No. _____

In the Supreme Court of the United States

DR. SAAD SAKKAL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented here is whether, in a jury instruction under the Controlled Substances Act, 21 U.S.C. § 801 et seq., language taken from an agency regulation (in particular, 21 C.F.R. § 1306.04(a)) may replace the statutory requirement, imposed by Section 841(a)(1), that a physician may be convicted as a drug dealer only if she knowingly or intentionally prescribed without "authorization." This is the same question presented in the pending petition in *Xiulu Ruan and John Patrick Couch v. United States*, No. 22-1175. The present case should therefore be held for the disposition of the *Ruan* petition and thereafter resolved in accordance with the Court's disposition of that case.

PARTIES TO THE PROCEEDING

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

Respondent, appellee below, is the United States of America.

RELATED PROCEEDINGS

Saad Sakkal v. United States, No. 22-84, The Supreme Court of the United States. Judgment Entered October 11, 2022.

United States v. Saad Sakkal, No. 20-3880, United States Court of Appeal for the Sixth Circuit. Judgements entered February 24, 2022 and May 31, 2023.

United States v. Saad Sakkal, No. 1:18cr088, United States District Court for the Southern District of Ohio. Judgment entered on August 14, 2020.

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OPINIONS AND RULINGS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit on remand is not reported. *See* Petitioner's Appendix ("App."), *infra* 1a-19a.

JURISDICTION

The Sixth Circuit's judgment was entered on May 31, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

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

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

21 C.F.R. § 1306.04(a) provides, in pertinent part:

> Purpose of issue of prescription.

> (a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.

STATEMENT

Following this Court's decision in *Ruan v. United States*, 142 S. Ct. 2370 (2022), Dr. Sakkal filed a petition for a writ of certiorari asking this Court to grant, vacate, and remand his case in light of the decision in *Ruan*. The Government agreed that such an order was warranted. On October 11, 2022, this Court granted the petition and remanded the case to the Sixth Circuit for further consideration under *Ruan*.

On remand, the Sixth Circuit reaffirmed Petitioner's CSA convictions, even though the jury instructions replaced the CSA's "except as authorized" language with what this Court called in *Ruan* the "ambiguous" language of 21 C.F.R. § 1306.04(a). *Ruan*, 142 S. Ct. at 2377. As the pending petition in *Ruan* makes clear, the circuits are divided on whether such an agency regulation may be substituted for the statutory text actually enacted by Congress. Dr. Sakkal's case should be held for the disposition of the *Ruan* petition and thereafter resolved in accordance with the Court's disposition of that case.

A. Statutory and Regulatory Framework

The CSA makes it unlawful for "any person knowingly or intentionally . . . to manufacture,

distribute, or dispense" a controlled substance, "[e]xcept as authorized by this subchapter." 21 U.S.C. § 841(a)(1).

"[T]his subchapter" authorizes persons who have registered with the Attorney General to dispense controlled substances "to the extent authorized by their registration[.]" *Id.* § 822(b). The CSA also directs the Attorney General to accept the registration of a medical doctor or other practitioner if he is "authorized to dispense . . . controlled substances under the laws of the State in which he practices." *Id.* § 823(g)(1).

21 C.F.R. § 1306.04(a) provides, in pertinent part:

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.

B. Factual Background

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

On June 21, 2018, a grand jury indicted Dr. Sakkal on charges of illegal distribution of controlled

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

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

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

For his part, Dr. Sakkal asserted that, whatever his occasional mistakes and unconventional practices, he did not act with the requisite criminal intent. In his opening statement, defense counsel told the jury that there would be no evidence showing that Dr. Sakkal "acted with malicious intent, criminal intent," or "greed." 4/1/19 Tr. 3 (Dkt. 46). At trial, counsel elicited testimony from former Lindenwald employees who acknowledged that Dr. Sakkal cared about his patients and sought to secure their well-being. *See*, *e.g.*, 4/3/19 Tr. 208 (Dkt. 69) (Robbi Mott, a former receptionist at Lindenwald, testified that Dr. Sakkal was a "good doctor" and she "felt that he cared" for his patients); 4/3/19 Tr. 90 (Dkt. 69) (Alisha Hayes, a former medical assistant at Lindenwald, testified that Dr. Sakkal "took a holistic approach" to treating his patients); 4/9/19 Tr. 37-38 (Dkt. 74) (Mohammed Sakkal, Dr. Sakkal's son and former scribe at Lindenwald, testified that Dr. Sakkal "cared about his patients to the point of naivete"); 4/3/19 Tr. 152, 157, 159 (Dkt. 69) (Deborah Clowers, a former practice manager at Lindenwald, testified that Dr. Sakkal "cared about his patients" and was "compassionate," "always wanted to do what was" in his patients' "best interest," "was doing a good job," was "practicing medicine in good faith," and was generally "a good doctor"). And in final argument, defense counsel reiterated that the question was not whether Dr. Sakkal had acted negligently or committed malpractice, but "whether or not he abandoned his role altogether as a physician and became a drug dealer." 4/9/19 Tr. 142 (Dkt. 74).

3. At the close of trial, the district court, stripping the CSA of its *mens rea* requirement and substituting the language of an agency regulation (21 C.F.R. § 1306.04(a)) for the "except as authorized" requirement of Section 841(a)(1), told the jury that it could convict Petitioner if his prescription of controlled substances "was not for a legitimate medical purpose and was outside the scope of medical practice." 4/19/19 Tr. 87-88 (Dkt. 74); App., *infra* 35a-36a. Reiterating the point, the court tied the *scienter* element *only* to the act of "dispensing":

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

4/9/19 Tr. 88 (Dkt. 74); App., *infra*, 35a-36a.

Lest the jury ignore that it was supposed to apply a purely objective standard for *scienter,* the district court defined "usual course of professional practice" to mean "that the practitioner has acted in accordance with the standard of medical practice generally recognized and accepted in the United States." 4/9/19 Tr. 90 (Dkt. 74); App., *infra*, 36a.

