguments that the warrants' instruction to seize "[p]atient files" was improper. R. 125 (R. & R. at 39, 46–47) (Page ID #1267, 1274–75). The defendants entered objections to the Report and Recommendation, R. 134 (Objs. to R. & R.) (Page ID #1330), but the district court adopted the magistrate judge's recommendations. R. 159 (May 26, 2015 Order at 24) (Page ID #1760).

Among the recommendations that the district court adopted was the finding that "the facts [in the affidavit] do not support the finding that the 'whole [of Ace Clinique's] business' was fraudulent," and therefore there was not probable cause to support a general "all records" search. R. 125 (R. & R. at 38) (Page ID #1266). Naturally, the defendants did not object to this conclusion, and the district court adopted the relevant portion of the Report and Recommendation without comment. R. 159 (May 26, 2015 Order at 24) (Page ID #1760).

Although the district court did not find there was probable cause to seize all patient files, it nevertheless upheld the warrant on the theory that the preamble to the list of items to be seized acted as a limit on the list—law enforcement could seize patient files only if those files were evidence of violations of the listed statutes. R. 125 (R. & R. at 38–39) (Page ID #1266–67). This, the district court reasoned, guided the executing agents' discretion, and so the warrants passed constitutional muster.

At trial, Agent Thad Lambdin testified. The defense cross-examined him about the search of the clinic, and he explained that during the search the FBI took "not every [file], but most of them" and that the FBI intended to take all of the patient files in the clinic. R. 317 (Mar. 23, 2016 Trial Tr. at 31) (Page ID #3839). Defense counsel asked Agent Lambdin whether the FBI tried to distinguish between files that were potential evidence and files that were not; Agent Lambdin answered that the FBI "took [files] from the different areas of the clinic because [the agents] could not, on that day, determine what all was being used or not used." *Id.* at 31–32

(Page ID #3839–40). Upon further questioning, Agent Lambdin reiterated that, at the time of the search, the FBI did not attempt to distinguish between files, but rather "just took them all." *Id.*

The defendants renewed their motion to suppress after Agent Lambdin testified. R. 262 (Trial Min. for Mar. 30, 2016) (Page ID #2784). They argued that Agent Lambdin's testimony demonstrated that the "the limitation upon which the magistrate judge and the Court relied was, in fact, no limitation at all." R. 261 (Renewed Mot. to Suppress at 3) (Page ID #2778). The renewed motion appears to assert that the testimony showed that the warrant was insufficiently particular; the district court construed the motion to argue also that "even if the warrant itself was constitutional, the agents' supposed 'deliberate and willful disregard' of the warrant's scope requires a blanket suppression of the patient files seized in the raid." R. 273 (Apr. 19, 2016 Op. at 3) (Page ID #2905).

The district court denied this motion because (1) agents' actions cannot affect the particularity of the warrant, which is determined by the four corners of the warrant itself; (2) the officers may not have exceeded the scope of the warrant because all patient files were potentially relevant to the alleged violations and there was no way agents in the field could have determined which files were potentially relevant evidence; and, (3) even if the search exceeded the scope of the warrant, the defendants did not argue that the patient files actually introduced at trial were beyond the scope of the warrant. *Id.* at 3–5 (Page ID #2905–07).

The defendants now argue, on appeal, that the warrant was facially unconstitutional.

2. The Search Warrant Was Constitutional

The Fourth Amendment to the United States Constitution says that "no Warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. "The chief purpose of the particularity requirement [is] to prevent general searches by requiring a neutral judicial officer to cabin the scope of the search to those areas and items for which there exists probable cause that a crime has been committed." *Richards*, 659 F.3d at 537 (alteration in original) (quoting *Baranski v. Fifteen Unknown Agents of the Bureau of Alcohol, Tobacco and Firearms*, 452 F.3d 433, 441 (6th Cir. 2006)). The constitutionality of a warrant is determined by what is contained in the

four corners of the warrant, although the government can incorporate by express reference affidavits and other material. *See Groh v. Ramirez*, 540 U.S. 551, 557–58 (2004).

Two sorts of infirmities can lead to an insufficiently particular, and therefore unconstitutional, warrant. *Richards*, 659 F.3d at 537. The first is when a warrant provides information insufficient "to guide and control the agent's judgment in selecting what to take." *Id.* (quoting *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999)). The second is when the category of things specified "is too broad in the sense that it includes items that should not be seized." *Id.* This is often referred to as "overbreadth." "The degree of specificity required depends on the crime involved and the types of items sought." *United States v. Abboud*, 438 F.3d 554, 575 (6th Cir. 2006) (quoting *United States v. Blakeney*, 942 F.2d 1001, 1026 (6th Cir. 1991)) (for example, "[i]n a business fraud case, the authorization to search for general business records is not overbroad").

The appellants argue that paragraph 13 of the warrant, which lists "[p]atient files" as an item to be seized, is insufficiently particular because the government did not have probable cause to search all patient files, and the preamble clause of the warrant—limiting it to evidence of violations of 21 U.S.C. §§ 841(a)(1), 846, 856 and 18 U.S.C. § 1956(h)—is inadequate to guide the agents' discretion.

The United States presents two defenses of the warrant. First, it argues that Ace Clinique was so permeated with fraud that there was probable cause to seize all patient files. Second, it argues that the preamble clause is a sufficient limitation on the agents' discretion. The first argument fails, but the second does not.

a. Pervasive Fraud

Although general warrants are prohibited, "'where there is probable cause to find that there exists a pervasive scheme to defraud, all the business records of an enterprise may be seized,' and consequently a description merely of records of that business will suffice" to satisfy the particularity requirement. 2 W. LaFave, Search and Seizure § 4.6(d) (5th ed. 2018) (quoting *United States v. Brien*, 617 F.2d 299, 309 (1st Cir. 1980)) (footnotes omitted). In other words, if an organization or business is permeated with fraud, then there is probable cause to believe that

all its records are instrumentalities or evidence of a crime. In those circumstances, a warrant authorizing a search of all records is not a general warrant, but rather a warrant describing exactly the items officers have probable cause to search or seize.

The court below considered and rejected the applicability in this case of the pervasive fraud doctrine. Appellee Br. at 57; R. 125 (R. & R. at 38) (Page ID #1266); R. 159 (May 26, 2015 Order) (Page ID #1737). The magistrate judge who issued the Report and Recommendation addressed this issue by first considering statements in the warrant affidavit discussing the percentage of patients who were pain patients: "The Government at times estimates 50% of Ace Clinique's patients to be legitimate. [One person] stated that she believed approximately 90% of the patient load was pain management, but [another person] estimated that number at 50-60%." R. 125 (R. & R. at 38) (Page ID #1266). Based on these numbers, the magistrate judge concluded that the "evidence does not support probable cause to find that 'the whole business is fraudulent.' Therefore, the Affidavit does not establish that Ace Clinique is 'permeated with fraud.'" *Id.* at 37–38 (Page ID #1265–66) (quoting *United States v. Roos*, No. 12-09-2-ART, 2013 WL 1136629, at *3 (E.D. Ky. March 18, 2014)). The district judge adopted this aspect of the Report and Recommendation without comment.

To the extent that this is a question of law, we review de novo. *United States v. Ford*, 184 F.3d 566, 575 (6th Cir. 1999). To the extent that the district court's conclusion that Ace Clinique was not permeated with fraud was a finding of fact, we review for clear error; clear error occurs when, as here, the district applied an incorrect legal standard to reach the factual finding. *See United States v. Mahbub*, 818 F.3d 213, 223 (6th Cir. 2016). We discuss first the proper factors for deciding whether the pervasive-fraud doctrine applies, and then we consider whether it existed in this case.

The court below applied a standard it derived from *United States v. Roos*: the "whole business" must be fraudulent to justify an all-records search. R. 125 (R. & R. at 37) (Page ID #1265) (quoting *Roos*, 2013 WL 1136629, at *3). Given the focus on the alleged percentages of patients who were pain patients, it is clear that the court below understood "whole business" to mean that every transaction in which a business engages is fraudulent; otherwise, probable cause

for an all-records search would be lacking. This is an incomplete, if not erroneous, understanding of pervasive fraud. Certainly one factor in determining whether there was pervasive fraud is the amount of fraud[3], but a large quantity of fraud is neither necessary nor sufficient for the exception to apply.

First, to the extent that the magistrate judge predicated the recommendation on an understanding that, for a business to be permeated with fraud, every transaction must be fraudulent—that is not the case. That could not be the case. Even the most fraudulent of businesses might conduct a legitimate transaction from time to time.

Even if the magistrate judge's understanding was not so cramped, it erred in considering only the quantity of fraudulent business when determining whether Ace Clinique was permeated with fraud. Other factors, such as the separability of the fraudulent aspect of the business from the legitimate and the central purpose of the business, are relevant.

The first factor not considered by the district court is the separability of the fraudulent from the legitimate. A broad warrant is justified if "every aspect" of the business operation it targets is "pervaded" with fraud. *Voss v. Bergsgaard*, 774 F.2d 402, 406 (10th Cir. 1985). One guiding principle of cases applying this doctrine is whether it is possible to separate the fraudulent aspects of the business from the legitimate. If it is possible, then the business is not permeated with fraud and a broad warrant is unjustified; if it is not, then a broad warrant can stand. For example, a business "incorporated solely as a conduit for the flow of kickback monies" might be so permeated with fraud that a broad warrant would be justified. *United States v. Accardo*, 749 F.2d 1477, 1479 n.3 (11th Cir. 1985). So too a business in which "the alleged fraud supposedly infected [the business], its principals and officers, its suppliers, and numerous other individuals and businesses with whom it did or had done business . . . [and] traces of that

[3]At least one other circuit has said that "'pervasive fraud' does not refer to the percentage of a defendant's business that is fraudulent." *United States v. Bradley*, 644 F.3d 1213, 1259 (11th Cir. 2011). Because at least half of Ace Clinique's business was potentially fraudulent, we do not answer the question here of whether the pervasive-fraud doctrine can apply when the fraud is small but "traces of that fraud were likely to be found spread out amongst the myriad of records" in the business, as the Eleventh Circuit held in *Bradley*. *Id.* at 1259–60. In other words, although quantity of fraud is not the only factor, we need not decide here whether it is a necessary factor.

fraud were likely to be found spread out amongst the myriad of records in [the business's] possession." *United States v. Bradley*, 644 F.3d 1213, 1259–60 (11th Cir. 2011).

Conversely, we have made clear that when the fraudulent aspect of a business is separable from and unrelated to a legitimate aspect of the business, an all-records search warrant is not justified. *Ford*, 184 F.3d at 576–77 ("Even if one business carried on at a site is permeated with fraud, if other businesses run at the same site are *separable* and are not shown to be related to the suspected crime, a warrant permitting seizure of all documents at the site is not justified." (emphasis added)); *see also Voss*, 774 F.2d at 406 ("Even if the allegedly fraudulent activity constitutes a large portion, or even the bulk, of the [target business's] activities, there is no justification for seizing records and documents relating to its legitimate activities" in a case where an organization conducted fraudulent transactions on behalf of clients but also engaged in unrelated advocacy work); *United States v. Roche*, 614 F.2d 6, 7 (1st Cir. 1980) (finding an all-records search to be overbroad because it could have been limited to the automobile insurance portion of the defendant's insurance agencies).

Another guiding principle is whether "the alleged criminal activity was the 'central purpose' of the place to be searched." *United States v. Asker*, 676 F. App'x 447, 462 (6th Cir. 2017) (quoting *United States v. Rude*, 88 F.3d 1538, 1551 (9th Cir. 1996)); *United States v Logan*, 250 F.3d 350, 365 (6th Cir. 2001) (upholding a warrant because "the warrant's general nature was due to the investigators' belief that [fraudulent activity] constituted [the business's] entire operation").

Consideration of these factors harmonizes legal doctrine and common sense. If the fraudulent portion of a business is in a silo separate from the legitimate portion, then there is no probable cause to think evidence of a crime would be found in the legitimate silo. On the other hand, if half of a business's transactions are fraudulent but are interspersed with and inseparable from the records of the legitimate transactions, then it is probable that evidence of a crime would be found in any record seized. Therefore, an all-records search would be supported by probable cause. Likewise, if a business's central purpose is fraud, it is far more likely that probable cause exists to seize all records than if only a portion of the business's purpose is fraudulent.

United States v. Roos, on which the court below relied, does not contradict the idea that probable cause to seize all records requires consideration of both the percentage of the business that is fraudulent as well as the separability of the fraudulent aspect of the business and the purpose of the business. 2013 WL 1136629, at *3. Furthermore, *Roos* does not suggest that all, or even the vast majority, of a business's transactions must be fraudulent to support an all-records search on the theory it is pervaded with fraud.

Roos is, in fact, quite different from the case at bar. It did address a warrant to search a doctor's office for patient files, and Dr. Roos was prescribing prescription painkillers, but there the resemblance stops. Dr. Roos came under suspicion after the police searched the house of two people suspected of unlawfully distributing painkillers and found oxycodone prescribed by Dr. Roos and reminders for appointments with Dr. Roos. *Id.* at *1. The suspected drug dealers were in Kentucky; Dr. Roos was based in Houston, Texas. *Id.* Kentucky State Police interviewed three Kentucky residents who said they traveled to Houston to get oxycodone prescriptions from Dr. Roos. *Id.* They would either travel to Houston, be examined quickly, and get prescriptions for large amounts of painkillers, or Dr. Roos "would call in the Texas prescriptions to a Kentucky pharmacy." *Id.* at *1. Based on this evidence, the police executed a warrant for "patient files for patients who have indicated they are from Kentucky." *Id.* After the search was executed, Dr. Roos argued "that the warrant lacked probable cause because the search warrant application did not establish that her whole medical practice was fraudulent." *Id.* at *3. In response to this argument, the district court correctly distinguished Dr. Roos's situation from the cases in which an all-records search was justified because the business was permeated with fraud. For one, the warrant at issue in *Roos* was limited to the Texas doctor's files on patients from Kentucky. Furthermore, to the extent that *Roos* suggests a broader warrant would not have been justified, that has no bearing on this case. In *Roos*, the government had evidence that Dr. Roos was conspiring with patients in Kentucky to distribute drugs unlawfully. *See United States v. Roos*, No. 12-09-2-ART, 2013 WL 1136638, at *1 (E.D. Ky. Jan. 24, 2013). Even if *Roos* were binding on this court, it would not alter the outcome in this case.

Turning back to the Chaneys and the Clinique, the question remains whether there was pervasive fraud justifying an all-records search. The first relevant factor is the quantity of fraud.

The affidavit accompanying and incorporated into the warrants showed that anywhere from one half to 90 percent of its patients were pain patients—that is, *potentially* fraudulent. Next, the separability of the fraudulent from the legitimate: although it is uncontested that the clinic saw some legitimate patients, there is no indication that the pain practice was at all separate. Ace Clinique did not have a "pain clinic" separate from the rest of its practice; it was one clinic. On the other hand, there is nothing to suggest that evidence of fraud might "infect" the files of non-pain patients. Finally, the central-purpose inquiry. It cannot be said with certainty that the *central* purpose of Ace Clinique was to operate as a "pill mill." Certainly it did operate as such, but the conceded non-negligible amount of legitimate patients at least suggests a dual purpose. The evidence is close, but there is not quite enough evidence to suggest that Ace Clinique was permeated with fraud. This means that there was not probable cause to seize all of its records wholesale based on the "permeated with fraud" theory.

b. Particularity

This leads to the government's second argument—that the warrant was limited to files that were "evidence of violations of [21 U.S.C. §§ 841(a)(1), 846, 856 and 18 U.S.C. § 1956(h)]," and therefore it was sufficiently particular. R. 71-3 (Warrant Two) (Page ID #743); Appellee Br. at 50. This is the theory under which the district court upheld the warrant. The defendants argue now that this clause did not provide any meaningful guidance to the officers executing the warrants, and so the warrants remain insufficiently particular.

There is no formula that determines whether a warrant is sufficiently particular. A sufficiently particular warrant "supplies enough information to guide and control the [executing] agent's judgment in selecting what to take." *Richards*, 659 F.3d at 537 (quoting *United States v. Upham*, 168 F.3d 532, 535 (1st Cir. 1999)). Whether this bar has been cleared is "best resolved upon examination of the circumstances of the particular case." *Logan*, 250 F.3d at 365. "[T]he degree of specificity in a warrant must be flexible, depending upon the type of items to be seized and the crime involved." *United States v. Blair*, 214 F.3d 690, 697 (6th Cir. 2000). Finally, "where a warrant adequately describes 'a category of seizable papers,' it is not lacking in specificity merely 'because the officers executing the warrant must exercise some minimal

judgment as to whether a particular document falls within the described category.'" *United States v. Bruce*, 396 F.3d 697, 709 (6th Cir. 2005), *vacated in part on other grounds*, 405 F.3d 1034 (mem.) (6th Cir. 2005) (quoting *United States v. Ables*, 167 F.3d 1021, 1034 (6th Cir. 1999)).

Furthermore, it is established law in this circuit that, in some circumstances, "[a] warrant that empowers police to search for something satisfies the particularity requirement if its text constrains the search to evidence of a specific crime." *United States v. Castro*, 881 F.3d 961, 965 (6th Cir. 2018). The defendants nevertheless persist, arguing that "where the referenced statutes are broad in scope, courts have held that the warrant contains no limitation at all and fails the particularity requirement." Lesa Chaney Br. at 34. They then argue that the statutes referenced here are so broad that they provide no meaningful guidance, and therefore the warrant is invalid. This argument, which was not made to the district court, is incorrect even if it were available to make for the first time on appeal.

First, the defendants' attack on 18 U.S.C. § 1956(h)[4] as a meaningful limit on the warrant is unavailing because it fails to view the warrant as a whole. Section 1956(h) deals with money laundering, and the defendants are correct that § 1956(h) is a broad statute that criminalizes "more than 250 predicate offenses." Lesa Chaney Br. at 35 (quoting *United States v. Santos*, 553 U.S. 507, 516 (2005)). Perhaps a warrant that described the items to be seized *only* by reference to a statute as broad as § 1956(h), and which offered the executing officers no additional guidance or details regarding the suspected criminal conduct, would fail for lack of particularity. That is not the case here, however. Instead, the warrant expressly incorporated a detailed affidavit that described the conduct at issue. Courts must take a common-sense, contextual approach when interpreting warrants. *Castro*, 881 F.3d at 965. Here, common sense dictates that the evidence of money laundering authorized by the warrant is that related to the "pill mill" operation described in the affidavit. The out-of-circuit cases cited by defendants are

[4]"Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy." 18 U.S.C. § 1956(h). Section 1956(h) proscribes money laundering; § 1957 proscribes "[e]ngaging in monetary transactions in property derived from specified unlawful activity."

inapposite. The warrant at issue in *United States v. Roche* failed to incorporate expressly a detailed affidavit, and would have likely been saved had it done so. 614 F.2d 6, 8 (1st Cir. 1980). Similarly lacking were the warrants at issue in *United States v. Leary*, 846 F.2d 592, 604 (10th Cir. 1988), and *United States v. Spilotro*, 800 F.2d 959, 967 (9th Cir. 1986). In sum, the warrant at issue here directed the officers to seize evidence of money-laundering violations related to the pill-mill scheme described in detail and at length in the affidavit. Therefore the officers' discretion was sufficiently guided. *Cf. Andresen v. Maryland*, 427 U.S. 463, 479–82 (1976) (upholding a warrant that authorized seizure of "fruits, instrumentalities, and evidence of crime" because that phrase must be read in context with the rest of the warrant).

Moreover, even if § 1956(h) were so broad as to provide no guidance at all, three statutes remain that would limit the scope of the warrant: 21 U.S.C. §§ 841(a)(1)[5], 846, and 856[6]. These statutes are far narrower than the statute prohibiting conspiracy to commit money laundering, and therefore provide specific guidance as to what sorts of patient files were authorized to be seized—namely, those that were evidence of drug distribution. The defendants argue otherwise, mainly relying on *United States v. Lazar*, 604 F.3d 230 (6th Cir. 2010), for support, but *Lazar* addresses a different situation entirely. The warrant at issue in *Lazar* incorporated a list of patients, and that list served as a limit on the scope of the warrant. *Id.* at 236–38 (describing the warrant as including an affidavit referring to the "below listed" and "following" patients). This court held that any files seized in addition to the listed patients were beyond the scope of the warrant. *Id.* *Lazar* presents a very different situation from this case because the warrant was limited to specific patients. It does not stand for the proposition that any warrant ordering the seizure of patient files without a list of names is de facto unconstitutional.

