No. 21-5261

In The
Supreme Court of the United States

SHAKEEL KAHN,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

VOLUME II

BEAU B. BRINDLEY*
BLAIR WESTOVER
LAW OFFICES OF
BEAU B. BRINDLEY
53 W. Jackson Blvd.
Ste. 1410
Chicago, Illinois 60604
(312) 765-8878
bbbrindley@gmail.com

Counsel for Petitioner

ELIZABETH PRELOGAR*
KENNETH A. POLITE, JR.
DAVID M. LIEBERMAN
DEPARTMENT OF JUSTICE
950 Pennsylvania Ave., N.W.
Rm. 5616
Washington, D.C. 20530
(202) 514-2217
SupremeCtBriefs@usdoj.gov

Counsel for Respondent

**Counsel of Record*

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. SHAKEEL KAHN, NABEEL AZIZ "SONNY" KHAN aka Nabeel Aziz "Sonny" Kahn, Defendants.	DOCKET NO. 17-CR-29-J Casper, Wyoming May 7, 2019 8:34 a.m. VOLUME VII of XX (Pages 1 to 325)

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE
and a jury of twelve and three alternates

* * *

[14] filled out the paperwork?

A I went into the back of the room, and I paid Sonny. They weighed me. Took me to the back of the room, and I met the doctor. He did a quick exam. Then he went over what I wrote on the paper that I wanted or that I was previously prescribed that I had wrote down, and he gave me what I wrote down, and then we set up an appointment for next mouth.

Q So you said he gave you an exam. Can you tell us what that involved?

A Sat me on the table, tapped your knees, elbows, checked my blood pressure.

Q And then when you stated you went over the paperwork of what you wanted or what you had had previously, what do you mean by that?

A The two drugs that I had stated that I had previously been on, he had went over it and asked a couple questions about it, and then prescribed them to me.

Q Do you recall what you put down?

A Oxycodone 30-milligram and Dilaudid 8-milligram.

Q And that was something you represented you had taken before?

A Yes.

Q Was there a question of how you had – where you had gotten those?

A On the sheet there was a question, so I wrote a previous [15] doctor.

Q What doctor do you recall?

A Dr. Shing.

Q Had you seen Dr. Shing previously?

A No.

Q Had you ever been prescribed those medications?

A No.

Q Nobody had prescribed those medications previously?

A No.

Q Was there a particular reason you used Dr. Shing?

A Yeah. He was no longer around, and you couldn't get his medical records, I was told.

Q Were you aware that there was a way for Shakeel Kahn to check your prescribing history?

A No.

Q But if he had checked, those would not have shown up in your prescribing history?

MR. BRINDLEY: Objection; speculation, Judge.

THE COURT: Sustained.

BY MS. HAMBRICK:

Q So during that first exam and visit that you talked about, you had written down you wanted oxycodone 30-milligram?

A Yes.

Q And Dilaudid, you stated?

A Yes.

* * *

[73] fill your prescriptions until the 28th"?

A I had to wait the 15-day period before I can try to attempt to fill them.

Q Is that – why is that? Would the pharmacies fill them if they were too soon?

A No.

Q So were there times you had a visit, and then the prescription would be dated later on closer to your refill date?

A Yes.

Q And then the next page, this a few days later on October 19th from Shakeel Kahn, "Sonny is running late. Should be there in about 20 or 30 minutes." What was occurring here?

A Dr. Kahn was out of town, so he was going to send his brother to meet me for the prescriptions.

Q And then the next page, you ask, "Is he still coming?" Do you know if he showed up that date with your prescriptions?

A Yes, he did.

Q So on that date, was there a physical exam by Shakeel Kahn?

A No.

Q Did you ever see Shakeel Kahn?

A No.

Q When you saw Sonny to get your prescriptions, what happened there?

A He took the payment, counted the money, and then gave the [74] prescriptions. He set the appointment up for the next time.

Q Where did that occur?

A In the first waiting room.

Q And did he take your height or weight or blood pressure that day?

A Sometimes he would take the height and weight, but not every time.

Q Do you recall specifically whether he did that day or not?

A That day, I don't recall. No.

Q So if we look at your patient chart from that date, Exhibit 3020, page 237, you see that is dated October 19th, 2015, correct?

A Yes.

Q Down here, the first bigger paragraph it says you returned to the office today for a follow-up on your low-back pain. It talks about you describing your pain, your current pain level, and that you weaned yourself off of the Xanax. Did you meet with Shakeel Kahn that day and give him all of this information?

A If that is the date going back to the E-mail, then no.

Q Do you recall whether or not you filled out paperwork on that date?

A I don't recall. There was times I would, and sometimes I wouldn't.

Q But you got prescriptions that day?

* * *

[84] Sunday?

Q Well, I think if we look back, you have an appointment, and you are asking if it is okay to bring grandma too. Let's look back. So if you go back to page 1 – we'll go back to the beginning. January – I'm sorry – page 1. You are saying on this date is your appointment today because you have to fill tomorrow. This is January 17th.

A Okay.

Q Then later on when you ask about grandma, on page 8, he says, "It is Sunday." He didn't want to see grandma, but you have an appointment that day. Did you ever see him on a Saturday or Sunday?

A I have seen him on a weekend, yes.

Q Okay. Do you think after this exchange that you and Connor went in for an appointment at the same time?

A I don't recall.

Q Okay. Do you recall if you had an exam on that day? Let's look at your patient chart, Exhibit 3020,

page 281. Would you have had a detailed exam on that day?

A No, because later on, exams kind of went away. It was come in, exchange money, talk a little bit if we needed to, and that was it.

Q Let's move on to Exhibit 1072, these are some E-mail and text exchanges on February 22nd, 2016. Does that look correct?

A Yes.

* * *

[240] parking lot, and I would pay Sonny, and Sonny would give me my scripts.

Q And during those visits, did Sonny take your weight and blood pressure?

A No.

Q But you would give him your money?

A Yeah.

Q And you would get your prescriptions?

A Yes.

Q Do you recall how many times that might have occurred?

A Once or twice.

Q Did there come a time when you started actually coming up here and seeing Shakeel Kahn in Wyoming?

A Yes. After you guys pulled – the DEA pulled his Arizona license.

Q Do you remember when that was?

A Not specifically, no.

Q When you would come up to Wyoming for a visit, were those visits generally any different than the visits had been in Arizona?

A A little bit different. There, it was – I was just – I only seen, like, in an examination room one time. Other than that, it was just in his little office.

Q In Wyoming?

A Yeah.

[241] Q So one time you went to an exam room?

A Uh-huh.

Q But the other times, you would just see him in his office?

A Yeah.

Q I'm going to show you what has not previously been admitted as Exhibit 9068. I will just show that to you, Ms. Thacker.

Do you recognize that?

A Yeah, that was it.

Q That's what?

A That was the office that I was seen in.

Q Here in Casper?

A Yes.

Q Is that picture a true and accurate depiction of the office?

A Yes.

MS. HAMBRICK: Your Honor, the Government would move to admit Exhibit 9068?

MR. BRINDLEY: No objection.

THE COURT: 9068 is received.

(Exhibit 9068 was received in evidence.)

MS. HAMBRICK: May we publish, Your Honor?

THE COURT: You may publish.

BY MS. HAMBRICK:

Q So this is what you are talking about where you would meet him after that?

[242] A Yes.

Q So is there any kind of examination going on in the office?

A No.

Q When you came to Casper, did you continue to be charged the same rate?

A Close to it, but it did go up there at the end.

Q So it continued to go up?

A Yes.

Q How did you get there?

A I drove – well, I didn't drive myself. I had to have someone else drive me. I'm not capable of really even driving from Topack to Fort Mohave at that point without going off the road or something.

Q And how long of a drive is it from there to Casper?

A It is about 13 hours.

Q And were you doing that every two weeks?

A Yes.

Q Did you ever fly to Casper?

A No. But he told me if I did, he would meet me at the airport.

Q And why didn't you fly?

A I didn't have the money to fly.

Q Did you tell that to Shakeel Kahn that you couldn't afford to fly?

A Yeah.

[243] Q Now, I am going to show you – I don't believe it has been admitted – Government's Exhibit No. 1103. Do you recognize that?

A Yes.

Q What is that?

A It is an E-mail from him saying that he has to increase my fee to $1,500 because of the amount of meds that I take.

Q And were there times when you communicated by text or E-mail?

A Not very often – not until he moved to Wyoming. At that point, we were.

Q Is this a true and accurate copy of this particular message?

A Yes.

MS. HAMBRICK: Government would move to admit Exhibit 1103?

MR. BRINDLEY: No objection.

THE COURT: All right. It is an E-mail? Not 11000?

MS. HAMBRICK: No. 1103, Your Honor. It is not on the exhibit list that the court has if the judge is looking for it?

THE COURT: 1103 is received. You may publish.

(Exhibit 1103 was received in evidence.)

BY MS. HAMBRICK:

Q This is an E-mail sent from a MediCorp E-mail to – do you [244] recognize that phone number, or that number?

A Yeah.

Q Was that yours?

A It is my phone number, yes.

Q Okay. And so in April of 2016, your fee is going to $1,500 per visit?

A Yes.

Q Did you try to come to Casper every two weeks?

A Yes, I did.

Q Was that getting difficult to do?

A Yes.

Q So were there times when you would go longer?

A Yeah – yes. It was harder to arrange to have somebody to – that was willing to just drive up here with me, and it was harder to come up with the money, because – yeah. That is a lot of money.

Q Okay. So –

A Crazy.

Q We will look at your visit on 6/24 of 2016, Exhibit 3026, page 711. You had a visit in June. You filled out some paperwork?

A Yes.

Q You believe you got your prescriptions?

A Yeah, but I'm not sure if that was the last time I was seen or second to last time I was seen? One of those times I didn't [245] get those prescriptions, because it was after they had raided his office. He wanted to do a urinalysis, and I couldn't because I had – I was dirty from meth, so I told him I would come back the next day.

Q We will come back to that time. Let's move to your patient file September 10, 2016, Exhibit 3026, page 720. You got prescriptions on that date?

A Yes.

Q I know it is hard to tell on the screen, do you know whether or not that is the only page in your chart from that day? Would you know that?

A No. I –

Q Was there ever a time when you got prescriptions that you did not fill out paperwork?

A Well, there was when I first started going up there or being seen by him up there, I couldn't go all the way up there, and he just had me wire him the money. He sent the scripts to me. He went and had them filled.

Q So explain. Say that again. So there were times during this time frame, you couldn't get to Wyoming?

A Yes.

Q So then what would happen?

A I wired the money to him, and he had – he filled the script and had it sent to me. He FedExed it to me.

Q Okay. So you don't recall on those dates that you would?

[246] A I didn't fill out any paperwork that day, no.

Q So now we are going to look at – I don't believe it has been admitted, Government's Exhibit No. 6109. It is really hard to see, Shawnna, but do you recognize that?

A Yes.

Q What is that?

A That is a MoneyGram that I sent to Dr. Kahn.

Q Does this document accurately reflect the date and amount of Money that you sent?

A Yes.

Q And who it was to and who it was from?

A Yes.

MS. HAMBRICK: The Government would move to admit Exhibit 6019?

MR. BRINDLEY: I don't have any objection, Judge.

THE COURT: It is received.

(Exhibit 6019 was received in evidence.)

MS. HAMBRICK: May we publish?

THE COURT: You may publish.

BY MS. HAMBRICK:

Q So I think we can blow that up a little bit, you can tell me the date on the MoneyGram?

A 9/20/2016.

Q And the receiver was Shakeel Kahn?

A Yes.

[247] Q You were the sender?

A Yes.

Q For a total amount of $500?

A Yes.

Q Is this what you are talking about, that you would wire Money?

A Yes. Is it okay if I just stand up? I will stay right here. Can I just stand up for a minute?

THE COURT: You may stand up anytime you need to.

BY MS. HAMBRICK:

Q Now, I will have you look at what has not yet been admitted as Exhibit 6110. Do you recognize that?

A Yes.

Q And what is that?

A That is another MoneyGram.

Q On a different day?

A Yeah, that one is Walmart to Walmart, though.

Q That is just another way to send money?

A Yes.

Q And this is a Walmart to Walmart that you sent?

A Yes.

Q Does this document accurately reflect the date, who received it, who sent it and the amount?

A Yes.

MS. HAMBRICK: The Government would move to admit and [248] publish Exhibit 6110?

MR. BRINDLEY: No objection.

THE COURT: It is received, and you may publish.

(Exhibit 6110 was received in evidence.)

MS. HAMBRICK: Thank you, Your Honor.

BY MS. HAMBRICK:

Q So what date, Ms. Thacker, was this sent on?

A 9/29/2016.

Q There is your sender information. The recipient was Shakeel Kahn?

A Yes.

Q How much was that for?

A $900.

Q Were there times when you are sending MoneyGram or Walmart to Walmart, and you had conversations with somebody in the office about where you were sending it or numbers they needed to pick it up?

A Yes.

Q Who would you have those conversations with?

A With Lyn.

Q To your knowledge, who was Lyn?

A Dr. Kahn's wife.

Q And were there times you were asked to send a MoneyGram or Walmart to Walmart in somebody else's name?

A Well, no – just that the Walmart to Walmart would not [249] allow them to receive any more, so I had to switch it from Walmart to Walmart to MoneyGram.

Q And were there times when you were having discussions about getting a prescription, but you were – you couldn't get your prescription, because you still owed Money?

A Yes.

Q And prior to today, did you have an opportunity to listen to and review some recorded phone calls?

A Yes.

Q And was one of those phone calls in regards to one of those times?

A Yes.

MS. HAMBRICK: Your Honor, previously admitted was Government's Exhibit 1017-A and B, and we would ask to now publish 1017-C?

THE COURT: Proceed.

BY MS. HAMBRICK:

Q So this is a call with Lyn Kahn?

A Yes.

(Audio was played, not reported.)

BY MS. HAMBRICK:

Q So prior to this, you had sent some Money, but still owed some Money for your prescription?

A Yes.

Q Why were you asking if he could just send the oxycodone [250] 30s?

A Because those were the ones that – I sold those. Those are the ones that everybody wants.

Q And was it your understanding, you could – if you had paid some Money, you could get some sort of prescription?

A Well, I had not tried that before, but I was hopeful.

Q Did that happen, or did you come up with some more Money?

A I didn't get the 30s sent, but he sent the other ones, the Dilaudid ones. I sold some of them and came up with the Money.

Q So I will show what has not yet been admitted as Government's Exhibit No. 6112. Do you recognize that?

A Yes.

Q What is that?

A It is a MoneyGram.

Q And you were the sender once again?

A Yes.

Q And you were sending it to who?

A To Shakeel Kahn.

Q Does this document accurately reflect the date and the sender and the receiver and the amount?

A Yes, it does.

MS. HAMBRICK: Your Honor, the Government would move to admit Exhibit 6112?

MR. BRINDLEY: No objection.

THE COURT: 6112 is received.

[251] (Exhibit 6112 was received in evidence.)

MS. HAMBRICK: May I publish, Your Honor?

THE COURT: You may publish.

BY MS. HAMBRICK:

Q Ms. Thacker, what date is this on?

A 10/8/2016.

Q And you are sending money to Shakeel Kahn?

A Yes.

Q And in what amount?

A $900.

Q I would like to show you an exhibit not yet been admitted, Exhibit 6113. You recognize that?

A Yes.

Q What is that?

A MoneyGram.

Q Does this document accurately reflect the information of the date it was sent and to and from who?

A Yes.

MS. SPRECHER: Your Honor, the Government would move to admit Exhibit 6113?

MR. BRINDLEY: No objection.

THE COURT: It is received.

(Exhibit 6113 was received in evidence.)

MS. HAMBRICK: May it be published, Your Honor?

THE COURT: You may publish.

[252] BY MS. HAMBRICK:

Q Okay. Exhibit 6113, that is another additional MoneyGram?

A Yes.

Q And what date was that sent on?

A 10/8/2016.

Q And to whom?

A Shakeel Kahn.

MS. HAMBRICK: And for how much? Can you move that down?

THE WITNESS: It was for $360.

BY MS. HAMBRICK:

Q You stated you received a Dilaudid prescription, correct?

A Yes.

Q So I will show what has been previously admitted as Government's Exhibit No. 4070-ST, page seven. So that shows a date, I believe, of October 8, 2016. Does that look correct?

A Yes.

Q Is this, like, an E-script? It was sent electronically to a pharmacy?

A Was it?

Q Well, do you know if you –

A I am really sorry, but I just remembered that I got the Dilaudid and not the oxys. I don't remember really what form the script came in or how I got them.

Q Okay. But this shows that your prescription for [253] hydromorphone and – do you know that to be Dilaudid?

A Yes.

Q The prescription was written on October 8, 2016, up in the right-hand corner, do you see that?

A Yes.

Q And then it was filled – and if you go down to the bottom – at the very bottom, Osco Pharmacy in Casper, Wyoming, does that look correct?

A Yes.

Q And so on October 8 when you are sending the MoneyGrams and this prescription is written and sent and filled, are you in Casper?

A Oh, no. They must have filled it for me, and then FedExed them.

Q Did that happen on occasion?

A Not very often.

Q But –

A I started coming up here, but, yes. It did happen here.

Q I am going to show what has been previously admitted as Government's Exhibit 4073-A.

MS. HAMBRICK: Can we go back to the last one, please, Lisa? I'm sorry.

BY MS. HAMBRICK:

Q If we find the prescription number of 2888346, if we go to the Exhibit 4073-A, you see that has the same number at the top

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. SHAKEEL KAHN, NABEEL AZIZ "SONNY" KHAN aka Nabeel Aziz "Sonny" Kahn, Defendants.	DOCKET NO. 17-CR-29-J Casper, Wyoming May 9, 2019 8:33 a.m. VOLUME IX of XX (Pages 1 to 229)

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE
and a jury of twelve and three alternates

* * *

[36] what we did for about an hour, filled out that paperwork, and then handed it back into the young lady at the front desk.

Q Did – at what point did you pay for the visit?

A At the end.

Q So you stated you – did you – after you turned the paperwork in, did you have to wait any longer to see –

A Yes.

Q Do you know how long you waited altogether?

A Over an hour.

Q So when you were called back in, did you go with your husband into the exam room?

A Yes, I did.

Q Can you tell us what happened after you got called back to the exam room?

A Lyn took his temperature, and I remembered it was Lyn, because I go by Lynn. She took his blood pressure, and she said that Dr. Kahn would be in in a few minutes.

Q So that happened actually back in the exam room?

A Yes.

Q Did you have to wait long in the exam room?

A Probably 10, 15 minutes.

Q And then Shakeel Kahn came?

A Yes, Dr. Kahn came in.

Q What happened after that?

A He asked Blake where his pain was at, and Blake said that [37] it was his back, and he had trouble sitting. I think even got up because he had been sitting for a while. It really hurts him to sit. He has got to move. He asked what kind of medication he was on. Blake was on Percocet. I think at that time it was

10/325. He asked him, "Are you sure that you don't need anything else?" And Blake said, "No. That's working. That's all I need." He didn't have him walk. He didn't touch his back. He never put a robe on, which I thought was very weird. I had never been in a doctor's office where they don't check a few things.