Finally, the district court gave the jury a "deliberate ignorance" instruction, which stated:

> No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substances alleged in these counts were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose, then you may find that the defendant knew that this was the case.
>
> But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose, and that the defendant deliberately closed his eyes to what was obvious.
>
> Carelessness or negligence or foolishness on his part are not the same as

> knowledge and are not enough to find him guilty on any of these counts.

4/9/19 Tr. 89-90 (Dkt. 74); App., *infra*, 36a.

4. Petitioner was convicted of thirty counts of illegal distribution of a controlled substance, one count of illegal distribution resulting in death, and six counts of use of another person's registration number to dispense controlled substances. 4/11/19 Tr. 2-7 (Dkt. 77). The district court sentenced petitioner to twenty years imprisonment. 8/14/2020 Tr. 20-22, 22-23 (Dkt. 104).

C. Appellate Proceedings

1. In *Ruan*, this Court noted that the plain text of Section 841(a)(1) "makes it a federal crime, '*[e]xcept as authorized*[,] . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance,' such as opioids." 142 S. Ct. at 2374-75 (quoting 21 U.S.C. § 841(a)). The Court held that Section 841(a)(1)'s "'knowingly or intentionally' *mens rea* applies to" the "except as authorized" requirement. *Id.* at 2375. As the Court explained, "[a]fter a defendant produces evidence that he or she was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting *in an unauthorized manner*, or intended to do so." *Id.* (emphasis added); *see also id.* at 2376, 2382. After all, the Court observed, "it is the fact that the doctor issued an *unauthorized* prescription that renders his or her conduct wrongful, not the fact of the dispensation itself. In other words,

authorization plays a 'crucial' role in separating innocent conduct—and, in the case of doctors, socially beneficial conduct—from wrongful conduct." *Id.* at 2377.

In holding that an "except as authorized" finding is "crucial" to convicting a physician of drug dealing, the Court recognized that the language of 21 C.F.R. § 1306.04(a) ("legitimate medical purpose"; "usual course of his professional practice") was "ambiguous." *Id.* That regulatory language, the Court noted, is "written in 'generalit[ies], susceptible to more precise definition and open to varying constructions.'" *Id.* And so, the Court explained, although the Government "can prove knowledge of a lack of authorization through circumstantial evidence[,]" including "by reference to objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice[,]'" in the end the government must prove "that a defendant knew or intended that his or her conduct was unauthorized." *Id.* at 2382.

2. On October 11, 2022, following affirmance by the Sixth Circuit on direct review (App., *infra,* 21a-33a) and denial of en banc review (App, *infra,* 37a), this Court granted, vacated, and remanded Petitioner's case for reconsideration in light of the decision in *Ruan* (App., *infra*, 20a).

3. On May 31, 2023, the Sixth Circuit reaffirmed Petitioner's convictions. C.A. Op. 13 (Dkt. 65-2); App., *infra*, 19a. Acknowledging that Petitioner had requested an instruction that covered the subjective intent standard articulated in *Ruan*, the

court of appeals noted that Dr. Sakkal's trial counsel had not *also* objected to the quite different instruction actually given (C.A. Op. 4-5 (Dkt. 65-2); App., *infra* 5a-6a). The court of appeals therefore applied a "plain error" standard, and under that standard the court concluded that the *Ruan* error was not "plain."

It reached that conclusion based on another of its post-*Ruan* decisions: *United States v. Anderson*, 2023 WL 2966356 (6th Cir. Apr. 17, 2023). There, a divided panel of the Sixth Circuit held that an identical "deliberate ignorance" instruction—identical to the one given to Dr. Sakkal's jury—"cover[ed] the holding of *Ruan*," and thus sufficiently apprised the jury of the *mens rea* requirement of the CSA. In particular, Dr. Anderson's jury was told that it could convict him if he

> deliberately blinded himself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substance was distributed or dispensed without a legitimate medical purpose in the usual course of professional practice, then you may find that the defendant knew this was the case.
>
> But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed

> or dispensed other than for a legitimate medical purpose while acting in the usual course of professional practice, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, or negligence, or foolishness on his part are not the same as knowledge and are not enough to find him guilty on this count.

Anderson, 67 F.4th at 766.[1]

So too for Dr. Sakkal, the court below reasoned. According to the Sixth Circuit, by telling Petitioner's jury that it could convict Dr. Sakkal if he "deliberately ignored a high probability that the controlled substances . . . were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose," the trial court had sufficiently covered the *scienter* standard articulated by this Court in *Ruan* (C.A. Op. 13 (Dkt. 65-2); App., *infra* 19a). In short, although it purported to apply a "plain error" standard of review, the court of appeals sustained Petitioner's convictions because, in its view,

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[1] Judge White dissented from this holding. *Anderson*, 67 F.4th at 771-72 (White, J., concurring in part and dissenting in part). As she explained, the "deliberate ignorance" instruction "comes close to, but falls short of" *Ruan*. *Id.* at 772. Section 841(a)'s unauthorized distribution element "does not depend on perceiving or ignoring probabilities[.]" *Id.* And "[t]elling the jury that carelessness, negligence, or foolishness is insufficient is not tantamount to instructing what mental state is required." *Id.* Accordingly, the district courts instructions failed to "comport with *Ruan*." *Id.*

the "deliberate ignorance" instruction was a *correct* implementation of *Ruan*, notwithstanding the fact that it substituted the regulatory language of 21 C.F.R. § 1306.04(a) for the "except as authorized" language that actually appears in the statute.

