No.

In the Supreme Court of the United States

DR. SAAD SAKKAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this Court should grant, vacate, and remand a judgment sustaining the conviction of a physician under 21 U.S.C. § 841(a)(1) where the jury was given a scienter instruction that is flatly inconsistent with this Court's recent decision in *Ruan* v. *United States*, 142 S. Ct. 2370 (2022).

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellant below, is Dr. Saad Sakkal.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

United States v. *Saad Sakkal*, No. 20-3880, United States Court of Appeals for the Sixth Circuit. Judgment entered February 24, 2022.

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OPINIONS AND RULINGS BELOW

The opinion of the court of appeals is not reported. See Petitioner's Appendix ("App."), *infra*, 1a-13a. The order of the Sixth Circuit denying rehearing is not reported. See App., *infra*, 14a.

JURISDICTION

The Sixth Circuit entered judgment on February 24, 2022. The court of appeals denied rehearing on April 27, 2022. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 841(a)(1) of the Controlled Substances Act ("CSA"), 21 U.S.C. § 841(a)(1), provides:

> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]

21 C.F.R. § 1306.04(a) provides:

> Purpose of issue of prescription.
>
> (a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner

> acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. § 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

STATEMENT

Petitioner, Dr. Saad Sakkal, was convicted of unlawfully dispensing or distributing controlled substances under 21 U.S.C. § 841(a)(1). At trial, Petitioner asked the district court to instruct the jury that he could be convicted under Section 841(a)(1) only if he subjectively intended to prescribe controlled substances outside the course of professional practice. Following then-binding Sixth Circuit law, the district court refused to give that instruction, and instead told the jury that it could convict Dr. Sakkal if he failed to prescribe in accordance with what he "reasonably believed" to be proper medical practice.

Last month, in *Ruan* v. *United States*, 142 S. Ct. 2370 (2022), this Court held that Section 841(a)(1) requires the government to prove that a doctor knowingly or intentionally prescribed in an

unauthorized manner, and expressly rejected the "reasonable belief" formulation. Petitioner therefore asks this Court to grant, vacate, and remand his case to the Sixth Circuit for further consideration in light of *Ruan*.

A. Statutory Background

The Controlled Substances Act makes it unlawful for "any person knowingly or intentionally . . . to manufacture, distribute, or dispense" a controlled substance, "[e]xcept as authorized by this subchapter." 21 U.S.C. § 841(a)(1). "[T]his subchapter" authorizes persons who have registered with the Attorney General to distribute controlled substances "to the extent authorized by their registration." *Id.* § 822(b). 21 C.F.R. § 1306.04(a) authorizes registered doctors to distribute controlled substances by issuing prescriptions, so long as the prescriptions are "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."

Prior to this Court's June 27, 2022 decision in *Ruan* v. *United States*, 142 S. Ct. 2370, there was significant divergence among the courts of appeals regarding the *mens rea* requirement for conviction of physicians under Section 841(a)(1). In *United States* v. *Moore*, 423 U.S. 122 (1975), this Court had observed that the CSA "does not spell out . . . in unambiguous terms" when physicians may be subject to prosecution. *Id.* at 140. Drawing on 21 C.F.R. § 1306.04(a), the Court held in *Moore* that a registered physician may be prosecuted under Section 841(a)(1) if her "activities fall outside the usual course of professional practice." *Id.* at 124.

In the years following *Moore*, a three-way circuit split developed over the availability and contours of a good faith defense to Section 841(a)(1) prosecutions. In the Sixth Circuit, where this case arose, the court of appeals had consistently held that a physician may be convicted if he failed to act "in accordance with what he *reasonably believed* to be proper medical practice." *United States* v. *Volkman*, 797 F.3d 377, 387-388 (2015) (emphasis added). In the Sixth Circuit's view, this "reasonable belief" standard was a "model of clarity and comprehensiveness in defining the unlawful-distribution offense." *Id.* at 388. If the government proved that the doctor's belief was objectively "[un]reasonabl[e]" the jury was free to convict under Section 841(a)(1). *Ibid.* Accordingly, the Sixth Circuit insisted that a doctor's subjective intent was beside the point. Indeed, the Sixth Circuit characterized as "extreme" and "incorrect" the suggestion that a jury should acquit a physician if he prescribed "in accordance with what he believed to be proper medical practice." *United States* v. *Godofsky*, 943 F.3d 1011, 1022, 1027 (2019).[1]

But just last month, this Court endorsed precisely the standard that the Sixth Circuit regarded as too "extreme." In *Ruan*, the Court held that Section 841(a)(1) requires a jury to find that a physician otherwise authorized to prescribed controlled substances may not be convicted unless the jury finds

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[1] Two other courts of appeals agreed with the Sixth Circuit's "reasonableness" standard. See, *e.g.*, *United States* v. *Wexler*, 522 F.3d 194, 206 (2d Cir. 2008) (describing the "objective standard of reasonableness required for a finding of good faith"); *United States* v. *Hurwitz*, 459 F.3d 463, 479 (4th Cir. 2006) (similar).

that she subjectively intended to prescribe in an unauthorized manner. 142 S. Ct. at 2375. Once a defendant "produces evidence that he or she was authorized to dispense controlled substances,"—*e.g.* by showing registration with the Attorney General—the government "must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so." *Ibid.* The Court emphasized that Section 841's *mens rea* requirement "plays a critical role in separating a defendant's wrongful from innocent conduct." *Id.* at 2379.

