APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. DAVID LAGUE, *Defendant-Appellant.*	No. 18-10500 D.C. No. 4:17-cr-00150-HSG-1 OPINION

Appeal from the United States District Court
for the Northern District of California
Haywood S. Gilliam, Jr., District Judge, Presiding

Argued and Submitted May 12, 2020
San Francisco, California

Filed August 20, 2020

Before: J. Clifford Wallace and Ryan D. Nelson, Circuit Judges, and James S. Gwin,[*] District Judge.

Opinion by Judge Wallace

[*] The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.

SUMMARY[**]

Criminal Law

The panel affirmed a former physician's assistant's conviction for distributing controlled substances outside the usual course of professional practice and without a legitimate medical purpose to five of his former patients, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(c), and (b)(2).

The panel held that uncharged prescriptions of controlled substances in enormous quantities and in dangerous combinations support a reasonable inference that the underlying prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. The panel wrote that the defendant's practice-wide evidence was therefore probative of his unlawful intent, undermining his defense at trial that the charged prescriptions amounted to "a few bad judgments." The panel concluded that because the prescription data made the intent element of the section 841 charges more probable, the district court properly admitted the defendant's uncharged prescriptions under Fed. R. Evid. 404(b).

The panel assumed, without deciding, that the district court abused its discretion under Fed. R. Evid. 403 by failing to preview all of the underlying prescription data before admitting it into evidence, but held that any error was harmless based on the overwhelming evidence of guilt.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel resolved remaining evidentiary objections in a concurrently-filed memorandum disposition.

COUNSEL

Leah Spero (argued), Spero Law Office, San Francisco, California, for Defendant-Appellant.

Joshua Halpern (argued), Attorney, United States Department of Justice, Washington, D.C.; Merry Jean Chan, Chief, Appellate Section; David L. Anderson, United States Attorney; United States Attorney's Office, San Francisco, California; for Plaintiff-Appellee.

OPINION

WALLACE, Circuit Judge:

David Lague, a former physician's assistant, was convicted of thirty-nine counts of distributing controlled substances outside the usual course of professional practice and without a legitimate medical purpose to five of his former patients, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(c), and (b)(2). Lague appeals from his judgment of conviction, arguing that the district court erred in allowing the government to present evidence of his uncharged practice-wide prescriptions.[1] We have jurisdiction under 28 U.S.C. §§ 1291 and 1294, and we affirm.

[1] We resolve Lague's remaining evidentiary objections in a concurrently-filed memorandum disposition.

I.

In 2007, Lague began working as a physician's assistant at a chronic pain-management medical practice in San Leandro, California. He was licensed to prescribe controlled substances including opioids.

In 2016, after Lague's patient SL[2] was arrested for possession with the intent to distribute opioids that Lague had prescribed to him, SL agreed to cooperate with the Drug Enforcement Administration's (DEA) investigation into the clinic.

At the direction of the DEA, SL recorded his future visits to the clinic. During one visit in 2016, SL offered cash to Lague in exchange for doubling his prescription for oxycodone. Lague wrote the double prescription, falsely recording in his patient notes that SL had asked for it simply to save money on his copay for the following month. Lague and SL discussed how Lague would write the prescription to avoid scrutiny from the pharmacy. SL would fill the prescription at one pharmacy but would refill his prescription the next month at a different pharmacy.

In his patient notes, Lague claimed to monitor SL's compliance through urine testing. But the urine tests revealed that SL had not been taking any of his prescriptions. Lague never confronted SL about the negative urine test results, and falsely wrote in his notes that SL was following his opioid agreement.

[2] As was done at trial, we refer to Lague's former patients using their initials to preserve their anonymity.

In March 2017, the DEA executed a search warrant at the clinic, seizing over one hundred patient files. Based on those patient files and on SL's recordings, the government charged Lague with thirty-nine counts of unlawfully distributing Schedule II and Schedule IV controlled substances to five former patients: SL, DL, KO, JF, and MCM. The government also charged Lague with seven counts of healthcare fraud and conspiracy to commit healthcare fraud for unlawfully prescribing fentanyl to MCM.

At trial, both parties presented a medical expert. The government called Dr. Charles Szabo. Lague called Dr. Gary Martinovsky. The experts opined on whether the charged prescriptions were within the usual course of professional practice.

The experts focused on Lague's charged prescriptions, testifying about various pain-management standards from the California Medical Board Guidelines, the American Pain Society Guidelines, and the Center for Disease Control and Prevention Guidelines.[3] These guidelines provide recommended prescribing amounts based on generally accepted medical standards.

Medical standards also warn of the risks of consuming controlled substances in certain combinations. For example, drug addicts combine opioids like oxycodone and hydrocodone with a benzodiazepine for an enhanced but dangerous "high." Drug addicts may take this combination with a muscle relaxant, forming the "holy trinity," for an

[3] The medical community refers to "milligrams of morphine equivalent," or "MME," to measure and compare the prescriptions of different opioids. Each opioid is assigned a conversion factor based on its potency relative to morphine.

even more dangerous "high." The "holy trinity" of drugs rarely serves a legitimate medical purpose.