The remainder of the defendants' arguments can be dealt with quickly. They rely on *United States v. Abrams* for support, and not illogically: *Abrams* does say that a warrant that allowed a seizure of all Medicare and Medicaid records from the office of doctors accused of

---

[5]"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense . . . a controlled substance." 21 U.S.C. § 841(a)(1).

[6]21 U.S.C. 856 prohibits and penalizes "[m]aintaining drug-involved premises."

Medicare/Medicaid fraud, even though limited only by reference to a particular criminal statute, was unconstitutional. 615 F.2d 541, 542–44 (1st Cir. 1980). *Abrams*, however, is unpersuasive. The opinion in *Abrams* was published only four years after the Supreme Court held in *Andresen v. Maryland* that a seizure of business records was constitutional based on a warrant's language allowing seizure of listed items "together with other fruits, instrumentalities and evidence of crime." 427 U.S. at 479. In *Abrams*, the First Circuit distinguished *Andresen* and noted that:

> Business records, although they may contain evidence of fraud, do not fall into the category of stolen or contraband goods. The government has cited no case and we have found none in which a seizure of all records was held valid pursuant to a generally worded warrant such as we have here. In the cases we have canvassed where a seizure of records was upheld, there has been some limitation in the warrant as to the records to be seized.

615 F.2d at 545. Time has shown otherwise. We have upheld numerous seizures of the majority of a person or business's records based on "generally worded warrant[s]." In *United States v. Gardiner*, 463 F.3d 445, 471 (6th Cir. 2006), we upheld a warrant that "specifically stated the records to be seized included: financial documents; . . . business records involving [certain of the defendants], . . . travel records; investment records; telephone records; records related to payment of personal and business expenses and cash purchases; . . . records and notes of financial transactions." We held "the warrant stated with particularity all items to be seized" and that, because the defendant was implicated in a broad scheme, a broad warrant was justified. *Id.*

Likewise, we have upheld warrants allowing seizure of "papers 'showing ownership and/or control' of illegal drugs," *Bruce*, 396 F.3d at 710, and "records and documents 'relating to the ownership, partnership, investment, construction and equipment costs, operating income and expenses, losses and/or distribution of income and/or profits attributable to each [restaurant franchise],'" *Asker*, 676 F. App'x at 462. In the latter case, we noted that "[g]iven the scope of the alleged money laundering, this list is unsurprisingly large, but nonetheless tailored." *Asker*, 676 F. App'x at 462.

So too with the Chaneys. The warrant authorized the seizure of all "[p]atient files . . . . [p]atient lists [and] [a]ppointment books, patient profiles, receipt books, ledgers of activity, notes regarding patient information, directions to pharmacies and other related documents as it pertains

to patients," so long as those files or patient-related documents contained evidence of money laundering or drug distribution. R. 71-3 (Warrant Two) (Page ID #744). This category surely contains numerous documents, but it is nevertheless tailored: the scheme was large, and so too the quantity of files seized.

This leads to the defendants' final argument: "The government was capable of describing the patient files and records and other items to be seized with more particularity." Lesa Chaney Br. at 41. They posit limiting the warrant to (1) files of patients who had been prescribed a controlled substance, (2) files of "those 50% of patients receiving controlled substance prescriptions that the government had some basis to conclude were [not] legitimate or probably legitimate," (3) files of individuals the government had already identified as being "unlawfully prescribed medication by Dr. Chaney," or (4) files of "individuals that received controlled substance prescriptions in June 2010, that are the genesis of this case." *Id.* at 41–42.

None of these proposed formulations show that the warrant was insufficiently particular or overbroad. The final two proposed formulations restrict the warrant to a far narrower group of files than the government had probable cause to seize. It is crucial to remember that the investigation of Ace Clinique revealed both specific instances in which patients were illegitimately prescribed controlled substances *and* evidence suggesting a larger fraud (for example, a pad of pre-signed prescriptions left for use while the doctor was away). These two formulations would limit the seizure to the specific instances already identified, ignoring the probable cause to search for other instances of fraud. It would be as though the government saw a person move drugs into a suspected stash house, but could authorize a warrant for only the quantity observed rather than any drugs found within.

The third formulation—limit the seizure to "those 50% of patients receiving controlled substance prescriptions that the government had some basis to conclude were [not] legitimate or probably legitimate"—is a gross misreading of the warrant affidavit. One person told an agent that 50 or 60 percent of Ace Clinique's patients were pain patients; there was never a distinction between a legitimate 50 percent and an illegitimate 50 percent. Therefore, this would not have been a valid formulation for the warrant.

We are left with the first proposed formulation: limit the warrant to patients who had been prescribed a controlled substance. This does not render illegitimate the warrant because it is no more particular than the warrant issued, which authorized the officers to seize evidence of drug-distribution crimes. It is, if anything, more broad—rather than restricting officers to only those patient files that are evidence of crimes, the defendants would authorize officers to seize every file of a person who was prescribed a controlled substance, regardless of the apparent legitimacy of the prescription. The defendants' failure to propose a more particular warrant formulation reveals the truth of the matter here: the warrant was as particular as was possible, in the circumstances. "When a more specific description of the items to be seized is unavailable, a general description will suffice." *Blakeney*, 942 F.2d at 1027. True, this formulation required the executing agents to use their judgment to determine whether a particular file could be seized, but that is not a fatal flaw. *See Bruce*, 396 F.3d at 710; *Ables*, 167 F.3d at 1034; *cf. United States v. Hanna*, 661 F.3d 271, 286 (6th Cir. 2011) ("We have allowed the search of electronic files beyond their titles, recognizing the risk of 'shielded' evidence otherwise.").

A final point deserves emphasis: the defendants do not challenge on appeal the execution of the warrant. Rather, they focus their arguments on the constitutionality of the warrant. Therefore, the manner in which the agents executed the search—namely, that they took all of the clinic's files, seemingly without review to see whether they constituted evidence of the named crimes—is of no moment. The defendants could have objected to the introduction of specific pieces of evidence as seized beyond the scope of the warrant, and, had the district court ruled against the defendants on those objections, we could have considered that on appeal. Those arguments, however, were not made below. We consider only the facial constitutionality of the warrant, and on those grounds the defendants' arguments all fail.

In sum, the warrant, as written, was constitutional.

B. There Was Sufficient Evidence For The Jury to Convict the Defendants

All the defendants argue that the evidence presented at trial was insufficient to sustain their convictions. We review jury verdicts using a deferential standard: we may "reverse a judgment for insufficiency of evidence only if, viewing the record as a whole, the judgment is

not supported by substantial and competent evidence." *United States v. Taylor*, 800 F.3d 701, 711 (6th Cir. 2015). The evidence must be "viewed in the light most favorable to the government" and "all reasonable inferences" must be drawn "in support of the jury's verdict." *United States v. Solorio*, 337 F.3d 580, 588 (6th Cir. 2003); *United States v. Stewart*, 729 F.3d 517, 526 (6th Cir. 2013). "[A] defendant claiming insufficiency of the evidence bears a very heavy burden." *United States v. Callahan*, 801 F.3d 606, 616 (6th Cir. 2015) (quoting *United States v. Jackson*, 473 F.3d 660, 669 (6th Cir. 2007)). It must be borne in mind, however, that the government bears the burden of proof of all elements beyond a reasonable doubt, and if the evidence did not meet that burden, the jury verdict must be reversed. *United States v. Parkes*, 668 F.3d 295, 300–03 (6th Cir. 2012).

1. The Drug-Distribution Counts

The first group of charges at issue are the drug-distribution counts. Ace and the clinic were found guilty of multiple counts of unlawfully distributing controlled substances, namely, oxycodone and hydrocodone, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. (Lesa Chaney was not charged with these counts.) "In order to obtain a conviction under 21 U.S.C. § 841(a)(1) against a licensed physician such as defendant, the government must show: '(1) That defendant distributed a controlled substance; (2) That he acted intentionally or knowingly; and (3) That defendant prescribed the drug without a legitimate medical purpose and outside the course of professional practice.'" *United States v. Johnson*, 71 F.3d 539, 542 (6th Cir. 1995) (quoting *United States v. Varma*, 691 F.2d 460, 462 (10th Cir. 1982)).

All defendants were found guilty of one count of conspiracy to distribute controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and 846. "To prove a drug conspiracy, the United States must establish '(1) an agreement to violate the drug laws, and (2) each conspirator's knowledge of, intent to join, and participation in the conspiracy.'" *United States v. Singleton*, 626 F. App'x 589, 595 (6th Cir. 2015) (quoting *United States v. Crozier*, 259 F.3d 503, 517 (6th Cir. 2001)).

Finally, all defendants were found guilty of two counts of maintaining drug-involved premises in violation of 21 U.S.C. § 856. "To convict a defendant on these charges, the government must prove beyond a reasonable doubt that the defendant (1) knowingly (2) maintained any place, whether permanently or temporarily, (3) for the purpose of distributing a controlled substance." *United States v. Lang*, 717 F. App'x 523, 545 (6th Cir. 2017).

a. Unlawful Distribution of a Controlled Substance

First, Ace and Ace Clinique challenge their convictions for unlawfully distributing oxycodone and hydrocodone in violation of 21 U.S.C. § 841(a)(1) (Counts 2–62).

Ace[7] argues that the government's evidence was insufficient for two reasons. First, Ace makes much of the fact that the government's witness, Dr. Stephen Loyd, found only two prescriptions—both not pre-signed—that, in Dr. Loyd's opinion, were not justified by a patient's underlying medical condition. And those were not from the patient files listed in Counts 2–62. Ace Br. at 45. Ace points to the fact that Dr. Loyd noted the various, serious underlying conditions that Ace's patients suffered and from this Ace concludes that the government failed to show the prescriptions were issued without a legitimate medical purpose. *Id.* at 45–46. In other words, Ace argues that the existence of an underlying medical condition that would justify the prescription of a controlled substance means that the substance was, de facto, issued with a legitimate medical purpose. Ace's second argument is that, per *United States v. Binder*, 26 F. Supp. 3d 656 (E.D. Mich. 2014), the government was required to prove *through expert testimony* that Ace issued prescriptions "outside the usual course of his professional practice and for no legitimate medical purpose." Ace Br. at 44–45 (citing 21 C.F.R. § 1306.04).

Ace's arguments are incorrect. His first argument begins with a flawed premise, as the district court explained in its post-trial opinion. R. 371 (Sept. 30, 2016 Op. & Order at 4) (Page ID #5911). Ace conflates "legitimate medical purpose" with "legitimate need" or, broader still, any condition that might justify the prescription of pain pills. *Id.* But the district court explained neatly the flaw in this logic:

[7]Ace and Ace Clinique's arguments regarding the sufficiency of the evidence are identical, and so, for purposes of this section, "Ace" refers to Ace Chaney and Ace Clinique unless otherwise distinguished.

> Accepting the Chaneys' premise, no physician could be held criminally liable for distributing opioid prescriptions to users who incidentally carried some legitimate need for painkillers, regardless of where, why, or how those prescriptions were issued. Suppose, for example, that a physician began dispensing prescriptions for powerful narcotics to strangers on a street corner, without asking for their medical history or performing a medical examination of any kind. Under the Chaneys' proposed construction of the law, the Government could not prosecute this physician for dispensing painkillers "without a legitimate medical purpose" absent some expert testimony that proved each stranger did not have a legitimate need for the pills.

Id. (footnote omitted). Instead, as the word "purpose" implies, we look at a provider's reason for issuing the prescription when determining whether it was issued for a legitimate medical purpose, rather than the patient's underlying conditions. As the district court made abundantly clear, a doctor prescribing opioid painkillers to anyone walking through the door is not saved if a person happens to have an underlying condition that could justify the prescription; likewise, a doctor who acts in good faith and with all due care but nevertheless issues a prescription to a patient who was merely faking symptoms is nevertheless acting with a legitimate medical purpose. To say otherwise would be absurdity.

Other "pill mill" cases support our common-sense reading of the statute. We have upheld similar convictions based on evidence of the doctor's intent—or purpose—rather than the patient's underlying condition. *See United States v. Elliott*, 876 F.3d 855, 864 (6th Cir. 2017) (noting that "the extremely short time [the defendant] spent with patients and her knowledge of the distances they traveled to obtain prescriptions at the clinic" supported the conviction); *United States v. Guzman*, 571 F. App'x 356, 363 (6th Cir. 2014) (the fact that the defendant "met with customers on an expedited basis and issued thousands of prescriptions for narcotics, with . . . prescription forms that [the doctor] had pre-signed" supported the conviction); *United States v. Word*, 806 F.2d 658, 663 (6th Cir. 1986) (finding that "[writing] prescriptions for various individuals whom [the defendant] did not examine" is evidence of illegitimate purpose). Evidence of the circumstances surrounding a prescription allows juries to infer that a physician's purpose was something other than legitimate medical treatment; the underlying conditions a patient may have had are not dispositive. Of course, the distinction between a physician's purpose and the patient's condition collapses when a provider's reason *is* to address the patient's

need; whether that was Ace's reason for prescribing pain pills is exactly the question in this case. The jury concluded that his reasons were illegitimate, a conclusion well supported by the evidence presented at trial.

This leads to Ace's second, equally flawed, argument. Expert testimony was not necessary to show illegitimate purpose in this case. First, the law in the Sixth Circuit is clear that expert testimony is not necessary. *Elliott*, 876 F.3d at 865. Second, there was plenty of evidence from which the jury could have concluded—absent expert testimony—that Ace was operating without a legitimate medical purpose. For example, a former patient named Charles Hicks testified that he was prescribed Percocet on his first visit to the clinic; that he was physically examined only once; that after a drug screening was negative for opiates,[8] he told Ace he was only taking drugs as needed, to which Ace responded that Hicks would have to start taking the pills more regularly; that Ace *increased* the dosage of Hicks's prescription after Hicks's drug screening was negative; and that Ace suggested to Hicks he could sell his additional OxyContin for cash. R. 400 (Mar. 3, 2016 Trial Tr. at 31–45) (Page ID #6411–25). Another example is the evidence that Ace was altering urine drug screens. R. 316 (Mar. 22, 2016 Trial Tr. at 38–42) (Page ID #3724–29). This, along with the myriad evidence summarized in the district court's opinions on the defendants' motions for acquittal, shows that in this case it was entirely appropriate for a jury to determine that Ace was operating without a legitimate medical purpose. *See* R. 267 (Apr. 12, 2016 Order) (Page ID #2794); R. 371 (Sept. 30, 2016 Op. & Order) (Page ID #5908).

b. Drug-Distribution Conspiracy

Next, the defendants argue that the evidence was insufficient to support their convictions for conspiracy to distribute Schedule II and III controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and 846 (Count 1).

[8]In this instance, a negative drug screening is a bad outcome. The idea behind the screenings is to test whether patients are actually taking the drugs they are being prescribed; thus, a positive result for opiates is the desired outcome.

Ace's argument as to this count is similar to his argument regarding Counts 2–62: he claims that the government has failed to prove an agreement to distribute controlled substances outside the usual course of professional practice and not for a legitimate medical purpose because the government did not provide expert testimony showing that all prescriptions distributed by Ace were illegitimate. Ace Br. at 47.

This count was supported by sufficient evidence for largely the same reasons that Counts 2–62 were proven. In addition, the government introduced evidence showing that Ace and Ace Clinique had a general practice of distributing medication for illegitimate purposes that went beyond the specific prescriptions charged in Counts 2–62. *See* Appellee Br. at 75–76.[9]

Lesa Chaney also challenges the jury's verdict as to Count One. She argues that the government failed "to identify even one patient that received a controlled substance prescription both outside the usual course of medical practice and for no legitimate medical purpose." Lesa Chaney Br. at 47. But this statement is, of course, incorrect. As discussed above, the government proved that 60 prescriptions were issued "outside the usual course of medical practice and for no legitimate medical purpose." Lesa was not charged in those counts, but the government offered evidence that she knew of Ace's practice of using pre-signed prescriptions and that she distributed the slips on occasion. *E.g.* R. 321 (Mar. 8, 2016 Trial Tr. at 18) (Page ID #4655); *see also United States v. Sadler*, 750 F.3d 585, 593 (6th Cir. 2014) ("The government had no obligation to produce 'direct evidence' against [the defendant], as 'guilty knowledge and *voluntary participation* may be inferred from surrounding circumstances.' Those circumstances all pointed in one direction—that this pain-treatment operation was a charade, and [the defendant] played a critical part in facilitating the charade." (quoting *United States v. Hodges*, 935 F.2d 766, 773 (6th Cir. 1991))). This was sufficient evidence to show Lesa's involvement in the conspiracy.

[9]Lesa, Ace, and the clinic argue that if the drug distribution and drug conspiracy counts fall, so too should the counts for maintaining drug-involved premises. But the drug distribution and conspiracy counts survive, and so too the drug-involved premises.

Lesa's final argument is that the government is attempting to turn the use of pre-signed prescriptions into a "strict liability" offense. But that is simply not the case. If that were, so a 25-day trial would not have been warranted. Rather, the government presented the use of pre-signed prescription pads in conjunction with other evidence of illegitimate purpose, all of which allowed the jury to infer malfeasance.

2. The Health-Care Fraud Counts

The next group of charges are the healthcare fraud counts.

All the defendants were found guilty of multiple violations of 18 U.S.C. § 1347, which proscribes knowingly and willfully executing (or attempting to execute) a scheme or artifice to defraud any health-care benefit program. This requires the government to prove that the defendants "(1) created 'a scheme or artifice to defraud' a health care program, (2) implemented the plan, and (3) acted with 'intent to defraud.'" *United States v. Bertram*, 900 F.3d 743, 748 (6th Cir. 2018) (quoting *United States v. Martinez*, 588 F.3d 301, 314 (6th Cir. 2009)). The convictions under this statute were based on the following conduct:

- Ace and Ace Clinique: medically unnecessary urine drug screens (counts 112–122); altered urine drug screens (counts 123–147); hospital visit billings (counts 150–163, 165–168, 171–171, 175, 177, 180, 182, 186, 188, 191–192); hospital visits on the high-volume day of March 19, 2013 (count 197); nerve conduction studies conducted by unqualified personnel (count 234).
- Lesa: medically unnecessary urine drug screens (counts 112–122); hospital visits on the high-volume day of March 19, 2013 (count 197); nerve conduction studies conducted by unqualified personnel (count 234).

In addition, all defendants were found guilty of conspiracy to commit health-care fraud in violation of 18 U.S.C. § 1349, and Ace and the clinic were found guilty of making false statements relating to health-care matters in violation of 18 U.S.C. § 1035. "The elements of health care fraud conspiracy under 18 U.S.C. § 1349 are (1) an agreement between two or more persons to (2) 'knowingly and willfully execute[ ], or attempt[ ] to execute, a scheme or artifice . . . to defraud any health care benefit program; or . . . to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or

payment for health care benefits, items, or services.'" *United States v. Pamatmat*, No. 17-1611, 2018 WL 6173401, at *4 (6th Cir. Nov. 26, 2018) (quoting *United States v. Patel*, 579 F. App'x 449, 460 (6th Cir. 2014)), *cert. denied*, 2019 WL 936741 (Apr. 1, 2019). To convict the defendants for false statements, "the government had to show that [their] false statements were willful and that [they] acted with intent to defraud." *United States v. Paulus*, 894 F.3d 267, 277 (6th Cir. 2018).

a. Medically Unnecessary Urine Drug Screens

All the defendants were found guilty of health-care fraud based on administering and billing for medically unnecessary urine drug screens, and all now appeal these convictions. Urine drug screens, when properly used, are a tool to help prevent patient abuse of pain medication. Doctors can test patients for the presence of the prescribed opioid—in which case, a positive result is desired—and for the presence of illicit drugs—in which case, a negative result is required. R. 354 (Mar. 9, 2016 Trial Tr. at 11) (Page ID #5668). These tests are medically indicated only at "the right frequency" and for "the right patient." *Id.* at 12 (Page ID #5669). If a patient is high risk, screening three or four times a year would be appropriate; for low-risk patients, once a year is adequate, per guidelines. R. 244 (Mar. 9, 2016 Trial Tr. at 66–67) (Page ID #2648–49). Ace Clinique was screening patients at much more frequent intervals. *E.g.*, *id.* at 82 (Page ID #2664) (describing a low-risk patient being screened 35 times in 35 months; another low-risk patient being screened 24 times in 42 months).

Ace argues that the government has failed to prove specific intent to defraud because it relied on "generalized" expert testimony rather than patient testimony or expert testimony "sufficiently specific to the patient, date, and services in the indictment." Ace Br. at 48. He points also to testimony of an expert witness that any drug screening is generally good. In addition, Lesa argues that the government failed to prove specific intent because: (1) she is not a healthcare professional; (2) there were divergent opinions in the medical community regarding how frequently urine drug screening should be conducted, therefore; (3) "[f]or [Lesa] to be found guilty of the healthcare fraud charges regarding the urine drug screens . . . it would have to be shown that she knew better than all these medical professionals." Lesa Chaney Br. at 52–53.