REASONS FOR GRANTING THE PETITION

In *Ruan*, this Court held that a physician may not be convicted under Section 841 of the CSA unless the government proves that she knew or intended that "her conduct was unauthorized." 142 S. Ct. at 2382. But Drs. Ruan and Couch, unlike their co-Petitioner Dr. Kahn, did not receive most of the benefits of this Court's decision. As their pending petition explains, the Eleventh Circuit, joined now by numerous other Circuits, sustained Drs. Ruan's and Couch's convictions based on instructions that substituted the language of 21 C.F.R. § 1306.04(a) for the "except as authorized" text of the statute. The Tenth Circuit, by contrast, held on remand from *Ruan* that only the actual language of the statute will do. It therefore vacated convictions that the Eleventh Circuit left standing.

The Sixth Circuit has jumped on the Eleventh Circuit's bandwagon. In its view, by "deliberately ignoring" the prospect that his prescriptions were prescribed "without a legitimate medical purpose in the usual course of professional practice," Petitioner was subject to conviction, without regard to whether he knew or intended to act "without authorization." That is the very question presented in Drs. Ruan and Couch's pending petition in No. 22-1175. We therefore

respectfully ask that this petition be held for disposition of that case.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of *Xiulu Ruan and John Patrick Couch v. United States,* No. 22-1175, and thereafter resolved in accordance with the Court's disposition of that case.

Respectfully submitted.

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, DATED MAY 31, 2023

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Name: 23a0242n.06

No. 20-3880

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAAD SAKKAL, M.D.,

Defendant-Appellant.

May 31, 2023, Decided

ON REMAND FROM THE SUPREME
COURT OF THE UNITED STATES.

OPINION

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

ROGERS, Circuit Judge.

With the express concurrence of the Government, the Supreme Court has vacated and remanded our affirmance

of defendant Sakkal's convictions for illegal distribution of controlled substances in violation of 21 U.S.C. § 841(a). In the previous appeal we rejected Sakkal's arguments that he was improperly denied bail, that the evidence against him was not sufficient, and that his trial counsel was ineffective in two ways that had been addressed by the district court following a hearing. We declined to address other ineffective-assistance issues on direct appeal and affirmed, leaving the unaddressed ineffective-assistance issues to possible consideration on collateral review under 28 U.S.C. § 2255. Subsequently, the Supreme Court held in *Ruan v. United States*, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022), that "once a defendant meets the burden of producing evidence that his or her conduct was 'authorized'" under § 841(a), "the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Id.* at 2376. Sakkal timely petitioned for certiorari, contending that in light of *Ruan* the district court erred in its jury instructions on the mens rea requirement under § 841(a). The United States advised the Court to grant certiorari, vacate the decision below, and remand the case for further consideration (GVR) in light of *Ruan*. The Supreme Court did just that. The fact that the United States endorsed the GVR did not waive its argument that Sakkal failed to preserve the *Ruan* issue in the district court, so we apply plain error review. Because the instructions below survive deferential plain-error review, we adhere to our prior judgment of affirmance. This, however, does not preclude Sakkal from raising the *Ruan* issue as part of his ineffective-assistance-of-counsel claims in a subsequent collateral attack under 28 U.S.C. § 2255.

Appendix A

Saad Sakkal practiced medicine at Lindenwald Medical Association from February 2015 to December 2016. Sakkal was licensed to practice medicine in Ohio and also had a Drug Enforcement Administration (DEA) registration number to dispense Schedule II through Schedule V controlled substances. The DEA began investigating Sakkal's prescription practices after a referral from the Ohio Medical Board, which had received several phone calls from pharmacists about Sakkal's issuance of problematic prescriptions.

In June 2018, a grand jury returned a thirty-nine-count indictment against Sakkal: thirty counts of illegal distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1); two counts of distribution of a controlled substance that resulted in death in violation of 21 U.S.C. § 841(b)(1)(C); and seven counts of using the registration number of another to dispense a controlled substance in violation of 21 U.S.C. § 843(a)(2).

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

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

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

Several pharmacies became aware of Sakkal's prescription practices and began calling Lindenwald to discuss concerns about them. Sakkal met with at least three pharmacies to discuss these concerns, but he did

not change his prescribing practices. Some pharmacies decided to stop filling Sakkal's prescriptions for controlled substances. In addition to charging Sakkal with illegal distribution of controlled substances, the indictment charged Sakkal with two counts of illegally distributing controlled substances that resulted in a patient's death.

At trial Sakkal requested inclusion of jury instructions regarding the "except as authorized" provision of 21 U.S.C. § 841(a). As relevant here, Sakkal proposed (instruction no. 3) instructing the jury that the Government must prove he "acted with intent to distribute the drugs and with intent to distribute them outside the course of professional practice," and that, to find him guilty, "the jury must make a finding of intent, not merely with respect to distribution, but also with respect to [Sakkal's] intent to act as a pusher rather than a medical professional." He further requested the court include an instruction stating that a physician does not violate § 841 if he prescribed the substances in "good faith" in "accordance with what the physician should reasonably believe to be a proper medical practice." Sakkal also requested the court instruct the jury as to the meaning of "outside the bounds of professional medical practice." According to Sakkal's proposed instruction no. 2, prescribing outside the bounds of professional medical practice means "prescrib[ing] drugs as being used not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or of dispensing controlled substances for other than a legitimate medical purpose; for example, the personal profit of the physician." The district court declined to use Sakkal's requested instruction on subjective intent (instruction no. 3) but did

use his requested instruction on deliberate ignorance and good faith (instruction no. 7). Sakkal made no objection, at either the pre-trial conference or the follow-up conference held after the defense had rested, to the district court's decisions to use instruction no. 7 and not use instruction no. 3. His only objection to the mens rea section of the jury instructions was to delete "or was beyond the bounds of medical practice" after "in the usual course of his professional practice," which the district court did. Thus, with respect to mens rea, the district court instructed as follows:

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

The instructions also included the following explanation:

> The term "knowingly" means that the act was done voluntarily and intentionally and not because of a mistake or accident. Although knowledge of the defendant cannot be established merely by demonstrating that he was careless, knowledge may be inferred if the defendant deliberately blinded himself to the existence of a fact.
>
> No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substances alleged in these counts were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose, then you may find that the defendant knew that this was the case.
>
> But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose, and that the defendant deliberately closed his eyes to what was obvious.
>
> Carelessness or negligence or foolishness on his part are not the same as knowledge and are not enough to find him guilty on any of these counts.

