APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-50083

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DALIBOR KABOV,
AKA DABO, AKA DALIBOR DABO KABOV,
Defendant-Appellant.

No. 19-50089

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BERRY KABOV,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California,
D.C. No. 2:15-cr-00511-DMG-2
D.C. No. 2:15-cr-00511-DMG-1
Dolly M. Gee, District Judge, Presiding

NOT FOR PUBLICATION

Argued and Submitted October 19, 2022
Pasadena, California

Filed July 18, 2023
Docket Entry Nos. 154, 155

Molly C. Dwyer, Clerk, U.S. Court of Appeals

MEMORANDUM[*]

Before: WARDLAW, CHRISTEN, and BUMATAY, Circuit Judges.[**]

Defendants Dalibor and Berry Kabov appeal their convictions for drug trafficking, money laundering, and tax-related offenses.[1] We have jurisdiction pursuant to 28 U.S.C. § 1291. We vacate defendants' drug importation convictions (Counts 5 through 8 of the indictment), and remand for the district court to apply the Supreme Court's decision in *Ruan v. United States*, 142 S. Ct. 2370 (2022) in the first instance. We affirm on all other grounds.

I. *Napue*, *Brady*, and Rule 33 Challenges

A. Legal Standards

Defendants raise a litany of claims based on *Napue v. Illinois*, 360 U.S. 264, 269 (1959), *Brady v.*

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[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[**] Judge Wardlaw was randomly selected as a replacement judge for Judge Kleinfeld on this case. Judge Wardlaw has reviewed the briefs and record in this case and has viewed the recording of the oral argument held on October 19, 2022.

[1] For clarity purposes, we refer to each defendant by his first name when necessary to distinguish between them.

Maryland, 373 U.S. 83 (1963), and Federal Rule of Criminal Procedure 33. We review de novo *Napue* and *Brady* claims. *United States v. Rodriguez*, 766 F.3d 970, 980 (9th Cir. 2014). We review the district court's factual determinations concerning *Napue* claims for clear error. *United States v. Renzi*, 769 F.3d 731, 751–52 (9th Cir. 2014). We review for an abuse of discretion the denial of a Rule 33 motion for a new trial based on newly discovered evidence. *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc).

To establish a *Napue* violation, a defendant must show: (1) testimony or evidence presented at trial was "actually false" or misleading; (2) the government knew or should have known that it was false; and (3) the testimony was material, meaning there is a "reasonable likelihood that the false testimony *could* have affected the judgment of the jury." *Renzi*, 769 F.3d at 751 (emphasis added) (quoting *United States v. Houston*, 648 F.3d 806, 814 (9th Cir. 2011)). Testimony is not "actually false" merely because the witness's recollection is "mistaken, inaccurate[,] or rebuttable." *Henry v. Ryan*, 720 F.3d 1073, 1084 (9th Cir. 2013); *see Renzi*, 769 F.3d at 752. But testimony that, "taken as a whole," leaves the jury with a "false impression" will satisfy *Napue*'s first prong. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957) (per curiam).

To establish a *Brady* claim, a defendant must show that: (1) the evidence at issue was favorable to the accused, either because it was exculpatory or because it was impeaching; (2) it was suppressed by the prosecution, either willfully or inadvertently; and (3) it was material. *See Strickler v. Greene*, 527 U.S. 263, 281–82 (1999). Evidence is material for *Brady*

purposes "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding *would* have been different." *Ochoa v. Davis*, 16 F.4th 1314, 1327 (9th Cir. 2021) (emphasis added) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)).

Federal Rule of Criminal Procedure 33 permits the district court to vacate a judgment and grant a new trial based on newly discovered evidence when the "interest of justice so requires." Fed. R. Crim. P. 33(a), (b)(1). We apply a five-part test when analyzing Rule 33 motions. The party seeking a new trial must show:

> (1) the evidence is newly discovered; (2) the defendant was diligent in seeking the evidence; (3) the evidence is material to the issues at trial; (4) the evidence is not (a) cumulative or (b) merely impeaching; and (5) the evidence indicates the defendant *would* probably be acquitted in a new trial.

Hinkson, 585 F.3d at 1264 (emphasis added) (citing *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005)).

B. Challenges to Courtland Gettel's Testimony

Defendants invoke *Napue*, *Brady*, and Rule 33 to challenge the testimony of government witness Courtland Gettel. Defendants argue that: Courtland Gettel lied about the death of his son to invoke sympathy; the government failed to disclose an FBI spreadsheet reflecting Gettel's bank transactions, and Gettel lied about the transactions; Gettel falsely testified that defendants caused his drug relapse and

he suffered multiple opiate-related overdoses and hospitalizations as a result; the government failed to disclose a report of an FBI interview with Gettel's business and criminal partner; the government withheld evidence that would have allowed the defense to argue that Gettel agreed to testify because the government threatened to arrest Gettel's wife; and the Government learned, the day the jury returned its verdict, that Gettel had continued to engage in fraudulent activity and to use drugs while he was cooperating with the government and testifying as a government witness.

All these arguments fail because the government presented overwhelming evidence of defendants' guilt, and none of these purported constitutional violations or additional evidence could or would have changed the outcome of defendants' trial. In short, Gettel's testimony was unnecessary to secure defendants' convictions.[1] The evidence showed, among other things, that: Berry coordinated drug transactions with an informant and stated that he intended to open a "clinic" to distribute more drugs; defendants' fingerprints were found in parcels with oxycodone pills; packages of cash were sent to (and seized from) defendants' private mailboxes; defendants' pharmacy

[1] The government also introduced into evidence text messages that directly corroborated Gettel's statements that he purchased drugs from the Kabovs. Defendants object that the government introduced these messages through Gettel, but the messages were extracted directly from defendants' cell phones and the government proffered that its agents could authenticate the messages. As such, the government could have introduced the messages as statements of a party opponent.

dealt almost exclusively in the highest dosages of opioids and controlled substances desirable on the black market; defendants used the same stolen identities—those of their college classmates—to obtain phony prescriptions before they opened their pharmacy and to create phony prescriptions at their pharmacy; text messages showed that defendants actively coordinated with a single physician who prescribed about 99 percent of the Kabovs' pharmacy's prescriptions; prescriptions received by the pharmacy suddenly changed to call for compounded pills when defendants stopped ordering pre-manufactured pills wholesale; and discrepancies in defendants' reporting to the California Department of Justice revealed that over 100,000 pills were unaccounted for.

Because the Kabovs cannot satisfy the materiality standards under *Napue*, *Brady*, or Rule 33 with regard to Gettel's testimony, their challenges to Gettel's testimony fail.

C. Other *Napue* Challenges

Defendants argue that the government violated *Napue* by presenting other false testimony at trial. We are not persuaded.

We reject defendants' argument that the government presented false evidence about three commercial mailboxes. First, defendants failed to show that Postal Inspector Daniel Johnson testified falsely when he stated that Dalibor was the "named renter" and "box holder" for mailbox 369. That Dalibor was assigned mailbox 487 on the same day he signed the lease for mailbox 369 does not establish that he was not also the renter of mailbox 369; indeed, the

government's theory at trial was that defendants used multiple mailboxes to facilitate their drug-distribution operations. Defendants also rely on Dalibor's declaration and the absence of additional evidence showing that he extended his initial rental period for mailbox 369. Dalibor did not testify at trial, so he was not available for cross-examination. At most, defendants show that Johnson's testimony was disputed or rebuttable, which is not enough to show that the government presented false evidence. *See Henry*, 720 F.3d at 1084.

