

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ETHEL OYEKUNLE-BUBU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Beau B. Brindley
COUNSEL OF RECORD

For Petitioner Ethel Oyekunle-Bubu

Law Offices of Beau B. Brindley
53 W Jackson Blvd. Ste 1410
Chicago IL 60604
(312)765-8878
bbbbrindley@gmail.com

INDEX TO APPENDICES

APPENDIX A - Court of Appeals Opinion Affirming Judgment	A1
APPENDIX B - Court of Appeals Order Denying Rehearing.....	A41
District Court Judgment Order.....	A42
District COurt Jury Charge	A46

\

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

July 25, 2023

Lyle W. Cayce
Clerk

No. 21-10620

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CAESAR MARK CAPISTRANO; ETHEL OYEKUNLE-BUBU;
WILKINSON OLOYEDE THOMAS,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CR-290-4
USDC No. 4:20-CR-290-8
USDC No. 4:20-CR-290-5

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, *Circuit Judges*.

PATRICK E. HIGGINBOTHAM, *Circuit Judge*:

A jury convicted a medical doctor and two pharmacists of drug-related crimes under the Controlled Substances Act for their roles in a pill-mill operation. We AFFIRM.

No. 21-10620

I.

A grand jury indicted Dr. Caesar Capistrano and two pharmacists, Wilkinson Oloyede Thomas and Ethel Oyekunle-Bubu (“Bubu”), (collectively, “Appellants” or “Defendants”) for roles in a “pill-mill” operation.¹ Prosecutors charged Appellants with three drug-distribution conspiracies that each spanned from 2011 to 2020.² Bubu and Thomas, who both owned pharmacies, were also charged with possession with intent to distribute controlled substances.³

While Capistrano is a medical doctor, he also owned multiple clinics. The Government’s theory was that he prescribed controlled substances and Bubu and Thomas filled those prescriptions and others, on a host of occasions, for which there was no legitimate medical purpose. The conspiracy involved recruiters coordinating with pill mills and complicit pharmacies to fill unlawful prescriptions for street-level distribution. Recruits posed as patients, getting prescriptions issued in their names in exchange for cash. The recruiters would then fill the recruits’ prescriptions at complicit pharmacies, paying exclusively in cash. Charged with drug-distribution conspiracies and with possessing with intent to distribute controlled substances,⁴ defendants invoked § 841(a) of the Controlled Substances Act, which exempts doctors and pharmacists from criminal

¹ A “pill mill” is a colloquial term for a medical clinic in which practitioners distribute controlled substances without “medical necessity or therapeutic benefit.” *See United States v. Lee*, 966 F.3d 310, 317 (5th Cir. 2020) (describing a “pill mill” as a “a medical practice that serves as a front for dealing prescription drugs”).

² 21 U.S.C. § 846.

³ 21 U.S.C. § 841.

⁴ 21 U.S.C. § 801 *et seq.*

No. 21-10620

liability for distributing “authorized” controlled substances.⁵ By regulation, prescriptions are “authorized” if they are (1) “issued for a legitimate medical purpose” and (2) “by an individual practitioner acting in the usual course of his professional practice.”⁶ At trial, the Government offered extensive evidence, including text messages, wiretaps, surveillance, cooperator testimony, and records from Defendants’ businesses and homes. The jury found Defendants guilty on all counts. The district court sentenced Capistrano and Bubu to 240 months’ imprisonment and Thomas to 151 months. Defendants timely appealed.

II.

We turn first to the standard of our review and then challenges to the sufficiency of the evidence.

A.

“The standard of review for insufficiency-of-the-evidence claims depends on whether the claims were preserved.”⁷ As the three defendants preserved their challenges to the sufficiency of the evidence against them by motions filed at trial, our review is *de novo*.⁸

Nonetheless, a “defendant seeking reversal on the basis of insufficient evidence swims upstream.”⁹ Our review is “highly deferential” to the jury’s

⁵ 21 U.S.C. § 841(a).

⁶ 21 C.F.R. § 1306.04(a).

⁷ *United States v. Suarez*, 879 F.3d 626, 630 (5th Cir. 2018).

⁸ See *United States v. Dailey*, 868 F.3d 322, 327 (5th Cir. 2017) (citation omitted); *United States v. Zamora*, 661 F.3d 200, 209 (5th Cir. 2011).

⁹ *United States v. Gonzalez*, 907 F.3d 869, 873 (5th Cir. 2018) (quoting *United States v. Mulderig*, 120 F.3d 534, 546 (5th Cir. 1997)).

No. 21-10620

finding of guilt.¹⁰ We will uphold the jury’s verdict so long as “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”¹¹ A verdict can be supported by “reasonable inferences from the evidence,”¹² but “may not rest on mere suspicion, speculation, or conjecture, or on an overly attenuated piling of inference on inference.”¹³ “Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof.”¹⁴ “[T]he jury is free to choose among reasonable constructions of the evidence.”¹⁵

1.

Bubu challenges two counts of possession with intent to distribute controlled substances in violation of 21 U.S.C. § 841(a)(1),¹⁶ which requires the Government to prove beyond a reasonable doubt that Bubu knowingly possessed a controlled substance—here, Hydrocodone and Carisoprodol—

¹⁰ *United States v. Zamora-Salazar*, 860 F.3d 826, 831 (5th Cir. 2017) (citation omitted).

¹¹ *United States v. Vargas-Ocampo*, 747 F.3d 299, 303 (5th Cir. 2014) (en banc) (citation omitted). A “reasonable doubt” is “one ‘based on reason which arises from the evidence or lack of evidence.’” *Jackson v. Virginia*, 443 U.S. 307, 317 n.9 (1979) (quoting *Johnson v. Louisiana*, 406 U.S. 356, 360 (1972)).

¹² *United States v. Moreland*, 665 F.3d 137, 149 (5th Cir. 2011) (quoting *United States v. Percel*, 553 F.3d 903, 910 (5th Cir. 2008)).

¹³ *Id.* (quoting *United States v. Rojas Alvarez*, 451 F.3d 320, 333 (5th Cir. 2006)).

¹⁴ *United States v. Rodriguez-Mireles*, 896 F.2d 890, 892 (5th Cir. 1990) (quoting *The Reindeer*, 69 U.S. 383, 401 (1864)) (alteration removed); see also *Vargas-Ocampo*, 747 F.3d at 303.

¹⁵ *United States v. Pennington*, 20 F.3d 593, 597 (5th Cir. 1994) (citations omitted).

¹⁶ One is for possessing with intent to distribute Hydrocodone to Cynthia Cooks, and the other is for possessing with intent to distribute Carisoprodol to Johnnie Parks. The challenges relate to Count 7 and Count 22 of the indictment, respectively.

No. 21-10620

which she intended to distribute.¹⁷ Bubu’s “[p]ossession may be actual or constructive, may be joint among several defendants, and may be proved by direct or circumstantial evidence.”¹⁸ “Constructive possession is ‘the knowing exercise of, or the knowing power or right to exercise, dominion and control over the proscribed substance.’”¹⁹

Bubu argues that there was “no evidence that [she] knew of the particular medical conditions of Ms. Cooks and Mr. Parks.” The Government counters that there was abundant evidence of Bubu’s involvement with recruiters—including her instructing recruiters to “remove [her] logo from vials” and leaving their recruits in the car, as having so many people in the area was a bad look—as well as other “numerous red flags” about Bubu’s pharmacy operations, including only accepting cash and charging unusually high prices for controlled substances, priced per pill rather than by a typical prescription quantity.

While § 841 does not require that Bubu *knew* the patients’ medical conditions, there must be sufficient evidence that Bubu knew the prescriptions she filled for Cooks and Parks were unauthorized.²⁰ Bubu concedes that she “knew *some* of the prescriptions emanating from Dr. Capistrano’s clinic were invalid.” Cooks was one of Capistrano’s recruiters who filled her and her recruits’ prescriptions at Bubu’s pharmacy.²¹ Bubu filled Cooks’s Hydrocodone prescription from Capistrano for the highest

¹⁷ *United States v. Delgado*, 256 F.3d 264, 274 (5th Cir. 2001).

¹⁸ *United States v. Valdiosera-Godinez*, 932 F.2d 1093, 1095 (5th Cir. 1991) (quoting *United States v. Gardea Carrasco*, 830 F.2d 41, 45 (5th Cir. 1987)).

¹⁹ *Id.* at 1096 (quoting *Gardea Carrasco*, 830 F.2d at 45).

²⁰ See *United States v. Ferris*, 52 F.4th 235, 242–43 (5th Cir. 2022).

²¹ Cooks pleaded guilty to drug conspiracy in this case.

No. 21-10620

possible prescription strength. Cooks testified that she directly interacted with Bubu, including phone calls. Parks was one of Cooks's recruits, and Cooks filled his prescriptions at Bubu's pharmacy. Bubu's dispense log, signed by Bubu, shows that Bubu filled Parks's and another one of Cooks's recruit's prescriptions from Capistrano for controlled substances.

In sum, given the evidence of Bubu's knowledge of Capistrano's clinic's practices and her involvement with recruiters, "a rational trier of fact could have found the elements of the crime beyond a reasonable doubt."²²

2.

Thomas argues that the evidence cannot show he knew any prescriptions were "invalid," and both Thomas and the Government point to "red flags."²³ We turn to the evidence, asking whether a rational jury could find beyond a reasonable doubt that Thomas *knew* the prescriptions were unauthorized.²⁴

The testimony of recruiter Wayne Kincade, and his text messages with Thomas, played a prominent role in the Government's case. Kincade started using Thomas's pharmacy to fill his recruits' prescriptions after another recruiter recommended the pharmacy. Kincade told Thomas he was picking up other people's prescriptions because they did not want to drive to the pharmacy. Kincade regularly texted and called Thomas about prescriptions and sent pictures of recruit's IDs if needed. Kincade testified that Thomas operated "by the book," but also that Thomas "fronted"

²² *Dailey*, 868 F.3d at 327 (citation omitted).

²³ Yet to overcome the medical defense, the appropriate inquiry is not about red flags, but about knowledge.

²⁴ See *Vargas-Ocampo*, 747 F.3d at 303; *Ferris*, 52 F.4th at 242–43.

No. 21-10620

Kincade prescriptions—once more than \$1,000 worth—because Thomas trusted that he would pay for the drugs later.

Kincade paid for the prescriptions in cash—three or four at a time for \$265 each—sometimes outside of business hours. When Kincade tried to fill more prescriptions each time, Thomas told him it was best to space them out so he would fill some now and the rest the next day. Thomas warned Kincade to “be careful cashing those Capistrano prescriptions because he [is] in the black book.” Thomas’s pharmacy stopped accepting Capistrano’s prescriptions but still filled prescriptions from Dr. Noel, another defendant who pleaded guilty. Kincade never told Thomas he sold drugs or suggested that he was breaking the law, but Kincade affirmed that, like everyone else involved in the conspiracy, Thomas “knew what [he] was doing.”

Thomas argues that Kincade’s statement that Thomas “wasn’t like some of the other pharmacists” and was “by the book” means “it was clear to Mr. Kincade that Mr. Thomas was not a party to a pill mill case.” But this view is not the only one fairly drawn from Kincade’s testimony that Thomas “knew what [he] was doing.” While Thomas imposed some requirements on filling other people’s prescriptions, a reasonable jury could infer that Thomas was trying to cover himself, as the Government argued. We may not reweigh the evidence, or second-guess “[c]redibility choices that support the jury’s verdict.”²⁵ Juries are “entitled to weigh . . . circumstantial evidence, drawing inferences for or against [a defendant’s] knowing and voluntary participation in a conspiracy with others.”²⁶ Where, as here, there are multiple reasonable constructions of the evidence, “the jury is free to choose among [them].”²⁷

²⁵ *Zamora-Salazar*, 860 F.3d at 832 (citation omitted).

²⁶ *Vargas-Ocampo*, 747 F.3d at 303.

²⁷ *Pennington*, 20 F.3d at 597 (citations omitted). Thomas argues that a reasonable jury cannot find a defendant guilty beyond a reasonable doubt if the “evidence gives equal

No. 21-10620

“[T]he ‘relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’”²⁸ Considered in the requisite light, the evidence was sufficient for a rational juror to find the requisite *mens rea* here.

3.