These arguments all fail.

First, the specificity of the government's proof. The defendants are correct that this court has said that "[i]f expert testimony is offered in lieu of patient testimony, the expert testimony should be sufficiently specific to the patient, date, and services in the indictment, [although] the patients' names need not be specifically mentioned during the expert's testimony." *United States v. Martinez*, 588 F.3d 301, 315 (6th Cir. 2009). The problem with the defendants' argument is that the government's expert did testify specifically as to each charged count. *See* R. 244 (Mar. 9, 2016 Trial Tr. at 81–89) (Page ID #2663–71) ("These are tables that I have performed for *each* patient and to kind of document their Opioid Risk Tool and also how many urine drug screens they had per month." (emphasis added)). This accords with *Martinez*:

> [The defendant's] records for each patient named in the indictment and the claims that [the defendant] submitted for reimbursement were admitted into evidence and available for the jury to review. [A doctor] testified that he reviewed the bills [the defendant] submitted and his patient files, and concluded that the billing was "not appropriate in any fashion" and that the procedures claimed in the billing "were not medically necessary in any way." Considering the evidence that [the defendant] performed procedures and prescribed medication that expert witnesses deemed medically unnecessary, a rational jury could infer that [the defendant] knowingly devised a billing scheme with the intent to defraud.

588 F.3d at 316 (internal citations omitted).

Similarly, in this case, Dr. Parker testified that only 31 of the 311 urine drug screens performed were medically indicated, and the complete medical files were admitted into evidence. R. 244 (Mar. 9, 2016 Trial Tr. at 86, 88–91) (Page ID #2668, 2670–73). Thus, the defendants' first argument fails.

Next, the defendants argue that one expert witness, Dr. Stephen Loyd, "testified for the government that he does not have a problem with [Ace Clinique's] drug screening regimen." Ace Br. at 48. The argument seems to be that Dr. Loyd's testimony rendered it impossible to show that the drug screens were illegitimate. This, however, is untrue. First, "courts may not 'independently weigh[ ] the evidence, nor judge[ ] the credibility of witnesses.' This rule applies with equal force to the testimony and conclusions of the government's expert witnesses." *Paulus*, 894 F.3d at 275 (quoting *United States v. Talley*, 164 F.3d 989, 996 (6th Cir. 1999))

(alteration in original). We cannot now say that the jury erred by crediting Dr. Parker's assessment that the urine screens were unnecessary over Dr. Loyd's testimony.

The second problem with this argument is that it overstates Dr. Loyd's testimony. He did say that "I don't have a problem with the drug screening regimen . . . . [P]articularly [in] rural Appalachia, I'm excited when people are drug-screened." R. 415 (Mar. 15, 2016 Trial Tr. at 160) (Page ID #7732). But Dr. Loyd said also that random drug screens (which Ace did not administer) are "preferable to a drug screen every time," and he noted instances where a patient tested negative for a drug the patient ought to have had in his system (because it was prescribed) but there was no indication Ace addressed this negative result. *Id.* at 48–52 (Page ID #7620–24).

Finally, this argument ignores the evidence of altered and ineffective drug screens (a violation for which Ace was convicted separately). *See generally* Appellee Br. at 31–33. The fact that Ace was altering drug screens adds to the potential inference that he had an illegitimate purpose and intent to defraud.

Last, there is Lesa's argument that she, as a layperson, could not have committed this fraud. But this argument is hollow. It is clear that someone need not be a medical professional to commit health-care fraud. *E.g.*, *United States v. Davis*, 490 F.3d 541, 549–50 (6th Cir. 2007). As the government points out, Lesa was aware that conducting screens was part of the regular patient visits to the clinic. R. 408 (Mar. 16, 2016 Trial Tr. at 19–20) (Page ID #7061–62). She was the owner of the clinic. Most damning, she knew about the altered tests, showing she was aware that the testing protocol at the clinic was not legitimate. R. 340 (Mar. 15, 2016 Trial Tr. at 15–16) (Page ID #5486–87). The jury could have legitimately concluded that she was aware of the fraud being conducted at her place of business.[10]

b. Making False Statements by Using Pre-Signed Prescription Pads

Next, Ace and Ace Clinique contest their convictions for violations of 18 U.S.C § 1035 for making false statements relating to health-care matters by using pre-signed prescriptions.

[10]Lesa makes similar, undeveloped arguments as to all of her fraud convictions. These arguments fail for the same reason—record evidence showed that Lesa was aware of the activities at the clinic, from which the jury could have inferred fraud.

They argue that the government failed to prove that Ace and the clinic intentionally hid the fact that the prescriptions were pre-signed. Ace Br. at 49. This is not so: Roy Combs, the "IT guy" at the clinic who kept the pre-signed pads, testified that Ace told him "not to tell anybody about the [the pre-signed prescriptions]. R. 321 (Mar. 8, 2016 Trial Tr. at 19–20) (Page ID #4656–57). This alone is evidence from which the jury could have concluded Ace intentionally hid the fact that the prescriptions were pre-signed.

c. The Nerve Conduction Studies

All the defendants challenge their convictions for violating 18 U.S.C. § 1347 by fraudulently charging for nerve conduction studies. According to the government's expert witness, Dr. Earl J. Berman, a true nerve conduction study is a "complex procedure" that tells a qualified practitioner whether a nerve is damaged by generating wave forms showing "how quickly a nerve impulse flows from a designated spot to a designated electrode." R. 354 (Mar. 9, 2016 Trial Tr. at 20) (Page ID #5677). Because "certain diseases . . . have . . . a certain neuropathy," for example, "[d]iabetes has a different characteristic wave form and flow rate than something that has a mass in the spine," "the technician has got to know very precisely how to set the electrodes, and the physician has to have special training as well to understand and interpret the wave forms and the latencies." *Id.* at 20 (Page ID #5677). "Medicare requires that a technician has special training and recognition by a nationally-recognized organization, and the physician also has to have certain nationally-recognized training." *Id.* at 21 (Page ID #5678).

Combs, the IT director at Ace Clinique, performed the nerve conduction studies there. R. 321 (Mar. 8, 2016 Trial Tr. at 4) (Page ID #4641). His only qualification to do so was a "couple days"-long course he attended that was led by the inventor of the machine. *Id.* at 7 (Page ID #4644). Combs's procedure involved "a machine that had eight D batteries in it that connected to a sponge that [he] had to get wet." *Id.* at 92 (Page ID #4729). He would then "connect [the machine] to a probe with a Q-tip on the end of it. . . . And then [he] would use the Q-tip and dip it in water, and hold it to different points on the [patient's] body." *Id.* The machine would generate a current, and when the patient felt "a sensation" Combs would write down the number on the machine's dial. *Id.*

Ace and the clinic argue that there was insufficient evidence to support this conviction because there was "confusion concerning whether a nerve conduction study involves a neural scan machine or an electromyogram (EMG)." Ace Br. at 50. They argue that the machine they used—what they term a neural scan machine—was different than the complex machine Dr. Berman described, and did not require the same training. This argument fails for two reasons. First, there was no such confusion. Dr. Berman very clearly testified that the procedure he was describing was the approved procedure for nerve conduction studies and *not* limited to EMGs or machines that use needles. R. 354 (Mar. 9, 2016 Trial Tr. at 39–44) (Page ID #5696–5701). Dr. Berman did testify that he was unfamiliar with the specific machine used at Ace Clinique, but the procedure he described for nerve conduction studies is from the Medicare/Medicaid billing manual. *Id.* This leads to the second reason why the arguments of Ace and the clinic fail: Dr. Berman's familiarity with their machine and what it may or may not require in terms of training is immaterial. Dr. Berman described the characteristics of the nerve conduction study for which the clinic billed Medicare. *Id.* By using that billing code, Ace and the clinic were representing that they were performing the type of procedure Dr. Berman described. They of course were not. Thus, they committed fraud, and no attempt to create confusion about EMGs as opposed to wet Q-Tips can undermine their convictions.

Finally, Lesa asserts broadly that the government "failed in its proof." Lesa Chaney Br. at 54. The record shows, however, that Lesa knew about the fraudulent practices at the clinic and was responsible for billing and administrative procedures at the clinic. That is sufficient evidence from which a jury could have found she knew of and committed (or aided and abetted) the fraud related to the nerve conduction studies.

For the reasons stated above, there was sufficient evidence for the jury to have convicted the defendants on all counts.[11]

[11]Ace argues also that there was "cumulative error," and all the defendants argue that the money-laundering charges fail because the drug-distribution counts fail. Because all of the defendants' arguments regarding the drug-distribution and health-care fraud counts are rejected, the money-laundering counts stand and there was no cumulative error.

C. Jury Misconduct

Next, all of the defendants argue that a new trial is warranted due to alleged jury misconduct. A new trial is warranted based on juror misconduct only if the misconduct "resulted in prejudice to [the defendant]." *United States v. Bowling*, 900 F.2d 926, 935 (6th Cir. 1990). "We apply the abuse-of-discretion standard in jury-misconduct cases." *United States v. Wheaton*, 517 F.3d 350, 361 (6th Cir. 2008).

1. Background

The allegations of jury misconduct in this case come from one alternate juror, juror number 116. On the fifth day of trial, a court clerk told the district court that she had received from the jury administrator some information about a recent conversation between the administrator and juror 116. "The administrator told the court clerk—and the clerk then told the [district court]—that this alternate had expressed 'some frustration with the process' and 'concerns about how serious[ly] the jury was taking their duty.'" R. 371 (Sept. 30, 2016 Op. at 18) (Page ID #5925) (quoting R. 285 (Telephone Conf.) (Page ID #2988)); R. 291 (Apr. 20, 2016 Tr. at 3) (Page ID #3028)). The district court did not investigate the concerns directly, nor did it alert counsel to the concerns. Instead, it "instructed the jury that 'if any issues . . . relate[d] to the jury instructions' arose, they should 'bring those to [the Court's] attention.'" *Id.* at 19 (Page ID #5926). The district court heard nothing further during the trial.

The day after the entry of the verdict, juror 116 contacted Ace's defense counsel and left a voicemail. Defense counsel reported the message to the court, and the parties held a telephone conference the next day. *Id.*; R. 285 (Telephone Conf.) (Page ID #2988). The district court determined that the appropriate course of conduct would be to conduct an *in camera* interview with the alternate to determine whether the concerns had to do with external influences on the jury or the jury's internal decisionmaking process. R. 371 (Sept. 30, 2016 Op. at 20) (Page ID #5927).

The *in camera* interview revealed details about the initial "concerns" that the district court was told about via the court clerk and jury administrator. The first incident occurred during opening statements. R. 291 (Apr. 27, 2016 Tr. at 6) (Page ID #3031) (describing the first

incident as happening during "the first statements"). Two jurors were discussing the Chaneys' house in the jury room during a break. The alternate told them "I don't think we should be talking about that." *Id.* One of the men who was discussing the house responded by saying "[w]e can talk about it in here" and asked "who said [that we cannot]?" *Id.* The alternate said that "[t]he Judge told us we couldn't." *Id.* Then another woman agreed with the alternate and said they could not discuss the case and "[i]t's right on the wall there." *Id.* This was the incident that was reported to the court.

Juror 116 reported another incident to the jury administrator. The jury administrator told the alternate juror to "tell [the other jurors] not to do that." *Id.* at 7 (Page ID #3032). It is unclear what exactly the alternate described to the administrator. Juror 116 did, however, describe to the court what the other incidents of misconduct were in her opinion. First, jurors were saying that they did not like the way one of the attorneys was treating an "elderly lady" witness. *Id.* Next, one of the jurors "got attracted to . . . Dr. Chaney's attorney, and he made it be known." *Id.* Finally, the alternate juror said that another woman was expressing her boredom at the trial (saying, for example, "I know how many lights . . . [are] in the ceiling."). *Id.* at 8 (Page ID #3033).

Based on these incidents the defendants moved for a new trial, but their motions were denied. R. 371 (Sept. 30, 2016 Op. at 34) (Page ID #5941).

2. A New Trial Was Not Warranted

The defendants rely nearly exclusively on *United States v. Resko* to support their argument that the alleged juror misconduct necessitated a new trial. *See* 3 F.3d 684 (3d Cir. 1993). In *Resko*, "approximately seven days into a nine-day trial . . . a juror approached a court officer and told him that the members of the jury had been discussing the case during their recesses and while waiting in the jury room. The court officer informed the trial court of this fact, and the court informed counsel." *Id.* at 687. The trial court declined the defendants' request for individualized voir dire, and instead gave a written questionnaire to each juror asking whether they participated in discussions and, if yes, whether they had "formed an opinion about

the guilt or non-guilt of either defendant as a result of your discussions with other jurors." *Id.* at 688. All jurors answered yes to the first question and no to the second. *Id.*

On appeal, the Third Circuit held that the district court erred by failing to conduct individualized voir dire because the questionnaire left the court with "no way to know the nature of [the jurors'] discussions" and whether those discussions were prejudicial. *Id.* at 690–95.

Here, the district court acted recklessly by choosing to keep information about potential juror misconduct from defense counsel. Nevertheless, a new trial is not warranted because the post-verdict interview with juror 116 revealed there was no juror misconduct that could have warranted a new trial, and thus there was no prejudice. *See Bowling*, 900 F.2d at 935. During the *in camera* interview, the alternate described one instance of potential misconduct (deliberating before close of evidence) that occurred during opening statements and was immediately quashed by other jurors. R. 291 (Apr. 20, 2016 Tr. at 6) (Page ID #3031). The rest of the supposed "misconduct" the juror reported could be characterized as less-than-ideal behavior (commenting on the appearance of a lawyer; complaining of boredom), but nothing that would warrant a new trial. *Id.* at 7 (Page ID #3032). Simply put, juror 116 was given a chance to air all her grievances, and nothing came close to conduct that would have warranted a new trial.

The defendants attempt to inject confusion by saying that there are a number of unresolved questions. *See* Lesa Chaney Br. at 58. But those attempts are fruitless. Juror 116 was clear when she spoke with the district judge, and the nature of the supposed misconduct is clear. It is nothing that could have possibly prejudiced the defendants. In sum, the district court's decision to withhold from the defendants an allegation of juror misconduct may have been imprudent, but in this case it is clear that, even if counsel had been informed of every "incident," nothing would have even approached necessitating a new trial. Therefore we affirm the decision of the district court.

D. Procedural Reasonableness at Sentencing

Finally, the defendants argue that their sentences were procedurally unreasonable because the district court failed to address their arguments for a lower drug-amount calculation and erred in calculating the loss amount.

We review factual findings at sentencing for clear error. *United States v. Valentine*, 694 F.3d 665, 672 (6th Cir. 2012). We review de novo the methodology the district court used to calculate loss amount. *United States v. Washington*, 715 F.3d 975, 984 (6th Cir. 2013).

First, the defendants argue that the district court erred by failing to explain sufficiently its rejection of the defendants' method of drug amount calculation. *See* Ace Br. at 53–54. The district court did, however, explain its reasoning "enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *United States v. Liou*, 491 F.3d 334, 338 (6th Cir. 2007) (quoting *United States v. Rita*, 551 U.S. 338, 356 (2007)). This is apparent from a review of the sentencing transcript. First, the district court explained its reasons for doubting the defendants' expert and method:

> I've read carefully the briefing that was filed, of course, listened carefully, for example, to [defense expert] Dr. Russell's testimony, the expert testimony that was raised here. And, I mean, I think one of the problems with the expert testimony, it's clear, as I've gone back and looked at that, is that it provides kind of this narrow bit of information, but not a real complete set of information as it relates to the alleged fraud that took place in this particular case. And I think it's very appropriate for guideline purposes to consider conduct that's much broader than simply the counts of conviction, for example, for, you know, presigned prescriptions, you know.

R. 508 (Sentencing Tr. at 15–16) (Page ID #10055–56). Then, the court gave a lengthy explanation of its reasoning for reaching the conclusions on drug and loss amount that it did. *Id.* at 25–29 (Page ID #10065–68).

The defendants' assertion that the district court's explanation was "very brief" or otherwise insufficient simply does not accord with reality. Therefore, this argument fails.

Finally, the defendants argue that the district court erred in calculating the loss amount. This argument is a rehash of the previous argument. The error of which the defendants complain is the district court's decision not to adopt the findings of their expert. Again, the district court sufficiently explained its decision regarding drug and loss amount, and specifically why it did not adopt the defense expert's methodology.

The defendants claim that the district court committed procedural error, but it is clear upon examination that their true complaint is the district court's decision to reject their expert's methodology. Because the district court committed no procedural error during sentencing, this claim fails.

III. CONCLUSION

For the reasons discussed above, we **AFFIRM** the district court's judgment regarding each defendant.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

UNITED STATES OF AMERICA,	)	
	)	Criminal No. 14-37-GFVT
Plaintiff,	)	
	)	**OPINION**
V.	)	**&**
	)	**ORDER**
JAMES ALVIN CHANEY, LESA L. CHANEY, and ACE CLINIQUE OF MEDICINE, LLC,	)	
Defendants.		

*** *** *** ***

After an exhaustive trial that spanned almost two months, a jury found Dr. James Alvin Chaney and his wife, Lesa L. Chaney, guilty of drug trafficking, health care fraud, making false statements and money laundering. [R. 281.] The Chaneys later moved for a judgment of acquittal and new trial on all counts. [R. 296, 297, 298, and 299.] The Court will now DENY both of Dr. Chaney's motions, DENY Mrs. Chaney's Motion for Acquittal, and GRANT IN PART her Motion for New Trial.

I

The Chaneys' story is a familiar one in this District. In 2006, the couple opened Ace Clinique of Medicine, LLC ("the Clinique"), a primary care clinic in Hazard, Kentucky. [R. 190 at 11.] The Clinique rapidly became a popular and lucrative enterprise. But according to the United States—and, more importantly, according to a jury—this success came at a high cost. In a 256-count indictment returned in December 2015, the Government accused the Chaneys of operating a taxpayer-funded pill mill. [R. 311 at 1.] At trial, the prosecution presented evidence

that the Chaneys knowingly left pre-signed prescriptions at the Clinique for distribution by unlicensed and unqualified medical staff, altered urine drug screens to conceal patients' drug abuse and/or diversion, triple- and quadruple-booked patients in the same time slot, forced others to wait for up to eight hours to be seen, fabricated medical records, and submitted fraudulent billings to public and private insurance providers. [*Id.*]

In April 2016, a jury convicted Dr. Chaney of sixty-one counts of unlawfully dispensing and distributing controlled substances, two counts of maintaining a drug-involved premises, two counts of knowingly obtaining controlled substances through misrepresentation or fraud, sixty-five counts of health care fraud, twenty counts of making false statements related to health care matters, twenty-one counts of money laundering, and three counts of conspiracy.[1] [R. 281 at 1-31.] The jury also convicted Mrs. Chaney of two counts of maintaining a drug-involved premises, thirteen counts of health care fraud, twenty counts of making false statements related to health care matters, twenty-one counts of money laundering, and three counts of conspiracy. [*Id.*]

The Chaneys then filed the present motions for acquittal and a new trial. [R. 296, 297, 298, and 299.] Both Defendants resuscitate the claim, previously rejected at trial, that the Government failed to produce sufficient evidence to support their convictions. [R. 296, 297.] They also seek a new trial on the basis of alleged (1) juror misconduct involving premature deliberations and (2)

[1] The jury also convicted a corporate Defendant, Ace Clinique of Medicine, LLC, of identical counts, with two exceptions: only Dr. Chaney was convicted of knowingly obtaining controlled substances through misrepresentation or fraud (Counts 66 and 67), and only the Clinique was convicted of making false statements related to the pre-signed certificates of medical necessity scheme (Counts 221-233). [R. 281 at 9-10, 26-28.] For the sake of clarity and efficiency, the Court will only refer to the individual Defendants in the body of this order.

prosecutorial misconduct in the Government's closing argument.[2] The Court will address each of these claims in turn.

II

A

To begin, the Court finds no cause to disturb its previous order denying the Chaneys' motions for acquittal. [R. 267.] Under Fed. R. Crim. P. 29(c), courts may "reverse a judgment for insufficiency of evidence only if this judgment is not supported by substantial and competent evidence upon the record as a whole." *United States v. Chavis*, 296 F.3d 450, 455 (6th Cir. 2002). Substantial evidence is "more than a scintilla," but need only be enough "evidence as a reasonable mind might accept to support a conclusion." *Id.* The Court will thus uphold a jury verdict "if, viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). When measuring the sufficiency of the Government's case, the Court must "decline to weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury." *United States v. Beddow*, 957 F.2d 1330, 1334 (6th Cir. 1992). Combined, "[t]hese standards place a very heavy burden upon a defendant making a sufficiency of the evidence challenge." *Id.* (internal quotations and citation omitted).