Defendants argue that Johnson also falsely testified that defendants were connected to mailbox 409 when Johnson knew that other individuals began renting that mailbox in June 2012. This *Napue* claim fails because Inspector Johnson testified that he intercepted and seized two packages addressed to "D. Kabov" or "Dabo Kabov" at mailbox 409 in December 2011 and January 2012, several months before business records show that others applied to rent the mailbox.

Defendants also attack Johnson's testimony that the Postal Service did not track money sent to mailbox 511 because the Postal Service "knew who the box was rented to." Defendants argue that this testimony falsely implied they rented mailbox 511 when in fact business records showed that Obaidulah Ahmadi rented mailbox 511. Johnson's statement was not misleading, and could not have affected the outcome of the trial, because the jury heard evidence that the intercepted parcels addressed to mailbox 511 were specifically addressed to Ahmadi and the

government's theory at trial was that Ahmadi was a co-participant in defendants' criminal activity.[2]

Defendants next argue the government's fingerprint expert falsely testified about when she first compared defendants' fingerprints to latent fingerprints found on the government's evidence. The expert testified that several of the latent prints matched Dalibor's fingerprints. In response to defense counsel's suggestion on cross-examination that the expert found "no matches" when she first lifted the latent prints in January 2014, the expert responded that "[t]here was no comparison done" at that time. In defendants' telling, the expert's statement was false because she ran the latent fingerprints through an FBI fingerprint database in January 2014, the database contains fingerprints of naturalized citizens, and the Kabovs submitted fingerprints when they were naturalized. Defendants also cite a notation in the expert's report stating that she compared the fingerprints from the evidence to Berry's fingerprints in a "U.S. Citizenship and Immigration [Services]" document. Based on this testimony, defendants speculate that the expert falsely testified about the date of the fingerprint comparison.

Defendants have not met their burden to show that the expert's testimony was false or misleading. In

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[2] Defendants also argue that Buntrock falsely testified that "defendants regularly listed" the commercial mail receiving agencies mailboxes as their addresses. The Kabovs do not develop this argument further. Given that a reasonable jury could conclude that the boxes belonged or were connected to the Kabovs, we are not persuaded that Buntrock's statement was false, misleading, or material.

context, this witness's testimony and her report made clear that she did not conduct a direct comparison between the latent prints and *Dalibor's fingerprint card* because "there was no fingerprint card . . . submitted with the evidence." Defendants fail to show that the expert knew the Kabovs' fingerprints were in the FBI database or that their fingerprints are in fact in the database. *See Henry*, 720 F.3d at 1084.

The government introduced a series of voice recordings from May and June 2012 between Berry and Greg Kneice, another participant in defendants' criminal activity. During cross-examination, the defense asked Johnson whether one of the telephone numbers used in the conversations was, in Johnson's "opinion," "somehow connected to [Berry] Kabov." Johnson answered, "That's correct." Defendants argue that this testimony was false and misleading because the government had subpoenaed telephone account information showing that the number's subscriber was someone else (not Berry). This *Napue* claim fails because the government is under "no obligation to correct [a witness's] qualified testimony about her own reasonably held belief, because it was not actually false." *Hayes v. Ayers*, 632 F.3d 500, 520 (9th Cir. 2011). Johnson's opinion was reasonable given that he was familiar with Berry's voice on the recordings, the participants on the calls discussed the Kabovs' pharmacy and government cash seizures, and the government presented evidence tying Berry to the location identified by the speaker on the recording.

Defendants also argue that Johnson falsely claimed the first recorded telephone call between Kneice and Berry occurred on May 29, 2012, because

digital data from Johnson's computer shows that he downloaded the calls a week before he claimed the calls occurred, and defendants' voice recognition expert concluded Berry was not one of the speakers on the call. These arguments are without merit because defendants fail to show that Johnson's testimony is actually false and not merely inaccurate or rebuttable. *See Henry*, 720 F.3d at 1084. Johnson testified about his process of transcribing the call logs, labeling the recordings, observing the first telephone call, and verifying the date by using Kneice's telephone. Johnson recognized Berry's voice, the jury was able to make its own voice comparison at trial, and circumstantial evidence that Berry was in Laguna Beach the same day the call was placed from that location further corroborated Johnson's statement. This evidence is equally consistent with the metadata being incorrect.

We conclude that defendants' *Napue* challenges fail individually and collectively because defendants failed to establish that much of the evidence they challenge was "actually false" or misleading, and there is not a reasonable probability that absent the remaining evidence, the result at trial could have been different.

II. Recorded Calls

Defendants challenge the district court's decision to admit Kneice's out-of-court statements made during recorded calls connected to the conspiracy. These challenges are without merit.

Defendants first argue that admitting Kneice's statements violated their confrontation rights because

they lacked an opportunity to cross-examine him. We review de novo Confrontation Clause challenges. *United States v. Barragan*, 871 F.3d 689, 705 (9th Cir. 2017). The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* (quoting *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004)). The district court admitted Kneice's statements on the recorded telephone calls only to give context to Berry's statements on the calls, and the court instructed the jury that it could not consider Kneice's statements for any other reason. Under our precedent, the admission of Kneice's statements for this purpose did not violate the Confrontation Clause. *See id.* at 704–05.

Defendants also argue that Johnson's opinion that Berry was one of the speakers on the recorded calls was based solely on Kneice's out-of-court statements. This argument fails because Johnson testified that he instructed Kneice to call Berry and personally observed that call, and Johnson had personal knowledge that allowed him to recognize Berry's voice.[3]

Defendants next argue that the district court abused its discretion by admitting the voice recordings

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[3] Defendants also challenge Kneice's statements that the government elicited during a hearing outside the presence of the jury, at which the district court considered whether to admit the call log and recordings. These confrontation challenges fail because even assuming there was a Confrontation Clause violation, any error was harmless beyond a reasonable doubt given the other evidence in the record that authenticated the calls and overwhelmingly established defendants' guilt.

and Johnson's call log because they were not properly authenticated. We review for an abuse of discretion the district court's authentication decisions and decisions to admit lay opinion testimony. *United States v. Estrada-Eliverio*, 583 F.3d 669, 672 (9th Cir. 2009); *United States v. Ortiz*, 776 F.3d 1042, 1044 (9th Cir. 2015). The district court did not abuse its discretion because a reasonable jury could find that the recordings and log were what the government claimed that they were. *See* Fed. R. Evid. 901(a); *United States v. Gadson*, 763 F.3d 1189, 1203–04 (9th Cir. 2014). For audio recordings, a witness who testifies that he recognizes a voice on a recording, or provision of other extrinsic evidence, may be sufficient for authentication. *See Gadson*, 763 F.3d at 1204. Johnson testified about Kneice's cooperation and his supervision of Kneice, how the calls were recorded and stored, and how he created the log. Johnson also confirmed that the recordings were accurate copies of the calls he recorded. The content of the calls further reinforced the calls' authenticity and that Berry was one of the speakers. Additionally, Drug Enforcement Administration (DEA) Investigator Kevin Buntrock testified to the jury that he was familiar with Berry's voice and recognized it in the recordings. Defendants' arguments focus on discrepancies in the recordings and Johnson's call log, but these arguments regarding accuracy and chain of custody are relevant only to the evidence's probative value, not its admissibility. *See id.* at 1204.

