No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FRANK PURPERA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Beau B. Brindley
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And Blair T. Westover
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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4158

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

FRANK CRAIG PURPERA, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Elizabeth Kay Dillon, District Judge. (7:17-cr-00079-EKD-1)

Argued: October 30, 2020 Decided: February 5, 2021

Before DIAZ, THACKER, and HARRIS, Circuit Judges.

Affirmed by unpublished per curiam opinion. Judge Diaz wrote an opinion concurring in part and dissenting in part.

ARGUED: Blair Tamara Westover, LAW OFFICES OF BEAU B. BRINDLEY, Chicago, Illinois, for Appellant. Laura Day Rottenborn, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee. **ON BRIEF:** Beau B. Brindley, LAW OFFICES OF BEAU B. BRINDLEY, Chicago, Illinois, for Appellant. Thomas T. Cullen, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dr. Frank Purpera ("Appellant") is a vascular surgeon who owned a medical practice in Blacksburg, Virginia, and was registered with the Drug Enforcement Administration ("DEA") to administer controlled substances. Between April 21, 2014, and August 4, 2016, Appellant purchased nearly 10,000 tablets of various controlled substances from Henry Schein, Inc., a medical supply distribution company ("Henry Schein"). On December 14, 2017, Appellant was charged with 67 counts of obtaining these controlled substances by fraud, in violation of 21 U.S.C. § 843(a)(3) (Counts 1–68);[1] one count of failing to maintain required records related to their disposition, in violation of 21 U.S.C. § 843(a)(4)(A) (Count 69); and one count of making a false statement to a DEA agent investigating Appellant's fraudulent activity, in violation of 18 U.S.C. § 1001(a)(2) (Count 70).

Following trial, a jury found Appellant guilty on all counts. Appellant moved for a judgment of acquittal, which the district court granted with respect to Count 21 but otherwise denied.[2] At sentencing, the district court calculated an advisory United States Sentencing Guidelines ("Guidelines") range of six to 12 months and imposed an above-Guidelines sentence of 20 months of imprisonment.

[1] Counts 1–68 of the indictment allege violations of 21 U.S.C. § 843(a)(3), but the indictment does not include a Count 27.

[2] The United States does not appeal the district court's grant of Appellant's motion for acquittal with respect to Count 21.

Appellant now claims that his convictions should be vacated for a multitude of reasons. He asserts (1) his trial counsel labored under a conflict of interest; (2) the district court erroneously refused two of his requested jury instructions; (3) the district court erroneously admitted expert testimony that contained impermissible legal conclusions; and (4) his convictions were not supported by sufficient evidence. Additionally, Appellant contends that his sentence is procedurally and substantively unreasonable. For the reasons that follow, we find each of these claims to be without merit and affirm Appellant's convictions and sentence.

I.

A.

From 2014 to 2016, Appellant purchased thousands of tablets of oxycodone (Percocet), hydrocodone (Lortab), alprazolam (Xanax), diazepam (Valium), and tramadol (Ultram) -- all controlled substances under federal law -- from Henry Schein. Pursuant to the company's policy, before completing these purchases, Appellant was required to submit purchase order forms that contained questions about "the approximate percentage of patients that leave [his] office with controlled substances daily"; "the approximate percentage of patients that are treated in [his] office with controlled substances daily"; and whether he uses "any of the controlled drug items [he] order[s] to treat family members or

friends."[3] J.A. 223–24.[4] At trial, the United States introduced evidence demonstrating that the purchase order forms Appellant submitted to Henry Schein contained inaccurate answers to these questions. For example, Appellant stated in his purchase order forms that he did not administer the drugs he purchased from Henry Schein to family members or friends, but in a June 23, 2017 letter to the Virginia Department of Health Professions, Appellant stated that the vast majority of those controlled substances were given to his wife, Rebecca Mosig.

At Appellant's trial, Shaun Abreu, a senior manager for Henry Schein, testified that the company requires prospective purchasers of its controlled substances to submit purchase order forms because the answers to the questions contained in the forms are important to the company when it decides whether or not to sell controlled substances to the prospective purchaser. Abreu explained that Henry Schein's policy is to only sell controlled substances to purchasers who will prescribe and administer them in compliance with all relevant "state medical board regulations," and the answers to the questions contained in the purchase order forms help the company determine if a potential purchaser will do so. J.A. 307. Abreu also testified that the purchase order forms must be "filled out

[3] At some point, Henry Schein removed the question about treating friends from its purchase order forms. However, the purchase order form submitted by Appellant in April 2014 contained that question.

[4] Citations to the "J.A." refer to the Revised Joint Appendix filed by the parties in this appeal.

and signed by" a party who is registered to administer controlled substances with the DEA. *Id.* at 306.

B.

Appellant first caught the attention of federal law enforcement in August 2016, when a DEA database revealed that he purchased more controlled substances than any other physician in western Virginia in 2015, and more than all but one in 2016. Further red flags were raised when the database revealed that, although Appellant purchased this high volume of controlled substances, he only prescribed them to two individuals: his wife and his mother.

The DEA's investigation of Appellant began in earnest on August 26, 2016, when DEA Investigator Mark Armstrong visited Appellant's office and questioned him about his purchase of oxycodone, alprazolam, and diazepam from Henry Schein. According to Investigator Armstrong's trial testimony, he asked Appellant if he maintained records related to the disposition of those drugs, and Appellant responded that he maintained such records in two different places: "in his patient file[s]," and in a separate "dispensing kind of log." J.A. 179. But when Investigator Armstrong then asked to review those records, Appellant quickly admitted "there wasn't a dispensing log." *Id.* A subsequent search warrant executed at Appellant's office revealed that there were no records in Appellant's patient files related to any of the drugs that he purchased from Henry Schein.

C.

Grand jury proceedings began in December 2017, and Kayla Castleberry, a former employee of Appellant, was called to testify. The day before her scheduled testimony,

Castleberry received text messages from Carla Craft, a then-current employee of Appellant who was also subpoenaed to testify before the grand jury. Throughout the text message exchange, Craft discouraged Castleberry from testifying before the grand jury without first securing legal representation. In one text, Craft wrote, "John is spazzing about you going alone tomorrow," and explained, "John is like freaked out that you're walking into a lions [sic] den." United States' Resp. in Opp'n to Def.'s Renewed Mot. to Dismiss Indictment for Prosecutorial Misconduct at 5, *United States v. Purpera*, No. 7:17-cr-79 (W.D. Va. Dec. 14, 2017; filed Jan. 26, 2018), ECF No. 88-1 [hereinafter United States' Resp. in Opp'n to Mot. to Dismiss Indictment]. Castleberry provided screenshots of these text messages to Robert Slease, a Special Agent with the United States Department of Health and Human Services who was working with the DEA task force investigating Appellant. Agent Slease interviewed Castleberry about the text messages. Castleberry said the conversation made her feel like she was "kind of being forced or coerced" to not testify. J.A. 56. Agent Slease suspected that John Brownlee, Appellant's lead trial counsel, was the "John" alluded to in Craft and Castleberry's text exchange. One week later, the DEA issued an administrative subpoena for the phone records related to the text message exchange. One of the phone numbers included in the subpoena belonged to Brownlee.

Upon learning of the DEA's administrative subpoena of his lead counsel's phone records, Appellant moved to dismiss the indictment, alleging prosecutorial misconduct and that the subpoena was an intentional and prejudicial invasion of the attorney-client privilege. The United States responded that there was no prosecutorial misconduct because the Government had subpoenaed the phone records not to learn the substance of

confidential attorney-client communications, but rather for the "very limited and legitimate purposes arising from the need to determine whether [Brownlee] was contacting a subpoenaed witness and encouraging her not to testify." United States' Resp. in Opp'n to Mot. to Dismiss Indictment at 1, ECF No. 88.[5] Appellant dismissed this explanation, asserting, "[T]here was no bona fide investigation into Mr. Brownlee." Dr. Frank Purpera's Reply in Supp. of His Renewed Mot. to Dismiss at 1–6, *United States v. Purpera*, No. 7:17-cr-79 (W.D. Va. Dec. 14, 2017; filed Jan. 27, 2018), ECF No. 92 [hereinafter Appellant's Reply in Supp. of Mot. to Dismiss Indictment]. On January 29, 2018, the district court held a pre-trial hearing on Appellant's motion to dismiss the indictment. The court ultimately denied the motion, finding no Government misconduct and no prejudice to Appellant. Appellant does not appeal this ruling, but now claims, through different counsel, that the DEA's investigation into Brownlee created a conflict of interest.

II.

A.

Conflict of Interest

Appellant claims his representation at trial was tainted by a conflict of interest stemming from the fact that his prosecution paralleled the DEA's investigation of his lead trial counsel, Brownlee. The United States concedes that these circumstances caused

[5] The United States made clear at oral argument that the phone records were searched pursuant to an administrative subpoena that was issued unbeknownst to the United States Attorney's office. *See* Oral Argument at 19:00–21:05, *United States v. Purpera*, No. 19-4158 (4th Cir. Nov. 2, 2020), https://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments.

Brownlee to labor under a conflict of interest. However, the parties dispute whether Appellant validly waived the conflict and, if not, whether it was sufficiently significant as to warrant the reversal of Appellant's convictions.

The right to legal representation "that is free from conflicts of interest" is a "necessary corollary to" the right to effective assistance of counsel guaranteed by the Sixth Amendment. *Fullwood v. Lee*, 290 F.3d 663, 688–89 (4th Cir. 2002) (internal quotation marks omitted). Like other ineffective assistance of counsel claims, claims that a defendant's representation at trial was tainted by a conflict of interest "present mixed questions of law and fact that we review de novo." *United States v. Dehlinger*, 740 F.3d 315, 323 (4th Cir. 2014) (internal quotation marks omitted). Generally, to prevail on a conflict claim, a defendant must "establish that (1) an actual conflict of interest (2) adversely affected his lawyer's performance." *Id.* at 322. To determine whether a conflict adversely affected a lawyer's performance, we apply a three-part test originally articulated by the Eleventh Circuit in *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (en banc). *See Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir. 2001) (en banc) (adopting the *Freund* test). The *Mickens* court described that test as follows:

> First, the [defendant] must identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued. Second, the [defendant] must show that the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision. . . . Finally, the [defendant] must establish that the defense counsel's failure to pursue that strategy or tactic was linked to the actual conflict.

Id.

If, however, a case involves what the Supreme Court has described as a "per se" violation of the Sixth Amendment, a showing of adverse effect is not necessary and the underlying conviction must be reversed. *See United States v. Cronic*, 466 U.S. 648, 659–60 (1984). The Supreme Court has recognized only three categories of per se violations of the Sixth Amendment: (1) "the complete denial of counsel;" (2) "counsel entirely fail[ing] to subject the prosecution's case to meaningful adversarial testing;" and (3) where "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate." *Id.*

1.

We begin by assessing whether Appellant validly waived Brownlee's conflict of interest. At the pre-trial hearing, the district court addressed the possibility that the administrative subpoena of Brownlee's phone records created a conflict of interest in his representation of Appellant. The district court accorded Appellant roughly 12 minutes to discuss with his attorneys -- including Brownlee -- whether he wanted to continue his defense with the same counsel. Following that discussion, the court inquired as to whether Appellant would "voluntarily, without [the court] requiring it, be willing to . . . waive[] any conflict." J.A. 138. Appellant responded, "[T]his is my team that I hired. I'm innocent. I would like to move forward and get my life together." *Id.* The court then asked Appellant whether his counsel had explained to him "that there might be a potential for a conflict of interest" stemming from the subpoena of Brownlee's phone records, and whether he nonetheless was "still willing to go forward with [the same] counsel . . . representing" him. *Id.* at 138–39. Appellant answered both questions in the affirmative.

We conclude that, despite the district court's colloquy, Appellant did not validly waive Brownlee's conflict of interest. To validly waive a conflict of interest, a defendant must possess a "knowledge of the crux of the conflict *and* an understanding of its implications." *United States v. Brown*, 202 F.3d 691, 698 (4th Cir. 2000) (emphasis in original). While it is clear Appellant was aware of the potential conflict of interest, we are not convinced that he was aware of its implications. For starters, the district court never explicitly confirmed that Appellant understood that Brownlee's conflict could negatively impact the quality of his legal representation. Furthermore, because Brownlee did not believe that the witness tampering investigation was legitimate, and because defense counsel stated that they saw "no issue with regard to any conflict or potential conflict," J.A. 136, it is plausible that those implications were never adequately explained to Appellant during his 12-minute conversation with his attorneys. Finally, we reject the United States' argument that Appellant must have understood the crux of the conflict as a result of his being present for the entire pre-trial hearing. The bulk of that hearing was devoted to determining whether the administrative subpoena of Brownlee's phone records constituted prosecutorial misconduct, not whether it created a serious conflict of interest.[6]

[6] Tellingly, the district court -- which conducted the colloquy regarding the conflict of interest -- did not find Appellant's waiver to be intelligent and knowing. The district court was concerned that Appellant was never "advised specifically about the possible implications of the conflict." J.A. 634.

2.

Because Appellant did not validly waive Brownlee's conflict of interest, we now must determine whether the conflict was so significant as to require the reversal of Appellant's convictions. Reversal is required if the conflict (1) constitutes a per se violation of the Sixth Amendment;[7] or (2) adversely affected Brownlee's representation of Appellant. Here, Appellant cannot establish that reversal is required under either approach.

a.

Appellant has been represented by counsel at every stage of his criminal proceedings. Furthermore, it cannot be said that Appellant's lawyers "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing," *Cronic*, 466 U.S. at 659, as defense counsel cross-examined each of the United States' trial witnesses and filed, inter alia, a motion to dismiss the indictment, motions to exclude key evidence and witnesses, a motion for a new trial, and a motion for judgment of acquittal. Therefore, to establish a per se violation of the Sixth Amendment, Appellant must demonstrate that Brownlee's conflict of interest made "the likelihood that any lawyer, even a fully competent one, could provide effective assistance [] so small that a presumption of prejudice is appropriate." *Id.* at 660. "This is an extremely high showing for a criminal defendant to make," *Brown v. French*, 147 F.3d 307, 313 (4th Cir. 1998), and we have been careful to not "broaden the

[7] At oral argument, Appellant argued that if a conflict of interest results in a per se violation of the Sixth Amendment, it may not be waivable in the first place. Because we conclude that Appellant did not validly waive Brownlee's conflict, we need not decide whether that is an accurate statement of the law in the Fourth Circuit.

per-se prejudice exception to *Strickland*," *Glover v. Miro*, 262 F.3d 268, 277 (4th Cir. 2001).

In arguing that Brownlee's conflict of interest meets this demanding standard and requires per se reversal of his convictions, Appellant urges us to adopt the following position, which he describes as a "basic rule" that has been "recognized by the Second Circuit": that "un-waived conflicts of interest[] stemming from an investigation into trial counsel for conduct related to the defendant's case are per se reversible and do not require" a showing of adverse effect.[8] Appellant's Reply Br. 11–12.