Q So there was no kind of hands-on physical exam?

A No.

Q When you had spoken – I want to back up just for a second. When you had spoken on the phone, did they say anything about bringing prior medical records?

A No.

Q Do you know if you took any with you that first visit?

A Did not.

Q Was there any discussion, other than what medication he was already taking about any prior history or exams, or anything for his back issues?

A I don't actually remember. I don't think there was much, if there was any.

Q Prior to seeing Shakeel Kahn, had your husband had any kind of X-rays or tests on his back?

* * *

[58] years ago.

Q If we go to page 18, this is a paper called, "Informed Consent and Physician Payment Agreement Opioid Use and Pain Management," do you remember this form?

A Yeah.

Q And those are your initials on it –

A Yes, they are.

Q – each line? Did Shakeel Kahn ever go over this information – this paperwork with you?

A I don't remember talking to him about it, no.

Q Did anyone else in the office go over any of this paperwork with you?

A No.

Q Do you remember how long you had to wait for your appointment in the waiting room?

A Probably a good hour or so.

Q What was the exam room like?

A It was a small office. There was one exam room, and it was lots of people.

Q And in the exam room, was there an exam table?

A Yes.

Q Do you recall whether or not there was any kind of hands-on physical exam?

A No.

Q I'm sorry that was my fault. That was a bad question. Was [59] there any kind of physical exam?

A They just took my vitals, and that's all I remember. I don't remember anything else.

Q Was there anything where he asked to see how you moved or how your back moved, or anything like that?

A I don't recall.

Q Did he discuss with you any prior X-rays or MRIs that you had had?

A He didn't discuss the actual MRIs. He just asked me what my history was.

Q So he didn't have any of them there that the two of you looked at together or anything?

A No.

Q Did he discuss with you getting any updated tests?

A Not at that time, I don't believe.

Q Did he discuss with you possibly other things, other than the pain pills to help you with your pain?

A Not that I remember.

Q Did he make any kind of referral to you to maybe go back and see a surgeon again, or anything like that?

A Not that I remember.

Q On that first visit, did he ask you to take a urine drug screen?

A Not on the first visit, I don't believe.

Q So what happened when that visit ended?

* * *

[110] kind of made up. I thought everything was fine, but it wasn't.

Q So at some point you became aware that Shakeel Kahn was moving to Wyoming?

A Yes.

Q How did you learn that?

A Probably through my brother somehow.

Q And so did you start having visits in Wyoming instead of Arizona?

A Yeah. I think I had been up here three, maybe four times. I would – his wife and daughter would pick me up at the airport. On occasion, even he would pick me up at the airport. He would – I thought he was doing me a big favor. He let me stay at his house. And in return, I would end up doing housework, cleaning, vacuuming, doing dishes. I even mowed his yard. Picked up dog manure. I remember those days.

Q And do you think you were still paying around $1,500 every visit?

A I think so. I'm not positive.

Q I will show you what has not been admitted as Exhibit 10016. We will look through all three of these. Now, we are going to look at 10017 and 10018.

Mr. Moody, does the information in the document look correct to you? I know they are really hard to read, but –

A Okay.

Q Do you think they accurately document your plane travel to [111] Wyoming?

A Probably, yeah. I would – yeah. Sea-Tac to Salt Lake City, and then to Casper.

MS. HAMBRICK: Your Honor, the Government would move to admit Exhibits 10016, 10017 and 10018.

MR. BRINDLEY: No objection, Your Honor.

THE COURT: They are received.

(Thereupon Government Exhibit Nos. 10016 through 10018 were received in evidence.)

BY MS. HAMBRICK:

Q We will go back to 10016. Mr. Moody, this appears to reflect that on October 14 of 2015, you flew

down here to Casper, and then left on October 16th. Is that what it says?

A The lowest one or the –

Q Yes.

A The lowest one – oh, now it is. Okay. That makes sense. October –

Q Does that look like one of your visits here?

A I believe so, yeah.

Q And you see where that is highlighted $675.70?

A Yes.

Q Does that seem right for the price you possibly paid for the ticket?

A I am not really sure, because my wife would take care of that for me. A lot of times, she would just tell me that I – [112] she got a really good deal on a ticket down here, but I don't remember it being that darn much, but if that is what it says.

Q Okay. Now, we'll go ahead and look at 10017. Does this appear to be another ticket for maybe just – November 19 of 2015?

A Okay.

Q Does that appear to be another trip you made down here?

A I believe so.

Q If we look at 10018, another one in April of 2016?

A Yeah, must be.

Q Was there any time you drove to Wyoming?

A No. No.

Q So when you came, you would fly?

A Yes.

Q Where did you state you would stay?

A With the doctor at his house.

Q Do you remember how that arrangement came about?

A Just out of convenience, I guess. I thought it was pretty nice of him to let me stay there. It was cheap and free.

Q Sure.

A They fed me dinners and –

Q Do you know how many times that happened?

A Gosh, three – four times, I believe. As many times as I came up here to see him, I came here.

Q Did you ever see any other patients at the house?

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. SHAKEEL KAHN, NABEEL AZIZ "SONNY" KHAN aka Nabeel Aziz "Sonny" Kahn, Defendants.	DOCKET NO. 17-CR-29-J Casper, Wyoming May 10, 2019 7:38 a.m. VOLUME X of XX (Pages 1 to 162)

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BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE
and a jury of twelve and three alternates

* * *

[85] opinion?

A No. It enhanced my opinion.

Q Can you tell us what you determined to be the cause of death of Jessica Burch?

A Yes. After reviewing all of the materials that I listed earlier, I ruled out traumatic causes of death. I ruled out natural causes of death based on her medical history and peri-mortem circumstances. And in light of the review of the postmortem toxicology findings, my conclusion was that Jessica Burch would not have died

but for oxycodone prescribed by Dr. Kahn on 3/16/2015. This was three days prior to her death. And these prescriptions for two different versions of oxycodone were filled the next day, so these were filled two days prior to her death.

Q Now, on what did you base that opinion?

A I based that opinion on the peri-mortem circumstances; that is, the timeline of what happened leading up to her death and correlating that information with her postmortem toxicology findings.

We know that she was on oxycodone regularly, so it makes sense that there would be oxycodone found postmortem. There is evidence in the interviews that Jessica Burch crushed and snorted her oxycodone. This is a very dangerous practice. And the reason is that when you crush up a pill that is pharmacologically designed to be absorbed orally through your

* * *

[100] frequent visits to the emergency department.

Q And when you encounter those patients in your work, what do you do to weed out the ones that are drug seeking and the ones that are legitimately needing pain relief?

A Somebody who is in legitimate pain and generally acute pain will respond well to non-opioid therapy. Generally, the drug seeking person will get mad at you if you don't prescribe the opioid, and they will leave the ER.

Q I believe you said the EKG on that visit was normal?

A Yes.

Q And then she presents to Dr. Kahn's office, I believe, sometime after that that you found significant?

A Right. So she presented on March 16, 2013, so this was three days prior to her death. Going backwards in Dr. Kahn's records, it says that, "She is being investigated for stomach cancer." And so I started looking backwards to the visit before that and the visit before that and the visit before that, which was basically over a three-year period. It said over and over again, copied and pasted from note to note, being investigated for stomach cancer.

Now, Dr. Kahn did not do anything himself to investigate this stomach cancer, nor did I see evidence anywhere in his record or otherwise that she was being investigated for stomach cancer; however, if he believed that she was being investigated for stomach cancer, and she truly [101] had it, she would have been dead perhaps by the end of three years or maybe very ill and under chemotherapy or something, because it doesn't take three years to find a cancer.

Q And on that visit, that is when those prescriptions we just talked about were written – well, two of those prescriptions were written to Jessica Burch by Shakeel Kahn?

A Both oxycodone prescriptions, so oxycodone 30 and oxycodone 15 for a total of 360 pills.

Q Going to the date of Jessica Burch's death, did you look at anything surrounding the death to come to your conclusion?

A Yes.

Q What did you look at?

A Well, I was looking for any kind of timeline as to what was going on prior to her being found unresponsive. And her significant other, Mr. Vargas, mentioned that they been together the night before, and that she had been acting high. Then he found her outside in the yard, and she was acting high and stumbling around. Then she was laying in the yard. He brought her into the living room and left her on the living room floor. He mentioned that at 7:30 in the morning, she was still breathing, but she was still in the same spot. So she was sleeping and – but she is still alive. And then her mother and sister were looking for her and came over to her house where they found her unresponsive and dead on the floor.

Q What did that indicate to you or were you able to rule out?

[102] A Well, we have pretty significant testimony in the interviews that she was acting intoxicated by opioids, acting high, and then being asleep and not moving. So there is not evidence of acting crazy. There is not evidence of seizing to death. There is not evidence that she was sick. There is not evidence that she

was injured; that this was a go-to-sleep and die kind of death. And Mr. Vargas himself noted green material on her nostrils himself, and he was thinking that was Xanax, which it probably was in part because we know from her postmortem toxicology that it was not just Xanax.

Q All right. And so is there a toxidrome that you identify that killed Jessica Burch?

A Yes, the opioid toxidrome.

Q You mentioned that she hadn't been sick before, but I want to talk about Exhibit 7013, which has not been received in evidence, which is the Mohave County Medical Examiner's Office Report. You are familiar with that one?

A Yes.

Q Looking at that first page, just for your reference, they indicate there was a history of multiple medical problems; one was stomach cancer, which we talked about; seizure disorder, which you ruled that out as part of the cause of death, right?

A Yes.

Q You talked about why you were able to rule that out?

A Yes.

[103] Q And fever is Item C on March 18 of 2015. What – why – what is it about the fever that you were able to include or exclude as part of the cause of death?

A The fever is pretty nonspecific. There are many, many individuals that complain of having a fever, but we call it subjective fever meaning that they feel hot. I don't have any kind of documentation of a true recorded temperature, and – but also individuals can get fevers from sore throats or urinary tract infections or other kinds of colds or something to that effect.

I would say that it is nonspecific, and there is not any other evidence to discuss that she was feeling very ill or in what way was she feeling ill, but, nevertheless, we would assume that there could have been some kind of infection. But developing a sepsis death is not a sudden death. It takes time.

Q And then finally, Item D, "Prescription medication misuse," is that one of the medical problems that you are taking into account in coming to your conclusion?

A Yes. Absolutely, we understand that she had addictions; that she was going biweekly to see Dr. Kahn to get these prescriptions; that she was snorting these oxycodones, and there is residue on her nose suggesting that. The events leading up to her death paint the picture of the opioid toxidrome and that she ultimately went to sleep, stopped [104] breathing and died.

Q Doctor, a person who abuses their opioid medications, will they build a tolerance to those opioid medications?

A Yes. And to make a point about tolerance, tolerance means that you have to use more of the drug than you used to get the same effect. I often heard arguments in drunk drivers before that are driving, but their alcohol level is above the legal limit to drive, and I will hear someone say, "Well, this guy, he is chronic alcoholic. He is tolerant to the effects of alcohol, so he probably wasn't drunk when he was driving." Well, that's ridiculous. You just drink more to get the effect that you used to get when you first started.

The same is true for opioid addicts. The first time they try any kind of opioid, they will get this high. But the problem is that that high goes away, but they always want to find it. It is called "Chasing the dragon." So they use more of their opioids. They use their opioids in different kinds of ways than they used to like crushing and snorting them in hopes of getting that high. It does not mean that they are immune to the effects of the opioids. It means that they must use more.

Q Did you review a toxicology report of Jessica Burch's blood?

A I did.

Q And I would like you to look at Exhibit 7015. Is this the [105] report that you reviewed?

A Yes.

Q This is a six-page report. What does this report contain?

A This report contains the positive findings that were found in Jessica Burch's postmortem blood.

MS. SPRECHER: And I would offer Exhibit 7015 at this time, Your Honor?

MR. THOMPSON: No objection, Your Honor.

THE COURT: 7015 is received.

(Exhibit 7015 was received in evidence.)

BY MS. SPRECHER:

Q I am going to look at the first page of this, Doctor. Before we get to the first page though, can you describe what it is the rest of this report contains?

A The most important part of this report is what is in the box. The rest of the report is – I am not saying it is unimportant. It is kind of extraneous information describing what the different drugs are and how they test for them. But the punchline part of the report is what is in that black box and that is what needs to be focused on. So don't get hung up on all of those details in the next several pages. All of these NMS lab reports look the same as this. On this report is naloxone.

Q You are looking at the box that says positive findings?

A Correct.

[106] Q And did you look at these positive findings and use them in your determination of what the cause of death of Jessica Burch was?

A Yes.

Q All right. Let's talk about those and go down the list. Naloxone, what is that?

A Naloxone is Narcan, that is the antidote for opioid toxicity. Clearly, they were trying to see if it would work. But like I said, it doesn't raise you from the dead. It didn't work, which is not surprising; however, Naloxone has no role in her death.

Q Okay. What about alprazolam?

A Alprazolam is the Xanax. And what is important is that Xanax being a benzodiazepine can work additively or synergistically with an opioid. In other words, it can potentiate the effects of the opioid. But as I said before, individuals can overdose on bottles of Xanax and get sleepy, but it doesn't cause significant respiratory depression in and of itself. So you have to have that opioid there for there to be a respiratory depression in the first place for Xanax to potentiate. So certainly Xanax may contribute, but it is not the "but for" cause of death.

Q What is Delta-9 THC?

A Delta-9 THC and Delta-9 carboxy THC are the metabolites of marijuana. They are the psychoactive metabolites of marijuana.

[107] And even though I am not a fan of marijuana in any form for multiple reasons, this is not going to cause someone to stop breathing and die. So it is not a

contributor to her death, and it is not a part of the "but for" of her death.

Q What about the Delta-9 Carboxy THC?

A Same thing. They are both the psychoactive components of the marijuana.

Q And then we have oxycodone and oxymorphone. What are those?

A Oxycodone is the oxycodone that would be from Dr. Kahn's oxycodone prescriptions. Now oxymorphone is another kind of opioid that can be prescribed. It is marketed under the trade name Opana. Oxymorphone could come from a potential prescription oxymorphone, but oxymorphone is actually a metabolite of oxycodone. So in just about every single oxycodone death that I see, I also see oxymorphone. There is no prescription for oxymorphone in this case. So this oxymorphone is purely a metabolite of oxycodone. So oxymorphone comes from oxycodone, but not the other way around.

Q What does it mean to be a metabolite?

A Your body changes that compound into something else. Your body changes oxycodone into oxymorphone in part.

Q And carisoprodol?

A Carisoprodol is Soma. Soma is a muscle relaxant. The combination of prescribing an opioid like oxycodone alone with [108] Xanax, a benzodiazepine and carisoprodol is a very dangerous practice. This is

known as the "Holy trinity," because they do potentiate their effects. But carisoprodol and its metabolite meprobamate, don't cause significant respiratory depression in and of themselves, so you have to have that opioid there to have that respiratory depressant effect.

So in this laundry list of medications that are found postmortem, the one that is most important and significant that causes respiratory depression and death is the oxycodone. And even though the others might potentiate the effects of it, the effects of oxycodone that is, she would not have died but for the presence of that oxycodone.

Q Dr. Raven's report mentions that the oxycodone level was "530 nanograms per milliter," and indicates that it is not necessarily a fatal dose. Are you familiar with what is a fatal dose, or is there such a thing?

A Well, again, there is a difference between a fatal dose and a fatal level. And there is not a defined lethal level postmortem. Now as far as a "dose," if I was to give you each a dose of oxycodone, you would experience different effects, because you are all different people. So I don't know what a dose for you would be versus a dose for you, and so there is a fatal dose, but that is not determined by the level. There is no way that you can look at that level and extrapolate backwards in some sort of voodoo way what the dose was that was [109] administered. That is junk science. And as I described before, this particular blood was sent,

and it was on femoral blood. That is the vein that is in your groin.

If the medical examiner had chosen to send heart blood, you would see a whole host of different numbers. So that is the fallacy in relying in any way on the number itself. I would like to see the number because this is not false positive results. Everything that is listed here is here for sure and measurable, and you have a level, but don't hang your hat on the number.

Q So, Doctor, finally, based on your education, training and experience in the field of medical toxicology and emergency medicine, have you concluded what caused the death of Jessica Burch?

A Yes. Jessica Burch would not have died but for the oxycodone that was prescribed by Dr. Kahn and filled two days prior to her death.

MS. SPRECHER: Thank you. I have no further questions.

THE COURT: Mr. Thompson?

CROSS-EXAMINATION

BY MR. THOMPSON:

Q Good morning, Doctor.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. SHAKEEL KAHN, NABEEL AZIZ "SONNY" KHAN aka Nabeel Aziz "Sonny" Kahn, Defendants.	DOCKET NO. 17-CR-29-J Casper, Wyoming May 13, 2019 9:37 a.m. VOLUME XI of XX (Pages 1 to 204)

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE
and a jury of twelve and three alternates

* * *

[39] were talking about with Dustin and you and Shakeel Kahn?

A Yeah.

Q Okay. Now did you ever bring other people than Dustin to see Shakeel Kahn?

A Yes.

Q When did that start happening?

A About three months – the third month I was going there.

Q So about June or July?

A Yeah.

Q Okay. And did Shakeel Kahn know you were bringing people to see him?

A Yeah.

Q How did he know?

A Because he said, you know, "Bring me more patients."

Q When did he say that?

A Huh?

Q When did he say that?

A That was about the third – fourth visit.

Q All right.

A He said, "Bring me more people, and just make sure that they have something wrong with them," so that he has something – they are getting pills before like at the IHS, you know – getting pills from another doctor.

Q What was your understanding of why you had to bring people that were getting pills before they saw Shakeel Kahn?

[40] A My understanding of that?

Q Yes. Why did you have to?

A It would help him make more money and help me make more money.

Q Were you going to get any benefit from bringing people? Did you get anything in return?

A I would – like, I pay for their whole visit. I would bring them, and, like, I would pay for their visit. He would write the prescriptions, and then I would get a large percent of that.

Q Percentage of what?

A The medications.

Q Did Shakeel Kahn know that?

A Yes.

Q How did he know?

A Because I told him.

Q What did you tell him?

A I said, well – and then like after – we – I would bring him in, and he wrote them – he goes, "So what are you – "

Q She has to take everything down. Okay.

A I talk too fast. So after like, he was like, "So what are you getting out of this?" And I was like, "I am only cutting them 20 – 20 oxy 15s, and 20 30s. The rest is mine."

Q So they – what did that mean?

A That means that I gypped a lot of people. I would take, [41] like, 90 or 100 of their pills, and then I would give them, you know, 20 of the 15s and 20 of the 30s.

Q Okay.

A Or 30. It – depending on who they were.

Q So when in this time frame – from the time that you saw him in April of 2016 to November of 2016, did you have that conversation with Shakeel Kahn?