Last, defendants argue that the district court violated their due process rights by admitting the recordings and letting Johnson testify about them because he deleted the original recordings from his

computer. This claim is forfeited because defendants did not raise it in a motion to suppress before trial, and the district court never addressed it. *See United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002); *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1260 n.8 (9th Cir. 2010). Motions to suppress must be made before trial "if the basis for the motion is then reasonably available" and the motion "can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3)(C). Motions that do not meet this deadline are untimely and may be considered only if the movant shows "good cause." Fed. R. Crim. P. 12(c). Defendants' good cause arguments—which they raise for the first time in their reply brief on appeal—do not withstand scrutiny because the record demonstrates the defense knew that Johnson had deleted the original recordings before he testified, and defense counsel highlighted the significance of that fact in his opening statement.

III. Challenged Jury Instructions

Defendants challenge the district court's jury instructions regarding the drug distribution and importation counts. We address each in turn.

Defendants do not dispute that they invited instructional error by proposing the distribution jury instructions they now challenge on appeal.[4] *See United States v. Perez*, 116 F.3d 840, 844 (9th Cir.

[4] The district court instructed the jury that the government needed to prove beyond a reasonable doubt that "the defendant acted with the intent to distribute the identified controlled substance outside the usual course of professional practice and without legitimate medical purpose."

1997) (en banc) (explaining that "the defendant himself propos[ing] allegedly flawed jury instructions" is a prototypical example of inducing or causing error); *United States v. Myers*, 804 F.3d 1246, 1254 (9th Cir. 2015) (explaining that when a defendant has invited the error and relinquished a known right, the alleged error is considered "waived and therefore unreviewable" (quoting *Perez*, 116 F.3d at 845)). The record reflects that defendants relinquished a known right because the arguments they raise on appeal concerning the distribution instructions are functionally the same arguments they made to the district court to support their proposed instruction. Defendants' challenges to these instructions fail.

Defendants were separately charged with and convicted of several counts of unlawfully importing controlled substances (Counts 5 through 8). Defendants argue that the district court failed to properly instruct the jury on the defense's theory for these counts, which was that defendants imported steroids for legitimate use and believed that their importation was lawful because their pharmacy was registered with the DEA. In support of their requested instruction, defendants presented evidence that they told their Chinese supplier to report the imported drugs to American customs officials. Defendants argued to the district court that their requested instruction required the jury to find defendants "knew that the importation was unlawful either as a result of intentional failure to obtain an import license or because it was obtained while acting and intending to act outside the usual course of professional practice and without a legitimate medical purpose." Defendants also argued to the district court that

knowledge that their importation was unlawful was an element of the importation offense. The government argues that defendants' instruction was not legally required because defendants did not provide evidence that they had a valid importation license. The district court declined to give defendants' requested instruction.[5]

The district court did not have the benefit of the Supreme Court's decisions in *Rehaif v. United States*, 139 S. Ct. 2191 (2019) and *Ruan v. United States*, 142 S. Ct. 2370 (2022), which bear on the questions presented here. We take no position on the parties' arguments, but rather vacate defendants' convictions on the importation counts and remand for the district court to apply *Rehaif* and *Ruan* in the first instance, decide whether the jury was properly instructed in light of those decisions, and for any further proceedings that may be required.

IV. Challenges to Dang's Expert Testimony

The government called Dr. Janice Dang of the California State Board of Pharmacy to testify as an

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[5] The district court instructed the jury that to meet its burden of proof on the importation counts, the government needed to prove:

> First, the defendant knowingly brought or caused to be brought the controlled substance named in the respective counts of the indictment into the United States from a place outside the United States.
>
> And second, the defendant knew the substance was the controlled substance named in the respective count of the indictment or some other prohibited drug.

The conspiracy instructions mirrored these instructions.

expert witness about the usual course of professional pharmacy practice and whether defendants' actions comported with the ordinary standards imposed on pharmacies by state regulatory law. Over defense objection, the district court permitted Dr. Dang to testify as an expert witness and to testify about how legitimate pharmacies operate. We review for an abuse of discretion the district court's decision to admit expert testimony. *United States v. Feingold*, 454 F.3d 1001, 1006 (9th Cir. 2006).

Defendants first argue that the district court failed to act as a "gatekeeper" under Federal Rule of Evidence 702 because the court did not explicitly determine whether Dr. Dang's testimony was reliable. *See United States v. Valencia-Lopez*, 971 F.3d 891, 898 (9th Cir. 2020) (explaining that a district court abuses its discretion by admitting expert testimony without making any reliability findings). This argument is without merit. Pretrial, defendants argued that Dr. Dang's testimony should be excluded on *Daubert* grounds because the government failed to show that she "applied reliable principles and methods to arrive at her conclusions," or that her "opinions have any acceptance." The district court explicitly rejected these arguments because Dr. Dang's testimony was based on "her knowledge and experience," not "scientific or technical analysis." The record showed that Dr. Dang had worked for the Board of Pharmacy for seventeen years as an investigator. The district court cited our decision in *Hangarter v. Provident Life and Accident Insurance Co.*, 373 F.3d 998 (9th Cir. 2004), which describes the applicable reliability inquiry when an expert provides non-scientific testimony. *Id.* at 1017–18. The court concluded that Dr. Dang "had a great

deal of experience inspecting and supervising the inspection of pharmacies to ensure compliance with governing laws and regulations." The court fulfilled its gatekeeping function.

Defendants next argue that Dr. Dang's testimony was not relevant or helpful to the jury and instead injected a lower civil standard of proof into the jury's determination. Defendants' argument cannot be reconciled with our holding and analysis in *Feingold*, where we concluded that expert testimony about the applicable standard of care for medical professionals prescribing medicines used for pain control was relevant and admissible in a prosecution for unlawful distribution. 454 F.3d at 1007. Expert testimony about accepted pharmaceutical practices was helpful for the jury to determine whether defendants were operating as a legitimate pharmacy, or unlawfully distributing controlled substances. *Id.* As explained, defendants waived any objection that the district court did not correctly instruct the jury about the proper standard for criminal liability for drug distribution.[6] *See supra*.

Defendants also argue that Dr. Dang's testimony was unduly prejudicial because they were only pharmacy owners, not licensed pharmacists. We hold

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[6] For the same reasons, we reject defendants' contention that the government's closing argument improperly relied on the standard for civil infractions to establish criminal liability. The district court instructed the jury, consistent with *Feingold*, that the government was required to prove the distribution was *both* (1) "outside the course of professional practice," which is the standard of pharmaceutical practice "generally recognized and accepted in the country"; and (2) "without a legitimate medical purpose."

that the district court did not abuse its discretion by concluding that the probative value of Dr. Dang's testimony was not substantially outweighed by the danger of undue prejudice. *See* Fed. R. Evid. 403. The primary factual issue at trial was whether the Kabovs used their pharmacy to engage in unlawful drug distribution. Testimony that the pharmacy operated far outside of accepted pharmaceutical practices was directly relevant to proving the government's theory that defendants' distributions were without authorization. The district court did not abuse its discretion by admitting Dr. Dang's testimony.