To monitor patients' pill-seeking behaviors, medical professionals perform urinalysis testing. The testing is designed to detect the consumption of unprescribed substances (a sign of drug addiction), and the nonconsumption of prescribed medications (a sign of illegal sales). Professionals also rely on other warning signs such as a patient seeking an early prescription refill.

At trial, the government presented evidence that Lague had prescribed enormous quantities of controlled substances in dangerous combinations to the five patients covered by the Second Superseding Indictment. The government presented the recordings of SL's visits. The government also presented the patient files of Lague's five patients. Two of Lague's former patients testified at trial, corroborating SL's testimony that Lague had falsified patient files and had not examined patients before prescribing controlled substances.

The government also introduced Lague's statements in his interview with the DEA and his testimony before the grand jury. In his interview with the DEA, Lague said that he did not want to be a "policeman" with his patients. He also said that it was "possible" that he had falsified his patients' files. Before the grand jury, Lague acknowledged that the level of opiates prescribed at the clinic, especially starting in 2015, was higher than appropriate.

In addition to this patient-specific evidence, the government introduced Lague's practice-wide prescription data from 2015 and 2016 to show how Lague's prescription levels compared to that of other opioid prescribers, including

Dr. Martinovsky.[4] The data concerned Lague's prescriptions for 458 patients unrelated to the Second Superseding Indictment. The prescription data showed that Lague had prescribed opioids at among the highest rates compared to other pain management prescribers in California.

Robert Gibbons testified about the prescription data. For his testimony, Gibbons, a statistician at the U.S. Department of Health and Human Services, relied on Medicare's Integrated Data Repository. Gibbons presented a series of charts comparing Lague's practices to three groups of practitioners: providers who prescribe opioids to over 50 Medicare patients, providers specializing in pain management and anesthesiology, and providers specializing in cancer treatment. The data showed that in 2016, Lague issued more opioids than any other Medicare prescriber in California. Gibbons testified that Lague's prescription data "made him an outlier" and that Lague's prescribed opioids were "quite a bit higher" than 99 percent of prescribers Gibbons compared.

Paul Short also testified about Lague's practice-wide prescription data. Short relied on California's Controlled Substances Utilization Review and Evaluation System (CURES), an aggregator of controlled substances filled by California pharmacies. Short presented charts that showed that Lague had prescribed 1.4 million Schedule II pills in 2016, that Lague's methadone and oxycodone prescriptions

[4] Before trial, the government moved in limine seeking the admission of Lague's practice-wide prescription data during trial. The district court granted the motion, holding that the practice-wide evidence was probative of Lague's intent and knowledge to write the charged prescriptions without a legitimate medical purpose.

exceeded the maximum recommended dosages, that Lague often prescribed a combination of opioids and benzodiazepines, and that Lague prescribed the "holy trinity" to some of his patients.

The government recalled Short as a rebuttal witness to compare Lague's prescription practices with those of Lague's expert, Dr. Martinovsky using the CURES data. The rebuttal testimony showed that Lague's prescription amounts dwarfed Dr. Martinovsky's.

After the conclusion of the trial in July 2018, the jury found Lague guilty of the unlawful distribution charges. Lague was convicted for doubling SL's opioid prescriptions so that he could sell the excess, and for prescribing controlled substances in enormous quantities and dangerous combinations to DL, KO, MCM, and JF. Lague was acquitted of the healthcare fraud charges. The district court sentenced Lague to 120 months imprisonment for his unlawful Schedule II prescriptions and to 60 months imprisonment for his unlawful Schedule IV prescriptions, to be served concurrently. This appeal followed.

II.

We review the question whether specific evidence falls within the scope of Federal Rule of Evidence 404(b) de novo. *See United States v. Carpenter*, 923 F.3d 1172, 1180–81 (9th Cir. 2019) (citation omitted). We review the district court's admission of "other act" evidence for an abuse of discretion. *Id.* If the district court abuses its discretion under Rule 403, we ask "whether the government successfully bore its burden of proof that the error in admitting the evidence was harmless." *United States v. McElmurry*, 776 F.3d 1061, 1070 (9th Cir. 2015).

III.

A.

It is generally "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). A medical professional's prescription of a controlled substance is lawful only if "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; *see also United States v. Moore*, 423 U.S. 122, 124 (1975).

Lague argues that the district court erred, under Federal Rule of Evidence 404(b), by granting the government's motion in limine to present data of his practice-wide prescriptions. He contends that these uncharged prescriptions do not support an inference that he intended to write the charged prescriptions outside the usual course of professional practice and without a legitimate medical purpose.[5]

[5] The government also argues that the prescription data was admissible because it was intrinsic to the charged conduct. Evidence of "other acts" is admissible irrespective of Rule 404(b) if the evidence is inextricably intertwined with the charged conduct. *United States v. Beckman*, 298 F.3d 788, 793 (9th Cir. 2002). This exception applies when (1) particular acts of the defendant are part of a single criminal transaction, or when (2) the "other act" evidence is necessary for the government to offer a coherent story of the crime. *Id.* at 794 (citation omitted).