To sustain a conviction for conspiracy under 21 U.S.C. § 846, the Government must prove beyond a reasonable doubt “(1) an agreement between two or more persons to violate the narcotics laws, (2) the defendant’s knowledge of the agreement, and (3) the defendant’s voluntary participation in the conspiracy.”²⁹

Capistrano argues he cannot be convicted of conspiracy because there was no record that he “had any contact, of any type whatsoever,” with the pharmacists. Capistrano also argues that there was “no testimony whatsoever that [he] said []or did anything.” The Government counters that there was abundant evidence of a conspiracy, and Capistrano’s involvement with it as well—including Capistrano instructing individuals to issue prescriptions when he was not there, and prescribing significant quantities of Alprazolam, Carisoprodol, and Hydrocodone, which accounted for 99.7% of his prescriptions—as well as other actions with respect to Capistrano’s operations. We have long held that “all members of a conspiracy are not

or nearly equal circumstantial support to a theory of guilt, as well as a theory of innocence.” *Moreland*, 665 F.3d at 149. But this Court “abandon[ed] any reliance on the ‘equipoise rule’” in *Vargas-Ocampo*. 747 F.3d at 302.

²⁸ *United States v. Xu*, 599 F.3d 452, 453 (5th Cir. 2010) (quoting *United States v. Valle*, 538 F.3d 341, 344 (5th Cir. 2008)).

²⁹ *Zamora*, 661 F.3d at 209 (quoting *United States v. Booker*, 334 F.3d 406, 409 (5th Cir. 2003)).

No. 21-10620

required to know every other member for a conspiracy to exist.”³⁰ Given the attendant record, Capistrano’s claim falls short.

B.

In sum, our highly deferential review compels us to conclude that “the totality of the evidence permits a conclusion of guilt beyond a reasonable doubt” for all Appellants on all challenged claims.³¹

III.

Bubu and Capistrano challenge the jury instructions given at trial. The challenges fail.

A.

Generally, “this court reviews jury instructions for abuse of discretion and harmless error.”³² “However, when a defendant fails to object to jury instructions, we review for plain error.”³³ Since neither Bubu nor Capistrano objected to the jury instructions, we review for plain error.³⁴

To establish plain error, one must show that: “(1) the district court erred, (2) the error was clear or obvious, (3) the error affected his substantial rights, and (4) this court should exercise its discretion to correct the error because the error seriously affects the fairness, integrity, or public reputation

³⁰ *Gonzalez*, 907 F.3d at 874 (citing *United States v. Bolts*, 558 F.2d 316, 325 (5th Cir. 1977)).

³¹ *United States v. Nieto*, 721 F.3d 357, 365 (5th Cir. 2013) (quoting *United States v. Hicks*, 389 F.3d 514, 533 (5th Cir. 2004)).

³² *United States v. Vasquez*, 677 F.3d 685, 692 (5th Cir. 2012) (per curiam) (citing *United States v. Betancourt*, 586 F.3d 303, 305 (5th Cir. 2009)).

³³ *Id.*

³⁴ See *United States v. Nagin*, 810 F.3d 348, 350 (5th Cir. 2016).

No. 21-10620

of judicial proceedings.”³⁵ By the metric of plain error review of jury instructions, a district court does not err when “the instruction, taken as a whole, is a correct statement of the law.”³⁶ “[W]hen a jury instruction omits . . . an essential element of an offense, the error may be severe enough to meet the plain-error standard.”³⁷ When reviewing a jury instruction, we must “consider the jury charge as a whole” and reverse only if the entire charge leaves us “with the substantial and ineradicable doubt whether the jury has been properly guided in its deliberations.”³⁸ In other words, to amount to plain error, the instruction “must ‘have meant the difference between acquittal and conviction.’”³⁹

After Appellants filed their initial briefs, the Supreme Court issued *Ruan v. United States*.⁴⁰ *Ruan* addresses the state of mind requirement to convict doctors under the Controlled Substances Act.⁴¹ In *Ruan*, the Supreme Court overturned the convictions of two doctors for violating 21

³⁵ *In re Deepwater Horizon*, 824 F.3d 571, 583 (5th Cir. 2016) (citation omitted).

³⁶ *Nagin*, 810 F.3d at 350 (quoting *United States v. Ebron*, 683 F.3d 105, 151–52 (5th Cir. 2012)).

³⁷ *United States v. Vasquez*, 899 F.3d 363, 378 (5th Cir. 2018) (first alteration in original), *as revised* (Aug. 24, 2018) (quoting *United States v. Fairley*, 880 F.3d 198, 208 (5th Cir. 2018)).

³⁸ *Septimus v. Univ. of Hous.*, 399 F.3d 601, 607 (5th Cir. 2005) (internal quotations omitted).

³⁹ *Vasquez*, 899 F.3d at 378 (quoting *Fairley*, 880 F.3d at 208). This is because the party must show that their substantial rights were affected, and to establish that one’s substantial rights were affected, defendants bear the burden of showing a reasonable probability that absent the error, they would have been acquitted. *See United States v. Oti*, 872 F.3d 678, 693 (5th Cir. 2017).

⁴⁰ 142 S. Ct. 2370 (2022). The Government’s brief and Bubu and Capistrano’s reply briefs address *Ruan*. Thomas does not address *Ruan*.

⁴¹ *Id.* at 2375.

No. 21-10620

U.S.C. § 841(a)(1), which makes it a federal crime, “[e]xcept as authorized . . . for any person *knowingly or intentionally* . . . to manufacture, distribute, or dispense . . . a controlled substance.”⁴² Although the defendants could prescribe such substances to their patients, prescriptions are authorized only when a doctor issued it “for a legitimate medical purpose . . . acting in the usual course of his professional practice.”⁴³ The specific question at issue was whether it was “sufficient for the Government to prove that a prescription was *in fact* not authorized,” or whether the Government must also “prove that the doctor *knew* or *intended* that the prescription was unauthorized.”⁴⁴ The Court held that “the statute’s ‘knowingly or intentionally’ *mens rea* applies to authorization.”⁴⁵ So, “[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.”⁴⁶

This Court then decided *United States v. Ferris*, which applied *Ruan* to pharmacist violations of § 841.⁴⁷ Emphasizing that it is the *unauthorized* nature of prescriptions that renders conduct wrongful, not the dispensation itself, this Court held that the Government must prove that a pharmacist

⁴² 21 U.S.C. § 841(a)(1) (emphasis added).

⁴³ 21 C.F.R. § 1306.04(a).

⁴⁴ *Ruan*, 142 S. Ct. at 2375.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ 52 F.4th at 242–43. *Ferris* was decided two days after Bubu submitted her Reply Brief. This Court allowed Bubu, Capistrano, and the Government to file supplemental briefs addressing *Ferris*’s impact on this case.

No. 21-10620

“knowingly or intentionally filled unauthorized prescriptions for a patient.”⁴⁸

1.

Bubu raises two challenges regarding the jury instruction. We address each in turn.

First, Bubu challenges the district court’s use of “or” rather than “and” in instructing the jury when a prescription is unauthorized. Section 841 makes it unlawful, “[e]xcept as authorized[,] . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance.”⁴⁹ A two-pronged definition provides that prescriptions for controlled substances are authorized if they are (1) “issued for a legitimate medical purpose” and (2) “by an individual practitioner acting in the usual course of his professional practice.”⁵⁰ Bubu argues that the district court erred in instructing the jury that “it could convict upon a finding that she acted *either* without legitimate medical purpose *or* outside the usual practice of medicine, measured objectively.”⁵¹

⁴⁸ *Id.* at 243.

⁴⁹ 21 U.S.C. § 841(a)(1).

⁵⁰ 21 C.F.R. § 1306.04. In *United States v. Armstrong*, we held that because “[b]oth prongs are necessary for a prescription to be legitimate[,] . . . a practitioner is unauthorized to dispense a controlled substance if the prescription *either* lacks a legitimate medical purpose *or* is outside the usual course of professional practice.” 550 F.3d 382, 397 (5th Cir. 2008).

⁵¹ Bubu’s opening brief argues that the “‘knowing and intentional’ language of § 841 applies” to both prongs, and that convictions require both prongs. However, Bubu conceded this argument was foreclosed by *Armstrong*. See *Armstrong*, 550 F.3d at 397 (“[A] practitioner is unauthorized to dispense a controlled substance if the prescription either lacks a legitimate medical purpose *or* is outside the usual course of professional practice.” (emphasis removed)). In the interim, the Supreme Court decided *Ruan*, and Bubu’s reply brief urges that intervening decision “fully vindicates” her argument. We do not see it that

No. 21-10620

The district court’s jury instructions incorrectly stated the law by omitting the *mens rea* element.⁵² This satisfies the first two prongs of the plain error test.⁵³ That said, we find that this error does not warrant a plain error reversal. While it is true the district court erred, and that error was clear, “an instruction that omits an element of the offense does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.”⁵⁴ To justify reversal on plain error review, Bubu must show that the error affected her substantial rights.⁵⁵ “‘As a general rule, an error affects a defendant’s substantial rights only if the error was prejudicial.’”⁵⁶ “‘Error is prejudicial if there is a reasonable probability that the result of the proceedings would have been different but for the error.’”⁵⁷

way. *Ruan* held that “§ 841’s ‘knowingly or intentionally’ *mens rea* applies to the ‘except as authorized’ clause.” 142 S. Ct. at 2376. The decision does not require that both prongs of authorization be lacking, which Bubu appears to recognize in her reply. Accordingly, a defendant can be convicted *either* for knowing prescriptions were issued for an illegitimate purpose *or* knowing they were dispensed outside the usual course of professional practice. We view *Ruan* as ridding the Government of the option—previously accepted under *Armstrong*—that a defendant can be convicted without knowledge for distributing prescriptions outside the objectively usual course of professional practice. 550 F.3d at 397.

⁵² See *Neder v. United States*, 527 U.S. 1, 12 (1999); *Nagin*, 810 F.3d at 350–51; see also *Henderson v. United States*, 568 U.S. 266, 279 (2013) (holding second prong of plain error review considers the law as clarified during time of appeal); *United States v. Kahn*, 58 F.4th 1308, 1316 (10th Cir. 2023) (“*Ruan* expressly disallows conviction under § 841(a)(1) for behavior that is only objectively unauthorized. The [G]overnment must prove that a defendant ‘knowingly or intentionally acted in an unauthorized manner.’” (quoting *Ruan*, 142 S. Ct. at 2376)).

⁵³ See *In re Deepwater Horizon*, 824 F.3d at 583 (“[T]he district court erred [and] the error was clear or obvious.”).

⁵⁴ *Neder*, 527 U.S. at 9.

⁵⁵ *Vasquez*, 677 F.3d at 693.

⁵⁶ *United States v. Johnson*, 943 F.3d 214, 223 (5th Cir. 2019) (cleaned up) (quoting *United States v. Gonzalez-Rodriguez*, 621 F.3d 354, 363 (5th Cir. 2010)).

⁵⁷ *Id.* (quoting *Gonzalez-Rodriguez*, 621 F.3d at 363).

No. 21-10620

In other words, the likelihood of a different result must be enough to undermine confidence in the outcome of the proceedings.⁵⁸ Bubu fails to make this showing.

Bubu’s failure to meaningfully address the third and fourth prongs of the plain error test either in her opening brief or in reply undermines her challenge.⁵⁹ Bubu’s initial brief does not argue that but for the error, there would be a reasonable probability she would be acquitted. Bubu even “assume[s] for the purpose of [substantial rights] that the [G]overnment presented sufficient evidence for a jury to find the defendant’s guilty knowledge under the correct standard,” but that because of the error, Bubu did not have a chance to defend herself.⁶⁰

Bubu’s concession shows that she *did* have the “chance to defend herself” — the opportunity to present evidence that could have raised doubts about her knowledge.⁶¹ Additionally, the record shows that Bubu’s counsel spent substantial time arguing that Bubu did not knowingly commit a crime. Because Bubu failed to argue that but for the incorrect jury instruction there was a reasonable probability that she would have been acquitted, she does not satisfy the plain error test. Accordingly, although the district court erred — based on an intervening Supreme Court case it could not know about at the time — in instructing the jury, such error does warrant reversal.

⁵⁸ *United States v. Holmes*, 406 F.3d 337, 365 (5th Cir. 2005) (citing *United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004)).

⁵⁹ Bubu addresses the third and fourth prongs in only six sentences.

⁶⁰ In support, Bubu cites her procedural history section, which includes a four-page discussion of the evidence the Government introduced to establish knowledge and a single paragraph noting that “some evidence tended to raise doubts about [Bubu’s] knowledge.”

⁶¹ We note that the two pieces of evidence Bubu points to “to raise doubts” are (1) a codefendant’s witness’s testimony and (2) testimony from a Government’s witnesses.

No. 21-10620

Bubu’s second challenge argues the district court erred by “tethering the pharmacist’s criminal liability to a doctor’s misconduct.” She argues that the instructions exclusively address doctors’ practices and not pharmacists’ practices and that any doctor’s unauthorized act—whether known or unknown by the doctor or pharmacist—could be imputed to a pharmacist. We conclude that reasonable minds can differ as to whether the instructions impute doctors’ misconduct to pharmacists, as the instructions simply ask the jury to consider each defendant’s “usual course of professional practice.” “[L]egal error must be clear or obvious, rather than subject to reasonable dispute.”⁶² This was not.