In its previous order, the Court thoroughly detailed the evidentiary basis for the charges against the Chaneys. [R. 267.] The Court now incorporates by reference those factual and legal

[2] Dr. Chaney also attempts to renew his motion to suppress certain patient files seized during a raid of the Clinique in September 2013. [R. 299-1 at 7.] This is the third time he has moved to suppress these files. [R. 71, R. 261, R. 299-1.] He provides no new grounds for this motion, and merely restates the same arguments that the Court rejected in two previous orders. The Court incorporates by reference the factual and legal conclusions contained in those orders. [R. 159, R. 273.] It is far too late to re-litigate this claim here.

conclusions, and adds a few points in response to the Chaneys' renewed motions for acquittal. First, the Court remains unpersuaded by the Chaneys' declaration that "no evidence" indicated the pre-signed prescriptions supplied by Dr. Chaney "were not medically necessary for any patient."[3] [R. 327 at 2.] This claim begins with a flawed premise and works backward. The Chaneys ask the Court to presume that the legitimacy of a prescription will always depend on the medical condition of that prescription's ultimate recipient. And if, luckily, this recipient has a condition that might otherwise justify her use of the pills—or, alternatively, if no expert testimony proves that she lacked such a condition—a reasonable jury could not find the prescriber guilty of violating the Controlled Substances Act. [*Id.* at 2-3, R. 296-1 at 5-7.]

This interpretation of the relevant legal standard contradicts both the case law and common sense. Accepting the Chaneys' premise, no physician could be held criminally liable for distributing opioid prescriptions to users who incidentally carried some legitimate need for painkillers, regardless of where, why, or how those prescriptions were issued. Suppose, for example, that a physician began dispensing prescriptions for powerful narcotics to strangers on a street corner, without asking for their medical history or performing a medical examination of any kind. Under the Chaneys' proposed construction of the law, the Government could not prosecute this physician for dispensing painkillers "without a legitimate medical purpose"[4] absent some expert testimony that proved each stranger did not have a legitimate need for the pills. That cannot

---

[3] Although the indictment did not charge Mrs. Chaney with individual counts of unlawful distribution, the jury did convict her of conspiracy to violate the Controlled Substances Act. In her motion for acquittal, Mrs. Chaney relies on a similar argument to support her challenge to the conspiracy conviction, claiming the Government needed to prove that a "representative sample" of patients received these prescriptions without a legitimate medical purpose. [R. 296-1 at 5-7.] The Court rejects this argument for the same reasons explained below.

[4] The two federal statutes implicated here—21 U.S.C. § 846 and 21 U.S.C. § 841(a)(l)—each turn on the question of whether Dr. Chaney issued these prescriptions "without a legitimate medical purpose." *See, e.g., United States v. Volkman*, 797 F.3d 377, 384-387 (6th Cir. 2015).

be the rule. The circumstances surrounding the provision of a prescription must be relevant to—and sometimes dispositive of—the question of that prescription's legitimacy.

Contrary to Mrs. Chaney's insistence, this logic is entirely consistent with the Sixth Circuit's recent holding in *United States v. Arny*, 2016 WL 4073491, at *7 (6th Cir. Aug. 1, 2016). In *Arny*, the Government accused the defendant of, among other things, refilling opioid prescriptions for certain patients without seeing them face-to-face. *Id.* The defendant responded that "half the patients" he saw were "unstable" and "had poor pain control," while the other "half were very stable." *United States v. Stephen C. Arny*, 7:12-CR-00011-ART, DE 306 at 108. Because he "felt rushed" and "there wasn't time" to examine every patient, he began refilling prescriptions for some patients without physically seeing them. *Id.* But the defendant also testified that he was present at the office when he refilled these prescriptions, and that he "read every file and every chart that was brought to [him] on each and every patient" before issuing a script. *Id.* at 160. On cross-examination, another staff member conceded that the defendant "reviewed [those charts] before he wrote the prescriptions." *Id.* at 79-80.

The *Arny* court found that the defendant's trial counsel provided ineffective assistance by failing to call numerous potentially helpful witnesses. *Arny*, 2016 WL 4073491 at *6. In particular, the court faulted counsel for not calling a physician who had previously worked at the facility. The court anticipated that this physician's "testimony that she, as a practicing pain management specialist, had prescribed the same 'near toxic' combination [of pills] that [the government's expert witness] described . . . [might] have demonstrated that there was a legitimate medical purpose for prescribing that combination of medication." *Id.* The court did acknowledge that the specialist's "testimony that she always saw every patient on their return visits, whereas

[the defendant] would sometimes refill prescriptions for his patients without seeing them in person, [might] not have helped [his] defense." *Id.* But the court also noted that "the expert witnesses for both the defense and the government stated that the applicable regulations did not require [the defendant] to see every patient on every visit," and that in any case "[the specialist's] testimony on that point would have been cumulative and not necessarily harmful to [him]." *Id.*

Mrs. Chaney now argues that "[t]he dissonance between the testimony of the government's expert medical witness . . . in *Arny* and the arguments it presented in this case illustrate the absence of evidence to support the verdicts."[5] [R. 362-1 at 4.] There are numerous problems with this claim. Most evidently, Mrs. Chaney unreasonably conflates the conduct at issue in *Arny*—which involved a defendant who refilled prescriptions without a face-to-face examination, but was otherwise present at the clinic and reviewed each patient's charts before signing the scripts—with Dr. Chaney's practice of pre-signing prescriptions. The defendant's practice in *Arny*, for example, would not have violated the federal regulation prohibiting pre-signed prescriptions, which simply requires that "[a]ll prescriptions for controlled substances shall be dated as of, and signed on, the day when issued." 21 C.F.R. § 1306.05(a).

By contrast, Dr. Chaney never argued that he was present at the office when patients received these pre-signed scripts, nor did he claim that he reviewed any patients' charts before

[5] Mrs. Chaney extensively cites the testimony of an expert witness in Dr. Arny's trial. [R. 362-1 at 1-4.] Most of this testimony is not taken from the Sixth Circuit's opinion; instead, she has directly lifted this testimony from the trial record in that case. Mrs. Chaney may wish that this expert had testified at her trial, but he did not. The *Arny* court's legal conclusions are relevant to this Court's discussion, but the cited expert testimony—provided in a different trial, against a different defendant, and on a different set of facts—is not before the Court. Regardless, this witness stated only that "there are no absolute rules with regards to common sense" in prescribing opioids, and that he would not "argue with" a physician issuing "a single prescription one time for a patient without seeing them because he's had a death in the family." *United States v. Stephen C. Arny*, 7:12-CR-00011-ART, DE 362 at 20. This testimony plainly failed to account for Dr. Chaney's practice of signing hundreds of pre-signed prescriptions days or weeks in advance, without any notice of who would ultimately receive those prescriptions.

signing the blank pads. Instead, the evidence demonstrated that Dr. Chaney signed hundreds of blank prescriptions days or weeks in advance, without any foreknowledge of who would ultimately receive those prescriptions. [R. 321 at 18-23.] Mrs. Chaney would then leave "stacks" of these pre-signed scripts in a drawer for Roy Combs, the office's untrained "IT guy," who would hand them out for distribution by unlicensed and unqualified medical staff. [*Id.* at 10, 18-23.] The Chaneys' illegal behavior is easily distinguishable from the misconduct addressed in *Arny*, and the *Arny* court's discussion is only tangentially relevant to this dispute.

Just as importantly, the *Arny* court never held that the defendant's failure to conduct face-to-face examinations was irrelevant to the charges against him. In fact, the court expressly recognized that the pain management specialist's "testimony that she always saw every patient on their return visits, whereas [the defendant] would sometimes refill prescriptions for his patients without seeing them in person, [might] not have helped [his] defense." *Arny*, 2016 WL 4073491 at *6. The court merely acknowledged that the defendant's failure to examine some patients in person, standing alone, was not enough to convict him. The Chaneys made a similar claim at trial when they argued "that [21 C.F.R. § 1306.05(a), which prohibits pre-signing prescriptions] does not create strict liability for a criminal violation of 21 U.S.C. § 841(a)." [R. 242 at 11-12.] This Court agreed and struck references to § 1306.05(a) from the jury instructions. [R. 272.] At best, then, *Arny* simply reinforces what the Court already held: Although Dr. Chaney's practice of pre-signing prescriptions was not *per se* criminal, the jury was entitled to consider evidence of this practice as relevant to the charges against him.[6]

[6] The Government did not charge Mrs. Chaney with individual counts of pre-signing prescriptions. The jury did convict her of participating in the drug conspiracy, but that count did not rely solely on Dr. Chaney's habit of pre-signing prescriptions. Even if *Arny* were relevant to the pre-signed prescription counts, it would not substantially undermine any of the other evidence relevant to her conspiracy conviction. *See infra* at 43-47.

The other two cases cited by the Chaneys only reinforce this conclusion. In *United States v. Binder*, 26 F. Supp. 3d 656 (E.D. Mich. 2014), the court held that "expert testimony is not always required" to support a drug distribution charge against a physician, "particularly in cases where there is evidence of conduct clearly outside the usual course of any professional practice." *Id.* at 662. In its survey of situations that are so "clearly outside" any usual course of practice, the court cited circumstances where a physician prescribed opioids without "conducting any examination, and in some cases without even meeting patients." *Id.* And in *United States v. Joseph*, 709 F.3d 1082 (11th Cir. 2013), the court held that, "[a]lthough . . . a violation of [§ 1306.05(a)] does not constitute a *per se* violation of [the Controlled Substances Act], the jury was entitled to infer, based on [the physician's] pre-signing and pre-dating of the prescriptions and [an unqualified physician's assistant's] delivery of those prescriptions to . . . patients, that they violated the Act." *Id.* at 1102. The court then cited an expert's testimony that "a reasonable doctor and physician's assistant would know that it is unlawful to distribute pre-signed prescriptions," and held that "a physician's delivery of a prescription without conducting any physical examination of the patient provides *strong evidence* to support a conviction under the Act." *Id.* (emphasis added).

Similarly here, the Government presented ample evidence to support the unlawful distribution counts.[7] Dr. Chaney admitted to pre-signing prescriptions that were later distributed by unqualified staff, often while he and Mrs. Chaney were on vacation. [R. 318 at 114-15.] Gregory Hoskins, a physician's assistant, and Shannon Wilder, a nurse practitioner, habitually issued these pre-signed prescriptions, despite the fact that neither were licensed to prescribe

[7] The Chaneys also argue that the evidence did not support their convictions for making false statements related to the pre-signed prescriptions scheme. [R. 298-1 at 12, R. 296-1 at 10-11.] This claim fails for similar reasons, and the Court will reject this argument by citing (1) the analysis above, (2) its treatment of this argument in a previous order, and (3) the discussion of these counts in relation to Mrs. Chaney's motion for new trial. *See* R. 267 at 11, *infra* at 47-49.

controlled substances. [*Id.* at 115.] Combs also testified that Dr. Chaney instructed him "not to tell anyone" about the pre-signed scripts. [R. 321 at 19.] And all of this behavior occurred in the context of the Clinique's other disturbing and illegitimate practices, as evidenced by testimony that the Chaneys altered urine drug screens to conceal evidence of patients' drug abuse and/or diversion, quadruple-booked patients into fifteen-minute time slots, forced others to wait for up to eight hours to be seen, and fabricated patient charts. [R. 340 at 9, 339 at 7; R. 335 at 10-11, R. 344 at 19, R. 336 at 5, R. 293 at 51-52, R. 321 at 101.]; *see also infra* at 37-38, 43-47.

Numerous witnesses also testified that pre-signed prescriptions were illegitimate. Dr. Morgan stated it "was pounded into [doctor's] heads during residency" that they should not pre-sign prescriptions, and "it was something that was so engrained, that it didn't really need to be almost taught." [Tr: Morgan Direct Examination at 5.] Dr. Youlio testified that a "pre-signed but otherwise blank prescription" could not be issued "for a legitimate medical purpose," and that Medicare and Medicaid would not pay for such a prescription because it was "not for a medically accepted purpose." [TR: Youlio Direct Examination at 7.] Dr. Loyd likewise confirmed that "you can't have pre-signed prescriptions," and that issuing these prescriptions was not "acceptable medical practice." [TR: Loyd Direct Examination at 110, 117-18.] Against the backdrop of this evidence, a jury could reasonably infer that the prescriptions at issue here—signed on a blank notepad, provided with total ignorance of their ultimate recipients, and later distributed by unlicensed and unqualified medical personnel—were supplied "outside the usual course of professional practice and not for a legitimate medical purpose." [R. 272 at 25.]

Second, the Chaneys challenge their convictions for submitting fraudulent billings in connection with unnecessary urine drug screens. [R. 298-1 at 9, R. 296-1 at 7.] At trial, Dr. Frank

Parker testified that the Kentucky Board of Medical Licensure recommends requiring "a urine drug screen once a year" if a patient is at "low risk" for opioid abuse, twice a year "if they're at moderate risk," and "three to four times a year if they're considered to be high risk." [R. 244 at 75.] He then carefully summarized the "tables that [he] performed for each [relevant] patient" to "document their Opioid Risk Tool and [count] how many urine drug screens they had per month." [*Id.* at 81.] He concluded that "all these patients were low risk for abuse of their medicines," and so the appropriate frequency of their urine drug screens should have been "one a year," for a total of thirty-one tests.[8] [*Id.* At 86.] The Clinique nevertheless billed for 311 urine drug screens during this time period. [*Id.*] The Government also introduced evidence that the Clinique was the number one biller in the state for urine drugs screens during this period, accounting "for an astounding ten percent of all urine drug screens billed in the Commonwealth of Kentucky." [R. 310 at 10.] Martha Smith recalled that the Clinique "probably did anywhere from 80 to 100 drug screens a day." [R. 341 at 6.] And Hoskins testified that all patients received urine drug screens "monthly," that these tests were not always necessary, and that he "felt like [the tests were] too frequent." [R. 293 at 56.]

Dr. Chaney also concedes that "Dr. Berman and Ms. Guice each testified that 'absent a medical indication,' Medicaid and Medicare would not pay for routine drug screens." [R. 298-1 at 9.] He argues, however, that this testimony simply "begs the question," because "there was

[8] Dr. Chaney briefly claims that the Court should afford little or no weight to Dr. Parker's testimony because it was "not based on his own experience, but on a guidance document found on the Kentucky Board of Medical Licensure website." [R. 298-1 at 9.] Professional standards in Dr. Chaney's region of practice are certainly relevant to the question of whether these tests were medically indicated. More importantly, Dr. Parker did not simply recite the language of this guidance document; instead, he applied the principles outlined in the document to the unique records associated with Dr. Chaney's patients. This application required a fusion of the written professional standards and Dr. Parker's personal expertise. That is not uncommon in expert testimony.

nothing but Dr. Parker's testimony to indicate the absence of a medical indication." [*Id.*] But the Government's case rested precisely on the claim that, by habitually ordering monthly tests without regard for a patient's risk of opioid abuse, the Chaneys failed even to consider whether the tests were medically indicated. Hoskins, for example, indicated there was a "standing order" to perform urine drug screens on patients, and "when [he] got to the chart, [the order for a test] would already be on the chart. When the patient got to the room, it would already be [there]." [R. 293 at 55.] Mrs. Chaney counters that there is an "ongoing debate" about the propriety of ordering these routine tests, and suggests that Dr. Loyd "lauded" the Chaney's "monthly regime." [R. 296-1 at 8.] But even Dr. Loyd faulted the Chaneys for performing these tests "[e]very single time" a patient visited, and argued instead that "you need to be doing random urine drug screens." [TR: Loyd Direct Examination at 23.] And it is not the role of the Court to balance Dr. Loyd's testimony against that of Dr. Parker, Dr. Berman and Ms. Guice. On these facts, a "rational trier of fact" could have "found the essential elements of the crime beyond a reasonable doubt." *Jackson,* 443 U.S. at 319.

Third, Dr. Chaney asks the Court to revisit his claim that "there was no testimony tying the counts of the indictment [related to fraudulent hospital billings] to dates on which Dr. Chaney was out of town."[9] [R. 298-1 at 10.] The jury convicted Dr. Chaney of billing for hospital services supposedly rendered by him—which generated a higher reimbursement rate than services

[9] Dr. Chaney relatedly argues that "the jury's verdict, finding Defendants not guilty as to some [of the hospital billing] counts and guilty as to others, is inconsistent." [R. 298-1 at 11.] He also emphasizes that the Government did not "respond to [his] argument regarding the inconsistency in the verdict." [R. 327 at 5.] The Government likely ignored this claim because "inconsistent verdicts do not give rise to a sufficiency of the evidence challenge" unless the jury returns "a guilty verdict on mutually exclusive crimes." *United States v. McCall*, 85 F.3d 1193, 1198 (6th Cir. 1996) (citing *United States v. Powell,* 469 U.S. 57, 67-69 (1984)); *see also United States v. Ruiz*, 386 F. App'x 530, 533 (6th Cir. 2010) (noting inconsistent verdicts are unreviewable except in cases "where a guilty verdict on one count necessarily excludes a finding of guilt on another.").

performed by mid-level providers—on days he was out of the country. But Chaney summarily argues that the "actual proof in the record—the hospital billings themselves—did not correspond to the Government Exhibit [summarizing those billings], in that they did not show Dr. Chaney himself performed all the services identified in the Government Exhibit." [*Id.*] He provides no citation to this alleged "actual proof in the record," however, and otherwise fails to address the relationship between any of the twenty-eight counts of which he was convicted and the more than one thousand pages of hospital billings introduced by the Government. The Court reminds Dr. Chaney's counsel that vague allusions to "the record," without any effort at citation or detailed argument, are insufficient to support a motion for acquittal. And "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." *Citizens Awareness Network, Inc. v. United States Nuclear Regulatory Comm'n,* 59 F.3d 284, 293-94 (1st Cir. 1995); *accord United States v. Hayter Oil Co.*, 51 F.3d 1265, 1269 (6th Cir. 1995).[10]

In any event, the Court's review of the "actual proof in the record" does not support Dr. Chaney's claim. At trial, FBI Agent Thad Lambdin confirmed that he had personally compared the "hospital records" summarized in Government Exhibit 504 to the "hospital billings from the Indictment," and that the exhibit entries corresponded to the dates on which the Chaneys were out of the country. [R. 316 at 110, R. 317 at 94-95.] A simple review of the "hospital billings themselves" reveals that for every date on which Dr. Chaney was out of town, there is a corresponding hospital record from that day listing Dr. Chaney as the attending physician. *See*

[10] Unfortunately, the United States' response does not do much better, arguing only that "evidence was presented" showing that "the Chaneys billed Medicare or Medicaid for hospital visits" on days they were on vacation. [R. 310 at 12.] This claim also contains no citation to the trial record.

Exhibits 151-192. The record at Exhibit 159,[11] for example, contains Dr. Chaney's signature beneath a written statement that "the patient was seen and examined by the attending physician" on March 8, 2013, though the Chaneys were out of the country from March 7 to March 10.[12] Likewise, the record at Exhibit 167A[13] lists Dr. Chaney as the "ordering provider" on September 15, 2013, though the Chaneys were out of the country from September 13 to September 16.

Hoskins also testified that he found "there [were] times that [Dr. Chaney] had signed" these records even though "he had not been to the hospital." [R. 293 at 68.] He recalled looking at medical charts at the hospital and saying to patients, "Well, I see Dr. Chaney's seen you this morning," though the patient would often respond, "No. I haven't seen Dr. Chaney today." [*Id.*] And Brenda Allen, a Clinique staff member who handled medical billing, testified that she advised Dr. Chaney not to bill under his own name for services rendered by other providers at the hospital, though he "continued to bill" as if he saw them. [Tr: Allen Direct Examination at 19-22.] These facts, viewed in a light most favorable to the prosecution, certainly provide enough evidence to support his conviction.

Fourth, the Chaneys seek reversal of their convictions for committing health care fraud on March 19, 2013. [R. 298-1 at 11, R. 296-1 at 9.] Kathy Rutledge, an auditor employed by the Government, calculated that the Chaneys billed $17,435 to insurance providers for a wide variety of services allegedly performed on this date. [TR: Rutledge Direct Examination at 54.] Parker also testified that in order to provide all of the documentation appearing in these records, he would "have to ask [patients] 1,842 questions," counsel the patients in "442 areas," and examine "549

---

[11] Exhibit 159 directly corresponds to Count 159 of the indictment. [R. 190 at 30.]