The intrinsic evidence exception to Rule 404(b) does not apply here. The uncharged prescriptions are not part of the section 841 charges, nor

We begin with the text of Federal Rule 404(b). *See United States v. Boulware*, 384 F.3d 794, 807 (9th Cir. 2004). Under Federal Rule 404(b), "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). But other act evidence may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed. R. Evid. 404(b)(2).

We apply a four-part test to determine whether "other act" evidence is admissible. A district court may admit other act evidence if: (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged. *See United States v. Bailey*, 696 F.3d 794, 799 (9th Cir. 2012) (citation omitted). The government "has the burden of proving that the evidence meets all of the above requirements." *United States v. Arambula-Ruiz*, 987 F.2d 599, 602 (9th Cir. 1993) (citation omitted).

Lague argues that the government failed to meet its burden under the first part of our Rule 404(b) analysis, *i.e.*, that his practice-wide evidence did not tend to prove a point material to the unlawful distribution charges because there was no evidence that those underlying prescriptions were issued unlawfully. We agree with Lague that, under Rule 404(b), "the government . . . bears the burden of proving a logical connection between appellant's purported

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are they necessary for the government to offer a coherent narrative of Lague's crimes.

involvement in the previous [act] and a material fact at issue in the crime with which he was charged." *United States v. Mayans*, 17 F.3d 1174, 1183 (9th Cir. 1994).

As is relevant here, the "material fact at issue" is whether Lague intended to prescribe controlled substances to the five patients covered by the Second Superseding Indictment without a legitimate medical purpose. *United States v. Rendon-Duarte*, 490 F.3d 1142, 1144–45 (9th Cir. 2007). If Lague's aberrational prescription data is probative of his intent to prescribe the underlying, uncharged prescriptions without a legitimate medical purpose, there is a logical connection between the "other" prescriptions and the charged prescriptions.

But we have not yet decided whether a medical professional's practice-wide prescription data is probative of unlawful intent in a section 841 charge. We therefore now turn to our sister circuits for guidance.

The government relies on the Eleventh Circuit's decision, *United States v. Merrill*, 513 F.3d 1293 (11th Cir. 2008). The defendant in *Merrill* was a physician charged with distributing controlled substances in violation of section 841(a). *Id.* at 1297. At trial, the physician insisted that his charged prescriptions were issued for a legitimate medical purpose. *Id.* at 1299. The district court allowed the government to introduce evidence of more than 33,000 prescriptions the physician had written during the relevant three-year period. *Id.* After his conviction, the defendant argued on appeal that the district court had abused its discretion by admitting the uncharged prescriptions under Rule 404(b). *Id.*

But the Eleventh Circuit upheld the physician's conviction and concluded that the district court "did not

abuse its discretion in admitting either the summary or the individual prescriptions underlying" the practice-wide data. *Id.* at 1303. The Eleventh Circuit explained that the "evidence of the quantity and combination of prescriptions" the physician had written was "directly related to" whether he was "relieved of liability under the Controlled Substances Act because he acted in the 'usual course of a professional practice.'" *Id.* This was because a "jury may consider prescription data sets outside those specifically charged in the indictment to determine whether a physician has exceeded the legitimate bounds of medical practice.'" *Id.*, *citing United States v. Harrison*, 651 F.2d 353, 355 (5th Cr. 1981).

Lague, for his part, relies on the Eighth Circuit's decision, *United States v. Jones*, 570 F.2d 765 (8th Cir. 1978). The physician in that case was also charged with intentionally distributing a Schedule II controlled substance under section 841. *Id.* at 766. At trial, the district court allowed the government to introduce evidence of 478 other prescriptions for Schedule II drugs the physician had written for his former patients as evidence of his unlawful intent to write the charged prescriptions. *Id.* Upon being convicted, the physician argued on appeal that the district court had erred in admitting the evidence of the uncharged prescriptions. *Id.*

The Eighth Circuit agreed with the physician and reversed the section 841 conviction. *Id.* The Eighth Circuit observed that the "other" prescriptions could be logically connected to the crime charged only if the physician wrote those "other" prescriptions "outside the bounds of professional medical practice." *Id.* But unlike the Eleventh Circuit in *Merrill*, the Eighth Circuit held that, without specific evidence of the treatment of the patients underlying

those "other" prescriptions, the quantity of the prescriptions was not probative of whether the physician had "acted unprofessionally." *Id.*

Lague and the government ask us to distinguish the case before us from *Merrill* and *Jones* respectively. We now turn to that issue.