V. Evidentiary Objections

We are not persuaded by defendants' remaining evidentiary objections. Defendants argue that two government witnesses—Internal Revenue Service Special Agent Carlos Tropea and DEA Investigator Buntrock—offered a mix of lay and expert opinion testimony and that the district court failed to give an appropriate "dual role" instruction. *See United States v. Vera*, 770 F.3d 1232, 1246 (9th Cir. 2014). Neither Tropea nor Buntrock provided dual-role testimony, so the instruction was not warranted for either witness. The government called Tropea as an expert witness. His conclusions that defendants' financial records were inconsistent with their receipt of cash gifts from their mother, and that any glitches in defendants' pill reporting system would not affect his analysis, constituted expert testimony because these opinions were based on his specialized knowledge and training. *See* Fed. R. Evid. 702, 703. Conversely, Buntrock provided only lay witness testimony based on his involvement in this investigation. We have long

permitted case agents to provide lay opinions based on their knowledge of an investigation. *See, e.g., Gadson*, 763 F.3d at 1206–07; *United States v. Freeman*, 498 F.3d 893, 904–05 (9th Cir. 2007); *Ortiz*, 776 F.3d at 1045 (voice identification is lay opinion).

Defendants also contend that Buntrock improperly bolstered Gettel's testimony. We disagree. Buntrock testified about facts that were consistent with Gettel's testimony, but this does not constitute improper bolstering. *Cf. United States v. Preston*, 873 F.3d 829, 845–46 (9th Cir. 2017). Buntrock also testified there was no publicly available information that may have indicated to Gettel that defendants were being investigated for identity theft. The district court permitted this questioning "as to [Buntrock's] knowledge." It did not call for an impermissible opinion on the veracity of Gettel's testimony that defendants were involved in identity theft.

Defendants argue that the government improperly presented evidence about their unlawful distribution of Adderall because the indictment charged them only with unlawful distribution of opioids. The district court did not abuse its discretion admitting this evidence. *See United States v. Nelson*, 137 F.3d 1094, 1106–07 (9th Cir. 1998). Defendants not only failed to object to significant portions of the Adderall-related testimony, defendants themselves elicited additional testimony about Adderall. The evidence was relevant because it corroborated testimony about how defendants used their pharmacy to provide drugs without prescriptions and it was further proof that the defendants knew their activities were unlawful. *See* Fed. R. Evid. 404(b); *see Nelson*,

137 F.3d at 1107 (explaining factors that the court must consider when admitting other similar act evidence). The district court did not abuse its discretion by concluding that the risk of undue prejudice did not substantially outweigh the probative value of the evidence because the jury already heard substantial evidence of defendants' other illicit drug-related activity. *See United States v. Le May*, 260 F.3d 1018, 1030 (9th Cir. 2001). Finally, the district court specifically instructed the jury about which drugs were at issue in the case and charged in the indictment, and the court provided the indictment to the jurors during their deliberations to avoid confusion. *See Nelson*, 137 F.3d at 1107.

Defendants next contend that the government used Agent Tropea's testimony to present inadmissible evidence to the jury about whether defendants' mother had gifted thousands of dollars to them and whether she prepared false statements to bolster the defense. This argument fails because defendants "open[ed] the door to this testimony" by raising it for the first time on cross-examination. *United States v. Hegwood*, 977 F.2d 492, 496 (9th Cir. 1992). The district court admitted this testimony only to show its effect on Tropea's investigation, and the court instructed the jury accordingly. Defendants identify nothing in the record to suggest that the government lacked a "good faith basis" for asking these questions. *United States v. Rushton*, 963 F.2d 272, 274–75 (9th Cir. 1992).

Defendants also challenge the government's statement in closing argument that "[t]here is a whole other can of worms of compounded creams and

insurance companies that is not at issue in this case." Defendants did not contemporaneously object to this argument, which directly responded to the testimony of one of the defense witnesses, who suggested that defendants' pharmacy dealt primarily in cash because "90 percent of insurance companies [would] not cover" the pharmacy's compounded creams. Defendants cannot show plain error because the government's argument did not "plainly" encourage the jury to convict based on other uncharged wrongful acts or evidence not in the record, nor can defendants show that any error "seriously affect[ed] the fairness, integrity, or public reputation of [the] judicial proceedings." *United States v. Cotton*, 535 U.S. 625, 631 (2002). The government directed the jury's focus to the opioid evidence in response to defendants' witnesses, argued that only "[t]he pills are at issue in this case," and reminded the jury that the government's witnesses testified that "insurance companies *do* cover Oxycodone pills." (emphasis added).

Last, defendants argue that their due process rights were violated because they were prevented from introducing evidence supporting their theory that gaps in their pharmacy's reporting were caused by glitches in the pharmacy's software, and the district court wrongfully excluded a letter from the software company's CEO on hearsay grounds. Defendants do not dispute that the letter was hearsay, but they argue that the court's decision to exclude it deprived them of evidence that was crucial to their defense. To succeed on their due process claim, defendants must show that the evidence was "sufficiently reliable and crucial to the defense." *United States v. Hayat*, 710 F.3d 875, 898

(9th Cir. 2013) (quoting *United States v. Lopez-Alvarez*, 970 F.2d 583, 588 (9th Cir. 1992)). To determine whether an excluded statement is sufficiently "reliable," we consider whether the excluded statement was spontaneous, corroborated, made against interest, or if it contained other "persuasive assurances of trustworthiness." *Id.* at 899 (citation omitted). Defendants have not attempted to show that the CEO's letter was reliable. The letter was not spontaneous, the state inspector testified she was unable to corroborate the letter's contents by speaking to the CEO directly, and the letter opined on defendants' mental state. On this record, the district court's decision to exclude the letter did not violate defendants' due process rights.

We vacate defendants' convictions on Counts 5 through 8 and remand those counts for proceedings consistent with this memorandum disposition. We affirm in all other respects. Each side shall bear its own costs on appeal.

AFFIRMED IN PART, VACATED IN PART, REMANDED.

Appendix B

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 2:15-511(A)-DMG
Social Security No. 0 5 2 3 (Last 4 digits)

UNITED STATES OF AMERICA,
Plaintiff,
v.
DALIBOR KABOV,
AKAS: DALIBOR D. KABOV;
DALIBOR DABO KABOV; DABO,
Defendant.

JS-3
Filed March 15, 2019
Document 379

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

Month	Day	Year
Mar	13	2019

COUNSEL Anthony Eaglin, Appointed
(Name of Counsel)

PLEA	[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE [X] NOT GUILTY
FINDING	There being a finding/verdict of GUILTY, defendant has been convicted as charged of the offense(s) of: *Conspiracy to Distribute Oxycodone, Hydromorphone, Hydrocodone and Promethazine with Codeine in violation of Title 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(C) as charged in Count 1 of the First Superseding Indictment; Distribution of Oxycodone in violation of Title 21 U.S.C. §§ 841(a)(1), (b)(1)(C) as charged in Counts 2-4 of the First Superseding Indictment; Conspiracy to Import a Schedule III Controlled Substance in violation of Title 21 U.S.C. §§ 963, 952(b), 960(a)(1) as charged in Count 5 of the First Superseding Indictment;* *Importation of a Schedule III Controlled Substance, Causing an Act to be Done in violation of Title 21 U.S.C. §§ 952(b), 960(a)(1), and 18 U.S.C. § 2(b) as charged in Counts 6-8 of the First Superseding Indictment; Engaging in Transactions in Criminally Derived Proceeds, Causing an Act to be Done*

	in violation of Title 18 U.S.C §§ 1957(a), 2(b) as charged in Counts 10-18 of the First Superseding Indictment; and Subscribing to a False Tax Return in violation of Title 26 U.S.C § 7206(1) as charged in Counts 46-50 of the First Superseding Indictment.
JUDGMENT AND PROB / COMM ORDER	The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of: ONE HUNDRED AND TWENTY-ONE (121) MONTHS. This term consists of 121 MONTHS on each of Counts 1 through 4, 97 MONTHS on each of Counts 5 through 8 and 10 through 18, and 36 MONTHS on each of Counts 46 through 50 of the First Superseding Indictment, all to be served CONCURRENTLY.