2.

Capistrano raises three jury-instruction challenges. First, Capistrano challenges the instruction given by the district court. The written jury charge correctly instructed the jury to determine whether the controlled substances were “(1) prescribed for what the defendant *subjectively* considered to be a legitimate medical purpose.” However, at trial, the district court misread the charge, telling the jurors to consider *objectively* legitimate medical purposes. Capistrano contends this warrants reversal.

To be sure, we have recognized the problematic nature of inconsistent jury instructions.⁶³ And we have found reversible error when *written* instructions were contradictory on an issue that neither party addressed during closing argument.⁶⁴ But when reviewing jury instructions, we “rarely

⁶² See *Puckett v. United States*, 556 U.S. 129, 135 (2009).

⁶³ *Aero Int’l, Inc. v. U.S. Fire Ins. Co.*, 713 F.2d 1106, 1113 (5th Cir. 1983) (noting that “it is impossible after verdict to ascertain which instruction the jury followed” (internal quotation omitted)).

⁶⁴ *Nowell ex rel. Nowell v. Universal Elec. Co.*, 792 F.2d 1310, 1316–17 (5th Cir. 1986).

No. 21-10620

will reverse a conviction based on a district court’s insignificant slip of the tongue.”⁶⁵ A “district court’s apparent mistake [is] sufficiently remedied to render any resulting error harmless” when the jury is given a copy of the instruction, in which “[t]he contradictory, erroneous statement is nowhere to be found.”⁶⁶ “[T]he proper inquiry is not whether the instruction ‘could have’ been applied in an unconstitutional manner, but whether there is a reasonable likelihood that the jury *did* so apply it.”⁶⁷

Here, not only was there no error in the written instructions, the parties also spent *extensive* time discussing the subjective knowledge requirement during closing arguments.⁶⁸ Even though the district court misspoke, when “consider[ing] the instructions as a whole, the evidence presented, and the arguments of counsel[,]” we do not believe this error is “so fundamental as to result in a miscarriage of justice.”⁶⁹ Accordingly, we find there was no reversible error.⁷⁰

⁶⁵ *United States v. Phipps*, 319 F.3d 177, 190 (5th Cir. 2003) (finding no reversible plain error where one reference was made to proof by a preponderance of the evidence).

⁶⁶ *United States v. Sanders*, 70 F.3d 1268 (5th Cir. 1995) (unpublished) (per curiam). In that event, “the district court’s ‘slip of the tongue,’ [is] cured by the straightforward and accurate statement of the applicable law subsequently furnished in writing to the jurors” and “d[oes] not constitute reversible error.” *Id.*; *see also Phipps*, 319 F.3d at 190 (holding that a judge’s “single slip of the tongue” in mentioning in one count the preponderance-of-the-evidence standard instead of the beyond-a-reasonable-doubt standard in the jury instructions was not plain error).

⁶⁷ *Phipps*, 319 F.3d at 190 (quoting *Victor v. Nebraska*, 511 U.S. 1, 6 (1994)).

⁶⁸ *See United States v. Musgrave*, 483 F.2d 327, 335 (5th Cir. 1973) (affirming a conviction despite a slip of the tongue, because the “[i]solated statements which appear prejudicial when taken out of context [were] innocuous when viewed in the light of the entire trial”).

⁶⁹ *Nowell*, 792 F.2d at 1316.

⁷⁰ *See Vaccaro v. United States*, 461 F.2d 626, 636 (5th Cir. 1972) (noting the “numerous cases in which convictions have been upheld despite erroneous instructions”

No. 21-10620

Second, like Bubu, Capistrano challenges the district court’s use of “or” rather than “and” in instructing the jury when a prescription is unauthorized. Unlike Bubu, however, Capistrano does not argue that the knowledge requirement applies to both authorization prongs. Rather, like Bubu, Capistrano argues that both prongs *must* be satisfied. Because the Government need not prove both prongs, Capistrano fails to establish plain error.

Lastly, Capistrano argues that “the trial court did not clearly explain nor adequately define to the jury what good faith means.” The district court’s jury instructions make no mention of good faith. However, good faith is not a required element of the offense.⁷¹ Capistrano fails to show any error, plain or otherwise.⁷²

B.

In sum, neither Bubu nor Capistrano have shown that any errors affected their substantial rights or that we should exercise our discretion to correct any such errors.⁷³ We reject Bubu and Capistrano’s arguments that we must vacate their convictions because of the jury instructions.

when it was confidently declared that the instructions “did not contribute to the verdict of guilt”).

⁷¹ Cf. *United States v. Rodriguez-Escareno*, 700 F.3d 751, 753 (5th Cir. 2012) (“The first step in plain-error review is to determine whether there was error.”).

⁷² See *Nagin*, 810 F.3d at 350–51.

⁷³ See *United States v. Broussard*, 669 F.3d 537, 553 (5th Cir. 2012) (“To affect the defendant’s substantial rights, the defendant must demonstrate that the error affected the outcome of the district court proceedings.”); *United States v. Escalante-Reyes*, 689 F.3d 415, 425 (5th Cir. 2012) (“Additionally, we do not view the fourth prong as automatic if the other three prongs are met.”).

No. 21-10620

IV.

We next address Bubu’s other claims. Her challenges all fail.

A.

Bubu contends that the district court deprived her of her constitutional right to counsel at a critical stage of the proceeding—during sentencing—by allowing her to proceed pro se without a clear and unequivocal waiver.⁷⁴ “Sixth Amendment challenges to the validity of a waiver of counsel are reviewed *de novo*.”⁷⁵ To determine whether the district court violated Bubu’s right to counsel, we ask whether Bubu properly waived her right to counsel and whether the waiver was knowing and intelligent.⁷⁶

1.

A criminal defendant, by virtue of the Sixth Amendment, has the right to counsel at trial.⁷⁷ The right extends to the sentencing phase just as forcefully as to the guilt phase.⁷⁸ “Where a fundamental constitutional right, such as the right to counsel, is concerned, courts indulge every reasonable presumption against waiver.”⁷⁹ Without a clear election to forgo counsel, “‘a court should not quickly infer that a defendant unskilled in the law has waived

⁷⁴ The parties do not dispute that sentencing is a critical stage in which defendants are entitled to be represented by counsel. *See United States v. Taylor*, 933 F.2d 307, 312–13 (5th Cir. 1991).

⁷⁵ *United States v. Mesquiti*, 854 F.3d 267, 271 (5th Cir. 2017) (citation omitted).

⁷⁶ *Id.* at 271–72.

⁷⁷ *See Taylor*, 933 F.2d at 312.

⁷⁸ *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992) (citing *Taylor*, 933 F.2d at 312).

⁷⁹ *Mesquiti*, 854 F.3d at 272 (quoting *United States v. Cano*, 519 F.3d 512, 517 (5th Cir. 2008)).

No. 21-10620

counsel and has opted to conduct his own defense.’”⁸⁰ Defendants “can waive [their] right to counsel implicitly, by [their] clear conduct, as well as by [their] express statement.”⁸¹ Further, defendants’ “‘refusal without good cause to proceed with able appointed counsel constitutes a voluntary waiver of’ the right to counsel.”⁸² “To constitute waiver, such a refusal must take the form of ‘a persistent, unreasonable demand for dismissal of counsel.’”⁸³

But the right is not limitless. Applied here, a criminal defendant is not entitled to a *particular* counsel, just a *competent* one.⁸⁴ As we have described this right previously, “[a] defendant is entitled to counsel capable of rendering competent, meaningful assistance. . . . No defendant has a right to more.’”⁸⁵

The issue regarding Bubu’s representation was no minor dispute, but instead a continuous and long-running issue. At sentencing, Bubu repeatedly stated she did not want her current attorney, J. Stephen Cooper, to represent her. Bubu did not like the attorney previously appointed to her, so the district court allowed Bubu to hire Cooper, who was Bubu’s *fourth* attorney. The district court then instructed Bubu: “he is either going to be your lawyer, or you’re going to proceed *pro se*.” Cooper explained there was “some conflict”

⁸⁰ *Burton v. Collins*, 937 F.2d 131, 133 (5th Cir. 1991) (quoting *Brown v. Wainwright*, 665 F.2d 607, 610 (5th Cir. 1982)).

⁸¹ *Mesquiti*, 854 F.3d at 272 (citation omitted).

⁸² *Id.* (quoting *United States v. Fields*, 483 F.3d 313, 350 (5th Cir. 2007)).

⁸³ *Id.* (quoting *United States v. Moore*, 706 F.2d 538, 540 (5th Cir. 1983)).

⁸⁴ *Moore*, 706 F.2d at 540; see also *Richardson v. Lucas*, 741 F.2d 753, 756 (5th Cir. 1984) (“Although the sixth amendment’s right to counsel in criminal cases is absolute, an accused’s right to a particular counsel is not.”).

⁸⁵ *McQueen v. Blackburn*, 755 F.2d 1174, 1178 (5th Cir. 1985) (quoting *Moore*, 706 F.2d at 540).

No. 21-10620

between Cooper and Bubu and that Bubu refused to talk to him.⁸⁶ The district court instructed Cooper to discuss the PSR and the dangers of self-representation with Bubu. After a 47-minute break, Cooper reported that Bubu refused to look at any documentation with him and when he spoke about the dangers of self-representation, she turned her back to him and said: “I’m representing myself.” Bubu told the district court she wanted a different lawyer to represent her. The district court spoke with the attorney Bubu wanted, who said he had not yet been retained to represent Bubu and that it would “not be feasible” to represent her at that time. The Government objected to Bubu bringing on a fifth attorney because “it seem[ed] like . . . a delay tactic” since Bubu had received “competent representation from her first lawyer through her fourth lawyer.” The district court agreed and, not wanting to keep delaying sentencing and recognizing Bubu’s “pattern” of “refus[ing] to talk to [her] attorneys[,]” denied Bubu’s request to fire Cooper and hire new counsel.

When asked if she desired to represent herself, Bubu responded “No” but also insisted that Cooper could not represent her. When told she had to choose between two options: either Cooper representing her or representing herself, Bubu refused to answer the question, reiterating: “I want new counsel.” After more back and forth, the district court concluded: “you’ve made clear that you do not want Mr. Cooper to represent you in this case . . . So that means, ma’am, you are going to represent yourself.” The district court proceeded, then Bubu interjected to say: “I cannot represent myself right now, sir.” The district court asked Bubu to not interrupt him, and Bubu again said, “I cannot represent myself.” The district court asked if she

⁸⁶ Cooper claims Bubu asked him to withdraw but refused to sign a motion to withdraw. Bubu claims there is “no record” that she spoke to Cooper and asked him to withdraw.

No. 21-10620

wanted Cooper to come back, which she eventually agreed to. Cooper returned and argued that Bubu “needs some credit for an exemplary life prior to this event,” asked for a minimum guidelines sentence, and introduced Bubu’s children to speak on her behalf.

Bubu’s conduct—which she concedes was “frustrating”—waived counsel. Bubu persistently and unreasonably demanded that her counsel be dismissed. After having already dismissed multiple attorneys and refusing to cooperate and communicate with Cooper—and even turning her back to him—she insisted she would represent herself. Although Bubu never told the court she wished to represent herself, her actions relinquished her right to counsel.⁸⁷ Bubu does not argue that she had good cause to not proceed with Cooper.⁸⁸ And we have long-held that “[a] defendant’s refusal without good cause to proceed with *able appointed counsel* constitutes a voluntary” decision to proceed pro se.⁸⁹ We find Bubu’s actions as a voluntary waiver of the right to counsel.

2.

While Bubu may have voluntarily waived the right to counsel, we must next ask if it was done knowingly and intelligently.⁹⁰ Defendants must “be

⁸⁷ See *Mesquiti*, 854 F.3d at 274 (“Mesquiti stated, ‘I don’t accept [current counsel] as my lawyer and I don’t consent to these proceedings.’”).

⁸⁸ See *United States v. Simpson*, 645 F.3d 300, 308 (5th Cir. 2011) (holding a defendant does not have “good cause” to appoint substitute counsel where the defendant refused to communicate with his attorney).

⁸⁹ *United States v. Romans*, 823 F.3d 299, 313 (5th Cir. 2016) (emphasis added) (quoting *Dunn v. Johnson*, 162 F.3d 302, 307 (5th Cir. 1998)); see also *In re Hipp, Inc.*, 5 F.3d 109, 114–15 (5th Cir. 1993).

