No.

In the Supreme Court of the United States

MEDARDO QUEG SANTOS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

THOMAS A. BURNS
Counsel of record
BURNS, P.A.
301 W. Platt St., Ste. 137
Tampa, FL 33606
(813) 642-6350
tburns@burnslawpa.com
Counsel for Petitioner

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QUESTIONS PRESENTED

1. If a physician's good faith is a complete defense to a prosecution for prescribing controlled substances without a legitimate medical purpose or outside the usual course of professional practice 21 U.S.C. § 841(a)(1), as this Court may hold in *Ruan v. United States*, No. 20-1410 (oral argument convened Mar. 3, 2022), may an expert provide incorrect legal opinion testimony that the test is purely objective?

2. At sentencing, may district courts find relevant conduct that has a wag-the-dog effect on the guidelines calculation by using a mere preponderance-of-evidence standard (as four circuits have held), or must they instead apply a clear-and-convincing-evidence standard (as one circuit has held)?

PARTIES TO THE PROCEEDING

The caption identifies all parties in this case.

RELATED CASES

United States v. Santos, No. 8:17-cr-420, United States District Court for the Middle District of Florida. Judgment entered October 8, 2020.

United States v. Duldulao, No. 20-13973, United States Circuit Court of Appeals for the Eleventh Circuit. Judgment entered December 21, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Dr. Medardo Queg Santos, respectfully petitions for a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–27a) is unreported.

JURISDICTION

The court of appeals filed its opinion on December 21, 2021. Pet. App. 1a–27a. Petitioner didn't seek rehearing. On March 15, 2022, Justice Thomas granted a 30-day extension (21A504) to file this petition from March 21, 2022 until April 20, 2022. Petitioners now invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1), which provides that "it shall be unlawful for any person knowingly or intentionally to ... distribute, or dispense ... a controlled substance."

21 U.S.C. § 829(a), which provides that medical practitioners may dispense Schedule II controlled substances (such as oxycodone, hydromorphone, morphine, methadone, and hydrocodone) with a "written prescription."

21 U.S.C. § 829(b), which provides that medical practitioners may dispense Schedule IV controlled substances (such as alprazolam) with a "written or oral prescription."

21 C.F.R. § 1306.04(a), which provides that medical practitioners with a DEA license may issue prescriptions for controlled substances so long as the prescriptions are issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."

STATEMENT

1. The Controlled Substances Act forbids "any person" to "knowingly or intentionally … manufacture, distribute, or dispense" a controlled substance. 21 U.S.C. § 841(a)(1). But there's an exception for DEA licensed physicians. *Id.* ("[e]xcept as authorized by this subchapter").

Specifically, the Act allows physicians to dispense controlled substances with a DEA license if they "obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him." *Id.* § 822(a)(1)–(2). With that license, physicians can write "effective" prescriptions for controlled substances so long as they're "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).

To ensure licensed medical professionals don't risk criminal prosecution and felony conviction based on simple malpractice, nearly all courts construing the Act and its implementing regulations require the government to prove the physician lacked a good faith basis for his prescription. But not the court of appeals.

According to circuit precedent, a doctor may be convicted under the Act if his prescription fell outside of professional norms—*without regard* to whether he believed in good faith that the prescription served a *bona*

fide medical purpose. That outlier position, if correct, would result in the kind of "sweeping expansion of federal criminal jurisdiction" that this Court has repeatedly condemned. *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (quoting *Cleveland v. United States*, 531 U.S. 12, 24 (2000)); *see also Bond v. United States*, 572 U.S. 844, 862–65 (2014). It would also chill medical progress, disrupt the doctor-patient relationship, and criminalize prescriptions whenever a lay jury is persuaded that the physician exceeded the "usual" practice of medicine.

Recognizing this problem, this Court recently granted certiorari in *Ruan v. United States*, No. 20-1410 (S. Ct.), to consider "whether a physician alleged to have prescribed controlled substances outside the usual course of professional practice may be convicted under Section 841(a)(1) without regard to whether, in good faith, he 'reasonably believed' or 'subjectively intended' that his prescriptions fall within that course of professional practice." This petition raises similar issues regarding the elements of the crime and the manner in which experts may opine about it.[1] It also raises a related issue about calculating drug weight through relevant conduct at sentencing.

2. A grand jury charged Dr. Santos with conspiracy to prescribe pain medications for no legitimate medical purpose and outside the usual course of professional practice (count one) and five counts of actually prescribing such medications (counts five through nine). Specifically, count one charged violation of 21

[1] There's a substantial possibility that the Court may decide *Ruan* in a way that sheds light on the questions presented here. For that reason, this Court may wish to hold the petition pending the outcome in *Ruan*.

U.S.C. § 846, as punished by § 841(b)(1)(C) and § 841(b)(2). Counts five through nine charged violation of § 841(a)(1), as punished by § 841(b)(1)(C) and § 841(b)(2).[2]

The case proceeded to a 15-day jury trial. Dr. Santos timely moved for judgment of acquittal on the conspiracy count at the close of the government's case-in-chief, then renewed his motion at the close of the defense case. The district court initially reserved ruling and didn't deny the motion until after Dr. Santos testified in his own defense. Thereafter, a jury acquitted Dr. Santos of two substantive counts (counts five and six), but returned guilty verdicts for conspiracy (count one) and three substantive counts (counts seven, eight, and nine).

After trial, Dr. Santos moved for judgment of acquittal or new trial. The Government opposed, and it was denied. Pet. App. 28a–39a.

Dr. Santos was sentenced to 72 months' imprisonment. He timely appealed, and the court of appeals affirmed. Pet. App. 1a–27a. He hasn't yet reported to prison because he suffered a massive stroke before Thanksgiving 2021.

3. The central theme of the trial was total confusion about what § 1306.04(a)'s two phrases—"issued for a legitimate medical purpose" and "acting in the usual course of his professional practice"—actually meant.

For instance, during opening statements, a prosecutor alluded to the forthcoming testimony of Dr. Kevin Chaitoff, the government's expert on pain clinics.

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[2] The record citations for this petition's Statement are contained in Dr. Santos's appellant's brief. *See* Appellant's Br. 1–26, *United States v. Duldulao*, No. 20-13973 (filed Feb. 19, 2021).

Attempting to frame the primary legal basis for Dr. Chaitoff's forthcoming testimony, he explained:

> I used that phrase a couple times, *no legitimate medical purpose* and *not in the usual course of medical practice*, so let's talk about that for a moment. You will hear that legal term mentioned throughout the trial. To determine whether the defendants actually did that, you must judge their activity objectively, and to assist you you're going to hear from a Dr. Kevin Chaitoff, a Board certified anesthesiologist that practices pain management. He will tell you about the proper *standard of care* and the red flags that he saw when reviewing the patient files.

But the prosecutor misspoke. First, it wasn't one phrase with one meaning; instead, they were two distinct phrases with two distinct meanings. Second, they weren't both objective standards; under circuit precedent, a "usual course of professional practice" was determined objectively, whereas a "legitimate medical purpose" was determined subjectively. Third, this wasn't a medical malpractice case in which the "standard of care" was relevant; rather, one of the issues concerned the "usual course of medical practice."

Anyways, continuing the confusion, immediately before Dr. Chaitoff took the stand, the district court engaged the lawyers in an extensive colloquy about the difference between § 1306.04(a)'s two key phrases, "no legitimate medical purpose" and "usual course of professional practice." The district court preliminarily agreed with the government that it could prove the offenses disjunctively, meaning either theory was sufficient to sustain a conviction. But it still wanted to unpack what those two phrases meant:

> And so what does that mean then, not in the usual course of medical—of professional practice? Because I had assumed that that meant there was going to be evidence of passing out prescriptions to family members or on a street corner, passing out prescriptions to people not in the usual course of professional practice, not they didn't do a thorough enough job evaluating their patients and if I were the doctor I would have ordered this or that or I would have done this or that. That's different than not for a legitimate medical purpose, because that just means for no good reason to me, no good medical reason, and I can't understand that if they are different, how they are different, and if they are the same, how can they be proved in the disjunctive? So how are they different? Or else they can only be proved in the conjunctive.

The government conceded the charged offenses didn't criminalize mere medical malpractice, but struggled to explain the difference between the two phrases. This frustrated the district court, which complained, "This is not like a mystery novel where we get to like wait until the last minute and hear the punchline."

The district court then turned to counsel for Dr. Santos's codefendant, Dr. Duldulao, who explained that, under circuit precedents like *United States v. Tobin*, 676 F.3d 1264 (11th Cir. 2012), "no legitimate medical purpose" was a subjective standard, whereas "usual course of professional practice" was an objective standard. He said, "I think from all I can tell it's the same standard, one is an objective, one is a subjective, but the case law seems to give no guidance as to anything more than that."

The government disagreed with Dr. Duldulao's assessment. But it disagreed in such a confusing fashion

that the district court again blurted out its frustration with the prosecutor: "Okay. I'm not going to get anywhere, so I will figure it out." The court continued, "I've read your brief a couple of times, and if I thought it answered my question, I wouldn't keep asking you."

The upshot of all this preliminary confusion about the legal framework was that neither the lawyers nor the district court ever considered *whether* an expert could testify about a purely subjective standard concerning a defendant's state of mind ("no legitimate medical purpose") or *the manner or extent to which* an expert could opine how a defendant's conduct measured against an objective standard regarding the "usual course of professional practice."

At any rate, when Dr. Chaitoff took the stand, the meat of his testimony was his interpretation of the legal requirements that govern pain clinics, the meaning of § 1306.04(a)'s two phrases ("legitimate medical purpose" and "usual course of his professional practice"), and—because he failed to understand or convey those two phrases' objective/subjective dichotomy—Dr. Santos's state of mind.

When asked about the "standard of care," Dr. Chaitoff offered his general legal interpretation of various statutes, regulations, guidelines, and a DEA manual. He did not, however, testify about what doctors in the pain-management industry actually do (apart from his legal interpretation of the supposed legal requirements) as the pain-management industry's custom or practice. Instead, he riffed opinions such as that there are four "mandated" rules for pain management doctors (he later conceded there were only three) or that "it's inherent to the rules that if you're going to prescribe a controlled substance, you have to

perform and document your physical examination that is commensurate with your treatment plan."

To buttress his legal interpretations, Dr. Chaitoff testified about how his own private practice operated, what policies it employed, how he personally evaluated patients, and what steps he thought were "important." Summing up the legal basis for that testimony, Dr. Chaitoff testified:

> Q. And the various steps that we have just walked through, obtaining a complete medical history, identifying the source of a patient's pain, identifying any comorbid conditions, I believe you said it was, performing a physical exam, verifying prior medications, are these steps that a practicing physician operating in the usual course of professional practice would do when treating a patient?
>
> A. Yes.
>
> *Q. And are these required by the rules or regulations that we've previously discussed?*
>
> *A. Yes.*

Dr. Chaitoff also discussed purported "red flags" without differentiating his personal red flags from those set forth in the DEA manual.

Remarkably, Dr. Chaitoff then purported to usurp the District Court's role by defining the legal meaning of the terms "no legitimate medical purpose" and "outside the scope of professional practice." Specifically, he opined about his legal interpretation of the phrase "outside the scope of professional practice":

> Q. Dr. Chaitoff, what does it mean to prescribe outside the scope of professional practice?
>
> A. That generally means generally acceptable medical practice. So in other words, an example

would be knowing that a patient is intentionally diverting and you issue them a prescription for a controlled substance. Another example might be exchange of controlled substances for monetary remuneration, things of that nature.

Q. And when we're talking about outside the scope of professional practice, what if any standards are you considering for purposes of defining that term?