B. Factual Background

1. Petitioner Dr. Saad Sakkal practiced medicine for more than forty-five years. Between 2015 and 2016, Petitioner practiced as a physician at Lindenwald Medical Association in Hamilton, Ohio. At that time, Petitioner was a registered physician with a license to practice medicine in Ohio, and had a DEA registration number to dispense Schedule II through Schedule V controlled substances. See App., *infra*, 2a-3a.

On June 21, 2018, a grand jury indicted Dr. Sakkal on charges of illegal distribution of controlled substances under 21 U.S.C. § 841(a)(1), illegal distribution that resulted in two patient deaths under 21 U.S.C. § 841(b)(1)(C), and use of another person's registration number to dispense controlled substances under 21 U.S.C. § 843(a)(2). Petitioner pleaded not guilty, and went to trial.

2. At trial, the government contended that Petitioner had ignored "warning signs" when he issued prescriptions, and criticized him for failing to

use the Ohio Automated Rx Reporting System, a program that monitors controlled substance prescriptions across medical providers. 4/1/19 Tr. 22, 33 (Dkt. 67); 4/9/19 Tr. 98-99, 138 (Dkt. 74). The government asserted that Petitioner had prescribed dangerous combinations of drugs, and it adduced testimony from local pharmacists who had refused to fill certain prescriptions written by Petitioner. See 4/1/19 Tr. 16 (Dkt. 67); 4/2/19 Tr. 130 (Dkt. 68); 4/2/19 Tr. 177-179 (Dkt. 68).

The lynchpin of the government's case was the testimony of Dr. Timothy King, a "pain management physician." See 4/8/19 Tr. 25 (Dkt. 73). Dr. King testified that Petitioner's prescriptions lacked a legitimate medical purpose because Dr. Sakkal had failed to follow the "standard of care." See, *e.g.*, 4/8/19 Tr. 111 (Dkt. 73) (prescription did not have "legitimate medical purpose" because "the foundational elements required by standard of care were not addressed and objectively defined"); 4/8/19 Tr. 134 (Dkt. 73) ("That's outside the standard of care. If they are prescribed, it's not for a legitimate medical purpose.").

For his part, Petitioner asserted that, whatever his occasional mistakes, he did not act with the requisite criminal intent. In his opening statement, defense counsel told the jury that there would be no evidence showing that Petitioner "acted with malicious intent, criminal intent," or "greed." 4/1/19 Tr. 3 (Dkt. 46). At trial, counsel elicited testimony from former Lindenwald employees who acknowledged that Petitioner cared about his patients and sought to secure their well-being. See, *e.g.*, 4/3/19 Tr. 208 (Dkt. 69) (Robbi Mott, a former receptionist at Lindenwald, testified that Petitioner was a "good

doctor" and she "felt that he cared" for his patients); 4/3/19 Tr. 152 (Dkt. 69) (Deborah Clowers, a former practice manager at Lindenwald, testified that Petitioner "was doing a good job," was "practicing medicine in good faith," and was generally "a good doctor"). And in final argument, defense counsel reiterated that the question was not whether Petitioner had acted negligently or committed malpractice, but "whether or not he abandoned his role altogether as a physician and became a drug dealer." 4/9/19 Tr. 142 (Dkt. 74).

3. Given the centrality of his scienter defense, Petitioner requested jury instructions on both intent and good faith. Among other things, Petitioner asked the Court to instruct the jury that it should acquit him unless it found that he had:

> acted with *intent* to distribute the drugs and with *intent* to distribute them outside the course of professional practice. *In other words, the jury must make a finding of intent, not merely with respect to distribution, but also with respect to the doctor's intent to act as a pusher rather than a medical professional.*

App., *infra*, 16a (emphasis added). In support of this requested instruction, Petitioner cited the Ninth Circuit's decision in *United States* v. *Feingold*, 454 F.3d 1001 (2006), in which that court, anticipating this Court's decision in *Ruan*, held that a physician may not be convicted under Section 841(a)(1) unless he subjectively intended to depart from professional standards.

Petitioner also asked the Court to instruct the jury on the meaning of the term "outside the bounds

of professional medical practice," and to clarify that this term means "a physician's authority to prescribe drugs as being used not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or of dispensing controlled substances for other than a legitimate medical purpose; for example, the personal profit of the physician." App., *infra*, 15a. Relatedly, Petitioner asked the Court to provide the following instruction about his theory of defense:

> The defense says that at all times he acted with a legitimate medical and therapeutic purpose within the course of professional practice. While his prescription practices are subject to legitimate debate, he acted at all times in good faith, with no unlawful motive and for the well-being of his patients.