⁹⁰ To be sure, the waivable right to counsel does not *force* a requirement of counsel on an unwilling criminal defendant. *Faretta v. California*, 422 U.S. 806, 819, 833–35 (1975).

No. 21-10620

made aware of the dangers and disadvantages of self-representation.”⁹¹ We require “district courts to exercise discretion in determining the precise nature of the warning provided to a defendant seeking to represent himself, depending on the circumstances of the individual case.”⁹² “Although . . . the precise nature of appropriate warnings depends on the particularities of the case, we have generally required trial courts to provide warnings of substance, including at least a modicum of specificity.”⁹³

Bubu argues that even if she waived her right to counsel, it was not a knowingly and intelligent choice because the court did not advise her that repeatedly requesting a new lawyer or asking for a continuance would result in immediate self-representation. The record shows otherwise.

The district court told Bubu, “I am not continuing the case any longer. And so that means today, you can represent yourself . . . or you can be represented by Mr. Cooper.” The sentencing transcript reveals the district court repeatedly advised Bubu against self-representation and of the disadvantages of self-representation. For example, the district court cautioned Bubu: “I’m going to advise you that, in my opinion, you will be far better off remaining with your retained attorney, Mr. Cooper. I think it is unwise of you to try to represent yourself.” The district court even instructed

A defendant may only relinquish this right, however, if it is *knowingly and intelligently*. *Id.* at 835; *see also Mesquiti*, 854 F.3d at 272 (quoting *Tovar*, 541 U.S. at 81).

⁹¹ *Faretta*, 422 U.S. at 835 (citation omitted).

⁹² *Mesquiti*, 854 F.3d at 272–73 (citation omitted). “The trial court must consider various factors, including ‘the defendant’s age and education and other background, experience, and conduct.’” *Id.* at 273 (quoting *McQueen*, 755 F.2d at 1177).

⁹³ *Id.* at 273. “The court must ensure that the waiver is not the result of coercion or mistreatment of the defendant and must be satisfied that the accused understands the nature of the charges, the consequences of the proceedings, and the practical meaning of the right [being waived].” *Id.* (quoting *McQueen*, 755 F.2d at 1177).

No. 21-10620

Cooper to discuss “dangers and disadvantages” of self-representation with Bubu. Bubu argues that the court should have to warn defendants that their conduct could result in self-representation. While sometimes district courts do this,⁹⁴ we have never imposed such a requirement⁹⁵ and we decline to do so today. Given the district court’s multiple warnings and attempts to reason with Bubu, we hold Bubu knowingly and voluntarily waived her right to counsel.

B.

Bubu challenges the district court’s refusal to grant a continuance. “A district court’s denial of a continuance is reviewed for abuse of discretion.”⁹⁶ “Trial judges have ‘broad discretion’ in ruling on motions for a continuance.”⁹⁷ “[T]he movant must show that the denial resulted in specific and compelling or serious prejudice.”⁹⁸ “This is true even where the denial of the continuance will shorten the amount of time available for preparation of the defendant’s case.”⁹⁹ “In review, we evaluate each situation on a case-by-case basis and normally consider only the reasons for continuance presented to the trial judge.”¹⁰⁰ To establish that denying a

⁹⁴ See *Moore*, 706 F.2d at 539 (noting the court warned it was “highly likely” that the defendant’s “failure . . . to cooperate with [his attorney] in preparation of his case will be construed . . . as a waiver of his right to counsel”).

⁹⁵ See generally, e.g., *Mesquiti*, 854 F.3d at 267.

⁹⁶ *United States v. Piper*, 912 F.3d 847, 853 (5th Cir. 2019) (per curiam) (citations omitted).

⁹⁷ *Mesquiti*, 854 F.3d at 275 (quoting *United States v. Scott*, 48 F.3d 1389, 1393 (5th Cir. 1995)).

⁹⁸ *United States v. Barnett*, 197 F.3d 138, 144 (5th Cir. 1999) (internal quotation omitted).

⁹⁹ *United States v. Gates*, 557 F.2d 1086, 1088 (5th Cir. 1977) (citation omitted).

¹⁰⁰ *Mesquiti*, 854 F.3d at 275 (quoting *Scott*, 48 F.3d at 1393).

No. 21-10620

continuance was an abuse of discretion, Bubu “must show that the denial resulted in ‘specific and compelling or serious prejudice.’”¹⁰¹ We will uphold the decision below so long as it was not arbitrary or unreasonable.¹⁰²

Bubu argues the district court abused its discretion in denying her continuance request made at sentencing because she was unprepared to represent herself. While Bubu’s briefs identify the correct standard, she fails to address the “specific and compelling or serious prejudice” that resulted from the denial of the continuance. To be sure, Bubu maintains that she needed more time to prepare to discuss her PSR objections. That said, she fails to explain how this discussion would have aided her defense. She therefore cannot establish prejudice.¹⁰³

The record also indicates that prior to Bubu’s request, the district court paused proceedings and instructed Bubu and her counsel to review the PSR. She refused to do so. Any resulting prejudice was by her own hand. Bubu’s counsel was available and capable of representing her, and she may not indefinitely postpone hearings to seek representation.¹⁰⁴ The district court acted well within its discretion in refusing to grant the requested continuance.

C.

Bubu argues that the district court erred by adopting the PSR without first hearing objections from her attorney, violating her Rule 32 rights, which

¹⁰¹ *Id.* (quoting *Barnett*, 197 F.3d at 144).

¹⁰² *United States v. Stalnaker*, 571 F.3d 428, 439 (5th Cir. 2009) (citation omitted).

¹⁰³ *See Mesquiti*, 854 F.3d at 276.

¹⁰⁴ *See Gates*, 557 F.2d at 1088 (“[A] defendant ‘may not indefinitely postpone trial by continued applications for more time to seek representation.’” (quoting *United States v. Arlen*, 252 F.2d 491, 494 (2d Cir. 1958))).

No. 21-10620

require sentencing courts to “allow the parties’ attorneys to comment on the probation officer’s determinations and other matters relating to an appropriate sentence.”¹⁰⁵ Because Bubu did not object to the PSR below, plain error review applies.¹⁰⁶

Bubu argues neither she nor her attorney had a chance to object. Nowhere does the Rule require courts to hear comments *before* ruling on PSR objections. The Rule governing parties’ opportunities to speak, Rule 32(i)(4)(A), provides that defendants and their attorneys must have an opportunity to speak “[b]efore imposing sentence,” not before adopting the PSR.¹⁰⁷ Bubu argues but cites no support for the assertion that “[a]t least where the defendant proceeds *pro se*, the same reasoning suggests that the court errs when ruling on PSR objections without soliciting argument from the defendant.” We have noted that “[t]he touchstone of [R]ule 32 is reasonable notice’ to allow counsel adequately to prepare a meaningful

¹⁰⁵ FED. R. CRIM. P. 32(i)(1)(C). Bubu’s initial brief quotes the correct subsection—Rule 32(i)(1)(C)—but incorrectly cites to 32(i)(4)(C), which is not relevant to Bubu’s appeal. Bubu’s Reply Brief cites the correct provision in some places and the incorrect in others.

¹⁰⁶ See *United States v. Reyna*, 358 F.3d 344, 350 (5th Cir. 2004) (en banc). While Bubu did not object to this below, she argues that we should review for harmless error because she was not given an opportunity to object. See FED. R. CRIM. P. 51(b) (“If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.”). However, the sentencing transcript reveals that Bubu did not attempt to object to the PSR. Bubu points to the judge telling her: “Please don’t interrupt me.” But not only was Bubu interrupting to object to her self-representation, this occurred *after* the court acknowledged and ruled on the PSR objections. We have long held that “[a] party must raise a claim of error with the district court in such a manner so that the district court may correct itself.” *United States v. Krout*, 66 F.3d 1420, 1434 (5th Cir. 1995) (quoting *United States v. Bullard*, 13 F.3d 154, 156 (5th Cir. 1994)). Bubu did not do so here.

¹⁰⁷ FED. R. CRIM. P. 32(i)(4)(A).

No. 21-10620

response and engage in adversary testing at sentencing.”¹⁰⁸ Here, both Bubu and her attorney were given opportunities to speak at sentencing. While the Federal Sentencing Guidelines say that “[w]hen any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding that factor[,]” it notes that counsel’s “[w]ritten statements” may suffice.¹⁰⁹ That is what happened here. Bubu’s attorney filed written objections. Additionally, unlike Rule 32(i)(1)(B) and Rule 32(i)(4)(A), Rule 32(i)(1)(C) does not require courts to “give [defendants] a reasonable opportunity to comment,”¹¹⁰ “address the defendant personally,”¹¹¹ or “provide the defendant’s attorney an opportunity to speak.”¹¹² Rule 32(i)(1)(C) instead requires that parties’ attorneys be allowed to comment.¹¹³ At no point did the district court prohibit Bubu’s attorney from commenting. Bubu has not established that the district court committed a clear or obvious violation of Rule 32(i)(1)(C).

¹⁰⁸ *United States v. Angeles-Mendoza*, 407 F.3d 742, 749 n.12 (5th Cir. 2005) (emphasis omitted) (quoting *United States v. Andrews*, 390 F.3d 840, 845 (5th Cir. 2004)); see also *Irizarry v. United States*, 553 U.S. 708, 715 (2008) (“Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate opportunity to confront and debate the relevant issues.”).

¹⁰⁹ U.S. SENT’G GUIDELINES MANUAL § 6A1.3 & cmt (U.S. Sent’g Comm’n 2016).

¹¹⁰ Rule 32(i)(1)(B).

¹¹¹ Rule 32(i)(4)(A)(ii).

¹¹² Rule 32(i)(4)(A)(i).

¹¹³ Rule 32(i)(1)(C).

No. 21-10620

D.

Bubu challenges as improper hearsay the admission of an investigator's testimony about an intercepted conversation between LaTonya Tucker, a receptionist for Capistrano who secured money from patients, and Ritchie Milligan, a recruiter, in which the two discuss "Little Barry Hill."¹¹⁴ Although evidentiary rulings are usually reviewed for abuse of discretion, a defendant must preserve the challenge through an objection.¹¹⁵ We review unpreserved challenges for plain error.¹¹⁶

Bubu argues she preserved the challenge by objecting to and referencing the presence of double hearsay in the challenged testimony at trial. But at trial, Bubu objected to a wiretapped conversation between Tucker and Milligan as double hearsay because it included "two different people talking." The testimony about Jonathan McGillivray that Bubu challenges on appeal occurred *after* the district court overruled Bubu's double hearsay objection. That objection did not preserve the error Bubu now urges because it was not "sufficiently specific to alert the district court to the nature of the alleged error and to provide an opportunity for correction."¹¹⁷ We therefore review for plain error.¹¹⁸

¹¹⁴ See FED. R. EVID. 801(d)(2)(E); *see also, e.g., United States v. El-Mezain*, 664 F.3d 467, 501–03 (5th Cir. 2011), *as revised* (Dec. 27, 2011) (discussing Rule 801(d)(2)(E)). The conversation revealed (1) that Bubu allowed Little Barry Hill to fill fraudulent prescriptions, and (2) that Little Barry Hill is a street name for Jonathan McGillivray.

¹¹⁵ *United States v. Morin*, 627 F.3d 985, 994 (5th Cir. 2010) (citing *United States v. Sanchez-Hernandez*, 507 F.3d 826, 831 (5th Cir. 2007)).

¹¹⁶ *United States v. Akins*, 746 F.3d 590, 597 (5th Cir. 2014).

¹¹⁷ *United States v. Neal*, 578 F.3d 270, 272 (5th Cir. 2009) (citing *United States v. Ocana*, 204 F.3d 585, 589 (5th Cir. 2000)).

¹¹⁸ *Akins*, 746 F.3d at 597.

No. 21-10620

Bubu contends this testimony is double hearsay because “[i]t reflected both the conversation between Ms. Tucker and Mr. Milligan *and* some prior conversation relating these facts about Mr. McGillivray to either Ms. Tucker or Mr. Milligan.” Bubu does not contest that the conversation between Tucker and Milligan is admissible under the conspiracy hearsay exclusion. She rather argues that Turner and Miller do not have personal knowledge of the information about McGillivray. But this contention brings no comfort. The record is insufficient to determine whether Turner or Miller obtained the information about McGillivray first-hand or in the furtherance of a conspiracy.¹¹⁹ Any error was neither plain nor obvious. And there was substantial evidence about McGillivray and Bubu’s fraudulent transactions,¹²⁰ so even if we did find errors, they did not affect Bubu’s substantial rights or seriously affect her trial’s fairness. We find no reversible error.

E.