To the extent the Second Circuit recognizes a "basic rule" concerning per se reversal based on conflicts of interest, Appellant miscomprehends it. In the Second Circuit, automatic reversal of a conviction is required when a defendant establishes that his attorney labored under a so-called "'per se' conflict of interest, i.e., one that does not as a matter of law admit of harmless-error analysis." *Armienti v. United States*, 234 F.3d 820, 823 (2d Cir. 2000). There are only two situations that give rise to a per se conflict of interest: "where trial counsel is not authorized to practice law," and where trial counsel "is implicated in the very crime for which his or her client is on trial." *Id.*; *see also Waterhouse v. Rodriguez*, 848 F.2d 375, 383 (2d Cir. 1988) (refusing to expand automatic reversal for conflicts of interest beyond these two situations).

[8] Appellant does not claim that the Fourth Circuit has adopted a "per se reversal" rule for conflicts of interest stemming from a government agency's parallel investigation of an attorney and his client. We decline to announce such a rule in this case.

Even if we were to adopt this approach, Brownlee's conflict of interest would not warrant per se reversal of Appellant's convictions. The Second Circuit has explained that the existence of a per se conflict hinges on "the similarity of counsel's activities to [the client]'s schemes and the links between them." *United States v. Cancilla*, 725 F.2d 867, 870 (2d Cir. 1984). Applying this framework, the Second Circuit has found a per se conflict of interest in a case where a defense attorney was believed to be participating in insurance fraud schemes that were similar to those for which his clients were on trial, *see id.* at 868, and in a case where a defendant was on trial for his participation in a heroin smuggling scheme and there was evidence demonstrating "that the defense counsel was . . . involved in heroin trafficking of his own," *United States v. Fulton*, 5 F.3d 605, 607 (2d Cir. 1993). In those cases, the substantial similarity between the attorneys' misconduct and the clients' misconduct is clear. In contrast, the potential witness tampering that led the DEA to subpoena Brownlee's phone records and the fraudulent behavior underlying Appellant's criminal convictions are completely different types of misconduct. For that reason, even under the Second Circuit approach that Appellant urges us to adopt, per se reversal of Appellant's convictions would be inappropriate, and Appellant would need to demonstrate that Brownlee's conflict of interest adversely affected his representation.

b.

Appellant posits two different ways in which he believes Brownlee's conflict of interest adversely affected his representation. He argues that because of the conflict, Brownlee (1) failed to call Appellant's wife, Rebecca Mosig, as a witness in his case-in-chief; and (2) failed to vigorously cross-examine Carla Craft, one of the witnesses for the

United States. Even assuming that these are plausible alternative defense tactics[9] that were objectively reasonable at the time of trial, Appellant cannot establish adverse effect under *Freund* because he has not shown that Brownlee's failure to pursue those tactics was in any way linked to his conflict of interest.

Appellant attempts to establish a link between Brownlee's conflict of interest and the decisions not to call Rebecca Mosig as a witness and vigorously cross-examine Carla Craft by arguing that pursuing these tactics "was inherently in conflict with" Brownlee's "other loyalties or interests." *United States v. Nicholson*, 611 F.3d 191, 212 (4th Cir. 2010) (internal quotation marks omitted). In Appellant's view, being the subject of a witness tampering investigation made Brownlee fearful of angering the DEA and caused him to labor "under a conflict that provided him with a personal incentive to pull his punches." Appellant's Br. 29. Appellant concludes that *any* decision by Brownlee to pursue a less aggressive defense strategy -- such as not calling Rebecca Mosig as a witness or failing to vigorously cross-examine Carla Craft -- was a manifestation of that fear and was "necessarily" linked to the conflict, "even if only subconsciously." *Id.* at 16, 29.

We do not doubt that a federal law enforcement agency investigating a defense attorney while simultaneously investigating his client can create a serious conflict of interest. Furthermore, we are sympathetic to Appellant's concerns that an attorney who finds himself in such a position may feel compelled to defend his client less vigorously.

[9] Brownlee's co-counsel cross-examined Craft at trial, so it is not clear that Brownlee cross-examining Craft is a plausible *alternative* defense tactic.

However, the facts of this case simply do not bring these concerns to fruition. It is clear from defense counsel's filings -- especially those related to the motion to dismiss for prosecutorial misconduct -- that Brownlee did not believe that he was the target of a bona fide federal investigation or that he faced any criminal exposure.[10] Instead, Brownlee viewed the purported investigation as an attempt by the United States to access confidential attorney-client information. Because Brownlee did not believe that he was a target of a legitimate criminal investigation, it was not inherently against his personal interest to engage in an aggressive defense of Appellant.

Additionally, counsel for the United States explained at oral argument that it was the DEA, not the United States Attorney's office, that issued the administrative subpoena that led to the production of Brownlee's phone records. *See* Oral Argument at 19:00–21:05, *United States v. Purpera*, No. 19-4158 (4th Cir. Nov. 2, 2020), https://www.ca4.uscourts.gov/oral-argument/listen-to-oral-arguments. Even if this subpoena made Brownlee wary of angering the DEA, it does not necessarily follow that he would feel incentivized to pull his punches when litigating Appellant's case.

[10] *See* Appellant's Reply in Supp. of Mot. to Dismiss Indictment at 2 (criticizing the DEA's decision to open an obstruction of justice investigation based on Brownlee's recommendation that a grand jury witness secure legal representation as "an extraordinary position"), 3 (stating that it "is not believable" that the DEA subpoenaed Brownlee's phone records pursuant to an "obstruction of justice investigation into his conduct"), 4 (asserting that "there was no bona fide investigation into Mr. Brownlee" and that there was "no evidence" that the decision was made to investigate Brownlee for potential obstruction of justice), 5 (claiming that "the government had no basis for the subpoena in a new or ongoing investigation").

Finally, the idea that Brownlee was pulling punches in order to appease the DEA is not supported by the record. The district court docket demonstrates that Appellant's trial counsel -- including Brownlee -- pursued an aggressive litigation strategy. Brownlee himself filed several important pre-trial and post-trial motions *after* learning that the DEA had subpoenaed his phone records as part of its witness tampering investigation, including a motion to exclude expert testimony, motion for judgment of acquittal, and motion for a new trial. If Brownlee was indeed pulling punches in order to appease the DEA, it would not make sense for him to file those motions, but stop short of calling Rebecca Mosig as a witness or vigorously cross-examining Carla Craft.

B.

Jury Instructions

Appellant claims the district court erred by refusing two of his requested jury instructions -- one related to Counts 1–68 (the acquiring controlled substances by fraud charges), and one related to Count 69 (the failing to maintain required records charge). We review a district court's decision to refuse a proposed jury instruction for abuse of discretion. *See United States v. McLaurin*, 764 F.3d 372, 378–79 (4th Cir. 2014). However, "we conduct a de novo review of any claim that jury instructions incorrectly stated the law." *Id.* at 379.

1.

The district court instructed the jury that in order to find Appellant "guilty on each of the 67 counts in Counts 1 through 68," the United States "must prove each of the following beyond a reasonable doubt:" (1) Appellant "acquired or obtained possession of

a controlled substance"; (2) Appellant "did so by fraud, forgery, deception, subterfuge, or material representation"; and (3) Appellant "acted knowingly or intentionally." J.A. 586. The jury instructions also included definitions for several key words, such as "fraud," "misrepresentation," and "material."

Appellant argues that the district court's instructions incorrectly stated the law of 21 U.S.C. § 843(a)(3) because they did not include a but-for causation requirement linking Appellant's false or misleading statements to his actual acquisition of the controlled substances. Specifically, he asserts that the district court erred by not issuing the following instruction:

> The misrepresentation, fraud, forgery, deception, or subterfuge must be an actual cause of how [Appellant] acquired or obtained possession of the controlled substance. If he still would have acquired or obtained possession regardless of the misrepresentation, fraud, forgery, deception, or subterfuge, then [the United States] has not proved [the] third element [of Counts 1–68].

Appellant's Br. 31–32.

Appellant's argument necessarily assumes that but-for causation is an element of 21 U.S.C. § 843(a)(3). The Fifth and Eighth Circuits have recognized but-for causation as an element of § 843(a)(3),[11] and the Sixth Circuit has assumed, without deciding, that it is an element. *See United States v. Bass*, 490 F.2d 846, 857 (5th Cir. 1974), *overruled on other grounds by United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984); *United States v. Wilbur*,

[11] The Third Circuit has also reached this conclusion, but in an unpublished decision. *See United States v. Adade*, 547 F. App'x 142, 146 (3d Cir. 2013).

58 F.3d 1291, 1292 (8th Cir. 1995); *United States v. Callahan*, 801 F.3d 606, 622 (6th Cir. 2015). The Fourth Circuit has never squarely addressed whether this statute contains a but-for causation requirement, and we need not do so today. Even assuming, as the Sixth Circuit did in *Callahan*, that it does, we conclude that the district court's jury instructions were not in error.

When reviewing whether jury instructions correctly stated the law, "we do not view a single instruction in isolation; rather we consider whether taken as a whole and in the context of the entire charge, the instructions accurately and fairly state[d] the controlling law." *United States v. Jefferson*, 674 F.3d 332, 351 (4th Cir. 2012). The district court's instructions for Counts 1–68, when viewed as a whole, conveyed to the jury that it was required to find a causal link between Appellant's fraudulent purchase order forms and Henry Schein's decision to sell him controlled substances. The jury was instructed that it needed to find, beyond a reasonable doubt, that Appellant acquired controlled substances "*by* fraud, forgery, deception, subterfuge, or material misrepresentation." J.A. 586 (emphasis supplied). The word "by" signaled to the jury that it had to find that Appellant acquired the controlled substances because of his fraud or misrepresentations. *See By*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/by (last visited Dec. 15, 2020) (defining "by" as "through the agency or instrumentality of"). Additionally, as part of its definition of the word "material," the court explained that the jury "must determine whether [an untrue] statement was one that a reasonable person might have considered important in making his or her decision." J.A. 587–88. This language reiterated to the jury that it was necessary to evaluate more than simply whether

Appellant's statements were untrue; it also needed to consider whether the statements were likely to influence Henry Schein when the company was deciding whether to sell controlled substances to Appellant.

2.

Count 69 charges Appellant with knowingly and intentionally omitting material information from a report or record required to be kept, in violation of 21 U.S.C. § 843(a)(4)(A). This charge stems from Appellant's failure to maintain a dispensing log or other documentation showing his disposition of controlled substances. A medical practitioner who regularly administers controlled substances is ordinarily required to maintain such records pursuant to federal regulations. *See* 21 C.F.R. § 1304(b). However, there is an exception to this record-keeping requirement that applies to practitioners who, inter alia, administer controlled substances "in the lawful course of professional practice." *Id.* § 1304.03(d).[12]

Appellant asserts that the district court's instructions with respect to Count 69 were flawed because the court did not instruct the jury that a medical practitioner acts within the lawful course of professional practice if he acts in good faith. Specifically, Appellant argues that the district court erred by refusing the following instruction:

> If a physician prescribes or administers a drug in good faith, then he has done so within the lawful course of professional practice. A physician prescribes or administers a drug in good

[12] This exception also requires that the medical practitioner not charge his patients for the controlled substances. However, in this appeal, the primary issue with respect to the exception is whether Appellant administered controlled substances in the lawful course of professional practice.

> faith in medically treating a patient when he does so for a legitimate medical purpose in the usual course of medical practice. Good faith means good intentions and the honest exercise of best professional judgment as to the patient's needs. It means that the doctor acted in accordance with (what he reasonably believed to be) the standard of medical practice generally recognized and accepted in the United States.

Appellant's Br. 36.

A district court's refusal to provide a requested instruction is an abuse of discretion "only if the instruction: (1) was correct; (2) was not substantially covered by the court's charge to the jury; and (3) dealt with some point in the trial so important, that failure to give the requested instruction seriously impaired the defendant's ability to conduct his defense." *United States v. Savage*, 885 F.3d 212, 223 (4th Cir. 2018).

The district court did not abuse its discretion by refusing Appellant's proposed good faith instruction because the instruction was not "correct." To begin with, Appellant does not point to any case that has recognized good faith as a defense to a § 843(a)(4)(A) charge, and we cannot find one. Appellant also argues that the good faith defense should be recognized in this case because it has been recognized in cases where physicians are charged with distributing controlled substances in violation of 21 U.S.C. § 841. But Appellant's proposed instruction is an inaccurate statement of even the § 841 good faith defense. We have made clear -- as has "every [other] court to specifically consider the question" -- that the good faith standard set out in those cases' jury instructions "must be an objective one." *United States v. Hurwitz*, 459 F.3d 463, 479 (4th Cir. 2006). Here, Appellant proposed a subjective -- and therefore legally incorrect -- instruction on the good faith defense.

In *Hurwitz*, we affirmed the district court's refusal of a proposed good faith instruction because, by defining good faith as "the doctor act[ing] according to what *he believed to be proper medical practice*," it "clearly set[] forth a subjective standard." 459 F.3d at 478 (emphasis in original). Appellant's proposed good faith instruction is similar to the one we rejected in *Hurwitz*. *See id.* Like the *Hurwitz* instruction, Appellant's proposed instruction permits a doctor "to decide for himself what constitutes proper medical treatment," thereby setting forth a standard for good faith that is entirely subjective. *Id.* Appellant attempts to justify his proposed instruction by arguing that it is similar to the good faith instruction approved by the Sixth Circuit in *United States v. Voorhies*, 663 F.2d 30, 34 (6th Cir. 1981), a case we cited favorably in *Hurwitz*. *See* 459 F.3d at 478. We are not persuaded. The instruction in *Voorhies* defined good faith as "an observance of conduct in accordance with what the physician *should* reasonably believe to be proper medical practice." 663 F.2d at 34 (emphasis supplied). That definition of good faith is meaningfully different from one that is based on what the physician *actually* believed. A jury tasked with assessing what a physician *should have* believed must apply an objective standard. In contrast, determining what a doctor *actually* believed requires a jury to assess the doctor's subjective point of view.

C.

Expert Witness Testimony

Appellant next claims the district court erroneously permitted the United States' expert witness, Dr. John Burton, a physician and Chair of Emergency Medicine at the Carilion Clinic in Roanoke, Virginia, to opine as to legal conclusions which Appellant

asserts Dr. Burton was not qualified to make. The United States introduced Dr. Burton's testimony as part of its effort to establish beyond a reasonable doubt that Appellant did not qualify for the exception to 21 U.S.C. § 843(a)(4)(A)'s record-keeping requirement. As explained previously, this exception applies to medical practitioners who, inter alia, administer controlled substances "in the lawful course of professional practice." 21 C.F.R. § 1304.03(d).

We review the admission of expert testimony for abuse of discretion. *See United States v. Landersman*, 886 F.3d 393, 411 (4th Cir. 2018). It is generally an abuse of discretion for the district court to admit "opinion testimony that states a legal standard or draws a legal conclusion by applying law to the facts." *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006). However, we have cautioned, "The line between a permissible opinion on an ultimate issue and an impermissible legal conclusion is not always easy to discern," and "drawing that line requires a case-specific inquiry of the charges, the testimony, and the context in which it was made." *United States v. Campbell*, 963 F.3d 309, 314 (4th Cir. 2020).