App., *infra*, 17a.

Finally, Petitioner asked the Court to include the standard Sixth Circuit instruction on good faith:

> If a physician dispenses a drug in good faith in the course of medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of accepted medical practice. That is, he has dispensed the drug lawfully.
>
> Good faith in this context means good intentions and an honest exercise of professional judgment as to a patient's medical needs. It means the defendant acted in accordance with what he reasonably believed to be proper medical practice.

Ibid.

4. The district court refused to give Petitioner's requested instruction on intent. To the contrary, the court told that jury that the "knowingly or intentionally" element applied *only* to the act of *distributing or dispensing* (precisely the argument this Court rejected in *Ruan*):

> In order to find the defendant guilty of a violation of 21 U.S.C. 841(a)(1), the government must prove beyond a reasonable doubt each of the following elements:
>
> > (1) The defendant distributed or dispensed a controlled substance as alleged in these counts of the Indictment;
> >
> > (2) The defendant acted knowingly and intentionally in distributing or dispensing that controlled substance; and
> >
> > (3) The defendant's act was not for a legitimate medical purpose in the usual course of his professional practice.

App., *infra*, 19a.

The district court also refused to give Petitioner's requested instructions on the term "outside the bounds of professional practice," and declined to give the theory-of-defense instruction he had proffered. Instead, applying *Volkman*, the district court gave only the "reasonable belief" instruction on good faith that was required by then-binding Sixth Circuit precedent.

5. Petitioner was convicted of thirty counts of illegal distribution of a controlled substance, one count of illegal distribution resulting in death, and six counts of use of another person's registration number

to dispense controlled substances. See App., *infra*, 6a. Petitioner was sentenced to twenty years imprisonment. See Dkt. 97.

C. The Court of Appeals' Decision

The Sixth Circuit, bound by its "reasonably believed" precedent on scienter, affirmed. App., *infra*, 1a-13a. Represented by new counsel, Petitioner contended that his trial lawyer had rendered ineffective assistance by failing to object to the district court's jury instruction on intent. Citing the Ninth Circuit's ruling in *United States* v. *Feingold*, Petitioner asserted that the trial court had improperly confined the intent element to the act of *distributing*, rather than requiring the jury to determine whether Petitioner had intentionally acted *outside the course of professional practice*. Petitioner noted that the "very crux" of his defense was that Petitioner "was negligent but not criminal." See Pet. C.A. Br. 61.

The Sixth Circuit declined to address Petitioner's challenge to the scienter instruction. The court stated that it "generally does not entertain ineffective-assistance-of-counsel claims on direct appeal because there has not been an opportunity to develop an adequate record." App., *infra*, 10a.[2]

Petitioner's motion for panel rehearing and rehearing en banc was summarily denied on April 27, 2022.

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[2] Petitioner also contended that his trial counsel had rendered ineffective assistance on a number of other bases, including that trial counsel had been derelict during the plea-bargaining process. Petitioner does not present these issues for this Court's review, but likewise does not waive his right to raise them on collateral review under 28 U.S.C. § 2255.

REASONS FOR GRANTING THE PETITION

In *Ruan* v. *United States*, 142 S. Ct. 2370 (2022), this Court held that Section 841's *mens rea* requirement extends to the statute's "except as authorized" clause. In order to convict a doctor for unlawfully distributing controlled substances under Section 841(a)(1), the government must prove beyond a reasonable doubt that the doctor knowingly or intentionally "acted in an unauthorized manner." Petitioner sought just such an instruction at trial but the district court refused to give it. Because the scienter requirement "plays a critical role in separating a defendant's wrongful from innocent conduct" (*Ruan*, 142 S. Ct. at 2379), this Court should grant this petition for certiorari, vacate the judgment of the Sixth Circuit, and remand this case for further consideration in light of *Ruan*.

1. At the time Petitioner went to trial, the law of the Sixth Circuit was well-settled. In *United States* v. *Volkman*, 797 F.3d 377 (2015), the Sixth Circuit upheld a jury instruction stating that a physician may not be convicted if he "dispenses a drug in good faith," where good faith "means that the defendant acted in accordance with what he *reasonably believed* to be proper medical practice." *Id.* at 387 (emphasis added). The court of appeals characterized this "objective intent" instruction as "a model of clarity and comprehensiveness in defining the unlawful distribution offense for a case involving a so-called 'pill mill' doctor." *Id.* at 388. The Sixth Circuit therefore adhered to its "reasonable belief" standard in its most recent decision preceding Dr. Sakkal's conviction. As the court of appeals stated in *United States* v. *Godofsky*, 943 F.3d 1011 (6th Cir. 2019), "good faith" in Section 841 cases "do[es] not mean

subjective good faith," but instead requires "*objective* good faith: whether a reasonable doctor under the circumstances could have believed, albeit mistakenly, that he had acted within the scope of ordinary professional medical practice for a legitimate medical purpose." *Id.* at 1026.