Bubu challenges the district court’s allowing a DEA agent to authenticate her signature as a lay witness. Since Bubu objected at trial, the district court’s ruling on the admissibility of evidence is reviewed for abuse

¹¹⁹ The parties argue about this possibility in their briefs. A statement is “not hearsay” if “[t]he statement is offered against an opposing party and . . . was made by the party’s coconspirator during and in furtherance of the conspiracy.” FED. R. EVID. 801(d)(2)(E).

¹²⁰ Evidence at trial included text messages between McGillivray and Bubu disputing cash payments. McGillivray sent Bubu text messages saying things like “I will draw [sic] off the patients I owe you tomorrow” and “I have all the patients and all my money.” Bubu told McGillivray to “Please remove [her pharmacy’s] logo from vials.” And on the day the Texas State Board of Pharmacy went to Bubu’s pharmacy, Bubu sent McGillivray a series of frantic texts, including: “Emergency” and “They say all X are fake. Call me.”

No. 21-10620

of discretion subject to harmless error.¹²¹ The metric is “unless manifestly erroneous,” we will not reverse.¹²²

At trial, the district court overruled Bubu’s objection to a DEA agent’s lay testimony identifying two of her signatures.¹²³ The agent gained familiarity with Bubu’s handwriting during the course of the investigation. Bubu argues that familiarity developed during a criminal investigation is “acquired for purposes of the litigation” and not admissible as lay witness testimony. While we have not addressed whether an investigator who develops familiarity about handwriting during an investigation may authenticate the handwriting as a lay witness, our sister circuits have. We are persuaded by their reasoning.

Under Rule 901 of the Federal Rules of Evidence, a signature can be authenticated by “[a] nonexpert’s opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.”¹²⁴ “Testimony based upon familiarity acquired for purposes of the litigation,” on the other hand, must be provided as expert testimony.¹²⁵ The First, Second, Sixth, Eighth, and Eleventh Circuits all allow investigators who become familiar with handwriting in the process of solving a crime to testify at trial as lay witnesses.¹²⁶ “Each of those circuits has drawn a distinction,

¹²¹ *United States v. Moparty*, 11 F.4th 280, 295 (5th Cir. 2021) (citations omitted).

¹²² *Brumfield v. Hollins*, 551 F.3d 322, 330 (5th Cir. 2008) (citing *United States v. Tucker*, 345 F.3d 320, 326 (5th Cir. 2003)).

¹²³ Bubu concedes in her reply that the third signature she objected to, Tomlinson’s signature on a patient consultation log, has no bearing on her case.

¹²⁴ FED. R. EVID. 901(b)(2).

¹²⁵ FED. R. EVID. 901(b) advisory committee’s note.

¹²⁶ See *United States v. Iriele*, 977 F.3d 1155, 1167 (11th Cir. 2020); *United States v. Harris*, 786 F.3d 443, 447–48 (6th Cir. 2015); *United States v. Ali*, 616 F.3d 745, 753–54 (8th

No. 21-10620

either explicitly or implicitly, between becoming familiar with someone's handwriting 'for the current litigation' and doing so for the purpose of determining if the defendant has committed a crime."¹²⁷ We found no sister circuit holding differently, nor did Bubu identify one.

Here, the agent's testimony was not merely a "one-shot comparison" where a witness identifies handwriting for the first time in the courtroom during trial.¹²⁸ Rather, over the course of the investigation, the agent reviewed 20,000 pages of prescriptions with witness signatures. Given that an "investigator is in the same position as any other lay witness who, as part of his job or in his day-to-day affairs, has seen examples of the defendant's handwriting, such as the defendant's 'accountant, employee[,] or family member[,]'"¹²⁹ we join our four sister circuits in holding that the district court did not err in admitting the agent's testimony.

V.

Finally, we address Capistrano's other claims. None is meritorious.

Cir. 2010); *United States v. Samet*, 466 F.3d 251, 256 (2d Cir. 2006); *United States v. Scott*, 270 F.3d 30, 48–50 (1st Cir. 2001).

¹²⁷ *Iriele*, 977 F.3d at 1166.

¹²⁸ *Cf. United States v. Pitts*, 569 F.2d 343, 348 (5th Cir. 1978) (holding lay testimony was properly excluded when the "familiarity" was gained "solely by comparing the signature" to the witness's signature on day of trial).

¹²⁹ *Iriele*, 977 F.3d at 1167 (first alteration in original) (quoting *Samet*, 466 F.3d at 256); *see also United States v. Kilgore*, 518 F.2d 496, 498 (5th Cir. 1975) (holding witnesses with experience viewing a defendant's initials and the types of documents they would sign could prove that by affidavit).

No. 21-10620

A.

Capistrano objects to statements made during the Government’s closing argument as mischaracterizing the facts. The statements were objected to at trial. We review for abuse of discretion.¹³⁰

“A criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone,” and “[t]he determinative question is whether the prosecutor’s remarks cast serious doubt on the correctness of the jury’s verdict.”¹³¹ To determine whether there was prosecutorial misconduct, we ask whether “the prosecutor made an improper remark” and whether “the defendant was prejudiced.”¹³² Prejudice is a “high bar.”¹³³

Capistrano objected to the Government’s assertion that he had “zero cancer patients.” The district court overruled the objection and instructed the jury: “you will remember what the evidence shows.” “The closing argument must be analyzed in the context of the entire case to determine whether it affected substantial rights of the accused. In making this determination, [we] should consider the strength of the [G]overnment’s case and the trial court’s instructions to the jury.”¹³⁴ The evidence shows that a “few” of Capistrano’s patients were diagnosed with cancer. But Capistrano did not treat patients for cancer, he treated them for “pain.” So when one of Capistrano’s employees was asked if they saw “any cancer patients at all[,]”

¹³⁰ See *United States v. Griffin*, 324 F.3d 330, 361 (5th Cir. 2003) (citation omitted).

¹³¹ *United States v. Iredia*, 866 F.2d 114, 117 (5th Cir. 1989) (per curiam) (citations omitted).

¹³² *Fields*, 483 F.3d at 358 (quotation marks and citation omitted).

¹³³ *United States v. Reagan*, 725 F.3d 471, 492 (5th Cir. 2013) (internal quotation and citation omitted).

¹³⁴ *United States v. Chase*, 838 F.2d 743, 749 (5th Cir. 1988) (citation omitted).

No. 21-10620

she responded “No.” Given the substantial evidence against Capistrano and the district court’s instructions to “remember what the evidence shows,” we find no reversible error. Indeed, the Government’s argument is consistent with the evidence. Moreover, if the evidence in the case to support a conviction is strong, it is unlikely that the defendant was prejudiced by any improper arguments made by the prosecutor in closing arguments.¹³⁵

B.

Capistrano argues his counsel was ineffective because he did not request home detention, failed to make various objections, failed to investigate claims, failed to object to jury instructions, and failed to request a *Franks* hearing.¹³⁶ Yet we review a claim for ineffective assistance of counsel (“IAC”) on direct appeal “[o]nly when the record is sufficiently developed with respect to such a claim.”¹³⁷ That is, evidence or examples establishing deficient performance or prejudice.¹³⁸ We have none here. As the record is not sufficiently developed to evaluate Capistrano’s IAC claim, we decline to consider the claims on direct appeal.¹³⁹

¹³⁵ See *United States v. Diaz-Carreon*, 915 F.2d 951, 956 (5th Cir. 1990). Even if we did credit this claim, after reviewing the record and considering the relevant factors, we cannot conclude that remark undermines the correctness of the verdict.

¹³⁶ See generally *Franks v. Delaware*, 438 U.S. 154 (1978).

¹³⁷ *United States v. Rosalez-Orozco*, 8 F.3d 198, 199 (5th Cir. 1993) (internal quotation and citation omitted).

¹³⁸ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¹³⁹ See *United States v. Isgar*, 739 F.3d 829, 841 (5th Cir. 2014); see also *United States v. Gulley*, 526 F.3d 809, 821 (5th Cir. 2008) (per curiam) (“If we cannot fairly evaluate the claim from the record, we must decline to consider the issue without prejudice to a defendant’s right to raise it in a subsequent proceeding.” (citations omitted)).

No. 21-10620

C.

Capistrano is proceeding *pro se*, so we must “interpret his brief liberally to afford all reasonable inference which can be drawn from them.”¹⁴⁰ By the rules, *pro se* “litigants must still brief the issues and reasonably comply with the standards of Rule 28 in order to preserve them.”¹⁴¹ Failure to comply with this Court’s rules results in dismissal.¹⁴² We will not address his remaining arguments as they either are frivolous or inadequately briefed.¹⁴³

VI.

In sum, we AFFIRM Appellants’ convictions and sentences. There is sufficient evidence for a jury to draw reasonable inferences to support Appellants’ convictions. Bubu and Capistrano fail to make the showings necessary to warrant plain error reversal. Bubu’s refusal to be represented by her retained attorney amounted to a knowing and voluntarily waiver of counsel. Bubu fails to show the necessary prejudice for her challenges to the denial for a continuance, as well as permitting a DEA agent to authenticate her signature as a lay witness. The Government’s closing argument was

¹⁴⁰ *In re Tex. Pig Stands, Inc.*, 610 F.3d 937, 941 n.4 (5th Cir. 2010) (citation omitted).

¹⁴¹ *Arredondo v. Univ. of Tex. Med. Branch at Galveston*, 950 F.3d 294, 298 (5th Cir. 2020) (internal quotation and citation omitted).

¹⁴² *Id.* (citation omitted)

¹⁴³ These include claims: (1) that the district court lacked subject matter jurisdiction over him because Article III does not mention “district court[s]”; (2) the Government lacked standing because the United States of America cannot be a named party; (3) he cannot be convicted for a Title 21 offense because he did not sign a contract with the United States; (4) he was not allowed to testify before being charged by a grand jury; (5) he was a victim of selective prosecution; (6) he had a right to a hearing of which he was deprived; (7) the district court inappropriately engaged in usurping the power of the State of Texas’s medical board; (8) the evidence offered at trial was falsified; and (9) the government failed to turn over his patient files.

No. 21-10620

consistent with the evidence. The record is not sufficiently developed to evaluate Capistrano's IAC claim. And Capistrano's additional claims are either frivolous or insufficiently briefed.

AFFIRMED.

No. 21-10620

PATRICK E. HIGGINBOTHAM, *Circuit Judge*, concurring in part and dissenting in part:

Decades ago, Justice Oliver Wendell Holmes, Jr., and Judge Learned Hand, two of our nation's preeminent legal minds, were having lunch, and after breaking bread, "as Holmes began to drive off in his carriage, Hand, in a sudden onset of enthusiasm, ran after him, crying, 'Do justice, sir, do justice.' Holmes stopped the carriage and reproved Hand: 'That is not my job. It is my job to apply the law.'"¹

"The exchange between the two judges is part of an age-old struggle to define the relation of law and justice and to determine to which the judge owes loyalty."² In Hand's telling of the story, he did so only "to provoke a response" from Holmes, knowing full-well that he agreed with Holmes's view of his juridical responsibility.³ And, indeed, as students of these two stalwarts and their jurisprudential philosophy know both believed their duty and fidelity was *strictly* to the law rather than to one's individual concept of a just outcome.⁴ By contrast, those like Chief Justice Earl Warren or Judge J.

¹ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 6 (1990). Over the years, this story has been told with slight variations. See, e.g., Michael Herz, "*Do Justice!*": *Variations of A Thrice-Told Tale*, 82 VA. L. REV. 111, 111–12 (1996) (retelling the story as told by Hand himself, Bork, and Prof. Abram Chayes).

² Herz *supra* n.1 at 112–13.

³ *Id.* at 111 (quoting Learned Hand, *A Personal Confession*, in *The Spirit of Liberty* 302, 306–07 (Irving Dilliard ed., 3d ed. 1960)).

⁴ See *id.* at 114–15 & n.11–13; see also William J. Brennan, Jr., *In Memoriam: J. Skelly Wright*, 102 HARV. L. REV. 361 (1988) ("If useful at all, the labels may be more serviceable to distinguish the judge who sees his role as guided by the principle that 'justice or righteousness is the source, the substance and the ultimate end of the law,' from the judge for whom the guiding principle is that 'courts do not sit to administer justice, but to administer the law.' Such legendary names as Justice Holmes and Judge Learned Hand have been associated with the latter view.").

No. 21-10620

Skelly Wright, two luminaries of their day, fall into the latter category.⁵ With regard to Bubu’s conviction on Count 3, the majority is loyal to neither.

Though I join the remainder of the Court’s opinion vis-à-vis Bubu’s other convictions as well as those of her co-defendants, as I believe there is a miscarriage of justice afoot, I would not affirm the sentence imposed for her drug trafficking conviction in Count 3.

I.