A It was early on, third or fourth visit.

Q Okay.

A That I was in there.

Q Do you remember the first person that you brought with you to see Shakeel Kahn?

A I think it was my brother Shawn.

Q Okay. And how did that visit go?

A Pretty –

Q Sames as always?

A Yeah.

Q All right. Did Shawn fill out paperwork?

A Yes.

Q Did you help him?

A Yes.

Q And did you pay for his visit?

A Yes.

Q Do you remember how much that one was?

A At that time, it was just still $500, because every initial

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. SHAKEEL KAHN, NABEEL AZIZ "SONNY" KHAN aka Nabeel Aziz "Sonny" Kahn, Defendants.	DOCKET NO. 17-CR-29-J Casper, Wyoming May 17, 2019 8:35 a.m. VOLUME XV of XX (Pages 1 to 300)

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE
and a jury of twelve and three alternates

* * *

[52] say, then I imagine they could sue you.

Q Slow down a little bit.

A Sorry.

Q So if you received information that suggested someone might be misusing their medication, did you ever automatically dismiss them without that proof?

A No. I would investigate and see if I could confirm that information.

Q And did you believe that not dismissing them was improper?

A No, not dismissing them is not improper. You still owe them a duty of care. If you don't have definitive proof, then you really have no basis or good cause to dismiss them.

Q Did you believe that it was your duty as a doctor to police your patients or try to catch them lying to you?

A Yes, I did try.

Q And what sort of method did you do to try to do that?

A Well, one I would ask them if they were selling their pills straight up. And if they denied that, then I would – at various times I would try a little more stealth if you will, I will say, "Hey, how much do those pills cost?" Or something along those lines to see if they could give me an answer.

Q What was your goal in doing that?

A To see if they were really doing it.

Q Were there other tools you used to try to make a patient understand that they needed to follow the rules regarding their [53] medication?

A Well, we had pain contracts. We administered urine drug screens. We would check the PDMP. We would get past medical records. We tried to go every

route we could to get a full picture of the patient and what they were doing.

Q Were some patients deemed a greater risk than others for abusing their medications?

A Yes.

Q How did you measure that risk?

A We used to what is called the COMM score, which is the Continuing Opioid Misuse Measure. And the other one is the SOAP score which stands for Screener for Opioid – I think – Prescribing Pattern is what it stands for. Those two forms give you – they ask a number of questions. The patient answers. You assume they are answering truthfully, but if they are – if they give you a high score on either of them, then you deem that patient to be a higher risk and require that – that patient requires greater monitoring.

Q Does the fact that a patient is deemed to be a higher risk mean that you can't prescribe them prescription opioids?

A No.

Q What does it mean?

A It means simply that you have to be more careful when you are prescribing to them.

Q And did you do that?

[54] A I did.

Q You mentioned pain management contracts. What type of thing does that deal with?

A It gives you what we call informed consent. It sets out my expectation of a patient in terms of their use of opioids, and it is sets out expectations that the patient will or what the patient can expect to receive in return if they agree with the contract.

Q What does informed consent mean?

A Simply to explain the risk and benefits of any treatment to any patient.

Q Were there contracts or forms that you had a patient sign on every office visit?

A Yes.

Q What was the purpose of that?

A It was to make sure they understood their expectation from us – my perspective, and that they were certifying that they were in fact not doing diversion, sales, misuse – anything like along those lines.

Q Why did you have them sign these contracts at almost every visit?

A Because I wanted to make sure it was recorded that they were stating that under oath effectively they were not doing these things.

Q Why did you want to make sure of that?

[55] A Because I felt that if they were being truthful, they would answer me. If they were being

untruthful they might have reservations about wanting to put their signature on a document declaring they are perjuring themselves.

Q Was the purpose of these particular contracts to protect the patient or to protect you?

A Both.

Q How?

A Well, it protects me because I have asked those questions that were printed from a legal perspective. From the patient's perspective, they are certifying they're here for a legitimate pain purpose. They are not in need of this rehabilitation. They are not addicts. They are not selling their drugs. They are not diverting their drugs, so it protects both of us.

Q So after you informed patients of the risks and ensured that they signed these various contracts, did you believe that you were following all of procedures that you were required to follow under the law?

A Yes.

Q And did you intend to act within the boundaries of the law governing your profession when you used these contracts?

A At all times.

Q Did you believe that your general prescribing practices –

MS. SPRECHER: Objection, Your Honor; leading.

MR. THOMPSON: It is a yes-or-no question.

[56] THE COURT: I don't know if you finished the question.

MR. THOMPSON: I have not.

THE COURT: Finish the question.

BY MR. THOMPSON:

Q Did you believe that your general prescribing practices were lawful and proper for a physician?

A Yes.

Q Did you ever receive any information from a medical regulatory body while you were practicing in Arizona that informed your own prescribing practices in pain contracts?

A Yes.

Q What was that body?

A The Arizona Medical Board.

Q And how did you receive that type of information?

A By a surprise visit by two investigators to my practice in February of 2012.

Q And why were those investigators there?

A They had received a complaint from a former patient of mine who had been discharged for doctor shopping stating that I had addicted her son and daughter-in-law to narcotics, and that I have been overprescribing to other patients in my office.

Q What was that first patient's name?

A Diana Carrol.

Q And had she been a patient of yours?

[57] A She had.

Q Was her son and daughter-in-law patients?

A Yes, they had been.

Q Why specifically was Ms. Carrol discharged from your practice?

A Ms. Carrol was seeing two doctors, myself and another doctor in Kingman, Arizona. She was obtaining benzodiazepines in Kingman and obtaining narcotics from my office, which was in clear violation of the contract she had signed with my office.

Q Why does the contract prevent patients from seeing multiple doctors?

A Because if you are seeing multiple doctors especially when you are receiving controlled substances, it can be problematic. I don't know what she is getting somewhere else, and that doctor doesn't know what she is getting from my side of things. This could lead to – well, to overdoses and to problems if we don't

coordinate or have one doctor prescribing controlled substances to one patient.

Q And if you find that a patient is seeing another doctor in violation of their agreement, do you automatically dismiss them from your practice?

A No. You try to talk to them first and try to understand why they are doing it. Sometimes it is an inadvertence that they don't realize they can't do that, but you always give them a chance.

[58] Q And did you give Ms. Carrol a chance?

A I did.

Q And what happened?

A She didn't want to stop.

Q Is it uncommon for a disgruntled patient to file a complaint to the medical board about their doctor?

A Not at all.

Q Did the fact that you received this complaint mean to you that you had done something wrong in treating this patient?

A No.

Q What happened after those investigators came to your office in response to this claim?

A They copied the three charts in question Diana Carrol, Cody Carrol and Sheri Carrol. They removed

an 15 additional charts from my office, copied those, and then took them off to be reviewed.

Q Is it your understanding that that review was completed?

A At some point, yes.

Q And what was the ultimate result after these charts were reviewed?

A They found no –

MS. SPRECHER: Objection, Your Honor; hearsay.

MR. THOMPSON: Not for the truth, Your Honor, just for the effect on the doctor.

THE COURT: Sustained. I'm sorry. Let me instruct [59] the jury.

MR. THOMPSON: Please.

THE COURT: The answer you are going to receive at this point is hearsay, but it is not being received for the truth in that the original documents are not before the Court at this point, nor anybody who can lay the foundation for those documents or the investigation that went on, but simply as offered for the impression it created on the doctor.

BY MR. THOMPSON:

Q What were you informed about the results of that investigation?

A That I had complied with the acceptable guidelines by the board.

Q Did that information impact your views of your prescribing practices?

A Yes.

Q How?

A It validated them.

Q Did you receive any other complaints from the Arizona Medical Board in 2012?

A I did.

Q How many?

A A total of three that year.

Q What was the next complaint?

A This was May of 2012, I received a notice of complaint by a [60] pharmacy in Bullhead City.

Q And what was the nature of the complaint filed by the pharmacist?

A That complained that I was overprescribing phentermine which was a weight loss drug and that I had been improperly prescribing opioids to two patients who had gone to that particular pharmacy.

Q Did that pharmacist contact you about his concerns before filing the complaint?

A No, he did not.

Q Did you ever have an opportunity to explain the reasons for those prescriptions to that pharmacist?

A I did not.

Q Did the medical board inform you that this complaint had been filed?

A It did.

Q And what did you do in response?

A I filed a response denying the allegations, and then it took its normal process.

Q Did you lay out the reasons for the prescriptions in your response to the medical board?

A I did.

Q And what happened after that?

A While that was pending, I received another complaint from the medical board in approximately June or July of 2012.

[61] Q What was the nature of that complaint?

A I had a patient, Frank Clark, who had been discharged from the practice, and he made complaint to the medical board that I addicted him to Percocet.

Q Why was Frank Clark discharged?

A Mr. Clark – there were rumors throughout his tenure as a patient that he had been selling his pills at the casino, which he always denied. Subsequently, I had reached a certain level of prescribing Percocet to

him that I was no longer comfortable beyond even though he wanted more. I was not willing to do that. So we ended up having a disagreement. He showed up at my office one day unannounced. He wanted to see me. I wasn't willing to do that, and there – ultimately what happened was Mr. Clark was trespassed off the property, and he threatened to bash in my face, and the police were called. He ended up serving three days in jail, and then subsequent to that, he filed a complaint with the Arizona Medical Board.

Q Why were you unwilling to prescribe the medication that Mr. Clark was asking for?

A Because I was not comfortable doing so, so I did not believe it was safe and effective for him any longer.

Q And did this complaint to the medical board come after that discharge occurred?

A It did.

Q Did you respond to the medical board about this complaint?

[62] A I did.

Q Did you explain to them the reasons for discharging Mr. Clark?

A I did.

Q What happened with these two complaints?

A They ended up going to a full hearing in 2014 before an Administrative Law Judge.

Q Did you attend that hearing?

A I did for six days.

Q And did you hire legal representation to go with you?

A I did.

Q Was that an expensive process?

A Very.

Q During this hearing, did you defend your prescribing practices?

A Yes.

Q What was the ultimate result from the Administrative Law Judge?

A I was vindicated.

Q What do you mean you were vindicated?

A The Administrative Law Judge found no violation of my – the standard of practice on behalf of prescribing.

Q How did that impact your view of your prescribing practices?

A It confirmed what I was doing was appropriate and correct.

[63] Q Did the Administrative Law Judge or the medical board advise you to do anything differently going forward after that hearing?

A Yes. The only finding they had found was that I had failed to document – I remember – I want to make that very clear – document that I had described the risk and benefits of opioid use in my charts.

Q Were you describing the risks and benefits of opioid use to your patients?

A I was verbally.

Q Why were you not properly documenting that fact?

A Honestly, I – I didn't think it was necessary.

Q After receiving this advice following the hearing to document these issues, did you apply that to your practice?

A I did. I changed my paperwork to reflect that that it had been done and acknowledged by the patient.

Q You mentioned another complaint in 2012; is that right?

A Correct.

Q What was that complaint?

A In December of 2012, a pharmacist in Phoenix complained that I was overprescribing to a patient of mine.

Q Was that involving opioid medication?

A It was.

Q And did that pharmacist contact you about your prescribing reasons?

[64] A No.

Q Did you ever have an opportunity to explain to the pharmacist why you had made that prescription?

A No.

Q Did you respond to that complaint when you received it?

A I did. I set out a long letter explaining my philosophy and the basis for – scientific basis for my prescribing and I forwarded it to the board along with the patient chart.

Q Did this complaint proceed to hearing as well?

A No. In April of 2013, I believe, I received a letter from the Arizona Medical Board stating that the complaint had been dismissed; that they had found no violation of the Medical Practices Acts.

Q So after going through all of these complaints and your responses, did you believe that there was anything improper about your prescriptions for opioid medication?

A No.

Q Why not?

A Because I now had been found validated four times in a row by the Arizona Medical Board.

Q Did going through that process of these four complaints and the responses and the hearings give you any opinion about the Arizona Medical Board that impacted the way you dealt with them in the future?

A Yes, it did.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. SHAKEEL KAHN, NABEEL AZIZ "SONNY" KHAN aka Nabeel Aziz "Sonny" Kahn, Defendants.	DOCKET NO. 17-CR-29-J Casper, Wyoming May 20, 2019 9:09 a.m. VOLUME XVI of XX (Pages 1 to 278)

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE
and a jury of twelve and three alternates

* * *

[60] Q And you were granted an extension?

A I was.

Q And did you use that time for that extension to go through those medical records with Lyn Kahn?

A I did.

Q And that was the time that you used to falsify information in those medical records?

A I didn't falsify the records. I updated them.

Q You just put things in there that didn't appear in your original medical records, right?

A I corrected errors, and I added things that I know I had done.

Q Some of those things that you remembered doing was urine screens, right?

A Yes.

Q And so in 2012, you would put that you had done a urine screen on, for example, Chris Muehlhausen, right?

A If I remembered having done it, yes.

Q And your testimony was that you had remembered doing those things, or you wouldn't have put them in the patient's chart, right?

A I did them at some point. I just couldn't remember when.

Q And when you were updating these medical records in 2015, you were updating medical records from 2012, right?

A Going back.

[61] Q And in 2013, you updated them?

A Yes.

Q And you updated the 2014 ones?

A I did.

Q And you did it all from memory, right, because it didn't appear in your charts, did they?

A It was oversight in the charting, yes.

Q So when you put in those urine drug screens that you say you remembered, you also indicated that you remembered the results of urine drug screens, didn't you?

A Yes.

Q So you remembered three years previously what the results were of a urine drug screen that you gave?

A I knew that if it had been an abnormal result, I would have had some indication in my chart of why it was. If I didn't, it meant it was normal.

Q But that is not what you put in your medical records, right? You actually put not that it was normal, you put what the results were, didn't you?

A Which would have been normal – negative for whatever wasn't there or was there.

Q Okay. I want you to take a look at Exhibit 3019, which is one of the entries of Christopher Muehlhausen's chart for March 13, 2012. Now you recognize page 1, right?

A Yes.

[62] Q And you also recognize page 2?

A Yes.

Q As I understand it, page 2 was the chart that – the notes that you had in the chart before the Arizona Medical Board asked to receive his chart, right?

A Correct.

Q And two, was the doctored medical chart that you and Lyn did, right?

A Correct.

Q So on page 2 of the original one, there is no mention of a urine drug screen, is there? I will zoom in, so you can see.

A No. I agree.

Q Okay. And so that would have appeared here where this yellow highlight is?

A Potentially, yes.

Q And probably you would have noted something down here where this blank yellow highlight is?

A Yes.

Q And you updated this page 1 in 2015, correct?

A Yes.

Q Sometime in October; is that right?

A Perhaps. I don't recall the date.

Q Okay. And you indicated that there was a urine drug screen done?

A Correct.

[63] Q Which indicated it was positive for opioids?

A Correct.

Q And negative for benzodiazepine, cocaine, methamphetamine and THC?

A Correct.

Q So are you telling us that you recalled specifically giving this urine drug screen on 3/13 of 2012, when you were making this chart up in 2015?

A Not on 3/13, but I know I had done one for him. I remembered the results.

Q So you just chose to put it in the 3/13 place?

A Yes.

Q That is not accurate, is it?

A No, I guess not.

Q But you knew you had to put it in there so that your records complied with what the board wanted, right?

A I think it would have been false if I hadn't stated I had done it when I had done it.

Q But you didn't know when you did it?

A I did not know when I had done it.

Q So would it have been more accurate to say, "I know I did a urine drug screen, I just – I don't recall the date"?

A You are right. I should have probably said that.

Q That would be more transparent than putting something false on the date of 3/13 of 2012, right?

[64] A I can't argue with you on that.

Q You did that on a lot of occasions in Chris Muehlhausen's chart, didn't you?

A I believe I did, yes.

Q And you did it in Crystal Dulin's chart, didn't you?

A I think so. I am not exactly sure.

Q And you did it in Anthony Vargas' file?

A Yes.

Q All right. You testified you had thousands of patients or visits that occurred during the time that you were practicing in Arizona, right?

A Correct.

Q And you are saying that you independently recall giving urine drug screens to those individuals?

A Certain patients, I recall, yes.

Q But you don't recall Jessica Burch, right?

A If I gave her a urine drug screen or not?

Q I believe you testified that you didn't really specifically recall Jessica Burch.

MR. THOMPSON: Objection; misstates the testimony, Your Honor.

MS. SPRECHER: Well, let me ask.

THE COURT: The jury will have to recall.

BY MS. SPRECHER:

Q When you were testifying about Jessica Burch, you indicated [65] that you didn't have any recollection about her specific visits, right?

A Certain visits, yes.

Q Okay.

A I recall – I recall her.

Q You just don't recall those visits?

A I don't recall her visits exactly, no.

Q During the course of your treatment of these individuals, were you ever concerned about your patients' financial well-being?

A Their financial well-being.

Q Yes.

A I don't remember giving it much thought. They said they were employed. I don't –

Q They were what?

A Employed.

Q All right. But not all of those patients were employed, were they?

A As far as I knew, they were.

Q Did you read their paperwork?

A I did.

Q Okay. You knew that Shawnna Thacker was not employed, right?

A I believe she was on disability or something, I – social assistance.

[66] Q So that is not employment. Would you agree with that?

A Yes.

Q You knew that Jessica Burch wasn't employed?

A I don't remember what Jessica Burch wrote.

Q All right. Give me one second. I will find it for you.

Let's just look at some of the patients that you treated over the course of your practice. I will show you first Exhibit 3000. This is page 2 of Deni Antelope's paperwork. Are you familiar with that?

A Yes.

Q This is an intake paperwork from 4/4/2016, right?

A Yes.

Q And this – if you look at the very bottom of page 1, this is your writing here, isn't it?

A Yes, it is.

Q You say that she is stay-at-home mom?

A Yes.

Q So that would indicate technically she is unemployed, not earning an income, right?

A She had a husband. I know that.

Q Right. And she also didn't have insurance, did she?

A She did not have insurance, no, or she didn't wish to state it. I don't recall which it was.

Q You didn't take insurance, so it didn't matter to you, right?

[67] A No. It did not.

Q But part of a patient's financial well-being would be being able to pay for office visits and medications with insurance, wouldn't you agree?

A I imagine so.

Q Okay. There were several of your patients that didn't have insurance, right?

A I believe so.

Q Okay. Let's look at Jessica Burch's paperwork, Exhibit 3003, page 5. It says her first was 3/20/2012. Do you recognize this paperwork?

A Yes.

Q And she says she is 21 years old with no occupation.

A She didn't fill it out, yes.

Q She didn't not fill it out. She put a dash there, right?

A Which I don't know whether she didn't have a job or didn't want to state it.

Q Okay.

A But she had insurance.

Q She did have insurance?

A State insurance, Medicaid Access.

Q Okay. So that means they are on low income, right?

A Yes. I didn't take Access though.

Q You didn't take any insurance, right?

A No.

[68] Q Why didn't you take any insurance?

A I got off information.

Q Because it was a hassle?

A Obama Care was a hassle, yes.