2. *Ruan* unequivocally rejected the Sixth Circuit's "reasonable belief" standard. Indeed, in that case the government specifically asked the Court to "read the statute as implicitly containing an 'objectively reasonable good-faith effort' or 'objective honest-effort standard.'" 142 S. Ct. at 2381 (quoting U.S. Br. at 16-17). But the Court squarely rejected this argument. An objective reasonableness standard, the Court explained, "would turn a defendant's criminal liability on the mental state of a hypothetical 'reasonable' doctor, not on the mental state of the defendant himself or herself," thereby "reduc[ing] culpability on the all-important element of the crime to negligence." *Ibid.* *Ruan* thereby overruled the Sixth Circuit's "reasonable belief" standard as articulated in *Volkman* and its progeny.

3. Petitioner expressly sought an instruction that, if given, would have correctly told the jury that it "must make a finding of intent, not merely with respect to distribution, but also with respect to the doctor's intent to act as a pusher rather than a medical professional." App., *infra*, 16a. Bound by Sixth Circuit precedent, the district court refused to give that instruction. Instead, the trial court instructed the jury that it could convict Petitioner as a drug dealer unless he "acted in accordance with what he reasonably believed to be proper medical

practice." App., *infra*, 19a. That instruction is flatly inconsistent with *Ruan*.

The erroneous "reasonable belief" standard gutted the very core of Petitioner's defense. It also enabled the government to tell the jury, both in argument and through its expert witness, that a departure from the medical standard of care was sufficient to convict. 4/8/19 Tr. 111 (Dkt. 73); 4/8/19 Tr. 118 (Dkt. 73); 4/9/19 Tr. 187 (Dkt. 74). Because "the jury was not correctly instructed on the meaning of [the *mens rea* requirement], it may have convicted [Petitioner] for conduct that is not unlawful." *McDonnell* v. *United States*, 136 S. Ct. 2355, 2375 (2016). That precludes any finding that the "errors in the jury instructions were harmless beyond a reasonable doubt." *Ibid.* (quotation marks omitted). "In a criminal appeal where a mens rea-related jury instruction issue may have made a difference to the conviction and sentence, it is critically important to ensure that the jury had a correct understanding of the relevant law." *United States* v. *Williams*, 836 F.3d 1, 20 (D.C. Cir. 2016) (Kavanaugh, J., concurring).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of this Court's decision in *Ruan* v. *United States*, 142 S. Ct. 2370 (2022).

Respectfully submitted.

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July 26, 2022

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-3880

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

SAAD SAKKAL, M.D.,

Defendant–Appellant.

Decided: Feb. 24, 2022

Appeal from the United States District Court
for the Southern District of Ohio
(No. 1:18-cr-00088-1)
Michael R. Barrett, U.S. District
Judge, Presiding

Before: ROGERS, STRANCH, and DONALD, Circuit Judges.

ROGERS, Circuit Judge:

As a physician at Lindenwald Medical Association, defendant Saad Sakkal prescribed various controlled substances to help patients manage pain. Following a Drug Enforcement Administration investigation, a grand jury indicted Sakkal on thirty-nine counts related to the illegal distribution of controlled substances, which included two charges of illegal distribution that resulted in death. Sakkal was arrested, and the district court ordered that Sakkal be held without pretrial bond. After trial, the jury convicted Sakkal on all counts except for one death count and one count of using another person's registration number to prescribe controlled substances. Sakkal moved for a new trial and retained new counsel, who raised a claim of ineffective assistance of the previous trial counsel. Following a hearing on the question of whether previous counsel was ineffective, the district court denied Sakkal's motion. On appeal, Sakkal argues that (1) the trial court improperly denied him bail; (2) the evidence was not sufficient to conclude that Sakkal's distribution of controlled substances caused a person's death; and (3) Sakkal received ineffective assistance of counsel at the plea-bargaining stage and during trial. None of these arguments warrants reversal.

Saad Sakkal practiced medicine at Lindenwald Medical Association from February 2015 to December 2016. Sakkal was licensed to practice medicine in Ohio and also had a DEA registration number to dispense Schedule II through Schedule V controlled

substances. The DEA began investigating Sakkal's prescription practices after a referral from the Ohio Medical Board, which had received several phone calls from pharmacists about Sakkal issuing problematic prescriptions.

In June 2018, a grand jury returned a thirty-nine-count indictment against Sakkal: thirty counts of illegal distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1); two counts of distribution of a controlled substance that resulted in death in violation of 21 U.S.C. § 841(b)(1)(C); and seven counts of using the registration number of another to dispense a controlled substance in violation of 21 U.S.C. § 843(a)(2). The magistrate judge initially ordered a $250,000 bond. The Government appealed the magistrate judge's order, and the district court overruled the magistrate judge's determination and ordered the U.S. Marshals Service to place Sakkal in custody without bond.