Appendix A

The jury convicted Sakkal, among other things, of thirty counts of illegally distributing a controlled substance. On Sakkal's motion for a new trial, the district court held an evidential hearing, with new counsel for Sakkal, on whether Sakkal received ineffective assistance of trial counsel in two respects not relevant to this appeal. The district court proceeded to rule against Sakkal on these two ineffective-assistance claims.

On Sakkal's direct appeal, we rejected his first argument—that he was improperly denied reasonable bail—and his second argument—that the evidence presented during trial was insufficient to establish that he caused the death of one of his patients. *United States v. Sakkal*, No. 22-3880, 2022 U.S. App. LEXIS 5142, 2022 WL 557520, at *3-4 (6th Cir. Feb. 24, 2022). We reviewed and rejected the two ineffective-assistance-of-counsel claims that the district court had ruled upon following the hearing. We declined to address the remaining ineffective-assistance-of-counsel claims based on our consistent practice not to entertain ineffective-assistance-of-counsel claims on direct appeal where there has not been an opportunity to develop an adequate record to evaluate the merits of the allegations. *See United States v. Williams*, 612 F.3d 500, 508 (6th Cir. 2010). "Such claims 'are more properly available in a post-conviction proceeding under 28 U.S.C. § 2255, after the parties have had the opportunity to develop an adequate record on the issue from which the reviewing court is capable of arriving at an informed decision.'" *Id.* (quoting *United States v. Rahal*, 191 F.3d 642, 645 (6th Cir. 1999)). Among the listed claims we declined to review was Sakkal's claim that his

"counsel did not object to the jury instructions about the necessary intent required to convict" him. *Sakkal*, 2022 U.S. App. LEXIS 5142, 2022 WL 557520, at *4 n.2.

Before Sakkal's time to petition for certiorari ran out, the Supreme Court decided *Ruan v. United States*, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022). The *Ruan* Court held that the "knowingly or intentionally" mens rea requirement applies not only to the "manufacture, distribute, or dispense" requirement of § 841(a), but also to the requirement that defendant's acts have not been "authorized." *Id.* at 2375. In the Supreme Court's words, "the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so." *Id.* Sakkal sought certiorari, arguing that the Supreme Court should GVR our judgment on the ground that his jury had been given a scienter instruction that did not comply with the *Ruan* holding. In a three-sentence memorandum in response, the Government agreed that GVR was "the appropriate course." The Supreme Court entered a GVR order in this and several other cases, some from this circuit and some from the Tenth and Eleventh Circuits. On remand, at our invitation, the parties have briefed how we should proceed.

The remaining substantive issue now before us is whether the jury instructions with respect to mens rea were erroneous under the *Ruan* holding. There are also procedural issues regarding whether Sakkal forfeited that issue in the district court, whether Sakkal forfeited the issue in our court, and whether the Government forfeited

reliance on these forfeitures by acquiescing in the GVR order. The bottom line is that, in light of this Court's recent post-*Ruan* holding in *United States v. Anderson*, No. 21-3073, F.4th , 2023 U.S. App. LEXIS 9080, 2023 WL 2966356 (6th Cir. April 17, 2023), the instructions in this case were not plainly erroneous, and affirmance is still required.

We apply plain error review to the question of whether the district court's scienter instruction complied with the holding of *Ruan*, because Sakkal did not preserve that jury instruction issue below, as required by Federal Rule of Criminal Procedure 30(d). Although Sakkal's counsel did propose to the district court an instruction that he contends anticipated the requirements of *Ruan*, that is not sufficient because he never objected to the district court's decision declining to give the instruction, despite clear opportunities to do so. In *United States v. Semrau*, 693 F.3d 510, 527 (6th Cir. 2012), we squarely held that merely proposing an instruction is not sufficient to preserve such an issue. Of course, when there is such a forfeiture, a defendant may nonetheless argue on direct appeal that there is plain error under Rules of Criminal Procedure 30(d) and 52(b). *See Greer v. United States*, 141 S. Ct. 2090, 2096, 210 L. Ed. 2d 121 (2021). This is in line with our recent unpublished opinion in *United States v. Fabode*, No. 21-1491, 2022 U.S. App. LEXIS 31186, 2022 WL 16825408 (6th Cir. Nov. 8, 2022), where we accordingly reviewed a claim of instructional error based on *Ruan* for plain error. In that case, the defendant, who was convicted before *Ruan* came down, had not argued for a *Ruan*-compliant instruction either in the form of proposed jury

instructions or in objecting to the instructions given in the district court. 2022 U.S. App. LEXIS 31186, [WL] at *6-7.

Indeed, Sakkal's supplemental reply brief (commendably) concedes that—apart from an argument based on the Government's acquiescence in the GVR—"the government has the better of the preservation issue in the district court," such that plain error review is proper. The Government's acquiescence in the GVR, however, makes no difference. In *Lawrence v. Chater*, 516 U.S. 163, 171, 116 S. Ct. 604, 133 L. Ed. 2d 545 (1996), the Court referred to its "well established practice of GVR'ing based on confessions of error that do not purport to concede the whole case." *Chater* cited *Moore v. United States*, 429 U.S. 20, 97 S. Ct. 29, 50 L. Ed. 2d 25 (1976), in which the Court GVR'd "based on the Solicitor General's confession of error, notwithstanding the Solicitor General's unresolved claim that the error was harmless[.]" *Id.* Granting, vacating, and remanding is discretionary on the part of the Supreme Court, and the Solicitor General should be able to advise the Court to GVR in such a way as to conserve the Supreme Court's scarce resources. When there are multiple certiorari petitions that have raised the same issue, and the Supreme Court has ruled on that issue, it makes sense that the remaining cases be sent back to the lower courts to apply the new law without deciding in each of those cases whether there is an alternative basis for deciding whether to grant certiorari. No one expects the Court to take all these cases just to make sure that there is not some independently dispositive issue lurking in any of them. It simply does not make sense to force the Government to find and argue such issues in the

Supreme Court, on pain of waiving legitimate bases for ruling in its favor, when the obviously advisable course in many cases is just to send the case back, as the Court did in this case. In other words, the Court should be able to rule on one issue, and have that ruling considered where relevant in the lower courts, without having to address alternative arguments in cases not yet before it. Moreover, the Government should be able to recommend such a course where appropriate, without waiving such alternative arguments.