Q Isn't it true there were some insurance companies that wouldn't contract with you, right?

A I had a contract with most, except perhaps Blue Cross/Blue Shield.

Q They wouldn't contract with you, would they?

A No. I was on contract with them, and they decided to discharge – or to let me go.

Q Do you recall why they wanted to let you go?

A I believe it was over the – to do with the reprimand from the Arizona Medical Board, if memory serves me correctly. I appealed, but I never got a chance to finish that appeal with them.

Q They cited that there were three licensing board issues that they had issue with, correct?

A It could be. I – it has been a very long time. You would have to refresh my memory.

Q I will show you Exhibit 10035. This is page 54. It is dated April 7 of 2011.

A So this would have had to follow the 2009 issue.

Q Yes. They tell you – well, I will let you read it for yourself.

[69] A Yes. And I had to wait three years before reapplying is what they said, yes.

Q So in 2011 they told you that because of the three licensing board issues and the expulsion from the University of Toronto, that they would not contract with you?

A Correct. I had been contracted with them before, anyway but – it simply –

Q You asked to contract with them, and they said no?

A It simply meant that I was no longer in network with them. I was an out-of-network provider then by their definition.

Q Let's see what Dawn Cabana said about her employment, Exhibit 3004. Dawn Cabana came to see you February 29 of 2016. If you look down at the bottom of that, she says stay-at-home mom, right?

A Yes.

Q Dawn Cabana appears to not have any insurance either, does she?

A She didn't put any down. I don't know that she didn't have any. She might have in Massachusetts.

Q Corissa Dickinson was another customer of yours, correct?

A Patient of mine.

Q I want to show you Exhibit 3006. Corissa Dickinson came to see you June 27th of 2016. If you look down at the bottom of that, you note that she is a homemaker as well, right?

A She was married or her husband Brian Hatcher worked.

[70] Q And even though he worked, her primary insurance was Medicaid, right?

A Yes, because, obviously, that weren't legally married so –

Q You knew that?

A Yes, because I had Mr. Hatcher as a patient as well.

Q Which means he is low income, right?

A Yes.

Q She is on Medicaid?

A Yes.

Q You knew that Stacy and David Drndarski did not have insurance, right?

A They had state insurance, I believe.

Q I will show you Exhibit 3007, page 1. This is David Drndarski's initial visit on January 30 of 2012. And insurance he just says, "It's me."

A Yes, but he does indicate he is working.

Q And Stacy Drndarski doesn't indicate she has any insurance in Exhibit 3008, does she?

A No. They did not state any insurance because I wasn't taking insurance in any event so –

Q And she was unemployed?

A Married to David, who worked.

Q Debra Elk Boy came to see you on 4/1 of '16, this is Exhibit 3010, page 1.

A Uh-huh.

[71] Q Debra indicated to you, she was unemployed, right?

A Yes. That she was a CNA on something –

Q And Debra Elk Boy on page 2 indicated she did not have insurance?

A That's what she put, "not applicable." Since we didn't take insurance, it wouldn't have mattered anyway.

Q Denissa Elk Boy was her daughter, right?

A I believe so.

Q And she came to see you June 6 – June 10 of 2016, looking at Exhibit 3011.

A Correct.

Q And she also was unemployed, right?

A Yes, that is what she wrote, or that is what she told me, I should say.

Q Lauren Klokis was a patient of yours in Arizona, wasn't she?

A No.

Q She was in Wyoming. My mistake. She has different types of paperwork. Looking at Exhibit 3016, page 1, it indicates that she came to see you on 11/24 of 2015?

A Correct.

Q And then no occupation is listed, right?

A No. She was – Darren Ryan was her significant other who worked.

Q But they didn't have insurance either, did they?

[72] A I don't remember if they did or didn't. They didn't state any insurance. That's all I know.

Q Charles Moody was also a client of yours. And looking at Exhibit 3017, page 1, this is his first visit April 4 of 2012. He tells you that he is on disability and retired, right?

A Correct.

Q And no insurance; takes care of himself?

A If he is 65 and older, he probably had Medicare. I don't remember if he did or didn't.

Q Fixed income on Medicare?

A He had tribal insurance as well, as I recall.

Q Okay. He just didn't mention it?

A No. He didn't mention it. No.

Q And Randy Moody was also a patient of yours looking at Exhibit 3018. His first visit 11/5 of 2012, on page 1?

A Correct.

Q And indicated that he was permanently disabled, correct?

A Correct.

Q He was on Medicare?

A Yes, tribal assistance and something else.

Q Jessica Rodriguez was also a person that came to see you for prescriptions?

A For about a year, I believe.

Q All right. And she indicated in Exhibit 3023 that she was a cashier at Love's at age 21, right?

[73] A Correct.

Q With no insurance?

A She didn't state any insurance, no. She may have had insurance. I don't know.

Q Shawnna Thacker, Exhibit 3076, her first – well, the first visit in November 2012 within the range of the dates that are charged, she indicated that she is a student at Ashford University, right?

A Um – I don't know if that is employer or school, but Ashford University online.

Q With no insurance?

A She did not state insurance, no, but I know she had been on Medicaid before.

Q Again, you would agree that is for people with low income?

A Yes.

Q Okay.

A State assistance.

Q Julienne Todd was also an individual that came to you?

A Yes.

Q She was disabled, right?

A I believe so.

Q I will show you Exhibit 3027. This is her intake paperwork for 4/1 of 2016. She indicates that she is disabled?

A Yes.

Q And indicates no insurance?

[74] A No. She didn't fill any insurance out.

Q Jacqueline Marr was also a person that came to see you for prescriptions?

A She did.

Q Looking at Exhibit 3035, her first visit 9/30 of 2013, at 20 years old, she is in school, right?

A Yes.

Q And indicates she has no insurance?

A Yes, or she didn't state it if she had it?

Q You would agree with me that the fees that you originally charged for your prescriptions were about $300, right?

A I charged for visits, not for prescriptions.

Q Well, isn't it true that people didn't even have a visit and still had to pay to get their prescription?

A I don't recall that in Arizona. In Wyoming, perhaps. But they were – they had access to me at all times.

Q There weren't times when you told individuals to go pick up prescriptions from Stacy and David Drndarski in the parking lot of your medical building?

A I told, I believe, Chris Muehlhausen one time when I was out of town.

Q And there were times that you had Stacy and David go pick up prescriptions from Nabeel, right?

A Yes. But I already had existing charts on them. They were patients of mine. I knew them for a long time.

[75] Q So when you said that you didn't charge people if they didn't have visits, that wasn't true?

A No. I am saying that I didn't charge them for prescriptions. I charged them for visits.

Q But if they didn't have a visit, and they got a prescription, they're paying for the prescription?

A They are paying for services. That is what they are paying for.

Q Are they paying for a visit, or are they paying for services? Which one is it?

A They are paying – a visit is service, medical service. That is what you are paying for.

Q And even though they don't see you?

A If I have seen them already once in a month, I don't have to see them every single time. I didn't – that wasn't a practice of mine.

Q To see them every single time?

A Not every single time. There were times when I wasn't available.

Q Yet every single time in every single chart you say, "Patient appears in office for visit," don't you?

A Yes, and that was a problem with copying and pasting the note over.

Q So every single time you said that, it wasn't true, every single time, was it?

[76] A It was – yes. It was not true that I had seen them. That is absolutely true.

Q And every time you copied and pasted it into their file, you knew it wasn't true?

A I didn't know it was true – because it was just being copied by the computer. It wasn't an intentional something I was doing.

Q But you had to go into the patient charts and update those notes, didn't you?

A I would have updated only the part of the assessment form, if I had it.

Q Only the assessment form?

A I believe. I don't – I wouldn't have changed a whole lot in the note, since it was continuous from one to the other.

Q You have to say in the beginning that the last time they came to visit you was the month before, right?

A The computer would already have that – all that was pre-printed on a template. It was sitting in there already.

Q So that little blurb – that first blurb that says, "The patient's last visit was the month before," you didn't do that?

A It's – it is already there. Everything is set out just the way you see it.

Q And you just left it?

A I should have edited it, yes. That was sloppiness on my part.

[77] Q So you would agree that if any of these individuals wanted to go see another medical practitioner, that practitioner would be relying on charts that contained lies?

A Sorry. Say that again.

Q If these patients wanted to go to another practitioner and they took your records that you kept to the other practitioner, he would be treating them based on lies, right?

A No, because it is accurate what was being prescribed to them.

Q But part of treatment, isn't just prescribing medication, is it?

A You have to distinguish between prescribing practices and recordkeeping practices. My recordkeeping practices may be terrible. I don't argue with that. My prescribing practices were legitimate and correct.

Q But in order to legitimize the prescription, you have to have records that support the necessity of the prescription, right?

A No. I treat patients for their problems. Record-keeping is a legal matter.

Q It is also part of the policies that you say that you ascribe to, correct?

A I don't believe I said anything about record-keeping in there. I said about treating their pain.

Q You indicate that you – looking at Exhibit 7024, you filed

* * *

[132] A At the visit, but on the phone whenever I talked to them.

Q Okay.

A You are making it sound like they walk in the office and nothing is said to them, you just take their – hand them a script and take money. That is what you are implying. I disagree with that vehemently.

Q We heard that testimony, didn't we?

A We also heard from a bunch of liars.

Q So I will move on from the form, because I can't tell if you think it is important or not, but you think it is important to be in the file, right?

A Yes.

Q And, in fact, you made up forms to put in files that the Arizona Medical Board was reviewing, right?

A For Anthony Vargas, yes.

Q And Christopher Muehlhausen, yes?

A I may have. I don't recall specifically.

Q And Crystal Dulin, yes?

A Forms for her, I don't remember if I did or didn't.

Q Okay. And with Anthony Vargas, you made fake forms every time that he was in prison, right? Every time that you said he had a visit, but he was in prison?

A Yes, that's true.

Q So that happened twice a month from June 21st of 2014, to November 11 of 2014, didn't it?

[133] A Correct.

Q And you papered your file making it look like he was there, right?

A I did.

Q And you made it look like he needed the prescriptions, right?

A No. He needed the prescriptions.

Q Well, at least your chart said he did, right?

A No. I know he did.

Q Because you went over and visited him at the jail?

A No. I did not visit him in the jail.

Q While you didn't visit him in the jail, your chart says every visit that he appeared in your office, didn't it?

A It did. The same cut and paste went, yes.

Q All right. But what you also made sure to record was that every visit he paid for that visit, right?

A The payment ticket records that the money was coming on his behalf, yes.

Q All right. And you charged Jessica Burch and Anthony Vargas each $750 every two weeks from June 2nd of 2014 through September 2nd, 2014, right?

A If that is what the ticket says, yes.

Q And those were for the prescriptions that Jessica Burch was picking up, right?

A It was for the visit, not for the prescriptions. The [134] prescriptions were part of the visit.

Q Well, Anthony Vargas never came to visit you between June 9 and September 2nd, did he?

A Correct.

Q So he was paying for prescriptions?

A He was paying for his medication and for access to my time and for a visit. If he was able to come in, he could have come in.

Q But he didn't?

A No. He did not. He was incarcerated.

Q All right. You also knew that when he was incarcerated, he wasn't working and making any money, right?

A Yes.

Q You knew that Jessica Burch was still unemployed, right?

A I did not know if she was or was not.

Q All right. Because you didn't ask, did you?

A I would not have asked her.

Q And you were having her pay $1,500 every two weeks to pick up scripts, right?

A She did not complain about it. She could have said something if it was a problem for her.

Q And then you raised Jessica Burch's prices to $1,000 every two weeks beginning in September of 2014, right?

A I imagine I did, yes.

Q And you also raised Anthony Vargas' rates to $1,000 every [135] two weeks from September 15 of 2014 to October 27 of 2014, didn't you?

A I imagine I did.

Q And that was for the extra access you were giving him to you?

A Yes and inflation and overhead in our office.

Q Right. And you also gave him more medication, didn't you? AI don't know if I did or didn't.

Q You didn't provide any more services to him, did you?

A I did. He E-mailed all the time. He was calling at weird hours, I mean – absolutely. I had to do more vigilance on him to make sure they weren't doing anything illegal with their pills.

Q That was from June 9, 2014, to September 2nd of 2014 that you had this vigilance?

A You mean while he was incarcerated? Is that what you are saying?

Q Yes.

A Absolutely. That still would have been the same.

Q And so you did some pill counts over at the jail?

A No. I did not do anything at the jail.

Q You never went to the jail?

A I never went to the jail.

Q Okay.

THE COURT: You might look for noon recess?

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. SHAKEEL KAHN, NABEEL AZIZ "SONNY" KHAN aka Nabeel Aziz "Sonny" Kahn, Defendants.	DOCKET NO. 17-CR-29-J Casper, Wyoming May 21, 2019 10:01 a.m. VOLUME XVII of XX (Pages 1 to 193)

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE
and a jury of twelve and three alternates

* * *

[15] presumed to be innocent of the crimes charged. The defendants pled not guilty to the charges contained in the Third Superseding Indictment. These pleas put in issue every essential element of the offenses as described in these instructions, and place the burden on the Government to establish every element by proof beyond a reasonable doubt. A copy of the Third Superseding Indictment will accompany you into the jury room during your deliberations.

The defendants are not on trial for any act or any conduct not specifically charged in the Third

Superseding Indictment. The Third Superseding Indictment asserts the offenses were commenced on or about a certain date; although, it is necessary for the Government to prove beyond a reasonable doubt that each offense was committed on a date reasonably near the date alleged in the Third Superseding Indictment. It is not necessary for the United States to prove that each offense was committed precisely on the date charged.

The term "knowingly" as used in these instructions to describe the alleged state of mind of the defendant means that the defendant was conscious and aware of his actions realized what he was doing or what was happening around him and did not act because of mistake or accident. Knowledge on the part of a defendant means that the act was done voluntarily and intentionally and not because – and it cannot be established merely by demonstrating that the defendant was negligent, [16] careless or foolish.

The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done by that person and all other facts and circumstances received in evidence which may aid you – may aid in your determination of that person's knowledge or intent.

You may infer, but you are certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during the trial.

Under the Federal Controlled Substances Act the following substances are controlled substances as a matter of law: Oxycodone, an opioid whose brand names include OxyContin, Percocet and Endocet is a Schedule II controlled substance.

Hydromorphone, an opioid whose brand names include Dilaudid is a Schedule II controlled substance.

Alprazolam, a benzodiazepine or anti-anxiety medication, whose brand names include Xanax, is a Schedule IV controlled substance.

Carisoprodol, a muscle relaxant whose brand names [17] include Soma is a Schedule IV controlled substance.

The following definitions apply throughout all jury instructions: The term distribute means to deliver or to transfer possession or control of something from one person to another. It includes the sale of something by one person to another. It is not necessary, however, for the Government to prove that any transfer of money or other thing of value occurred at the same time or because of the distribution.

The term dispense means to deliver a controlled substance to an ultimate user by or pursuant to the

lawful order of a practitioner. It includes prescribing or issuing a prescription for a controlled substance.

In order for a medical practitioner's prescription of controlled substances to be a lawful prescription, it must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.

Practitioner includes a physician or other person licensed, registered or otherwise permitted by the United States or the jurisdiction in which he or she practices to distribute or dispense a controlled substance in the course of professional practice. A registered practitioner is a practitioner who has a valid DEA registration number.

The following 12 jury instructions are specific to Count 1, which charges Defendants Shakeel Kahn and Nabeel Khan [18] with conspiracy to commit a federal drug crime.

Count 1 of the Third Superseding Indictment is alleged against both defendants. It charges that from January 2011 through and including on or about November 30, 2016, in the District of Wyoming and elsewhere, Defendant Shakeel A. Kahn, then a physician licensed to practice medicine in the state of Wyoming and Arizona, and while acting and intending to act outside the usual course of professional practice and without a legitimate medical purpose did knowingly, intentionally and unlawfully combine, conspire, confederate and agree together with Defendant Nabeel Sonny Khan, also known as Nabeel Aziz Sonny Kahn,

and Lyn Kahn, also known as Lyn Voss, Shawnna Christine Thacker, and Paul Edward Beland, and with other persons known and unknown to the grand jury to dispense and distribute mixtures or substances containing detectable amounts of oxycodone, a Schedule II controlled substance; hydromorphone, a Schedule II controlled substance; carisoprodol, a Schedule IV controlled substance; alprazolam, a Schedule IV controlled substance, the use of which resulted in the death of Jessica Burch, in violation of Title 21 United States Code Section 841(a)(1) and Title 21 United States Code Section 846.

Title 21 United States Code Section 846 states that any person who attempts or conspires to commit any offense defined by this subchapter is guilty of an offense against the [19] United States. The subchapter referred to includes Section 841(a)(1) of Title 21 of the United States Code, which in turn states it shall be unlawful for any person knowingly or intentionally to distribute or dispense a controlled substance.

Count 1 of the Third Superseding Indictment charges Defendants Shakeel A. Kahn and Nabeel Aziz Sonny Khan with conspiring together, and with others to violate Federal Law governing the controlled substances. The defendants are charged with conspiracy to dispense and distribute the controlled substances of oxycodone, hydromorphone also known as Dilaudid, alprazolam also known as Xanax, and carisoprodol also known as Soma.

To find a defendant guilty of this crime, you must be convinced that the Government has proved each of the following elements beyond a reasonable doubt: First, from January 2011 through on or about November 30, 2016; second, the defendant agreed with at least one other person to distribute or dispense oxycodone, hydromorphone, carisoprodol and/or alprazolam outside the usual course of professional medical practice or without a legitimate medical purpose.

Third, the defendant knew the essential objectives of the conspiracy; fourth, the defendant knowingly and voluntarily involved himself in the conspiracy; and, fifth, there was interdependence among the members of the conspiracy.

If the Government fails to prove each of these [20] elements by proof beyond a reasonable doubt, you must find the defendant not guilty. If, however, the Government proves every element of proof beyond a reasonable doubt, you should find the defendant guilty.

Please keep in mind that while Count 1 is charged against both defendants, you must separately consider the evidence against each defendant and return a separate verdict for each.

In order for a defendant to be found guilty of Count 1, the Government must prove beyond a reasonable doubt that the respective defendant knowingly and deliberately arrived at some type of agreement and understanding with another person that they would distribute or dispense prescription drugs outside the

usual course of medical practice or without a legitimate medical purpose.

A conspiracy is an agreement between two or more persons to accomplish an unlawful purpose. It is a kind of partnership in criminal purposes in which each member becomes the agent or partner of every other member. The evidence may show that some of the persons involved in the alleged conspiracy are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged or tried together in one proceeding.

The evidence need not show that the members entered into an express or formal agreement, nor does the law require

* * *

[28] The standard is satisfied if you find that the Government has proven beyond a reasonable doubt that but for Jessica Burch ingesting one or more of the controlled substances distributed and/or dispensed by the defendant, Jessica Burch would not have died.