At trial, the Government introduced testimony that Sakkal utilized several dangerous prescription methods. The Government's expert, Dr. Timothy King, testified that Sakkal was prescribing multiple substances that served the same purpose and that this "therapeutic duplication" risked "significant adverse effects, including respiratory sedation and death." Sakkal also prescribed several dangerous combinations of controlled substances, including: (1) amphetamines and opioids; (2) methadone with a benzodiazepine and an amphetamine; and (3) opioids with a benzodiazepine and a muscle relaxant, Soma. Finally, Sakkal sometimes prescribed high amounts of controlled substances.

The Government also presented testimony that Sakkal ignored warning signs about the danger of his prescription practices. Employees at Lindenwald administered drug screens to determine if patients were taking their controlled substances as prescribed and to evaluate whether the patient was also taking illegal controlled substances. These drug screens operate as an objective method to ensure that controlled-substance prescriptions do not contribute to a risk of overdose or maintenance of an addiction. Sakkal's records indicated that his patients' drug screens sometimes revealed that patients were taking unprescribed controlled substances or were not taking prescribed controlled substances. Sakkal's records never showed that he discharged or disciplined a patient because of the concerning drug screens.

Sakkal also failed to use the Ohio Automated Rx Reporting System (OARRS) to monitor his patients' prescriptions for controlled substances. This system is designed to log all of a patient's controlled-substance prescriptions that are filled or dispensed in Ohio. This allows a physician to ensure that patients have not already received a prescription for their ailments and to confirm that patients have not been doctor shopping to obtain controlled substances. Even when other Lindenwald employees provided Sakkal with OARRS reports for his patients, he did not review the reports.

Several pharmacies became aware of Sakkal's prescription practices and began calling Lindenwald to discuss concerns about these practices. Sakkal met with at least three pharmacies to discuss these concerns, but he did not change his prescribing

practices. Some pharmacies decided to stop filling Sakkal's prescriptions for controlled substances.

In addition to charging Sakkal with illegal distribution of controlled substances, the indictment charged Sakkal with two counts of illegally distributing controlled substances that resulted in a patient's death. One of these patients, Ashley Adkins, visited Sakkal for the first time in December 2015. After Sakkal conducted an examination in "medical student type fashion," he prescribed seventeen medications for Adkins, including a "fairly high dose" of a benzodiazepine and a muscle relaxant. On January 18, 2016, an anonymous caller reported to Lindenwald that Adkins was abusing her medications and looking to sell or trade them. That same day, Adkins returned for a second appointment and reported having anxiety and pain. Her medical record from that day states: "She appears to be under the influence of either drugs or alcohol. Her speech is very slurred, her balance is off." Despite these concerning signs, Sakkal prescribed Adkins another benzodiazepine and a low dose of oxycodone.

Following the appointment, Adkins went with her living companion, Chris Norvell, to fill her prescriptions. The two spent time together afterwards, and Adkins passed away during the night while Norvell was asleep. When Norvell woke up, he realized that Adkins had died and noticed that half the bottle of oxycodone was gone. A coroner performed an autopsy and concluded that Adkins died of benzodiazepine and oxycodone toxicity. The autopsy did not locate any fentanyl, cocaine, or marijuana in Adkins's blood. The toxicology report indicated that Adkins's benzodiazepine and oxycodone levels were

outside the therapeutic ranges. On cross examination, however, King acknowledged that Adkins would have had appropriate levels of benzodiazepine and oxycodone in her system if she had taken Sakkal's prescriptions as directed.

The jury convicted Sakkal of thirty counts of illegally distributing a controlled substance, the death count involving Adkins, and six counts of using the registration number of another to dispense a controlled substance. Sakkal's counsel filed a motion for a new trial, and Sakkal hired separate counsel to file supplements to the motion, asserting that Sakkal received ineffective assistance of trial counsel. Sakkal argued that his trial counsel, among other things, provided ineffective assistance during the plea-bargaining process and by deciding not to call an expert witness. The district court held an evidentiary hearing on the motion for a new trial. At the hearing, Sakkal's trial counsel testified about his advice regarding the plea offer and the strategy behind his decision not to call an expert witness. The district court denied Sakkal's motion for a new trial, reasoning that trial counsel's recommendation to "seriously consider" accepting the plea offer was competent advice. The district court also concluded that Sakkal's trial counsel "conducted a reasonable examination" into the viability of calling expert witnesses in Sakkal's defense and that this strategy did not amount to ineffective assistance of counsel. In the alternative, the district court concluded that Sakkal had not shown he was prejudiced by the alleged ineffective assistance of counsel. Sakkal timely filed his notice of appeal.