We find no abuse of discretion in the admission of Dr. Burton's testimony. In this case, whether Appellant qualified for the exception to the record-keeping requirement turned on whether he administered controlled substances in the *lawful* course of professional practice. Dr. Burton never opined as to the legality or illegality of Appellant's conduct. In fact, the district court ordered that his testimony "stay[] away from the words 'lawful' and 'legal'" because he "isn't a legal expert." J.A. 471–72. Rather, Dr. Burton's testimony primarily consisted of his opinions that Appellant's conduct fell "outside the

usual course of professional practice." *Id.* at 434, 439 (emphasis supplied). In *McIver*, we held that similar expert testimony, that is, a physician's opinion that a defendant's conduct "was outside the legitimate practice of medicine," did not contain impermissible legal conclusions because the language used by the witness fell "within the limited vernacular that is available to express whether a doctor acted outside the bounds of [] professional practice." 470 F.3d at 556, 562. The same is true of Dr. Burton's testimony. Therefore, we affirm the admission of Dr. Burton's expert testimony.

D.

Motion for Judgment of Acquittal

Appellant claims the district court erred by denying his motion for judgment of acquittal with respect to Counts 1–20, 22–26, and 28–70. He asserts there was insufficient evidence to support his convictions on these counts.

When reviewing the district court's denial of a motion for judgment of acquittal based on evidentiary sufficiency, we view "the evidence in the light most favorable to the government" and will affirm so long as there is "substantial evidence to support the conviction." *United States v. White*, 771 F.3d 225, 230 (4th Cir. 2014). "Substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* Defendants face an uphill battle under this standard, as "the jury's verdict must stand unless we determine that *no* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Royal*, 731 F.3d 333, 337 (4th Cir. 2013) (emphasis supplied).

1.

Counts 1–20, 22–26, and 28–68 charge Appellant with violations of 21 U.S.C. § 843(a)(3), which provides, "It shall be unlawful for any person knowingly or intentionally . . . to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." The indictment alleges Appellant violated this provision by falsely asserting to Henry Schein "that the controlled substances were dispensed to his patients" and by falsely denying that "any of the controlled substances were used by him personally" or "that he used any of the controlled substances in the treatment of his spouse or family or friends." J.A. 23.

Appellant asserts the United States "failed to prove with any evidence that [he] did not use any of the requested controlled substances to treat his patients." Appellant's Br. 46. This argument is inconsistent with the record. The United States introduced ample evidence at trial demonstrating that Appellant did not use the controlled substances that he purchased from Henry Schein to treat his patients. For example, Investigator Armstrong testified that a DEA search of Appellant's patient files "found that there were no records of dispensing or administration for any of the drugs that were purchased from Henry Schein." J.A. 198. In addition, four different former or current employees of Appellant testified that they never saw Appellant administer controlled substances to his patients.

Appellant also asserts that, even if the United States could prove that the purchase order forms he submitted to Henry Schein were fraudulent, it cannot establish that his fraud

was a but-for cause of the company's decision to sell him controlled substances.[13] Appellant's argument in this regard proceeds as follows: Shaun Abreu, a senior manager for Henry Schein, testified that had Appellant been truthful on the purchase order forms about using the controlled substances to treat family members and friends, the company's "next step" would have been to consult the relevant Virginia regulations to determine whether such treatment is permissible in the state. J.A. 310. The company's research would have revealed that while state regulations prohibit the *prescribing* of controlled substances to family members, they do not prohibit the *administering* of controlled substances to family members or friends. For this reason, Appellant concludes that Henry Schein would have sold him the controlled substances even if he had answered the questions in the purchase order forms honestly, so his fraud is not a but-for cause of his acquisition of the drugs.

We first note that per the testimony at trial, Henry Schein actually relied on Appellant's purchase order forms when deciding whether to sell him controlled substances. Shaun Abreu repeatedly testified that the answers to the questions contained in those forms were material to Henry Schein, and further testified that had Appellant been honest about using the controlled substances to treat family members and friends, the company "would not have filled [his] order." J.A. 414. This evidence is sufficient to establish that

[13] Like Appellant's argument that the district court erred by refusing his requested jury instruction on causation, this argument necessarily assumes that 21 U.S.C. § 843(a)(3) includes a but-for causation requirement. As we did when we analyzed the jury instruction issue, we will assume, without deciding, that it does.

Appellant's fraud was subjectively material to Henry Schein. However, that is not the end of our inquiry, as the materiality standard in criminal fraud cases is an objective one. *See United States v. Raza*, 876 F.3d 604, 620 (4th Cir. 2017). Objective materiality hinges not on whether Henry Schein actually found Appellant's purchase order forms to be material, but whether a reasonable company would have done so under identical circumstances.

We conclude that sufficient evidence supports a jury finding that Appellant's statements on the purchase order forms were objectively material. Medical supply distribution companies like Henry Schein are subject to certain DEA regulations. Abreu explained in his trial testimony that, because of these regulations, it is in the best interest of medical supply distribution companies to be selective about the medical practitioners to whom they sell controlled substances, and to ensure that the practitioners use the controlled substances in compliance with all applicable laws and regulations. A medical supply distribution company selling controlled substances in Virginia, then, would certainly be aware of 18 Virginia Administrative Code § 85-20-25, a state regulation that governs a medical practitioner treating or prescribing for self or family.[14] As Appellant points out, this section does not appear on its face to prohibit a medical practitioner from administering controlled substances to family members or friends. However, it does make clear that a practitioner may not *prescribe* controlled substances to family members, and may only

[14] Section 85-20-25 provides, in relevant part, "Treating or prescribing shall be based on a bona fide practitioner-patient relationship, and prescribing shall meet the criteria set forth in § 54.1-3303 of the Code of Virginia," and that, subject to exceptions not present here, "[a] practitioner shall not prescribe a controlled substance to himself or a family member." 18 Va. Admin. Code § 85-20-25.

administer controlled substances to family members pursuant to a bona fide practitioner-patient relationship.

Even though this regulation does not expressly prohibit the administering of controlled substances to family members or friends, Appellant stating that he engaged in that practice would have reasonably caused a medical supply distribution company to decide against selling to him. For starters, administering controlled substances to family members or friends raises questions about the existence of a bona fide practitioner-patient relationship. Furthermore, a practitioner administering controlled substances to his family members reasonably raises concerns about him *prescribing* to his family members as well. In sum, although administering controlled substances to family members may not itself violate Virginia medical regulations, a practitioner admitting that he engages in such conduct could reasonably make a medical supply distribution company leery that the practitioner would violate those regulations in some other way. For these reasons, we find ample support in the record for the conclusion that Appellant's misstatements were objectively material, and reject Appellant's argument that the purchase order forms did not impact Henry Schein's decision to provide him with the controlled substances.

The dissent posits that there is insufficient evidence to support Appellant's convictions on Counts 1–6, 17–20, 28, 40–43, and 55. These counts stem from Appellant's statement on the April 16, 2014 purchase order form that he does not "use any of the controlled drug items . . . to treat family members or friends." J.A. 309–10. As the dissent acknowledges, "[T]his statement was undeniably false" because Appellant "treated [Rebecca] Mosig with such substances." *Post* at 40. However, the dissent submits that

this misstatement was not material to Henry Schein's decision to fill the orders Appellant placed in connection with the April 16, 2014 form. In the dissent's view, because Appellant and Rebecca Mosig were not yet married as of April 16, 2014, they were merely friends when Appellant filled out and submitted that purchase order form. Accordingly, because Virginia law does not prohibit practitioners from prescribing or administering controlled substances to friends, the dissent concludes that Henry Schein would have sold controlled substances to Appellant even if his answers on the purchase order form had been truthful.

The dissent's conclusion is flawed in two respects. First, it ignores the fact that, under Virginia law, a prescription for controlled substances "may be issued only to persons . . . with whom the practitioner has a bona fide practitioner-patient relationship." Va. Code Ann. § 54.1-3303.[15] This requirement applies to everyone, including family members and friends of a practitioner. It would be reasonable, then, that if Henry Schein consulted relevant state law, it would be concerned not only with whether a practitioner treats his friends with controlled substances, but also with whether the practitioner prescribes to his friends outside the scope of a bona fide practitioner-patient relationship. Second, the dissent does not take into account the fact that Appellant and Rebecca Mosig were married on April 26, 2014 -- just ten days after Appellant filled out and submitted the April 16, 2014 purchase order form. *See* Br. for Appellant 47. Had Appellant truthfully answered that form's question about treating family members or friends, he would have had to

[15] This quotation states Section 54.1-3303 as it existed when it was entered into evidence by the United States. The current version of this section utilizes slightly different language.

explain that he used the controlled substances to treat a woman who within a matter of days would be converted from friend to wife. *See* Government Exhibit 5-3 (April 16, 2014 Controlled Substance Form) at 1, *United States v. Purpera*, No. 7:17-cr-79 (W.D. Va. Dec. 14, 2017; filed Feb. 2, 2018), ECF No. 114-3 (instructing Appellant to "Please explain" an affirmative response to the question about using controlled drug items to treat family members or friends). Henry Schein reasonably would have been troubled by this information. As the dissent recognizes, "[A] sensible drug company might well be concerned about the lack of a bona fide practitioner-patient relationship when a doctor purports to treat family members, because a doctor in Virginia is prohibited from prescribing controlled substances to family members." *Post* at 42–43. These same concerns would have been raised had Appellant been truthful when filling out the April 16, 2014 form, because his answers would have put Henry Schein on notice that he used the company's controlled substances to treat someone who was to become a family member in a matter of days.

2.

Count 69 charges Appellant with knowingly failing to maintain records related to his disposition of controlled substances, in violation of 21 U.S.C. § 843(a)(4)(A). The primary dispute with respect to Count 69 is whether the United States met its burden of proving beyond a reasonable doubt that Appellant did not qualify for the exception to § 843(a)(4)(A)'s record-keeping requirement. Pursuant to this exception, a medical practitioner "is not required to keep records of controlled substances . . . which are administered in the lawful course of professional practice." 21 C.F.R. § 1304.03(d).

The district court found that Dr. Burton's expert opinion that Appellant's treatment of his wife was outside the usual course of professional practice was "substantial evidence from which a reasonable jury could find that [Appellant] did not administer controlled substances 'in the lawful course of professional practice.'" J.A. 609. Appellant contends that even if Dr. Burton correctly opined that his actions violated the norms of the medical profession, that evidence by itself does not establish that he did not qualify for the exception to the record-keeping requirement. Appellant's position in this regard is consistent with the jury's instructions for Count 69, which provided, "[V]iolations of . . . professional norms alone are not sufficient" to prove that Appellant did not qualify for the exception. *Id.* at 591. Nonetheless, Appellant's argument is ultimately unavailing because it incorrectly assumes that Dr. Burton's testimony is the only evidence supporting the jury's finding that Appellant did not qualify for the exception.

The United States introduced ample evidence demonstrating that Appellant acquired the controlled substances that he administered to his wife through fraudulent means. Indeed, the jury convicted Appellant on 67 separate counts of that very crime. A finding that Appellant acquired controlled substances by fraud inherently supports the conclusion that his administering of those substances was not within the lawful course of medical practice. It may be true that Appellant administering controlled substances to his wife is not in itself a violation of any state or federal laws or regulations. However, in determining whether Appellant qualified for the exception to § 843(a)(4)(A)'s record-keeping requirement, the jury was required to assess not merely the ultimate administering of the controlled substance to his wife, but rather the entire *course* of professional practice

leading up to that point. Here, Appellant's course of practice began with an unlawful acquisition of controlled substances. That finding alone supports a conclusion that Appellant did not qualify for the exception to the record-keeping requirement, even if he did not commit an additional unlawful act when he subsequently administered those controlled substances to his wife.

3.

Count 70 charges Appellant with making a false statement to a federal investigator in violation of 18 U.S.C. § 1001(a)(2). The indictment alleges Appellant falsely stated to Investigator Armstrong that he kept records related to the dispensing of controlled substances in his patient files and that he maintained a separate dispensing log related to those drugs. We hold that the United States introduced sufficient evidence to support a conviction on Count 70 based on either of these statements.

a.

Appellant argues that his statement to Investigator Armstrong about the records he maintained in his patient files cannot support a conviction under § 1001(a)(2). According to Appellant, his statement to Investigator Armstrong was only that he maintained records in his patient files related to the disposition of *some* controlled substances, but not necessarily the substances he purchased from Henry Schein. Appellant concludes that since he maintained records related to his administering of lidocaine -- a controlled substance under Virginia law -- in the patient files, his statement to Investigator Armstrong was literally true and cannot support a conviction.

This argument is unavailing. Appellant is correct that a § 1001(a)(2) conviction cannot be premised on a literally true statement, *see United States v. Good*, 326 F.3d 589, 592 (4th Cir. 2003), but this defense "applies only where a defendant's allegedly false statements were *undisputedly* literally true." *United States v. Sarwari*, 669 F.3d 401, 406 (4th Cir. 2012) (emphasis in original) (internal quotation marks omitted). The defense does not apply to "an answer [that] would be true on one construction of an arguably ambiguous question but false on another." *Id.* at 407 (alteration in original). Here, there is ambiguity surrounding the precise nature of Investigator Armstrong's question about the patient files. Appellant asserts that Investigator Armstrong was asking about whether he maintained records in those files related to *any* controlled substances, while Investigator Armstrong testified at trial that he and Appellant discussed only the "oxycodone, Xanax, and Valium" that he purchased from Henry Schein, and "those are the drugs" that Appellant told him were "recorded in the patient files." J.A. 179. A reasonable finder of fact could conclude from this testimony that Investigator Armstrong's question specifically pertained to the controlled substances that Appellant purchased from Henry Schein. Furthermore, a reasonable finder of fact could conclude that Appellant answered this question with a false statement.

b.

Appellant concedes that he falsely represented to Investigator Armstrong that he maintained a separate dispensing log for the recording of his administration of controlled substances. He argues, however, that this statement cannot sustain a § 1001(a)(2)

conviction because he "took back" the claim within a minute of making it, before the statement could "impact or alter" the DEA's investigation. Appellant's Br. 51.

Title 18 U.S.C. § 1001(a)(2) prohibits "any materially false, fictitious, or fraudulent statement or representation." For purposes of this statute, a "materially false" statement is one that "has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed." *United States v. Hamilton*, 699 F.3d 356, 362 (4th Cir. 2012). The United States was not required to prove that Appellant's "false statement actually influenced the [DEA]'s decision-making process." *Id.* It is therefore irrelevant that Appellant walked back his statement before it could impact the DEA's investigation.

E.

Sentence

Appellant's final claim is that his sentence is procedurally and substantively unreasonable. He asserts that the district court based its decision to impose an above-Guidelines sentence of 20 months of imprisonment on unfounded speculation about who ultimately used many of the controlled substances that Appellant purchased from Henry Schein, and whether those substances contributed to the opioid epidemic.