The Government is not required to prove that a defendant intended to cause the death of Jessica Burch. If the jury found both defendants guilty of the conspiracy charged in Count 1, you must consider this additional question separately as to each defendant: The verdict form will allow you to indicate your answer to this additional question separately for each defendant.

In order to establish that Jessica Burch's death resulted from a defendant's conduct, the Government need not prove that the death was foreseeable to the defendant.

The following three jury instructions are specific to Counts 4, 6, 7, 11, 14, 16, 19 and 20 which charge Defendant Shakeel Kahn with unlawfully distributing and/or dispensing oxycodone.

Counts 4, 6, 7, 11, 14, 16, 19 and 20 are all alleged against Defendant Shakeel A. Kahn. They charge various instances of knowingly and unlawfully dispensing and/or distributing oxycodone while acting and intending to act outside the usual course of professional practice and without a legitimate medical purpose in violation of Title 21 United [29] States Code Section 841 subparagraph A1. In pertinent part, Section 841(a) states it is "unlawful for any person knowingly or intentionally to distribute or dispense a controlled substance" unless a specific exception authorizes it.

As stated earlier in these instructions, federal regulations provide such an exception for controlled substance presciptions that are issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice. Please refer back to those earlier instructions for additional guidance.

Counts 4, 6, 7, 11, 14, 16, 19 and 20 allege that on or about various dates, in the District of Wyoming, Defendant Shakeel A. Kahn, then a physician licensed to practice medicine in the states of Wyoming and Arizona, and while acting and intending to act outside the

usual course of professional practice and without a legitimate medical purpose knowingly, intentionally and unlawfully dispensed and distributed a mixture and substance containing a detectable amount of oxycodone, a Schedule II controlled substance, to persons known to the grand jury in violation of Title 21 United States Code Section 841(a)(1).

To prove Defendant Shakeel A. Kahn guilty of one or more of these counts, the Government must prove beyond a reasonable doubt each of the following elements:

First, on or about the date alleged in the each count [30] as set forth in the table contained in the next jury instruction and in the District of Wyoming; second, Defendant Shakeel A. Kahn distributed or dispensed a mixture or substance containing a detectable amount of oxycodone to another person; and, third, Defendant Shakeel A. Kahn, knowingly or intentionally distributed or dispensed the controlled substance outside the usual course of professional medical practice or without a legitimate medical purpose.

If the Government fails to prove each of these elements by proof beyond a reasonable doubt, you must find the defendant not guilty. If, however, the Government proves every element by proof beyond a reasonable doubt, you should find the defendant guilty.

The table sets forth date alleged in each count of knowingly and unlawfully distributing and/or dispensing oxycodone outside the usual course of professional practice and without a legitimate medical purpose. As

you can see from the chart, each of the counts is set forth in one column, and the column next to it the pertinent dates set forth, including Count 20, which sets forth a range of dates on or about June 7, 2016, through and including on or about June 9, 2016.

The good faith of Defendant Shakeel A. Kahn is a complete defense to the charges in Count 1 conspiracy to commit a federal drug crime as well as charges in Counts 4, 6, 7, 11, 14, 16, 19, and 20, knowingly and unlawfully dispensing and/or [31] distributing oxycodone outside the usual course of professional practice and without a legitimate medical purpose because good faith on the part of Defendant Shakeel Kahn would be inconsistent with knowingly and intentionally distributing and/or dispensing controlled substances outside the usual course of professional practice and without a legitimate medical purpose which is an essential part of the charges.

Good faith connotes an attempt to act in accordance with what a reasonable physician should believe to be proper medical practice. The good faith defense requires the jury to determine whether Defendant Shakeel Kahn acted in an honest effort to prescribe for patients' medical conditions in accordance with generally recognized and accepted standards of practice.

A defendant's good faith must have existed at the time the unlawful acts were committed. One cannot assert good faith as a defense if the opinions or beliefs advanced as justifications for the good faith defense are formulated after the commission of criminal acts.

If you find that a defendant lied about some aspect of the charged conduct, you may consider that in addition to other evidence presented in determining whether the defendant acted in good faith.

The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in this case. It is the [32] Government's burden to prove to you beyond a reasonable doubt that a defendant knowingly or intentionally acted unlawfully. In determining whether the Government has proven that a defendant intentionally or knowingly violated the law, you should consider all of the evidence in the case bearing on the defendant's state of mind.

The following six jury instructions are specific to Counts 2 and 3, each of which charges a defendant with knowingly involving firearms in federal drug trafficking crimes.

Count 2 of the Third Superseding Indictment is alleged against Defendant Shakeel A. Kahn. It charges that from January 2011 through and including on or about November 30, 2016, in the District of Wyoming and elsewhere, Defendant Shakeel A. Kahn knowingly possessed firearms in furtherance of a federal drug trafficking crime; namely, conspiracy to dispense and distribute mixtures or substances containing detectable amounts of oxycodone, a Schedule II controlled substance, and alprazolam, a Schedule IV controlled substance, as more fully alleged in Count 1 of the Third

Superseding Indictment, in violation of Title 18 United States Code Section 924 subparagraph (c)(1).

Title 18 United States Code Section 924(c)(1) states in relevant part that "any person who in furtherance of any drug trafficking crime possesses a firearm is guilty of an

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. SHAKEEL A. KAHN, *et al.*, Defendants.	Case No. 17-CR-0029-ABJ

ORDER DENYING SHAKEEL A. KAHN'S MOTION FOR NEW TRIAL

(Filed Aug. 9, 2019)

This matter came before the Court on Defendant Shakeel Kahn's Motion for New Trial (Doc. 808), his supplement (Doc. 809), and the Government's response (Doc. 838). Having considered the parties' arguments, reviewed the record herein, and being otherwise fully advised, the Court finds the motion should be denied.

BACKGROUND

Dr. Shakeel Kahn and several others were charged together in this drug conspiracy case, which generally alleged that the defendants and others conspired to unlawfully distribute controlled substances through Dr. Kahn's medical practices in Arizona and Wyoming.

(Doc. 356.) All defendants except Dr. Kahn and his brother/co-defendant, Nabeel Khan, pled guilty before trial pursuant to various plea agreements, and the brothers went to trial before a jury that lasted approximately one month. At the conclusion of trial, Dr. Kahn was convicted of all 21 charges he faced. (Doc. 751.) He now seeks a new trial under Fed. R. Crim. P. 33, alleging the Court erred in several ways.

STANDARD OF REVIEW FOR RULE 33 MOTION

A trial court may vacate a conviction and order a new trial under Federal Rule of Criminal Procedure 33(a) "if the interest of justice so requires." When considering a motion for new trial, "the court may weigh the evidence and consider the credibility of witnesses in determining whether the verdict is contrary to the weight of the evidence such that a miscarriage of justice may have occurred." *United States v. Evans*, 42 F.3d 586, 593 (10th Cir. 1994) (internal quotation marks and citation omitted).

DISCUSSION

The Court separately considers each ground asserted by Dr. Shakeel Kahn.

1. Pretrial Motion to Suppress

Dr. Kahn filed a pretrial motion to suppress evidence obtained pursuant to several search warrants.

(Doc. 529.) He again argues there was insufficient probable cause to support the search warrants and the seizure of the evidence. More specifically, he takes issue with the Court's refusal to suppress certain patient files that he had altered before sending them to the Arizona Board of Medicine as part of its investigation into his prescribing practices. (Doc. 808 at p. 2.)

As Dr. Kahn agrees, his "arguments have been fully briefed and presented to this court" previously. (Doc. 808 at p. 1.) The Court held an evidentiary hearing on the motion to suppress, among other motions, on March 21-22, 2019 (Doc. 603), and the Court issued its written decision on the matter on April 10, 2019 (Doc. 650). There, the Court carefully considered the search for and seizure of Dr. Kahn's patient files and determined it complied with the Fourth Amendment. *(Id.* at pp. 4-10.) After hearing the evidence presented at trial, the Court does not find a basis for changing its earlier decision, and the Government is right that Dr. Kahn "offers nothing new for this court to consider." (Doc. 838 at p. 3.) Dr. Kahn has not shown the interest of justice requires a new trial due to this issue.

2. <u>Spousal Statements Admitted Pursuant to the Crime-Fraud Exception of the Marital Privilege</u>

On the first day of trial, Dr. Kahn filed a motion to exclude certain incriminating statements he made to his wife, Lyn Kahn, arguing they were inadmissible under the confidential marital communications

privilege. (Doc. 697.) On May 10, 2019, immediately prior to any testimony from Lyn Kahn and outside the presence of the jury, the Court held an evidentiary hearing on the matter and denied Dr. Kahn's motion after concluding the challenged statements were admissible for three reasons: (1) they were made before Dr. Kahn and Lyn Kahn were married and thus never protected, (2) they were made in the presence of others and thus not confidential, and/or (3) they satisfied the crime-fraud exception to the privilege. Dr. Kahn now reasserts the statements did not meet the crime-fraud exception, though he does not identify any specific statements. (Doc. 808 at p. 2.) Again, the Court does not find a basis for changing its earlier decision that the challenged statements were made between Dr. Kahn and his wife during and in furtherance of a criminal conspiracy in which they were both participants. Dr. Kahn has not shown the interest of justice requires a new trial due to this issue.

3. Dr. Shakeel Kahn's Proffered Jury Instructions

Dr. Kahn next questions some of the jury instructions provided by the Court at trial. He first argues a new trial is warranted "because the jury was instructed that it may convict him of illegal distribution if it found that the government proved beyond a reasonable doubt that the controlled substances in question were prescribed 'without a legitimate medical purpose' *or* 'outside the usual court of professional practice,' whereas the Government should be required

to prove both components. (Doc. 808 at p. 3 (emphasis in original).) Dr. Kahn concedes, though, "the Tenth Circuit has already consistently found that the 'or' language is proper." (*Id.*) And he's correct. *See, e.g.*, *United States v. Nelson*, 383 F.3d 1227, 1233 (10th Cir. 2004); *United States v. Miller*, 891 F.3d 1220, 1226 (10th Cir. 2018). The Court appreciates Dr. Kahn's disagreement with the Tenth Circuit, but that disagreement does not warrant a new trial.

He also argues "the Court erred in failing to adopt the remainder" of his proffered jury instructions and his objections to the Government's proffered instructions. (Doc. 808 at p. 3.) He does not identify any specific instruction or provide any analysis as to why he thinks the Court erred. In short, Dr. Kahn has not shown the interest of justice requires a new trial due to this issue.

4. <u>Dr. Shakeel Kahn's Mid-Trial Motion for Mistrial</u>

In a supplement to his motion for new trial, Dr. Kahn presented a fourth ground in support of his motion for a new trial. (Doc. 809.) During trial, Diversion Investigator Robert Churchwell testified that law enforcement was monitoring Dr. Kahn's "jail calls," which informed the jury that he was incarcerated while awaiting trial. Dr. Kahn moved for a mistrial at the time, but the Court denied the motion while giving a limiting instruction to the jury to disregard the comment. Dr. Kahn argues, "This improper remark

warranted a mistrial and the Court erred in denying the motion." (Doc. 809 at p. 1.)

A new trial must be denied on this issue for two reasons. First, "a defendant may not add new arguments in support of a motion for new trial by including them in an amendment filed after the time under Rule 33 has expired." *United States v. Custodio*, 141 F.3d 965, 966 (10th Cir. 1998) (citing *Anthony v. United States*, 667 F.2d 870, 875-76 (10th Cir. 1981)). Here, Dr. Kahn's extended time for a Rule 33 motion expired on July 19, 2019, yet his supplement was filed on July 20, 2019. (Docs. 786, 809.) His request for a new trial based on this ground was untimely, he has offered no excusable neglect for its tardiness, and it must be denied on that basis. *See United States v. Johnson*, 821 F.3d 1194, 1199 (10th Cir. 2016).

Additionally, and ignoring the supplement's tardiness, the argument fails on its merits. "In determining whether a new trial is required after a witness offers improper information, we consider '(1) whether the prosecutor acted in bad faith, (2) whether the district court limited the effect of the improper statement through its instructions to the jury, and (3) whether the improper remark was inconsequential in light of the other evidence of the defendant's guilt." *United States v. Lamy*, 521 F.3d 1257, 1266 (10th Cir. 2008) (quoting *United States v. Meridyth*, 364 F.3d 1181, 1183 (10th Cir. 2004)). Nothing suggests the prosecutor acted in bad faith, even previously instructing DI Churchwell not to mention the fact that Dr. Kahn had been incarcerated. (Doc. 838 at p. 10.) The Court also gave a

limiting instruction to the jury to disregard the remark. The "jury is presumed to follow its instructions," *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and Dr. Kahn has provided nothing to suggest otherwise. Finally, the Court agrees with the Government that "the remark remains highly inconsequential in light of all the other evidence and testimony presented against the Defendant throughout the trial." (Doc. 838 at p. 10.) DI Churchwell's two-word comment was prejudicial, but it was little more than a drop in the bucket of evidence and testimony weighing against Dr. Kahn after a month of trial. There is no reasonable basis to fear that the jury would not have convicted Dr. Kahn but for this inartful utterance. Dr. Kahn has not shown the interest of justice requires a new trial due to this issue.

CONCLUSION AND ORDER

Dr. Shakeel Kahn has not met his burden of showing the interests of justice require a new trial under Fed. R. Crim. P. 33.

IT IS THEREFORE ORDERED that Defendant Shakeel Kahn's Motion for New Trial (Doc. 808) and his supplement (Doc. 809) are **DENIED**.

DATED: August 9th, 2019.

/s/ Alan B. Johnson
Alan B. Johnson
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA vs. Shakeel Kahn	Case Number: 17-CR-29-ABJ-1 Defendant's Attorney(s): Beau Brindley, Michael J. Thompson, Michael H. Reese

AMENDED[1] JUDGMENT IN A CRIMINAL CASE

(Filed Aug. 19, 2019)

THE DEFENDANT was found guilty on counts 1, 2, 4-14, 16-23 after pleas of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 841(a)(1)(b)(1)(C) and (b)(2)	Conspiracy to Dispense and Distribute Oxycodone, Alprazolam, Hydromorphone, and Carisoprodol,	November 30, 2016	1

[1] Dates offense concluded added

	Resulting in Death		
18 U.S.C. § 924(c)(1)	Possession of Firearms in Furtherance of a Federal Drug Trafficking Crime	November 30, 2016	2
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Dispensing of Oxycodone	September 2, 2016	4
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Possession with Intent to Distribute Oxycodone and Aid and Abet	September 2, 2016	5
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Dispensing of Oxycodone	September 30, 2016	6
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Dispensing of Oxycodone	October 1, 2016	7
21 U.S.C. § 843(b)	Unlawful Use of a Communications Facility	October 1, 2016	8
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Possession with Intent to Distribute Oxycodone and Aid and Abet	October 1, 2016	9

21 U.S.C. § 841(a)(1) and (b)(1)(C)	Possession with Intent to Distribute Oxycodone and Aid and Abet	October 2, 2016	10
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Dispensing of Oxycodone and Aid and Abet	October 7, 2016	11
21 U.S.C. § 843(b)	Unlawful Use of a Communications Facility	October 3, 2016	12
21 U.S.C. § 843(b)	Unlawful Use of a Communications Facility	October 7, 2016	13
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Dispensing of Oxycodone and Aid and Abet	November 9, 2016	14
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Dispensing of Oxycodone	October 28, 2016	16
21 U.S.C. § 843(b)	Unlawful Use of a Communications Facility	October 31, 2016	17
21 U.S.C. § 843(b)	Unlawful Use of a Communications Facility	November 14, 2016	18
21 U.S.C. § 841(a)(1)	Dispensing of Oxycodone and Aid and Abet	November 11, 2016	19

and (b)(1)(C)			
21 U.S.C. § 841(a)(1) and (b)(1)(C)	Dispensing of Oxycodone	June 9, 2016	20
21 U.S.C. § 848(a), (b) and (c)	Continuing Criminal Enterprise	November 30, 2016	21
18 U.S.C. § 1957	Engaging in Monetary Transactions Derived from Specified Unlawful Activity	June 9, 2014	22
18 U.S.C. § 1957	Engaging in Monetary Transactions Derived from Specified Unlawful Activity	November 29, 2016	23

The defendant is sentenced as provided in pages 4 through 11 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's USM No: **16483-091**

August 12, 2019
Date of Imposition of Sentence

/s/ Alan B. Johnson
Alan B. Johnson
United States District Judge

August 19, 2019
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months as to Counts 1, 4, 5, 6, 7, 9, 10, 11, 14, 16, 19, 20, and 21; 48 months as to Counts 8, 12, 13, 17, and 18; 120 months as to Counts 22 and 23, all to be served concurrently; and 60 months as to Count 2, consecutive to all other counts.

The Court recommends to the Bureau of Prisons that the defendant be placed at FCI Terminal Island, FCI Sheridan, or FCI Pensacola.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this Judgment.

_____
United States Marshal/Bureau of Prisons

By: _____
Authorized Agent

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years as to Counts 1, 2, 4, 5, 6, 7, 9, 10, 11, 14, 16, 19, 20, and 21; 3 years as to Counts 22 and 23; 1 year as to Counts 8, 12, 13, 17, and 18, all to be served concurrently.

The defendant shall not commit another federal, state or local crime. The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter (as determined by the court) for use of a controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant' s presentence report or other reliable information indicates a low risk of future substance abuse by the defendant.

If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine.

The defendant shall (A) make restitution in accordance with 18 U .S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S .C. § 3572(d)), the defendant shall adhere to the schedule.

The defendant shall submit to the collection of a DNA sample at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S .C. § 14135a).

The defendant shall comply with the standard conditions that have been adopted by this Court as defined in the contents of the Standard Conditions page (if included in this judgment). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced or released from imprisonment, unless the probation officer instructs

the defendant to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

3. The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

4. The defendant shall answer truthfully the questions asked by the probation officer.

5. The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

7. The defendant shall work full time (at least 30 hours per week) at a lawful type of employment,

unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

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

11. The defendant shall not act or make any agreement with a law enforcement agency to act as a

confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

13. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Restitution	Fine
1	$100.00	$5,000.00	
Notes:			
2	$100.00		
Notes:			
4	$100.00		
Notes:			
5	$100.00		
Notes:			
6	$100.00		
Notes:			
7	$100.00		
Notes:			

8	$100.00		
Notes:			
9	$100.00		
Notes:			
10	$100.00		
Notes:			
11	$100.00		
Notes:			
12	$100.00		
Notes:			
13	$100.00		
Notes:			
14	$100.00		
Notes:			
16	$100.00		
Notes:			
17	$100.00		
Notes:			
18	$100.00		
Notes:			
19	$100.00		
Notes:			
20	$100.00		
Notes:			
21	$100.00		
Notes:			
22	$100.00		
Notes:			
23	$100.00		
Notes:			
Totals	$2,100.00	$5,000.00	

The fine and/or restitution includes any costs of incarceration and/or supervision. The fine and/ or restitution, which is due immediately, is inclusive of all penalties and interest, if applicable.