A. Well, it's defined under the Controlled Substances Act. It's further delineated within the DEA manual 2006. There is a Florida Rule 458.331 which discusses the disciplinary action to be taken if one should prescribe controlled substance out of professional practice for no legitimate medical purpose. It's also mandated within—it's inherent to the rules we discussed yesterday regarding prescribing of controlled substances, 464.44, I believe, and the Rule 64B8-9.013, which talks about what is required to be done before one writes a controlled substance to a patient.

Similarly, he opined about his legal interpretation of the phrase "no legitimate medical purpose":

Q. And turning to the term "legitimate medical purpose," what does that term mean?

A. That term means best clinical judgment and current standards of medical care.

Q. What does it mean to prescribe for no legitimate medical purpose?

A. Well, if one failed to obtain a history, failed to obtain everything basically we spoke about yesterday, so in other words, if a patient came in and said "I'm in pain" and you didn't fulfill all those

> requirements that we discussed and you issued them a prescription for a controlled substance, it would be for no legitimate medical purpose.

Even more remarkably, in a colloquy that was like pulling teeth, Dr. Chaitoff finally admitted his pretrial reports had never disclosed his extensive—indeed, almost exclusive—reliance on those legal authorities:

> THE COURT: Are all of those regulations, definitions, laws and such referenced in your report?
>
> THE WITNESS: They've all been relied on in formulating those reports.
>
> THE COURT: I understand that. My question is did you disclose that you were relying on all of them by referencing them in your report.
>
> THE WITNESS: They were not referenced specifically by law other than the definition of a controlled substance.
>
> THE COURT: What were they referenced as?
>
> THE WITNESS: Well, in formulating my opinion I relied on what is stated within those rules to formulate my opinion.
>
> THE COURT: So turn to your report, your September report, and then read which line in the report references those documents that are in that binder.
>
> THE WITNESS: I'm sorry. Which statement, ma'am?
>
> THE COURT: Is there a statement in your report that says: I relied on the following things in formulating this opinion?

> THE WITNESS: In formulating my opinion I had to take all those rules and laws into consideration.
>
> THE COURT: I'm asking you do you say that in your report.
>
> THE WITNESS: Specifically, no.

Some of Dr. Chaitoff's legal opinions were quite ridiculous. For instance, he absurdly opined that illegible handwriting on a progress note[3] and abbreviating months on a prescription were crimes. On cross-examination, Dr. Chaitoff was forced to admit his blunder. Even the district court thought his handwriting and abbreviation opinions were daft, remarking exasperatedly that "whether somebody dotted their I's and crossed their T's and whether doctors have bad handwriting is not criminal."

On cross-examination, Dr. Chaitoff was forced to make numerous concessions about his purported personal red flags:

- he admitted that no law, regulation, or guideline indicated that cash payments were a red flag;
- he admitted that refusal to accept cash payments would violate the Florida Patient's Bill of Rights;
- he admitted that no law, regulation, or guideline indicated that walk-ins or self-referrals were a red flag;
- he admitted that the law permitted registered pain management clinics could advertise;

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[3] Ironically, Dr. Chaitoff admitted his own handwriting was illegible: "I apologize. You won't be able to read my writing." And the district court agreed his "handwriting is not very good."

• he admitted that no law, regulation, or guideline forbade pain clinics from treating patients who traveled long distances;

• he admitted that Florida law expressly allowed pain clinics to treat a majority of their patients with opiates; and

• he admitted that his personal red flags weren't listed in the DEA manual;

Lastly, he admitted he had previously testified the real purpose of his personal red flags was so he could exclude patients from his practice that he had characterized as "riffraff" and "critters."

Having set the table with his general legal opinions, Dr. Chaitoff then began serving up particularized legal opinions whether specific prescriptions Dr. Santos issued were crimes:

> Q. And as to the undercover Detective Chin, generally what did you opine as to the treatment that she received from, I believe, Dr. Santos?
>
> A. Similarly, violations of standard of care, prescriptions for controlled substances were provided for no legitimate medical—were provided for no legitimate medical purpose in that they were issued not in the course of one's usual professional practice.

And Dr. Chaitoff reinforced his opinion after reviewing Dr. Santos's medical files:

> Q. And turning to all the patient files that you received relating to Dr. Santos, generally what did you opine as to the treatment that those patients received?
>
> A. Well, 100 percent fell below the standard of care. Generally the predominance, or most of

> them, prescriptions for controlled substances were provided for no legitimate medical purpose, they were not issued in the course of one's professional practice.

Finally, Dr. Chaitoff delivered the *coup de grâce* and opined that specific prescriptions were crimes. Parroting § 1306.04(a)'s language, he opined that the January 14, 2015 prescriptions charged in count seven for 180 tablets of oxycodone 30mg and 30 tablets of alprazolam 1m, the May 20, 2015 prescription charged in count eight for 120 tablets of oxycodone 30mg, 30 tablets of morphine 15mg, and 30 tablets of alprazolam 1mg, and the August 7, 2015 prescriptions charged in count nine for 30 tablets of oxycodone 120mg, 30 tablets of alprazolam 1mg, 30 tablets of morphine 15mg, and 90 tablets of oxycodone 30mg were crimes.

During closing argument, the government doubled down on the legal foundation for Dr. Chaitoff's legal opinions:

> Dr. Chaitoff explained to you what a legitimate medical purpose and treating within the scope of professional practice means. He explained that prescribing for a legitimate medical purpose means within a doctor's best clinical judgment. He also explained that prescribing within the scope of professional practice means within generally accepted standards of medical practice, such as under Florida laws or Federal Rules and regulations, and he talked about red flags.

Ultimately, the jury returned guilty verdicts on counts seven, eight, and nine.

4. At sentencing, Dr. Santos asked the district court to calculate drug weight by clear-and-convincing evidence, not mere preponderance. He argued any drug

weight beyond that of the three prescriptions in counts seven, eight, and nine would have to be calculated by the sentencing court. But because that relevant conduct would have a wag-the-dog effect on the guidelines calculation, Dr. Santos alerted the district court to a pre-*Booker* circuit split about the standard of proof. *See United States v. Watts*, 519 U.S. 148, 156 (1997); *United States v. Cavallo*, 790 F.3d 1202, 1233–34 (11th Cir. 2014).

After a brief discussion about the governing standard of proof, the district court chose the preponderance standard and adopted Probation's calculation:

> This decision is made on a preponderance of the evidence based upon the evidence presented, including expert testimony and witness testimony in this case with respect to Dr. [Santos's] prescription practices and his conviction on both of the counts, including the actual prescription counts, [which] supports the Government's slighter burden on sentencing as to Dr. Santos.

The upshot of that ruling was it left Dr. Santos with a base offense level of 32 instead of 24. After a two-level enhancement for abuse of trust, Dr. Santos's guidelines range became 151–188 months instead of 63–78 months. *See* U.S.S.G. § 5A. Varying downward, the district court sentenced Dr. Santos to 72 months' imprisonment.

5. On appeal, Dr. Santos argued the admission of Dr. Chaitoff's expert testimony was improper legal opinion and improper commentary on his state of mind, challenged the sufficiency of evidence, and asserted the district court procedurally erred at sentencing when it miscalculated drug weight by finding relevant conduct by mere preponderance instead of by clear-

and-convincing evidence. But the court of appeals affirmed. Pet. App. 1a–27a.

When stating the elements, the court of appeals explained, "[a]n unlawful distribution under § 841(a)(1) occurs in the medical context when '(1) the prescription was not for a legitimate medical purpose *or* (2) the prescription was not made in the usual course of professional practice." Pet. App. 9a–10a (emphasis added) (citation omitted). "'The rule is disjunctive, and a doctor violates the law if he falls short of either requirement.'" *Id.* (citation omitted).

The court of appeals did not, however, explain how the first element was subjective, whereas the second was objective. *See id.* Instead, the court of appeals had explained that subjective/objective dichotomy in a prior case. *See United States v. Tobin*, 676 F.3d 1264, 1282 (11th Cir. 2012) (approving jury instruction to that effect).

At any rate, assessing the circumstantial evidence by that disjunctive standard with a subjective/objective dichotomy—in which a doctor could be found guilty if he subjectively believed or objectively acted in a manner that violated the Act—the court of appeals found it sufficient. Pet. App. 16a–21a.

Next, the court of appeals considered the propriety of Dr. Chaitoff's testimony. *Id.* 21a–25a. It noted that expert testimony was permissible, but not necessary. *Id.* 22a. Applying plain-error review, the court of appeals rejected Dr. Santos's argument that the admission of Dr. Chaitoff's opinions about "legitimate medical purpose," which the jury had been instructed pertained only to Dr. Santos's subjective beliefs, didn't violate Federal Rule of Evidence 704(b). *Id.* 23a. Similarly, the court of appeals also rejected Dr. Santos's

argument that the admission of Dr. Chaitoff's opinions about "legitimate medical purpose" and "usual course of professional practice" were improper legal opinions masquerading as expert testimony. *Id.* 23a–25a. The court of appeals did not, however, differentiate the *legal* foundation for Dr. Chaitoff's opinions (which were often incorrect) from what might have been permissible testimony about industry standards.

Finally, the court of appeals affirmed Dr. Santos's sentence. Pet. App. 26a–27a.

REASONS FOR GRANTING THE PETITION

I. *Ruan* may dramatically change the analysis of the propriety of Dr. Chaitoff's expert testimony, the manner in which the jury was instructed to assess the evidence, and the sufficiency of that evidence

Ruan may dramatically change the analysis of the propriety of Dr. Chaitoff's expert testimony, the manner in which the jury was instructed to assess the evidence, and the sufficiency of that evidence. For that reason, the Court should hold the petition pending the decision in *Ruan*, which was argued on March 1, 2022. *See supra* note 1.

1. First of all, like the jury in *Ruan*, Dr. Santos's jury wasn't instructed that good faith was a complete defense. Depending on the outcome in *Ruan*, that might have ramifications for whether he received a fair trial and how the court of appeals assessed the sufficiency of the evidence.

Second, the ruling in *Ruan*—by clarifying the elements of a § 841(a) prosecution and the availability of a good faith defense—might also have ramifications for the admissibility of expert testimony, such as that presented by Dr. Chaitoff, as explained below.

2. No witness, whether a fact witness or an expert witness, is allowed to testify about his or her legal opinions. Rather, interpreting the law is a court's job. It's a district court's "responsibility to serve as the singular source of law require[s] it to be vigilant about the admissibility of legal conclusions from an expert witness." *Commodores Ent. Corp. v. McClary*, 879 F.3d 1114, 1129 (11th Cir. 2018) (affirming exclusion of expert whose report was "replete with legal opinion" and whose voir dire testimony masqueraded "in the form of legal conclusions" and "risked confusing, prejudicing, or misdirecting the jury"). That's because a district court is "the only source of the law," and an expert's testimony is never allowed to "invade[] the court's exclusive prerogative." *Id.*

But that's precisely what Dr. Chaitoff repeatedly and unforgivably did. At trial, he repeatedly expounded legal opinions about what congressional statutes, state statutes, federal and state regulations, and a DEA manual supposedly did or did not "mandate." Unsurprisingly, his legal opinions were often mistaken—sometimes absurdly so. And he exacerbated this problem by unwittingly offering expert testimony about Dr. Santos's subjective state of mind, which was equally forbidden. *See* Fed. R. Evid. 702(a).