The cases cited by Sakkal do not support his Government waiver argument. The fact that the Government *may* use a petitioner's failure to raise an issue as one reason to oppose certiorari does not require the conclusion that it *must*, on pain of forfeiting the issue in the court below. Moreover, that the Government may use the petitioner's failure to raise an issue as one reason for opposing certiorari does not say anything about the meaning of a summary memorandum acquiescing in certiorari. Thus the Government briefs in *Salgado v. United States*, 140 S. Ct. 2640 (2020) (No. 19-6590), 140 S. Ct. 2640, 206 L. Ed. 2d 713, 2020 WL 1372757, and *Stevens v. Dep't of Treasury*, 500 U.S. 1, 111 S. Ct. 1562, 114 L. Ed. 2d 1 (1991), provide Sakkal no support on the GVR-acquiescence waiver issue. Of course, there are cases referring to the possibility that the Government may waive a waiver issue, but the cases cited by Sakkal do not deal with a GVR acquiescence, and most do not even deal with waiver at the certiorari level at all. *See Greer*, 938 F.3d at 770; *United States v. Gibbs*, 626 F.3d 344, 351 (6th Cir. 2010) (discussing waiver where we remanded the

case to the district court). In *Lee v. Kemna*, 534 U.S. 362, 376 n.8, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002), there is indeed a reference to a Government procedural default in its opposition to the petition for a writ of certiorari, but the case also involved a Government failure to raise the waiver issue in the court below, *i.e.* not solely at the certiorari level, and the case did not involve a Government acquiescence in a GVR.

The Government's agreement to a GVR thus did not forfeit the argument that Sakkal procedurally defaulted his objections to the district court's intent instructions. Plain error review is therefore appropriate, unless Sakkal's failure to challenge the intent instructions in his initial briefing to us in turn forfeited even plain error review.

However, we need not resolve the latter argument here. For practical purposes, GVR'ing our decision—based on a Supreme Court case that came down after appellate judgment but before a certiorari petition was due—is little different from having the court of appeals examine the applicability of *Ruan* before judgment in our court but after briefing. In the latter case, we do not doubt that we could order supplemental briefing on the relevance of the new precedent, based for instance on Rule of Appellate Procedure 28(j), and proceed to address the relevance of the new precedent with no harm to the structural interest of respect for the district court, and no harm to a party's ability to fully address the issue. The possibility that the district court will be reversed without having had the chance to bring its actions into compliance with the law is

just as small as under standard plain error review of its decisions. Also, by permitting supplemental briefing, the parties can address the applicability of the new precedent, just as they could where the new precedent came down during the late stages of appellate review. The latter situation occurred in *Fabode, supra*, and we proceeded to examine whether *Ruan* applied notwithstanding the failure of the defendant to argue regarding an intent instruction in his initial appellate briefing. *Fabode*, 2022 U.S. App. LEXIS 31186, 2022 WL 16825408, at *7.

However, we need not resolve this argument because, as in *Fabode*, it makes no difference as Sakkal's intent instruction claim fails on plain error review. That conclusion is compelled by our post-*Ruan* decision in *United States v. Anderson*, No. 21-3073, F.4th , 2023 U.S. App. LEXIS 9080, 2023 WL 2966356 (6th Cir. April 17, 2023), upholding a conviction under § 841(a) where the intent instruction was almost identical to the one in Sakkal's case.

Sakkal argues that the following instruction in the district court "told the jury that the 'knowingly or intentionally' element applied *only* to the act of *distributing* or *dispensing* (precisely the sort of instruction that the Supreme Court rejected in *Ruan*)":

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

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

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

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

Sakkal's supplemental reply brief characterizes this instruction as telling "the jury, point blank, that the scienter element of Section 841(a)(1) applies *only* to the act of 'dispensing' controlled substances, and not to the separate 'except as authorized' element." This language clearly says that "knowingly and intentionally" applies to "dispensing," and does not say that in so many words with respect to the negative "not for a legitimate medical purpose in the usual course of his professional practice."

Our recent holding in *Anderson* forecloses this negative implication argument, however. *Anderson* was another § 841(a) case in which the conviction preceded the *Ruan* decision. The instruction in that case was formulated a little differently but maintained the same dichotomy: the knowing-and-intentional scienter is specifically tied to the action of dispensing, but not specifically tied to the "not for a legitimate medical purpose in the usual course of his professional practice" requirement:

> First, the defendant knowingly or intentionally dispensed or distributed a Schedule II controlled substance, including fentanyl, Adderall, oxycodone and hydrocodone; and,
>
> Second, that the defendant, Dr. Anderson, prescribed the drug without a legitimate medical purpose and outside the course of professional practice.

Anderson, 2023 U.S. App. LEXIS 9080, 2023 WL 2966356, at *7. In evaluating whether this language reflected a violation of *Ruan*, our court reasoned as follows,

> The [district] court then gave "more detailed instructions on some of these terms." In describing terms related to the second element, it explained that:
>
> > Although knowledge of the defendant cannot be established merely by demonstrating he was careless, knowledge may be inferred if the defendant deliberately blinded himself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substance was distributed or dispensed without a legitimate medical purpose in the

> usual course of professional practice, then you may find that the defendant knew this was the case.