The defendant shall pay interest on any fine and/or restitution of more than Two Thousand Five Hundred Dollars ($2,500.00), unless the fine and/or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

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

> The interest and penalties not be applied to fine and/or restitution.

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	Amount of Restitution
Office of the Clerk United States District Court 2120 Capitol Avenue 2nd Floor, Room 2131 Cheyenne, WY 82001	$5,000.00

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due in full immediately.

IT IS ORDERED the defendant shall pay a special assessment fee in the amount of $2,100, which shall be due immediately. Payments for monetary obligations shall be made payable by cashier's check or money order to the Clerk of the U.S. District Court, 2120 Capitol Avenue, Room 2131, Cheyenne, Wyoming 82001 and shall reference the defendant's case number, 17-CR-29-ABJ-1. The defendant shall participate in the Inmate Financial Responsibility Program to pay his/her monetary obligations. The defendant shall pay all financial obligations immediately. While incarcerated, the defendant shall make payments of at least $25 per quarter. Any amount not paid immediately or through the Inmate Financial Responsibility Program shall be paid commencing 60 days after his/her release from confinement in monthly payments of not less than 10% of the defendant's gross monthly income. All monetary payments shall be satisfied not less than 60 days prior to the expiration of the term of supervised release.

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. NABEEL AZIZ KHAN, a/k/a Sonny, a/k/a Nabeel Aziz Kahn, Defendant - Appellant.	No. 19-8051
UNITED STATES OF AMERICA, Plaintiff - Appellee, v. SHAKEEL KAHN, Defendant - Appellant.	No. 19-8054

Appeals from the United States District Court for the District of Wyoming (D.C. Nos. 2:17-CR-00029-ABJ-4 & 2:17-CR-00029-ABJ-1)

(Filed Feb. 25, 2021)

Mark Baker (Rebekah A. Gallegos, with him on the briefs), Peifer, Hanson, Mullins & Baker, P.A.,

Albuquerque, New Mexico, appearing for Appellant Nabeel Aziz Khan.

Beau B. Brindley (Blair T. Westover, with him on the briefs), Chicago, Illinois, appearing for Appellant Shakeel Kahn.

Stephanie I. Sprecher, Assistant United States Attorney (Mark A. Klaassen, United States Attorney; Stephanie A. Hambrick and David A. Kubichek Assistant United States Attorneys, with her on the briefs), Office of the United States Attorney for the District of Wyoming, Casper, Wyoming, appearing for Appellee.

Before **BRISCOE**, **MATHESON**, and **CARSON**, Circuit Judges.

BRISCOE, Circuit Judge.

Defendant Nabeel Aziz Khan ("Nabeel") and his brother, Defendant Dr. Shakeel Kahn ("Dr. Kahn," collectively "Defendants"),[1] challenge their drug trafficking and money laundering convictions following a jury trial in the United States District Court for the District of Wyoming. Defendants were tried together; they

[1] Although Defendants are brothers, they spell their last names differently. In the interest of clarity, we refer to Nabeel Khan by his first name, and Dr. Shakeel Kahn as "Dr. Kahn," as Defendants do in their briefing.

appeal separately. Because their appeals raise several overlapping issues, we address both appeals in this opinion.

We conclude that the search of Dr. Kahn's Arizona residence was proper. The magistrate judge who issued the warrant had a substantial basis for concluding that the affidavit in support of the warrant established probable cause. Further, the seizure of items not listed in the warrant was supported by the plain view doctrine. The searches of Dr. Kahn's Wyoming residence and Wyoming business were also proper. The district court's instruction regarding liability under § 841 was correct because this court has previously held that criminal liability under § 841 is disjunctive, not conjunctive. Nabeel's challenge to the district court's good faith instruction falls victim to forfeiture as he raises a different theory on appeal than he presented to the district court. The district court's good faith instruction correctly stated the law as to Dr. Kahn because "good faith" is not a defense as to mens rea, but rather is a defense as to the lawfulness of a prescription. The district court's intent instruction did not burden Dr. Kahn's right to testify on his own behalf because it did not direct the jury on how to weigh Dr. Kahn's testimony. The evidence was sufficient to sustain Nabeel's conviction because the evidence shows Nabeel knew Dr. Kahn's prescriptions were unlawful. And finally, the objectionable testimony identified by Dr. Kahn in his motion for a new trial was inconsequential in light

of the overwhelming evidence of guilt.[2] Accordingly, exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm.

I

In 2008, Dr. Kahn started a medical practice in Ft. Mohave, Arizona. Later that year, Nabeel arrived in Arizona and began assisting with managing Dr. Kahn's practice. Nabeel's responsibilities included checking patients in, taking their vitals such as blood pressure or body weight, and processing their payments.

After Nabeel's arrival, Dr. Kahn's practice shifted towards pain management. Dr. Kahn regularly prescribed patients various controlled substances, including oxycodone, alprazolam, and carisoprodol. As time went on, Dr. Kahn spent less time with patients, and the patients he did see were almost exclusively for pain management. The prescriptions he wrote aligned closely with what patients were able to pay, rather than the patients' medical need; when patients were prescribed more pills, Dr. Kahn charged more for his medical services, and when patients could not afford the price of the prescription, Dr. Kahn prescribed fewer pills, or withheld a prescription entirely. The price of prescriptions also closely tracked the "street price" of the pills, which Dr. Kahn often discussed with patients.

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[2] Dr. Kahn also initially raised a challenge to the district court's causation instruction. Because Dr. Kahn conceded that issue on reply, we decline to address it. *See* Dr. Kahn's Reply Br. at 22.

In addition to shifting towards pain management, Dr. Kahn's practice also shifted to a primarily "cash-only" basis, although he also accepted payment in personal property, including firearms.

After a patient died, Dr. Kahn commented "[s]he was probably selling her prescriptions for illegal drugs." App., Vol. VI at 2573.[3] In fact, many of Dr. Kahn's patients sold pills so they could afford their prescriptions. *See, e.g.*, *id.* at 2566, 3559. Nabeel also spoke with at least one patient about a TV news report that described patients who illegally sold their prescription medication.

In 2013, Nabeel helped Dr. Kahn draft a "drug addiction statement," which patients were required to sign. By signing the drug addiction statement, patients swore that Dr. Kahn was not a "drug dealer," that they were not "addicts," and that they would be liable to Dr. Kahn, or his officers and agents, for $100,000 for any civil or criminal action brought against Dr. Kahn, or his officers and agents, as a result of any action taken by the patient. *See id.*, Suppl. Vol. I at 134; *id.*, Vol. VI at 4461. At trial, an expert witness for the government opined that Defendants' "drug addiction statement" was neither an "appropriate" nor "acceptable" way to advise a patient. *Id.*, Vol. VI at 1418.

Beginning in late 2012, pharmacies in the Ft. Mohave area began refusing to fill prescriptions issued by

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[3] All citations to the record are to Appellant's Appendix in 19-8051, *United States v. Nabeel Khan*, unless otherwise specified.

Dr. Kahn. In 2015, Dr. Kahn opened a second practice in Casper, Wyoming. During that time, Dr. Kahn continued to travel to Arizona to see patients about once per month; other patients travelled to Wyoming to see Dr. Kahn. Nabeel also met patients in parking lots to exchange their prescriptions for cash. Dr. Kahn maintained offices and residences in both Arizona and Wyoming during this time, although he primarily resided in his Wyoming residence. Nabeel primarily resided at Dr. Kahn's Arizona residence. Nabeel also acted as office manager for the Arizona office. Dr. Kahn's wife, Lyn Kahn, acted as office manager for the Wyoming office. As part of her role as office manager, Lyn Kahn forwarded calls from the Wyoming office to her cell phone to schedule appointments and arrange payments.

In 2016, in the course of investigating Dr. Kahn's prescribing practices, the government intercepted a call between Dr. Kahn and Lyn Kahn. During that call, Dr. Kahn, while cleaning his Wyoming office, indicated that he would bring some patient files to his Wyoming residence. Pursuant to a warrant, officers searched Dr. Kahn's Arizona residence, his Wyoming residence, and "Vape World," a Wyoming business owned by Dr. Kahn and Lyn Kahn. In searching Dr. Kahn's Arizona residence, officers seized patient files pursuant to the warrant; they also seized U.S. currency, firearms, and automobiles, although those items were not listed on the warrant as items to be seized.

Defendants and Lyn Kahn were charged in a 23-count indictment, alleging, among other charges, that

the Defendants and Lyn Kahn conspired to dispense and distribute controlled substances resulting in death in violation of 21 U.S.C. §§ 841 and 846, that Defendants possessed firearms in furtherance of a federal drug trafficking crime in violation of 18 U.S.C. § 924(c)(1), and Dr. Kahn engaged in monetary transactions derived from specified unlawful activity in violation of 18 U.S.C. § 1957 (money laundering). App., Vol. I at 327. Prior to trial, Lyn Kahn pled guilty to the conspiracy charge against her.

Defendants moved to suppress evidence gathered from the searches of Dr. Kahn's Arizona residence, his Wyoming residence, and Vape World. The district court denied that motion, except that it suppressed the seizure of any automobiles.

During the trial, a witness for the government, on direct examination, referred to Dr. Kahn being in jail. Dr. Kahn objected and moved for a mistrial. The district court denied the motion from the bench, and instead offered a curative instruction. The district court acknowledged, however, that it was "not sure" that its instruction would cure the prejudice caused by the witness's testimony. *Id.*, Vol. VI at 3858.

Defendants also objected to the district court's jury instructions regarding liability under § 841(a)(1), their respective "good faith" defenses, and intent. The district court denied those objections. The jury returned a verdict of guilty on all counts, except that it acquitted Nabeel of causing the death of one of Dr. Kahn's patients. Dr. Kahn filed a Rule 33 motion

reasserting his mistrial motion. In a written order, the district court ruled that a mistrial was unwarranted in light of the overwhelming evidence presented of Dr. Kahn's guilt. Defendants then filed timely notices of appeal.

II

A. The Search of the Arizona Residence and the Resulting Seizures Did Not Violate the Fourth Amendment

Both Defendants challenge the search of Dr. Kahn's Arizona residence, and the resulting seizures of U.S. currency and firearms not identified in the warrant. The government responds that the issue is waived through inadequate briefing and is without merit because the search was supported by probable cause, and the seizures were permitted under the plain view doctrine.

"When reviewing a motion to suppress, we view the evidence in the light most favorable to the government, accept the district court's findings of fact unless they are clearly erroneous, and review de novo the ultimate question of reasonableness under the Fourth Amendment." *United States v. Petit*, 785 F.3d 1374, 1378–79 (10th Cir. 2015). "Once a magistrate judge determines probable cause exists, the role of a reviewing court is merely to ensure the [g]overnment's affidavit provided a 'substantial basis' for reaching that conclusion." *United States v. Biglow*, 562 F.3d 1272, 1281 (10th Cir. 2009); *see also United States v. Riccardi*, 405

F.3d 852, 860 (10th Cir. 2005) (review of magistrate judge's probable cause finding is "very deferential").

The warrant in question was issued by a magistrate judge for the District of Arizona. *See* App., Vol. III at 132. The warrant permitted seizure of financial and business records, electronic media, appointment books and schedules, controlled substances, and patient records for fifty-one specific patients. *Id.* at 134–36. The warrant did not include U.S. currency or firearms as items to be seized.

Drug Enforcement Agency ("DEA") Special Agent Brett Patterson authored an affidavit in support of the warrant. Special Agent Patterson had extensive experience and knowledge "of the methods used by drug traffickers to import illegal drugs from Mexico, store them in cities in border states, distribute them in those areas to local buyers or buyers from out-of-state, transport them to other parts of the United States for distribution, and collect and launder drug proceeds." *Id.* at 144. In his experience investigating "high-level narcotics trafficking organizations based in Phoenix, Arizona," Special Agent Patterson learned "that narcotic traffickers frequently maintain at their residence and businesses, books and records listing narcotic suppliers and purchasers, and similar books and records documenting those narcotic transactions." *Id.* But Special Agent Patterson did not attest to any specific expertise in investigating physicians accused of issuing unlawful prescriptions.

Special Agent Patterson identified "numerous red flags" in Dr. Kahn's prescribing behavior, including "extremely high dosage amounts, patients traveling from out of state, multiple patients from the same household receiving controlled substance prescriptions, lack of individualized therapy, early refills, dangerous drug combinations and overlapping controlled substance prescriptions with Dr. Kahn's Arizona and Wyoming DEA registrations being utilized." *Id.* at 153–54. All fifty-one patients whose records were sought fell within that "pattern of suspicious prescriptions." *Id.* at 164. Only eight of those patients, however, were discussed with any specificity in the affidavit.

Special Agent Patterson also attested that investigators intercepted a phone call between Dr. Kahn and Lyn Kahn, in which Dr. Kahn said he would "take the charts home or whatever." *Id.* at 150. At the time of the call, Dr. Kahn was cleaning his medical office in Wyoming, and was returning to his Wyoming residence. Special Agent Patterson did not attest to when that call took place, although the district court concluded that it "could not have been older than about six months" based on the timing of the investigation. *Id.*, Vol. V at 1171.

In another intercepted call, Lyn Kahn informed a patient that Dr. Kahn travelled to Arizona once a month to practice medicine. Dr. Kahn kept a medical office in Arizona, with a sign reading "Shakeel Kahn, MD. By appointment only." *Id.*, Vol. III at 160. The Arizona medical office had a furnished waiting room and was current on its rent. Lyn Kahn also resided at the

Arizona residence in October 2016, and she forwarded phone calls from the Wyoming medical office to her cellular telephone to "schedule appointments and arrange payments and money transfers." *Id.* at 159.

In one such call, occurring when Lyn Kahn resided at the Arizona residence, a patient asked Lyn Kahn if he should send money through Western Union for a prescription pickup. The patient also told Lyn Kahn that he would be bringing a new "client." *Id.* at 161. Lyn Kahn informed the patient that he would have to pay extra for a pickup on a Saturday, to which the patient replied that he would do whatever Dr. Kahn and Lyn Kahn wanted regarding the money. Special Agent Patterson attested that this call "demonstrates the exploitation of [Dr. Kahn's] position for profit and the cash for prescription scheme being conducted by Dr. Kahn." *Id.*

Special Agent Patterson opined that, due to the cash nature of Dr. Kahn's practice, Dr. Kahn "may utilize a safe to secure bulk cash at [the Arizona residence]." *Id.* at 150. Special Agent Patterson based his opinion on an intercepted call in which Dr. Kahn told Lyn Kahn that he needed to get a safe out of a store [Vape World] in Wyoming and bring it home. Special Agent Patterson also attested that Dr. Kahn had likely received over $3,000,000 for issuing prescriptions. *Id.* at 162.

When executing the warrant at the Arizona residence, officers discovered and seized approximately $1,000,000 in U.S. currency, over forty firearms, and at

least one automobile.[4] Two safes were searched. Officers discovered the currency in envelopes in one or both safes which Nabeel either opened voluntarily or provided access to the safe's combination. The firearms were scattered throughout the Arizona residence. Officers also discovered several different forms of identification; some had Nabeel's name, but someone else's picture, or Nabeel's picture but another name. During the execution of the warrant, Special Agent Patterson spoke with Nabeel. Nabeel informed Special Agent Patterson that the firearms belonged to him, that they were registered to Dr. Kahn, and that Nabeel was "not allowed" to have them. *Id.*, Vol. VI at 353. Nabeel also informed Special Agent Patterson that he was in the United States illegally and had previously used Dr. Kahn's identity, so that Dr. Kahn's insurance would pay for Nabeel's surgery.

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[4] The record is not entirely clear as to how many firearms and automobiles were seized. The district court only indicated that "more than 40 firearms, and at least one automobile" were seized. App., Vol. V at 1162. In his brief, Dr. Kahn asserts that "approximately 41 firearms, and 5 automobiles" were seized. Dr. Kahn's Br. at 7. Nabeel asserts that "five automobiles, and more than 40 firearms" were seized. Nabeel's Br. at 43. And the government responds that officers seized "49 firearms." United States' Dr. Kahn Br. at 27. The Search Warrant Receipt appears to list 49 firearms and 5 automobiles. *See* App., Vol. II at 1007–09. In any event, the precise number of firearms and automobiles does not affect our analysis.

1. We Decline to Find a Waiver Based on Inadequate Briefing

The government asserts that Defendants have waived their suppression arguments through inadequate briefing because Defendants failed to cite to the trial transcript. *See* Fed. R. App. P. 28(e) ("A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected."). Defendants' opening briefs do, however, include citations to the relevant pretrial motions, exhibits, and the district court's suppression rulings. Further, Defendants provided citations to the trial transcript on reply. Thus, any alleged deficiencies do not frustrate our review of Defendants' suppression arguments. *See United States v. Hall*, 473 F.3d 1295, 1303 (10th Cir. 2007) (treating an argument as waived where we could not "even attempt to assess the merits of [appellant's] argument"). Accordingly, we exercise our discretion in overlooking any waiver based on inadequate briefing and proceed to the merits. *See United States v. Mullikin*, 758 F.3d 1209, 1211 n.3 (10th Cir. 2014) (declining to determine whether argument was waived, where any error was harmless).

2. Special Agent Patterson's Affidavit Established an Adequate Nexus between the Arizona Residence and Evidence of a Crime

Both Defendants challenge whether the government established a nexus between the Arizona residence and evidence of a crime. Defendants assert that

Special Agent Patterson lacked expertise in investigating medical practitioners suspected of unlawfully prescribing medication, and that the government had insufficient reasons to suspect Dr. Kahn stored medical or financial records at the Arizona residence.

"Probable cause undoubtedly requires a nexus between suspected criminal activity and the place to be searched." *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000). "Whether a sufficient nexus has been established between a defendant's suspected criminal activity and his residence . . . necessarily depends upon the facts of each case." *Biglow*, 562 F.3d at 1279. "Certain non-exhaustive factors relevant to our nexus analysis include (1) the type of crime at issue, (2) the extent of a suspect's opportunity for concealment, (3) the nature of the evidence sought, and (4) all reasonable inferences as to where a criminal would likely keep such evidence." *Id.* Although neither "hard evidence" nor "personal knowledge of illegal activity" are required to demonstrate an adequate nexus, an affidavit must demonstrate "circumstances which would warrant a person of reasonable caution in the belief that the articles sought are at a particular place." *Id.* (internal quotations omitted).