It is ordered that the defendant shall pay to the United States a special assessment of $2200, which is due immediately. Any unpaid balance shall be due

during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline Section 5E1.2(a), all fines are waived as the Court finds that the defendant has established that he is unable to pay and is not likely to become able to pay any fine.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of THREE (3) YEARS. This term consists of three years on each of Counts 1 through 8 and 10 through 18 and one year on each of Counts 46 through 50 of the First Superseding Indictment, all such terms to run CONCURRENTLY under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation Office and General Order 18-10;

2. The defendant shall not commit another violation of federal, state, or local law or ordinance;

3. During the period of community supervision, the defendant shall pay the special assessment and restitution in accordance with this judgment's orders pertaining to such payment;

4. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer;

5. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath, and/or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using illicit drugs, alcohol, and abusing prescription medications during the period of supervision;

6. As directed by the Probation Officer, the defendant shall pay all or part of the costs of treating the defendant's drug dependency to the aftercare contractor during the period of community supervision, pursuant to 18 U.S.C. § 3672. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required;

7. The defendant shall truthfully and timely file and pay taxes owed for the years of conviction, and shall truthfully and timely file and pay taxes during the period of community supervision. Further, the defendant shall show proof to the Probation Officer of compliance with this Order;

8. The defendant shall pay restitution under 18 U.S.C. § 3583(d) in the amount of $175,548 to IRS-RACS, Attn: Mail Stop 6261, Restitution, 333 W. Pershing Avenue, Kansas City, MO 64108. The defendant shall make monthly installments of at least 10 percent of defendant's gross monthly income, but not less than $100, whichever is greater, during the period of supervised release. These payments shall begin 30 days after the commencement of supervision;

9. The defendant shall not be employed in any position or have an ownership interest in any business that requires licensing and/or certification by any local, state, or federal agency without the prior written approval of the Probation Officer;

10. The defendant shall apply all monies received from income tax refunds to the outstanding Court-ordered financial obligation. In addition, the defendant shall apply all monies received from lottery winnings, inheritance, judgments, and any anticipated or unexpected financial gains to the outstanding Court-ordered financial obligation; and

11. The defendant shall cooperate in the collection of a DNA sample from the defendant.

The Court authorizes the Probation Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotics addiction or alcohol dependency. Further redisclosure of the Presentence Report by the treatment provider is prohibited without the consent of the Court.

The Court recommends that the defendant be designated to a federal correctional facility in the Southern California area. The Court also recommends that the defendant be assessed for suitability for the Bureau of Prisons' 500-Hour Residential Drug Abuse Program.

The Court dismisses all remaining counts of the underlying indictment as to this defendant.

The bond is exonerated as to this defendant.

The Court informs the defendant of his right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

March 15, 2019
Date

[handwritten signature
Dolly M. Gee, United States District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

March 15, 2019	By	/s/ Kane Tien
Filed Date		Deputy Clerk

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation or release from imprisonment, unless otherwise directed by the probation officer;
3. The defendant must report to the probation office as instructed by the court or probation officer;
4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;
5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;
6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;
7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;
8. The defendant mut work at a lawful occupation unless excused by the probation officer for

schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;

9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;

10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;

13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;

14. As directed by the probation officer, the defendant must notify specific persons and organizations of

specific risks posed by the defendant to those persons and organizations and must permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications;

15. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

[X] The defendant will also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k).

The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1 Special assessments under 18 U.S.C. § 3013;

2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;

3. Fine;

4. Community restitution, under 18 U.S.C. § 3663(c); and

5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant must maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds must be deposited into this account, which must be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, must be disclosed to the Probation Officer upon request.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

_____ By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

_____ By _____

Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant Date

_____ _____
U. S. Probation Officer/ Date
Designated Witness

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 2:15-511(A)-DMG
Social Security No. 9 9 1 2 (Last 4 digits)

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERRY KABOV,
AKAS: NONE.,

Defendant.

JS-3
Filed March 15, 2019
Document 377

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

Month	Day	Year
Mar	13	2019

COUNSEL Janet E. Hong, Appointed
(Name of Counsel)

PLEA [ ] GUILTY, and the court being satisfied that there is a factual basis for the plea.
[ ] NOLO CONTENDERE
[X] NOT GUILTY

FINDING

There being a finding/verdict of GUILTY, defendant has been convicted as charged of the offense(s) of:

Conspiracy to Distribute Oxycodone, Hydromorphone, Hydrocodone and Promethazine with Codeine in violation of Title 21 U.S.C. §§ 846 and 841(a)(1), (b)(1)(C) as charged in Count 1 of the First Superseding Indictment; Distribution of Oxycodone in violation of Title 21 U.S.C. §§ 841(a)(1), (b)(1)(C) as charged in Counts 2-4 of the First Superseding Indictment; Conspiracy to Import a Schedule III Controlled Substance in violation of Title 21 U.S.C. §§ 963, 952(b), 960(a)(1) as charged in Count 5 of the First Superseding Indictment;

Importation of a Schedule III Controlled Substance, Causing an Act to be Done in violation of Title 21 U.S.C. §§ 952(b), 960(a)(1); 18 U.S.C. § 2(b) as charged in Counts 6-8 of the First Superseding Indictment; Engaging in Transactions in Criminally Derived Proceeds, Causing an Act to be Done in violation of Title 18 U.S.C §§ 1957(a), 2(b) as charged in Counts 10-18 of the First Superseding Indictment; and Subscribing to a False Tax Return in violation of Title

	26 U.S.C § 7206(1) as charged in Counts 43-45 of the First Superseding Indictment.
JUDGMENT AND PROB / COMM ORDER	The Court asked whether there was any reason why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of: ONE HUNDRED AND TWENTY-ONE (121) MONTHS. This term consists of 121 MONTHS on each of Counts 1 through 4, 97 MONTHS on each of Counts 5 through 8 and 10 through 18, and 36 MONTHS on each of Counts 46 through 50 of the First Superseding Indictment, all to be served CONCURRENTLY.

It is ordered that the defendant shall pay to the United States a special assessment of $2200, which is due immediately. Any unpaid balance shall be due during the period of imprisonment, at the rate of not less than $25 per quarter, and pursuant to the Bureau of Prisons' Inmate Financial Responsibility Program.