In relevant part, Federal Rule of Evidence 702(a) provides that a "witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." *Id.* Ordinarily, Rule 702(a) forbids experts from rendering legal opinions because they do not "help" the jury. *Id.*

"A witness ... may not testify to the legal implications of conduct; the court must be the jury's only source of law." *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir.1990); *accord United States v. Long*, 300 Fed. App'x 804, 814 (11th Cir. 2008) ("An expert witness may not testify as to his opinion regarding ultimate legal conclusions."). This rule "prevents an expert witness from stating an opinion as to whether the defendant did or did not have the requisite mental state to be convicted of the crime charged." *Long*, 300 Fed. App'x at 814; *accord Montgomery*, 898 F.2d at 1541 (experts can testify about ultimate issues of fact, but can't "merely tell the jury what result to reach").

For that reason, virtually every court of appeals—including the court of appeals below until this case—had concluded it's "black-letter law" that it's "'not for witnesses to instruct the jury as to applicable principles of law, but for the judge.'" *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (collecting cases from the First, Second, Fourth, Fifth, Sixth, Ninth, Tenth, and D.C. Circuits); *accord Montgomery*, 898 F.2d at 1541 (expert's testimony that Aetna "had a duty to hire tax counsel" was "a legal conclusion" that "should not have been admitted"). Indeed, "expert testimony proffered solely to establish the meaning of a law is presumptively improper." *United States v. Prigmore*, 243 F.3d 1, 18 n.3 (1st Cir. 2001). And a regulation "has the status of law and, as such, its meaning must be determined in accordance with ordinary principles of statutory construction rather than by means of expert testimony." *Wojciechowicz v. United States*, 582 F.3d 57, 73 (1st Cir. 2009).

The First Circuit's decision in *Nieves-Villanueva* is illustrative: "In our legal system, purely legal

questions and instructions to the jury on the law to be applied to the resolution of the dispute before them is exclusively the domain of the judge." 133 F.3d at 99. "Accordingly, expert testimony on such purely legal issues is rarely admissible." *Id.* "'The danger is that the jury may think that the 'expert' in the particular branch of the law knows more than the judge—surely an impermissible inference in our system of law.'" *Id.* (citation omitted). When such legal opinion testimony is "plainly not offered to assist the judge," but rather is "presented to the jury," it's inadmissible. *Id.* at 100. In other words, "[b]ecause the jury does not decide such pure questions of law, such testimony is not helpful to the jury and so does not fall within the literal terms of [Rule] 702." *Id.*

Nevertheless, it's "often difficult to draw the line between what are questions of law, what are questions of fact, and what are mixed questions." *Id.* (citations omitted). "Indeed, the definition of what is law and what is application or practice may be difficult to ascertain." *Id.* "This may be particularly so when the issues involve not only a statute and formally promulgated regulations, but also guidelines, handbooks, advisory rulings, interpretive bulletins, general counsel's letter opinions, informational notices and similar accoutrements of the modern bureaucratic state." *Id.* But when the legal "issues raised" by the expert's testimony are "routinely before the federal courts" and "not complex," the "use of such testimony [i]s egregious." *Id.* at 101.

Applying those standards, *Nieves-Villanueva* held an expert's testimony "concerning actual personnel practices, the various categories of public employees and the like" were "unobjectionable." *Id.* at 99. But the expert's other testimony about "the holdings of

various opinions of the Supreme Court of Puerto Rico and by reference, of this court (over objection), and to the legal conclusion that these appointments were in violation of law (without objection)" should have been excluded. *Id.*

In contrast to the above limitations, "the customs and practices of an industry are proper subjects for expert testimony," *Pelletier v. Main Street Textiles, LP*, 470 F.3d 48, 55 (1st Cir. 2006), which "is common fare" in litigation. *Levin v. Dalva Bros., Inc.*, 459 F.3d 68, 79 (1st Cir. 2006); *accord Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1183 n.13 (5th Cir. 1975); *Moore v. GEICO Gen. Ins. Co.*, 758 Fed. App'x 726, 731 (11th Cir. 2018).

3. Dr. Chaitoff's testimony was riddled with inadmissible state-of-mind and legal opinions. He gave a legal definition of the regulatory phrase "legitimate medical purpose" without mentioning it was a subjective standard. He gave a legal definition of the regulatory phrase "outside the scope of professional practice" that tethered the standard to what he personally deemed theoretically "acceptable" instead of what pain doctors actually do. He claimed that the way his own pain clinic operated was "mandated" by rules and regulations. He failed to differentiate his personal red flags from the DEA's red flags. His reports never disclosed his reliance on legal authorities for his opinions. He absurdly opined that that illegible handwriting on a progress note and abbreviating months on prescriptions were crimes. And he specifically opined that each of the prescriptions charged in counts seven, eight, and nine was a crime under both of the government's theories (again, without delineating their subjective and objective bases). Each of those opinions

was inadmissible because it usurped the roles of the judge and the jury.

Crucially, Dr. Chaitoff never truly opined on the pain medicine's industry customs and practices. Sure, he gave occasional lip service to what he thought other pain doctors hypothetically "would" do, but he never explored what other doctors actually *did* do. Rather, Dr. Chaitoff primarily opined about legal requirements and how he conducted his own pain clinic. Dr. Chaitoff's legal opinions were therefore inadmissible as industry custom or practice.

And Dr. Chaitoff did not limit his testimony in the way the experts in *United States v. Diaz*, 876 F.3d 1194, 1197–99 (9th Cir. 2017), or similar cases, limited their testimony. The expert in *Diaz* had used § 1306.04(a)'s phrases "in their ordinary, everyday sense" and never implied they would "'have a separate, distinct and specialized' legal significance apart from common parlance." *Id.* at 1199. Thus, he "did not substitute his judgment for the jury's." *Id.*

Unlike the expert in *Diaz*, Dr. Chaitoff didn't use the regulatory phrases in their ordinary, everyday sense. Instead, he repeatedly took pains to opine that their meaning arose exclusively the rules and regulations that govern pain clinics, and he repeatedly testified how the jury should apply his interpretation of the law to the facts of the case. That is, he expressly and repeatedly linked "scope of professional practice" and "legitimate medical purpose" to legal standards.

The court of appeals disagreed, of course, and ruled that even if it was error to admit Dr. Chaitoff's testimony, that error wasn't plain under this Court's precedent or circuit precedent. Pet. App. 21a–25a. But if *Ruan* is decided in a way that sheds light on the

subjective and objective nature of the elements of a § 841(a) conviction, the Court should grant the petition, vacate the judgment, and remand for reconsideration in light of *Ruan*.

4. Although the court of appeals didn't reach the issue, the error did affect Dr. Santos's substantial rights. This wasn't a situation where an expert made a brief off-the-cuff comment during a lengthy trial, e.g., *United States v. Feldman*, 936 F.3d 1288, 1299–1300 (11th Cir. 2019), or where the evidence of guilt was overwhelming. Rather, this was a situation where the government's star witness repeatedly testified at length about his legal opinions—which were wrong—and even the district court had serious reservations about the verdict, stating, "I believe that there is a substantial likelihood that a motion for new trial or an acquittal will be granted ... in light of the circumstances of this case and the oddity of the verdict that was entered." And the district court expressly denied a motion for judgment of acquittal on counts seven, eight, and nine exclusively on the basis of Dr. Chaitoff's testimony.

Among other things, Dr. Chaitoff falsely testified that both standards were objective. And the prosecutor emphasized Dr. Chaitoff's flawed testimony during opening statement, closing argument, and rebuttal.

Similarly, the error impugned the tribunal's reputation. "'The purpose of [this fourth element of plain error review] is to analyze whether a 'reasonable citizen would[] bear a rightly diminished view of the judicial process and its integrity if' the court refused to correct the alleged error.'" *United States v. Hawkins*, 934 F.3d 1251, 1268 (11th Cir. 2019). In other words, it's "'about institutional legitimacy.'" *Id.* (citation omitted). Relevant considerations are "the volume of his

testimony," "the importance of that testimony to the Government's case," and whether "improper opinion testimony permeated the trial and tainted the process." *Id.*

Here, Dr. Chaitoff was the government's most important witness, he testified over the course of four days, and he was involved in a "battle of the experts" with the defendants' experts. Leaving "this plain error uncorrected" would "suggest[] to prosecutors in this circuit that overzealous presentation of improper testimony will be tolerated and to district courts that they need not be vigilant in ensuring the integrity of trials involving this type of testimony." *Id.* at 1268–69. That is particularly important guidance to provide in these pain clinic cases, which are being litigated more frequently nowadays.

II. A 4-1 circuit split exists whether sentencing courts can find relevant conduct that has a wag-the-dog effect on guidelines calculations by mere preponderance or by clear-and-convincing evidence

The District Court should have calculated drug weight under a clear-and-convincing evidence standard. It was error to let the government skate by under a mere preponderance standard.

1. The starting point for calculating drug weight is a petit jury's verdict. Here, the verdict found a conspiracy (count one) and illegal prescriptions on three specific days: January 14, 2015 (count seven); May 20, 2015 (count eight); and August 7, 2015 (count nine). In total, the verdict on these counts equated to 15.3g of oxycodone (a 102.51kg converted weight), 0.9g of morphine (a 0.45kg converted weight), and 60mg of alprazolam (a 0kg converted drug weight), for a total converted drug weight of 102.96kg. U.S.S.G. § 2D1.1

cmt. 8(D) (conversion table). That converted drug weight would've equated to a base offense level of 24. U.S.S.G. § 2D1.1(c)(8) (quantity table).

Because the jury found that those three prescriptions were illegal beyond a reasonable doubt, circuit precedent required the district court to include those prescriptions in its drug weight calculation. *See Feldman*, 936 F.3d at 1322 (drawing distinction between evidence sufficient to support a petit jury's verdict and the findings necessarily made in it, and concluding that "because we cannot determine which of the two findings the special verdict reflects, the jury's verdict does not constitute the necessary finding that but for ingestion of a Schedule II substance, the victim would have lived").

In other words, even if there might have been sufficient evidence upon which a reasonable jury could have relied to conclude that Dr. Santos wrote many illegal prescriptions, the petit jury did not necessarily find that he wrote any illegal prescriptions beyond that which was alleged in counts seven, eight, and nine. Any factual findings beyond those three illegal prescriptions, thus, would exceed the scope of the verdict and therefore would have to be made independently by the sentencing court.

2. Typically, "[w]hen a defendant challenges one of the factual bases of his sentence as set forth in the PSR, the Government has the burden of establishing the disputed fact by a preponderance of the evidence." *United States v. Lawrence*, 47 F.3d 1559, 1566 (11th Cir. 1995). As such, a district court could ordinarily consider relevant conduct, including acquitted conduct. *E.g.*, *United States v. Campbell*, 491 F.3d 1306, 1314–15 (11th Cir. 2007).

Nevertheless, due process forbids judicial factfinding at sentencing from serving as a "tail which wags the dog of the substantive offense." *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986). As such, starting in pre-*Booker* days, there developed a circuit split whether relevant conduct that would dramatically increase a sentence in a wag-the-dog fashion must be found by a mere preponderance or by clear-and-convincing evidence. *See United States v. Watts*, 519 U.S. 148, 156 (1997) ("We acknowledge a divergence of opinion among the Circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence."); *United States v. Cavallo*, 790 F.3d 1202, 1233–34 (11th Cir. 2014) (acknowledging prior circuit split, but concluding any error wasn't plain because there was "no controlling precedent" from the Supreme Court or Eleventh Circuit).

For instance, before *Booker*, the Third and Ninth Circuits initially held the clear-and-convincing evidence standard should apply to wag-the-dog relevant conduct. *E.g.*, *United States v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999) ("the district court erred in failing to apply the clear and convincing standard"); *accord United States v. Kikumura*, 918 F.2d 1084, 1101–02 (3d Cir. 1990).