We disagree with Lague that *Merrill* is different from this case. Lague contends that Merrill is inapposite because the government there had to prove a scheme to defraud involving excessive quantities of drugs. We acknowledge that the Eleventh Circuit's opinion in *Merrill* had referenced its earlier discussion that "evidence of the quantity and combination of prescriptions . . . during the relevant period is directly related to the issue of whether [the physician] committed health care fraud." *Merrill*, 513 F.3d at 1303. But in *Merrill*, the Eleventh Circuit independently concluded that the physician's practice-wide prescription data was admissible under Rule 404(b) because it tended to prove the intent element of the section 841(a) charges, *i.e.*, whether the physician intended to act "in the usual course of professional practice." *Id.* We read *Merrill* to affirm the admission of practice-wide uncharged prescriptions under Rule 404(b) irrespective of any nexus to a healthcare fraud charge.[6]

We also disagree with the government that this case is different from *Jones*. The government asserts that *Jones* was decided against the backdrop of the clear-and-convincing standard the government was required to overcome when

[6] We are similarly unpersuaded by the Tenth Circuit's suggestion that the holding in *Merrill* was limited to the fraud charges. *See United States v. MacKay*, 715 F.3d 807, 841 (10th Cir. 2013).

seeking to admit "other act" evidence before the Federal Rules of Evidence was codified. We disagree. In *Jones*, the Eighth Circuit acknowledged that the government's burden of proof to have "other acts" admitted into evidence had been relaxed by the Federal Rules of Evidence. *Jones*, 570 F.2d at 768 (explaining the evolution of a proponent's burden of proof under Rule 404(b)).

Simply put, *Merrill* and *Jones* are irreconcilable. Faced with this split of authority, and after carefully examining the law of our circuit, we hold that the Eleventh Circuit's opinion in *Merrill* better comports with the text and purpose of Rule 404(b).

"Rule 404(b) is a rule of inclusion—not exclusion—which references at least three categories of other 'acts' encompassing the inner workings of the mind: motive, intent, and knowledge." *United States v. Curtin*, 489 F.3d 935, 944 (9th Cir. 2007) (en banc). Under our "low threshold test of sufficien[cy]," *United States v. Dhingra*, 371 F.3d 557, 566 (9th Cir. 2004), the government "need not prove Rule 404(b) evidence by a preponderance of the evidence," *Bailey*, 696 F.3d at 799. Instead, the government need only lay a factual foundation from which a "jury could reasonably conclude that [the defendant] committed the allegedly-similar bad acts," and that he possessed the requisite intent in committing those bad acts. *Id.*, *citing Huddleston v. United States*, 485 U.S. 681, 685 (1988); *see also* Fed. R. Evid. 104(b). In deciding where "other act" evidence is relevant to prove intent, we defer to the "district judge's own experience, general knowledge, and understanding of human conduct and motivation." *Curtin*, 489 F.3d at 948, *quoting* McCormick on Evidence § 185 (6th ed. 2006) (emphasis and alteration omitted).

Applying this relaxed standard, we hold that uncharged prescriptions of controlled substances in enormous quantities, and in dangerous combinations, support a reasonable inference that the underlying prescriptions were issued outside the usual course of professional practice and without a legitimate medical purpose. Lague's practice-wide evidence was therefore probative of his unlawful intent, undermining his defense at trial that the charged prescriptions amounted to "a few bad judgments."[7] Because the prescription data made the intent element of the section 841 charges more probable, the district court properly admitted Lague's uncharged prescriptions under Rule 404(b).

B.

Next, Lague contends that the district court abused its discretion, under Federal Rule of Evidence 403, by failing to preview the underlying prescription data before admitting it into evidence. *See Curtin*, 489 F.3d at 958 (holding that a district court "does not properly exercise its balancing discretion under Rule 403 when it fails to place on the scales and personally examine and evaluate all that it must weigh"). We assume, without deciding, that the district court abused its discretion by failing to preview all of the prescription data

[7] We have held that "other act" evidence is probative of intent in similar circumstances. *See United States v. Garrison*, 888 F.3d 1057, 1060, 1064 (9th Cir. 2018).

before granting the government's motion in limine.[8, 9] We hold that any error was harmless based on the overwhelming evidence of guilt against Lague.

The burden to show that the evidentiary trial error was harmless falls on the government, and our review begins with a "presumption of prejudice." *Bailey*, 696 F.3d at 803. Reversal is not required if "there is a 'fair assurance' of harmlessness or, stated otherwise, unless it is more probable than not that the error did not materially affect the verdict." *Id.*, *quoting United States v. Morales*, 108 F.3d 1031, 1040 (9th Cir. 1997) (en banc); *see also United States v. Rendon-Duarte*, 490 F.3d 1142, 1144–45 (9th Cir. 2007). We have "found harmless error despite the erroneous admission of evidence" where "the properly admitted evidence was highly persuasive and overwhelmingly pointed to guilt." *Bailey*, 696 F.3d at 804 (citations omitted).

Although Lague's prescription data was presented through two witnesses and highlighted in the government's opening statement and closing argument, the focus of the nearly two-week trial was on the charged prescriptions. The government admitted the patient files, presented the testimony of one patient's father, a patient's former surgeon, and investigators. Thus, even without the uncharged

[8] In the government's motion in limine, the 2015 data was not presented to the district court; the government simply represented that the 2015 data was "similar" to the 2016 data.