Pursuant to Guideline Section 5E1.2(a), all fines are waived as the Court finds that the defendant has

established that he is unable to pay and is not likely to become able to pay any fine.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of THREE (3) YEARS. This term consists of three years on each of Counts 1 through 8 and 10 through 18 and one year on each of Counts 43 through 45 of the First Superseding Indictment, all such terms to run CONCURRENTLY under the following terms and conditions:

1. The defendant shall comply with the rules and regulations of the United States Probation Office and General Order 18-10;

2. The defendant shall not commit another violation of federal, state, or local law or ordinance;

3. During the period of community supervision, the defendant shall pay the special assessment and restitution in accordance with this judgment's orders pertaining to such payment;

4. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, not to exceed eight tests per month, as directed by the Probation Officer;

5. The defendant shall participate in an outpatient substance abuse treatment and counseling program that includes urinalysis, breath, and/or sweat patch testing, as directed by the Probation Officer. The defendant shall abstain from using illicit

drugs, alcohol, and abusing prescription medications during the period of supervision;

6. As directed by the Probation Officer, the defendant shall pay all or part of the costs of treating the defendant's drug dependency to the aftercare contractor during the period of community supervision, pursuant to 18 U.S.C. § 3672. The defendant shall provide payment and proof of payment as directed by the Probation Officer. If the defendant has no ability to pay, no payment shall be required;

7. The defendant shall truthfully and timely file and pay taxes owed for the years of conviction, and shall truthfully and timely file and pay taxes during the period of community supervision. Further, the defendant shall show proof to the Probation Officer of compliance with this Order;

8. The defendant shall pay restitution under 18 U.S.C. § 3583(d) in the amount of $175,286 to IRS-RACS, Attn: Mail Stop 6261, Restitution, 333 W. Pershing Avenue, Kansas City, MO 64108. The defendant shall make monthly installments of at least 10 percent of defendant's gross monthly income, but not less than $100, whichever is greater, during the period of supervised release. These payments shall begin 30 days after the commencement of supervision;

9. The defendant shall not be employed in any position or have an ownership interest in any business that requires licensing and/or certification by any local, state, or federal agency without the prior written approval of the Probation Officer;

10. The defendant shall apply all monies received from income tax refunds to the outstanding Court-ordered financial obligation. In addition, the defendant shall apply all monies received from lottery winnings, inheritance, judgments, and any anticipated or unexpected financial gains to the outstanding Court-ordered financial obligation; and

11. The defendant shall cooperate in the collection of a DNA sample from the defendant.

The Court authorizes the Probation Office to disclose the Presentence Report to the substance abuse treatment provider to facilitate the defendant's treatment for narcotics addiction or alcohol dependency. Further redisclosure of the Presentence Report by the treatment provider is prohibited without the consent of the Court.

The Court recommends that the defendant be designated to a federal correctional facility in the Southern California area. The Court also recommends that the defendant be assessed for suitability for the Bureau of Prisons' 500-Hour Residential Drug Abuse Program.

The Court dismisses all remaining counts of the underlying indictment as to this defendant.

The bond is exonerated as to this defendant.

The Court informs the defendant of his right to appeal.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may

change the conditions of supervision, reduce or extend the period of supervision, and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

March 15, 2019
Date

[handwritten signature
Dolly M. Gee, United States District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Clerk, U.S. District Court

March 15, 2019	By	/s/ Kane Tien
Filed Date		Deputy Clerk

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below).

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must report to the probation office in the federal judicial district of residence within 72 hours of imposition of a sentence of probation

or release from imprisonment, unless otherwise directed by the probation officer;

3. The defendant must report to the probation office as instructed by the court or probation officer;

4. The defendant must not knowingly leave the judicial district without first receiving the permission of the court or probation officer;

5. The defendant must answer truthfully the inquiries of the probation officer, unless legitimately asserting his or her Fifth Amendment right against self-incrimination as to new criminal conduct;

6. The defendant must reside at a location approved by the probation officer and must notify the probation officer at least 10 days before any anticipated change or within 72 hours of an unanticipated change in residence or persons living in defendant's residence;

7. The defendant must permit the probation officer to contact him or her at any time at home or elsewhere and must permit confiscation of any contraband prohibited by law or the terms of supervision and observed in plain view by the probation officer;

8. The defendant mut work at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons and must notify the probation officer at least ten days before any change in employment or within 72 hours of an unanticipated change;

9. The defendant must not knowingly associate with any persons engaged in criminal activity and must not knowingly associate with any person convicted of a felony unless granted permission to do so by the probation officer. This condition will not apply to intimate family members, unless the court has completed an individualized review and has determined that the restriction is necessary for protection of the community or rehabilitation;

10. The defendant must refrain from excessive use of alcohol and must not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

11. The defendant must notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12. For felony cases, the defendant must not possess a firearm, ammunition, destructive device, or any other dangerous weapon;

13. The defendant must not act or enter into any agreement with a law enforcement agency to act as an informant or source without the permission of the court;

14. As directed by the probation officer, the defendant must notify specific persons and organizations of specific risks posed by the defendant to those persons and organizations and must permit the probation officer to confirm the defendant's compliance with such requirement and to make such notifications;

15. The defendant must follow the instructions of the probation officer to implement the orders of the court, afford adequate deterrence from criminal conduct, protect the public from further crimes of the defendant; and provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

[X] The defendant will also comply with the following special conditions (set forth below).

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant must pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment under 18 U.S.C. § 3612(f)(1). Payments may be subject to penalties for default and delinquency under 18 U.S.C. § 3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed before April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant must pay the balance as directed by the United States Attorney's Office. 18 U.S.C. § 3613.

The defendant must notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence address until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. § 3612(b)(l)(F).

The defendant must notify the Court (through the Probation Office) and the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. § 3664(k).

The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution under 18 U.S.C. § 3664(k). See also 18 U.S.C. § 3572(d)(3) and for probation 18 U.S.C. § 3563(a)(7).

Payments will be applied in the following order:

1 Special assessments under 18 U.S.C. § 3013;

2. Restitution, in this sequence (under 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid):
   Non-federal victims (individual and corporate),
   Providers of compensation to non-federal victims,
   The United States as victim;

3. Fine;

4. Community restitution, under 18 U.S.C. § 3663(c); and

5. Other penalties and costs.

CONDITIONS OF PROBATION AND SUPERVISED RELEASE PERTAINING TO FINANCIAL SANCTIONS

As directed by the Probation Officer, the defendant must provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant must not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant must maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds must be deposited into this account, which must be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, must be disclosed to the Probation Officer upon request.

The defendant must not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have been satisfied in full.

These conditions are in addition to any other conditions imposed by this judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ to _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____
at _____
the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

_____ By _____
Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

_____ By _____
Filed Date Deputy Clerk

FOR U.S. PROBATION OFFICE USE ONLY

Upon a finding of violation of probation or supervised release, I understand that the court may (1) revoke supervision, (2) extend the term of supervision, and/or (3) modify the conditions of supervision.

These conditions have been read to me. I fully understand the conditions and have been provided a copy of them.

(Signed) _____ _____
Defendant Date

_____ _____
U. S. Probation Officer/ Date
Designated Witness

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 19-50083

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DALIBOR KABOV,
AKA DABO, AKA DALIBOR DABO KABOV,
Defendant-Appellant.

No. 19-50089

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
BERRY KABOV,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California, Los Angeles
D.C. No. 2:15-cr-00511-DMG-2
D.C. No. 2:15-cr-00511-DMG-1

Filed November 14, 2023
Docket Entry Nos. 163, 164
Molly C. Dwyer, Clerk, U.S. Court of Appeals

ORDER

Before: WARDLAW, CHRISTEN, and BUMATAY, Circuit Judges.

The panel has unanimously voted to deny the consolidated petition for rehearing en banc filed by Defendants-Appellants Dalibor Kabov and Berry Kabov.

The full court has been advised of Defendants-Appellants' petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The consolidated petition for rehearing en banc is DENIED.

Appendix D

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CR 2:15-511-DMG

UNITED STATES OF AMERICA,

Plaintiff,

v.

BERRY KABOV, DALIBOR KABOV, GLOBAL COMPOUNDING, LLC,

Defendants.