Here, the magistrate judge's probable cause finding to search the Arizona residence is supported by a substantial basis. Specifically, the Arizona residence is tied to Defendants' suspected drug trafficking in several ways: Dr. Kahn transported medical records from his Wyoming office to his Wyoming residence, he regularly travelled to Arizona to practice medicine, and he

maintained an office and residence in Arizona. The involvement of Dr. Kahn's wife, Lyn, further ties the Arizona residence to the Defendants' illegal drug activity. Lyn Kahn resided at the Arizona residence for a period, received calls forwarded from the Wyoming office, and scheduled appointments and arranged payments and money transfers. The nexus is further supported through Special Agent Patterson's opinion that drug traffickers keep drug-related records in their homes. Accordingly, the affidavit includes facts describing the type of crime at issue (drug trafficking), the extent of Dr. Kahn's and Lyn Kahn's opportunities to move records and conceal them (their travels between Arizona and Wyoming, and Dr. Kahn's travel between his offices and residences), the nature of the evidence sought (patient files and financial records), and the reasonable inferences regarding where a criminal would likely keep such evidence (in a residence). *See id.*

Defendants raise several objections to the magistrate judge's nexus determination, none of which are availing. Although Defendants show that the magistrate judge could have reached a different conclusion, they do not show that the magistrate judge's probable cause determination lacked a "substantial basis." *Id.* at 1281. For example, Defendants assert that the magistrate judge could have distinguished Special Agent Patterson's expertise with a "standard drug trafficking case" from "a case involving a doctor accused of prescribing outside the scope of professional practice." Dr. Kahn's Br. at 21; *see also* Nabeel's Br. at 42. Yet, even assuming Special Agent Patterson's opinion is entitled

to no weight, "[a]dditional evidence connecting a defendant's suspected activity to his residence may also take the form of inferences a magistrate judge draws from the [g]overnment's evidence." *Biglow*, 562 F.3d at 1280 (internal quotation marks omitted). Here, such an inference is supported by the intercepted call in which Dr. Kahn indicated he was going to bring patient files from his Wyoming office to his Wyoming residence.

Defendants also assert that the intercepted call only showed that Dr. Kahn brought records to his Wyoming residence, and only "on one occasion" while cleaning his office. Dr. Kahn's Br. at 19; Nabeel's Br. at 43. Defendants contrast the Wyoming residence with the Arizona residence, which they describe as a "secondary residence at which there is no reason to believe [Dr. Kahn] spen[t] any significant time." Dr. Kahn's Br. at 21; *see also* Nabeel's Br. at 42 ("Dr. Kahn had moved to Wyoming more than a year before the search [of the Arizona residence]."). Yet, Dr. Kahn regularly traveled from Wyoming to Arizona to see patients, where he maintained a medical office. Thus, given the transient nature of Dr. Kahn's practice between his offices and homes in Wyoming and Arizona, the magistrate judge could have concluded that Dr. Kahn brought records to his Arizona residence as he had in Wyoming. Further, Lyn Kahn resided at the Arizona residence in October 2016 and used her cellular phone to schedule appointments and arrange payments. Thus, the magistrate judge could also have concluded that Lyn Kahn, a co-conspirator, also kept records at the Arizona residence. Even considering Defendants' counterarguments

collectively, the magistrate judge's probable cause finding is supported by a substantial basis and may not be disturbed under our "very deferential" review. *Riccardi*, 405 F.3d at 860.

3. Special Agent Patterson's Affidavit Established Probable Cause as to All Patients Included in the Warrant

Dr. Kahn also asserts that, even if a nexus were established to support a warrant to search the Arizona residence, Special Agent Patterson's affidavit only established probable cause as to the eight patients explicitly described, but did not provide probable cause to search for and seize the records of all fifty-one patients. *See* Dr. Kahn's Br. at 25. Special Agent Patterson averred that all fifty-one patients showed "red flags," including "extremely high dosage amounts, patients traveling from out of state, multiple patients from the same household receiving controlled substance prescriptions, lack of individualized therapy, early refills, dangerous drug combinations and overlapping controlled substance prescriptions with Dr. Kahn's Arizona and Wyoming DEA registrations being utilized." App., Vol. III at 153–54. Those red flags were identified by reviewing computerized "prescription drug monitoring program" information in both Arizona and Wyoming. *Id.* at 153. Accordingly, the magistrate judge could have concluded that the eight patients explicitly described in the affidavit were illustrative of the remaining "red flagged" patients, and thereby provided a "substantial basis" for the magistrate judge's

probable cause determination as regards the more generally described patients. *Biglow*, 562 F.3d at 1281.

4. The Seizure of U.S. Currency and Firearms Was Permitted Under the Plain View Doctrine

The government concedes that the Arizona warrant did not authorize seizure of U.S. currency, firearms, or automobiles. The government asserts that the U.S. currency and firearms were properly seized under the plain view doctrine. Defendants counter that the plain view doctrine does not apply here because further investigation was required to establish probable cause. Defendants also argue that the plain view doctrine cannot apply because the discovery of those items was not "inadvertent." *See* Dr. Kahn's Br. at 31.

"The plain view doctrine allows a law enforcement officer to seize evidence of a crime, without violating the Fourth Amendment, if (1) the officer was lawfully in a position from which the object seized was in plain view, (2) the object's incriminating character was immediately apparent (i.e., there was probable cause to believe it was contraband or evidence of a crime), and (3) the officer had a lawful right of access to the object." *United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006) (internal quotation marks omitted).

Contrary to Defendants' assertion, there is no inadvertent discovery requirement under the plain view doctrine. Defendants rely on language from Justice Stewart's plurality opinion in *Coolidge v. New*

Hampshire, 403 U.S. 443 (1971). There, Justice Stewart wrote: "If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of 'Warrants . . . particularly describing . . . [the] things to be seized.'" *Id.* at 471. The Supreme Court has since expressly rejected Justice Stewart's reasoning in *Coolidge* and the "inadvertent discovery requirement." *Horton v. California*, 496 U.S. 128, 138–39 (1990); *see also id.* at 141 ("If the interest in privacy has been invaded, the violation must have occurred before the object came into plain view and there is no need for an inadvertence limitation on seizures to condemn it."). Thus, under current Supreme Court precedent an officer may, if on the premises pursuant to a valid warrant or under an exception of the warrant requirement, seize items which immediately appear to be evidence or contraband of a crime. *See United States v. Le*, 173 F.3d 1258, 1269 (10th Cir. 1999) ("We think it clear that the inadvertence requirement is no longer a necessary condition for a legal 'plain view' seizure.").

Because Defendants do not challenge whether the objects were in "plain view" or whether officers had a right of access to the objects (presuming the warrant was valid), they only question whether "the object's incriminating character was immediately apparent." *Angelos*, 433 F.3d at 747. The parties dispute whether the incriminating character must be "immediately apparent" at the time of the search, or at the time of the seizure. Defendants assert that the plain view doctrine

does not apply to the U.S. currency or firearms because the incriminating nature of those items was not "immediately apparent" upon their discovery. Rather, the officers only developed probable cause after questioning Nabeel for more than an hour. The government responds that the items were properly seized because their incriminating nature was immediately apparent at the time of their seizure.

The time at which probable cause must be "immediately apparent" depends on the nature of the privacy invasion. All parties rely on *Arizona v. Hicks*, 480 U.S. 321 (1987). The officers in *Hicks* entered an apartment without a warrant under the exigent circumstance of investigating a shooting. The Supreme Court held that the plain view doctrine did not permit police to record serial numbers on stereo equipment if doing so required police to move the equipment because moving the objects "produce[d] a new invasion of respondent's privacy unjustified by [other circumstances] that validated the entry." *Id.* at 325. Yet in *Hicks*, unlike here, the privacy invasion was a warrantless search of the defendant's property, i.e., moving the stereo. Thus, *Hicks* stands for the proposition that to *search* an object under the plain view doctrine, its criminal nature must be immediately apparent at its initial discovery.

To *seize* an object, however, the criminal nature must be apparent at its seizure. Accordingly, "[a]long with numerous other circuits, we have upheld the plain view *seizure* of documents even when the police only learned of the documents' incriminating nature by perusing them during a *lawful search* for other

objects." *United States v. Soussi*, 29 F.3d 565, 570 (10th Cir. 1994) (emphases added); *see also United States v. Johnston*, 784 F.2d 416, 420 (1st Cir. 1986) (holding probable cause must be established during the search, but not the moment of discovery, because "[police] are not limited by the chance of which room they happen to search first").

Here, the officers had probable cause to seize the U.S. currency upon its discovery. Special Agent Patterson, who supervised the search of the Arizona residence, had other evidence tying the U.S. currency to Dr. Kahn's drug enterprise. For example, in his affidavit in support of the warrant, Special Agent Patterson described evidence showing that Dr. Kahn sold prescription medication for cash, that Dr. Kahn had collected more than $3,000,000 from such sales, that Dr. Kahn (like other drug traffickers) likely kept bulk cash in his residence, possibly in a safe, and that on one occasion Dr. Kahn discussed bringing a safe home, albeit to his Wyoming residence. Thus, upon learning of bulk cash stored in a safe (or safes), Special Agent Patterson had probable cause to believe that cash was evidence of Dr. Kahn's illegal activity.

Defendants assert that the officers lacked probable cause to seize the cash because one of the very purposes of the search was to determine whether Dr. Kahn was issuing unlawful prescriptions. Defendants' argument conflates the burden of proof to sustain a conviction with probable cause to seize evidence; although the government may have required further evidence to *prove* a drug conspiracy, the officers had probable

cause to *seize* bulk cash. Further, even assuming officers lacked probable cause to believe bulk cash would be discovered at Dr. Kahn's Arizona residence, upon its discovery, the officers had probable cause to believe the cash was evidence of Dr. Kahn's illegal activity. *Horton*, 496 U.S. at 139 ("[I]f [an officer] has a valid warrant to search for one item and merely a suspicion concerning the second, whether or not it amounts to probable cause, we fail to see why that suspicion should immunize the second item from seizure if it is found during a lawful search for the first.").

The officers also had probable cause to seize the firearms as contraband after questioning Nabeel. Nabeel informed Special Agent Patterson that the firearms were his, were registered to another, and that he was "not allowed" to own the firearms. App., Vol. VI at 353. Officers also discovered conflicting forms of identification. Defendants do not challenge the voluntariness of Nabeel's incriminating statements or the discovery of the conflicting identification cards during that search. Thus, the officers had probable cause to believe that Nabeel was an alien in unlawful possession of a firearm. *See* 18 U.S.C. § 922(g)(5).

5. The Officers Did Not Grossly Exceed the Scope of the Warrant

Defendants next assert that, by seizing numerous items not mentioned in the warrant, the officers grossly exceeded the scope of the warrant, thereby requiring blanket suppression.

"When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement [under the Fourth Amendment] is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant." *United States v. Medlin*, 842 F. 2d 1194, 1199 (10th Cir. 1988) (*Medlin II*). In *Medlin II*, the warrant authorized the search and seizure of "firearms—illegally possessed by Arvle Edgar Medlin, and/or stolen firearms, records of the purchase or sale of such firearms by Medlin, which are fruits, evidence and instrumentalities of [unlawful possession of a firearm by a convicted felon]." *Id.* at 1195. In addition to seizing 130 firearms from Medlin's residence, officers also seized 667 items of suspected stolen property. This court found that the 667 items were not seized pursuant to a warrant and were not seized under any exception to the warrant requirement. We then affirmed the district court's factual finding that "the seizure of the 667 items was 'not mitigated by practical considerations' and that [the officer] 'employed the execution of the federal search warrant as a fishing expedition.'" *Id.* at 1199.

Similarly, in *United States v. Foster*, 100 F.3d 846, 851 (10th Cir. 1996), we concluded that the seizure of "anything of value" grossly exceeded the scope of the warrant, and thus merited blanket suppression. In addition to seizing the drugs and guns listed in the warrant, officers also seized, without explanation, a "BB gun, drill, TVs, lawnmower, coveralls, socket set, clock radio, coins, knives, [and] jewelry." *Id.* at 850. Thus, the

search presented "one of those exceedingly rare cases" in which blanket suppression was appropriate. *Id.* at 852.

Here, blanket suppression is unwarranted. The facts of this case do not begin to resemble those of *Medlin II* or *Foster*. Here, only the automobiles were seized without an exception to the warrant requirement. Moreover, even if an exception to the warrant requirement did not apply to the U.S. currency or firearms, the officers' departures from the warrant were not as gross as those in *Medlin II* or *Foster*. Contrary to Dr. Kahn's assertion, the officers did not "seize[] 'anything of value' they came across." Dr. Kahn's Br. at 32. Unlike *Foster*, the officers did not seize items that were unrelated to the warrant's purpose and focus like tools, clothes, or household appliances. In short, the record does not indicate that officers turned the warrant into a "general warrant."[5]

B. The Search of the Wyoming Residence Did Not Violate the Fourth Amendment

Dr. Kahn also asserts that the search of his Wyoming residence lacked probable cause. According to Dr. Kahn, DEA Investigator Robert Churchwell's affidavit in support of the warrant for the Wyoming search differed from Special Agent Patterson's affidavit in support of the warrant for the Arizona search in two

[5] Because we sustain the search of the Arizona residence on other grounds, we decline to address the government's good faith and severability arguments.

important ways. First, Investigator Churchwell's affidavit "did not include any opinion as to whether drug dealers tend to keep records or drug paraphernalia at home." Dr. Kahn's Br. at 22. Second, Investigator Churchwell's affidavit did not inform the magistrate judge when Dr. Kahn stated he planned to bring patient files from his Wyoming office to his Wyoming residence.

Neither of these distinctions affects our analysis. As explained above, "[a]dditional evidence connecting a defendant's suspected activity to his residence may also take the form of inferences a magistrate judge reasonably draws from the [g]overnment's evidence." *Biglow*, 562 F.3d at 1280 (internal quotation marks omitted). Thus, the affidavit's failure to include an opinion regarding where drug dealers tend to keep records is not necessarily fatal. Just as the facts provided in Special Agent Patterson's affidavit established a nexus to the Arizona residence, the facts provided in Investigator Churchwell's affidavit similarly established a nexus to the Wyoming residence.

Further, the intercepted call in which Dr. Kahn indicated he would bring patient files to his Wyoming residence was not too stale. "[W]hether the information is too stale to establish probable cause depends on the nature of the criminal activity, the length of the activity, and the nature of the property to be seized." *United States v. Snow*, 919 F.2d 1458, 1460 (10th Cir. 1990) (internal quotations omitted). In *Snow*, we held that an affidavit containing "undated hearsay" was not stale, where the investigation occurred over a five week

period, the defendant was "running an ongoing, continuous operation to defraud the government," and the items sought "were of the type that would be kept for some time given the nature of [the] defendant's activities." *Id.* Here, as in *Snow*, the government was investigating ongoing and continuous criminal activity, making the passage of time "less critical." *Id.* Also, Dr. Kahn's patient files would likely be kept for some time, as opposed to being regularly recycled or destroyed. Thus, considering the nature of Dr. Kahn's criminal activity and the nature of the property to be seized, the intercepted call was not too stale. *See also Riccardi*, 405 F.3d at 861 (holding that, in a child pornography prosecution, a five-year old copy shop receipt was not too stale because it showed the defendant had the "desire and ability" to convert sexually explicit photographs of minors into digital format).

C. The Search of Vape World Did Not Violate the Fourth Amendment

Dr. Kahn also asserts that Investigator Churchwell's affidavit failed to establish a nexus to Vape World because there was no evidence of "ongoing and continuous" criminal activity at that business location. Dr. Kahn's Br. at 24. A "source of information" informed investigators that, on at least one occasion, Dr. Kahn instructed a patient to pick up his prescription outside of Vape World. App., Vol. III at 191. Financial records also showed that Dr. Kahn and Lyn Kahn owned Vape World, that Vape World generated thousands of dollars in cash deposits and credit card transactions, and that

a personal check for $300 from one of Dr. Kahn's Arizona patients was deposited in an account associated with Vape World. Investigator Churchwell opined that, based on his training and experience, "drug traffickers sometimes use legitimate businesses to conceal unlawfully obtained drug proceeds either through financial institutions or bulk cash storage." *Id.* at 193. These facts provided a "substantial basis" for the magistrate judge's probable cause determination. *Biglow*, 562 F.3d at 1281.

D. A Practitioner May Be Convicted for Prescribing Controlled Substances Either Outside the Scope of Professional Practice *or* Not for a Legitimate Medical Purpose

Defendants ask us to revisit our prior holding that a licensed physician may be convicted under 21 U.S.C. § 841 for either prescribing "outside the scope of professional practice" *or* "for no legitimate medical purpose." *See United States v. Nelson*, 383 F.3d 1227 (10th Cir. 2004). Because one panel may not overturn a decision by a prior panel, we must reject Defendants' challenge. *United States v. Caiba-Antele*, 705 F.3d 1162, 1165 (10th Cir. 2012) ("[W]e are bound by the precedent of prior panels absent en banc reconsideration or a superceding contrary decision by the Supreme Court." (quoting *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993))).

In any event, our prior holding in *Nelson* is sound. Under § 841(a)(1), drug distribution is only unlawful "except as authorized by this subchapter." As we found in *Nelson*:

> The exact extent of the authorization is described in 21 C.F.R. § 1306.04(a): "A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." In other words, a practitioner is authorized to dispense controlled substances only if he acts with a legitimate medical purpose *and* in the usual course of professional practice. Conversely, a practitioner would be unauthorized to dispense a controlled substance if he acts without a legitimate medical purpose *or* outside the usual course of professional practice.

Nelson, 383 F.3d at 1233 (emphasis in original).

Other circuits have reached the same conclusion. *See, e.g.*, *United States v. Armstrong*, 550 F.3d 382, 399–400 (5th Cir. 2008) (collecting cases), *overruled on other grounds by United States v. Guillermo Balleza*, 613 F.3d 432, 433 n. 1 (5th Cir. 2010).

E. The District Court Properly Instructed the Jury on Good Faith

Both Defendants challenge the district court's jury instructions on the good faith defense, but on different grounds. Nabeel asserts that the district court erred by expressly limiting its good faith instruction to Dr.

Kahn, permitting the jury to convict Nabeel on less evidence than was required to convict Dr. Kahn. Dr. Kahn asserts that the district court erred by instructing the jury that a defendant's "good faith" must be reasonable, permitting the jury to convict Dr. Kahn by finding a lesser mens rea than § 841 requires.

"We review a district court's decision on whether to give a particular jury instruction for abuse of discretion and view the instructions as a whole de novo to determine whether they accurately informed the jury of the governing law." *United States v. Sorensen*, 801 F.3d 1217, 1228–29 (10th Cir. 2015) (alteration and internal quotations marks omitted).

Here, the district court instructed the jury:

> The good faith of Defendant Shakeel A. Kahn is a complete defense to the charges in Count One (conspiracy to commit a federal drug crime) as well as the charges in Counts Four, Six, Seven, Eleven, Fourteen, Sixteen, Nineteen, and Twenty (knowingly and unlawfully dispensing and/or distributing Oxycodone outside the usual course of professional practice and without a legitimate medical purpose), because good faith on the part of Defendant Shakeel Kahn would be inconsistent with knowingly and intentionally distributing and/or dispensing controlled substances outside the usual course of professional practice and without a legitimate medical purpose, which is an essential part of the charges. "Good faith" connotes an attempt to act in

> accordance with what a reasonable physician should believe to be proper medical practice.
>
> The good faith defense requires the jury to determine whether Defendant Shakeel Kahn acted in an honest effort to prescribe for patients' medical conditions in accordance with generally recognized and accepted standards of practice.
>
> . . .
>
> The burden of proving good faith does not rest with a defendant because a defendant does not have any obligation to prove anything in this case. It is the [g]overnment's burden to prove to you, beyond a reasonable doubt, that a defendant knowingly or intentionally acted unlawfully.
>
> In determining whether or not the [g]overnment has proven that a Defendant intentionally or knowingly violated the law, you should consider all of the evidence in the case bearing on the Defendant's state of mind.