Sakkal first argues that the district judge failed to grant him reasonable bail pursuant to 18 U.S.C. § 3142(f) and that the failure to give him reasonable bail violated his rights under the Sixth and Eighth Amendments. This claim fails because Sakkal's subsequent conviction and sentencing render his pretrial detention claims moot.[1] Constitutional claims and 18 U.S.C. § 3142 claims to pretrial bail become moot once the defendant is convicted. *United States v. Manthey*, 92 F. App'x 291, 297 (6th Cir. 2004) (citing *Murphy v. Hunt*, 455 U.S. 478, 481 (1982)) (constitutional claims); *United States v. Mattice*, No. 17-4276, 2018 WL 2945942, at *1 (6th Cir. June 11, 2018) (18 U.S.C. § 3142 claims); *see also United States v. Lyle*, 793 F.2d 1294, at *2 (6th Cir. 1986) (table). Once Sakkal was convicted on thirty-seven counts in the indictment, his claims concerning pretrial detention became moot because he was credited for the time he spent in detention.

Sakkal next asserts that the evidence presented during trial was insufficient to establish that he caused Adkins's death. The Government presented ample evidence, however, that the benzodiazepine and oxycodone prescribed by Sakkal were the but-for cause of Adkins's death, and this evidence was

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[1] To the extent that Sakkal argues that his detention prevented him from effectively communicating with his counsel to prepare his defense, the district court did not consider this ineffective-assistance-of-counsel claim in the post-trial evidentiary hearing or in its order denying the motion for a new trial. This court generally does not consider an ineffective-assistance-of-counsel claim on direct appeal where there has not been an opportunity to develop an adequate record for review, *United States v. Williams*, 612 F.3d 500, 508 (6th Cir. 2010), and we therefore decline to review this claim on direct appeal.

sufficient for the jury to convict Sakkal of the death count related to Adkins. As Sakkal concedes in his opening brief, Adkins filled her prescriptions from Sakkal on the day she died, and she took half of the bottle of oxycodone within a four-to-five-hour period the night she died. The coroner testified that Adkins had no fentanyl, cocaine, or marijuana in her system and that Adkins died from "both oxycodone and benzodiazepine toxicity." The Controlled Substances Act provides an enhanced penalty where "death or injury results from the use of" a controlled substance distributed in violation of 21 U.S.C. § 841(a)(1). *United States v. Jeffries*, 958 F.3d 517, 519 (6th Cir. 2020) (quoting 21 U.S.C. § 841(b)(1)(C)). To establish that a "physician violates the CSA in a manner that leads to the death of a patient," the "use of the drug must have been a but-for cause of the victim's death," *United States v. Volkman*, 797 F.3d 377, 392 (6th Cir. 2015), and such causation "exists where use of the controlled substance 'combines with other factors to produce' death, and death would not have occurred 'without the incremental effect' of the controlled substance," *id.* (quoting *Burrage v. United States*, 571 U.S. 204, 211 (2014)). Construing the Government's evidence in the light most favorable to the Government, *United States v. Williams*, 998 F.3d 716, 727 (6th Cir. 2021), a rational trier-of-fact could conclude that Adkins would not have died without the use of the oxycodone and benzodiazepine prescribed by Sakkal.

Sakkal argues that he did not cause Adkins's death because, if Adkins had taken the benzodiazepine and oxycodone as Sakkal directed, she would not have died. But the causal relationship required to apply the penalty enhancement in 21

U.S.C. § 841(b)(1)(C) is "between the decedent's use of the controlled substance and the resultant death." *Jeffries*, 958 F.3d at 520. Thus, "[t]he question under this statute's language is whether death resulted from use of the controlled substance—not whether death was a foreseeable result of the defendant's § 841(a)(1) violation." *Id.* at 520–21. The enhancement therefore does not require the Government to prove that Sakkal directed Adkins to ingest lethal amounts of the controlled substances; rather, the Government satisfied its burden by demonstrating that Adkins died from ingesting the controlled substances Sakkal prescribed to her.

Sakkal contends that the but-for causation requirement for the § 841(b)(1)(C) penalty enhancement would put "every practicing physician in the United States at considerable risk." But this assertion fails to recognize that the Government must also prove, as it did here, that a physician distributed controlled substances without any legitimate medical purpose in violation of § 841(a)(1) in order to hold a physician criminally liable for a patient's overdose death.

In his reply brief, Sakkal argues for the first time that the evidence was insufficient for the jury to conclude that he prescribed controlled substances to Adkins without a legitimate medical purpose. But "an appellant abandons all issues not raised and argued in its initial brief on appeal." *Bard v. Brown Cnty.*, 970 F.3d 738, 751 (6th Cir. 2020) (quoting *United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006)). We have consistently refused to review arguments raised for the first time in a reply brief on appeal because the Government has not had an opportunity to respond to

the arguments. *United States v. Adams*, 598 F. App'x 425, 429 (6th Cir. 2015) (citing *United States v. Campbell*, 279 F.3d 392, 401 (6th Cir. 2002)). We therefore decline to review this sufficiency-of-the-evidence claim raised for the first time in his reply brief.