Filed December 9, 2016
Document 132

CRIMINAL MINUTES—GENERAL

Present: The Honorable DOLLY M. GEE, UNITED STATES DISTRICT JUDGE

Interpreter N/A

		Benjamin R. Barron
Kane Tien	Not Reported	Not Present
Deputy Clerk	*Court Reporter*	*Assistant U.S. Attorney*

U.S.A. v. Defendant(s):	Present	Cust.	Bond
1) Berry Kabov	Not		X
2) Dalibor Kabov	Not		X

3) Global Compounding, LLC	Not		X
Attorneys for Defendant(s):	Present	Appt.	Ret.
1) Victor Sherman	Not		X
2) Marc S. Nurik	Not		X
3) Victor Sherman	Not		X

Proceedings: [IN CHAMBERS] ORDER RE GOVERNMENT'S MOTIONS *IN LIMINE* [115, 116, 117, 118, 119]

The First Superseding Indictment ("FSI") alleges fifty counts against Defendants Berry Kabov ("B. Kabov"), Dalibor Kabov ("B. Kabov") and Global Compounding Pharmacy, LLC ("Global") for conspiracies involving distribution and importation of controlled substances and to structure and conduct illegal financial transactions, three counts of distribution of controlled substances, three counts if importing controlled substances, nine counts of conducting financial transactions with illegal proceeds having a value greater than $10,000, twenty-four counts of structuring financial transactions, and eight counts of willfully subscribing to false tax returns. [Doc. # 97.] The FSI alleges that B. Kabov and D. Kabov owned and operated Global, a retail pharmacy.

On November 15 and 16, 2016, the Government filed five motions *in limine* ("MILs") noticed for hearing on December 7, 2016:

1. MIL to Authorize admission of ARCOS and CURES Data ("MIL #1") [Doc. # 115];

2. MIL to Authorize Admission of Expert Testimony Regarding Professional Violations and Modus Operandi ("MIL # 2") [Doc. # 116];

3. MIL to Permit Authentication of Cooperator Recordings through Agent Testimony ("MIL #3") [Doc. # 117];

4. MIL to Admit Evidence Concerning Defendants' Insurance-Fraud Scheme under F.R.E. 404(B) or Permit Cross-Examination Using Such Evidence ("MIL # 4") [Doc. # 118]; and

5. MIL to Admit Evidence Regarding Defendants' Expenditures ("MIL #5") [Doc. # 119].

On November 23, 2016, Defendants B. Kabov and D. Kabov (collectively, "the Kabovs") filed oppositions to the five MILs. [Doc. ##120, 121, 122, 123, and 124.] On November 30, 2016, the Government filed replies to the five oppositions. [Doc. ## 126, 127, 128, 129, and 130.]

I.
MIL #1: ARCOS and CURES Data

Under the Controlled Substances Act, it is unlawful to knowingly or intentionally distribute or dispense a controlled substance. 21 U.S.C. § 841(a). Although an exception is made for physicians and pharmacists, they "are still subject to criminal prosecution 'when their activities fall outside the usual course of professional practice.'" *United States v. Feingold*, 454 F.3d 1001, 1003 (9th Cir. 2006) (quoting *United States v. Moore*, 423 U.S. 122, 124 (1975)).

By this motion, the Government seeks an order authorizing the admission of records from the federal

Automation of Reports and Consolidated Orders Systems ("ARCOS"), which tracks wholesale orders of drugs shipped to pharmacies, and records from the California Controlled Substances Utilization Review and Evaluation System ("CURES"), which tracks all drugs dispensed by pharmacies. The Government contends that the ARCO and CURES data show, *inter alia*, that defendants began ordering massive amounts of oxycodone from June 2012 through the time period of the conspiracy alleged in Count One, that Global dispensed huge amounts of oxycodone, and that defendants' CURES submissions were pervaded with fraud to conceal their black market sales. The Government proposes calling administrators from ARCOS and CURES as witnesses to authenticate the data.

In opposition, the Kabovs contend that they did not have a direct connection to ARCO or CURES because it was the pharmacist-in-charge at Global that was responsible for ensuring the pharmacy's compliance and that because the Kabovs are not pharmacists, they were not responsible for ordering and dispensing drugs.

Defendants' responsibility and liability, however, are factual matters for the jury. Moreover, the Government contends that there is evidence of the Kabovs' direct involvement in the pharmacy's CURES submissions and other evidence demonstrating that the Kabovs had sole custody of the keys to the pharmacy and its controlled drug storage, to the exclusion of the pharmacist-in-charge. Defendants request that the Court defer ruling until the Government has established a foundation and shown

the relevance of the evidence, and do not otherwise raise any substantive objection. Because the Government has shown the relevance of the evidence, this MIL is conditionally GRANTED, subject to the Government providing a witness to authenticate the proposed evidence at trial.

II.
MIL #2: EXPERT TESTIMONY AND *MODUS OPERANDI*

The Government seeks permission to admit the expert testimony of pharmacist Dr. Janice Dang, Lead Supervising Inspector for the California State Board of Pharmacy ("CSBOP"), on Defendants' alleged violations of professional standards regarding pharmacy practice and on common patterns of *modus operandi* in prescription drug diversion by pharmacies. The Government seeks to present Dr. Dang to testify about the various rules and standards of conduct for pharmacies, identify those standards violated by Defendants, and identify "common red flags/*modus operandi*" of controlled drug diversion. According to her resume (attached as Exhibit A to MIL #2), since 2000 to the present, Dr. Dang has worked for the CSBOP, as Board Inspector, Consultant, Supervising Inspector of the Compliance Team, Supervising Inspector of the Drug Diversion and Fraud Team, and, since January 2015, the Lead Supervising Inspector.

In opposition, the Kabovs contend (1) Dr. Dang lacks experience to testify, (2) Dr. Dang's testimony is irrelevant because the Kabovs are not pharmacists, and (3) Dr. Dang's testimony should be excluded on *Daubert* grounds.

Defendants argue that because Dr. Dang has never been a pharmacist-in-charge and, therefore, does not have experience with the tasks and responsibilities of a retail pharmacy, she lacks the necessary experience to opine on retail pharmacy operations. Her resumé indicates, however, that she has had a great deal of experience inspecting and supervising the inspection of pharmacies to ensure compliance with governing laws and regulations.

The Kabovs contend that because they are not pharmacists, Dr. Dang's testimony regarding compliance or noncompliance with rules of conduct governing pharmacy practice is not relevant as to them. Nonetheless, "[l]ay persons who conspire with or aid and abet a practitioner's unlawful distribution of drugs can be convicted under the CSA [(Controlled Substances Act)] and its regulations." *United States v. Smith*, 573 F.3d 639, 646 (8th Cir. 2009). As such, Dr. Dang's testimony is appropriate.

Defendants' contention that Dr. Dang's testimony should be excluded on *Daubert* grounds are unavailing. Because Dr. Dang's expected testimony will be based on her knowledge and experience rather than on scientific or technical analysis, those particular *Daubert* factors do not apply. *See, e.g., Hangarter v. Provident Life and Accident Ins. Co.*, 373 F.3d 998, 1016-17 (9th Cir. 2004).

Accordingly, MIL # 2 is GRANTED.

III.
MIL #3: ADMITTING RECORDINGS THROUGH AGENT

The Government seeks to authenticate recorded telephone conversations between B. Kabov and a cooperating source through the testimony of the case agent.