"We review all sentences -- whether inside, just outside, or significantly outside the Guidelines range" -- for abuse of discretion. *United States v. Blue*, 877 F.3d 513, 517 (4th Cir. 2017) (internal quotation marks omitted). We begin by ensuring that the district court did not commit any significant procedural errors. *See United States v. Carter*, 564 F.3d 325, 328 (4th Cir. 2009). Such errors include "failing to calculate (or improperly

calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence -- including an explanation for any deviation from the Guidelines range." *Id.* "If, and only if, we find the sentence" to be procedurally reasonable, we proceed to an assessment of its substantive reasonableness. *Id.* At this stage, we determine whether, under the "totality of the circumstances, including the extent of any variance from the Guidelines range," the district court abused its discretion in imposing the sentence. *Gall v. United States*, 552 U.S. 38, 51 (2007). When reviewing an above-Guidelines sentence, we are bound to "give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance." *United States v. Zuk*, 874 F.3d 398, 409 (4th Cir. 2017). At the same time, however, we recognize that "inherent in the idea of 'discretion' is the notion that it may, on infrequent occasion, be abused." *Id.*

Appellant is correct that, at sentencing, the district court mentioned that many of the pills that he purchased from Henry Schein were unaccounted for. *See* J.A. 684 ("The facts would indicate that the majority of the drugs were not given to [Appellant]'s wife. I don't know where they are. There's no evidence to that."). However, these statements do not affect the procedural or substantive reasonableness of Appellant's sentence because they were irrelevant to the district court's sentencing decision. The court made explicitly clear that it did not consider "the number of opioid pills available to [Appellant]'s wife" for purposes of calculating Appellant's sentence. *Id.* at 681. Instead, it considered the number of pills given to Appellant's wife "only for purposes of checking the factual basis of one

of [his] arguments," that is, Appellant's argument that he committed a "crime of love" and only obtained the controlled substances so he could treat his sick wife. *Id.* Additionally, contrary to Appellant's contention, the district court never speculated as to whether the controlled substances fraudulently acquired by Appellant contributed to the opioid epidemic.

Appellant does not claim that the district court committed any other errors at the sentencing stage of his proceedings, and our review of the record does not reveal any. The sentence is procedurally reasonable, as the court properly calculated the advisory Guidelines range as a term of imprisonment of six to 12 months, expressly considered the factors set out in 18 U.S.C. § 3553(a), and explained that its decision to impose an above-Guidelines sentence of 20 months of imprisonment was based on the serious nature of the offenses, specifically the types and quantities "of the controlled substances obtained" and the "length of time over which the offenses occurred." J.A. 684. The sentence, including the eight-month upward variance from the Guidelines range, is also substantively reasonable, as it is justified by the § 3553(a) factors, particularly the need for a sentence to "reflect the seriousness of the offense" and "promote respect for the law."

III.

For the reasons set forth herein, Appellant's convictions on Counts 1–20, 22–26, and 28–70, as well as the sentence imposed by the district court, are

AFFIRMED.

DIAZ, Circuit Judge, concurring in part and dissenting in part:

Dr. Frank Purpera submitted false statements on two purchase order forms so that he could acquire controlled substances from Henry Schein, Inc. He then lied to a federal investigator about his administration of, and recordkeeping for, those substances. For the reasons ably explained by the majority, I agree that we should affirm most of Purpera's convictions.

But I think the evidence is insufficient to support Purpera's convictions on Counts 1–6, 17–20, 28, 40–43, and 55. These counts arise from the first purchase order form and related addenda that Purpera submitted to Henry Schein,[1] and are among the counts alleging that Purpera fraudulently obtained controlled substances in violation of 21 U.S.C. § 843(a)(3).[2] Contrary to the government's assertions, the form in question contains but one false statement. And as to that statement, the record doesn't contain substantial evidence that Purpera's dishonesty was subjectively material to Henry Schein's decision to fill the order, or that it would have been objectively material to a reasonable drug distributor's decision to fill such an order. I would therefore reverse the convictions on those counts and remand for resentencing.

[1] Although Purpera didn't move for acquittal on the counts arising from the addenda, as explained *infra*, Purpera's arguments as to the counts arising from the first form necessarily apply to those arising from the addenda.

[2] Purpera obtained thousands of tablets of oxycodone, hydrocodone, testosterone, alprazolam, diazepam, and tramadol.

I.

Dr. Purpera had never purchased controlled substances from Henry Schein before the events leading up to his offenses. Henry Schein requires a new customer like Purpera to fill out a questionnaire form attached to the initial purchase order so that the company can comply with relevant federal and state regulations. When a medical provider later seeks to order controlled substances not listed on the original form, Henry Schein requires the provider to list the new drugs in an addendum. But because an addendum includes only basic information related to the new order (such as quantity and frequency of the drugs), Henry Schein refers back to the information in the customer's original questionnaire when deciding whether to ship controlled substances requested in an addendum.

Purpera submitted his first questionnaire form and order to Henry Schein on April 16, 2014 and later submitted two addenda supplementing that order. Counts 1–6, 28, and 40–43 represent the drugs fraudulently obtained through the April 2014 form, and Counts 17–20 and 55 represent those fraudulently obtained through the addenda.[3]

Each count charges Purpera with violating 21 U.S.C. § 843(a)(3), which makes it unlawful for any person to knowingly "acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge." The indictment alleges that Purpera made three false statements in the questionnaire forms: (1) that he was not ordering drugs for his personal use, (2) that he dispensed the drugs to his patients, and

[3] At Henry Schein's request, Purpera later submitted a second questionnaire form. The drugs obtained via that form, and a related addendum, support the remaining fraudulent acquisition counts against Purpera.

(3) that he did not use the drugs "in the treatment of his spouse or family or friends." J.A. 23.

The indictment doesn't allege that the addenda contained any falsehoods. But because Henry Schein consults the original form before deciding to fill an order from a related addendum, the counts arising from the addenda are based on the same alleged misrepresentations. Accordingly, I look to that first form to see if the statements described in the indictment were false when Purpera made them.[4]

First, Purpera's representation on the April 2014 form that he wasn't self-medicating was truthful. Purpera had answered "No" to the question, "Do you use any of the controlled drug items you order for your own personal use?" J.A. 311. At trial, the government contended that this answer was false because Purpera used the testosterone ordered from Henry Schein. But as the district court recognized, Purpera didn't order the testosterone until August 2014, months after he submitted the first form. Because Purpera's response to the question about self-medicating was true at the time, the district court acquitted Purpera of Count 21, which alleged his fraudulent acquisition of testosterone through the first form and related addenda.

Nor did Purpera lie on the April 2014 form about dispensing controlled substances to his patients. Purpera circled "1–10%" in response to the question, "Please circle the

[4] Henry Schein's instructional materials for its forms don't require a customer to update information contained in an original questionnaire form. In fact, they suggest the opposite, stating several times that the company would "request additional information" from the customer if necessary. J.A. 219–20.

approximate percentage of patients that are treated in your office with controlled substances daily." J.A. 223. The evidence at trial was that Purpera administered at least some of the drugs to Rebecca Mosig,[5] whom he married ten days after submitting the April 2014 form. Indeed, Purpera kept a patient file for Mosig, which included several prescriptions that he wrote her. The government has since conceded that Mosig may account for the 1–10% of patients treated with controlled substances in Purpera's office. Thus, Purpera's representation about treating patients can't support the counts arising from the first form and related addenda either.

This leaves one remaining alleged misrepresentation on the April 2014 form: Purpera's "No" answer to Question 15, which asked, "Do you use any of the controlled drug items you order to treat family members or friends?" J.A. 309–10. Because Purpera treated Mosig with such substances, this statement was undeniably false. But to be clear, Purpera's answer was false because Mosig was his friend (albeit a special one), not because she was part of Purpera's family (since they hadn't yet tied the knot).

This distinction matters, because not every lie violates 21 U.S.C. § 843(a)(3). As the majority explains, the false statement must also have been material to a drug distributor's decision to fill an order of controlled substances. Materiality can be analyzed under a subjective standard (i.e., whether the fraud caused the particular drug supplier

[5] Purpera claimed that he administered the "vast majority" of the controlled substances obtained from Henry Schein to his wife. J.A. 442. But as the district court noted, there's a significant discrepancy between the quantity of drugs Purpera ordered and the quantity he dispensed to Mosig.

involved—here, Henry Schein—to ship the drugs), or an objective standard (i.e., whether the fraud would have caused a reasonable drug supplier to ship the drugs). As the majority correctly notes, the precedent in this circuit suggests that "the correct test for materiality [in a criminal fraud case with a private victim] . . . is an objective one."[6] *United States v. Raza,* 876 F.3d 604, 621 (4th Cir. 2017). But because the majority spends some time discussing whether Henry Schein actually relied on Purpera's misrepresentation, I do as well. Here, Purpera's false statement simply was not material under either standard.

I begin, as the majority did, with subjective materiality. Shaun Abreu testified for Henry Schein that the answer to Question 15 on the April 2014 form was material because the company would "consult" and "adhere to" relevant state law on using controlled drugs to treat family and friends. J.A. 310. Critically, Virginia law prohibits physicians from prescribing controlled substances to family members, but it treats friends like any other patient. 18 Va. Admin. Code § 85-20-25. As a consequence, Abreu stated that Henry Schein wouldn't fill an order in Virginia for controlled substances if a doctor intended to use them to treat family members. *See* J.A. 310–11. But, said Abreu, the company would fill such an order in a state that permitted using controlled substances to treat family members. *See* J.A. 409–10. Abreu also explained that because Virginia law "didn't really

[6] Some of our sister circuits, however, appear to evaluate violations of 21 U.S.C. § 843(a)(3) under a subjective standard of materiality. *See, e.g., United States v. Callahan*, 801 F.3d 606, 622 (6th Cir. 2015); *United States v. Adade*, 547 F. App'x. 142, 146 (3d Cir. 2013); *United States v. Bass*, 490 F.2d 846, 857 n. 11 (5th Cir. 1974), *overruled on other grounds by United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984).

address friends," Henry Schein later removed that part of Question 15 from the form entirely. *See* J.A. 406.

Given Abreu's testimony and the particulars of Virginia law, a false answer to Question 15 on the April 2014 purchase order form couldn't have been the cause—"but for" or otherwise—of Henry Schein's decision to sell Purpera controlled substances to treat Mosig. Even if Purpera had answered truthfully, the company would have filled the order because doctors in Virginia aren't barred from treating friends. Henry Schein's decision to later remove the question further confirms that Purpera's false statement as to his use of controlled substances to treat his friend was immaterial to Henry Schein.

On objective materiality too, the majority's analysis falls short. There's simply no evidence that, in light of Virginia law, a reasonable drug distributor would have viewed as objectively material a doctor's truthful answer about the use of controlled substances to treat friends. While the majority suggests a reason (i.e., that friendship could indicate the absence of a bona fide practitioner-patient relationship), the majority's inability to cite to the record on this point is telling. Specifically, no testimony—lay or expert—speaks to what a reasonable distributor would have considered material with respect to the treatment of friends and why.

The record shows that a sensible drug company might well be concerned about the lack of a bona fide practitioner-patient relationship when a doctor purports to treat family members, because a doctor in Virginia is prohibited from prescribing controlled substances

to family members.[7] But that concern is tenuous at best when it comes to friends, who (under Virginia law) are in the same position as any other patient.

In sum, Purpera lied in response to Question 15 in the April 2014 form with respect to his treatment of friends, but his misrepresentation wasn't material to his acquisition of any controlled substances. And because there are no other falsehoods on the April 2014 form, Purpera couldn't have fraudulently acquired the controlled substances ordered in that first form and the related addenda.

* * *

For these reasons, I can't agree with my colleagues that the government offered substantial evidence to support Purpera's convictions on Counts 1–6, 17–20, 28, 40–43, and 55. Because I would instead reverse those convictions and remand for resentencing, I am unable to join Part II.D.1 of the majority opinion.

[7] For this reason, among others, Purpera's convictions on the counts arising from his second form and the related addendum are sound. By the time Purpera submitted the second form, Mosig was his wife, so his response "No" to the amended Question 15, which asked "Do you use any controlled substances to treat family members?" was false. J.A. 346. And given Virginia law, the answer was material (and reasonably so) to Henry Schein's decision to fill the order.

AO 245B (Rev. 2/18 - VAW Additions 05/17) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT
Western District of Virginia

UNITED STATES OF AMERICA
V.
FRANK CRAIG PURPERA, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: DVAW717CR000079-001

Case Number:

USM Number: 22011-084

Beau Brindley, Retained
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

☒ was found guilty on count(s) 1-20, 22-26, 28-68, 69, & 70 after a plea of not guilty,

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	11/18/2014	1
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	3/17/2015	2
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	5/19/2015	3

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

2/12/2019
Date of Imposition of Judgment

/s/ Elizabeth K. Dillon
Signature of Judge

Elizabeth K. Dillon, United States District Judge
Name and Title of Judge

2/20/2019
Date

DEFENDANT: FRANK CRAIG PURPERA, JR.
CASE NUMBER: DVAW717CR000079-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	5/19/2015	4
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	6/9/2015	5
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	7/28/2015	6
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	10/28/2015	7
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	11/30/2015	8
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	1/18/2016	9
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	2/17/2016	10
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	3/4/2016	11
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	4/7/2016	12
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	5/4/2016	13
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	6/6/2016	14
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	7/5/2016	15
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Oxycodone	7/28/2016	16
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Hydrocodone	8/14/2014	17
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Hydrocodone	8/14/2014	18
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Hydrocodone	11/18/2014	19
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Hydrocodone	3/17/2015	20
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Testosterone	1/11/2016	22
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Testosterone	1/11/2016	23
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Testosterone	3/8/2016	24
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Testosterone	3/8/2016	25
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Testosterone	8/4/2016	26
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	2/6/2015	28

DEFENDANT: FRANK CRAIG PURPERA, JR.
CASE NUMBER: DVAW717CR000079-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	9/28/2015	29
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	10/28/2015	30
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	12/14/2015	31
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	1/11/2016	32
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	2/17/2016	33
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	3/8/2016	34
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	4/7/2016	35
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	5/4/2016	36
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	6/7/2016	37
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	7/5/2016	38
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Alprazolam	8/4/2016	39
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	10/31/2014	40
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	1/20/2015	41
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	3/12/2015	42
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	8/12/2015	43
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	9/28/2015	44
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	10/28/2015	45
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	12/14/2015	46
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	1/11/2016	47
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	2/17/2016	48
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	3/8/2016	49
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	4/7/2016	50
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	5/4/2016	51

DEFENDANT: FRANK CRAIG PURPERA, JR.
CASE NUMBER: DVAW717CR000079-001

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	6/7/2016	52
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	7/5/2016	53
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Diazepam	8/4/2016	54
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	2/6/2015	55
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	9/28/2015	56
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	9/28/2015	57
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	10/28/2015	58
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	10/28/2015	59
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	12/14/2015	60
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	12/14/2015	61
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	1/11/2016	62
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	1/11/2016	63
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	2/17/2016	64
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	3/8/2016	65
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	3/8/2016	66
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	4/7/2016	67
21:843(a)(3) and 843 (d)(1)	Obtain Controlled Substance by Fraud - Tramadol	4/7/2016	68
21:843(a)(4)(a) & (d)(1)	Omitting Material Information Required to be Kept	8/26/2016	69
18:1001(a)(2)	False Statement	8/26/2016	70

DEFENDANT: FRANK CRAIG PURPERA, JR.
CASE NUMBER: DVAW717CR000079-001

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

Twenty (20) Months; to consist of twenty (20) months on each of counts 1-20, 22-26, 28-70 to run concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons:

1) The Defendant be housed a FCI Oakdale, Louisiana, near his family.