[9] We also assume, without deciding, that the district court's admission of Lague's practice-wide evidence under Rule 403 is reviewed for an abuse of discretion.

prescription data,[10] the case was not as close as Lague suggests.

The jury also had access to the patients' medical charts underlying the unlawful distribution charges, showing continued "red flags" such as use of illegal drugs and, most importantly, the prescriptions for the charged patients that showed copious prescribed controlled substances. For example, the evidence revealed that Lague doubled SL's opioid prescriptions without asking SL about his pain, and that he covered it up by falsely telling the pharmacy that it was for a two-month prescription. The evidence also showed that Lague had prescribed opioids to DL, a drug addict, multiple times the CDC's limit for exercise-induced shoulder pain, despite his urine test showing that he was using cocaine and unprescribed morphine and Xanax. Lague also prescribed DL a benzodiazepine and an amphetamine on top of the opioids. Based on the patient-specific evidence, the government certainly cleared the "benchmark for criminal liability" by proving that Lague "intentionally . . . distributed controlled substances for no legitimate medical purpose and outside the usual course of professional practice." *United States v. Feingold*, 454 F.3d 1001, 1010 (9th Cir. 2006).[11]

[10] Dr. Martinovsky's prescription data played an even more minor role in the trial and did not meaningfully impact the jury's verdict in light of the overwhelming evidence of Lague's guilt.

[11] Evidence of Lague's unlawful intent to distribute controlled substances without a legitimate medical purpose to JF, KO, and MCM was similarly compelling. Lague prescribed JF, a self-described drug addict, 50 times the CDC ceiling for oxycodone for a weight-lifting

We disagree with Lague that the prescription data "was impossible to defend against." Lague's trial counsel successfully cabined the weight of the prescription data, inducing the government's witnesses to concede that the prescription data was not highly probative of Lague's guilt. If Lague had rebuttal evidence that the uncharged prescriptions were legitimate, he could have presented it.

We also disagree with Lague that the district court was required to give a specific limiting instruction after the government introduced the prescription data. The district court read a general limiting instruction to the jury before their deliberations. Lague did not request a more specific instruction during trial. This general instruction mitigated the prejudice of admitting the "other act" evidence. *See United States v. Hardrick*, 766 F.3d 1051, 1056 (9th Cir. 2014). That the jury acquitted Lague of healthcare fraud and was able to compartmentalize the evidence on the various charges also militates against Lague's claim of prejudice. *See Park v. California*, 202 F.3d 1146, 1150 (9th Cir. 2000).

Thus, the admissible evidence at trial shows that Lague "gave inadequate physical examinations or none at all," that

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injury despite red flags such as refilling prescriptions too soon and in increasing quantities and asking for more easily abused drugs.

Lague prescribed KO seven-times the CDC limit for opioids for back pain. After she began treatment at the clinic, she tested positive for cocaine three times in a year, but negative for the hydrocodone she was prescribed. Lague later prescribed KO the "holy trinity" of drugs.

Lague prescribed enormous quantities of fentanyl (50 times the CDC daily ceiling) to MCM, despite knowing she was a heroin user. Lague later increased the fentanyl dosage and justified the increase because of MCM's need to manage stress related to her divorce, sister's wedding, and trip to Disneyland.

he "ignored the results of the tests he did make," that he took minimal "precautions against [the] misuse and diversion" of controlled substances, and that he prescribed "as much and as frequently as the patient demanded." *Moore*, 423 U.S. at 142–43. We reject Lague's characterization of the trial as one based on the credibility of two competing expert witnesses. We therefore hold that it was more probable than not that any Rule 403 error in admitting the prescription data did not materially affect the jury's verdict.

IV.

Lague's practice-wide prescription data was admissible under Rule 404(b)(2) to prove his unlawful intent to distribute controlled substances outside the usual course of professional practice. Even if we assume that the district court abused its discretion, under Rule 403, by failing to preview all of the underlying prescription data admitted at trial, the result would be the same. The patient-specific evidence overwhelmingly pointed to Lague's guilt, and thus, any Rule 403 error would be harmless.

AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

USA,

Plaintiff,

v.

LAGUE,

Defendant.

Case No. 17-cr-00150-HSG-1

ORDER DENYING MOTION FOR RELEASE PENDING APPEAL

Re: Dkt. No. 212

Pending before the Court is Defendant David Lague's motion for release pending appeal. *See* Dkt. No. 212. The Court held a telephonic hearing on April 17, 2020.[1] For the reasons discussed below, the Court **DENIES** the motion.