One month after oral argument, Bubu’s counsel moved to file supplemental briefing raising a new claim: “whether the Court reversibly erred in imposing a sentence of 20 months on Count Three, when 21 U.S.C. §§ 841(b)(1)(E)(3) and 846 set forth a maximum of 12 months.”⁶ The unopposed motion for leave to file was directed to me as a single judge matter and granted, with a request that the Government respond.⁷ It did, “agree[ing] [that] the sentence exceeded the statutory maximum and that the sentence could not be greater than 12 months” and urging that “the Court [] reform the judgment to reduce the sentence” in accordance with the statutory maximum rather than remanding altogether.⁸ In other words, the Government conceded plain error urging that the panel correct the error rather than remand for a new sentencing hearing.

⁵ See Brennan, *supra* n.4 at 361–62;

⁶ Unopposed Motion for Leave to File Supplemental Letter Brief Regarding Statutory Maximum on Count Three at 1, *United States v. Ethel Oyekunle-Bubu*, No. 21-10620 (Dkt. No. 455).

⁷ See generally Order, *United States v. Ethel Oyekunle-Bubu*, No. 21-10620 (Dkt. No. 459).

⁸ Government’s Response to Supplemental Letter Brief at 2, *United States v. Ethel Oyekunle-Bubu*, No. 21-10620 (Dkt. No. 455).

No. 21-10620

II.

When the Government confesses that a person is facing nearly a year in prison for which there is no legal basis—it matters. Nigh a century ago, the Supreme Court made clear that “[i]n exceptional circumstances, *especially in criminal cases*, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.”⁹ Twenty-six and a half years later, the High Court reaffirmed that principle.¹⁰ Since that pronouncement, our Court has taken that principle to heart, “recogniz[ing] an exception to” the general waiver rule “whereby we will consider a point of error not raised on appeal when it is necessary ‘to prevent a miscarriage of justice.’”¹¹ The Federal Rules of Criminal Procedure specifically endow us with the authority to reverse a sentence on the basis of plain error, even though the defendant has

⁹ *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (emphasis added).

¹⁰ *See Silber v. United States*, 370 U.S. 717, 718 (1962) (quoting *Atkinson*, 297 U.S. at 160).

¹¹ *United States v. Whitfield*, 590 F.3d 325, 346 (5th Cir. 2009) (quoting *United States v. Montemayor*, 703 F.2d 109, 114 n.7 (5th Cir. 1983)); *see also, e.g., United States v. Douglas*, 910 F.3d 804, 806 (5th Cir. 2018), *as revised* (Dec. 19, 2018) (“The threshold question is whether we should address the district court’s error at all because Douglas did not object below or raise this issue in his opening brief. We answer in the affirmative.”); *United States v. Delgado*, 672 F.3d 320, 329 (5th Cir. 2012) (en banc) (“[I]n very rare instances, we have applied the plain-error standard to errors neither preserved below *nor* argued on appeal.”); *United States v. Gonzalez*, 259 F.3d 355, 359 (5th Cir. 2001) (“We may raise an issue sua sponte ‘even though it is not assigned or specified’ when ‘plain error is apparent’” (quoting *United States v. Pineda-Ortuno*, 952 F.2d 98, 105 (5th Cir. 1992))); *United States v. Musquiz*, 445 F.2d 963, 966 (5th Cir. 1971) (“We notice this error on our own motion, as we think we are required to do when the error is so obvious that failure to notice it would ‘seriously affect the fairness, integrity, or public reputation of judicial proceedings.’” (quoting the above passage from *Atkinson* quoted in *Silber*)).

No. 21-10620

not raised the issue on appeal.¹² And of course, this issue was raised on appeal, albeit not in a timely fashion. To these eyes, the error at issue here falls squarely within this exception. This is no minor error, but one the Government *concedes* will subject Bubu to nearly one year of prison beyond her legal sentence.

If the point is to impose discipline upon counsel for their shortcomings, it misses the mark. As Chief Justice Marshall wrote just over two centuries ago, “the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”¹³ Affirming this sentence beyond what Congress permits, as our Court does today, exceeds our power and usurps that of the Congress. Indeed, I can think of no clearer subject of “exceptional circumstances” worthy of action than an unlawful sentence.¹⁴ And in conceding the error, the Government asked this Court to correct the error and otherwise affirm rather than remand for resentencing.¹⁵

¹² See *Whitfield*, 590 F.3d at 346–47 (quoting Fed. R. Crim. P. 52(b): “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention”).

¹³ *United States v. Wiltberger*, 18 U.S. 76, 95 (1820).

¹⁴ Accord, e.g., *United States v. Graham*, 275 F.3d 490, 522 (6th Cir. 2001) (“Both the Supreme Court and this circuit have found *sua sponte* consideration of plain error to be appropriate to remedy unlawful sentences imposed by the district court.”); cf. *Bartone v. United States*, 375 U.S. 52, 53 (1963) (holding that district court’s error in increasing sentence by one day in the absence of the defendant “was so plain . . . that it should have been dealt with by the Court of Appeals, even though it had not been alleged as error”). And beyond fairness, “judicial economy [also] dictate[s] that we address now this issue that would doubtless otherwise be raised in a subsequent habeas proceeding.” *Pineda-Ortuno*, 952 F.2d at 105.

¹⁵ See generally Government’s Response to Supplemental Letter Brief, *United States v. Ethel Oyekunle-Bubu*, No. 21-10620 (Dkt. No. 455).

No. 21-10620

Our Court has corrected errors in unlawful sentences without remand for unlawful terms of supervised release¹⁶ or where the modification of the carceral term for one count did not impact the *total* imprisonment.¹⁷ I would remand the case and allow the able district judge to exercise his discretion.

The form of the remedy aside—affirm with a modification or remand—inaction ought not be countenanced, as the Court’s opinion demands Ethel Oyekunle-Bubu stay in prison eight months more than Congress deemed permissible.

¹⁶ See *United States v. McWaine*, 290 F.3d 269, 277 (5th Cir. 2002) (“Although McWaine does not raise this issue, we have the discretion to sua sponte modify the term. . . . This Court has modified terms of supervised release that exceeded the statutory maximum without remanding for re-sentencing. Accordingly, this Court hereby modifies the district court’s sentence of five years’ supervised release for Count 1 to three years.”); *United States v. Castenada*, No. 00-40929, 2002 WL 334721, at *1 (5th Cir. 2002) (unpublished) (per curiam) (“We find that Castenada’s four-year term of supervised release exceeds the statutory maximum of three years. . . . We therefore modify Castenada’s supervised release to the statutorily mandated three-year term.”).

¹⁷ See *United States v. Sotelo*, 401 F. App’x 967, 969 (5th Cir. 2010) (unpublished) (per curiam) (“Sotelo’s 87-month sentence exceeds the statutory maximum of 60 months for the conspiracy offense. Accordingly, we MODIFY Sotelo’s sentence for the conspiracy charge to 60 months in prison. . . . The modification does not affect the overall term of imprisonment because Sotelo’s concurrent sentence for his exportation charge exceeds the modified sentence. . . . Sotelo’s sentences are thus AFFIRMED as modified.”); *United States v. Hernandez-Muniz*, 354 F. App’x 133, 134 (5th Cir. 2009) (unpublished) (per curiam) (“The maximum term of imprisonment allowed for a violation of § 1324(a)(1)(A)(ii) and (v)(ii) is five years. . . . As the Government concedes, Hernandez-Muniz’s sentence of 65 months of imprisonment for transporting an alien exceeds the 60-month maximum and constitutes plain error that affects his substantial rights and affects the fairness, integrity, and public reputation of the judicial proceedings. . . . Accordingly, we modify the term of imprisonment imposed for Hernandez-Muniz’s conviction for violating § 1324(a)(1)(A)(ii) and (v)(ii) to 60 months. . . . The modification does not affect the overall term of imprisonment because Hernandez-Muniz’s concurrent sentence for his illegal reentry conviction exceeds the modified sentence for his violation of § 1324(a)(1)(A)(ii) and (v)(ii).”).

No. 21-10620

No jurisdictional bar prevents this Court from correcting this error.¹⁸ With respect, to these eyes, refusing to do so works a manifest injustice without principled justification.

I accept the necessity of maintaining the guardrails of our court with its myriad rules of preclusion, but I would correct this error—and in doing so would be attending these rules, enabling their function without blinking at an injustice we are duty-bound to correct. This is not the pursuit of justice and fairness in the abstract. It is simply a citizen’s government refusing to enforce a prison sentence it confesses is illegal.

With respect, I must DISSENT from affirming Bubu’s sentence for Count 3.

¹⁸ See *United States v. Huntsberry*, 956 F.3d 270, 282 n.4 (5th Cir. 2020) (holding “we have jurisdiction to review even unpreserved arguments”); *United States v. Arellano-Banuelos*, 912 F.3d 862, 865 n.2 (5th Cir. 2019) (noting that while “[t]he proper time to closely examine the record and develop legal defenses is before the completion of briefing,” and that “[w]e are even more reluctant to consider arguments raised after oral argument is complete and the case has been submitted for decision” because “[t]he proper time to closely examine the record and develop legal defenses is before the completion of briefing, not in the months after oral argument,” the Court retains discretion to consider such issues where “‘exceptional circumstances’” exist (quoting *Martinez v. Mukasey*, 519 F.3d 532, 545 (5th Cir. 2008); and then quoting *Silber*, 370 U.S. at 718)); *United States v. Guillen-Cruz*, 853 F.3d 768, 777 (5th Cir. 2017) (“Whether we will consider an unpreserved argument is a matter of discretion.”).

United States Court of Appeals
for the Fifth Circuit

No. 21-10620

United States Court of Appeals
Fifth Circuit

FILED

November 27, 2023

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

CAESAR MARK CAPISTRANO; ETHEL OYEKUNLE-BUBU;
WILKINSON OLOYEDE THOMAS,

Defendants—Appellants.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:20-CR-290-4

ON PETITION FOR REHEARING EN BANC

Before HIGGINBOTHAM, SMITH, and ENGELHARDT, *Circuit Judges.*

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

Fort Worth Division

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

ETHEL OYEKUNLE-BUBU

Case Number: 4:20-CR-00290-O(08)

U.S. Marshal's No.: 09920-509

Laura Montes, Assistant U.S. Attorney

J Stephen Cooper, Attorney for the Defendant

On January 28, 2021 the defendant, ETHEL OYEKUNLE-BUBU, was found guilty by jury verdict rendered as to Counts One, Two, Three, Seven and Twenty-Two of the Second Superseding Indictment filed on December 16, 2020. Accordingly, the defendant is adjudged guilty of such Counts, which involves the following offense:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. § 846 (21 U.S.C. §§ 841 (a)(1) and (b)(1)(C))	Conspiracy to Dispense and Distribute, or Possess with Intent to Dispense and Distribute Hydrocodone	09/24/2020	One
21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1), (b)(1)(E)(2))	Conspiracy to Dispense and Distribute, or Possess with Intent to Dispense and Distribute Carisoprodol	09/24/2020	Two
21 U.S.C. § 846 (21 U.S.C. §§ 841(a)(1) and (b)(1)(E)(3))	Conspiracy to Dispense and Distribute, or Possess with Intent to Dispense and Distribute Promethazine with Codeine	09/24/2020	Three
21 U.S.C. §§ 841 (a)(1) and (b)(1)(C); and 18 U.S.C. § 2	Possession with Intent to Distribute and Dispense Hydrocodone; Aiding and Abetting	09/24/2020	Seven
21 U.S.C. §§ 841 (a)(1) and (b)(1)(E)(2); and 18 U.S.C. § 2	Possession with Intent to Distribute and Dispense Carisoprodol; Aiding and Abetting	09/24/2020	Twenty-Two

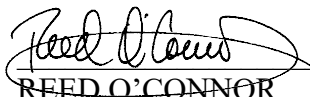
The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to Title 18, United States Code § 3553(a), taking the guidelines issued by the United States Sentencing Commission pursuant to Title 28, United States Code § 994(a)(1), as advisory only.

The defendant shall pay immediately a special assessment of \$500.00 (\$100.00 per Count) as to Counts One, Two, Three, Seven and Twenty-Two of the Second Superseding Indictment filed on December 16, 2020.

Upon motion of the government, all remaining counts are dismissed, as to this defendant only.

The defendant shall notify the United States Attorney for this district within thirty days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Sentence imposed June 18, 2021.


 REED O'CONNOR
 U.S. DISTRICT JUDGE

Signed June 18, 2021.