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before _____ on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: FRANK CRAIG PURPERA, JR.
CASE NUMBER: DVAW717CR000079-001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Two (2) Years; to consist of 1 year on each of counts 1-20, 22-26, & 28-69, and 2 years on count 70, to run concurrently.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. ☐ You must make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution. *(check if applicable)*
3. You must not unlawfully possess a controlled substance.
4. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: FRANK CRAIG PURPERA, JR.
CASE NUMBER: DVAW717CR000079-001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: FRANK CRAIG PURPERA, JR.
CASE NUMBER: DVAW717CR000079-001

SPECIAL CONDITIONS OF SUPERVISION

1) Following release from imprisonment, the court will evaluate defendant's status and determine whether, after incarceration, drug rehabilitation is necessary and appropriate. If additional rehabilitation is deemed appropriate, the defendant shall participate in a program as designated by the court, upon consultation with the probation officer, until such time as the defendant has satisfied all the requirements of the program.

2) The defendant shall reside in a residence free of firearms, ammunition, destructive devices, and dangerous weapons.

3) The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms or illegal controlled substances.

DEFENDANT: FRANK CRAIG PURPERA, JR.
CASE NUMBER: DVAW717CR000079-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 6,800.00	$	$ 34,000.00 Consisting of $500 on each of Counts 1-20,22-26, and 28-70.	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	_____	_____	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

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

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: FRANK CRAIG PURPERA, JR. Judgment - Page 10 of 10

CASE NUMBER: DVAW717CR000079-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

A ☒ Lump sum payment of $ 6,800 immediately, balance payable

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, ☒ F or, ☐ G below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F, or ☐ G below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ During the term of imprisonment, payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $ 25, or 50 % of the defendant's income, whichever is greater, to commence 60 (e.g., 30 or 60 days) after the date of this judgment; AND payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $ 2,000 during the term of supervised release, to commence 60 (e.g., 30 or 60 days) after release from imprisonment.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, 210 Franklin Rd., Suite 540, Roanoke, Virginia 24011, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Any obligation to pay restitution is joint and several with other defendants, if any, against whom an order of restitution has been or will be entered.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,	)	
	)	Criminal Action No. 7:17-cr-00079
v.	)	
	)	By: Elizabeth K. Dillon
FRANK CRAIG PURPERA, JR.,	)	United States District Judge
	)	
Defendant.	)	

MEMORANDUM OPINION

Pending before the court are several post-trial motions by defendant Frank C. Purpera, Jr. (Purpera). While still represented by his trial counsel, Purpera filed motions for acquittal and for a new trial. (Dkt. Nos. 122, 124.) Approximately one month after those motions were filed, new counsel substituted in for trial counsel. New counsel filed a supplemental motion for new trial on August 6, 2018, raising as a new ground that trial counsel labored under a conflict of interest that resulted in a violation of Purpera's Sixth Amendment right to counsel. (Dkt. No. 165.) All three of those motions were argued before the court on August 13, 2018. At that time, defense counsel indicated that he adopted the motions of prior defense counsel, in addition to the newer ground asserted. Thereafter, defendant advanced additional arguments as to the conflict-of-interest issue (Dkt. No. 174), to which the United States responded. [1]

[1] Technically, neither of the supplemental motions for new trial were filed within the extended time for doing so as granted by the court, which expired on March 15, 2018. Fed. R. Crim. P. 33(b)(2) (allowing fourteen days to file); (Dkt. No. 121 (oral order granting defendant's motion to extend that time until March 15, 2018).) They were both filed after that date. Nonetheless, the government did not challenge those motions on timeliness grounds but instead addressed them on their merits. Thus, it has waived any challenge to Purpera's failure to abide by the deadline, which is not jurisdictional. *Eberhart v. United States*, 564 U.S. 12, 18 (2005) (reasoning that Rule 33 is a non-jurisdictional claim-processing rule that may be forfeited if the government fails to raise the issue before the court rules on the merits of the motion).

All of these motions are pending before the court and addressed herein. For the reasons discussed below, the court will deny all of Purpera's motions with the exception of the motion for judgment of acquittal with regard to Count 21, which it will grant. The court will also conditionally grant the motion for new trial as to Count 21.

I. BACKGROUND

At trial, the jury found Purpera guilty on all 69 counts in the indictment, which consisted of Counts 1 through 26 and 28 through 70.[2] Counts 1 through 26 and 28 through 68 charged him with knowingly and intentionally acquiring and obtaining possession of controlled substances by misrepresentation, fraud, forgery, deception, or subterfuge, in violation of 21 U.S.C. § 843(a)(3). Specifically, the government charged that Purpera, a physician, made materially false statements to a drug supplier by denying that any of the controlled substances were used by him personally, by falsely denying that he used any of the controlled substances in the treatment of his spouse or family or friends, and by falsely asserting that the controlled substances were administered to his patients, in some cases for "presurgical anxiety" and "post surgical pain." Each count involved different dates and substances, including oxycodone, hydrocodone, testosterone, alprazolam, diazepam, and tramadol.

Count 69 charged him with knowingly or intentionally omitting material information from a report, record, or other document required to be made and kept to document the disposition of controlled substances, in violation of 21 U.S.C. § 843(a)(4)(A). Lastly, Count 70 charged him with willfully and knowingly making a materially false, fictitious, or fraudulent statement or representation to a DEA Diversion Investigator on or about August 26, 2016, in violation of 18 U.S.C. § 1001(a)(2). Specifically, Count 70 alleged that he told the investigator that he recorded the controlled substances he administered to patients in their patient files and

[2] There was no Count 27 in the indictment.

that he maintained a separate controlled substance log and report, both of which he knew to be false and both of which were false.

Additional facts relevant to each of the motions will be discussed in context.

II. DISCUSSION

A. Motion for Judgment of Acquittal

In his first motion, Purpera moves the court for a judgment of acquittal on Counts 1–6, 21, 28, 40–43, 69, and 70. As to all but counts 69 and 70, he argues that he is entitled to acquittal because the controlled substances at issue in those counts were not obtained as a result of any related fraudulent statement. As to Counts 69 and 70, he argues that the government failed to present sufficient evidence for a rational finding of guilt.

1. Standard of review

Purpera's motion for judgment of acquittal is made pursuant to Federal Rule of Criminal Procedure 29. That rule provides that "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). "A defendant challenging the sufficiency of the evidence faces a heavy burden . . . . " *United States v. Young*, 609 F.3d 348, 355 (4th Cir. 2010) (internal citations and alterations omitted). Specifically, "[t]he jury's verdict must stand unless . . . no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Royal*, 731 F.3d 333, 337 (4th Cir. 2013) (citing *Young*, 609 F.3d at 355).

Put differently, the motion should be denied if the jury's verdict on any given charge is supported by "substantial evidence." *United States v. Alvarez*, 351 F.3d 126, 129 (4th Cir. 2003). "[S]ubstantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable

doubt." *United States v. Burgos*, 94 F.3d 849, 862 (4th Cir. 1996). In addressing a claim of insufficient evidence, moreover, this court must "view the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the [g]overnment . . . ." *Young*, 609 F.3d at 355 (citation omitted).

2. Counts 1–6, 28, 40–43

With regard to Purpera's challenge to Counts 1–6, 28, and 40–43, all of those counts were based on the United States' allegation that Purpera made materially false statements to his supplier of controlled substances, Henry Schein, Inc. (Henry Schein).

These counts were based on substances that were dispensed pursuant to the April 16, 2014 form Purpera submitted to Henry Schein (Gov't Ex. 7-1a, Dkt. No. 114-31). Purpera argues that he truthfully responded "no" to the Henry Schein form question, "Do you use any of the controlled drug items you order to treat family members or friends?" Specifically, he contends that his answer was truthful because, although he was treating his now-wife, Rebecca Mosig Purpera (Mosig), was not married to her at the time he completed the form. Instead, they were married ten days later, on April 26, 2014. Thus, he argues that she was not a "family member" or a "friend." Even if she could be considered a friend, Purpera points out that Shaun Abreu, a Henry Schein representative, conceded on cross-examination that the "friend" part of the inquiry was later taken off the form because state laws do not address treating friends, because doctors can be friends with their patients, and because a "friend" standard was simply unworkable. Based on this, Purpera argues that it was "immaterial" to Henry Schein whether he answered "yes" or "no" to that question, at least insofar as it referred to "friends."

To the extent Purpera is arguing that his soon-to-be wife was not a "friend," the court finds that argument ridiculous. Certainly, there is substantial evidence from which a reasonable

jury could conclude that she was his friend ten days before marriage. With regard to his argument that it did not matter to Henry Schein whether he was treating friends, there was "substantial evidence" to the contrary. He argues that the government had to prove causation and specifically that, but for the misrepresentation, Henry Schein would not have transferred the substances to him. Even under a lesser standard of causation (proximate cause or substantially influence), he contends, there was insufficient evidence of causation. But Abreu testified that Henry Schein would not have shipped the controlled substances requested on that form had Purpera answered "yes" to that question. Abreu also testified that the form was important and relevant in Henry Schein's decision. Thus, regardless of the later changes to the form to omit the reference to "friend," there is "substantial evidence" of causation.

3. Count 21

Count 21, concerning testosterone, was also based on the United States' allegation that Purpera made materially false statements to Henry Schein, and Purpera addresses this count separately.[3] He argues that he made no misrepresentations because he stated on the Addendum (which was the first form requesting testosterone in August 2014 (Gov't Ex. 7-2a, Dkt. No. 114-21)) that it was being used to treat "low testosterone" and that was true; it was being used to treat his low testosterone. The April 16, 2014 form Purpera submitted to Henry Schein (Gov't Ex. 7-1a, Dkt. No. 114-31), asked in Question 16, "Do you use any of the controlled drug items you order for your own personal use?" Purpera answered, "No." But, as he points out, he did not order testosterone in April 2014. He argues that there was no requirement for him to go back and update the original controlled substance form, and Mr. Abreu acknowledged that such an obligation was not clearly stated. While his answers on the Addendum certainly implied that he

[3] The government makes no argument specifically addressing Count 21. Rather, generally, it just notes that the Henry Schein forms address Purpera's medical practice and patients.

was using testosterone to treat his patients' low testosterone, an implication is not sufficient evidence from which a jury could find that Purpera made a material misrepresentation to obtain the testosterone from Henry Schein. For this reason, the court will grant Purpera's motion for judgment of acquittal as to Count 21.

4. Count 69

Purpera next challenges his conviction on Count 69, which alleges a violation of 21 U.S.C. § 827, due to Purpera's failure to keep records. But there is an exception to the record-keeping requirement. Specifically, records are not required with regard to administration of controlled substances in the lawful course of professional practice "unless the practitioner regularly engages in the dispensing or administering of controlled substances and charges his patients, either separately or together with charges for other professional services, for substances so dispensed or administered . . . . " 21 U.S.C. § 827(c)(1)(B); 21 C.F.R. §1304.03(b)–(d).

Purpera argues that Count 69 is limited to his failure to keep records of administered controlled substances, and the government's theory was that he did not administer these substances to his patients. Alternatively, he argues that he qualified for the recordkeeping exception because there was evidence that he regularly engaged in dispensing or administering and that he did not charge patients for medications, all of which was in the lawful course of professional practice. (*See* Instr. No. 24.) As a whole, Purpera argues that the evidence showed, at most, that his accounting failure was a state recordkeeping violation, which was not enough to show practice outside the lawful course to establish a federal violation.

The government responds that 1) Jury Instruction No. 22 states that a practitioner who "manufactures, distributes, or dispenses" is required to maintain records,[4] and 2) Purpera stated

[4] As set forth in Jury Instruction No. 27, dispensing does include administration. (Instr. No. 27.)

in his letter to the Department of Health Professions that he *did* administer the controlled substances to himself and to his wife. (Gov't Ex. 8-2R, Dkt. No. 114-36.) Additionally, the government argues that the recordkeeping exception only applies when the substances are administered in the lawful course of professional practice, which was not the case here with him administering and prescribing to his wife.

There was substantial evidence in the form of Purpera's letter to the Department of Health Professions that he administered the "vast majority" of controlled substances he obtained to himself and his wife. He was required to maintain records of "each such substance manufactured, received, sold, delivered, or otherwise disposed of by him," (Instr. No. 22, Dkt. No. 109), unless he qualified for the exception. There was substantial evidence that Purpera did not keep these records. Moreover, Dr. Burton testified that Purpera's treatment of his wife, by prescription and administration of controlled substances, was not within the course of professional practice. Dr. Burton also testified that receipt of 10,000 pills without documentation as to the disposition of those pills was outside the scope of professional practice. Thus, there was substantial evidence from which a reasonable jury could find that Purpera did not administer controlled substances "in the lawful course of professional practice" so that he did not fit within the record-keeping exception. Moreover, Purpera admits in his briefing that there was evidence that he acted outside the scope of lawful practice with regard to administration of controlled substances regarding "his failure to abide state and federal recordkeeping requirements." (Mem. Supp. Mot for J. of Acquittal 17, Dkt. No. 123.)

For all of these reasons, the court will deny the motion for acquittal as to Count 69.

5. Count 70

Purpera next argues that his conviction on Count 70 cannot stand. As to his statement that he recorded the controlled substances he dispensed to patients in their patient files, he argues this was true because lidocaine is a controlled substance under Virginia law, and he did record lidocaine in his patient charts. Thus, his argument continues, his statement to Investigator Armstrong that he recorded controlled substances he dispensed to patients in patient records was not false.

The jury was entitled to conclude otherwise. Armstrong's testimony made clear that the discussion he had with Purpera did not involve lidocaine, but concerned the *federally* controlled substances ordered from Henry Schein. Armstrong testified that he asked if the specific federal controlled substances were recorded, and Purpera told him that they were. That was false. Thus, the evidence amply supports the jury's verdict on Count 70.

With regard to the second alleged false statement, which was that he maintained a separate controlled substance dispensing log, Purpera contends that was immaterial because he corrected his response within 30 seconds to one minute. The government contends that Purpera's answer changed after the agent continued to ask follow-up questions and it became obvious that the agent was going to want to see the log. It reasons that "[t]he fact that the agent was dogged and refused to be put off does not absolve Purpera of his liability for making false statements to the agent." (Resp. to Mot. New Trial 7, Dkt. No. 131.)