The instruction given to the jury specifically covers the holding of *Ruan*, by referring continuously to the "knowledge of the defendant," his "deliberate ignorance," and if he "knew" that the prescriptions were dispensed illegitimately. Such terms go beyond an objective view of the "usual course of professional practice" and instead direct the jury's attention to Anderson's subjective mindset in issuing the prescriptions.

The [district] court goes on to further emphasize that knowledge, and no lesser level of culpability, is required to find Anderson guilty on this element:

> But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed other than for a legitimate medical purpose while acting in the usual course of professional practice, and that the defendant deliberately closed his eyes to what was obvious. *Carelessness, or negligence, or foolishness on his part are not the same as knowledge and are not enough to find him guilty on this count.*

> The instructions given by the court, though not expressed in the way Anderson requested, substantially cover the concept of knowledge through the description of deliberate ignorance and the juxtaposition of "knowledge" with "[c]arelessness, negligence, or foolishness." *Cf. United States v. Damra*, 621 F.3d 474, 502 (6th Cir. 2010) (finding that, in the tax evasion context, a good faith instruction was substantially covered by the court's instruction that the defendant had to have acted voluntarily and deliberately to violate known law to be found guilty). Because the jury instructions given in Anderson's case appear to comport to *Ruan* and to substantially cover the requested instruction, we reject Anderson's argument that the district court abused its discretion in failing to give a good faith instruction.

2023 U.S. App. LEXIS 9080, [WL] at *7-8 (citations omitted). This reasoning is directly applicable to Sakkal's case because the same deliberate ignorance instruction relied upon in *Anderson* to eliminate any negative inference was given word-for-word in Sakkal's trial. *See* supra, p. 5-6.

Given *Anderson*'s holding that this language kept the instructions in that case from amounting to a violation of *Ruan*, the conclusion is compelled that the same language in Sakkal's case kept the instructions from amounting to plain error. A reversal for plain error requires four elements:

> *First*, there must be an error. *Second*, the error must be plain. *Third*, the error must affect "substantial rights," which generally means that there must be "a reasonable probability that, but for the error, the outcome of the proceeding would have been different." If those three requirements are met, an appellate court may grant relief if it concludes that the error had a serious effect on "the fairness, integrity or public reputation of judicial proceedings."

Greer, 141 S. Ct. at 2096-97 (citations omitted). It is sufficient for the purposes of this case to conclude that the second requirement is not met, that any error be plain. For these purposes, "[p]lain is synonymous with 'clear' or, equivalently, 'obvious.'" *United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993). The *Anderson* court explained that "more detailed instructions" in that case ensured that the instructions comported with *Ruan*'s holding, and the same is true in Sakkal's case by virtue of the identical "more detailed instructions." *See Anderson*, 2023 U.S. App. LEXIS 9080, 2023 WL 2966356, at *7-8. It follows that the instruction in Sakkal's case cannot be "plain error" in light of our published precedent in *Anderson*.

This conclusion is sufficient to affirm Sakkal's conviction on direct appeal. We do not address the other elements of the plain error test, or any arguments regarding ineffectiveness of Sakkal's counsel.

The judgment of the district court is affirmed.

APPENDIX B — ORDER OF THE SUPREME COURT OF THE UNITED STATES, DATED OCTOBER 11, 2022

SUPREME COURT OF THE UNITED STATES

No. 22–84

SAAD SAKKAL,

Petitioner,

v.

UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Sixth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the petition for writ of certiorari is granted. The judgment of the above court in this cause is vacated, and the case is remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Xiulu Ruan* v. *United States*, 597 U.S. ___ (2022).

October 11, 2022

Scott S. Harris
Clark of the Supreme Court of the United States
/s/ Scott S. Harris

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED FEBRUARY 24, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-3880

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAAD SAKKAL, M.D.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

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

ROGERS, Circuit Judge.

As a physician at Lindenwald Medical Association, defendant Saad Sakkal prescribed various controlled substances to help patients manage pain. Following a Drug Enforcement Administration investigation, a grand jury indicted Sakkal on thirty-nine counts related to the illegal distribution of controlled substances, which

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

Saad Sakkal practiced medicine at Lindenwald Medical Association from February 2015 to December 2016. Sakkal was licensed to practice medicine in Ohio and also had a DEA registration number to dispense Schedule II through Schedule V controlled substances. The DEA began investigating Sakkal's prescription practices after a referral from the Ohio Medical Board, which had received several phone calls from pharmacists about Sakkal issuing problematic prescriptions.

In June 2018, a grand jury returned a thirty-nine-count indictment against Sakkal: thirty counts of illegal distribution of a controlled substance in violation of 21 U.S.C. § 841(a)(1); two counts of distribution of a controlled substance that resulted in death in violation of 21 U.S.C.

§ 841(b)(1)(C); and seven counts of using the registration number of another to dispense a controlled substance in violation of 21 U.S.C. § 843(a)(2). The magistrate judge initially ordered a $250,000 bond. The Government appealed the magistrate judge's order, and the district court overruled the magistrate judge's determination and ordered the U.S. Marshals Service to place Sakkal in custody without bond.

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

The Government also presented testimony that Sakkal ignored warning signs about the danger of his prescription practices. Employees at Lindenwald administered drug screens to determine if patients were taking their controlled substances as prescribed and to evaluate whether the patient was also taking illegal controlled substances. These drug screens operate as an objective method to ensure that controlled-substance prescriptions do not contribute to a risk of overdose or maintenance of an addiction. Sakkal's records indicated that his patients'

drug screens sometimes revealed that patients were taking unprescribed controlled substances or were not taking prescribed controlled substances. Sakkal's records never showed that he discharged or disciplined a patient because of the concerning drug screens.