I. BACKGROUND

On July 24, 2018, a jury convicted Mr. Lague, a former physician's assistant, of 39 counts of unlawful distribution of controlled substances to five different patients. *See* Dkt. No. 145. Mr. Lague sought release pending sentencing to see his 95-year-old father, *see* Dkt. No. 158, and the Court granted the request, *see* Dkt. Nos. 169, 170. On November 14, 2018, the Court denied Mr. Lague's motion for a new trial. Dkt. No. 181. The Court then sentenced Mr. Lague on December 17, 2018, committing him to the custody of the United States Bureau of Prisons ("BOP") to be imprisoned for 120 months. *See* Dkt. Nos. 191, 197.

Mr. Lague timely noticed his appeal. *See* Dkt. No. 192; *see also United States v. David Lague*, Case No. 18-10500 (9th Cir.). The briefing in the appeal is complete and oral argument is currently set for May 12, 2020. *See id.* at Dkt. Nos. 44, 48. At the time he filed his appeal,

[1] During the hearing, defense counsel confirmed that to the extent Mr. Lague has any right to appear at and participate in the hearing, Mr. Lague waives that right.

however, Mr. Lague did not seek bail pending the resolution of his appeal. Instead, on March 30, 2020—over fifteen months after filing his appeal—Mr. Lague filed the pending motion. *See* Dkt. No. 212. Mr. Lague contends that he meets the traditional factors detailed below, and also cites the current COVID-19 pandemic as an additional exceptional circumstance warranting release pending appeal. *See* Dkt. No. 212. If released, Mr. Lague intends to live with his wife in San Jose. *See id.* at 12; *see also* Dkt. No. 213 at ¶ 3.

II. LEGAL STANDARD

A defendant convicted of a non-violent crime shall be detained pending appeal unless the court finds the following:

> (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and
>
> (B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in--
>
> > (i) reversal,
> >
> > (ii) an order for a new trial,
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> > (iii) a sentence that does not include a term of imprisonment, or
> >
> > (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

18 U.S.C. § 3143(b)(1). "If the judicial officer makes such findings, such judicial officer shall order the release of the person . . . ." *Id.* The Act "shifted the burden of proof from the government to the defendant," which "mak[es] it considerably more difficult for a defendant to be released on bail pending appeal." *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985).

Whether a person is likely to flee, is likely to pose a danger to the safety of others or the community, or appeals the conviction for the purpose of delay are questions of fact. *See United States v. Khan*, No. 12-cr-0860-YGR, 2014 WL 2930656, at *2 (N.D. Cal. June 27, 2014). Whether the appeal "raises a substantial question of law or fact likely to result in" one of the four statutory outcomes involves a two-step inquiry. First, courts consider whether the appellate question is "substantial," which goes to "the *level of merit* required in the question presented."

Handy 761 F.2d at 1280. And while all other circuits employ a more rigorous standard, the Ninth Circuit defines a "substantial" question as a question that is "fairly debatable." *Id.* at 1281; *see* 3B Charles Alan Wright et al., Federal Practice and Procedure Criminal § 770 (4th ed. 2018) (identifying other circuits' standards). Identifying an appellate argument alone is not enough; rather, a defendant must explain "the basis for that argument" and articulate why the argument is likely to prevail. *United States v. Montoya*, 908 F.2d 450, 450–51 (9th Cir. 1990). At the second step, courts consider whether the issue is sufficiently important to the case's merits that a contrary appellate holding is "likely to result in" reversal or a new trial, which goes to "the *type of question* that must be presented." *Handy* 761 F.2d at 1280. Courts at this step do not predict the odds of reversal, which would be "tantamount to requiring the district court to certify that it believes its ruling to be erroneous." *Id.* at 1281. Courts instead consider the significance of a contrary appellate holding on the substantial question to the ultimate disposition of the appeal: "A court may find that reversal or a new trial is 'likely' *only if it concludes that the question is so integral to the merits of the conviction on which defendant is to be imprisoned that a contrary appellate holding is likely to require reversal of the conviction or a new trial*." *Khan*, 2014 WL 2930656, at *2 (citing *United States v. Miller*, 753 F.2d 19, 23 (3d Cir. 1985)).

Because Mr. Lague's conviction involved a drug offense subject to a maximum term of imprisonment of at least ten years, he may be released only if "'it is clearly shown that there are exceptional reasons why [his] detention would not be appropriate.'" *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003) (quoting 18 U.S.C. § 3145(c)).

III. DISCUSSION[2]

A. No Flight Risk or Danger to Others

Mr. Lague contends that he neither is likely to flee nor poses a danger to the safety of any

[2] Although the timing of this motion is highly unusual, the parties agree that the Court retains jurisdiction to consider Mr. Lague's request. *See* Dkt. No. 219. The Court agrees that Section 3143(b) appears to allow the Court to decide the motion despite the fact that Mr. Lague has already been committed to the custody of the BOP and served part of his 120-month sentence. *Cf. United States v. Zimny*, 857 F.3d 97, 99 (1st Cir. 2017) (reversing denial of release pending appeal, where defendant was already in BOP custody); *United States v. Snyder*, 946 F.2d 1125, 1126 (5th Cir. 1991) (holding that district court had jurisdiction to rule on motion for release pending petition for writ of certiorari where defendant had been ordered into BOP custody).

other person or the community if released pending appeal. The government appears to agree, acknowledging that it had previously conceded as much, *see* Dkt. No. 167, and does not contest that point here, *see* Dkt. No. 215 at 3. Mr. Lague was convicted of nonviolent offenses and has no other criminal history or history of violence. *See* Dkt. No. 182 at 9. He remained out on bail during trial and prior to sentencing, and there is nothing before the Court now to suggest that calculus has changed since he has been incarcerated. Mr. Lague therefore has met his burden under Section 3143(b)(1)(A).