[12] The indictment lists the dates on which the Chaneys were out of the country. [*Id.*] The Government laid a foundation for these dates at trial, including the introduction of flight records. [R. 316 at 20.] The Chaneys do not challenge the accuracy of these dates.

[13] Exhibit 167A directly corresponds to Count 167 of the indictment. [R. 190 at 30.]

areas of the body." [*Id.* at 65.] He thus concluded that it would have taken him approximately "26 hours to actually do the clinical work that's documented on these 52 patients." [R. 244 at 65.] The Government adds that Dr. Parker's assessment was "generous," given that "he did not consider the dozens of other patients seen by mid-level providers that day, despite Mr. Chaney's obligation to supervise these individuals and sign the prescriptions for controlled substances these providers were issuing," nor did he "consider the ten hospital visits Mr. Chaney allegedly performed on this date." [R. 310 at 13.] Numerous witnesses also testified that the Clinique's frenetic pace made it impossible for providers to fill out patient charts in the time allotted, and so the Chaneys would fabricate medical records on the weekends to make up for the missing charts. *See infra* at 44-45.

In response to this evidence, Dr. Chaney offers the puzzling claim that "it does not matter whether patients were seen quickly, with or without physical exams," because "[t]he issue is whether Defendants billed improperly for those visits, and the government presented no evidence the visits were improperly billed." [R. 298-1 at 11.] Needless to say, it does matter. Evidence that a physician billed for a single day of services that would have taken the Government's expert at least twenty-six hours to provide, even in the absence of specific evidence about "how much was billed for each patient's visit," provides sufficient circumstantial support for the Chaneys' conviction. This count also does not charge the Chaneys with fraudulently billing for a specific patient visit on March 19, but broadly charges the Defendants with a single count of health care fraud for any and all activity occurring on that date. [R. 190 at 31-32.] Given (1) the dubiously thorough documentation appearing in the medical records from this day, (2) the expert testimony establishing the implausibility of actually providing these services in a single day, and (3) the evidence that the Clinique billed insurance providers more than $17,000 for these supposed

services, the Court finds that the Government introduced enough "evidence as a reasonable mind might accept to support [the jury's] conclusion." *Chavis*, 296 F.3d at 455.

Mrs. Chaney relatedly claims there was "no evidence that [she] knew what had been billed for on March 19, 2013, or that she knew or had any capacity to know what services had or had not been provided as billed." [R. 296-1 at 9.] Although she concedes that proof of her "presence [at the Clinique] is not strictly necessary" to support her conviction, she also suggests "[t]here was no evidence that she was even present at ACM on March 19, 2013." [R. 296-1 at 9.] As described in greater detail later in this order, the evidence at trial established that Mrs. Chaney was the full-time CEO of the Clinique, that only she set the schedule, that she would triple- and quadruple-book patients, that "there was clear indication . . . there were too many patients, too long of a wait," that she fabricated patient charts, that she forged Dr. Chaney's signature on medical records, and that she "knew what the billings were." [R. 267 at 11]; *see also infra* at 16-17, 43-47. The Government did not need to show that Mrs. Chaney personally shepherded patients in and out of the office on March 19 to support her conviction. This strong circumstantial evidence was enough. *See, e.g., United States v. Tocco*, 200 F.3d 401, 424 (6th Cir. 2000) ("Circumstantial evidence alone is sufficient to sustain a conviction and such evidence need not remove every reasonable hypothesis except that of guilt.").

Fifth, the Chaneys dispute the jury's conclusion that they fraudulently billed for nerve conduction studies performed by unqualified personnel. [R. 298-1 at 12, R. 296-1 at 9.] Combs testified that he conducted these tests, despite having only a high school education and no medical training. [R. 267 at 14.] The Government's expert, Dr. Berman, stated that nerve conduction studies "are very complex" and require a "technician [who] has special training and recognition

by a nationally-recognized organization." [Tr: Berman Direct Examination at 19.] And Rutledge presented "claims data" from Medicare and Medicaid showing that the Clinique routinely billed under specific procedure codes, including "99504," that are used to signify the performance of a nerve conduction study. [TR: Rutledge Direct Examination at 43-45.]

Dr. Chaney believes Rutledge's testimony was insufficient because "[t]here is no evidence in the record that billing code 99504 is the only nerve conduction test CPT code or that this particular code is the one to which Dr. Berman was referring." [R. 298-1 at 12.] But Dr. Berman's testimony did not concern a specific nerve conduction study or a "particular code." Instead, he generally described the nature and complexity of nerve conduction studies, and stated that performing any such study required "special training and recognition by a nationally-recognized organization." [TR: Berman Direct Examination at 18-19.] The evidence at trial did not suggest, and the Chaneys do not propose, that any machine other than the one used by Combs could plausibly qualify as a nerve conduction study. Given that (1) Dr. Berman stated nerve conduction studies are "very complex" and require "special training," (2) the Clinique billed for nerve conduction studies, and (3) the staff member who performed these studies had a high school education and no medical training, a "rational trier of fact could have found the essential elements of [this] crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319.

Lastly, the Court will briefly address Mrs. Chaney's overarching claim, scattered throughout her motion for acquittal, that the evidence was insufficient to support her conviction for knowingly "aiding and abetting" these crimes. [R. 296-1 at 8-10.] The Court reiterates its previous holding that this argument, "like all of [Mrs. Chaney's] challenges to the evidence introduced against [her], fails to appreciate the distinction between circumstantial and direct

evidence." [R. 267 at 15.] Mrs. Chaney repeatedly argues that the Government failed to present direct evidence of her knowledge about specific prescriptions and/or billings. This evidence overlooks some of the direct evidence of Mrs. Chaney's involvement in the Clinique's operations; even Dr. Chaney conceded, for example, that the office's billing and collection instructions sometimes contained the notation "per Lesa" in the margins. [R. 319 at 124, 131, 152.] More importantly, direct evidence of this knowledge—which would include, presumably, Mrs. Chaney signing her name next to specific fraudulent billings or announcing in the presence of witnesses that she knew her conduct was unlawful—was not necessary to sustain her conviction. As the jury instructions explained, "[t]he law does not make any distinction between" circumstantial and direct evidence, "or say that one is any better evidence than the other." [R. 272 at 7.] The jury, faced with the enormous body of evidence summarized in this order, *infra* at 43-47, reasonably found Mrs. Chaney guilty of these crimes.

But even if the Chaneys' claims fail under Rule 29, Mrs. Chaney insists that the Court should still grant her a new trial under Rule 33(a).[14] [R. 296-1 at 4.] Under this rule, the Court may reverse the jury's judgment if "the verdict was against the manifest weight of the evidence." *United States v. Crumb*, 187 F. App'x 532, 536 (6th Cir. 2006). Unlike Rule 29, Rule 33 empowers the Court to "act as a thirteenth juror, assessing the credibility of witnesses and the weight of the evidence." *United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2007). In assuming this unwieldy role of a "thirteenth juror," however, the Court must remain sensitive to the sacred role of the jury as the preferred arbiter of a defendant's guilt or innocence. *Cf. United States v. Lockhart*, 2013

[14] Dr. Chaney apparently does not seek a new trial on these grounds, although he does make a general request for reversal in the "interests of justice" at the conclusion of his motion for new trial. *See infra* at 50. To the extent that Dr. Chaney argues the "manifest weight of the evidence" demands reversal of his conviction, the Court relies on the analyses above and below to reject that claim.

WL 6669818, at *1 (E.D. Ky. Dec. 18, 2013) ("Our system casts the jury, not the Court, as the star of the criminal trial."). That is why courts will reverse the jury's verdict "only in the extraordinary circumstance where the evidence preponderates *heavily* against the verdict." *United States v. Freeman-Payne*, 626 F. App'x 579, 584-85 (6th Cir. 2015) (internal quotations and citation omitted) (emphasis in original).

The evidence does not so preponderate here. At best, Mrs. Chaney reiterates the same plausible arguments that she raised at trial. Although these defenses were not frivolous, the Government effectively countered her claims with a substantial array of evidence that strongly established her guilt. *See infra* at 43-47. The jury likewise rejected her arguments, and the Court finds no "extraordinary" basis for replacing their judgment with the Court's. *Freeman-Payne*, 626 F. App'x at 584-85.

B

Both Defendants also move for a new trial on the basis of alleged juror misconduct. [R. 297-1, R. 299-1.] This accusation rests on new information provided by an alternate juror in the wake of trial. The timeline of events leading to the discovery of this information—including, most notably, what the Court knew and when the Court knew it—is critical to resolving the Chaneys' allegation. This timeline proceeds as follows: On the fifth day of the Chaneys' trial, a court clerk briefly relayed to the Court some information that she had received from the jury administrator about a recent conversation between the administrator and one of the trial's alternate jurors. The administrator told the court clerk—and the clerk then told the Court—that this alternate had expressed "some frustration with the process" and "concerns about how serious[ly] the jury was taking their duty." [R. 291 at 3, TR: 4/20/16 Telephonic Conference at 7.] The clerk did not

provide any detail about the specific comments and/or behavior that apparently caused the alternate's concern, and the alternate did not report any of these concerns to the Court.

Armed with only a skeletal, third-hand allusion to one alternate's frustration, the Court determined that further investigation would be premature. But in an effort to uncover any concerns that might actually warrant an investigation, the Court immediately instructed the jury that if "any issues . . . relate[d] to the jury instructions" arose, they should "bring those to [the Court's] attention." [TR: Trial, Day 5 at 1.] Despite this instruction, the Court never heard from the alternate or any other juror.[15]

The timeline then jumps to the day after the close of trial. On this day, the same alternate called the law offices of Dr. Chaney's counsel and left a voicemail. The alternate identified herself as a juror in the Chaneys' trial, and suggested that counsel would be "glad if [she] called her" back. [TR: 4/20/16 Telephonic Conference at 3.] Counsel reported this message to the Court, and the parties promptly convened for a telephonic conference. At the conference, the Court reminded the parties that Fed. R. Evid. 606(b) constrained its investigation of the alternate's claims. [*Id.* at 9.] This rule states that a "court may not receive a juror's affidavit or evidence of a juror's statement" about any internal influence that may have affected "that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." Fed. R. Evid. 606(b)(1); *see also United States v. Logan*, 250 F.3d 350, 380 (6th Cir. 2001) (noting that Rule 606(b) "prevents the unwarranted badgering of jurors that would invariably arise in its absence in an alleged attempt to search for the 'truth'" and "provides jurors with an inherent right to be free from interrogation

[15] In her *in camera* interview, the alternate suggests that she did report additional concerns to the administrator after this instruction. This time, however, the alternate indicates that the administrator said she "wasn't going to tell [the Court]," and that the alternate should just "tell them not to do that." [R. 290 at 6-7.] As discussed later, *infra* at 19-20, 31-32, none of these additional accusations suggested that the jurors were deliberating prematurely.

concerning internal influences on the decision-making process."). But an exception to this rule applies when the evidence relates to "extraneous prejudicial information [that] was improperly brought to the jury's attention" or "an outside influence [that] was improperly brought to bear on any juror." Fed. R. Evid. 606(b)(2)(A)-(B).[16]

At the time, neither the Court nor the parties knew if the alternate's allegations concerned potentially "extraneous" or "outside" influences. Without this information, the Court decided that additional investigation was necessary. About a week later, the Court conducted an *in camera* interview with this alternate, and later agreed to file that interview in the record under seal. [R. 291.] This interview revealed that all of the alternate's concerns related strictly to alleged internal influences on the jury's decision-making process. In total, the alternate identified four events during the course of trial that she felt were "inappropriate." [*Id.* at 7.] First, she reported overhearing two jurors "talking about the case" immediately after the Government's opening statement; specifically, she remembered these jurors making a comment about pictures of "Dr. Chaney's house" that the Government had shown in its opening statement. [*Id.* at 6.] She then allegedly told these jurors that they "should[n't] be talking about that," to which they responded, "We can talk about it in here." [*Id.*] Another juror replied, "We can't," and then added, "It's right on the wall there." [*Id.*] Second, the alternate stated that after an "elderly lady testified" sometime

[16] In July 2016, the Chaneys also filed a joint motion for permission to interview an additional juror in this case. [R. 353.] They attached an affidavit from Dr. Chaney's brother describing a conversation he allegedly had with this juror, and suggested that the affidavit supplied grounds for further inquiry. [*Id.* at 1.] The Court agreed and later submitted a questionnaire to this juror. [R. 367.] The juror's comments on this questionnaire indicated no concerns about external influences on the jury's deliberation process. He answered "No" when asked if any juror had brought "up information that he or she had learned outside of the courtroom" or called "the jury's attention to information that was not presented as evidence during the trial." [R. 367 at 5.] Although he also expressed some concern about the unanimity of the verdict, his comments related only to alleged internal influences on the deliberation process. Rule 606(b) prohibits the Court from considering this evidence. The Court incorporates by reference its discussion of this issue at DE 367, pp. 1-2.

later, one of these same two jurors said counsel "shouldn't have treated her that way, whatever they meant, you know." [*Id.* at 7.] Third, she indicated that one of these same jurors "got attracted" to Dr. Chaney's counsel and "made it known" to the other jurors. [*Id.* at 7.] Finally, she recalled hearing a third juror declare that she knew "how many lights" were "in the ceiling" after a particularly long bout of testimony. [*Id.* at 8.] Apart from these three jurors, the alternate emphasized that "all of [the others] took it seriously." [*Id.* at 10.]

After the Court filed a transcript of this interview in the record, the Chaneys requested permission to conduct even "further inquiry and investigation" into the alternate's claims. [R. 297-1 at 3.] Because the alternate's account revealed no concerns about any external influences on the jury's deliberation process—and because Rule 606(b) expressly prohibits post-verdict investigation of any other influence on this process—the Court denied that request. [*Id.*] In their motions for new trial submitted shortly thereafter, the Chaneys argued that the jurors' alleged misconduct, coupled with the Court's treatment of these allegations before and after the verdict, deprived them of their right to a fair trial.

In response, the Government maintains that "[t]here is absolutely no evidence the jurors began discussing their verdict" before formal deliberations began, and a "passing reference to the Chaneys' house is not evidence of deliberation." [R. 311 at 4.] They likewise claim that the Chaneys now "seek to invade the province of the jury in a matter clearly prohibited by [Rule 606(b)] and long-established case law." [*Id.* at 7.] Although the Court agrees with both of these propositions, the Government's argument overlooks one additional basis for the Chaneys' motion. The Chaneys do not simply challenge the Court's handling of these claims after the jury reached its verdict; they also argue that "the Court was aware . . . that jurors were prematurely discussing

the evidence during the trial, although the parties were not made aware of the situation." [R. 326 at 1-2.] According to Dr. Chaney, then, another "issue presented . . . is whether the Court erred in failing to advise the parties at the time this information came to the Court's attention and whether the Court failed to make sufficient inquiry into what it described in a post-verdict in camera interview as 'concerns about how serious[ly] the jury was taking their duty.'" [*Id.* at 2.]

The problem with this claim, however, is that it presumes the Court was aware of the alternate's detailed accusations prior to the jury's verdict. It was not. As the Court has already stated on the record, a court clerk briefly reported to the Court on the fifth day that the jury administrator had heard one alternate expressing "some frustration with the process" and "concerns about how serious[ly] the jury was taking their duty." [R. 291 at 3, TR: 4/20/16 Telephonic Conference at 7.] That is a far cry from being "aware" that jurors were prematurely deliberating. The clerk never indicated to the Court that a juror had commented on pictures of the Chaneys' house, nor did she report any of the alternate's additional concerns. All of these claims appeared for the first time in the alternate's post-verdict interview. The Court could not have alerted the parties to these allegations prior to discovering that they existed.

The relevant question, then, is not whether the Court *would* have investigated the alternate's detailed post-verdict allegations had it received those complaints prior to the jury's verdict; rather, the question is whether the Court *should* have investigated the third-hand, generalized report of concern that it actually received at the beginning of trial, without the benefit of those post-verdict details.

With this narrow question in mind, the Court turns to the body of case law governing the responsibility of a trial judge to investigate allegations of juror misconduct. In *United States v.*

Shackelford, 777 F.2d 1141 (6th Cir. 1985), the Sixth Circuit held that "[w]hen possible juror misconduct is brought to the trial judge's attention[,] he has a duty to investigate and to determine whether there may have been a violation of the sixth amendment." *Id.* at 1145. What neither *Shackleford* nor any Sixth Circuit precedent squarely addresses, however, is what type of alleged behavior qualifies as "possible juror misconduct" sufficient to trigger a court's "duty to investigate." Common sense holds that not *all* information "brought to the trial judge's attention" necessarily activates this duty. In *Schackleford*, the "possible juror misconduct" involved a juror who left the jury room during deliberations, interacted with his wife for a few minutes, and then returned to the deliberation room shortly before the jury reached a guilty verdict. *Id.* at 1144. On these facts, the potential for juror misconduct—including the possibility of an outside influence on the deliberation process—was specific and clear. But suppose, for example, that a jury administrator simply informed the Court that one juror had raised her voice in the deliberation room, or that she had arrived from her lunch break ten minutes late. There is plainly a spectrum of information that a court may receive about a juror's conduct at trial. And in order to prevent unwarranted and disruptive intrusions into the jury room, trial judges must retain some discretion in determining what information does, or does not, generate a duty to investigate. *Cf. Logan*, 250 F.3d at 380.

The Sixth Circuit acknowledged this spectrum in *United States v. Holloway*, 166 F.3d 1215 (6th Cir. 1998) (unpublished table opinion). In *Holloway*, the Court briefly analyzed a case of the Third Circuit, *United States v. Resko*, 3 F.3d 684, 690-91 (3d Cir. 1993). The court in *Resko* granted the defendant a new trial because "the district court [had] failed to engage in any investigation beyond [a] cursory questionnaire" after "every juror [had] admitted [in the middle of

trial] to partaking in premature discussions." *Id.* at 690. Distinguishing that case from the one before it, the *Holloway* court noted that "the *Resko* court admitted that it faced a 'difficult' case . . . and limited its holding to instances where 'unequivocal' evidence of misconduct arises mid-trial." *Holloway*, 166 F.3d at *5 (quoting *Resko*, 3 F.3d at 694).[17]

Three sister circuits also provide some instructive analysis of where to draw this line. In *United States v. Stafford*, 136 F.3d 1109 (7th Cir. 1998), a juror sent a note directly to the trial judge "asking whether the alternate juror (whom the judge had said she would select after the closing arguments) could 'stay in the jury room to hear the sentencing.'" *Id.* at 1112. The defendant argued that the juror's reference to "sentencing" indicated this juror had already presumed the defendant's guilt, and faulted the trial judge for not holding "a hearing at which the identity of the juror who had sent the note would be established and that juror and perhaps the other jurors could be quizzed by the judge about the meaning of the note." *Id.* The *Stafford* court found that "[s]uch a hearing would be routine in a case in which jury misconduct was alleged and the allegation was sufficiently substantiated to warrant a further inquiry." *Id.* But the court also qualified that "[n]ot every allegation of jury misconduct is sufficiently substantial or sufficiently well substantiated to warrant putting the jurors on the spot in this fashion." *Id.* The reason for this exception was intuitive: "Quizzing a juror, or perhaps all the jurors, in the middle of a trial is likely to unsettle the jury, and the judge is not required to do so unless there is a much stronger indication of bias or irregularity than there was in this case." *Id.* at 1113 (citing *White v. Smith*, 984 F.2d 163, 166-67 (6th Cir. 1993)).

[17] Because the issue in *Holloway* concerned only post-verdict allegations of juror misconduct, the court's discussion of the standard for reviewing mid-trial allegations did not control the outcome. But the court's recognition of *Resko*'s limitation remains relevant to this Court's analysis.

Likewise, in *United States v. Bradley*, 644 F.3d 1213 (11th Cir. 2011), a juror sent a note directly to the trial judge stating "that [he] had overheard fellow jurors making 'statements in private that they will make sure [the defendants] go to jail.'" *Id.* at 1278. The court "considered the note and decided to (1) instruct the jurors once again on the presumption of innocence and (2) direct them to refrain from coming to premature conclusions." *Id.* The court also "periodically reminded the jurors of their duty not to deliberate," and "polled each juror" on the last day of trial "to ensure that the panel 'had complied with all of the Court's instructions.'" *Id.* at 1278. In evaluating the sufficiency of this response, the *Bradley* court noted that "[t]he district court's discretion . . . is at its zenith when the alleged misconduct relates to 'statements made by the jurors themselves, and not from media publicity or other outside influences.'" *Id.* at 1277 (quoting *Grooms v. Wainwright*, 610 F.2d 344, 347 (5th Cir. 1980)). Although the court "would have preferred that the [trial] court take more aggressive action," it ultimately concluded "that the district court did not err when it forewent a full investigation into juror impartiality in favor of a less intrusive remedy." *Id.* at 1280.