Since *Booker*, however, the legal landscape has looked a bit different. The Third Circuit overruled *Kikumura*, stating that, "although concerns about the 'tail wagging the dog' were valid under a mandatory guideline system [,]... these concerns were put to rest when Booker rendered the Guidelines advisory." *United States v. Fisher*, 502 F.3d 293 (3d Cir. 2007). The Fourth and Seventh Circuits agree that mere preponderance is enough. *United States v. Grubbs*, 585

F.3d 793, 801 (4th Cir. 2009) ("Whatever theoretical validity may have attached to the *McMillan* exception to a preponderance of the evidence sentencing standard, the Supreme Court's decision in *Booker* and subsequent cases applying *Booker* have nullified its viability."); *United States v. Reuter*, 463 F.3d 792, 793 (7th Cir. 2006) (tail-wagging debate has been "rendered academic by *Booker*"). Still, the Ninth Circuit's decision in *Hopper* remains good law, and other more recent authority provides some support for *Hopper*'s point of view.[4] As such, there continues to be a 4-1 circuit split.

3. Application of a clear-and-convincing evidence standard would've made a difference. Even the district court recognized the weakness of the evidence and the "oddity of the verdict." Certainly, it was too weak to prove by clear-and-convincing evidence that every prescription Dr. Santos wrote and that Dr. Chaitoff reviewed was illegal.

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[4] *See, e.g.*, *United States v. McGowan*, 288 Fed. App'x 288, 292 (7th Cir. 2008) ("A district judge who is justifiably reluctant to impose a sentence resting primarily on facts proven only by a preponderance of the evidence is now free to deviate from the Guidelines."); *United States v. Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005) (district court should independently assess "the weight and quality" of relevant conduct evidence under § 3553(a)); *United States v. Wendelsdorf*, 423 F. Supp. 2d 927, 937 (N.D. Iowa 2006) ("unique circumstances may permit a judge to exercise its discretion to not consider relevant acquitted conduct even if such conduct is proved by a preponderance of the evidence"); *United States v. Gray*, 362 F. Supp. 2d 714, 723 (S.D. W. Va. 2005) (continuing to calculate guideline sentence using preponderance standard but analyzing evidence beyond a reasonable doubt for purposes of assessing guidelines' reliability and conducting the § 3553(a) analysis).

As "a matter of administration and to secure nationwide consistency," all sentencing proceedings should begin "by correctly calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007). Under circuit precedent, a procedural error would require vacation of the sentence, unless a district court says it would still impose an identical sentence. *United States v. Keene*, 470 F.3d 1347, 1349–50 (11th Cir. 2006).

Here, the error in applying the wrong evidentiary standard was harmful, because it meant the difference between a range of 151–188 months and a range of 63–78 months. That the district court varied downward makes no difference, because it never indicated per *Keene* it would've imposed the same sentence regardless of the guidelines calculation. And in any case, the guidelines are supposed to serve as the "starting point" and "initial benchmark." *Gall*, 552 U.S. at 49.

CONCLUSION

The petition should be granted.

Respectfully submitted,

THOMAS A. BURNS
Counsel of record
BURNS, P.A.
301 W. Platt St., Ste. 137
Tampa, FL 33606
(813) 642-6350
tburns@burnslawpa.com

Counsel for Petitioner

April 20, 2022

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 20-13973

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

KENDRICK DULDULAO and
MEDARDO QUEG SANTOS,
Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:17-cr-00420-MSS-AEP-4.

Before JORDAN, JILL PRYOR, and TJOFLAT, Circuit Judges.

PER CURIAM:

Kendrick Eugene Duldulao and Medardo Queg Santos, both physicians, served sequentially as Medical Directors of a pain management clinic in Tampa, Florida, called Health and Pain Clinic ("HPC"). HPC liberally dispensed controlled substances to its patients. Duldulao and Santos, along with others involved with HPC, were charged with drug and conspiracy crimes related to their activities at the clinic. A jury convicted Duldulao and Santos; they now appeal the sufficiency of the evidence supporting their conspiracy

convictions, and Santos appeals the district court's admittance of expert testimony, as well as his sentence. After careful review, and with the benefit of oral argument, we affirm.

I. BACKGROUND[1]

A superseding indictment charged Duldulao and Santos with one count of conspiracy to distribute and dispense oxycodone, hydromorphone, morphine, methadone, and hydrocodone (Schedule II controlled substances) and alprazolam (Xanax, a Schedule IV controlled substance), not for a legitimate medical purpose and not in the usual course of professional practice, in violation of 21 U.S.C. § 846. It also charged both men with substantive counts of distributing controlled substances not for a legitimate medical purpose and not in the usual course of professional practice, in violation of 21 U.S.C. § 841.

Ernest Gonzalez, the de facto owner of HPC, hired Duldulao in 2011 and Santos in 2014 to work at his pill mill. A pill mill is a pain management clinic that does not follow medical standards because its purpose is to prescribe controlled substances regardless of whether its patients have a medical need for them. A hallmark of the pill mill is that procedures to ensure patients received prescriptions only for legitimate medical needs are nonexistent or frequently not followed. To that end, HPC's procedures ensured that patients got into the doctor's office and out with their prescriptions as quickly as possible. Although the clinic was not supposed to dole out controlled substances to patients who were abusing the drugs, its

[1] Because we write for the parties, we recount only the facts necessary to explain our decision.

patients exhibited recognizable signs of drug-seeking behavior and drug addiction.

Gonzalez knew that the patients "were coming in [] to get controlled substances," so, at Duldulao's and Santos's respective job interviews, Gonzalez made it clear that HPC's patients expected to receive controlled substances during their visits. Doc. 382 at 38.[2] Gonzalez confirmed that Duldulao knew the clinic was "needing a doctor who was going to do controlled substances" and discussed specific controlled substances that Duldulao would use to treat the clinic's patients. Doc. 382 at 36. Gonzalez also told Duldulao and Santos about key aspects of the business model: very short, timed patient appointments, high patient volume (30–40 patients per day), and cash only—no insurance payments.

Aside from what Duldulao and Santos were told during their interviews, characteristics of the clinic suggested that it was not a legitimate medical operation. For example, the clinic had barely any medical equipment—only an exam table for the patients to sit on—or supplies.

As another example, the HPC staff who ran the front desk and did patient intake had no medical or administrative training. Yet they wrote prescriptions for controlled substances for the doctor to sign after each patient's brief visit. Their other duties included collecting cash payments from patients and knocking on the doctor's door to indicate that the ten-minute appointment should end.

What is more, many of the patients appeared to be drug abusers. Witnesses described them as having

[2] "Doc." numbers are the district court's docket entries.

bloodshot eyes, slurring their words, looking sleepy, and stumbling when they walked. Some of them had visible track marks, indicating intravenous drug abuse. Others looked like they were going through opiate withdrawal—sweating, shaking, vomiting, and experiencing hot and cold flashes. People were "nodding out" in the waiting room and "shooting up" in the parking lot. Doc. 384 at 100; Doc. 387 at 42. Patients hung out in the parking lot and left behind trash like baggies, blunt wrappers, and syringes. Appearances aside, as many as one in five patients tested positive for illegal drugs during their drug tests at HPC. The clinic administered drug tests to pass state inspections, but patients sometimes bribed HPC staff to skip the drug test. The staff falsified test records after letting patients skip the test.

Nevertheless, according to witnesses, HPC patients always left with new prescriptions for controlled substances. To obtain prescription medication, HPC patients did not need much documentation of a condition that required pain management—just an MRI within the last two years documenting a physical abnormality of some kind. That and a Florida driver's license got the patients prescriptions for controlled substances like oxycodone and methadone.

Furthermore, both defendants' own practices failed to comport with usual professional practice. During patient appointments, Duldulao conducted cursory medical examinations. Sometimes he spent up to five minutes on the physical exam; sometimes he simply did not perform one. He spent little time on patient medical history. When he went on vacation, his patients picked up prewritten, postdated prescriptions without any medical exam at all. He wrote prescriptions for controlled substances for patients even when

they bore visible track marks or had traveled from long distances—both red flags for controlled substance abuse, according to the government's medical expert witness, Dr. Kevin Chaitoff. Duldulao prescribed controlled substances in dangerous combinations, allowing his patients to mix Xanax, methadone, and a muscle relaxer called Soma. He even admitted to his girlfriend that he worked at a "pain mill." Doc. 386 at 143.

When Santos replaced Duldulao as HPC's Medical Director, little changed at HPC. Like Duldulao had, Santos prescribed controlled substances to people who looked like drug abusers. He saw them in brief appointments, timed by HPC staff. It did not matter if his patient's medical history or drug test was missing. It did not matter if a patient told him she shared her pills with friends or family. He prescribed patients controlled substances nonetheless. He prescribed drugs in the same dangerous combinations that Duldulao had. Santos, too, went on vacations but left prewritten, postdated prescriptions for his patients.

Unbeknownst to Santos, however, two of his patients were government agents: undercover DEA task force member Kathy Chin and her "boyfriend," confidential informant Robert Vasilas. Santos's unlawful interactions with them led to his three substantive convictions for unlawful distribution. Santos's first substantive conviction for distribution and dispensing arose out of the first time Chin and Vasilas saw Santos together. Vasilas, a returning patient, told Santos that Chin was "robbing" him of his pills when she ran out of hers. Doc. 386 at 173. Instead of investigating this red flag, Santos gave them prescriptions for greater quantities of oxycodone. He also wrote Vasilas a new prescription for Xanax without asking him

about his history with anxiety or what tools he used to manage it. He started Vasilas on Xanax, when most doctors would not have prescribed that drug to someone who was also taking an opioid. At no point did Santos discuss alternative treatments or milder medications with either patient.

Santos's second substantive conviction stemmed from a visit Chin made to HPC without Vasilas. In an earlier visit, Santos had agreed to give Chin prescriptions to take to Vasilas, who said he was going to be out for town for work. Santos told Chin she would have to pay for a visit for Vasilas, even though Vasilas would not actually be present. Santos gave her prescriptions for the absent Vasilas, even filling out Vasilas's file as though he had examined him.

The third substantive conviction concerned a return visit by Chin and Vasilas. Vasilas told Santos that he had run out of his pills and had been getting medications from friends and family. Santos responded by giving Vasilas extra prescriptions with a "do not fill until" date; Santos charged him for the prewritten prescriptions. After collecting evidence through these undercover visits, the government indicted Santos, Duldulao, and Gonzalez. Gonzalez pled guilty and testified against Santos and Duldulao.

At trial, the government established the above facts through the testimony of Gonzalez, government agents, HPC patients, and HPC employees. The government also called Dr. Chaitoff, an expert in pain management treatment, to testify about how he practices pain management. Dr. Chaitoff testified that in his practice he conducts a comprehensive physical exam on patients; speaks with them about their medical history, their current pain, and the narcotics agreement patients are required by law to sign; and

typically allots 30 to 35 minutes for an initial visit and 20 minutes for a follow-up—much longer than the appointments patients received with Duldulao or Santos. He testified that patients who are clearly abusing controlled substances should not be treated with more controlled substances, even if they have a legitimate pain problem.

Dr. Chaitoff opined that "most of" the prescriptions that Santos wrote for controlled substances "were provided for no legitimate medical purpose, [and] they were not issued in the course of one's professional practice." Doc. 388 at 20. Santos moved to strike his testimony, but the district court denied the motion, noting that Santos could still effectively cross-examine Chaitoff to challenge his credibility.