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

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

In addition to charging Sakkal with illegal distribution of controlled substances, the indictment charged Sakkal with two counts of illegally distributing controlled substances that resulted in a patient's death. One of these patients, Ashley Adkins, visited Sakkal for the first time in December 2015. After Sakkal conducted an examination in "medical student type fashion," he prescribed seventeen

medications for Adkins, including a "fairly high dose" of a benzodiazepine and a muscle relaxant. On January 18, 2016, an anonymous caller reported to Lindenwald that Adkins was abusing her medications and looking to sell or trade them. That same day, Adkins returned for a second appointment and reported having anxiety and pain. Her medical record from that day states: "She appears to be under the influence of either drugs or alcohol. Her speech is very slurred, her balance is off." Despite these concerning signs, Sakkal prescribed Adkins another benzodiazepine and a low dose of oxycodone.

Following the appointment, Adkins went with her living companion, Chris Norvell, to fill her prescriptions. The two spent time together afterwards, and Adkins passed away during the night while Norvell was asleep. When Norvell woke up, he realized that Adkins had died and noticed that half the bottle of oxycodone was gone. A coroner performed an autopsy and concluded that Adkins died of benzodiazepine and oxycodone toxicity. The autopsy did not locate any fentanyl, cocaine, or marijuana in Adkins's blood. The toxicology report indicated that Adkins's benzodiazepine and oxycodone levels were outside the therapeutic ranges. On cross examination, however, King acknowledged that Adkins would have had appropriate levels of benzodiazepine and oxycodone in her system if she had taken Sakkal's prescriptions as directed.

The jury convicted Sakkal of thirty counts of illegally distributing a controlled substance, the death count involving Adkins, and six counts of using the registration number of another to dispense a controlled substance. Sakkal's counsel filed a motion for a new trial, and Sakkal

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

Sakkal first argues that the district judge failed to grant him reasonable bail pursuant to 18 U.S.C. § 3142(f) and that the failure to give him reasonable bail violated his rights under the Sixth and Eighth Amendments. This claim fails because Sakkal's subsequent conviction and sentencing render his pre-trial detention claims moot.[1]

1. To the extent that Sakkal argues that his detention prevented him from effectively communicating with his counsel to prepare his defense, the district court did not consider this ineffective-assistance-of-counsel claim in the post-trial evidentiary hearing or

Constitutional claims and 18 U.S.C. § 3142 claims to pretrial bail become moot once the defendant is convicted. *United States v. Manthey*, 92 F. App'x 291, 297 (6th Cir. 2004) (citing *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S. Ct. 1181, 71 L. Ed. 2d 353 (1982)) (constitutional claims); *United States v. Mattice*, No. 17-4276, 2018 U.S. App. LEXIS 15709, 2018 WL 2945942, at *1 (6th Cir. June 11, 2018) (18 U.S.C. § 3142 claims); *see also United States v. Lyle*, 793 F.2d 1294, at *2 (6th Cir. 1986) (table). Once Sakkal was convicted on thirty-seven counts in the indictment, his claims concerning pretrial detention became moot because he was credited for the time he spent in detention.

Sakkal next asserts that the evidence presented during trial was insufficient to establish that he caused Adkins's death. The Government presented ample evidence, however, that the benzodiazepine and oxycodone prescribed by Sakkal were the but-for cause of Adkins's death, and this evidence was sufficient for the jury to convict Sakkal of the death count related to Adkins. As Sakkal concedes in his opening brief, Adkins filled her prescriptions from Sakkal on the day she died, and she took half of the bottle of oxycodone within a four-to-five-hour period the night she died. The coroner testified that Adkins had no fentanyl, cocaine, or marijuana in

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in its order denying the motion for a new trial. This court generally does not consider an ineffective-assistance-of-counsel claim on direct appeal where there has not been an opportunity to develop an adequate record for review, *United States v. Williams*, 612 F.3d 500, 508 (6th Cir. 2010), and we therefore decline to review this claim on direct appeal.

her system and that Adkins died from "both oxycodone and benzodiazepine toxicity." The Controlled Substances Act provides an enhanced penalty where "death or injury results from the use of" a controlled substance distributed in violation of 21 U.S.C. § 841(a)(1). *United States v. Jeffries*, 958 F.3d 517, 519 (6th Cir. 2020) (quoting 21 U.S.C. § 841(b)(1)(C)). To establish that a "physician violates the CSA in a manner that leads to the death of a patient," the "use of the drug must have been a but-for cause of the victim's death," *United States v. Volkman*, 797 F.3d 377, 392 (6th Cir. 2015), and such causation "exists where use of the controlled substance 'combines with other factors to produce' death, and death would not have occurred 'without the incremental effect' of the controlled substance," *id.* (quoting *Burrage v. United States*, 571 U.S. 204, 211, 134 S. Ct. 881, 187 L. Ed. 2d 715 (2014)). Construing the Government's evidence in the light most favorable to the Government, *United States v. Williams*, 998 F.3d 716, 727 (6th Cir. 2021), a rational trier-of-fact could conclude that Adkins would not have died without the use of the oxycodone and benzodiazepine prescribed by Sakkal.

Sakkal argues that he did not cause Adkins's death because, if Adkins had taken the benzodiazepine and oxycodone as Sakkal directed, she would not have died. But the causal relationship required to apply the penalty enhancement in 21 U.S.C. § 841(b)(1)(C) is "between the decedent's use of the controlled substance and the resultant death." *Jeffries*, 958 F.3d at 520. Thus, "[t]he question under this statute's language is whether death resulted from use of the controlled substance—not whether death was a foreseeable result of the defendant's

§ 841(a)(1) violation." *Id.* at 520-21. The enhancement therefore does not require the Government to prove that Sakkal directed Adkins to ingest lethal amounts of the controlled substances; rather, the Government satisfied its burden by demonstrating that Adkins died from ingesting the controlled substances Sakkal prescribed to her.

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

In his reply brief, Sakkal argues for the first time that the evidence was insufficient for the jury to conclude that he prescribed controlled substances to Adkins without a legitimate medical purpose. But "an appellant abandons all issues not raised and argued in its initial brief on appeal." *Bard v. Brown Cnty.*, 970 F.3d 738, 751 (6th Cir. 2020) (quoting *United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006)). We have consistently refused to review arguments raised for the first time in a reply brief on appeal because the Government has not had an opportunity to respond to the arguments. *United States v. Adams*, 598 F. App'x 425, 429 (6th Cir. 2015) (citing *United States v. Campbell*, 279 F.3d 392, 401 (6th Cir. 2002)). We therefore decline to review this sufficiency-of-the-evidence claim raised for the first time in his reply brief.