B. No Purpose of Delay

Mr. Lague also argues that neither his appeal nor this motion was filed for the purpose of delay. Indeed, Mr. Lague appears to have timely filed the appeal and completed briefing. The government likewise does not argue that Mr. Lague's appeal is for the purpose of delay. *See* Dkt. No. 215 at 3. The Court does not ascribe any improper motive to Mr. Lague's decision to appeal. Accordingly, the Court finds the Mr. Lague has established with clear and convincing evidence that his appeal is not for the purpose of delay

C. Substantial Question

Mr. Lague next contends that his appeal raises substantial questions of law, including whether the Court erred in admitting several pieces of evidence during trial. *See* Dkt. No. 212 at 5–9. *First*, the Court granted the government's request under Federal Rule of Evidence 404(b) to admit data relating to Mr. Lague's prescriptions and how his prescriptions compared to those of other physicians in California as evidence of Mr. Lague's intent to issue prescriptions without a medical purpose. *Id.* at 5. Mr. Lague contends that the prescription data did not, on its own, raise an inference that the prescriptions were unlawful, and therefore could not raise an inference of unlawful intent. *Id.* at 6. *Second*, the Court allowed the government to introduce evidence of three patient overdose deaths, finding that defense counsel had opened the door to such evidence during the cross examination of the government's medical expert. *Id.* at 7. Mr. Lague argues that defense counsel did not open the door during cross examination, and that in any event, the evidence was inadmissible under Rule 404(b) to show Mr. Lague's intent to consciously disregard the risk of overdose death because he did not know about the deaths at the relevant time. *Third*,

Mr. Lague contends that evidence of pill seekers becoming patients in Mr. Lague's practice was irrelevant to whether Mr. Lague prescribed pills outside the scope of professional practice. *Id.* at 7–8.

In response, the government argues that Mr. Lague has not demonstrated that his appeal raises a substantial question of law as to all of his counts of conviction. *See* Dkt. No. 217 at 3. At least two of the counts, it explains, were not based on the evidence detailed above, but rather on videotaped meetings between Mr. Lague and a confidential informant. *Id.* at 4. The Court does not agree that the three evidentiary issues that Mr. Lague raises can be so easily compartmentalized. The jury was exposed to all this evidence when deliberating and could have considered it when determining whether Mr. Lague was predisposed to prescribe medication without a legitimate medical purpose.[3]

The Court does not agree that admitting this evidence was error. Nevertheless, the Court finds that these evidentiary issues are "fairly debatable," meaning "something more than the absence of frivolity" and "debatable among jurists of reason." *Handy*, 761 F.2d at 1281–82 (quotations omitted). The Court further finds that these evidentiary questions are sufficiently important to the case's merits that a contrary appellate holding is "likely to result in" reversal or a new trial. *See Handy* 761 F.2d at 1280. The government relied on this evidence, particularly the prescription data, extensively throughout trial, and if credited by the jury the evidence reasonably could have affected whether the jury thought Mr. Lague's prescriptions were unlawful. The Court finds that Mr. Lague has met his burden under Section 3143(b).

D. Exceptional Reasons

The Court understands that Mr. Lague filed this motion, at least in part, because of the

[3] The Court also notes that the defense did not formally concede at trial that the offense elements were met as to these two counts, and argue for acquittal only on the basis of entrapment (even though it focused heavily on that defense). *See* Dkt. No. 157 (defense counsel argued at closing that "[t]he Court will instruct you that with respect to the distribution of these drugs [charged in Counts One and Two] in order to find Mr. Lague guilty, you must find all of the other factors that were applicable to the other distribution counts and you must also find that he was not entrapped into committing the offenses"). *See also* Dkt. No. 140 at 18 (jury instruction making clear that the government had the burden of proving three elements with respect to each distribution count, and additionally had to prove that the defendant was not entrapped as to Counts One and Two only).

unprecedented circumstances facing the country in light of the COVID-19 pandemic. Much remains unknown about COVID-19, and the Court acknowledges the unusual challenges facing the penal system given this evolving health crisis. Nevertheless, Congress has created a presumption that defendants like Mr. Lague who are convicted of certain drug offenses shall remain incarcerated absent exceptional reasons. *See Garcia*, 340 F.3d at 1015 (citing 18 U.S.C. § 3145(c)). This is a high standard, and the Court must "examine the totality of the circumstances." *Id.* at 1019.