After the government rested its case, both Duldulao and Santos moved for a judgment of acquittal. At the conclusion of the trial, the district court granted Duldulao's motion as to most of the substantive counts of dispensing and distributing controlled substances but otherwise denied the motions. The jury convicted Duldulao of conspiracy and acquitted him of the one remaining substantive count of dispensing and distributing controlled substances. The jury convicted Santos of conspiracy and three substantive charges of distribution relating to his treatment of Chin and Vasilas, but it acquitted him of two other charges of distribution. After the jury returned its verdict, Duldulao and Santos renewed their motions for judgment of acquittal the district court denied their motions. The court ultimately sentenced Duldulao to twelve months and one day of imprisonment and Santos to six years of imprisonment.

On appeal, Duldulao and Santos now challenge their convictions, and Santos also challenges his sentence.

II. STANDARD OF REVIEW

We review the sufficiency of the evidence de novo when, as here, the defendants have preserved their claims by moving for judgments of acquittal. *United States v. Azmat*, 805 F.3d 1018, 1035 (11th Cir. 2015).

We review evidentiary issues that were not raised at trial for plain error, which "occurs if (1) there was error, (2) that was plain, (3) that affected the defendant's substantial rights, and (4) that seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Wright*, 607 F.3d 708, 715 (11th Cir. 2010) (internal quotation marks omitted). An error is plain if it is "clear" or "obvious." *United States v. Olano*, 507 U.S. 725, 734 (1993). We have explained that "where the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it." *United States v. Chau*, 426 F.3d 1318, 1322 (11th Cir. 2005) (internal quotation marks omitted).

We review the district court's denial of a motion to strike testimony for an abuse of discretion. *See United States v. Anderson*, 782 F.2d 908, 916 (11th Cir. 1986). We will reverse only if we find an error that affected the defendant's substantial rights. *See United States v. Barton*, 909 F.3d 1323, 1337 (11th Cir. 2018).

We review a district court's application of the Sentencing Guidelines de novo. *United States v. Johnson*, 980 F.3d 1364, 1374 (11th Cir. 2020).

III. DISCUSSION

Duldulao and Santos challenge their convictions on the ground that there was insufficient evidence that they knowingly agreed to participate in the pill mill conspiracy. Santos challenges his conviction on the

additional grounds that the district court made two reversible trial errors. He contends that the court plainly erred in admitting Dr. Chaitoff's testimony about his treatment of patients and that it abused its discretion in denying his motion to strike Dr. Chaitoff's testimony. Santos also appeals his sentence, arguing that the district court should have applied a clear-and-convincing-evidence standard, rather than a preponderance-of-the-evidence standard, to any relevant conduct findings that would increase his offense level. We address each issue in turn.

A. The Defendants' Challenges to the Sufficiency of the Evidence

Sufficiency of the evidence review requires us to examine "whether the evidence, when viewed in the light most favorable to the government, and accepting reasonable inferences and credibility choices by the fact-finder, would enable the trier of fact to find the defendant guilty beyond a reasonable doubt." *United States v. Monroe*, 866 F.2d 1357, 1365 (11th Cir. 1989). We will affirm a conviction unless there is "no reasonable construction of the evidence" from which the jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Garcia*, 405 F.3d 1260, 1269 (11th Cir. 2005).

To establish conspiracy in violation of 21 U.S.C. § 846, the government must prove beyond a reasonable doubt that "(1) there was an agreement between two or more people to commit a crime (in this case, unlawfully dispensing controlled substances in violation of § 841(a)(1)); (2) the defendant knew about the agreement; and (3) the defendant voluntarily joined the agreement." *Azmat*, 805 F.3d at 1035. An unlawful distribution under § 841(a)(1) occurs in the medical context when "(1) the prescription was not for a

legitimate medical purpose or (2) the prescription was not made in the usual course of professional practice." *United States v. Abovyan*, 988 F.3d 1288, 1305 (11th Cir. 2021). "The rule is disjunctive, and a doctor violates the law if he falls short of either requirement." *Id.*

The government does not need direct evidence to prove conspiracy; circumstantial evidence can prove each element. The first element, the existence of an agreement, "may be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme." *Azmat*, 805 F.3d at 1035 (internal quotation marks omitted). The second element, knowledge of an agreement, will be satisfied if "the circumstances surrounding a person's presence at the scene of conspiratorial activity are so obvious that knowledge of its character can fairly be attributed to him." *Id.* (internal quotation marks omitted). As for the third element, that the defendant voluntarily joined in the agreement, circumstantial evidence can show a defendant participated in a conspiracy "by showing that he committed acts that furthered the purpose of the conspiracy." *United States v. Iriele*, 977 F.3d 1155, 1172 (11th Cir. 2020). Our cases sometimes merge the first two elements and abbreviate the elements of conspiracy as "knowledge" and "participation." *See, e.g.*, *id.* at 1169–73; *Azmat*, 805 F.3d at 1036–37.

Circumstantial evidence of conspiracy includes "red flags" that would have put a reasonable doctor on notice of the illegitimacy of the operation. *See, e.g.*, *Azmat*, 805 F.3d at 1036 ("All of the witnesses with medical backgrounds also testified that there was an abundance of red flags that should have tipped off any doctor that his patients were seeking pills."). Where,

as here, the defendant is a doctor who allegedly participated in a pill mill conspiracy, we have looked to evidence of the doctor's interaction with patients to conclude "that a defendant distributed a prescription without a legitimate medical purpose and outside the usual course of professional practice." *United States v. Joseph*, 709 F.3d 1082, 1104 (11th Cir. 2013). These aspects include inordinately large quantities of controlled substances prescribed, brief or nonexistent physical examinations, failure to review patient history before prescribing medications, issuance of prescriptions to a patient known to be delivering the drugs to others, and a lack of a logical relationship between the drugs prescribed and treatment of the allegedly existing condition. *See id.*; *Azmat*, 805 F.3d at 1036.

There were sufficient red flags in evidence in this case to establish the defendants' knowledge of an unlawful scheme. Combined with the evidence of the defendants' own conduct, there was sufficient evidence that Duldulao and Santos knowingly joined an agreement to unlawfully dispense controlled substances.

1. Duldulao's Sufficiency Challenge

Duldulao argues that there was insufficient evidence to support the elements of the conspiracy charge and, specifically, that the red-flag evidence was weak. We agree with the district court that there was sufficient evidence for the jury to find that he knowingly joined an agreement to unlawfully dispense controlled substances. The district court relied on the following types of evidence: HPC owner Ernest Gonzalez's testimony that Duldulao agreed to write narcotics prescriptions; staff and patient testimony about Duldulao's adherence to the plan to write controlled substance prescriptions to the vast majority of

the clinic's clientele; staff testimony regarding HPC's operations while Duldulao served as Medical Director; patient testimony that confirmed the clinic's standard operating scheme under Duldulao; and Duldulao's statements to his then-girlfriend Kelly Schleisner about the clinic, including that it was a "pain mill." Doc. 376 at 6– 9. This evidence was sufficient to establish that Duldulao knowingly and voluntarily joined an agreement to unlawfully distribute controlled substances.

From this evidence, the jury reasonably could have found that the government proved all three elements of the conspiracy charge. As this Court has in other cases, here we treat the first and second elements, an agreement to commit a crime and knowledge of the agreement, as a single knowledge element. The jury reasonably could have inferred that Duldulao had knowledge of the criminal object of the conspiracy based on Gonzalez's testimony about his interview with Duldulao for the position of Medical Director, HPC staff's testimony about Duldulao's conduct at the clinic, staff and patient testimony about the patients, and Duldulao's statements to Schleisner. For the third element, voluntary participation, the jury reasonably could have concluded from the testimony concerning his conduct and interactions with patients that Duldulao willingly agreed to and did participate in the conspiracy.

First, we turn to the knowledge element. Gonzalez's testimony was evidence that Duldulao knew about the suspicious nature of HPC from the beginning and nevertheless agreed to get involved. During Duldulao's job interview, Gonzalez showed him a file that listed the types of controlled substances HPC had previously prescribed for patients. Gonzalez told Duldulao that

patient visits were timed and that it was "expected that he would probably take about ten minutes" for each patient. Doc. 382 at 40–41. To "expedite things," the staff would write out prescriptions before the patient's visit that Duldulao could sign afterwards. Id. at 41–42. This is circumstantial evidence of a scheme to get controlled substances into patients' hands as quickly as possible without regard to medical need. This evidence could lead a jury to conclude that Duldulao agreed to join the conspiracy when he agreed to prescribe opiates under those conditions.

In addition to what he knew before accepting his position as Medical Director of HPC, in treating his patients Duldulao would have seen that they exhibited signs of drug addiction, which are red flags for doctors. *See Iriele*, 977 F.3d at 1170; *Azmat*, 805 F.3d at 1036. Witnesses described patients as looking like drug abusers—for example, they were "a little too sleepy," slurred their speech, had bloodshot eyes or dilated pupils, had visible track marks, smelled of marijuana, and "nodd[ed] out" in the waiting room. Doc. 382 at 92, 96. One employee testified that some patients looked "like they were sleepy and like falling when they would walk." Doc. 382 at 155. Another described the waiting room as "[s]ometimes chaos" with "people nodding out." Doc. 384 at 100. One witness testified that he was addicted to drugs while he was a patient at HPC and looked like "death warmed over." *Id.* at 257. Nevertheless, he and others like him left Duldulao's office with prescriptions for opiates and other controlled substances.

Beyond the patients' appearances, Duldulao heard from HPC staff that some patients had tested positive for illegal drugs. Staff also told him that some patients traveled long distances to reach the clinic, bypassing

other pain management doctors and spending hours in a car despite their supposed chronic pain. Again, our precedent in *Azmat* warns that these red flags suggest the patients were seeking drugs without a legitimate medical purpose. 805 F.3d at 1036. Yet Duldulao prescribed them those drugs. A jury reasonably could infer that he knew the patients were likely drug abusers and knew that he was participating in a conspiracy to unlawfully prescribe them controlled substances.

Other circumstances surrounding Duldulao's presence at HPC are such that a jury reasonably could attribute knowledge of the conspiracy's unlawful character to him. Duldulao knew the clinic's parking lot was covered with trash, including drug paraphernalia, and that the clinic had little medical supplies or equipment. He knew the staff had no training for or experience with working in a medical office, yet they pre-wrote prescriptions for him to sign. He was also aware that HPC did not accept insurance: patients could only pay in cash. The jury could infer that he had "knowledge of the conspiracy due to his presence at" the clinic. See id.

Second, the element of active participation in the conspiracy found support in the evidence of Duldulao's conduct and interactions with the patients. Some HPC patients testified that Duldulao did not review their medical history forms and that his physical exams were as brief as two minutes, if they happened at all. *See id.* Duldulao sometimes prescribed combinations of opioids, Xanax, and Soma, drugs "described in the … medical literature as the unholy holy trinity for substance abuse." *Iriele*, 977 F.3d at 1170 (internal quotation marks omitted). When he went on vacation, Duldulao signed prewritten and postdated

prescriptions and left them with HPC staff so patients could come in to pick them up without a physician present or any medical exam. *See Joseph*, 709 F.3d at 1090–91 ("[E]very 'legitimate doctor' … knows that he may not pre-sign prescriptions."). A jury could reasonably infer from this conduct that Duldulao actively participated in the conspiracy.