Sakkal next raises several ineffective-assistance-of-counsel claims on direct appeal. This court generally does not entertain ineffective-assistance-of-counsel claims on direct appeal because there has not been an opportunity to develop an adequate record to evaluate the merits of the allegations. *United States v. Williams*, 612 F.3d 500, 508 (6th Cir. 2010). "Such claims 'are more properly available in a post-conviction proceeding under 28 U.S.C. § 2255, after the parties have had the opportunity to develop an adequate record on the issue from which the reviewing court is capable of arriving at an informed decision.'" *Id.* (quoting *United States v. Rahal*, 191 F.3d 642, 645 (6th Cir. 1999)). Only two of Sakkal's claims are properly presented for review, the district court having developed a record below on those two issues by holding a hearing and evaluating Sakkal's arguments. Accordingly, we review Sakkal's two ineffective-assistance-of-counsel claims for which there is an adequate record for review, and we decline to review Sakkal's remaining ineffective-assistance-of-counsel claims on direct appeal.[2]

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[2] To be clear, the claims we decline to review include: Sakkal received ineffective assistance of counsel because he could not communicate with his counsel while detained to prepare his defense; Sakkal's counsel did not file any motions in limine concerning the DEA phone call or the limits of Dr. King's testimony; Sakkal's counsel did not object to testimony by the

First, Sakkal contends that his trial counsel's actions during the plea-bargaining process amounted to ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). Sakkal fails to establish this claim because he does not show that his counsel's advice constituted deficient performance. In determining that Sakkal's trial counsel gave competent advice about whether to accept the plea offer, the district court credited the testimony of Sakkal's counsel that, shortly before the trial began, he discussed the terms of the plea bargain with Sakkal and told him to "seriously consider taking the plea offer" because it was substantially below the minimum term Sakkal faced if convicted on the death counts. Sakkal's counsel explained that Sakkal would likely have to serve only a short term of imprisonment under the plea offer because of the time he had already served in pretrial detention and the opportunities he would have with the Bureau of Prison to receive good-credit time and to serve the final six months of his term in a halfway house. Reviewing these factual findings for clear error, *Logan v. United States*, 910 F.3d 864, 868 (6th Cir. 2018) (citing *Guerrero v. United States*, 383 F.3d 409, 414 (6th Cir. 2004)), the district court did not clearly err in crediting the testimony of Sakkal's previous trial counsel. Sakkal must show that this performance by his counsel was deficient and that he suffered prejudice because of the deficiency to succeed on his

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computer programmer; Sakkal's counsel did not object to testimony by a pharmacist; Sakkal's counsel did not object to a witness's testimony about an uncharged death; Sakkal's counsel did not object to the testimony of a former employee's opinion; and Sakkal's counsel did not object to the jury instructions about the necessary intent required to convict Sakkal.

ineffective-assistance-of-counsel claim. *Strickland*, 466 U.S. at 687.

Sakkal argues that his counsel's recommendation was insufficient because it came after months "of insincere assessments of his chances at trial and unreal expectations of an 'acquittal' and 'exoneration' when no actual preparations for success were being made by" his counsel. But the district court correctly noted that, in a previous hypothetical discussion between Sakkal and his trial counsel, Sakkal stated that he did not want to take a three-year plea offer because he thought he was innocent. And "[t]he decision to plead guilty—first, last, and always—rests with the defendant." *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003). Although Sakkal is entitled to effective assistance of counsel once the Government offered him a plea bargain, *Logan*, 910 F.3d at 871 (quoting *Lafler v. Cooper*, 566 U.S. 156, 168 (2012)), Sakkal has not shown that his counsel's recommendation that Sakkal "seriously consider" the plea offer amounted to deficient performance in light of Sakkal's previous hesitancy to consider a three-year plea deal.

Second, regarding his trial, Sakkal arguably renews his claim from below that his counsel's trial strategy not to call an expert witness amounted to ineffective assistance of counsel. *See* Appellant's Brief at 55–56. But Sakkal fails to show that his trial counsel's performance was deficient. As the district court noted, Sakkal's trial counsel testified that he decided not to call an expert after he consulted with two potential experts. One of these experts informed Sakkal's counsel that a battle-of-the-experts strategy had been unsuccessful in other cases and that "in his

opinion, there would not be an expert that would be able to testify" for Sakkal and defend his prescribing practices. Sakkal's counsel therefore decided that the best strategy would be to argue that Sakkal prescribed the medications in good faith and lacked the necessary criminal intent. To succeed on his claim, Sakkal must "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"[3] *Stojetz v. Ishee*, 892 F.3d 175, 193 (6th Cir. 2018) (quoting *Strickland*, 466 U.S. at 689). Sakkal does not present any other evidence that his counsel's trial strategy was deficient. In the absence of deficient performance by Sakkal's counsel on either ineffective-assistance-of-counsel claim, these claims are without merit, and we need not address the district court's alternative conclusions that Sakkal failed to establish prejudice for either claim.

For the foregoing reasons, we affirm the judgment of conviction and the district court's judgment with regard to two of Sakkal's ineffective-assistance-of-counsel claims.