The court agrees with the government's analysis as to this second statement. It was a false statement, even if he quickly corrected it under pressure from questioning. Moreover, even if Purpera had made only the first false statement to Armstrong, that would have been sufficient to convict him of Count 70.

For all of the reasons described above, then, Purpera's motion for judgment of acquittal will be granted as to Count 21 only, and denied as to Counts 1–6, 28, 40–43, 69, and 70.

B. Motion for New Trial

1. Standard of review

Federal Rule of Civil Procedure 33 allows a district court, "[u]pon the defendant's motion, [to] vacate any judgment and grant a new trial if the interest of justice so requires." The standard for granting a new trial depends, in part, on the grounds advanced by the moving party, but a district court "should exercise its discretion to grant a new trial sparingly, and it should do so only when the evidence weighs heavily against the verdict." *United States v. Chong Lam*, 677 F.3d 190, 203 (4th Cir. 2012) (internal citations and alterations omitted). When considering a motion for new trial on the grounds that the jury's verdict was against the weight of the evidence, moreover, the "court is not constrained by the requirement that it view the evidence in the light most favorable to the government. Thus it may evaluate the credibility of the witnesses." *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985).

2. Jury's findings not against the weight of the evidence

For the same reasons argued in his motion for acquittal, Purpera argues that the jury's findings went against the weight of the evidence on Counts 1–6, 21, 28, 40–43, 69, and 70. Although the standard is different when addressing a motion for new trial (and more favorable to the defendant), the court concludes that, even weighing the credibility of the witnesses, the jury's verdict should stand on all of those counts, except Count 21. Thus, for the reasons already discussed with regard to Counts 1–6, 28, 40–43, 69, and 70, the court concludes Purpera is not entitled to a new trial.

With regard to Count 21, the court will conditionally grant a new trial for the same reasons stated previously. *See* Fed. R. Crim. P. 29(d)(1).

3. Improper and prejudicial testimony and comment

Purpera next argues that the jury was exposed repeatedly to improper and prejudicial testimony and comment because 1) the prosecutor interjected during Purpera's closing argument that Purpera "could have put on evidence to prove the point," but the prosecution cannot comment on a defendant's decision not to testify; 2) the prosecution let false testimony go uncorrected regarding treating and prescribing to family members under Virginia law, and although the court gave a proper jury instruction on this point, "the damage had been done"; and 3) at trial the court allowed the government to elicit "bad character" testimony about Purpera's telling witnesses to respond to investigators by saying that they did not recall. He argues that even if these errors were individually harmless, cumulatively, they affected the trial to the extent that it was no longer fair.

The government responds that 1) its comment during Purpera's closing argument did not have anything to with Purpera's decision not to testify; instead, this comment was a sustained objection to defense counsel's improper argument that it was Mosig who ordered the drugs, and the court's instruction that lawyers' statements are not evidence cured any possible prejudicial effect; 2) there was no false testimony, and Jury Instruction No. 26 made clear the distinction between prescribing and administering under Virginia law; and 3) the evidence concerning Purpera's instructions to witnesses to say that they did not recall was properly admitted as intrinsic to the charged offenses.

a. Prosecutor's comment during closing

During defense counsel's closing argument, counsel stated that Purpera's wife ordered the controlled substances. The government objected, and that objection was sustained because there was no evidence that she ordered the drugs. In making the objection, the government noted that defense counsel could have called her to testify. So, the court agrees with the government that its comment was not an improper comment on Purpera's decision not to testify. Additionally, the court instructed the jury that statements by counsel are not evidence. Even if the remarks were improper, moreover, they would require retrial only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *United States v. Higgs*, 353 F.3d 281, 330 (4th Cir. 2003) (quoting *United States v. Mitchell*, 1 F.3d 235, 240 (4th Cir. 1993)). Put differently, the remarks must have been both improper and "prejudicially affected the defendant's substantial rights so as to deprive the defendant of a fair trial." *Id.* (citations omitted). Factors to be examined in determining prejudice include:

> (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

Id. (citation omitted).

Considering these factors and applying them to the prosecutor's interjection, the court does not believe that the interjection "so infected the trial with unfairness" that Purpera was denied due process. *See Higgs*, 353 F.3d at 330. Thus, a new trial is not warranted on this ground.

b. Prosecution's presentation of "false" evidence

Purpera also asserts that the prosecution let "false" testimony go uncorrected at trial and that this warrants a new trial because it resulted in a due process violation. Specifically, the prosecution elicited testimony from three witnesses (Agent Armstrong, Shaun Abreu, and Dr. John Burton), to the effect that in Virginia, doctors should not, in the legitimate course of practice, treat family members, or should do so only in emergencies. With regard to this testimony, a review of Virginia law concerning a doctor's treating and prescribing for self or family members is warranted. The Virginia Administrative Code regarding treating and prescribing for self and family states that treating "shall be based on a bona fide practitioner-patient relationship" and a "patient record" documenting the same should be maintained, and that "[a] practitioner shall not prescribe a controlled substance to himself or a family member, other than Schedule VI . . . unless the prescribing occurs in an emergency situation . . . . " 18 VAC 85-20-25. Virginia law, however, makes a distinction between prescribing and administering. *See* Virginia Code § 54.1-3401. Thus, there is no Virginia statute or regulation prohibiting the "in-office administration" of controlled substances to a family member.

Purpera acknowledges that the court made this clear in the jury instructions and, in Jury Instruction No. 26, specifically instructed the jury that there is a distinction between prescribing and administering under Virginia law. Notably, "[a] jury is presumed to follow its instructions." *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (citation omitted). But Purpera argues that the damage had already been done at that point, especially since the supposed impropriety of Purpera's administration of drugs to his spouse was a central theme in the government's case. (Mem. Supp. Mot. New Trial 3–4, Dkt. No. 125.) Purpera relies on two Supreme Court cases wherein the Court opined that perjured testimony, deliberately solicited or left uncorrected,

violates due process. *See Napue v. Illinois*, 360 U.S. 264 (1959), and *Mooney v. Holohan*, 294 U.S. 103, 112 (1935) (noting the deception of the court and the jury).

Given the absence of perjured testimony, the admittedly proper jury instructions, and the fact that neither the court nor the jury was deliberately or inadvertently deceived so as to violate Purpera's due process rights, the motion for new trial will be denied as to Count 69.

c. Testimony concerning Purpera's coaching of witnesses

Finally, the court disagrees that evidence that Purpera told his employees to say "I do not recall," when questioned by agents, was inadmissible Rule 404(b) evidence and necessitates a new trial. While the witnesses differed slightly in their accounts and one seemed unsure of whether the conversation occurred during the first or second DEA visit, both were steadfast in their testimony that Purpera had made such a statement to them. It was reliable evidence. Additionally, contrary to Purpera's contention, the Fourth Circuit has held that evidence of post-scheme conduct that shows a guilty mind (such as shredding documents or intimidating witnesses) can nonetheless be intrinsic evidence not subject to the additional requirements of Rule 404(b). *United States v. Bajoghli*, 785 F.3d 957, 965–66 (4th Cir. 2015). Moreover, the court does not believe it was unduly prejudicial. *See id.* at 966 (where "evidence is probative of an element of the offense charged, 'the balance under Rule 403 should be struck in favor of admissibility, and evidence should be excluded only sparingly.'") (citation omitted).[5] Thus, no

[5] The Fourth Circuit also has recognized that "[e]vidence of witness intimidation is admissible to prove consciousness of guilt . . . under Rule 404(b), if the evidence (1) is related to the offense charged and (2) is reliable." *United States v. Van Metre*, 150 F.3d 339, 352 (4th Cir. 1998) (citation omitted). Both of those prongs are met here. And the court concludes that Rule 403 of the Federal Rules of Evidence does not otherwise bar its introduction. Thus, the evidence would also have been admissible under 404(b). Purpera complains, however, that the evidence was not identified in the government's 404(b) notice, and so it should have been excluded. The government does not respond to this precise argument. But even if Purpera did not have adequate notice, and thus it was error to admit the (otherwise-admissible) evidence, the court cannot conclude that this testimony so infected the whole trial that a new trial was required. There was ample evidence that Purpera committed the offenses as found by the jury's verdict, and no injustice would result from not allowing a new trial.

new trial is warranted on this ground.

4. Erroneous jury instructions on Counts 1–68 and 69

Purpera next argues that the jury instructions for Counts 1–68 erroneously omitted an instruction for "but for" causation and that Count 69 erroneously omitted an instruction on "good faith," *i.e.*, that if a physician administers a drug in good faith, it is an absolute defense to the charge of omitting material information for a record required to be kept.

The government responds that the instruction defining misrepresentation made it clear that the false statement had to be capable of influencing the decision to provide the substance, and that the instructions as to these counts were nearly identical to Purpera's proposed instructions. (Gov't Resp. to Mot. New Tr. 13–15, Dkt. No. 131.) It also responds that good faith is not a defense to the charge in Count 69 and that Purpera's proffered instruction of good faith was rejected in *United States v. Hurwitz*, 459 F.3d 463, 478 (4th Cir. 2006).

The but-for causation instruction offered by Purpera, which would have stated that the jury could not find him guilty if "he still would have acquired or obtained possession regardless of the misrepresentation," is not supported by the greater weight of authority. *See United States v. Madden*, 11-cr-879, 2012 WL 6000290, at *2 (N.D. Cal. Nov. 30, 2012) (describing circuit split, seemingly recognizing Purpera's causation standard as an "outlier" view, and noting that a "majority" of courts have affirmed convictions where there was no direct evidence that the misrepresentation caused the drugs to be given to the defendant); *cf. United States v. Callahan*, 801 F.3d 606, 622 (6th Cir. 2015) (assuming, without deciding, that a but-for causation standard could apply). The parties did not present a case to the court from the Fourth Circuit on the issue, and the court's research did not disclose one. Nonetheless, this court agrees with the courts that hold deception or subterfuge, even where the trickery occurred *after* the defendant's acquisition

of a drug, was sufficient to sustain a conviction under 21 U.S.C. § 843(a)(3). Thus, the court did not err in declining Purpera's but-for causation instruction.

As to the good faith defense, the Fourth Circuit has held it inapplicable to the offenses here. *Hurwitz*, 459 F.3d at 478. Thus, again there was no error.

For these reasons, and for the reasons set forth by the court on the record in response to Purpera's objections to instructions, the court disagrees that its instructions were erroneous on either ground raised by Purpera. He is not entitled to a new trial on this basis.

Having rejected all of the grounds advanced by Purpera in his first motion for a new trial, the court will deny the motion, except that the court will conditionally grant it as to Count 21.

C. Supplemental Motion for New Trial Based on Conflict of Interest

In his supplemental motion, Purpera raises a new ground that he says entitles him to a new trial. Specifically, Purpera asserts that his lead trial counsel, John Brownlee, labored under a conflict of interest because Brownlee was himself being investigated by the United States Attorney in connection with his communications with potential witnesses in Purpera's case. Purpera first argues that this conflict is significant enough that it requires a *per se* reversal and is not waivable. Even if it is waivable, moreover, Purpera argues that he did not knowingly and voluntarily waive his right to conflict-free counsel. Third and finally, Purpera contends that he has shown an adverse effect on Brownlee's performance as a result of the conflict.

Although the United States repeatedly notes that it is not admitting a conflict of interest existed, it does not argue that there was *not* a conflict of interest. Nor do the United States' filings engage in a meaningful way on the specific issues raised by Purpera. Instead, the United States simply insists that any conflict was validly waived by Purpera. It further contends that, even if the waiver were not valid, the conflict had no effect on the trial and thus should not result

in Purpera getting a new trial. The court cannot agree, on the record before it, that there was a valid waiver of the conflict. But the court agrees with the United States that Purpera cannot establish an "adverse effect" on his attorneys' performance as a result of the conflict. For this reason, the motion for new trial based on the conflict will be denied.

1. Factual background concerning the conflict of interest

Trial in this matter was scheduled to begin on the morning of January 29, 2018. Four days before trial, Purpera filed a renewed motion to dismiss the indictment with prejudice, asserting new grounds of alleged prosecutorial misconduct. Specifically, in addition to grounds asserted in a prior motion, Purpera's renewed motion argued that the Drug Enforcement Agency (DEA) had improperly issued a subpoena for the phone records of Brownlee, Purpera's lead trial counsel. (Mot. Dismiss & Mem. Supp., Dkt. Nos. 77–78.) In response, the United States argued that there was no misconduct and that counsel's telephone records were subpoenaed for the "very limited and legitimate purposes arising from the need to determine whether Purpera's defense attorney, [John Brownlee,] was contacting a subpoenaed witness and encouraging her not to testify." (Resp. to Mot. Dismiss 1, Dkt. No. 88.) The government further noted that it sought records "to determine whether attempts were being made to compromise a controlled substance investigation and prosecution, specifically, whether defense counsel was communicating with Witness A [Carla Craft], represented by her own counsel, during the same time period during which Witness A [Carla Craft] was attempting to convince Witness B [Kayla Castleberry] to delay her court appearance." (*Id*. at 2.)

Specifically, there had been text communications between two grand jury witnesses (one current employee and one former employee of Purpera's)—Craft and Castleberry—on the day

before Castleberry was to testify before the grand jury on December 14, 2017.[6] Craft's texts discouraged Castleberry from testifying without having counsel to represent her. As part of the text exchange, Craft wrote, "John is spazzing about you going alone tomorrow." (Resp. to Mot. to Dismiss, Ex. 1, at 3, Dkt. No. 88-1.) Craft also wrote to Castleberry, "It might be best to give Morgan [another attorney] a call again and confirm, because John is like freaked out that you're walking into a lions den, but maybe Morgan and John haven't communicated." (*Id.*) The text communications were provided to DEA Agent Slease by Castleberry, and Slease also interviewed Craft regarding them.

The United States found out about the texts from Castleberry on December 14, 2017. That same day, Purpera was indicted. The next week, a subpoena was issued for the phone records. The United States denied that the records were sought to learn the substance of client-attorney communications, pointing out that the subpoena only requested times and dates of calls and numbers dialed, and did not seek the content of any texts or phone conversations. In Purpera's reply, defense counsel noted skepticism that there was actually an active investigation into Brownlee's conduct, suggesting instead that this was simply an improper attempt by the prosecution to either learn about privileged communications or force Purpera to obtain new counsel on the eve of trial. As an alternative sanction to dismissal, Purpera requested that all members of the prosecution team who had been exposed to the information be prohibited from participating in the case.

The evening before trial, the United States filed a brief notice suggesting that defense counsel may have a conflict of interest and asking that the court take up the matter at the time it heard the motion to dismiss and other pre-trial motions. The court held a nearly three-hour

[6] It is unclear to the court whether Castleberry was to testify regarding the crimes for which Purpera was indicted on December 14 or for the ongoing investigation regarding alleged healthcare fraud of which all parties were aware and which all parties specifically mentioned to the court.

hearing on the morning of trial, in which it addressed all pending motions. (Minutes, Dkt. No. 96.)