A 42

Judgment in a Criminal Case
Defendant: ETHEL OYEKUNLE-BUBU
Case Number: 4:20-CR-00290-O(8)

Page 2 of 4

IMPRISONMENT

The defendant, ETHEL OYEKUNLE-BUBU, is hereby committed to the custody of the Federal Bureau of Prisons (BOP) to be imprisoned for a term of NINETY (90) MONTHS as to Count One; TWENTY (20) MONTHS as to Count Two; TWENTY (20) MONTHS as to Count Three; NINETY (90) MONTHS as to Count Seven; and TWENTY (20) MONTHS as to Count Twenty-Two of the Superseding Indictment filed on December 16, 2020 to run **CONSECUTIVE** for a **TOTAL** of **TWO HUNDRED FORTY (240) MONTHS**.

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

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THREE (3) YEARS** as to Count One, Two, Three, Seven and Twenty-Two of the Superseding Indictment filed on December 16, 2020.

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

- (1) You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
- (2) After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
- (3) You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
- (4) You must answer truthfully the questions asked by your probation officer.
- (5) You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
- (6) You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
- (7) You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated

Judgment in a Criminal Case
Defendant: ETHEL OYEKUNLE-BUBU
Case Number: 4:20-CR-00290-O(8)

Page 3 of 4

circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

- (8) You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
- (9) If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
- (10) You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
- (11) You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
- (12) If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
- (13) You must follow the instructions of the probation officer related to the conditions of supervision.

In addition the defendant shall:

not commit another federal, state, or local crime;

not illegally possess controlled substances;

cooperate in the collection of DNA as directed by the probation officer;

not possess a firearm, ammunition, destructive device, or any dangerous weapon;

report in person to the U.S. Probation Office in the district to which the defendant is released from the custody of the Federal Bureau of Prisons within 72 hours of release;

refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court;

pay the assessment imposed in accordance with 18 U.S.C. § 3013;

take notice that if this judgment imposes a fine, you must pay in accordance with the Schedule of Payments sheet of this judgment; and,

not otherwise participate, directly or indirectly, in prescribing controlled substances without the probation officer's approval.

Judgment in a Criminal Case
Defendant: ETHEL OYEKUNLE-BUBU
Case Number: 4:20-CR-00290-O(8)

Page 4 of 4

FINE/RESTITUTION

The Court does not order a fine or costs of incarceration because the defendant does not have the financial resources or future earning capacity to pay a fine or costs of incarceration.

Restitution is not ordered because there is no victim other than society at large.

FORFEITURE

Pursuant to 21 U.S.C. § 853, it is hereby ordered that defendant's interest in the following property is condemned and forfeited to the United States: \$5,200 seized from Legacy Texas Bank ending in 3094, \$87,018 seized on May 20, 2020, a forfeiture money judgment of \$180,451, and real property located at 2007 Crosbyton Lane, Grand Prairie, Texas.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

United States Marshal

BY

Deputy Marshal

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

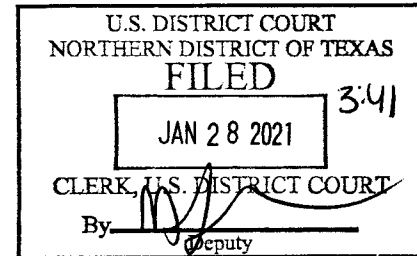
UNITED STATES OF AMERICA

v.

**CAESAR MARK CAPISTRANO (04)
WILKINSON OLOYEDE THOMAS (05)
ETHEL OYEKUNLE-BUBU (08)**

§
§
§
§
§
§
§
§

No. 4:20-cr-290-O



JURY CHARGE

Members of the Jury:

In any jury trial there are, in effect, two judges. I am one of the judges, the jury is the other. It is my duty to preside over the trial and to decide what evidence is proper for your consideration. It is also my duty at the end of the trial to explain to you the rules of law that you must follow and apply in arriving at your verdict.

First, I will give you some general instructions which apply in every case, for example, instructions about burden of proof and how to judge the believability of witnesses. Then, I will give you some specific rules of law about this particular case, and finally, I will explain the procedures you should follow in your deliberations.

You, as jurors, are the judges of the facts. But in determining what actually happened, that is, in reaching your decision as to the facts, it is your sworn duty to follow all of the rules of law as I explain them to you.

You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute

or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences.

It is also your duty to base your verdict solely upon the evidence received during the trial and the law as given and explained to you by the court, without prejudice or sympathy. That was the promise you made and the oath you took before being accepted as jurors, and the court and the parties have the right to expect nothing less.

The Indictment, or formal charge against a defendant, is not evidence of guilt. A defendant is presumed by the law to be innocent. A defendant begins with a clean slate. The law does not require the defendants to prove their innocence or produce any evidence at all and no inference whatever may be drawn from the election of a defendant not to testify. The government has the burden of proving the defendants guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendants.

While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendants' guilt be proved beyond all possible doubt. It is only required that the government's proof exclude any "reasonable doubt" concerning the defendants' guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in making the most important decisions of your own affairs.

As I told you earlier, it is your duty to determine the facts. To do so, you must

consider only the evidence presented during the trial. Evidence is the sworn testimony of the witnesses, including stipulations, and the exhibits.

The questions, statements, objections, or arguments made by the lawyers are not evidence. The function of the lawyers is to point out those things that are most significant or most helpful to their respective sides of the case, and to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that control in the case. What the lawyers say is not binding upon you. During the trial, I sustained objections to certain questions and exhibits. You must disregard those questions and exhibits entirely. Do not speculate as to what the witness would have said if permitted to answer the question or as to the contents of an exhibit.

Also, certain testimony or other evidence has been ordered removed from the record and you have been instructed to disregard this evidence. Do not consider any testimony or other evidence which has been removed from your consideration in reaching your decision. Your verdict must be based solely on the legally admissible evidence and testimony.

Also, do not assume from anything I may have done or said during the trial that I have any opinion concerning any of the issues in this case. Except for the instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own verdict.

In considering the evidence, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common

sense lead you to draw from the facts which have been established by the evidence. Do not be concerned about whether the evidence is “direct evidence” or “circumstantial evidence.” You should consider and weigh all of the evidence that was presented to you. “Direct evidence” is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. “Circumstantial evidence” is proof of a chain of events and circumstances indicating that something is or is not a fact. The law makes no distinction between the weights to be given either direct or circumstantial evidence. But the law requires that you, after weighing all of the evidence, whether direct or circumstantial, be convinced of the guilt of a defendant beyond a reasonable doubt before you can find him or her guilty.

I remind you that it is your job to decide whether or not the government has proved the guilt of a defendant beyond a reasonable doubt. In doing so, you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate.

You are the sole judges of the credibility or “believability” of each witness and the weight to be given the witness’s testimony. An important part of your job will be making judgments about the testimony of the witnesses who testified in this case. You should decide whether you believe all, some part, or none of what each person had to say, and how important that testimony was. In making that decision I suggest you ask yourself a few questions: Did the person impress you as honest? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness have any relationship with either the government or the defense? Did the witness seem to have a good memory? Did the witness clearly see or hear the things

about which he or she testified? Did the witness have the opportunity and ability to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

These are a few of the considerations that will help you determine the accuracy of what each witness said.

Your job is to think about the testimony of each witness you have heard and decide how much you believe of what each witness had to say. In making up your mind and reaching a verdict, do not make any decisions simply because there were more witnesses on one side than on the other. Do not reach a conclusion on a particular point just because there were more witnesses testifying for one side on that point. You will always bear in mind that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

During the trial you heard the testimony of Kristy Smith, Johnny Sosa, John Van Ness, Shawn Cambron, Dr. Diane Ginsburg, and Dr. Timothy King, who expressed their opinions.

If scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, a witness qualified by knowledge, skill, experience, training, or education may testify and state an opinion concerning such matters.

Merely because such a witness has expressed an opinion does not mean, however, that you must accept this opinion. You should judge such testimony like any other testimony. You may accept it or reject it, and give it as much weight as you think it

deserves, considering the witness's education and experience, the soundness of the reasons given for the opinion, and all other evidence in the case.

You have been told that some witnesses have previous criminal convictions. A conviction is a factor you may consider in deciding whether to believe that witness, but it does not necessarily destroy the witness's credibility. It has been brought to your attention only because you may wish to consider it when you decide whether you believe the witness's testimony. It is not evidence of anything else.

In this case, the government called witnesses who were alleged accomplices named as co-defendants in the Indictment and with whom the government has entered into plea agreements. These agreements provide for the dismissal of some charges. Such plea bargaining, as it is called, has been approved as lawful and proper, and is expressly provided for in the rules of this court.

An alleged accomplice, including one who has entered into a plea agreement with the government, is not prohibited from testifying. On the contrary, the testimony of such a witness may alone be of sufficient weight to sustain a verdict of guilty. You should keep in mind that such testimony is always to be received with caution and weighed with greater care. You should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that testimony beyond a reasonable doubt.

The fact that an accomplice has entered a plea of guilty to the offense charged is not evidence of the guilt of any other person.

The testimony of a witness who is shown to have used addictive drugs during the period of time about which the witness testified must always be examined and weighed by the jury with greater care and caution than the testimony of ordinary witnesses.

You should never convict any defendant upon the unsupported testimony of such a witness unless you believe that testimony beyond a reasonable doubt.

You will note that the Indictment charges that the offenses were committed “on or about” a specified date. The government does not have to prove that the crimes were committed on those exact dates, so long as the government proves beyond a reasonable doubt that the defendants committed the crimes on a date reasonably near the dates stated in the Indictment.

You are here to decide whether the government has proved beyond a reasonable doubt that the defendants are guilty of the crimes charged in the Indictment. The defendants are not on trial for any act, conduct, or offense not alleged in the Indictment. Neither are you called upon to return a verdict as to the guilt of any other person or persons not on trial as a defendant in this case, except as you are otherwise instructed.

If any of the defendants are found guilty, it will be my duty to decide what the punishment will be. You should not be concerned with punishment in any way. It should not enter your consideration or discussion.

A separate crime is charged against one or more of the defendants in each count of the Indictment. Each count, and the evidence pertaining to it, should be considered separately. The case of each defendant should be considered separately and individually. The fact that you may find one or more of the accused guilty or not guilty of any of the

crimes charged should not control your verdict as to any other crime or any other defendant. You must give separate consideration to the evidence as to each defendant.

There is a long-standing rule against “guilt by association.” A defendant may not be convicted merely because people who worked with him or her committed criminal conduct. In this case, a defendant cannot be convicted simply because he or she was associated with or friendly with anyone you may find to have acted in violation of the law. Each element of each offense must be proved independently on the basis of each defendant’s conduct and state of mind.

During the testimony of Shawn Cambron, you heard evidence related to the investigation that he conducted into Defendant Ethel Oyekunle-Bubu. This evidence is not admissible for the truth of the matter asserted but only to show that Ethel Oyekunle-Bubu was confronted with certain information by Shawn Cambron. You must not consider that evidence in deciding if Ethel Oyekunle-Bubu committed the acts charged in the Indictment.

Possession, as that term is used in this case, may be of two kinds: actual possession and constructive possession. A person who knowingly has direct physical control over a thing, at a given time, is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention, at a given time, to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that a defendant had actual or constructive possession, either alone or jointly with others.

The word “knowingly” means that the act was done voluntarily and intentionally, not because of a mistake or an accident.

The word “intentionally,” as that term is used from time to time in these instructions, means to act purposely, with conscious desire to cause the result of the conduct.

Several exhibits have been identified as typewritten transcripts of the oral conversation which can be heard on tape recordings received in evidence. The transcripts also purport to identify the speakers engaged in such conversations.

I have admitted these transcripts for the limited and secondary purpose of aiding you in following the content of the conversation as you listen to the tape recordings, and also to aid you in identifying the speakers.

You are specifically instructed that whether the transcripts correctly or incorrectly reflect the content of the conversations or the identities of the speakers is entirely for you to determine based upon your own evaluation of the testimony you have heard concerning the preparation of the transcripts, and from your own examination of the transcripts in relation to your hearing of the tape recordings as the primary evidence of their own contents; and, if you should determine that the transcripts are in any respect incorrect or unreliable, you should disregard them to that extent. It is what you hear on the tape that is evidence, not the transcripts.

Certain charts and summaries have been shown to you solely as an aid to help explain the facts disclosed by evidence (testimony, books, records, and other documents) in the case. These charts and summaries are not admitted evidence or proof of any facts. You should determine the facts from the evidence that has been admitted.

Certain charts and summaries of other records have been received into evidence. They should be considered like any other evidence in the case. You should give them only such weight as you think they deserve.

The charts and summaries include inferences or conclusions drawn from the records underlying them. It is up to you to determine if these inferences or conclusions are accurate.

Title 21, United States Code, Section 846, makes it a crime for anyone to conspire with someone else to commit a violation of certain controlled substances laws of the United States.