The Second Circuit also faced a similar scenario in *United States v. Abrams*, 137 F.3d 704 (2d Cir. 1998). There a juror sent a note directly to the trial judge stating that there were "several jury members that [were] new to the judicial system," and asking the judge to "remind them about discussion prior to going to deliberation." *Id.* at 705. The trial judge chose not to interview or poll the jurors in response to this note, and instead "brought the jurors back to the courtroom and told them that he had mistakenly neglected to instruct them not to discuss the case among themselves until deliberations begin, explained that this practice was preferred because the government presented its case first, and directed them not to discuss the case until they ha[d] heard all of the

evidence." *Id.* at 706. On appeal, the *Abrams* court found that the trial judge's response was proper. The court stressed that the mid-trial interrogation of jurors "is intrusive and may create prejudice by exaggerating the importance and impact of what may have been an insignificant incident." *Id.* at 708. The court also noted that "the [jury] note did not explain the nature of any discussions or even indicate whether such discussions had taken place," and therefore "the possibility of any far-reaching conversation regarding views on the case was minimal and any possible prejudice unlikely." *Id.* Because "[t]he circumstances surrounding the note suggest[ed] that if any discussions had taken place, they were insignificant," the court found that "the district court did not abuse its discretion in deciding to deal with the juror's note solely by giving a curative instruction." *Id.*

The information available to this Court was substantially more ambiguous than that provided in *Stafford, Bradley*, or *Abrams.* Here, the Court had only a third-hand report of some concern that jurors were "not taking their duties serious[ly] enough," and certainly had no reason to believe that jurors were actually discussing the defendants' guilt or innocence, much less that they intended to "make sure [the defendants went] to jail." *Bradley,* 644 F.3d at 1278. Given the nebulous nature of this report, the Court determined that "basic remedial action" was necessary in lieu of a more "intrusive remedy." *Id.* at 1278, 1280; *see also United States v. Bostick,* 791 F.3d 127, 154 (D.C. Cir. 2015) ('"We have explicitly rejected any automatic rule that jurors are to be individually questioned' about alleged misconduct.") (citation omitted). The Court thus immediately chose to instruct the jury that if they had "any issues that relate[d] to the jury instructions," they should "bring those to [the Court's] attention." [TR: Trial, Day 5 at 1.]

In the days before and after this event, the Court also repeatedly provided the jury with explicit and careful instructions about prohibited juror communications. On the fourth day, for example, the Court reminded the jury that "[t]he only evidence you can consider is what you're hearing here in court as the trial unfolds," and "[y]ou ought not to be commenting on the evidence or engaging in conversation about the case amongst yourselves." [TR: Trial, Day 4 at 113.] On the fifth day, the Court again instructed, "I'd remind you of those instructions that I've given to you. Of course, they continue to be in full force. You're not to comment on the evidence or begin discussing the case amongst yourselves or consider outside information and, of course, continue to keep an open mind as the trial unfolds." [TR: Trial, Day 5 at 89.] The next day, the Court once again told the jury that "[i]t's really important" to "remember that the only evidence that you can consider is that which is here in court," adding that jurors should not "communicat[e] with each other" or "start commenting on the evidence." [TR: Trial, Day 6.] And on the seventh day, the Court reminded the jury that they could not "communicate about the case," that doing so would "violate [their] oath[s]," and that they must "keep an open mind as the trial unfolds." [TR: Trial, Day 7.] These habitual instructions continued until the end of trial over a month later. In the absence of any evidence that the jury had actually begun deliberating prematurely, the Court reasonably assumed that they would follow these instructions. *See, e.g. United States v. Starnes*, 552 F. App'x 520, 523-24 (6th Cir. 2014) ("[W]hen a court instructs a jury to do something, there is a strong presumption that the jury will follow that instruction.") (citation omitted).

But that is not quite the end of the Court's analysis. In addition to faulting the Court for choosing not to conduct further investigation into the court clerk's comment, the Chaneys also challenge the Court's decision not to bring this issue to the attention of the parties at trial. Under

Fed. R. Crim. P. 43, defendants have a right to be present at "every trial stage, including jury empanelment and the return of the verdict." The Sixth Circuit interprets this provision to require the defendant's appearance only when "his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *United States v. Patterson*, 587 F. App'x 878, 884 (6th Cir. 2014) (internal quotations and citation omitted). To some extent, then, the Chaneys' declaration of a right to be present here simply begs the question, as the ultimate issue is whether the court clerk's vague report raised "substantial" enough concerns to warrant any response from the Court.[18] *See id.* at 885 (finding no Rule 43 concerns in part because the disputed "event was a relatively minor occurrence in the context of a two-week trial."); *United States v. Taylor*, 489 F. App'x 34, 43 (6th Cir. 2012) (noting that Rule 43 only implicates a defendant's "right to be present at *critical* stages of the proceedings") (emphasis added). As the Court has already explained, this ambiguous information was not sufficiently substantial to require that response.

But even if the Court's decision somehow violated Rule 43, the Supreme Court has expressly held that "a violation of Rule 43 may in some circumstances be harmless error." *Rogers v. United States*, 422 U.S. 35, 35 (1975). To determine whether an error was harmless, courts ask if "the district court's conduct" created "a reasonable possibility of prejudice." *United States v. Harris*, 9 F.3d 493, 499 (6th Cir. 1993). The Court struggles to identify how the events in dispute created such a possibility. Dr. Chaney argues that, "[h]ad Defendants known of the jury's

[18] Rule 43 also does not apply when the decision at issue is purely "one of law." *United States v. Taylor*, 489 F. App'x 34, 44 (6th Cir. 2012) (quoting *United States v. Jones*, 381 F.3d 114, 122–23 (2d Cir. 2004)). The question in dispute here—whether the clerk's report was "sufficiently substantial" to warrant further inquiry—was arguably a question of law for which Rule 43 does not apply. But in an abundance of caution, the Court will proceed with a Rule 43 analysis.

violation[s] . . . they would have moved for a mistrial or, alternatively, for a dismissal of the two jurors in question." [R. 299-1 at 2.] This argument, of course, makes the same mistake of assuming that the Court could have relayed information about these two jurors' "violations" before the jury's verdict. The only information available to the Court at that time was the third-hand, generalized report of one alternate's "frustration with the process" and "concerns about how serious[ly] the jury was taking their duty." [R. 291 at 3, TR: 4/20/16 Telephonic Conference at 7.] For the same reasons explained throughout this order, the Court certainly would have denied a motion for a mistrial or dismissal on the basis of that information alone.[19] And even if the Court had investigated the alternate's ambiguous report and discovered the information revealed later, none of the alternate's detailed post-verdict allegations were sufficiently serious to warrant a mistrial. *See infra* at 31-32.

The Chaneys counter by citing *United States v. Gay*, 522 F.2d 429 (6th Cir. 1975). In *Gay*, the court considered a defendant's "charge that the '[trial] court erred in excusing jurors already impaneled and sworn without the presence of [the defendant], his lawyer or explanation of reasons for excusing [these] jurors.'" *Id.* at 433. The court noted that a trial judge enjoys considerable "discretion . . . to dismiss a juror and replace him with an alternate," but this "discretion is always subject to review for abuse, and a record is necessary for such review." *Id.* at 435. In the "total absence of a record of the proceedings in which the changes in the makeup of the jury occurred," the Court found that it was "require[d] . . . to assume prejudice." *Id.*

[19] Counsel also claims that "[e]ven had these motions been denied, the subsequent complaint would have caused these motions to have been renewed," and "they would have sought a mistrial when the attorney for the United States commented on Defendant Lesa Chaney's failure to testify." [R. 324 at 6.] In view of the same facts and legal conclusions discussed above and below, however, these renewed motions would have also been denied.

The Chaneys argue that here, because there is no "record" of the Court's inaction in the aftermath of the court clerk's report, the Court is also "require[d] . . . to assume prejudice." [R. 299-1 at 4, R. 297-1 at 7.] But the facts of this case are strongly distinguishable from those in *Gay*. The animating concern in *Gay* was that the trial court *did* conduct further proceedings—and in fact took dramatic, affirmative action on the basis of those proceedings—without the defendant's presence. A record could and should have been created in that context, and the court appropriately presumed prejudice in its absence. Here, however, the Court determined that the clerk's report was insufficient to warrant a hearing of any kind. This case is more like *Harris*, 9 F.3d 493, where the defendant faulted a trial judge for (1) failing to notify defense counsel after receiving a jury note and (2) failing to take any significant action after receiving this note. The defendant argued that "prejudice exist[ed] . . . because he was not given an opportunity 'to frame an answer that was specific to the jury's concerns.'" *Id.* at 493. But the court held that "[t]his claimed prejudice simply restates the obvious, for the failure to notify parties of a jury note necessarily results in a lack of opportunity for the parties to respond." *Id.* The court added that the "[trial] court did not make a substantive response to the jury's note," and held that it could not "conceive" of any "reasonable possibility of prejudice that resulted from the district court's conduct." *Id.*

The *Harris* court did not express a concern about the district court's failure to create a "record" for one evident reason: the trial judge found no basis for providing "a substantive response to the jury's note," and so no activity occurred from which a record could be created. *Id.* The same reasoning applies here. The present question is not whether the Court erred in failing somehow to create a record of its own inaction; the question is whether the Court erred in determining that the clerk's vague, third-hand report of one alternate's frustration—which

contained no detailed accusations and no grounds for suspecting that jurors had actually deliberated prematurely—was insufficient to warrant a response from which a record could be created. For the reasons explained above, the Court did not err in reaching this conclusion.

The Court adds, finally, that every dimension of this inquiry leads to the same question: whether the jurors' conduct deprived the Chaneys of their right to a fair trial. The court in *Gay* reversed the trial court because, in the "total absence of a record," it could not possibly determine whether the trial judge's affirmative actions had violated this right. *Gay*, 522 F.2d at 433. And the court in *Resko* reversed the trial court because "there [was] no way to know the nature of" the premature deliberations to which the jurors had admitted, including "whether they involved merely brief and inconsequential conversations about minor matters or whether they involved full-blown discussions of the defendants' guilt or innocence." *Resko*, 3 F.3d at 690-91. In this case, however, the Court possesses a comprehensive record of the alternate's accusations. As Mrs. Chaney herself underscores, "[w]e do not operate in a vacuum here." [R. 324 at 6.] The alternate's recorded interview provides a meticulous account of the discussions that she felt were "inappropriate"—so meticulous, in fact, that she also describes a number of events that are largely irrelevant to any concern about premature deliberations, including one juror's declaration of boredom and another's comment about the physical appearance of an attorney.[20] [R. 291 at 7-8.]

And to the extent that a comment about "Dr. Chaney's house" does imply some possibility of premature deliberation, this single statement hardly amounts to a "full-blown discussion[ ] of the defendants' guilt or innocence." *Resko*, 3 F.3d at 91. Courts have consistently held that "when

[20] The Court recognizes that consideration of this evidence risks violating Rule 606(b). But this rule prohibits the use of certain evidence to impeach the "validity of a verdict." *Id.* Because the inquiry here is not strictly about the validity of the verdict, but about the potential for prejudice caused by the Court's response to the clerk's report, the Court will briefly address the details of the alternate's account.

there are premature deliberations among jurors with no allegations of external influence on the jury, the proper *process* for jury decision making has been violated, but there is no reason to doubt that the jury based its ultimate decision only on evidence formally presented at trial." *United States v. Gianakos*, 415 F.3d 912, 921-22 (8th Cir. 2005) (emphasis in original) (quoting *Resko*, 3 F.3d at 690); *see also United States v. Williams-Davis*, 90 F.3d 490, 505 (D.C. Cir. 1996) (finding that "[t]he probability of some adverse effect on the verdict [caused by internal influences] is far less than for extraneous influences.").[21] Here, the evidence indicates only that two jurors may have discussed pictures of the Chaneys' house at the very beginning of trial. Other jurors apparently admonished them not to discuss the evidence again, and the remaining record—notwithstanding the alternate's additional accusations, none of which even plausibly describes deliberation about the Chaneys' guilt or innocence—suggests that the jurors proceeded to obey those instructions throughout the two-month trial that followed. On these facts, the Court cannot identify any reasonable possibility of prejudice to the Chaneys' right to a fair and impartial jury.

Two other facts also strongly reinforce the conclusion that the alternate's claims do not mandate retrial. First, the alleged comment about the pictures of the Chaneys' house occurred in response to the Government's opening statement. [R. 291 at 6.] The fact that two jurors may have commented on a single piece of evidence at the very start of the Government's case—but proceeded to refrain from such discussion for the remainder of a remarkably complex two-month trial—raises little concern about the jury's ability to keep an open mind throughout the presentation of the evidence. Similarly, in *Bradley*, the court was "encouraged" by the fact that an alleged juror

[21] The *Williams-Davis* court even noted that "some reformers have proposed completely doing away with the rule against intra-jury discussion of the case before the formal start of deliberations, presumably reasoning that jurors are mature enough to discuss the case during the trial in a tentative way, without settling into final opinions until the case is fully in." *Williams-Davis*, 90 F.3d at 505.

comment "was made so early in the trial," as it "indicated that the jurors had merely been influenced, as was intended, by the Government's evidence to that date." *Bradley*, 644 F.3d at 1279. And in *Abrams*, the court emphasized that jurors "had only heard opening statements" prior to the alleged premature deliberations, and "[t]he jury had been instructed that opening statements [were] not evidence." *Id.* at 708. The court thus concluded that "any impact on the defendant's right to a fair trial from premature discussion among jurors on the first day of trial was minimal, and any questioning of jurors was likely to be intrusive and to magnify the episode." *Id.* at 708–09.

Second, the jury returned a carefully drawn split verdict on the Chaneys' 256-count indictment, finding the Chaneys guilty of many counts but acquitting them of over a hundred others. [R. 282, 283.] If this minor, isolated comment about the Chaneys' house—which did not directly pertain to any specific count of the indictment—had somehow tainted the jury's general impression of the Chaneys' culpability, it is curious that the jury nevertheless found them innocent of over a hundred charges. *See, e.g., United States v. Morales*, 655 F.3d 608, 633 (7th Cir. 2011) ("These split verdicts imply that the jury reached independent conclusions as to each defendant without making up its mind before the close of the evidence."); *Bradley*, 644 F.3d at 1279-80 (holding that evidence the jury "partially acquitted" defendants "provides circumstantial evidence that the jury did indeed 'consider[ ] the charges individually and assess[ ] the strength of the evidence as to each charge.'") (citation omitted).

Taking all of these facts into consideration, the Court finds no sound basis for granting the Chaneys a new trial on account of any alleged juror misconduct. The clerk's vague report of one alternate's frustration did not suggest that jurors were deliberating prematurely, the Court took

basic remedial action in the wake of this report, and the well-developed record reveals that this alleged misconduct—even accepted as true—did not prejudice the Chaneys' right to a fair trial. The Court will thus deny the Chaneys' motions on these grounds.

C

i

The Chaneys next move for a new trial on the basis of alleged prosecutorial misconduct. This claim springs from a comment made by the prosecution on the last day of trial.[22] In its closing argument, the prosecution told the jury that "[a]t one point [Greg Hoskins] told you [Mrs. Chaney] actually signed some prescriptions, said, 'You didn't see this,' forged Dr. Chaney's name. That's what Greg Hoskins told you." [R. 300 at 18.] Both Defendants immediately objected. At the bench, Dr. Chaney's counsel argued that the prosecution had "just told the jury something that [was] not true." [*Id.* at 19.] The Court then asked the prosecutor if Hoskins's statement was "in

[22] The Chaneys also briefly mention one prosecutor's alleged "comment[ ] on Mrs. Chaney's failure to testify." [R. 297-1 at 7.] During its rebuttal argument, the Government stated, "Remember, [Dr. Chaney is] the only one responsible, he said, for the pre-signed scripts . . . [and as for] Lesa Chaney, she never made a statement, except what's in the billing papers. But you saw her checks." [R. 300 at 124.] At the bench, the prosecutor indicated that "[a]s [he] was making that . . . statement, [he] recognized that it was going to be improper if [he] finished it that way, so [he] did alter it." [*Id.* at 125.] The Court immediately instructed the jury that Mrs. Chaney had an "absolute constitutional right not to testify" and they should not "use [her failure to testify] against any defendant in any way." [R. 300 at 127.] The Chaneys do not allege that this statement, without more, amounted to misconduct warranting a new trial. Instead, they argue that if they had known about the jurors' alleged premature deliberations in the context of trial, they would have moved for a mistrial after this prosecutor "commented on Mrs. Chaney's failure to testify." [R. 299-1 at 7, R. 297-1 at 8.] This claim still makes the same mistake of assuming that the Court was aware of these alleged premature deliberations during trial. It was not. In any event, the Government's comment was ambiguous, isolated, properly addressed by a curative instruction, and easily outweighed by the evidence against her. *See infra* at 43-47. A motion for any relief on the basis of this comment would fail. *See, e.g.*, *Shaieb v. Burghuis*, 499 F. App'x 486, 495 (6th Cir. 2012) ("Unless there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions . . . we presume that the jury complied with the trial court's curative instruction.") (internal quotations and citation omitted).

evidence," to which he replied, "It is; I asked him about it. It's [in] my notes. I asked him about it." [*Id.*]

The parties now agree that Hoskins never provided this testimony. At the time, however, no transcript of Hoskins's testimony was available. Without access to this transcript, the Court could not immediately determine if the Government's representation was accurate. The Court thus instructed the prosecutor to "move on from that particular point," and reminded defense counsel that "you've got carte blanche to point out that there's not a shred of evidence for his theory that supports an accusation or statement that the government has made." [*Id.* at 20.] In their own closing arguments, both Defendants vigorously insisted that Hoskins had never made this statement.

The Chaneys now seek a new trial on account of the Government's misstatement. In evaluating this claim, the Court will first ask "if the [the misstatement] was improper, and if it was," then "proceed to analyze whether it was flagrantly improper, such that reversal is required." *United States v. Johnson*, 581 F.3d 320, 329 (6th Cir. 2009). To determine whether the prosecutor's statement was "flagrantly improper," the Court will "ask (1) whether [it] tended to mislead the jury; (2) whether [it was] isolated or pervasive; (3) whether [it was] deliberately made; and (4) whether the overall evidence against the defendant [was] strong." *Id.* And even if the prosecutor's conduct was not flagrant, the Court may still grant a new trial "if (1) proof of defendant's guilt [was] not overwhelming, *and* (2) defense counsel objected, *and* (3) the trial court failed to cure the error with an admonishment to the jury." *United States v. Carroll*, 26 F.3d 1380, 1385–86 (6th Cir. 1994) (emphasis in original). In applying each of these factors, the critical question "is whether the prosecutors' comments so infected the trial with unfairness as to make

the resulting conviction a denial of due process." *Girts v. Yanai*, 501 F.3d 743, 761 (6th Cir. 2007) (internal quotations and citations omitted).

ii

The Court need not waste time asking if this prosecutor's misstatement was improper. It was. *See, e.g., United States v. Carter*, 236 F.3d 777, 784 (6th Cir. 2001) ("The law is clear that, while counsel has the freedom at trial to argue reasonable inferences from the evidence, counsel cannot misstate evidence."). But the next step of the inquiry—which asks if the Government's statement "tended to mislead the jury"—causes the paths of the two Defendants to diverge. This is true for a simple reason: the prosecutor's misstatement concerned only Mrs. Chaney. This comment did not mention Dr. Chaney in any way, nor did it imply that he knew Mrs. Chaney had forged his signature on any prescription. Dr. Chaney still insists that the Government's "misrepresentation [was] crucial" to his defense, as "the jurors could have been convinced of Dr. Chaney's good faith in presigning prescriptions, but once they heard that Mrs. Chaney had signed his name, the jury could no longer accept this premise, since allowing someone else to sign his name to prescriptions would indicate a lack of good faith." [R. 299-1 at 5.]