Duldulao argues that this evidence was insufficient to support his conspiracy conviction. He points out that Gonzalez did not testify to telling Duldulao that HPC was a pill mill, that the job was contingent on Duldulao's agreement to exclusively write prescriptions for controlled substances, or that the patients would not have a medical need for these drugs. And, as Duldulao emphasized, Gonzalez testified that, despite his own guilty plea, he was not guilty of conspiracy. testified that he "[n]ever" conspired "with Dr. Duldulao to have him write scripts for no legitimate medical purpose." Doc. 383 at 214. But the jury was free to believe parts of Gonzalez's testimony and disregard others. *See United States v. Takhalov*, 827 F.3d 1307, 1321 n.10 (11th Cir. 2016). Thus, the jury reasonably could have concluded that Duldulao did, in fact, agree to and participate in the conspiracy to unlawfully distribute controlled substances.

Duldulao is correct that the jury heard other countervailing evidence: videos of undercover officers' appointments with Duldulao showed him asking about their medical history and performing a relatively thorough physical exam. In these videos, he asked about their current medications and advised them not to mix the opiates with alcohol. Indeed, Duldulao was acquitted of the substantive charges that were based on these videos. But Duldulao's then-girlfriend Schleisner testified that he told her that he was "pretty sure"

some patients were actually undercover officers. Doc. 386 at 132. Construing the evidence in favor of the government, we conclude that a reasonable jury could have found that these recorded exams were anomalies based on Duldulao's suspicions that he was dealing with undercover law enforcement and that most of the time he adhered to the agreement to write prescriptions for controlled substances for no legitimate medical purpose and outside of the usual course of professional practice.

Duldulao also argues that his conspiracy conviction cannot stand because he was acquitted of the underlying substantive charges. Not so. Sometimes a jury renders inconsistent verdicts, but the inconsistency is not a sufficient reason for setting the verdict aside. *See United States v. Powell*, 469 U.S. 57, 64–65 (1984). We have upheld a defendant's conviction when he was found guilty of the conspiracy only and not the underlying substantive offenses. *United States v. Brito*, 721 F.2d 743, 749–50 (11th Cir. 1983) ("[I]nconsistency in a jury's verdict does not require reversal.") (internal quotation marks omitted). "[A]s long as the guilty verdict is supported by sufficient evidence, it must stand, even in the face of an inconsistent verdict on another count." *United States v. Mitchell*, 146 F.3d 1338, 1345 (11th Cir. 1998). Having examined the evidence that supports Duldulao's conspiracy conviction and found it to be sufficient, we reject his challenge and affirm the district court.

2. Santos's Sufficiency Challenge

We agree with the district court that there was sufficient evidence to support the jury's finding that Santos knowingly joined an agreement to unlawfully dispense controlled substances. The district court relied on the following evidence: Gonzalez's testimony,

including an implicit admission on cross examination: when asked whether he conspired with Santos, Gonzalez said, "That's what I'm pleading to," Doc. 383 at 224; staff and patient testimony about Santos's conduct and interactions with patients; staff testimony about HPC's operations while Santos served as Medical Director, which still included brief, timed patient visits, prewritten prescriptions, little to no medical equipment, and no experienced staffers; and patient testimony about their experiences that confirmed that the clinic's standard operating scheme under Santos still featured "high patient volume, long-distance patients, brief medical visits, little to no medical documentation needed to see the doctor, cash payments, no insurance, cursory physical examinations, papered and/or inaccurate patient records, and patients presenting with signs of apparent drug abuse." Doc. 377 at 8.[3] This evidence was sufficient to establish that Santos knowingly and voluntarily joined an agreement to unlawfully distribute controlled substances.

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[3] The district court also relied on Santos's testimony, in which he admitted that he agreed to write prescriptions for controlled substances at HPC, despite the many indicators that it was not a legitimate operation. The district court erred when it relied on Santos's testimony. When the district court reserves ruling on a motion for a judgment of acquittal made after the government's case-in-chief, the district court's analysis of the evidence and our review on appeal is limited to the evidence the government presented. *United States v. Moore*, 504 F.3d 1345, 1346 (11th Cir. 2007). Because Santos moved for a judgment of acquittal at the close of the government's evidence, the district court was obligated to follow this snapshot rule and judge the sufficiency of the evidence based only on the government's case. It was not supposed to consider Santos's testimony at all when it ruled on the Rule 29 motion for acquittal. But this is harmless error; the remaining evidence was sufficient to deny the motion and convict Santos. *See Barton*, 909 F.3d at 1337.

Santos argues that the government failed to prove that he knowingly agreed to write illegal prescriptions. As we noted above, the agreement element of conspiracy merges with the knowledge element, and we treat them as a single knowledge requirement. We agree with the district court that there was sufficient evidence to support the jury's finding that Santos knowingly joined an agreement to unlawfully dispense controlled substances. Gonzalez's testimony shows that Santos knew about the suspicious circumstances at HPC. Santos's tenure at HPC featured the same red flags that support Duldulao's conspiracy conviction. And, unlike Duldulao, Santos was also convicted of substantive violations based on undercover surveillance, demonstrating that he knew about and agreed to participate in the conspiracy to unlawfully distribute controlled substances.

Gonzalez's testimony was evidence that Santos knew he was agreeing to work at a clinic with an unlawful criminal purpose. When Gonzalez interviewed Santos for the Medical Director position, he made it clear that he wanted a doctor who would write controlled substance prescriptions because when "[t]he patients would come in, they wanted their controlled substances." Doc. 383 at 67. Just like he did with Duldulao, Gonzalez showed Santos a file that contained the types of drugs HPC had prescribed. Santos "was okay with all of it except for he didn't like the methadone and the Xanaxes together." *Id.* at 67. Gonzalez notified Santos of the "same format" for timed visits as he had done with Duldulao, and Santos agreed to write prescriptions under those conditions. *Id.* at 68. Santos's job interview presented circumstantial evidence that he knew about the criminal scheme.

Other circumstantial evidence about HPC supports an inference that Santos knew about and agreed to the conspiracy. This evidence included numerous red flags, which we discussed as to Duldulao and which "all stayed the same" under Santos: the office had minimal medical equipment or supplies; the staff was untrained; patients traveled long distances to the clinic; the parking lot was littered with trash, including syringes; and HPC only accepted cash. Doc. 384 at 117–18. Patients showed signs of drug addiction, including slurred speech, nodding out, and track marks on their arms. Regardless, "they got their medications" from Santos. Doc. 383 at 115. A jury could reasonably conclude from this evidence that Santos knew the nature of the conspiracy and agreed to join it.

The knowledge element also found support in the evidence of Santos's conduct. Santos, like Duldulao, signed and postdated prescriptions when he went on vacations. Patients did not see Santos while he was on vacation, but they came to HPC and picked up their postdated prescriptions. Santos also left blank, presigned prescriptions for HPC staff to issue. His conduct supports an inference that he knew he had agreed to participate in the conspiracy to unlawfully distribute controlled substances.

Further, at one point, Santos came into the clinic "real nervous" and told Gonzalez "that [they] had to start dropping the medications" to lower doses. Doc. 383 at 125. Gonzalez responded that patients who had been taking high doses could not simply decrease their doses overnight; they could suffer a heart attack or a seizure. Santos began lowering prescription doses anyway, telling Gonzalez there were new guidelines from the federal government to comply with. In fact, the Drug Enforcement Administration ("DEA") had

recently seized patient records and shut down a clinic Santos's wife operated. The jury could have inferred that Santos was worried that the DEA would raid HPC and discover that he had been prescribing abnormally high doses of controlled substances. *See Azmat*, 805 F.3d at 1028, 1036–37 (upholding the conviction of a doctor who sometimes decreased patients' medications for self-serving reasons).

Moreover, Santos was convicted of substantive § 841(a) offenses based on his interactions with purported patients who were actually government agents. In an undercover video with confidential informant Vasilas, when Santos asked how Vasilas's supply of narcotics had held up in the months since his last visit, Vasilas said, "I know that I'm not supposed to be saying this but I had to ask friends and family, you know, to help me out." Government Ex. 207 (segment 003) at 2:30–2:50.[4] Santos gave him prescriptions anyway—in fact, Santos gave him three months' worth of prescriptions, made him pay three times as though he was actually coming back in for the two follow-ups, and let his girlfriend pick up his prescriptions, even though Vasilas had just admitted to sharing medication. When Chin asked for an increase in her dosage, Vasilas told Santos, "I know we're not supposed to talk about this, doc, but, you know, … she runs out because it's not enough for her, so I have to help her out sometimes." *Id.* at 15:30–15:38. These admissions showed that the patients were diverting their medication, a serious red flag that suggested they were abusing drugs. *See Azmat*, 805 F.3d at 1032; *Joseph*, 709 F.3d

[4] This citation refers to Government Exhibit 213, a video recording of the appointment, which was admitted into evidence at trial.

at 1090. But Santos did not even react; instead he gave his patients the increased quantities they wanted. These substantive convictions show that he participated in the conspiracy and bolster the inference that he knew about its criminal nature.

Santos contends that "patient testimony and resort to red flags cannot mend the evidentiary gap [as to an agreement] because it does not show any agreement between Dr. Santos and Gonzalez." Santos Br. at 54. We disagree. Just as with Duldulao, the jury was entitled to rely on "inferences from the conduct of the alleged participants or from circumstantial evidence of [the] scheme" to find an agreement. *Azmat*, 805 F.3d at 1035 (internal quotation marks omitted). Here, Gonzalez's testimony, the multiple red flags, and Santos's conduct together constitute sufficient evidence that Santos agreed to work at a pill mill and unlawfully distribute controlled substances. A reasonable jury could find from this evidence that Santos agreed to be part of a conspiracy to distribute controlled substances with no legitimate medical purpose and outside the scope of professional practice. We reject his challenge to the sufficiency of the evidence supporting his conspiracy conviction.

B. Santos's Challenge to the Government's Expert Testimony

Prescriptions for controlled substances are lawful when they are "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." *Joseph*, 709 F.3d at 1094 (quoting 21 C.F.R. § 1306.04(a)). To convict a doctor for violating 21 U.S.C. § 841(a), the government must prove that she issued prescriptions with no legitimate medical purpose or outside of the usual course of professional practice. *Id.* The government

often uses the testimony of a medical expert witness to satisfy its burden. *See, e.g.*, Azmat, 805 F.3d at 1036. But expert medical testimony is not necessary for a conviction. *Joseph*, 709 F.3d at 1100. Here, the government called an expert witness, Dr. Chaitoff, who testified about the definitions of "legitimate medical purpose" and "the usual course of professional practice."

For the first time, on appeal, Santos argues that Dr. Chaitoff's testimony violated the rules of evidence in two ways: first, by opining on Santos's subjective mental state, and second, by reaching a legal conclusion. But the district court's decision to admit the testimony was not contrary to binding precedent directly resolving these legal issues. *United States v. Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003). Therefore, we discern no plain error.

A district court may admit expert testimony that "help[s] the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). Generally, "[a]n opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). But "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Fed. R. Evid. 704(b). Rule 704 bars a witness from giving legal opinions (*e.g.*, "The defendant broke the law") and from discussing culpable mental states (*e.g.*, "And he did it knowingly"). An expert witness can give his opinion about an ultimate issue so long as he does not tell the jury what result to reach. *See* Fed. R. Evid. 704 advisory committee's note. There is a difference between simply opining on an ultimate issue and

impermissibly directing the jury to a result, however. *See United States v. Grzybowicz*, 747 F.3d 1296, 1310 (11th Cir. 2014).

Santos first argues that Dr. Chaitoff violated Federal Rule of Evidence 704(b) by testifying about Santos's subjective mental state. That argument is not supported by the record, though. Dr. Chaitoff testified about Santos's conduct and his professional opinion of that conduct, but he did not speculate about what was going on in Santos's mind. *See United States v. Akwuba*, 7 F.4th 1299, 1317–18 (11th Cir. 2021) (concluding that medical experts' testimony about the defendant's conduct in issuing prescriptions did not impermissibly give opinions regarding her mental state).