Dr. Kahn's App., Vol. I at 239–40.

1. Nabeel's Challenge to the District Court's Good Faith Instruction Is Forfeited

Nabeel asserts that the district court erred "in instructing the jury that good faith was a defense for [Dr. Kahn] while refusing to instruct the jury that good faith was a defense for Nabeel Khan[.]" Nabeel's Br. at 2. This argument was not, however, the same as the

argument Nabeel raised before the district court, and thus we decline to consider it.

During trial, Nabeel submitted a written objection to the district court's proposed good faith instruction. In his objection, Nabeel asserted that he "is not a doctor and cannot be held to the same standard as Dr. Kahn when assessing the charges and his good faith belief that what he was doing was not a crime." App., Vol. II at 1635. Nabeel attached a proposed good faith instruction, which would have instructed the jury that "good faith of a defendant, whether or not objectively reasonable, is a complete defense to the crimes charged, because good faith on the part of a defendant is inconsistent with specific intent, which is an essential part of the charges." *Id.* at 1637.

At the jury instruction conference, the district court furnished a new good faith instruction, acknowledging that it had "pulled a surprise upon counsel." *Id.*, Vol. VI at 4549. Nabeel again objected, informing the district court that "a good faith instruction is important as [Nabeel] is not being held to the same standard as a doctor, and that he should, as [his counsel] indicated in [a prior written objection], be held to a good faith belief that what he was doing was not a crime." *Id.*

A party objecting to jury instructions must "inform the court of the specific objection and the grounds for the objection. . . ." Fed. R. Crim. P. 30(d). Failure to do so "precludes appellate review, except as permitted under Rule 52(b) [i.e., plain error]." *Id.* The "heart" of Rule

30(d) requires that the objection "be made with specificity and distinctness." *United States v. Allen*, 129 F.3d 1159, 1162 (10th Cir. 1997) (quoting *United States v. Agnew*, 931 F.2d 1397, 1401 n.3 (10th Cir. 1991)).

Before the district court, Nabeel argued that he "cannot be held to the same standard" as Dr. Kahn. App., Vol. II at 1635. Yet, Nabeel now asserts that he not only can, but *must* be held to at least the same standard as Dr. Kahn. *See* Nabeel's Reply Br. at 10 (arguing "the government must prove that a lay defendant like Nabeel acted with the *same* level of culpable knowledge required to convict a prescribing practitioner like Dr. Kahn") (emphasis added). Additionally, before the district court, Nabeel rejected an "objective" good faith instruction, and instead proposed a "subjective" good faith instruction. Yet, Nabeel now asserts not only that he is entitled to an "objective" good faith instruction, but that such an instruction was required because it was provided to Dr. Kahn.

Because Nabeel did not raise this specific objection before the district court, we may review only for plain error. Fed. R. Crim. P. 30(d); *Allen*, 129 F.3d at 1162. Nabeel does not argue plain error, however, so we treat the argument as waived, and decline to consider it. *United States v. Leffler*, 942 F.3d 1192, 1198 (10th Cir. 2019).[6]

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[6] In other circumstances, we have discretion to consider a waived claim where, as here, the government does not argue waiver. *See United States v. Heckenliable*, 446 F.3d 1048, 1049 n.3 (10th Cir. 2006) (concluding the government "waived the

2. Dr. Kahn's Objection to the District Court's Good Faith Instruction Is Without Merit

Dr. Kahn asserts that the district court erred by instructing the jury that his "good faith" as a physician must be reasonable, permitting the jury to convict Dr. Kahn by finding a lesser mens rea than § 841 requires, i.e., that his actions were merely unreasonable.

Section 841(a)(1) makes it unlawful "[e]xcept as authorized by this subchapter . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance." 21 U.S.C. § 841(a)(1). One such authorization exception is provided under 21 U.S.C. § 829, which permits a registered practitioner to dispense a controlled substance with a "prescription." A prescription is lawful, and thus the exception applies, if the prescription is "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a). Accordingly, "[a]n order purporting to be a prescription issued not in the usual course of professional treatment . . . is not a prescription within the meaning and intent of [21 U.S.C. § 829] and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations

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waiver"). Under Rule 30(d), however, the forfeiture or waiver of an objection to jury instructions "precludes appellate review, except as permitted under Rule 52(b)." Thus, it is unclear whether the government may "waive the waiver" for an objection to jury instructions. In any event, we decline to exercise our discretion to review Nabeel's waived claim.

of the provisions of law relating to controlled substances." *Id.*; *see also United States v. Lovern*, 590 F.3d 1095, 1099 (10th Cir. 2009) (Gorsuch, J.).

We hold that § 841(a)(1) and § 1306.04(a) require the government to prove that a practitioner-defendant either: (1) subjectively knew a prescription was issued not for a legitimate medical purpose; or (2) issued a prescription that was objectively not in the usual course of professional practice. As we held in *Nelson*, the government need only prove criminal liability under one of those two prongs. 383 F.3d at 1233. As § 1306.04(a) explains, under the first prong, a prescription is valid only if it is issued "for" a legitimate medical purpose. Thus, the only relevant inquiry under that first prong is why a defendant-practitioner subjectively issued that prescription, regardless of whether other practitioners would have done the same. *See United States v. Feingold*, 454 F.3d 1001, 1008 (9th Cir. 2006) ("[T]he jury must look into a practitioner's mind to determine whether he prescribed the pills for what he thought was a medical purpose." (alterations omitted)).

Section 1306.04(a) also explains that, under the second prong, a prescription is valid only if it is issued "in" the scope of professional practice. Thus, the only relevant inquiry under that second prong is whether a defendant-practitioner objectively acted within that scope, regardless of whether he believed he was doing so. For this reason, at least when referencing the usual course of professional practice, federal case law "has rejected a subjective standard of good faith, in favor of

an objective one." *United States v. Schneider*, 704 F.3d 1287, 1303 (10th Cir. 2013) (Holmes, J., concurring) (collecting cases).

Limiting consideration of a defendant-practitioner's subjective belief to the "legitimate medical purpose" prong accords with the Fifth and Eleventh Circuits. In *United States v. Norris*, the Fifth Circuit held that a jury is properly instructed when directed to consider "1) [w]hether [the defendant-practitioner] prescribed the drugs for what he subjectively considered a legitimate medical purpose and 2) from an objective standpoint whether the drugs were dispensed in the usual course of a professional practice." 780 F.2d 1207, 1209 (5th Cir. 1986). In *United States v. Tobin*, the Eleventh Circuit, adopting the *Norris* framework, held that "a jury must determine from an *objective* standpoint whether a prescription is made in the 'usual course of professional practice.'" 676 F.3d 1264, 1283 (11th Cir. 2012) (emphasis in original).

The *Norris* framework is also consistent with Congress's policy goals in enacting the Controlled Substances Act ("CSA"), of which § 841(a)(1) is a part. If an objective standard applied to both prongs, a pharmacist who unknowingly filled an invalid prescription would be liable under the CSA because the prescription was not filled for a legitimate medical purpose, even if it was filled within the pharmacist's scope of professional practice. If a subjective standard applied to both prongs, a pharmacist who willingly ignored evidence that a prescription was invalid could escape liability, so long as he (even unreasonably) believed the

prescription was filled for a legitimate medical purpose, and he acted within his own (unreasonable) scope of professional practice. Thus, the *Norris* framework punishes practitioners who act as "street pushers," without punishing practitioners who are acting within the scope of their professional practice. *See United States v. Moore*, 423 U.S. 122, 140 (1975) ("But the scheme of the [CSA], viewed against the background of the legislative history, reveals an intent to limit a registered physician's dispensing authority to the course of his 'professional practice.' ").

Dr. Kahn's assertion that "good faith is a defense because it negates the mens rea element of the offense" is without merit. Dr. Kahn's Br. at 38. Unlike other criminal offenses, good faith does not go to mens rea for § 841 offenses involving practitioners. Rather, as numerous other circuits have recognized, good faith defines the scope of professional practice, and thus the effectiveness of the prescription exception and the lawfulness of the actus reus. *See, e.g.*, *Norris*, 780 F.2d at 1209 n.2 (affirming jury instruction stating "[a] controlled substance is prescribed by a physician in the usual course of a professional practice, and, therefore, lawfully, if the substance is prescribed by him in good faith, medically treating a patient in accordance with a standard of medical practice generally recognized and accepted in the United States"); *Tobin*, 676 F.3d at 1281 (substantially similar); *United States v. Chube II*, 538 F.3d 693, 699 (7th Cir. 2008) (substantially similar); *see also United States v. Volkman*, 797 F.3d 377, 387 (6th Cir. 2015) (affirming jury instruction stating

"[i]f a physician dispenses a drug in good faith in the course of medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of accepted medical practice. That is, he has dispensed the drug lawfully"); *United States v. Vamos*, 797 F.2d 1146, 1152 (2d Cir. 1986) (substantially similar).

Dr. Kahn's assertion that this instruction permitted the jury to criminally convict him for mere acts of malpractice or negligence is also without merit. The district court instructed that Dr. Kahn need only "attempt" to act reasonably, and that such an attempt must be made in an "honest effort." Dr. Kahn's App., Vol. I at 239. Further, the district court correctly instructed that the jury must reach its conclusion "beyond a reasonable doubt." *Id.* at 240. Thus, the jury could not convict Dr. Kahn for merely failing to apply the appropriate standard of care; it could only convict Dr. Kahn if it found, beyond a reasonable doubt, that Dr. Kahn failed to even attempt or make some honest effort to apply the appropriate standard of care. *See United States v. Sabean*, 885 F.3d 27, 45 (1st Cir. 2018) ("To safeguard the defendant's rights, the court emphasized that 'a sincere effort to act in accordance with proper medical practice,' even if flawed, could not undergird a guilty verdict so long as the defendant had acted in 'good faith.' "); *United States v. Wexler*, 522 F.3d 194, 206 (2d Cir. 2008) (concluding jury did not convict the defendant for "gross mistake or malpractice . . . because the instruction on good faith as to the honest exercise of professional judgment and a reasonable belief

as to proper medical practice would shield [the defendant] from criminal liability for any mistake, however gross"). In short, we find no error in the district court's instructions.

F. The District Court Properly Instructed the Jury on Intent

Dr. Kahn asserts that the district court's intent instruction unfairly burdened his right to testify because it "amount[ed] to directing the jury to disregard the defendant's testimony." Dr. Kahn's Br. at 41.

The district court instructed the jury:

> The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind. In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent. . . . It is entirely up to you, however, to decide what facts to find from the evidence received during the trial."

Dr. Kahn's App., Vol. I at 155.

This instruction was proper, and, as Dr. Kahn concedes, is similar to language this court has upheld in prior cases. *See, e.g.*, *United States v. Vreeken*, 803 F.2d

1085, 1092 (10th Cir. 1986). Further, contrary to Dr. Kahn's assertion, the district court's instruction did not burden his right to testify. The district court left the jury free to "consider any statements made" by Dr. Kahn, and to decline to consider any other facts or circumstances. Thus, the jury instruction did not "arbitrarily single out his testimony, and denounce it as false." *Reagan v. United States*, 157 U.S. 301, 305 (1895). Nor did the district court "highlight[] a testifying defendant's deep personal interest in the outcome of a trial." *United States v. Gaines*, 457 F.3d 238, 247 (2d Cir. 2006) (discussing *Reagan*). Rather, the district court properly left weighing the competing evidence "entirely" up to the jury. Dr. Kahn's App., Vol. I at 155.

G. The Evidence Was Sufficient to Convict Nabeel of Conspiracy

Nabeel asserts that the evidence admitted at trial fails to show that he had the requisite mental state to be guilty of a drug conspiracy. Specifically, Nabeel asserts that the evidence does not show that he "knew the prescriptions underlying criminal charges were written without a legitimate medical purpose in defiance of professional standards." Nabeel's Br. at 28. According to Nabeel, because the record lacks evidence that he had any medical education or pharmacy training, he could not have known that Dr. Kahn prescribed drugs outside the scope of professional practice.

"We review the sufficiency of the evidence to support a conviction de novo, asking only whether, taking

the evidence—both direct and circumstantial, together with the reasonable inferences to be drawn therefrom—in the light most favorable to the government, a reasonable jury could find [the defendant] guilty beyond a reasonable doubt." *United States v. Medina-Copete*, 757 F.3d 1092, 1107 (10th Cir. 2014) (alteration in original) (citation and internal quotation marks omitted). "The jury, as fact finder, has discretion to resolve all conflicting testimony, weigh the evidence, and draw inferences from the basic facts to the ultimate facts." *United States v. Harris*, 695 F.3d 1125, 1134 (10th Cir. 2012) (internal quotation marks omitted). "We accept at face value the jury's credibility determinations and its balancing of conflicting evidence." *Medina-Copete*, 757 F.3d at 1107 (internal quotation marks omitted).

The evidence here, when considered in the light most favorable to the government, supports the jury's conclusion that Nabeel knew that the prescriptions were not issued for a legitimate medical purpose or were issued outside the scope of Dr. Kahn's professional practice. Nabeel interacted directly with patients and saw patient profiles. Nabeel also discussed patients, prices, and appointment frequencies with Dr. Kahn. Nabeel also spoke with at least one patient about a TV news report that described patients who illegally sold their prescription medication.

Nabeel's integral knowledge of the ongoing illegal trafficking in prescription medications is most clearly demonstrated by his role in drafting, and directing patients to complete, a "drug addiction statement." By

signing that statement, patients swore that Dr. Kahn was not a "drug dealer" and that "[a]ny statement[s] to that effect made by [the patient] . . . are complete falsehoods and actionable as slander [and that the patient] unequivocally den[ies] any such statement made to that effect and they should be considered to be lies." App., Suppl. Vol. I at 134. Patients further swore that they were not an "addict" and that they "suffer from moderate to severe chronic pain that is helped by the use of prescription controlled substances." *Id.* Most concerning, the statement also required patients to agree to pay Dr. Kahn, as well as his "officers and agents," "$100,000.00 USD for each and every action, investigation, complaint, or other legal or administrative proceeding whether civil or criminal however commenced . . . as a direct and/or indirect result of any action attributable in any manner whatsoever to [the patient]." *Id.* By drafting this statement, the jury could have concluded that Nabeel knew that Dr. Kahn was in fact acting as a "drug dealer," that the prescriptions were not issued for legitimate medical purposes, and that Dr. Kahn (and "officers and agents" like Nabeel) were thus subject to criminal liability. Accordingly, when all evidence presented is considered together the evidence is sufficient to sustain Nabeel's conspiracy conviction. Because we sustain Nabeel's conspiracy conviction, we also sustain his conviction for possessing a firearm in the commission of a federal drug-trafficking crime.

Nabeel's reliance on our prior decision in *United States v. Lovern*, 590 F.3d 1095 (10th Cir. 2009)

(Gorsuch, J.), is misplaced. Unlike Nabeel, the pharmacy technician in *Lovern* "did not interact with customers; he did not see patient profiles; [and] he did not communicate with . . . doctors[.]" *Id.* at 1105. Further, we concluded the evidence presented in *Lovern* suggested that the technician only knew of some other unlawful activity, such as unlawfully accepting prescriptions over the internet, or failing to register as a pharmacy technician. *Id.* at 1106. Thus, we reversed the jury's conviction of a pharmacy technician because the evidence was insufficient to show that the defendant "knew of the particular problem that [gave] rise to liability under the CSA as opposed to . . . state law or regulation." *Id.* at 1109. In contrast, Nabeel offers no alternative theory for what unlawful activity he may have suspected, if not the unlawful distribution of controlled substances.

H. The Improper Witness Testimony Did Not Require a Mistrial

Finally, Dr. Kahn asserts that the district court erred in denying his motion for a mistrial following unfairly prejudicial testimony by a witness.

At trial, a witness for the government testified on direct examination that he was "monitoring Shakeel Kahn's jail calls while he was incarcerated." App., Vol VI at 3857. Dr. Kahn objected and, at sidebar, moved for a mistrial. The government acknowledged that the witness's statement prejudiced Dr. Kahn's defense, but asserted that the prejudice could be cured by an

instruction. *Id.* The district court then denied Dr. Kahn's motion, explaining:

> We have spent nearly a month here in this trial. This remark has been made. A whole lot of money has been spent at this point both by the government and by [Dr. Kahn]. I am not sure that my instruction alone can cure any prejudice—a question in the jurors' mind about—about this.

Id. at 3858.

The district court then instructed the jury that "[t]he answer of the witness . . . is stricken with the instruction that the jury must not speculate whether or not Shakeel Kahn was incarcerated for any period after he was arrested." *Id.* at 3859–60.

Although not discussed by either party, Dr. Kahn also filed a written Rule 33 motion for a new trial, which the district court denied in a written order. The district court held that a new trial was not required because the prosecutor did not act in bad faith, the district court gave a limiting instruction, and "the remark remains highly inconsequential in light of all the other evidence and testimony presented against [Dr. Kahn] throughout the trial." *Id.*, Vol. II at 1984–85 (citing *United States v. Lamy*, 521 F.3d 1257, 1266 (10th Cir. 2008)).

We review a decision to grant or deny a mistrial for abuse of discretion. *United States v. McKissick*, 204 F.3d 1282, 1299 (10th Cir. 2000). Denial of a new trial "is an abuse of discretion only if it is arbitrary,

capricious, whimsical, or manifestly unreasonable." *Lamy*, 521 F.3d at 1266. "In determining whether a new trial is required after a witness offers improper information, we consider (1) whether the prosecutor acted in bad faith, (2) whether the district court limited the effect of the improper statement through its instructions to the jury, and (3) whether the improper remark was inconsequential in light of the other evidence of the defendant's guilt." *Id.* (internal quotations omitted).

Assuming the district court's reference to the cost and time of trial in its oral ruling was an abuse of discretion, reversal is unwarranted because there is not a "reasonable possibility" that the objectionable testimony affected Dr. Kahn's conviction. *United States v. Nunez*, 668 F.2d 1116, 1124 (10th Cir. 1981) (citing *United States v. Bishop*, 534 F.2d 214, 220 (10th Cir. 1976)). As the district court found in its written ruling and we confirm in our review of the record, the evidence of guilt in this case is overwhelming in light of the government's weeks-long presentation of patient records, patient testimony, and expert testimony. Dr. Kahn's reliance on *Decks v. Missouri*, 544 U.S. 622, 630 (2005) is misplaced. Any prejudice to Dr. Kahn arising from the witness's passing reference to "jail calls" is not remotely akin to the prejudice suffered by a defendant who is required to appear before a jury in shackles or prison garb.

III

For the reasons set forth above, we **AFFIRM**.