Mr. Lague details at length the difficulty of social distancing in prison and notes that there has been limited testing of inmates and staff. But the existence of COVID-19 and the limitations of testing both inside and outside of prisons are generalized concerns that affect every inmate in prison. Such generalized concerns do not, on their own, constitute exceptional circumstances. As the Ninth Circuit explained in *United States v. Garcia*, the Court should "consider circumstances that would render the hardships of prison unusually harsh *for a particular defendant*." *Id.* (emphasis added).

Mr. Lague argues that he is particularly at risk because he is 62 and has atrial fibrillation and hypertension. *See* Dkt. Nos. 212, 218. But the CDC considers adults age 65 and older to be "older adults" at higher risk of severe illness from COVID-19, and atrial fibrillation does not appear to be a risk factor identified by the CDC.[4] Mr. Lague, therefore, asks the Court to consider his hypertension an exceptional reason warranting his release pending appeal. The Court does not minimize the risks that COVID-19 poses, but the mere possibility that it may spread to a particular prison and that Mr. Lague, as an inmate there, may contract it does not constitute exceptional reasons warranting his release.

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[4] *See* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html (last visited 4/20/2020); *see also* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html#serious-heart-conditions (last visited 4/20/2020) (listing "serious heart conditions" that may put people at higher risk for severe illness from COVID-19, but not including atrial fibrillation).

IV. CONCLUSION

Given the totality of the circumstances, the Court **DENIES** the motion for release pending appeal.

IT IS SO ORDERED.

Dated: 4/20/2020

HAYWOOD S. GILLIAM, JR.
United States District Judge

UNITED STATES DISTRICT COURT **CERTIFIED COPY**

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable HAYWOOD S. GILLIAM, JR., Judge

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID LAGUE, Defendant.	**Pretrial Conference** NO. CR 17-000150 HSG Pages 1 - 39 Oakland, California Thursday, May 17, 2018

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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Proceedings reported by electronic/mechanical stenography; transcript produced by computer-aided transcription.

Thursday, May 17, 2018 3:03 p.m.

P R O C E E D I N G S

THE CLERK: And we're calling CR17-00150, the United States of America versus David Lague.

Please step forward and state your appearances for the record please.

MS. LIN: Good afternoon. Rita Lin on behalf of the United States. I also have with me Frank Riebli.

THE COURT: Good afternoon Ms. Lin.

MR. REILLY: Good afternoon. Jim Reilly with Summit Defense appearing with Mr. Lague, who is present, out of custody.

THE COURT: Good afternoon, Mr. Reilly.

So we're here for our pretrial confidence. I've reviewed the motions in limine and the other submissions and looks as though there is not --

MS. LIN: No, Your Honor, from the --

THE COURT: -- much that's hotly contested.

What were you going to say?

MS. LIN: Sorry. I was just going to say no more filings from the government, Your Honor.

THE COURT: All right. Why don't we do this: Let's start with the motions in limine, and then we can talk about some of the other logistics for the trial.

So the government has filed, what, eight motions in

limine?

MS. LIN: Correct, Your Honor.

THE COURT: All right. And some were opposed, but it seemed to me that several weren't.

Really, I think the most substantive likely is motion in limine one regarding the prescription data. And the objection or the opposition, as I understand it, to that motion is that the aggregate prescription data is, in essence, irrelevant.

Really, it seemed to me the defense was relying largely on the *Stump* case. But looking at the cases the government cited especially *Merrill*, which is the Eleventh Circuit case, it's hard for me to conclude that the information is irrelevant to knowledge and intent.

To the extent there might be innocent explanations, I think that goes to the weight rather than the admissibility of the evidence. But it does strike me that the better part of the authority establishes the -- the relevance of that sort of information.

And then with regard to the business record dimension, I think that will be the matter of the government simply laying the 803(b) or 803(6) foundation, and assuming that can be done, it strikes me that these likely would be considered business records.

Mr. Reilly, I'll let you make any record you'd like on the that motion.

MR. REILLY: No, Your Honor. I'm prepared to submit on the written papers.

THE COURT: All right. So that motion is granted subject to the business record foundation being laid for those records.

Motion in limine number two concerns the admissions of testimony of patients not named in the indictment, and there really didn't seem to be any opposition to that, subject, of course, to the defense's right to cross-examine those witnesses, and so I will grant that motion.

As to motion in limine three, excluding evidence about whether other prescribers committed the same crimes, as I understand it, Mr. Reilly is indicating that he's not planning to make that argument, correct?

MR. REILLY: That is correct, Your Honor.

THE COURT: All right. So I would deny that motion as moot.

Motion in limine four, offer of proof regarding unnoticed affirmative defenses, you know, there, I think there is a dispute as to whether notice has been given. But in any event, it seemed to me that Mr. Reilly's proposal not to make any reference in his opening and then we'll see whether the defense actually gets presented and, if so, whether there's a basis for an instruction on entrapment struck me as logical, and it sounds to me that the parties agree that before any