Second, Santos cannot show that there was any plain error in admitting Dr. Chaitoff's testimony despite the fact that Dr. Chaitoff's testimony reached the ultimate issue of whether Santos prescribed drugs for no legitimate medical purpose and outside the usual course of professional practice—the standards of medical care that govern the case. To summarize Dr. Chaitoff's testimony, he first gave background testimony about these standards, explaining that he derived their meanings from the DEA manual, state and federal regulations, and his own pain management practice. Giving examples from his experience, he explained the process he follows before prescribing controlled substances: finding out who referred the patient; verifying that the patient has insurance; discussing in detail the patient's pain complaints and medical and social history, touching on whether there is a history of substance abuse; and completing an extensive physical examination. Before starting someone on controlled substances, he discusses the medication's risks and counsels patients about alternative

pain management treatments. He emphasized that there is no one-size-fits-all approach to treating a patient's pain.

He also testified about red flags that would warn him that patients might be abusing their medication: patients with no medical records or no referral, those who traveled from long distances, and those who shared their medication or ran out early. These are all examples of patients who would prompt further investigation, according to Dr. Chaitoff. He found red flags when he watched videos of undercover officer Chin and confidential informant Vasilas visiting Santos's office. Santos had been prescribing opiates for Chin for four months. She had missed two months of appointments, which, Dr. Chaitoff testified, would prompt most doctors to ask her how she had been managing the pain without medication and whether she had gone through withdrawal.

Dr. Chaitoff also noted that it is unusual for a doctor to see a couple together and perform a brief physical exam on both of them simultaneously, as Santos did in the video. Reviewing Santos's notes, Dr. Chaitoff testified that there was little documentation about the results of the physical examinations and why the injuries warranted treatment with controlled substances. Strikingly, Vasilas said that Chin had taken some of his medication, clear evidence of diversion that Santos did not follow up on. Instead, he increased her quantity of oxycodone tablets. Dr. Chaitoff gave his opinion about an ultimate issue when he testified that, at that visit, Santos prescribed Chin and Vasilas controlled substances for no legitimate medical purpose and outside the scope of professional practice. Dr. Chaitoff came to the same conclusion about two other

visits. Santos was convicted of substantive charges based on those three patient visits.

It was not plain error to admit Dr. Chaitoff's ultimate-issue evidence. Our precedent allows medical experts to testify about the ultimate issue of the appropriate standard of care. In *Azmat*, the government's medical expert testified that the patients exhibited an "abundance of red flags" and concluded that the doctor did not write prescriptions for them for a legitimate medical purpose or in the usual course of professional practice. 805 F.3d at 1036. The defense's medical expert concluded that the doctor "act[ed] appropriately under medical standards," but the jury determined that the government's expert was more credible and convicted the defendant. *Id.* This Court accepted both experts' testimony as properly admitted and affirmed the doctor's conviction. *See id.* at 1042–44, 1049. Just as in *Azmat*, here it was not plain error for the district court to admit Dr. Chaitoff's testimony for the jury's consideration.

C. Santos's Challenge to the Denial of His Motion to Strike Expert Testimony

Duldulao and Santos both moved to strike Dr. Chaitoff's testimony because it relied on evidence the district court had excluded regarding Duldulao's other pain clinic, Rehabilitative Health. The district court granted Duldulao's motion because Dr. Chaitoff improperly relied on the excluded evidence to form his ultimate opinion on whether Duldulao prescribed controlled substances for no legitimate medical purpose and outside the usual course of professional practice. By contrast, the court denied Santos's motion because the excluded evidence did not involve him, so Dr. Chaitoff's opinion about his conduct remained untainted. Moreover, Santos was not prejudiced because

he still had an opportunity to effectively cross-examine Dr. Chaitoff and impeach his credibility.

Santos argues that the district court abused its discretion when it denied his motion to strike and allowed Dr. Chaitoff to continue testifying and give his opinion about the propriety of Santos's prescriptions. Although the court deemed Dr. Chaitoff a "less than reliable witness" because of his memory problems and lack of candor, it was within the court's discretion to deny Santos's motion to strike. Doc. 388 at 97. Only one topic was offlimits in Santos's cross-examination: the evidence about Duldulao's other pain clinic that was excluded by the court's in limine order. That limit did not substantially affect Santos's right to cross-examine the witness; he could still mitigate any prejudice through thorough cross-examination. *See United States v. Williams*, 865 F.3d 1328, 1341 (11th Cir. 2017).

D. Santos's Sentencing Challenge

Lastly, Santos challenges his six-year sentence, contending that the district court used the wrong standard of proof to calculate the total drug quantity that determined his base offense level. The government bears the burden of establishing drug quantity for the purpose of the Sentencing Guidelines by a preponderance of evidence. *United States v. Rodriguez*, 398 F.3d 1291, 1296 (11th Cir. 2005). The preponderance standard also applies to acquitted conduct; it satisfies due process in both situations. *United States v. Siegelman*, 786 F.3d 1322, 1332 n.12 (11th Cir. 2015). Santos argues that the clear-and-convincing-evidence standard should apply here because including his acquitted conduct dramatically increased his sentence. We reject his argument.

The government and Santos initially agreed that Santos's sentence should be based on the total drug quantity from his controlled substance prescriptions in all 86 of the patient files that were admitted at trial, assigning him a base offense level of 32 under the Sentencing Guidelines. Later, Santos objected and asked the district court to calculate the drug quantity based only on the prescriptions that the jury had found to be unlawful beyond a reasonable doubt, which would lower his base offense level to 24. He argued that his partial acquittal meant the court should not generalize from his three convictions to all 86 patient files. The court disagreed, finding the drug quantity by a preponderance of the evidence. It calculated that Santos had a base offense level of 32 and added a two-level enhancement for abusing his position of trust. On appeal, Santos maintains that the higher standard of proof should apply.

His argument is foreclosed by precedent. This Court has consistently held that district courts are required to make factual findings for sentencing purposes by a preponderance of the evidence. *United States v. Aguilar-Ibarra*, 740 F.3d 587, 592 (11th Cir. 2014). It thus was not error for the district court to determine Santos's total drug quantity using a preponderance of the evidence standard.

IV. CONCLUSION

For the foregoing reasons, we affirm the district court on all issues.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:17-cr-420-MSS-AEP

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MEDARDO QUEG SANTOS,
Defendant.

ORDER

THIS CAUSE comes before the Court for consideration of Defendant Medardo Queg Santos's Renewed Motion for Judgment of Acquittal Regarding Count One of Indictment and, in the Alternative, Motion for a New Trial, (Dkt. 359), and the Government's Response in opposition thereto. (Dkt. 367) Upon consideration of all relevant filings, case law, and being otherwise fully advised, Defendant Santos's Renewed Motion for Judgment of Acquittal Regarding Count One of Indictment and, in the Alternative, Motion for a New Trial, (Dkt. 359), is DENIED.

I. BACKGROUND

On April 29, 2019, trial of this case commenced. (Dkt. 169) At the close of the Government's case-in-chief, both Defendants moved for judgment of acquittal on all counts pursuant to Federal Rule of Criminal

Procedure 29. (Dkts. 331, 332) As to Defendant Santos, the Court denied the Motion with respect to Counts One and Counts Five through Nine. (Dkt. 342) At the conclusion of trial, Santos renewed his Motion for Acquittal as to Count One. (Dkt. 349; *see also* Dkt. 334) The Court denied the Renewed Motion, finding that the evidence was sufficient for a reasonable jury to find Santos guilty of the conspiracy charged in Count One beyond a reasonable doubt. (Dkt. 334) On May 23, 2019, the jury returned a verdict of "guilty" as to the conspiracy charged in Count One as well as the substantive allegations charged in Counts Seven, Eight, and Nine. (Dkt. 339) As to Counts Five and Six, the jury returned a "not guilty" verdict. (*Id.*)

By this Motion, Santos challenges the sufficiency of the evidence supporting the jury's guilty verdict for Count One. (Dkt. 359) He also argues, in the alternative, that the Court should grant a new trial. (*Id.*) The Government opposes the Motion, arguing that the evidence was sufficient to support the verdict, and it contends that no new trail is warranted. (Dkt. 367)

II. STANDARD OF REVIEW

a. Judgment of Acquittal

Federal Rule of Criminal Procedure 29 provides in relevant part that a court must order the entry of judgment of acquittal for "any offense for which the evidence is insufficient to sustain a conviction." *See* Fed. R. Crim. P. 29(a). On a motion for judgment of acquittal, the court must determine whether the evidence, taken in the "light most favorable to the Government, [is] sufficient to support [a] jury's conclusion that the defendant [is] guilty beyond a reasonable doubt." *United States v. Williams*, 390 F.3d 1319, 1323 (11th Cir. 2004) (citations omitted). "The Court must

view evidence as a whole, assessing pieces of evidence not in isolation but in conjunction with the other evidence." *United States v. Renwick*, 273 F.3d 1009, 1029 (11th Cir. 2001) (*per curiam*) (citations omitted).

In considering a motion for judgment of acquittal under Rule 29(c), "the issue is not whether a jury reasonably could have acquitted but whether it reasonably could have found guilt beyond a reasonable doubt." *United States v. Martin*, 803 F.3d 581, 587 (11th Cir. 2015) (citing *United States v. Thompson*, 473 F.3d 1137, 1142 (11th Cir. 2006)). The Court "will not overturn a jury's verdict if there is 'any reasonable construction of the evidence [that] would have allowed the jury to find the defendant guilty beyond a reasonable doubt.'" *Id.* (quoting *United States v. Friske*, 640 F.3d 1288, 1291 (11th Cir.2011)). Moreover, a "jury is free to choose among reasonable constructions of the evidence," and as such, "[t]he court must accept all of the jury's 'reasonable inferences and credibility determinations.'" *United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999) (citing *United States v. Sellers*, 871 F.2d 1019, 1020 (11th Cir. 1989)). Furthermore, "[t]he test for sufficiency of the evidence is identical regardless of whether the evidence is direct or circumstantial, and no distinction is to be made between the weight given to either direct or circumstantial evidence." *United States v. Kendrick*, 682 F.3d 974, 984 (11th Cir. 2012) (citation omitted).

b. New Trial

The Eleventh Circuit has stated that "[a] motion for a new trial must be viewed with 'great caution.'" *United States v. Reed*, 887 F.2d 1398, 1404 (11th Cir. 1989). Pursuant to Federal Rule of Criminal Procedure 33, a district court may grant a new trial in the interests of justice or because of newly discovered

evidence. *See United States v. Hernandez*, 433 F.3d 1328, 1335 (11th Cir. 2005); *see also United States v. Ramos*, 179 F.3d 1333, 1336 (11th Cir. 1999). A Rule 33 motion "is addressed to the sound discretion of the trial court." *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985). If a court concludes that "the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury." *Id.* at 1312–13.

III. DISCUSSION

a. The Jury's Verdict is Supported By Sufficient Evidence

As the Government properly states,

> [u]nder Federal Rule of Criminal Procedure 29, a court considering a post-verdict motion for judgment of acquittal must view the evidence at trial in the light most favorable to the government. *United States v. Mintmire*, 507 F.3d 1273, 1289 (11th Cir. 2007); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ('[T]he factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution.')[(emphasis added)]. That is, the Court must draw all reasonable inferences and credibility choices in the government's favor, regardless of whether that evidence is direct or circumstantial. *United States v. Williams*, 390 F.3d 1319, 1323-24 (11th Cir. 2004); *see also United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999) (court must resolve conflicts in evidence

in favor of the government and accept all reasonable inferences that tend to support its case).