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[3] In his reply brief, Sakkal appears to imply, in his argument about the causation issue, that the expert-witness decision was deficient because his counsel should have called him to testify and explain his treatment protocols to rebut the Government's evidence. But we do not consider arguments raised for the first time in a reply brief, *Bard*, 970 F.3d at 751, and Sakkal therefore forfeits this argument. In any event, the district court correctly noted that Sakkal's counsel decided not to call Sakkal as a witness because he believed Sakkal had lied to him and that the Government could discredit his testimony on cross examination. Sakkal does not explain how this tactical decision about his credibility would amount to deficient performance.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-3880

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

SAAD SAKKAL, M.D.,

Defendant–Appellant.

Filed: Apr. 27, 2022

BEFORE: ROGERS, STRANCH, and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX C

UNITED STATES DISTRICT FOR THE
SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAAD SAKKAL, M.D.,

Defendant.

CASE NO. 1:18-cr-88 (MRB)
Filed: Mar. 29, 2019

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* * *

DEFENDANT, SAAD SAKKAL, M.D.'S, REQUESTED JURY INSTRUCTION NO. 2

* * *

Outside the bounds of professional medical practice means a physician's authority to prescribe drugs as being used not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or of dispensing controlled substances for other than a legitimate medical purpose; for example, the personal profit of the physician.

* * *

MEMORANDUM

United States v. Alerre, 430 F.3d 681 (4th Cir. 2005)

* * *

DEFENDANT, SAAD SAKKAL, M.D.'S, REQUESTED JURY INSTRUCTION NO. 3

To convict a practitioner under USC §841(a), the government must prove:

1. That the practitioner distributed controlled substances;

2. That the distribution of those controlled substances was outside the usual course of professional practice and without a legitimate medical purpose; and

3. That the practitioner acted with intent to distribute the drugs and with intent to distribute them outside the course of professional practice. In other words, the jury must make a finding of intent, not merely with respect to distribution, but also with respect to the doctor's intent to act as a pusher rather than a medical professional.

* * *

MEMORANDUM

United States v. Chube, 538 F.3d 693 (7th Cir. 2008)

United States v. Feingold, 454 F.3d 1001 (9th Cir. 2006)

* * *

DEFENDANT, SAAD SAKKAL, M.D.'S, REQUESTED JURY INSTRUCTION NO. 5

That concludes the part of my instructions explaining the elements of the crime. Next I will explain the defendant's position.

The defense says that at all times he acted with a legitimate medical and therapeutic purpose within the course of professional practice. While his prescription practices are subject to legitimate debate, he acted at all times in good faith, with no unlawful motive and for the well-being of his patients.

* * *

MEMORANDUM

Sixth Circuit Pattern Jury Instruction 6.01

* * *

DEFENDANT, SAAD SAKKAL1 M.D.'S, REQUESTED JURY INSTRUCTION NO. 7

* * *

It is the theory of the defense that Dr. Sakkal treated his patients in good faith. If a physician dispenses a drug in good faith in the course of medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of accepted medical practice. That is, he has dispensed the drug lawfully.

Good faith in this context means good intentions and an honest exercise of professional judgment as to a patient's medical needs. It means the defendant acted in accordance with what he reasonably believed to be proper medical practice.

* * *

MEMORANDUM

United States v. Volkman, 736 F.3d 1013 (6th Cir. 2013)

APPENDIX D

UNITED STATES DISTRICT FOR THE
SOUTHERN DISTRICT OF OHIO

UNITED STATES OF AMERICA,

Plaintiff,

v.

SAAD SAKKAL, M.D.,

Defendant.

CASE NO. 1:18-cr-88 (MRB)
CINCINNATI, OHIO
April 9, 2019

DAY 7 OF PROCEEDINGS BEFORE
THE HONORABLE MICHAEL R. BARRETT,
JUDGE, and a JURY

* * *

THE COURT: Okay. You guys ready?

All right. So I'm going to go through the jury instructions, as I said before.

* * *

In order to find the defendant guilty of a violation of 21 U.S.C. 841(a)(1), the government must prove beyond a reasonable doubt each of the following elements:

(1) The defendant distributed or dispensed a controlled substance as alleged in these counts of the Indictment.

(2) The defendant acted knowingly and intentionally in distributing or dispensing that controlled substance; and

(3) The defendant's act was not for a legitimate medical purpose in the usual course of his professional practice.

* * *

The term "usual course of professional practice" means that the practitioner has acted in accordance with the standard of medical practice generally recognized and accepted in the United States.

* * *

It is the theory of the defense that Dr. Sakkal treated his patients in good faith. If a physician dispenses a drug in good faith in the course of medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of accepted medical practice. That is, he has dispensed the drug lawfully.

"Good faith" in this context means good intentions and an honest exercise of professional judgment as to a patient's medical needs. It means that the defendant acted in accordance with what he reasonably believed to be proper medical practice.

* * *