The Government's proffer indicates, *inter alia*, that between December 2011 and February 2012, law enforcement interdicted three packages containing oxycodone around the Columbus, Ohio area, two of which were found to have D. Kabov's fingerprints. The United States Postal Inspection Service ("USPIS") identified a Columbus-based trafficker (hereafter referred to as "CS") involved in receiving the oxycodone parcels. The CS began cooperating with the investigation and purchased weekly loads of oxycodone from B. Kabov, which were shipped from Los Angeles by B. Kabov in exchange for cash. The USPIS case agent provided the CS with a cellular telephone and recording device to capture calls with B. Kabov. The CS engaged in multiple telephone calls with B. Kabov in May and June 2012 concerning oxycodone transactions. The USPIS case agent met with the CS during the investigation and extracted the digital recordings. The Government seeks to admit the recordings, providing foundational testimony of the USPIS case agent, who will explain the investigation involving and identifying the CS and the chain of custody of the recordings. The DEA case agent will also testify that he has heard B. Kabov speak on multiple occasions and recognizes B. Kabov's voice on the recordings.

The Kabovs oppose the motion contending (1) the Government has not established that the recordings were legally obtained and (2) the Government has not authenticated the recordings and has failed to establish the chain of custody.

Because the recordings were captured by a cooperating witness, they were lawfully obtained. *United States v. Nerber*, 222 F.3d 597, 605 at n.10 (9th Cir. 2000); *see also* 18 U.S.C. § 2511(2)(c). Moreover, because the recorded statements by the CS will be admitted only for the purpose of giving context to B. Kabov's statements, Defendants have not identified a Confrontation Clause problem. *See United States v. Burden*, 600 F.3d 204, 223-25 (2d Cir. 2010).[1]

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). "The government need only make a prima facie showing of authenticity, as the rule requires only that the court admit evidence if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification." *United States v. Tank*, 53 F.3d 627, 630 (9th Cir. 2000) (quotation marks, brackets and citations omitted). "[A] defect in the chain of custody goes to the weight, not the admissibility, of the

[1] The Court notes that the Government has produced the recordings and draft transcripts to the defense and that, although Defendants oppose the Government's motion, they have not moved to exclude the evidence. Nonetheless, at Defendants' request, the Court construes Defendants' opposition to the Government's motion as a request to exclude.

evidence introduced." *United States v. Matta-Ballesteros*, 71 F.3d 754, 768 (9th Cir. 1995).

At the hearing, in response to defense counsel's complaint that they have not had access to the CS, Government counsel offered to provide assistance in facilitating the service of a subpoena if Defendants wish to call the CS as a witness at trial. Government counsel also offered to provide defense counsel with contact information for the CS's counsel so that Defendants can inquire into whether the CS is willing to speak with them.

Accordingly, subject to the Government providing proper foundational testimony of the USPIS case agent and the DEA case agent outside the presence of the jury, the recordings may be admitted via agent testimony.

IV.
MIL # 4: ADMITTING INSURANCE-FRAUD EVIDENCE UNDER SECTION 404(B)

The Government seeks to admit evidence of an insurance fraud scheme in which it contends Defendants engaged after the offenses charged herein (1) under Fed. R. Evid. 404(b) to prove intent, knowledge, common plan, and lack of mistake or accident; (2) if defense "opens the door" through misleading evidence; and (3) under Fed. R. Evid. 608(b) on cross-examination if Defendants choose to testify.

This insurance fraud scheme is admittedly separate from the offenses charged herein and, although it does share some similarities, it does not appear to share a common scheme or pattern with the

alleged offenses. Moreover, because this insurance fraud scheme post-dates the charged offenses, use of this evidence to prove intent or knowledge of the charged offenses would require the jury to find that any intent or knowledge proved by the insurance fraud scheme was possessed by Defendants prior thereto. Therefore, such evidence could cause confusion to the jury. Moreover, it is unnecessary to the proof of this case and its admission poses the potential of unfair prejudice to Defendants. As such, its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury. Accordingly, admission of the Rule 404(b) evidence will be excluded under Rule 403.

To the extent Defendants "open the door" such that the evidence becomes relevant for impeachment of Defendants' testimony or rebuttal purposes, however, the evidence shall be admissible for impeachment or rebuttal purposes.

V.

MIL #5: ADMITTING EVIDENCE RE DEFENDANTS' EXPENDITURES

The Government seeks an order allowing it to introduce evidence of Defendants' personal expenditures during the time period covering the alleged offenses (1) as relevant to show willfulness and motive on the false tax return counts, (2) as probative of Defendants' motive for drug diversion and money laundering, (3) as providing corroboration for Defendants' criminal conduct, and (4) because its probative value outweighs unfair prejudice.

In opposition, the Kabovs contend that the evidence should be excluded because it is not relevant, likely to consume time and mislead the jury, and is prejudicial. If the expenditure evidence tends to show that Defendants received far more income than was reported in their tax returns, then it will certainly be relevant and probative to show willfulness in subscribing to false tax returns. It is also relevant to proving money laundering. Defendants' primary objection to this evidence seems to be that it would "stoke the emotions and prejudices of jurors, most of whom would find the defendants' alleged lifestyle well out of reach." [Doc. 121 at 3.[2]]

Of course, the starting point for determining admissibility is the requirement of relevance (Fed. R. Evid. 401), which is met here. The only authority cited by Defendants to support exclusion is their quote from *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940), that "appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them." The quoted language, used to describe statements made by a prosecutor to the jury, was followed by the Court's explanation that "[t]hey were, we think, undignified and intemperate. . . . But it is quite another thing to say that these statements constituted prejudicial error." In this case, the expenditure evidence is certainly relevant and probative. But if its admission would be highly prejudicial, it would be excludable. Other than arguing in generalities, however,

[2] Page references are to the page numbers inserted in the header of the document when it is filed in the CM/ECF filing system.

Defendants have not brought to the Court's attention any specific evidence that would give rise to prejudice. In the absence of any showing that the probative value of the expenditure evidence is substantially outweighed by a danger of unfair prejudice, the Government's motion is GRANTED.

VI.
CONCLUSION

Based on the foregoing, IT IS ORDERED as follows:

1. The Government's MIL #1 to authorize admission of ARCOS and CURES data is conditionally GRANTED, subject to its authentication at trial;

2. The Government's MIL #2 to authorize admission of expert testimony regarding professional violations and *modus operandi* is GRANTED;

3. The Government's MIL #3 to permit authentication of cooperator recordings through agent testimony is GRANTED, subject to the Government providing proper foundational testimony at trial outside the presence of the jury pursuant to Fed. R. Evid. 104(c);

4. The Government's MIL #4 to admit evidence concerning Defendants' insurance-fraud scheme under Fed. R. Evid. 404(b) is DENIED, except to the extent Defendants "open the door" resulting in the evidence becoming relevant for rebuttal or impeachment of Defendants' testimony; and

5. The Government's MIL #5 to admit evidence regarding Defendants' personal expenditures is GRANTED.

Appendix E

Relevant Provisions and Statutes

U.S. Const. amend. XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously

taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

21 U.S.C. § 841

Prohibited acts A

(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; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving-

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of-

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of

methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a

term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving-

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of-

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such

substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid

(including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition

to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term

of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall,

if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior

conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed-

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use-

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution.-

(A) In general.-Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) Definition.-For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally-

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting

requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that-

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means-

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4–butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other heath 1 professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4–butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally-

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally-

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(g) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections 2 823(g) or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 831 of this title.

(3) Inapplicability

(A) This subsection does not apply to-

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to-

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).