Additionally, the law accepts that a jury has discretion to choose among various reasonable constructions of evidence. *Williams*, 390 F.3d at 1323. Thus, evidence need not exclude every hypothesis of innocence or be inconsistent with every conclusion except guilt in order for a court to deny a motion for judgment of acquittal. *See United States v. Merrill*, 513 F.3d 1293, 1299 (11th Cir. 2008); *United States v. Browne*, 505 F.3d 1229, 1253, 1262 (11th Cir. 2007) ('Sufficiency review operates as a backstop to protect the defendant's due process rights, not as a license for the court to second-guess the jury.'). Stated differently, '[i]t is not enough for a defendant to put forth a reasonable hypothesis of innocence, because the issue is not whether a jury reasonably could have acquitted but whether it reasonably could not have found guilt beyond a reasonable doubt.' *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009) (citation omitted).

...

In sum, this Court must 'uphold the jury's verdict unless no trier of fact could have found guilt beyond a reasonable doubt.' *United States v. Aguilar*, 188 F. App'x 897, 899 (11th Cir. 2006); *see also United States v. Alaboud*, 347 F.3d 1293, 1296 (11th Cir. 2003) ('A jury's verdict must be sustained against a [Rule 29] challenge if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.') (emphasis added). Under this well-settled legal standard, the Court should not disturb the jury's verdict.

(Dkt. 367 at 1–3) Against this legal backdrop, the verdict in this case must be sustained. The jury convicted Santos on Counts One, Seven, Eight, and Nine of the Second Superseding Indictment. (Dkt. 339) The only Count for which Santos disputes the jury's verdict is Count One, which charged him with conspiracy to distribute and dispense, and cause the distribution and dispensing of various Schedule II controlled substances, not for a legitimate medical purpose and not in the usual course of professional practice. (Dkt. 171 at 2) To establish guilt on this count, the Government was required to prove that

(1) two or more people in some way agreed to try to accomplish a shared and unlawful plan as charged in the Second Superseding Indictment;

(2) the Defendant, knew the unlawful purpose of the plan and willfully joined in it; and

(3) the object of the unlawful plan was to distribute and dispense, and cause the distribution and dispensing of, oxycodone, hydromorphone, morphine, methadone, hydrocodone, and1 alprazolam, for no legitimate medical purpose and outside the usual course of professional practice.

(Dkt. 337 at 17–18); *see also* Eleventh Circuit Pattern Criminal Jury Instruction, 6.21.846B, Controlled Substances—Conspiracy (2019).

To meet its burden, the Government introduced testimonial and documentary evidence to show that the Defendant conspired with Co-Defendant Gonzalez to open and operate a pain clinic in which prospective patients would be seen and prescribed controlled substances without regard to medical necessity and outside the scope of medical practice standards. (Dkt. 367 at 3–6) Gonzalez testified that Santos agreed to write

narcotics as the exclusive means of treating the clinic's clientele. (Trial Tr., 41–42, 213–214, May 6, 2019) He testified that the staff was untrained, and that Santos knew of the lack of training and expertise of the staffers at the clinic. (*Id.* at 43) Gonzalez made clear that the operation was largely rote and that prescriptions would be written in advance of the actual doctor's visit, to be signed at the end of the visit. (*Id.* at 84, 105–06, 119–21)

The Defendant is correct that Gonzalez testified that the discretion was left to the doctor to decide what controlled substances to prescribe. The jury, of course, was within its authority to disbelieve the testimony of Gonzalez on that point entirely, relying instead on the actual behavior of Santos in adhering to the plan indiscriminately to write controlled substance prescriptions to the vast majority of the clinic's clientele without regard to medical necessity and outside the scope of professional practice. Similarly, even if that testimony is to be believed, it does not negate the fact that the prescriptions were often pre-written and the predetermined protocol that was followed in virtually all patients was nearly identical. (Dkt. 367 at 6, 16) Additionally, the jury was within its discretion to conclude that Santos's role in the conspiracy was to prescribe and Gonzalez's role was to drum up the "patients." Although various persons may have different roles in a conspiracy, if their joint agreement is to perpetrate the scheme, they are no less conspirators. *United States v. Guerra*, 293 F.3d 1279, 1285 (11th Cir. 2002) (internal citations omitted) ("A defendant may be found guilty of conspiracy if the evidence demonstrates he knew the 'essential objective' of the conspiracy, even if he did not know all its details or played only a minor role in the overall scheme.");

United States v. Jones, 913 F.2d 1552, 1557 (11th Cir. 1990) (internal citations omitted) ("It is not necessary for the government to prove that a defendant knew every detail or that he participated in every stage of the conspiracy.").

The Defendant is also correct that Gonzalez testified that he had no role in the decision to prescribe controlled substances to patients and that Santos was the one who ultimately determined whether there were legitimate medical reasons for the prescriptions, (Dkt. 359 at 5–6), however, such testimony is not dispositive of whether Santos did in fact conspire. The jury was free to disregard Gonzalez's testimony in this regard, which it apparently did, and its decision to do so finds support in the record evidence. Additionally, Gonzalez at least implicitly admitted on cross-examination to having conspired with Santos. *See* Trial Tr., 199, May 6, 2019 (Q: Did you conspire with [Santos]? A: That's what I'm pleading to.). Moreover, the Government offered the testimony of other witnesses, including staffers and patients, to establish the conduct of Santos and Gonzalez during the conspiracy and to corroborate the terms and scope of the agreement to unlawfully dispense controlled substances. *See United States v. Cross*, 928 F.2d 1030, 1042 (11th Cir. 1991) (defendant's knowledge of, and membership in, an agreed upon scheme may be proven by acts on his part that furthered the conspiracy). In particular, Jennifer Edenfield testified about Health and Pain Center's operations while Santos served as the clinic's medical director. She confirmed that patient visits were brief and timed; prescriptions were prewritten; the clinic had little to no medical equipment; and staffers had no experience working in medical clinics. (Dkt. 367 at 10); *United States v. Rodriguez*, 765 F.2d 1546, 1551

(11th Cir. 1985) (determining whether defendants knowingly volunteered to join a conspiracy may be proven by "direct or circumstantial evidence, including inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme").

Patients also testified about their experiences at Health and Pain Center. Their testimony confirmed the clinic's standard operating scheme under Santos, including high patient volume, long-distance patients, brief medical visits, little to no medical documentation needed to see the doctor, cash payments, no insurance, cursory physical examinations, papered and/or inaccurate patient records, and patients presenting with signs of apparent drug abuse and sponsoring activities (who then still received controlled substances). (Dkt. 367 at 11)

Finally, Dr. Santos testified. In the course of that testimony, he corroborated his agreement with Gonzalez and participation in a conspiracy to distribute or dispense controlled substances for no legitimate medical purpose and/or outside the scope of professional practice. Specifically, Santos testified that he had entered into an agreement to write prescriptions for controlled substances at Health and Pain Center. *See* Trial Tr., 222:1-20, May 20, 2019. He confirmed knowing that Gonzalez, Colon, and other staffers had minimal to no medical background. *Id.* at 227:19–228:8. He also admitted to knowing that the clinic was cash-based, *id.* at 223:24–224:4, had minimal to no medical equipment, *id.* at 229:1-20, and that it did not accept insurance, *id.* at 229:21-22. Santos also stated that he did not review the Controlled Substance Agreement with patients, but instead, left such responsibility to (medically untrained) staffers. *Id.* at 232:4-16. Santos also admitted to treating patients who presented with

red flags, like obtaining medications from illegitimate sources, *id.* at 232:19–233:13, obtaining medications earlier than the medically appropriate 30-day period, *id.* at 239:2–240:5, or traveling long distances, *id.* at 249:12-24.

Furthermore, Santos stated that of his hundreds of patients, he believed he had referred a patient to a specialist for alternative treatment "one or two times." *Id.* at 234:20– 235:6. He provided no oversight as to how staffers were administering urine screens to patients. *Id.* at 235:7–236:4. And while he agreed that patient records were "very important," *id.* at 237:17, Santos admitted to inputting information into patient files that was inaccurate, false, or that reflected tests or exams that had not occurred or been administered. *Id.* at 243:11–244:23, 246:11–247:20. Santos also agreed that he renegotiated his salary so that it was based on a percentage of patients who entered the clinic so that he could earn more money. *Id.* at 223:11–224:4.

All such evidence was available to the jury in evaluating whether there was a conspiratorial scheme, the object of which was to ensure the continued unlawful distribution of controlled substances to patients for no legitimate medical purpose or outside the scope of professional practice. *United States v. Charles*, 313 F.3d 1278, 1284 (11th Cir. 2002), *cert. denied*, 539 U.S. 933 (2003) (to prove participation in conspiracy, the government must have proven beyond reasonable doubt, even if only by circumstantial evidence, that conspiracy existed and that defendant knowingly and voluntarily joined conspiracy). Viewed in the light most favorable to the Government, a rational trier of fact could have found the essential elements of conspiracy beyond a reasonable doubt and could have concluded

that Santos not only agreed to an unlawful drug-dispensing scheme during his tenure at Health and Pain Center, but that he actively participated in it. *See United States v. Clavis*, 956 F.2d 1079, 1085 (11th Cir. 1992) ("Once the existence of a conspiracy is established, only slight evidence is necessary to connect a particular defendant to the conspiracy."). Accordingly, the Court DENIES Santos's Rule 29 Motion.

b. No New Trial Is Warranted

Santos moves alternatively for a new trial in the interest of justice based on insufficiency of the evidence. (Dkt. 359) His argument does not support the exceptional relief that he seeks.

The Court is permitted to grant a motion for new trial if a convicted defendant shows that the court committed errors during trial that prejudiced him. *See United States v. DeLaughter*, 2007 WL 3034645, at *1 (M.D. Fla. Oct. 16, 2007). Even if a defendant makes such a showing, however, a new trial is not warranted unless the error affected the defendant's substantial rights and had a substantial influence on the jury's verdict. *Id.*; *see also* Fed. R. Crim. P. 52(a). Santos points to no errors; thus, the Government does not address this ground for a new trial. As previously stated, the Government offered evidence from which a jury could find that Santos agreed to and participated in a conspiracy to distribute controlled substances for no legitimate medical purpose or outside the scope of professional practice.

For the same reason that he fails in his notion to challenge the conspiracy conviction under Rule 29, Santos fails to establish a basis for a new trial under Rule 33. As explained *supra*, "the court may vacate any judgment and grant a new trial if the interest of

justice so requires." *See Hernandez*, 433 F.3d at 1335; *see also Ramos*, 179 F.3d at 1336. In order for a court to grant a Rule 33 motion for a new trial, "the evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *Martinez*, 763 F.2d at 1312–13.

More than ample evidence supported the finding that Santos conspired to prescribe controlled substances for no legitimate medical purpose and outside the scope of professional practice. Such evidence included co-conspirator Gonzalez's testimony, staff members' testimony, patients' testimony, and Santos's own testimony, as well as substantial physical evidence, including business records and patient files. Thus, the Court cannot find that the jury's verdict was against the manifest weight of the evidence, and therefore, no new trial is warranted. Accordingly, Santos's Rule 33 motion is also DENIED.

IV. CONCLUSION

Upon consideration of the foregoing, it is hereby ORDERED that Defendant Medardo Queg Santos's Renewed Motion for Judgment of Acquittal Regarding Count One of Indictment and, in the Alternative, Motion for a New Trial, (Dkt. 359), is DENIED.

DONE and ORDERED at Tampa, Florida this 18th day of October, 2019.

MARY S. SCRIVEN, United States District Judge.