There are two problems with this claim. First, the thrust of Dr. Chaney's "good faith" defense did not concern *who* pre-signed a particular prescription—after all, it does not require medical expertise to sign a blank notepad. Instead, Dr. Chaney's defense rested on (1) his "good faith" belief in the ability of the Clinique's unlicensed and unqualified medical staff to distribute pre-signed prescriptions for only legitimate medical purposes, and (2) the lack of evidence about the medical condition of each prescription's ultimate recipient. Evidence that Mrs. Chaney, rather than Dr. Chaney, signed at least one of these blank notepads did not substantially undermine this

defense. But the jury rejected it. And second, the prosecutor's misstatement did not indicate that Dr. Chaney "allowed" Mrs. Chaney to forge his signature on the day in question; rather, it failed to mention Dr. Chaney in any way, and implied (for self-evident reasons) that Dr. Chaney was not even present that day. Nor did the prosecution ever argue, as a basis for the charges against Dr. Chaney, that he had allowed or otherwise encouraged Mrs. Chaney to forge his signature on prescriptions. It remains possible, of course, that a juror might have independently drawn this unsupported inference. But the Court finds no clear reason to believe that any juror made this connection.

Dr. Chaney nevertheless asks the Court to assume that (1) the jury actually drew this attenuated inference, (2) the inference also impacted the jury's deliberation of his guilt or innocence, and (3) this impact outweighed the deep, varied, and overwhelming body of evidence presented against him over the course of a two-month trial. That the Court will not do. The jury convicted Dr. Chaney after receiving evidence that he knowingly left pre-signed prescriptions for distribution by unlicensed and unqualified medical staff, told an employee "not to tell anyone" about the pre-signed scripts, shouted at employees to "fix" urine drug screens that showed signs of patients' drug abuse and/or diversion, somehow saw up to four patients every fifteen minutes, forced others to wait for up to eight hours to be seen, fabricated medical records, submitted fraudulent billings to public and private insurance providers, ordered an employee to obtain prescriptions unlawfully and divert them to Dr. Chaney for his own private use, and even

encouraged one patient to dissolve the pills he had prescribed and inject them.[23] On these facts, one isolated comment about Mrs. Chaney's behavior—with no indication that Dr. Chaney was even aware of or encouraged this behavior—plainly fails to overcome the immense weight of the evidence against him.[24]

iii

The impact of the Government's misstatement on Mrs. Chaney's defense, however, is more complicated. Before measuring this effect, the Court should first determine which counts of the indictment are actually at issue. To this end, the Court will divide Mrs. Chaney's charges into two broad categories: those that relate to the Clinique's pattern of pre-signing prescriptions, and those that do not. This latter category includes the health care fraud charges listed in Counts 112-122, 197, and 234. All of these counts rely upon facts wholly unrelated to Dr. Chaney's habit of pre-signing prescriptions, including evidence that the Clinique (1) billed insurance providers for unnecessary urine drug screens, (2) billed on March 19 for "a level of services [and] . . . a number of patients that could not have been performed in one day," and (3) billed for Combs's performance of nerve conduction studies. [R. 190-1 at 26-37.]

---

[23] *See, e.g.*, R. 318 at 114-115, R. 321 at 19-21 (pre-signed prescriptions), R. 340 at 9, R. 339 at 7, (fixed urine drug screens); R. 335 at 10-11 (quadruple booking), R. 344 at 19, R. 336 at 5 (quadruple booking and up to eight hour wait), R. 293 at 51-52, R. 321 at 101 (fabricated medical records), R. 244 at 86, R. 317 at 94-95, R. 267 at 9, TR: Youlio Direct Examination at 7, R. 244 at 65, R. 298-1 at 9, TR: Rutledge Direct Examination at 43-45 (fraudulent billings), R. 321 at 127-130 (diversion of pills for private use), TR: Charles Hicks Testimony at 13-14 (injecting dissolved pills).

[24] For a similar reason, the one category of charges of which the jury found only the corporate defendant guilty—Counts 221-233, which involved Combs's use of pre-signed certificates of medical necessity to sell back braces—is irrelevant to the prosecutor's misstatement. Combs readily admitted to this practice, but testified that the Chaneys did not profit from it in any way. [R. 281 at 86-87.] Although the jury found the Clinique guilty of those charges because of its association with Combs, it acquitted both Mrs. Chaney and Dr. Chaney of these counts. The prosecutor's isolated reference to a single, unrelated comment made by Mrs. Chaney could not have prejudiced the Clinique's defense on these charges. And in any case, the evidence of Combs's unlawful sale of these braces was overwhelming. [*See generally* R. 281.]

In her discussion of the prosecutor's comment, Mrs. Chaney largely ignores these charges and focuses instead on the relationship between this misstatement and the jury's "guilty findings as to the drug and drug related charges." [R. 297-1 at 2.] In one tangential sentence, however, she does offer the unelaborated claim that "[i]f the [misstatement suggested] Mrs. Chaney so knowingly and wrongfully joined in the drug conspiracy, it could likewise be inferred that her involvement in the many varieties of health care fraud was not so benign and exculpatory as it otherwise appeared." [R. 297-1 at 12.] But even accepting that the Government's misstatement "tended to mislead the jury" about the "drug and drug related charges," the Court finds no plausible grounds for suspecting that this single comment impacted the jury's deliberation of her guilt on those unrelated counts of health care fraud. If any element of these separate offenses relied, even marginally, on the Clinique's practice of pre-signing prescriptions, the Court might recognize some possibility of prejudice here. But the Court carefully instructed the jury about the elements necessary to convict her on each of these offenses, and none bore any relation to the facts implicated by the prosecutor's misstatement.[25] [R. 272 at 41-52.]

Mrs. Chaney also fails to mention that the jury actually *acquitted* her of 88 out of 101 counts of health care fraud. [R. 283 at 1.] She makes no attempt to explain how, if the prosecutor's misstatement generally compelled the jury to reject her "good faith" defense by "inferr[ing] that her involvement in the many varieties of health care fraud was not so benign and exculpatory as it otherwise appeared," they nevertheless acquitted her of almost ninety percent of those counts. This split verdict strongly indicates that the jury followed the Court's instructions and carefully weighed

[25] Because the prosecutor's misstatement did not impact any of these substantive health care fraud offenses, it also did not implicate Count 68, which charges the Chaneys with conspiring to commit health care fraud. [R. 272 at 41.] The Court expressly instructed the jury that "[i]n order to return a guilty verdict [on Count 68], all twelve of you must agree that" the defendants conspired to commit at least one of the substantive health care fraud counts. [R. 272 at 77.]

the specific evidence relevant to each offense. *Cf. Bradley*, 644 F.3d at 1279-80 (holding that evidence a jury "partially acquitted" the defendant suggests "that the jury did indeed 'consider[ ] the charges individually and assess[ ] the strength of the evidence as to each charge.'") (citation omitted); *see also* Jury Instructions, R. 272 at 13 ("It is your duty to separately consider the evidence that relates to each charge, and to return a separate verdict for each one."); *Starnes*, 552 F. App'x at 523-24 ("[W]hen a court instructs a jury to do something, there is a strong presumption that the jury will follow that instruction."). There is no tenable basis for suspecting that the prosecutor's misstatement prejudiced Mrs. Chaney's defense as to these unrelated counts.[26]

The real counts at issue are the "drug and drug related charges." [R. 297-1 at 2.] The Clinique's habit of pre-signing prescriptions is relevant to each of these counts, and thus a more probing analysis of the misstatement's effect on these charges is in order. The first is Count 1, which alleges that Mrs. Chaney conspired "to unlawfully distribute and unlawfully dispense Schedule II controlled substances and Schedule III controlled substances."[27] [R. 190 at 11.] Because Hoskins's phantom testimony implicated Mrs. Chaney in the pre-signed prescription scheme, the Court finds that the prosecutor's misstatement did "tend to mislead" the jury about the evidence supporting Count 1. This is especially true given that the statement occurred during the Government's closing argument. *See Simpson v. Warren*, 475 F. App'x 51, 63 (6th Cir. 2012)

[26] Because Mrs. Chaney has failed to show that the prosecutor's comment was prejudicial, or even relevant, to these charges, her claim would fail even if the remaining elements of the flagrancy test were met. But the Court also notes that, as described above and below, (1) the prosecutor's statement was isolated and unintentional and (2) the weight of the evidence supporting these counts was substantial. *See supra* at 9-17, *infra* at 43-47.

[27] Counts 63-64, which charge Mrs. Chaney with maintaining a premises that unlawfully distributed or dispensed controlled substances, are derivative of the conspiracy count. Because finding Mrs. Chaney guilty of conspiracy was a sufficient condition for finding her guilty of these two counts, the Court need not discuss them separately here.

(finding it "significant" that prosecutor's misstatements occurred "shortly before deliberations") (citation omitted).

The next question is whether the prosecutor's comment was "isolated or pervasive." *Johnson*, 581 F.3d at 329. This issue is not in serious dispute, as the Defendants readily "acknowledge [that] the Government only misrepresented Mr. Hoskins' testimony one time."[28] [R. 326 at 11.] The parties do, however, strongly disagree about the third element of the "flagrancy" test, which asks if the prosecutor's misstatement was "deliberately made." *Johnson*, 581 F.3d at 329. This conflict turns on the relevant definition of "deliberate."

According to Mrs. Chaney, "[t]he prosecutor's assertion that his 'notes' supported [this misstatement]" suggests that it was a prepared remark, and thus "the misrepresentation was deliberate and intentional." [R. 297-1 at 13.] But this argument presumes that a comment is "deliberate" so long as the prosecutor intended for the challenged words to come out of his mouth. The Sixth Circuit does not interpret the legal standard that way. In deciding whether a comment was sufficiently "deliberate" in this context, courts have consistently looked to the *substantive* intent underlying the prosecutor's comment. In other words, the relevant question is whether the prosecutor intended to mislead the jury or prejudice the defendant, not whether the prosecutor intended to make the statement itself. To hold otherwise would require courts to find that almost every comment by a prosecutor was "deliberate," except in those rare cases where a

---

[28] In her reply, Mrs. Chaney does briefly attempt to argue that "[t]he prosecutorial misconduct in the government's closing argument was not merely an isolated comment" because "the misconduct included a misstatement to the jury regarding Greg Hoskins' testimony, the fabrication of a statement attributed to Mrs. Chaney and then an inexplicable and unfounded representation to the Court that questions eliciting such testimony had been asked of Hoskins." [R. 324 at 1.] That is essentially three ways of saying the same thing. The record shows that the prosecutor made this comment only once in his closing argument. [R. 300 at 18.] He did later comment at the bench that the testimony was in "his notes," but that statement was made to the Court, not the jury. And as explained below, the fact that this testimony appeared in the Government's notes suggests that the misstatement was not made in bad faith.

prosecutor's statement actually resulted from a slip of the tongue. That is not the standard. *See, e.g., Johnson*, 581 F.3d at 330 ("Although the questions were deliberately *placed* before the jury, they were not the kind of repeated errors that we have deemed 'deliberate misconduct' in the past.") (emphasis added); *United States v. Solivan*, 937 F.2d 1146, 1154 (6th Cir. 1991) (distinguishing its own facts from those where comments were not "deliberately injected into the proceedings to incite the jury against the defendant."); *Bates v. Bell*, 402 F.3d 635, 648 (6th Cir. 2005) (holding that "[t]he intentionality of the prosecutor's improper remarks can be inferred from their strategic use," and noting that the prosecutor "opted to select inappropriate arguments and use them repeatedly during summation."); *United States v. McConer*, 530 F.3d 484, 500 (6th Cir. 2008) (finding prosecutor's statement was not deliberate because it could not "be said that the prosecution was deliberately attempting to sneak in prohibited evidence."). Here, the fact that the prosecutor believed Hoskins's statement was in evidence—and even affirmed that this testimony was "[in] his notes"—strongly suggests that he did not intend to mislead the jury.

The Government also notes that, "[a]s the Defendants' conceded, Greg Hoskins's statement to the FBI clearly indicated Mrs. Chaney pre-signed prescriptions." [R. 311 at 8.] And in the witness list submitted to the Court before trial, the Government stated that Hoskins would provide this precise testimony. *See* Government Witness List at 10. The prosecutor's misstatement likely resulted from (1) an inadvertent failure to elicit this testimony at trial and (2) a secondary failure to recognize this oversight prior to closing arguments. No evidence indicates

that the Government actually intended to "sneak in prohibited evidence." *McConer*, 530 F.3d at 500.[29]

The fourth and final element requires the Court to measure the strength of "the overall evidence against the defendant." *Johnson*, 581 F.3d at 329. This is the most important question. In their post-verdict motions, the Chaneys apparently assume that Count 1 resulted strictly from the Clinique's practice of pre-signing prescriptions. But as the Court noted in its previous Rule 29 order, "Count 1 is not limited to pre-signed prescriptions." [R. 267 at 2.] The jury instructions explain that Count 1 simply charges Mrs. Chaney "with conspiring to knowingly and intentionally distribute and/or dispense" controlled substances "outside the usual course of professional practice and without a legitimate medical purpose." [R. 272 at 17.] With that broad allegation in mind, the Court will now detail the evidence relevant to Count 1.

In his trial testimony, Dr. Chaney confirmed that Mrs. Chaney served as the central manager of the Clinique's operations. He testified that she was the CEO, that she "set the schedule," that she supervised the facility's employees, that she was responsible for overseeing the submission of "claims for payment to Medicare, Kentucky Medicaid and private insurers," and that she ordinarily worked at the facility on a daily basis. [R. 319 at 58, 116, 137.] He also admitted that the office's billing and collection instructions sometimes contained the notation "per Lesa" in the margins. [R. 319 at 124, 131, 152.] Larry Patrick, the Clinique's former office

---

[29] Although Sixth Circuit precedent requires an inquiry into the prosecutor's intent, this questions runs far afield of the ultimate concern, which is whether the Defendants received a fair trial. A "deliberate" statement that does not violate this right will never be grounds for a new trial, while an "accidental" one that does violate this right will often provide these grounds. *See, e.g.*, *United States v. Warshak*, 631 F.3d 266, 307 (6th Cir. 2010) ("[T]he prosecutor's intent in making certain remarks is a fairly rough proxy for the ultimate question, which is whether the remarks at issue contaminated the trial with unfairness."); *Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.").

manager, testified that he quit his job because Mrs. Chaney was doing all of his work for him. [R. 334 at 33.]

Dr. Chaney also indicated that the Clinique's schedule was "locked" by Mrs. Chaney, and only she could determine the number of patients seen in a given time period. [R. 318 at 68-69.] Numerous staff members reported that Mrs. Chaney would triple- and quadruple-book patients for a single time slot. Kathleen Caudill, for example, stated that the Clinique's providers would sometimes see four patients in a fifteen-minute period, for a total of twelve patients an hour. [R. 335 at 10-11.] James Fields testified that "a lot of time[s]" these slots were "quadruple-booked," and visits with providers lasted "very few minutes." [R. 344 at 19.] Randall Huff recalled that the Clinique sometimes saw "[a] hundred" patients a day. [R. 294 at 10.] Angela Renfro said that patients would wait "[a]nywhere between five to eight hours to be seen," and that she discussed with co-workers her feeling that the Clinique scheduled "too many patients for one day." [R. 336 at 5.] Wilder described the frequency and volume of patients as akin to "herding cattle," and stated that providers "got them in there and [ ] got 'em out of there." [R. 332 at 24.] And Dr. Chaney reportedly rationalized his own drug use by telling Combs that "if [Mrs. Chaney] expected him to be at the office seeing all the patients" every day at such a high volume, he would need "help to get it done." [R. 321 at 127.]

Staff members testified that it was impossible to perform their responsibilities at the pace Mrs. Chaney expected. Combs recalled that Mrs. Chaney would "jump on" nurses if the speed slowed, and "[t]ell them they needed to pick up the pace and keep the flow going." [R. 321 at 95.] Hoskins stated that Mrs. Chaney would "tell [him] to hurry up and get people in and out," and that "speed[ing] up the exams" was necessary "just to see the amount of patients." [R. 293 at 49.] And

Caudill remembered that Mrs. Chaney would ask her "what was wrong with the flow" because the patients were "not getting to the room[s] quick[ly] enough." [R. 335 at 16.] Because the nurses were so often "in a hurry," they began filling out patient charts before the patients had even been seen. [*Id.* at 15.] Hoskins also stated that providers could not possibly fill out these charts in the time frame permitted, and so typically 20-30 charts would be left in a separate room each day "to be completed later." [R. 293 at 51.]

Providers often failed to fill out these charts on the same day that patients were seen, resulting in "stacks" of medical records being left in this room for days at a time. [*Id.*] Hoksins testified that Mrs. Chaney would call and ask him to "come in" on weekends to "complete some of the charts." [*Id.* at 52.] He stated that he would simply "grab a stack of the charts" and fill them in, often for patients that he had not even examined. [*Id.* at 52-53.] Combs recalled bringing blank charts to the Chaneys' house on the weekends when Mrs. Chaney was present. [R. 321 at 102.] And he even testified that he saw Mrs. Chaney forge Dr. Chaney's signature on the charts and fill them out herself. [R. 323 at 126, R. 321 at 102.]

The evidence also established that Mrs. Chaney actively participated in the pre-signed prescriptions scheme. Larry Patrick testified that Mrs. Chaney repeatedly supplied him with pre-signed prescriptions. [R. 334 at 28.] Combs further testified that Mrs. Chaney would "lock [pre-signed prescriptions] up in a drawer," and that she gave him a "key to the drawer" and told him to retrieve the scripts "any time the providers needed a pre-signed prescription." [R. 321 at 18.] He remembered that there were "just [] stacks" of these pre-signed pads, and that at any given time there might be "100" or more pre-signed scripts in the drawer. [*Id.* at 19.] He also testified that Dr. Chaney told him "not to tell anybody about" the pre-signed prescriptions, which he assumed

was because "it was not right" to supply the scripts. [*Id.* at 19-20.] Combs, the Clinique's "IT guy" who had a high school education and no medical training, estimated that he personally handed out "hundreds" of pre-signed scripts to unqualified medical providers at Mrs. Chaney's instruction. [R. 293 at 19, R. 321 at 18, 23.] At least three other witnesses confirmed that Combs handed out these pre-signed scripts. [R. 344 at 7, R. 293 at 19, R. 332 at 9-10.] Fields testified that Mrs. Chaney left the pre-signed scripts for Combs. [R. 344 at 7.] And Hoskins, a physician's assistant who was not licensed to prescribe controlled substances, testified that both Combs and Mrs. Chaney gave him pre-signed scripts, even on days when no physician was in the office. [R. 293 at 19, 71.]

At least eight witnesses also testified that urine drug screens were routinely altered at the Clinique.[30] [R. 293 at 57-58, R. 294 at 10-15, R. 321 at 27, R. 337 at 9, R 338 at 15, R. 339 at 10, R. 340 at 7-8, R. 344 at 11.] Combs testified that Mrs. Chaney's office lay only "10-15 feet" from the lab where these alterations occurred. [R. 321 at 23.] After Fields witnessed a staff member alter a urine drug screen, he took the test to Mrs. Chaney and told her it had been altered. [R. 344 at 12.] And Wanda Couch stated that she showed an altered drug screen to Mrs. Chaney in order "to tell her . . . about the drug test[s] being changed." [R. 340 at 21.] She nevertheless confirmed

[30] Mrs. Chaney argues that her culpability "with respect to altered urine drug screens . . . has no connection to any charge actually made in the case." [R. 350 at 4.] This claim ignores the fact that Count 1 broadly charges Mrs. Chaney with conspiring to unlawfully dispense and distribute controlled substances. [R. 272 at 17.] Evidence that urine drug screens were routinely altered to conceal patients' drug abuse and/or diversion—and that Mrs. Chaney was repeatedly notified of this practice—is plainly relevant to the conspiracy charge.

that after showing Mrs. Chaney the altered test, nothing changed and the "urine drug screens continue[d] to be altered."[31] [*Id.*]

In total, these facts supplied overwhelming evidence of Mrs. Chaney's active participation in a conspiracy "to knowingly and intentionally distribute and/or dispense" controlled substances "outside the usual course of professional practice and without a legitimate medical purpose." [R. 272 at 17.] Although the prosecutor's misstatement did "tend to mislead the jury" about one piece of the Government's narrative, the remainder of this evidence powerfully counterbalanced any prejudice caused by the prosecutor's isolated, unintentional misstatement. This comment was not sufficiently flagrant to warrant reversal on Count 1.[32]

The final category of charges against Mrs. Chaney poses the hardest question. Counts 198-220 accuse her of participating in a scheme to conceal "a material fact" by billing insurance providers for pre-signed prescriptions. [R. 272 at 51, R. 190 at 33-34.] The "material fact" here is that the prescriptions were pre-signed. Dr. Youlio, an employee of the company that administers Medicare's Part D prescription drug benefits, testified that Medicare and Medicaid will not pay for pre-signed prescriptions because they are "not [issued] for a medically accepted purpose." [TR: Youlio Direct Examination at 7.] But in order to find Mrs. Chaney guilty of these counts, the Government also had to prove that she "knowingly and willfully" concealed the fact that the prescriptions were pre-signed, meaning she "acted with knowledge that [her] conduct was

---

[31] The Government also provided substantial evidence of Mrs. Chaney's motive for supporting this unlawful conduct. The prosecution argued that "Mrs. Chaney, more than anyone, spent the fraudulently obtained money and enjoyed the fruits of the Defendants' fraud." [R. 346 at 8.] These expenses included a startling amount of foreign travel on the Chaneys' private plane—often on days when prescriptions bearing Dr. Chaney's name were issued—and tens of thousands of dollars consistently spent on clothing and other items. [*Id.*] Although these luxuries, standing alone, furnished no evidence of Mrs. Chaney's guilt, they supplied persuasive context for the evidence presented.