In his opening remarks at that hearing, William Gould, another attorney from Brownlee's firm who also represented Purpera, referenced again what he believed to be the improper conduct by the agents or prosecutors in the case, through the issuance of an allegedly overbroad subpoena for telephone records for the number tied to Brownlee's phone. But he also noted in his opening that the government's conduct had resulted in Purpera having a decision to make about whether he continues with his current counsel or not.

During that hearing, the court heard testimony from Agent Slease, who had requested that a subpoena issue for the phone records related to the number that he suspected might be Brownlee's. Slease noted that the number came back as registered only to Brownlee's law firm, Holland & Knight. After defense counsel raised the issue, however, the agent was able to confirm from some of Brownlee's emails that the number was used by him. When Slease testified at the hearing, he specifically stated that the subpoena "was within a tampering investigation" that was an "ongoing investigation" and was "still going on," "beyond the matters of the Court today." (Pre-trial Mots. Hr'g Tr. 33, 54, 64, Dkt. No. 154.) The investigation was said to be associated with Purpera's then-current case. (*Id*. at 64.) Slease stated that he had sent the telephone information over to the United States Attorneys' office a week or two before trial, but had not done anything else on the investigation, although he stated that he still had some unspecified follow-up to do. Notably, Purpera was present throughout the hearing, and he heard all the testimony presented.

All parties also made it clear to the court that Purpera was still under investigation for healthcare fraud, separate and apart from the charges for which he was about to be tried.

At the conclusion of testimony and argument on that motion, the court denied the motion to dismiss. Specifically, the court explained that the subpoena was issued to investigate communications after Castleberry expressed that she "felt intimidated, coerced, or at the very least uncomfortable with regard to some messages she was getting . . . . " (Pre-trial Mots. Hr'g Tr. 103.) The court also noted that there was an ongoing investigation of Dr. Purpera with regard to "other matters not involved in the case before us today." (*Id.*) Because the court found that there had not been any improper purpose, it concluded there had been no government misconduct. The court also noted a lack of prejudice. The court thus denied the motion, noting that the government would not—and did not intend to—introduce certain evidence it had obtained that was unrelated to the case. (*Id.* at 103–04.)

At that point, the court asked Gould whether there was an unresolved issue about whether Purpera wanted to continue with him, Brownlee, and their firm as counsel. At that point, the court took about a twelve-minute recess to allow Purpera to communicate with his counsel about the issue. (*Id.* at 105 (transcript showing break from 11:14 a.m. until 11:26 a.m.).)

When court reconvened, the court inquired with Purpera as to whether he was willing to waive any conflict of counsel, and he said that he was.[7] It is that waiver that the United States relies on to argue that Purpera validly waived any conflict of counsel.

2. Applicable principles

The parties largely agree on the legal principles applicable to this type of conflict-of-interest claim, and there are both Supreme Court and Fourth Circuit cases setting them forth. First, there are some violations of the Sixth Amendment so egregious that they require *per se* reversal, without any showing of prejudice. (*See infra* Section II-C-4). For the rest, a counsel's

[7] The entirety of the on-record discussion regarding the waiver is set forth in Section II-C-6 *infra*, addressing the validity of the waiver.

conflict of interest requires a new trial only if the defendant establishes that the conflict adversely affected his attorney's performance. With the showing of an adverse effect, an "actual conflict" exists.

Two of the key Fourth Circuit cases in this area arose from two appeals in the same criminal case. In the first, *United States v. Nicholson*, 475 F.3d 241 (4th Cir. 2007) (*Nicholson I*), the Fourth Circuit reversed the district court's ruling that counsel had no conflict of interest, and remanded for a determination of whether the conflict adversely impacted counsel's performance. In *United States v. Nicholson*, 611 F.3d 191 (4th Cir. 2010) (*Nicholson II*), the appellate court again reversed the district court, disagreeing with its determination that the conflict had not adversely affected counsel's performance. In *Nicholson II*, the court also clarified the meaning of the term "actual conflict" and adopted two alternatives originally set forth in *Freund v. Butterworth*, 165 F.3d 839, 860 (11th Cir. 1999) (en banc), for proving the third factor of the adverse effect test.

In *Nicholson II*, the court acknowledged that it had previously used the term "actual conflict" imprecisely, even in *Nicholson I*. The *Nicholson II* court explained and clarified that to prevail on a "conflict of interest claim under the clarified standard, the petitioner must show that (1) his lawyer operated under a "conflict of interest" and (2) that said conflict "adversely affected his lawyer's performance." *Nicholson II* , 611 F.3d at 196 n.2. Thus, except in those cases where the conflict is so great that it requires *per se* reversal, an "actual conflict" only exists when a conflict adversely affects the lawyer's performance. *See id.*

In making the determination of whether a conflict adversely affected the lawyer's performance, the court reviews the three so-called *Freund* factors first set forth in *Freund*, 165 F.3d 839, and adopted by the Fourth Circuit in *Mickens v. Taylor*, 240 F.3d 348, 361 (4th Cir.

2001) (en banc), *aff'd without consideration of this point*, 535 U.S. 162 (2002). Specifically, to show an adverse affect, a defendant must: (1) identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued; (2) establish that "the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision"; and (3) establish that the failure to pursue the strategy or tactic was linked to the actual conflict. *Nicholson I*, 475 F.3d at 252 (quoting *Mickens*, 240 F.3d at 361). In assessing these three factors, no *Strickland*-type deference is owed to the attorney's tactical decisions. Furthermore, "[i]n establishing these three aspects of this test, the petitioner is not required to show that the strategy or tactic not taken would have been successful, but only that it would have been objectively reasonable." *Nicholson I*, 475 F.3d at 252.

To establish the link required in the third step above, the defendant has two available options. He can establish either that (1) the alternative tactic was "inherently in conflict with . . . the attorney's other loyalties or interests" or (2) otherwise show that the alternative tactic was "not undertaken due to" the other loyalties or interests. *Nicholson II*, 611 F.3d at 212 (quoting *Freud*, 165 F.3d at 860).

Having set forth the applicable legal principles, the court will turn first to the existence of a conflict and then to whether an adverse effect needs to be shown and whether Purpera has made that showing. Lastly, it will discuss the validity of Purpera's waiver.

3. Brownlee had a conflict of interest due to his being the subject of an ongoing investigation that was related to Purpera's case.

First, as a factual matter, the court is constrained to note that, in the briefing and argument on the subject, defense counsel repeatedly questioned whether there was actually any intent on the part of the government to investigate Brownlee or whether that was simply being offered as an excuse for obtaining his phone records. Indeed, Brownlee did not seem concerned

that he faced any real criminal exposure as a result of the "investigation," as made clear in the documents counsel filed with the court. (*See, e.g.*, Reply Mot. Dismiss 5, Dkt. No. 92 ("There was no bona fide investigation into Mr. Brownlee. The decision to investigate a former U.S. Attorney for potential obstruction of justice is not one that would have been made lightly. There has been no evidence presented to defense counsel, whatever the government may have stated in court, that any such decision was actually made."); Hr'g Tr. 105 (Gould stating to the court that "[w]e see no issue with regard to any conflict or potential conflict" and noting, with respect to the conflict, that the record before the court is clear that, "while there may be an ongoing investigation of Dr. Purpera on some other matters, there is not any concern….[T]he record made it very clear that, to the extent there is an investigation, it's of the healthcare fraud part.").

Purpera's counsel also seemed unconcerned that what he allegedly did—gave advice to a grand jury witness to obtain counsel before testifying—was criminal or unethical. As counsel explained:

> According to the government, the recommendation that someone get a lawyer before a grand-jury appearance is cause to open an obstruction-of-justice investigation. That is an extraordinary proposition. [] It would result in the commission of a dozen felonies every time a sheaf of subpoenas left the doors of the U.S. Attorney's Office.

(Reply Mot. Dismiss 2, Dkt. No. 92) (internal footnote omitted). This would also explain why defense counsel did not see any conflict of interest. Brownlee did not actually believe that he was under investigation, nor was he worried about a possible criminal charge.

Despite all of these assertions by defense counsel, though, Agent Slease testified that there was on ongoing investigation into possible witness tampering, and, although he did not explicitly state that Brownlee was a target of the investigation, the context of his testimony implied it at the very least. Slease also said on several occasions that the investigation was

"ongoing." Additionally, the court found that there was at least no misconduct in issuing the subpoena, given the concerns expressed by Castleberry to a federal agent, thereby implicitly ruling that it was part of a legitimate investigation. Thus, the record supports that Brownlee was under investigation at the time of trial for potentially tampering with witnesses, although those witnesses may have been testifying about other possible crimes, not the ones for which Purpera was being tried. That being so, the question is whether that gave rise to a conflict of interest.

Purpera cites to a number of cases in which courts have held there was a conflict of interest where a defendant's attorney was being investigated for criminal activity by the same prosecutor's office prosecuting his client. These cases universally hold that an attorney under investigation for a potential crime related to his client's criminal prosecution labors under a conflict. (*See, e.g.*, Suppl. Post-Trial Mot. 9–10 (collecting authority).) The government cites no cases to the contrary. In its initial response (Dkt. No. 168), the government focused entirely on Purpera's waiver and noted that it did not concede there was an actual conflict, but it did not brief that issue. In its supplemental response (Dkt. No. 171), it again says it does not concede there was a conflict, but contends that the issue need not be decided because Purpera cannot show an adverse effect in any event.

In light of the undisputed authority relied on by Purpera, and the facts as the court has found them, the court concludes that Brownlee's knowledge that he was the subject of an ongoing investigation for supposed witness tampering gave rise to a conflict of interest. As it discusses next, the court concludes that the conflict does not require *per se* reversal, but instead that Purpera must establish an adverse effect on his counsel's representation, which he cannot do.

4. The conflict is not so significant that it requires a *per se* reversal.

In *United States v. Cronic*, 466 U.S. 648 (1984), the Supreme Court recognized that a *per se* Sixth Amendment violation may arise in three categories of cases: (1) when there is a "complete denial of counsel . . . at a critical stage" of trial; (2) when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing"; and (3) when "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659–60. A finding of *per se* prejudice is "an extremely high showing for a criminal defendant to make." *Brown v. French*, 147 F.3d 307, 313 (4th Cir. 1998).

Also,

> [t]he Fourth Circuit has "cautioned against 'broaden[ing] the *per-se* prejudice exception to *Strickland*,' warning that it would 'add an extra layer of litigiousness to ineffective assistance law'" and allow courts to "'regard trials . . . [not] through a particularized lens [but] rather . . . through some broad-brush presumption of prejudice.'" *United States v. Smith*, 640 F.3d 580, 589–90 (4th Cir. 2011) (quoting [*Glover v. Miro*, 262 F.3d 268, 277, 279 (4th Cir. 2001]).

Obilo v. United States, No. 1:09-cr-47, 2012 WL 12965626, at *10 (E.D. Va. July 6, 2012), *report and recommendation adopted*, No. 1:09-cr-47, 2013 WL 12221626 (E.D. Va. Feb. 13, 2013).

The first and second situations referenced in *Cronic* clearly are not applicable here. Purpera's trial counsel was present and advocated strongly for Purpera at all stages of his case and certainly did not "fail[] to submit the prosecution's case to meaningful adversarial testing." *Cf. Cronic*, 466 U.S. at 659–60.

Nor does the third situation apply here. That conclusion is strengthened by the limited authority cited by Purpera where *per se* prejudice was found, which involved more serious

conflicts *directly* related to the offense, such that the conflict would seem to fall within the third *Cronic* category. For example, in *United States v. Fulton*, 5 F.3d 605, 611 (2d Cir. 1993), the court concluded that allegations by a government witness that defense counsel had engaged in heroin trafficking related to the heroin charge for which his client was on trial, created an actual conflict that did not require a showing of adverse effect, but was a *per se* violation of the Sixth Amendment. Similarly, the Fifth Circuit concluded that where defense counsel was being investigated for helping his client escape, and his client was on trial for that same escape, this constituted an actual conflict requiring disqualification regardless of any showing of actual prejudice, absent a waiver. *United States v. White*, 706 F.2d 506, 510 (5th Cir. 1983).

In this case, by contrast, the conflict was not so great that no reasonable client would consent, nor so great that no reasonable attorney could competently represent his client. The investigation into Brownlee here related to Purpera, to be sure, in that it involved Brownlee's contact with two witnesses—Craft and Castleberry—before at least Castleberry testified before a grand jury investigating Purpera, but there is no suggestion that Brownlee played any role in Purpera's crimes. Thus, the conduct simply was not on the same severe level as the cases noted above that found a *per se* Sixth Amendment violation. *See Fulton*, 5 F.3d at 611 (explaining that, in the Fifth Circuit, the *per se* rule applies not when an attorney is implicated in any crime, but where an attorney is implicated in the crimes of his or her client). Notably, moreover, in other cases with conflicts similar or more severe than that here (or with a closer relation to the defendant's crimes), courts have required a showing of adverse effect. *See, e.g.*, *Gov't of Virginia Islands v. Zepp*, 748 F.2d 125 (3d Cir. 1984) (requiring a showing of an adverse effect, rather than treating the conflict as a *per se* violation, where counsel faced potential criminal liability for flushing heroin possessed by defendant down toilet, where defendant was charged

with heroin offense); *United States v. Greig*, 967 F.2d 1018, 1024–25 (5th Cir. 1992) (requiring a showing of an adverse effect, rather than treating the conflict as a *per se* violation, where counsel faced disciplinary charges for talking with represented co-defendant of his client's without giving notice to that co-defendant's attorney). Indeed, given Brownlee's apparent lack of belief that he had done anything wrong or that the investigation was even legitimate, Brownlee could competently represent Purpera.

For these reasons, the court rejects Purpera's argument that the conflict here requires *per se* reversal.

5. Purpera has not shown an adverse effect on Brownlee's representation resulting from the conflict.

Because the conflict here did not require *per se* reversal, Purpera must establish an adverse effect by meeting the three so-called *Freund* factors. As noted above, that means Purpera must: (1) identify a plausible alternative defense strategy or tactic that his defense counsel might have pursued: (2) establish that "the alternative strategy or tactic was objectively reasonable under the facts of the case known to the attorney at the time of the attorney's tactical decision"; and (3) establish that the failure to pursue the strategy or tactic was linked to the conflict. *Nicholson I*, 475 F.3d at 252 (quoting *Mickens*, 240 F.3d at 361).

Here, Purpera has identified two plausible alternative defense strategies or tactics that Brownlee might have pursued. The first was to call Mosig as a witness in Purpera's case-in-chief. The second was to cross-examine Craft. The court addresses each in turn.

a. Failure to call Purpera's wife

According to Purpera's motion and her own affidavit, Rebecca Mosig Purpera (Mosig), Dr. Purpera's wife, was prepared to testify and, up until the time of trial, the defense strategy included her testimony. She was the person who filled out the medication order forms at issue in

the trial. She states that she would have testified that Purpera did not know that there was anything incorrect about the order forms because she commonly signed the forms for him without giving them to him for his review. Thus, according to her, her testimony would have proved a lack of intent on Purpera's part, and she was therefore an "essential" witness. (Suppl. Post-Trial Mot. 14, Dkt. No. 165; Mosig Aff., Dkt. No. 167.) She was not called to testify, however. The court agrees that calling her was a plausible alternative defense strategy that Brownlee could have pursued and thus that Purpera can establish the first *Freund* factor. But Purpera cannot show that such a strategy was "objectively reasonable," nor can he establish that the failure to call Mosig was in any way linked to the conflict.