In this case, Count One charges defendants with conspiring to dispense and distribute and possess with intent to dispense and distribute, outside the scope of professional practice and not for a legitimate medical purpose, a mixture or substance containing a detectable amount of hydrocodone, a Schedule II or Schedule III controlled substance. Section 841(a)(1) makes it a crime for anyone to knowingly or intentionally distribute or possess with intent to distribute a controlled substance outside the scope of professional practice or not for a legitimate medical purpose.

Count Two charges the defendants with conspiring to dispense and distribute and possess with intent to dispense and distribute, outside the scope of professional practice and not for a legitimate medical purpose, a mixture or substance containing a detectable

amount of carisoprodol, a Schedule IV controlled substance. Section 841(a)(1) makes it a crime for anyone to knowingly or intentionally distribute or possess with intent to distribute a controlled substance outside the scope of professional practice or not for a legitimate medical purpose.

Count Three charges the defendants with conspiring to dispense and distribute and possess with intent to dispense and distribute, outside the scope of professional practice and not for a legitimate medical purpose, a mixture or substance containing a detectable amount of promethazine with codeine, a Schedule V controlled substance. Section 841(a)(1) makes it a crime for anyone to knowingly or intentionally distribute or possess with intent to distribute a controlled substance outside the scope of professional practice or not for a legitimate medical purpose.

A “conspiracy” is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of “partnership in crime” in which each member becomes the agent of every other member.

For you to find a defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That two or more persons, directly or indirectly, reached an agreement to dispense and distribute and possess with intent to dispense and distribute a controlled substance outside the scope of professional practice and not for a legitimate medical purpose;

Second: That the defendant knew of the unlawful purpose of the agreement;

Third: That the defendant joined in the agreement willfully, that is, with the intent to further its unlawful purpose; and

Fourth: That the overall scope of the conspiracy involved at least an amount of

hydrocodone, carisoprodol, or promethazine with codeine.

One may become a member of a conspiracy without knowing all the details of the unlawful scheme or the identities of all the other alleged conspirators. If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him or her for conspiracy even though that defendant had not participated before and even though that defendant played only a minor part.

The government need not prove that the alleged conspirators entered into any formal agreement, nor that they directly stated between themselves all the details of the scheme. Similarly, the government need not prove that all of the details of the scheme alleged in the Indictment were actually agreed upon or carried out. Nor must it prove that all of the persons alleged to have been members of the conspiracy were such, or that the alleged conspirators actually succeeded in accomplishing their unlawful objectives.

Mere presence at the scene of an event, even with knowledge that a crime is being committed, or the mere fact that certain persons may have associated with each other and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy. Also, a person who has no knowledge of a conspiracy, but who happens to act in a way which advances some purpose of a conspiracy, does not thereby become a conspirator.

The government must prove beyond a reasonable doubt that the defendants conspired to dispense and distribute and possess with intent to distribute a controlled substance, but need not prove that the defendants knew which particular controlled

substance was involved.

Hydrocodone, carisoprodol, and promethazine with codeine are controlled substances within the meaning of this law.

The Indictment charges defendant Ethel Oyekunle-Bubu in Count Seven, Wilkinson Thomas in Count Eleven, and Caesar Capistrano in Count Eighteen with a violation of Title 21, United States Code, Section 841(a)(1), which makes it a crime for anyone knowingly or intentionally to possess hydrocodone, a controlled substance, with intent to distribute and dispense it outside the scope of professional practice or not for a legitimate medical purpose.

For you to find a defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed a controlled substance;

Second: That the substance was in fact hydrocodone; and

Third: That the defendant possessed the substance with the intent to distribute it.

To “possess with intent to distribute” simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction, and outside the scope of professional practice or not for a legitimate medical purpose.

The Indictment charges defendant Caesar Capistrano in Count Nineteen and Ethel Oyekunle-Bubu in Count Twenty-Two with a violation of Title 21, United States Code, Section 841(a)(1), which makes it a crime for anyone knowingly or intentionally to possess

carisoprodol, a controlled substance, with intent to distribute and dispense it outside the scope of professional practice or not for a legitimate medical purpose.

For you to find a defendant guilty of this crime, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the defendant knowingly possessed a controlled substance;

Second: That the substance was in fact carisoprodol; and

Third: That the defendant possessed the substance with the intent to distribute it.

To “possess with intent to distribute” simply means to possess with intent to deliver or transfer possession of a controlled substance to another person, with or without any financial interest in the transaction, and outside the scope of professional practice or not for a legitimate medical purpose.

The law provides that a defendant may be found guilty of an offense if he or she aids or abets another in the commission of that offense. This guilt may be established without proof that the defendant personally did every act constituting the offense alleged. The law recognizes that, ordinarily, anything a person can do for himself or herself may also be accomplished by him or her through the direction of another person as his or her agent, or by acting in concert with, or under the direction of another person or persons in a joint effort or enterprise.

If another person is acting under the direction of a defendant or if that defendant joins another person and performs acts with the intent to commit a crime, then the law holds that defendant responsible for the acts and conduct of such other persons just as though the defendant had committed the acts or engaged in such conduct.

Before any defendant may be held criminally responsible for the acts of others, it is necessary that the accused deliberately associate himself or herself in some way with the crime and participate in it with the intent to bring about the crime.

Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish that a defendant either directed or aided and abetted the crime unless you find beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator.

In other words, you may not find any defendant guilty unless you find beyond a reasonable doubt that every element of the offense as defined in these instructions was committed by some person or persons, and that the defendant voluntarily participated in its commission with the intent to violate the law.

For you to find a defendant guilty of aiding and abetting, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

First: That the offense of possession with intent to distribute and dispense hydrocodone or carisoprodol outside the scope of professional practice or not for a legitimate medical purpose was committed by some person;

Second: That the defendant associated with the criminal venture;

Third: That the defendant purposefully participated in the criminal venture; and

Fourth: That the defendant sought by action to make that venture successful.

“To associate with the criminal venture” means that the defendant shared the criminal intent of the principal. This element cannot be established if the defendant had no knowledge of the principal’s criminal venture.

“To participate in the criminal venture” means that the defendant engaged in some affirmative conduct designed to aid the venture or assist the principal of the crime.

A conspirator is responsible for offenses committed by another conspirator if the conspirator was a member of the conspiracy when the offense was committed and if the offense was committed in furtherance of, and as a foreseeable consequence of, the conspiracy.

Therefore, if you have first found a defendant guilty of the conspiracy charged in Count One, and if you find beyond a reasonable doubt that, during the time that defendant was a member of that conspiracy, another conspirator committed an offense for Possession with Intent to Distribute and Dispense Hydrocodone in Counts Four through Twenty-Two both in furtherance of and as a foreseeable consequence of that conspiracy, then you may find that defendant guilty of the corresponding substantive Count with which he or she has been charged (Count Seven, Eleven, or Eighteen), even though that defendant may not have participated in any of the acts which constitute the offenses described in Counts Four through Twenty-Two.

If you have first found a defendant guilty of the conspiracy charged in Count Two, and if you find beyond a reasonable doubt that, during the time that defendant was a member of that conspiracy, another conspirator committed an offense for Possession with Intent to Distribute and Dispense Carisoprodol in Counts Four through Twenty-Two both in furtherance of and as a foreseeable consequence of that conspiracy, then you may find that defendant guilty of the corresponding substantive Count with which he or she has been charged (Count Nineteen or Twenty-Two), even though that defendant may not have

participated in any of the acts which constitute the offenses described in Counts Four through Twenty-Two.

The Federal Controlled Substances Act, Title 21, United States Code, Section 841(a)(1) makes it a crime for anyone to “knowingly or intentionally . . . distribute or dispense . . . a controlled substance.” However, Medical practitioners properly licensed under state law, such as physicians, and pharmacists, are excepted from this general prohibition, but only to the extent that they distribute or dispense a controlled substance pursuant to a valid prescription, for a legitimate medical purpose and within the usual course of professional practice.

Someone who is a “practitioner” is legally authorized to prescribe drugs. A “practitioner” means a physician or doctor, pharmacy, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he or she practices. At the time in question, defendants Caesar Capistrano, Wilkinson Thomas, and Ethel Oyenkule-Bubu were persons properly registered with the DEA to distribute controlled substances.

The regulation which allows physicians to dispense controlled substances provides that in order for a prescription for a controlled substance to be authorized, it must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his or her professional practice.

Licensed pharmacists can fill prescriptions subject to the same duty that the practitioner or doctor has when he or she issues the controlled substances prescription: the

prescription must be issued by a registered doctor for a legitimate medical purpose in the usual course of his or her professional practice.

In considering the charges in this case, you must decide whether the controlled substances were (1) prescribed for what the defendant subjectively considered to be a legitimate medical purpose; and (2) from an objective standpoint, were dispensed in the usual course of a professional practice.

The phrase “usual course of professional practice” means acting in accordance with a standard of medical practice generally recognized and accepted in the United States. This is an objective standard that considers what is generally recognized in the medical profession, not what an individual practitioner subjectively believes the standard should be.

In making a medical judgment concerning the right treatment for an individual patient, physicians have discretion to choose among a wide range of available options. Therefore, in determining whether a defendant acted without a legitimate medical purpose, you should examine all of the physician’s actions and the circumstances surrounding them.

Types of behavior from which you could infer that the physician was acting without a legitimate medical purpose or outside the usual course of professional conduct include that an inordinately large quantity of controlled substances was prescribed; large numbers of prescriptions were issued; no physical examination was given; the physician warned the patient to fill prescriptions at different drug stores; the physician issued prescriptions to a patient known to be delivering the drugs to others; the physician prescribed controlled drugs at intervals inconsistent with legitimate medical treatment; the physician involved

used street slang rather than medical terminology for the drugs prescribed; there was no logical relationship between the drugs prescribed and treatment of the condition allegedly existing; or the physician wrote more than one prescription on occasion in order to spread them out. These examples are neither conclusive nor exhaustive. They are simply meant to give you an idea of the kind of behavior from which you might conclude that a doctor was not prescribing drugs for a legitimate medical purpose or was not acting in the usual course of medical practice.

Expert testimony is not always required to show that a physician is not acting for a legitimate medical purpose or in the usual course of his or her professional practice. If any expert testimony is offered, you are not bound by the expert testimony, and you may instead consider all of the facts and circumstances surrounding the defendants' prescribing practices as presented to you by other evidence in this case.

Federal law further provides that an order seeming to be a prescription issued not in the usual course of professional practice is not a lawful prescription within the meaning of the Controlled Substances Act. A person issuing such an order shall be subject to the penalties provided for violations of the Controlled Substances Act. Thus, responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner.

The term "dispense" means to deliver a controlled substance by, or pursuant to the lawful order of, a practitioner, including the prescribing of the controlled substance for such delivery.

The term "distribute" means to deliver (other than by administering or dispensing)

a controlled substance.

To reach a verdict, whether guilty or not guilty, all of you must agree. Your verdict must be unanimous as to each individual count in the Indictment. Your deliberations will be secret. You will never have to explain your verdict to anyone.

It is your duty to consult with one another and to deliberate in an effort to reach agreement if you can do so. Each of you must decide the case for yourselves, but only after an impartial consideration of the evidence with your fellow jurors. Do not let any bias, sympathy, or prejudice that you may feel toward one side or other influence your decision in any way. In particular, do not let racial, ethnic, national origin, or other bias influence your decision in any way. During your deliberations, do not hesitate to reexamine your own opinions and change your mind if convinced that you were wrong. But do not give up your honest beliefs as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times, you are judges—judges of the facts. Your duty is to decide whether the government has proved the defendants guilty beyond a reasonable doubt.

When you go to the jury room, the first thing that you should do is select one of your number as your foreperson, who will help to guide your deliberations and will speak for you in the courtroom.

A verdict form has been prepared for your convenience.

The verdict form lists each count with which these defendants have been charged. For each count, the relevant defendant's name is listed with a blank space next to it.

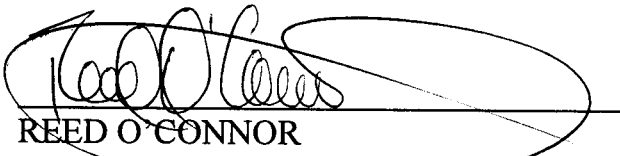
The foreperson will write the unanimous answer of the jury in the space provided

for each count of the Indictment, either Guilty or Not Guilty. At the conclusion of your deliberations, the foreperson should date and sign the verdict.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the court security officer. I will either reply in writing or bring you back into the court to answer your message.

Bear in mind that you are never to reveal to any person, not even to the court, how the jury stands, numerically or otherwise, on any count of the Indictment, until after you have reached a unanimous verdict.

SO ORDERED on this **28th day of January 2021.**



REED O'CONNOR
UNITED STATES DISTRICT JUDGE