[32] Because the evidence supporting Count 1 (and, by extension, Counts 63-64) was overwhelming, any claim premised on non-flagrant conduct would fail as to these counts. *See supra* at 49.

unlawful." [R. 272 at 52.]; *see also* Brief of the United States, *Russell v. United States*, 2014 WL 1571932, at * 6 (March 10, 2014); *Russell v. United States*, 134 S. Ct. 1872 (2014).

The question presented to the jury on these counts, then, was fairly narrow. The jury needed to conclude that Mrs. Chaney (1) aided in concealing the fact that Dr. Chaney pre-signed prescriptions and (2) did so "with knowledge that [her] conduct was unlawful." [*Id.*] These counts thus directed the jury to the specific question of whether Mrs. Chaney knew that, according to Medicare and Medicaid, pre-signed prescriptions could not be issued "for a medically accepted purpose." [TR: Youlio Direct Examination at 7.] The prosecutor's misstatement did touch, at least indirectly, upon this question. Mrs. Chaney's alleged conduct—in which she forged Dr. Chaney's signature and added, "You didn't see this" [R. 300 at 18]—strongly implied that (1) she cared little about the legitimacy of these prescriptions and (2) she knew her approach to handling these prescriptions, if known to others outside the facility, would place her in legal jeopardy. And that impression of recklessness and bad faith could have influenced the jury's perception of her broader knowledge about the legitimacy of the pre-signed scripts.

Because the question before the jury was narrow, the universe of evidence relevant to these counts was also somewhat circumscribed. This evidence included a broad range of testimony establishing that Mrs. Chaney directly facilitated Dr. Chaney's practice of pre-signing prescriptions. *See supra* at 45-46. Other evidence also demonstrated (1) her intimate familial and working relationship with Dr. Chaney, whose medical training would have alerted him to the danger and illegitimacy of these prescriptions, (2) her central role in running the Clinique, including her supervision of the billing process, and (3) her deep understanding of the way the Clinique operated, including the strong likelihood that patients were routinely seeking

prescriptions for illegitimate purposes. *See supra* at 43-47. Faced with this evidence, the jury was entitled to infer that Mrs. Chaney concealed the Clinique's practice of pre-signing prescriptions with knowledge that her conduct was unlawful. Given (1) the substantial weight of this evidence and (2) the fact that the prosecutor's comment was isolated and unintentional, the Court finds again that the Government's misstatement was not flagrant.

But that is still not the end of the inquiry. Even non-flagrant conduct may warrant a new trial "if (1) proof of defendant's guilt is not overwhelming, *and* (2) defense counsel objected, *and* (3) the trial court failed to cure the error with an admonishment to the jury." *Carroll*, 26 F.3d at 1385–86.[33] As explained above, counsel for the Chaneys immediately objected to the Government's misstatement, and the Court lacked the information necessary at the time to issue a proper curative instruction.

The remaining question is whether the evidence against Mrs. Chaney on these counts was overwhelming. Taking all of the cited testimony into careful consideration, *supra* at 45-46, the Court finds that the evidence of Mrs. Chaney's *involvement* in the provision of pre-signed prescriptions was overwhelming. But the Court cannot similarly say that the evidence of her specific *knowledge* about the illegitimacy of these pre-signed scripts was also overwhelming. Although the Government provided significant evidence to support this element of the offense, the present question is not whether this evidence was significant, but whether it was "overwhelming."

---

[33] The Court need not apply the standard for non-flagrant conduct to Mrs. Chaney's separate health care fraud counts. Mrs. Chaney has altogether failed to show that the prosecutor's misstatement even touched upon these counts, much less that it caused any prejudice to her defense against those charges. The Court would not be required to apply this standard if, for example, (1) the prosecutor stated that Hoskins had testified about her unpaid parking tickets, (2) the defense objected, and (3) the Court failed to issue a curative instruction. Although the test for non-flagrant conduct does not explicitly incorporate the requirements of relevance and prejudice, common sense holds that a defendant must first demonstrate these threshold elements before the test can apply. And in any case, the evidence supporting these counts was overwhelming.

Carroll, 26 F.3d at 1385–86. It was not. Mrs. Chaney is entitled to a new trial on Counts 198-220.[34]

D

Lastly, Dr. Chaney argues that "[e]ven if the Court does not believe any individual argument herein requires a new trial, taken together, and considering also Defendants' arguments set forth in their motion for judgment of acquittal, justice requires that Defendants be afforded a new trial." [R. 299-1 at 9.] Under Fed. R. Crim. P. 33(a), the Court may "vacate any judgment and grant a new trial if the interest of justice so requires." Resort to this rule typically requires some finding that "the [jury's] verdict was against the manifest weight of the evidence" or a "substantial legal error has occurred." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010).

The Government introduced a wealth of evidence establishing the Chaneys' direct and pervasive involvement in these crimes. *Cf. Lundy v. Campbell*, 888 F.2d 467, 481 (6th Cir. 1989) ("The asserted grounds for relief, considered individually or together, describe 'mistakes' . . . that pale into relative insignificance given the overwhelming uncontradicted evidence of the defendant's guilt."). And apart from the prosecutorial misconduct issue noted above, no

[34] Vacating these counts will not impact the validity of Mrs. Chaney's separate conspiracy and money laundering convictions. Count 1 does not necessarily rely upon—or even mention—the pre-signed prescriptions scheme. And Count 68 charges Mrs. Chaney with conspiring to commit "health care fraud." [R. 272 at 41.] Counts 198-220 do not charge Mrs. Chaney with committing health care fraud, but with providing a false statement under 18 U.S.C. § 1035. [*Id.* at 51.] The Court expressly instructed the jury that "[i]n order to return a guilty verdict [on Count 68], all twelve of you must agree that" the defendants conspired to commit at least one of the underlying health care fraud counts, which did not include Counts 198-220. [R. 272 at 77.] Courts "must presume that juries follow their instructions" absent an "overwhelming probability that the jury [was] unable to follow [them]." *Washington v. Hofbauer*, 228 F.3d 689, 706 (6th Cir. 2000) (internal quotations and citation omitted). Vacating these counts also will not impact Mrs. Chaney's separate money laundering charges unless those charges explicitly "cross-referenc[ed]" the "counts that ha[ve] been vacated." *United States v. Tencer*, 107 F.3d 1120, 1130 (5th Cir. 1997); *see also United States v. Jamieson*, 427 F.3d 394, 403 (6th Cir. 2005) (citing *Tencer* with approval and noting "[a] review of the record indicates that the money-laundering counts do not rely solely on the [disputed counts] as their predicate."). These money laundering counts broadly refer to drug distribution and health care fraud, and make no mention of Counts 198-220. [R. 272 at 32, 54.]

"substantial legal error occurred" that might otherwise warrant a new trial. *Cf. United States v. Anderson*, 488 F. App'x 72, 80 (6th Cir. 2012) ("[C]umulative error analysis only applies to errors, not non-errors."). Nor can the Court identify any other legal or equitable basis for granting a new trial. The Court will thus deny Dr. Chaney's motion on these grounds.

III

With the exception of Mrs. Chaney's challenge to Counts 198-220, the Chaneys' claims are meritless. Accordingly, the Court **HEREBY ORDERS** as follows:

(1) Dr. James Alvin Chaney's and Ace Clinique of Medicine's Motion for New Trial and Motion for Acquittal **[R. 298, 299]** are **DENIED**;

(2) Lesa L. Chaney's Motion for Acquittal **[R. 296]** is **DENIED**;

(3) Lesa L. Chaney's Motion for New Trial as to Counts 198-220 **[R. 297]** is **GRANTED**;

(4) Lesa L. Chaney's Motion for New Trial as to all other counts **[R. 297]** is **DENIED.**

This 30th day of September, 2016.

Gregory F. Van Tatenhove
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 17-6167/6239/6240/6314/6315/6351

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES ALVIN CHANEY, M.D. (17-6239/6351); LESA L. CHANEY (17-6167/6314); ACE CLINIQUE OF MEDICINE, LLC (17-6240/6315),

Defendants - Appellants.

FILED
Apr 11, 2019
DEBORAH S. HUNT, Clerk

Before: COLE, Chief Judge: SUHRHEINRICH and MOORE, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Kentucky at London.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's judgment regarding each defendant is AFFIRMED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

FILED ELECTRONICALLY

NO. 14-CR-00037-SS-GFVT

UNITED STATES OF AMERICA — **PLAINTIFF**

V.

JAMES A. CHANEY, AND
ACE CLINIQUE OF MEDICINE, LLC — **DEFENDANTS**

MOTION FOR NEW TRIAL

Defendants, James A. Chaney and Ace Clinique of Medicine, LLC, hereby move the Court for a new trial pursuant to Fed.R.Civ.P. 33. As grounds for this Motion, Defendants submit the memorandum filed herewith.

/s/ Elizabeth S. Hughes
Elizabeth S. Hughes
GREEN CHESNUT & HUGHES PLLC
201 East Main Street, Suite 1250
Lexington, Kentucky 40507
Telephone: (859) 475-1471
Facsimile: (859) 455-3332
Email: ehughes@gcandh.com
ATTORNEYS FOR DEFENDANTS
JAMES A. CHANEY AND ACE CLINIQUE OF MEDICINE, LLC

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing **MOTION FOR NEW TRIAL** has been served on May 2, 2016, via the Court's ECF system, which will send electronic notice to counsel of record.

/s/ Elizabeth S. Hughes
ATTORNEY FOR DEFENDANTS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
SOUTHERN DIVISION
LONDON

FILED ELECTRONICALLY

NO. 14-CR-00037-SS-GFVT

UNITED STATES OF AMERICA **PLAINTIFF**

V.

JAMES A. CHANEY, AND **DEFENDANTS**
ACE CLINIQUE OF MEDICINE, LLC

MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL

The Defendants, James A. Chaney and Ace Clinique of Medicine, LLC, submit the following memorandum in support of their motion hereby move the Court for a new trial pursuant to Fed.R.Civ.P. 33. As grounds for this motion, Defendants state as follows:

I. JUROR MISCONDUCT

Based upon the information derived from the interview of Juror #116 we know the following:

(1) Immediately after opening statements, two jurors were discussing the case in direct contravention of the Court's instructions.

(2) This information was conveyed to the jury administrator, who brought it to the Court's attention.

(3) The Court did not inform counsel for the parties so that proper objections or motions could be made.

(4) The two jurors continued to discuss the case in contravention of the Court's instructions and this was not brought to the attention of the parties.

While FRE 606 prevents a juror from testifying with respect to statements made during deliberations, the testimony of Juror #116 does not implicate statements made during deliberations. In fact, Juror #116 was an alternate and did not participate in deliberations. Rather, these facts may all be established without Juror #116's testimony. The Court has acknowledged that it was made aware of the concerns of the juror and the record reflects that the matter was not brought to the attention of the parties.

The misconduct on the part of the two jurors who began discussing the case at the earliest possible opportunity was material and important. It bears upon Defendants' right to a fair and impartial jury. Had Defendants known of the jury's violation of the instructions, particularly at such an early stage of the trial, they would have moved for a mistrial or, alternatively, for a dismissal of the two jurors in question. Even had these

motions been denied, the subsequent complaint would have caused these motions to have been renewed. Furthermore, had Defendants been made aware of the jurors' misconduct, they would have sought a mistrial when the attorney for the United States commented on Defendant Lesa Chaney's failure to testify.[1]

The Court has previously referenced *Tanner v. United States*, 483 U.S. 107 (1987), and *United States v. Logan*, 250 F.3d 350 (6th Cir. 2001), as being pertinent to the present inquiry, but neither of these cases addresses the issue now before the Court. In *Tanner* and *Logan*, no one was aware of the juror misconduct prior to the verdict and, therefore, none of the parties had the opportunity to address the situation and make appropriate motions at the time the misconduct occurred. Here, the misconduct was brought to the Court's attention, but not to the attention of the parties. This fact removes the present case from the purview of *Tanner* and *Logan*. Rather, the inquiry must be whether the Defendants were entitled to know of Juror #116's complaints and the misconduct of the two jurors at the time. Defendants submit that their Sixth Amendment right to a fair and impartial jury was violated and it materially affected the defense of the case.

---

[1] Although the comment was made with respect to Mrs. Chaney, it affects Dr. Chaney and the corporate defendant equally. If the jurors took the failure to testify into account in determining Mrs. Chaney's guilt, it affected their evaluation of Dr. Chaney as well since under the facts of this case, Mrs. Chaney could not have been guilty if Dr. Chaney was not guilty as well.

This conclusion is supported by *United States v. Gay*, 522 F.2d 429, 435 (6th Cir. 1975), in which the Sixth Circuit considered a district court's failure to give notice to defense counsel of juror requests to be excused. In *Gay*, the district court considered juror excuses and acted on those requests outside the presence of the defense and without giving notice; the Sixth Circuit held the defense was entitled to an opportunity to object and make a record of the proceedings:

> We hold that it was error for the District Judge to engage in discussions with members of the jury after it was impaneled and to consider requests for excuses out of the presence of the defendant and without giving notice to defense counsel. This does not preclude the parties and counsel from agreeing to In camera consideration of requests to be excused, but the decision as to whether this may be done is that of the parties, not the court. The defendant should have an opportunity to object to requests for excuses from the jury and to make a record of the proceedings. This holding does not affect the discretion of the trial court to dismiss a juror and replace him with an alternate, or dismiss an alternate for illness, hardship or other cause. However, even though such dismissals are within the discretion of the trial judge and do not require the consent of the parties, his discretion is always subject to review for abuse, and a record is necessary for such review.
> The Supreme Court noted in Rogers that "a violation of Rule 43 may in some circumstances be harmless error . . . ." (95 S.Ct. 2095). Even though the appellant has not been able to demonstrate prejudice in the present case, the total absence of a record of the proceedings in which the changes in the makeup of the jury occurred requires us to assume prejudice. We have the utmost confidence in the integrity of the District Judge who presided in these proceedings, and of the trial judges of the circuit individually and as a group. However, in a time when our judicial system is being severely questioned,

> it is as important to maintain the appearance of justice and regularity as it is to be certain of their reality.

Similarly, in the case at bar, the Court does have discretion to determine the extent of the investigation of juror misconduct and how to deal with such misconduct, but Defendants were entitled to notice and an opportunity to be heard on the issue. The failure to provide this notice and opportunity requires a new trial.

II. PROSECUTORIAL MISCONDUCT

It is undisputed that the attorney for the United States represented to the jury during closing argument that Greg Hoskins testified that Defendant Lesa Chaney signed Dr. Chaney's name to blank prescriptions; that Defendants objected; that the Court declined any relief; and that Greg Hoskins in fact did not testify as represented by the Government. This misrepresentation is crucial, as the jurors could have been convinced of Dr. Chaney's good faith in presigning prescriptions, but once they heard that Mrs. Chaney had signed his name, the jury could no longer accept this premise, since allowing someone else to sign his name to prescriptions would indicate a lack of good faith.

The Sixth Circuit has a two-step approach for assessing whether prosecutorial misconduct warrants a new trial. *United States v. Carroll,* 26 F.3d 1380 (6th Cir. 1994). The Court first considers whether the prosecutor's conduct and remarks were improper. *Id.* at 1387; *see also Boyle v. Million,* 201 F.3d 711 (6th Cir. 2000). The second step requires the

Court to weigh four factors in determining whether the impropriety was flagrant and thus warrants reversal. These four factors are as follows: (1) whether the conduct and remarks of the prosecutor tended to mislead the jury or prejudice the defendant; (2) whether the conduct or remarks were isolated or extensive; (3) whether the remarks were deliberately or accidentally made; and (4) whether the evidence against the defendant was strong. *Carroll,* 26 F.3d at 1385; *see also Boyle,* 201 F.3d at 717; and *United States v. Collins,* 78 F.3d 1021, 1039 (6th Cir.), *cert. denied,* 519 U.S. 872 (1996).

The prosecutor's remarks during closing argument were obviously improper. "The law is clear that, while counsel has the freedom at trial to argue reasonable inferences from the evidence, counsel cannot misstate evidence[.]" *United States v. Carter,* 236 F.3d 777, 784 (6th Cir. 2001). Greg Hoskins did not testify that he observed Mrs. Chaney sign her husband's name to any prescription pad, as represented by the attorney for the United States. Thus, the prosecutor misstated the trial evidence to the jury. That the misrepresentation was not accidental can be inferred from the fact that the prosecution did not mention this alleged testimony during the argument on the Rule 29 motions.

The prosecutor's misrepresentations both misled the jury and prejudiced all three Defendants. The Sixth Circuit "has consistently recognized that a prosecutor's misrepresentation of material evidence can have a significant impact on jury

deliberations "because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty." *Carter,* 236 F.3d at 785-6, quoting *Washington v. Hofbauer,* 228 F.3d 689, 700 (6th Cir. 2000); *see also United States v. Solivan,* 937 F.2d 1146, 1150 (6th Cir.1991) (Because jurors are likely to "place great confidence in the faithful execution of the obligations of a prosecuting attorney, improper insinuations or suggestions [by the prosecutor] are apt to carry [great] weight against a defendant" and therefore are more likely to mislead a jury.). The prosecutor's misrepresentation of the evidence to the jury was inherently prejudicial. *Carter,* 236 F.3d at 786. A new trial is warranted.

Furthermore, the prosecution also commented on Mrs. Chaney's failure to testify. Without information that jurors had disregarded the Court's instructions, Defendants did not request a mistrial, but this additional misconduct, coupled with the earlier misrepresentation of significant testimony, warrants a new trial now that the transcript of Mr. Hoskins' testimony is available and it has been conclusively established that the attorney for the United States misrepresented the evidence.

III. MOTION TO SUPPRESS

Defendants renewed their motion to suppress after Agent Lambdin testified that all patient files and records were seized during execution of the search warrant on

September 9, 2013. In ruling on the renewed motion to suppress, the Court took issue with the fact that the motion to suppress was decided upon the four corners of the warrant itself and, therefore, the testimony of Agent Lambdin did not alter the result. (Doc # 273). The Court overlooks, however, the import of Agent Lambdin's testimony.

Both the Court and the magistrate judge acknowledged the issue was a "close call" with respect to whether the particularity requirement had been met, but found the language identifying the statutes in question was sufficiently limiting. The testimony of Agent Lambdin merely illuminated the fact that this supposed limitation was in fact no limitation at all. Thus, the warrant failed to identify the items to be seized with particularity for the reasons previously advanced by Defendants and the fruits of the search should have been suppressed.

Moreover, assuming the limitation was valid, Agent Lambdin's testimony established that the officers exceeded the scope of the warrant. The Court concluded that the agents did not act in bad faith or otherwise flagrantly disregard the limitations of the warrant. Defendants disagree. The record reflects that the agents did not consider the language referencing the statutes to be a limitation at all and their disregard of the limitation was, in fact, flagrant.

IV. INTERESTS OF JUSTICE

Rule 33 permits the Court to order a new trial when justice so requires. Even if the Court does not believe any individual argument herein requires a new trial, taken together, and considering also Defendants' arguments set forth in their motion for judgment of acquittal, justice requires that Defendants be afforded a new trial.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court order a new trial. Defendants adopt and incorporate by reference any argument advanced by Defendant Lesa Chaney to the extent such argument may also support the motion for a new trial made by these Defendants.

Respectfully submitted,

/s/ Elizabeth S. Hughes

Elizabeth S. Hughes
GREEN CHESNUT & HUGHES PLLC
201 East Main Street, Suite 1250
Lexington, Kentucky 40507
Telephone: (859) 475-1471
Facsimile: (859) 455-3332
Email: ehughes@gcandh.com
ATTORNEYS FOR DEFENDANTS JAMES A. CHANEY AND ACE CLINIQUE OF MEDICINE, LLC

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION FOR NEW TRIAL** has been served on May 2, 2016, via the Court's ECF system, which will send electronic notice to counsel of record.

/s/ Elizabeth S. Hughes
ATTORNEY FOR DEFENDANTS