Purpera cannot show that calling Mosig would have been "objectively reasonable." In short, and having sat through the entirety of the evidence in this trial, the court agrees with the government that Mosig's testimony (particularly that likely to be elicited on cross-examination) would have been detrimental to the defense. As noted by the government, Mosig's affidavit does not list all the subjects about which she would face cross-examination, including:

- Numerous prescriptions written to her by her husband [prescriptions which are the subject of pending charges in another case against Purpera];
- False information provided to another doctor about what medication she was taking when she was seeking additional prescriptions for controlled substances, which may have supported an inference that Purpera knew he was not legitimately administering or prescribing controlled substances to her or that he was not dispensing the controlled substances he was ordering to her, contrary to his representations to the Department of Health Professions;
- Her request to not be written controlled substances by another doctor at approximately the same time her husband was to begin being tested for use of controlled substances, which may have supported a theory that Purpera was himself using the controlled substances he was ordering.

(Suppl. Resp. to Def.'s Supp. Post-trial Motion 3–4, Dkt. No. 171.) While Purpera does not need to show that the alternative strategy would have been successful, he does need to show that it

would have been reasonable. Here, no such showing can be made due to the significant damage that Mosig's testimony could have done to Purpera's case. Indeed, the court can see no circumstance in which calling Mosig would have been objectively reasonable. Thus, Purpera cannot establish the second factor—that the alternative strategy was objectively reasonable. *Cf. Stephens v. Branker*, 570 F.3d 198, 211–13 (4th Cir. 2009) (describing various proposed defense strategies as "plausible" but rejecting them under the second factor of the *Mickens* test, because they were not "objectively reasonable"); *United States v. Dehlinger*, 740 F.3d 315, 325 (4th Cir. 2014) (affirming district court's finding that proposed alternative strategies were not "objectively reasonable," and thus there was no "adverse effect" from the conflict).

As for any supposed link, the court cannot find any link between the decision not to call Mosig and Brownlee's conflict. The investigation into Brownlee was narrow and focused on whether he had interfered with—at most—two specific witnesses and discouraged them from testifying before the grand jury or from doing so without counsel. The investigation had nothing to do with Mosig, nor (despite Purpera's characterizations in his motion to the contrary) did it have to do with Brownlee's "preparation" for trial of any witness or witnesses. Also, as the government points out, defense counsel did in fact call other witnesses to the stand who he had interviewed prior to trial. Thus, there simply is no logical "link" between the decision not to call Mosig and the alleged investigation into Brownlee.

For these reasons, Purpera has not shown an adverse effect on Brownlee's performance due to a failure to call Mosig.

b. Failure to cross-examine Craft

The second "plausible" tactic that Purpera alleges Brownlee should have taken and did not was to cross-examine Craft, who was the witness sending text messages to Castleberry.

Craft and Castleberry were the two witnesses involved in the tampering investigation.[8] This argument, however, is based on erroneous facts. Although Craft was not initially cross-examined, she was recalled shortly after her initial testimony, and she was, in fact, cross-examined by Purpera's defense counsel (although by Gould, not Brownlee). So, she was cross-examined.

Even if Purpera had argued that the cross-examination should have been more vigorous, he does not identify any topic of cross-examination, or any subject, that he believes should have been pursued. Where there is a complete absence of a cross-examination, it might be enough to say the alternative tactic would have been to cross-examine a witness. But because that was done, Purpera must offer a topic or line of inquiry that he believes should have been pursued but was not. He has failed to do that in his briefing and argument. Thus, the court concludes that neither the first nor second of the *Mickens* factors are satisfied here. For this reason, an adverse effect on Brownlee's performance is not shown by this alleged failure, either.

Because there was no adverse effect on Brownlee's representation, Purpera is not entitled to a new trial.

6. Purpera's waiver was not valid.

Because the court concludes that Purpera has failed to establish any adverse affect as a result of the conflict, it is not strictly necessary to address in any detail whether Purpera's waiver of conflict-free counsel was knowing and voluntary. Nonetheless, the court will set forth the on-record discussion on the topic for ease of reference, as well as its analysis on the issue. After a recess, the following occurred:

> MR. GOULD: Your Honor, I think we're ready to proceed. We see no issue with regard to any conflict or potential conflict.

[8] Castleberry was never called as a witness.

THE COURT: Very well. So I take it that motion is withdrawn? Well, that's the U.S.'s motion, so --
MR. RAMSEYER: We're not withdrawing the motion, Your Honor. If I may just address that, if I could.
THE COURT: Okay.
MR. RAMSEYER: Defense counsel sent an e-mail to the government yesterday, or we received it yesterday, indicating that they were exploring the issue of whether they could continue to represent Dr. Purpera, given the government's response to their motion to dismiss, where it indicated that some of the conduct of defense counsel was being looked at. And we think, given the fact that they raised that issue that they thought there was a potential issue there, that there could potentially be a potential conflict of interest under Rule 1.7. And we would request that the Court inquire from Dr. Purpera if he's interested -- willing to waive any potential conflicts of interest. We think, at this point, it's a potential conflict of interest, not a conflict of interest. But given that defense counsel has raised that they had some concerns about that, we think it would be appropriate to make sure, if there is any potential conflict of interest, that Dr. Purpera waives that.
THE COURT: Mr. Gould?
MR. GOULD: That note, again, we sent that out, I guess, on Friday, and it had -- the intent of it was to ask a lot of questions about what happened just today, Your Honor, about who authorized this. And we did mention that possibility. Given the wording of the government's response, I think the record in front of the Court today indicates that it's very clear that, while there may be an ongoing investigation of Dr. Purpera on some other matters, that there is not any concern. Obviously, it's Your Honor's courtroom. If you'd like to inquire of our client about his comfort with Mr. Brownlee as counsel, you can absolutely do that. But I don't think it's necessary in this case, and I think that, again, the record made it very clear that, to the extent there is an investigation, it's of the healthcare fraud part. Does that make sense?
THE COURT: It does. Would Mr. Purpera voluntarily, without me requiring it, be willing to tell me whether or not he waives any conflict?

> THE DEFENDANT: Your Honor, this is my team that I hired. I'm innocent. I would like to move forward and get my life back together.
> THE COURT: All right. And did you – without telling me what discussions you had with your counsel, was it explained to you that there might be a potential for a conflict of interest?
> THE DEFENDANT: Yes, ma'am.
> THE COURT: All right. And do you feel you understand that?
> THE DEFENDANT: I do, yes, ma'am.
> THE COURT: All right. And are you still willing to go forward with counsel from Holland & Knight representing you?
> THE DEFENDANT: Yes, ma'am.
> THE COURT: All right. Very well. Thank you.
> MR. BROWNLEE: Thank you, Judge.

(Pre-trial Mots. Hr'g Tr. 105–08.)

As is evident from the foregoing, then, the record reflects that the court inquired with Purpera about whether his counsel had explained to him that there was a potential conflict and whether he understood the conflict or potential conflict. The record also reflects that a twelve-minute recess was taken during which not just Brownlee, but also Gould spoke with Purpera to discuss the conflict with him. Purpera twice told the court that he understood the conflict but wanted to proceed with his current counsel. The first time he said, "This is my team that I hired. I'm innocent. I would like to move forward and get my life back together." (Hr'g Tr. 107–08.)

Purpera relies on a lot of out-of-circuit authority (primarily cases from the Second and Fifth Circuits) that set forth specific procedures the court should take in order to ensure that a waiver is knowing and voluntary. *See, e.g.*, *United States v. Greig*, 967 F.2d 1013, 1022 (5th Cir. 1992) (describing the so-called Garcia hearing to address a potential conflict of interest with a defendant); *United States v. Iorizzo*, 786 F.2d 52, 59 (2d Cir. 1986). Although the procedures set forth in these and related cases may be ideal practices for obtaining a waiver, Purpera cites to no Fourth Circuit case adopting them or requiring them. Instead, the Fourth Circuit has

explained that a waiver is valid if a defendant has "knowledge of the crux of the conflict *and* an understanding of its implications, . . . even if the defendant does not know each detail concerning the conflict." *United States v. Brown*, 202 F.3d 691, 698 (4th Cir. 2000). Whether a waiver is "knowing and intelligent depends on the circumstances of each individual case as well as the background and experience of the accused." *United States v. Blau*, 159 F.3d 68, 74 (2d Cir.1998).

Here, many factors point in favor of finding a knowing and valid waiver. As an initial matter, this case is somewhat unusual in that an entire hearing was held, in Mr. Purpera's presence, dealing with issues that allegedly gave rise to the conflict, *i.e.*, the investigation into Brownlee. Purpera is an intelligent man, with a medical degree and the capability of understanding—perhaps much more than most defendants—what was being discussed regarding Brownlee's conduct, the government's investigation, and the supposed conflict. Moreover, as noted by his counsel early in the hearing, Purpera had been actively involved in his own defense and read thoroughly case-related materials and cases. Gould advised the court that Purpera was an "active participant in his defense," and not just by giving advice—he's "carefully" "read everything," including case law. (Pre-trial Mots. Hr'g Tr. 17–18.) All of these factors suggest that he had knowledge of the exact nature of the conflict. Also, it is undisputed that he was advised about the conflict by both Brownlee and by Gould, who is not alleged to labor under the same conflict of interest, although he is from the same firm as Brownlee.

But the record does not definitively reflect that Purpera was advised specifically about the possible implications of the conflict. *See Brown*, 202 F.3d at 698. That is, at no point on the record was he advised that Brownlee might, for example, be less rigorous in his defense of Purpera in order to curry favor with the United States Attorney for the Western District of

Virginia, who was involved in the tampering investigation. That is one of the chief concerns of this type of conflict of interest. *See United States v. Fulton*, 5 F.3d 605, 610 (2d Cir. 1993) (explaining that "the attorney may fear that a spirited defense could uncover convincing evidence of the attorney's guilt or provoke the government into action against the attorney"). And Purpera's knowing in general terms about Brownlee being investigated is not the same as the court explaining the conflict by telling him, for example, "Because Mr. Brownlee is being investigated by the U.S. Attorney, he might not do everything he can to defend you because he has his own interest in not angering the U.S. Attorney's office." Thus, although the court questioned Purpera in general terms and relied on his own counsel to advise him, the court acknowledges that it could have done more to discuss the implications of the conflict with Purpera.

For these reasons, the court cannot conclude that Purpera's waiver was intelligent and knowing. Thus, the court does not rely on the purported waiver in denying Purpera's motion.

III. CONCLUSION

For the foregoing reasons, the court will grant Purpera's motion for judgment of acquittal with regard to Count 21 only and will deny the motion for judgment of acquittal as to all other counts. The court will conditionally grant a new trial as to Count 21 and will deny all other remaining and pending post-trial motions filed by Purpera. An appropriate order will be entered.

Entered: September 18, 2018.

/s/ Elizabeth K. Dillon
Elizabeth K. Dillon
United States District Judge

also my ruling with regard to the Rule 29 motion, that the Court finds that that is not a requirement in the Fourth Circuit, but for causation. And while there is a circuit split in that regard, there's also a discussion about that view being an outlier view, so the Court is not going to instruct on that.

MR. TAYLOR: Yes, Your Honor. Thank you, Your Honor.

Page 25, this is jury instruction number 18. We would object to the use of the same definition of "material" that is used for 18 U.S.C. Section 1001 later in the jury instruction.

THE COURT: We changed the later definition of "material." This one is what you wanted, I understand.

MR. TAYLOR: Oh, then no objection, Your Honor. My apologies.

And then finally, our final objection is a jury instruction of ours that we proffered that was not included. That was our proposed jury instruction B6, which was our proposed definition of "lawful course of professional practice."

We base that substantially upon the jury instruction that was used in *United States v. McIver*, which was upheld on appeal. And we cited the *McIver* case, which itself distills all the pertinent case law on this issue. And we believe it

would be helpful to the jury and actually prejudicial to Dr. Purpera to not include that instruction, especially including an instruction on good faith as required by *United States v.* --

THE COURT: And would you like to tender that instruction, sir, for the record?

MR. TAYLOR: Yes, I would.

THE COURT: All right. You may do so. And the Court notes that I believe it's not an appropriate instruction for this case and will not instruct the jury as requested.

MR. TAYLOR: All right. Thank you, Your Honor.

THE COURT: Thank you.

MR. RAMSEYER: Your Honor, totally just a reminder what the Court said the Court was going to do, on page 30, instruction number 23, just in the first line, the word "next," I think the Court indicated it was going to take that word out just because it wasn't in the next paragraph when we were talking about that.

THE COURT: It is "next" now.

MR. RAMSEYER: I thought you said you were taking "next" out.

THE COURT: There were two "nexts."

MR. RAMSEYER: Oh.

THE COURT: And we eliminated the first one.

Rejected
2/1/2018
EKD

Instruction B-6.

Count 69: Omitting material information on controlled-substances records required to be kept—lawful course of professional practice.

The previous instruction, describing the *third* element of this count, described the two exceptions to recordkeeping for controlled substances prescribed or administered in the lawful course of professional practice.

In making a medical judgment concerning the right treatment for an individual patient, physicians have discretion to choose among a wide range of available options. Therefore, in determining whether the defendant acted outside the lawful course of professional practice, you should examine all of the Defendant's actions and the circumstances surrounding them.

If a physician prescribes or administers a drug in good faith, then he has done so within the lawful course of professional practice. A physician prescribes or administers a drug in good faith in medically treating a patient when he does so for a legitimate medical purpose in the usual course of medical practice. Good faith means good intentions and the honest exercise of best professional judgment as to the patient's needs. It means that the doctor acted in accordance with (what he reasonably believed to be) the standard of medical practice generally recognized and accepted in the United States.

In contrast, a physician acts outside the lawful course of professional practice when he prescribes or administers a controlled substance other than for a legitimate medical purpose and not in the usual course of medical practice. For you to find that the government has proven this, it is not enough, standing alone, for the Government to prove beyond a reasonable doubt that the physician violated a rule or regulation, treated a patient differently than another physician would have, or even committed medical malpractice or otherwise negligently violated the professional standard of care, although you may consider such things as part of your assessment of the totality of the circumstances.

Instead, the Government must prove beyond a reasonable doubt that the Defendant was acting outside the bounds of any legitimate professional medical practice—that he was using his authority to prescribe or administer controlled substances not for

treatment of a patient, but for an illegitimate purpose, such as for making a personal profit or maintaining another's drug habit.[36]

[36] *See United States v. McIver*, 470 F.3d 550, 557–60 (4th Cir. 2006); *see also* Jury Instructions at 17–19, *United States v. McIver*, No. 8:04-cr-745-HFF (D.S.C. Apr. 18, 2005), ECF 27.