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

First, Sakkal contends that his trial counsel's actions during the plea-bargaining process amounted

2. To be clear, the claims we decline to review include: Sakkal received ineffective assistance of counsel because he could not communicate with his counsel while detained to prepare his defense; Sakkal's counsel did not file any motions in limine concerning the DEA phone call or the limits of Dr. King's testimony; Sakkal's counsel did not object to testimony by the computer programmer; Sakkal's counsel did not object to testimony by a pharmacist; Sakkal's counsel did not object to a witness's testimony about an uncharged death; Sakkal's counsel did not object to the testimony of a former employee's opinion; and Sakkal's counsel did not object to the jury instructions about the necessary intent required to convict Sakkal.

to ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Sakkal fails to establish this claim because he does not show that his counsel's advice constituted deficient performance. In determining that Sakkal's trial counsel gave competent advice about whether to accept the plea offer, the district court credited the testimony of Sakkal's counsel that, shortly before the trial began, he discussed the terms of the plea bargain with Sakkal and told him to "seriously consider taking the plea offer" because it was substantially below the minimum term Sakkal faced if convicted on the death counts. Sakkal's counsel explained that Sakkal would likely have to serve only a short term of imprisonment under the plea offer because of the time he had already served in pretrial detention and the opportunities he would have with the Bureau of Prison to receive good-credit time and to serve the final six months of his term in a halfway house. Reviewing these factual findings for clear error, *Logan v. United States*, 910 F.3d 864, 868 (6th Cir. 2018) (citing *Guerrero v. United States*, 383 F.3d 409, 414 (6th Cir. 2004)), the district court did not clearly err in crediting the testimony of Sakkal's previous trial counsel. Sakkal must show that this performance by his counsel was deficient and that he suffered prejudice because of the deficiency to succeed on his ineffective-assistance-of-counsel claim. *Strickland*, 466 U.S. at 687.

Sakkal argues that his counsel's recommendation was insufficient because it came after months "of insincere assessments of his chances at trial and unreal expectations of an 'acquittal' and 'exoneration' when no actual preparations for success were being made by" his counsel. But the district court correctly noted that, in

a previous hypothetical discussion between Sakkal and his trial counsel, Sakkal stated that he did not want to take a three-year plea offer because he thought he was innocent. And "[t]he decision to plead guilty—first, last, and always—rests with the defendant." *Smith v. United States*, 348 F.3d 545, 552 (6th Cir. 2003). Although Sakkal is entitled to effective assistance of counsel once the Government offered him a plea bargain, *Logan*, 910 F.3d at 871 (quoting *Lafler v. Cooper*, 566 U.S. 156, 168, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012)), Sakkal has not shown that his counsel's recommendation that Sakkal "seriously consider" the plea offer amounted to deficient performance in light of Sakkal's previous hesitancy to consider a three-year plea deal.

Second, regarding his trial, Sakkal arguably renews his claim from below that his counsel's trial strategy not to call an expert witness amounted to ineffective assistance of counsel. *See* Appellant's Brief at 55-56. But Sakkal fails to show that his trial counsel's performance was deficient. As the district court noted, Sakkal's trial counsel testified that he decided not to call an expert after he consulted with two potential experts. One of these experts informed Sakkal's counsel that a battle-of-the-experts strategy had been unsuccessful in other cases and that "in his opinion, there would not be an expert that would be able to testify" for Sakkal and defend his prescribing practices. Sakkal's counsel therefore decided that the best strategy would be to argue that Sakkal prescribed the medications in good faith and lacked the necessary criminal intent. To succeed on his claim, Sakkal must "overcome the presumption that, under the circumstances, the challenged action 'might be

considered sound trial strategy.'"[3] *Stojetz v. Ishee*, 892 F.3d 175, 193 (6th Cir. 2018) (quoting *Strickland*, 466 U.S. at 689). Sakkal does not present any other evidence that his counsel's trial strategy was deficient. In the absence of deficient performance by Sakkal's counsel on either ineffective-assistance-of-counsel claim, these claims are without merit, and we need not address the district court's alternative conclusions that Sakkal failed to establish prejudice for either claim.

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

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

APPENDIX D — TRANSCRIPT EXCERPT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION, DATED APRIL 9, 2019

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 1:18-cr-088

UNITED STATES OF AMERICA,

Plaintiff,

- v -

SAAD SAKKAL, M.D.,

Defendant.

Day 7 of Jury Trial

Tuesday, April 9, 2019
Cincinnati, Ohio

9:40 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHAEL R.
BARRETT, JUDGE, AND A JURY

***

Appendix D

[72]THE COURT: Okay. You guys ready?

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

***

[87]Federal law authorizes registered medical practitioners to dispense controlled substances by issuing a lawful prescription. Registered practitioners are exempt from criminal liability if they distribute or dispense controlled substances for a legitimate medical purpose while acting in the usual course of professional practice.

However, a registered practitioner violates Section 841(a)(1) of Title 21 of the United States Code if the practitioner distributes or dispenses a controlled substance without a legitimate medical purpose outside of the usual [88]course of professional practice.

***

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

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

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

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

***

[89]No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substances alleged in these counts were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose, then you may find that the defendant knew that this was the case.

But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose, and that the defendant deliberately closed his eyes to what was obvious.

Carelessness or negligence or foolishness on his part are not the same as knowledge and are not enough to find him [90]guilty on any of these counts.

***

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

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APPENDIX E — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED APRIL 27, 2022

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 20-3880

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SAAD SAKKAL, M.D.,

Defendant-Appellant.

ORDER

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

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

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