No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT HOFSCHULZ,
LISA HOFSCHULZ,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Beau B. Brindley
COUNSEL OF RECORD

For Petitioner Randy Lamartiniere

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

INDEX TO APPENDICES

In the

United States Court of Appeals

for the Seventh Circuit

Nos. 21-3403 & 21-3404

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LISA HOFSCHULZ and ROBERT HOFSCHULZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
No. 18-cr-145-PP — **Pamela Pepper**, *Chief Judge*.

ARGUED SEPTEMBER 8, 2023 — DECIDED JUNE 25, 2024

Before SYKES, *Chief Judge*, and ROVNER and KIRSCH, *Circuit Judges*.

SYKES, *Chief Judge*. A jury convicted Lisa Hofschulz, a nurse practitioner, of conspiracy and 14 counts of distributing drugs in a manner unauthorized by the Controlled Substances Act, including one count of unlawful drug distribution resulting in the death of a patient. *See* 21 U.S.C. § 841(a)(1), (b)(1)(C); *id.* § 846. The charges arose out of her operation of a "pain clinic" as a front for a pill mill from

which she dispensed opioid prescriptions for cash-only payment. Robert Hofschulz, her then ex-husband, was also convicted for his role in helping her run the opioid mill. (The couple have since remarried.)

The Hofschulzes challenge their convictions on three grounds. First, they argue that the jury instructions were inconsistent with the Supreme Court's decision in *Ruan v. United States*, 597 U.S. 450 (2022), issued shortly after they were sentenced. *Ruan* held that in a § 841 case against a medical professional for distributing drugs in an unauthorized manner, the statute's intent requirement applies to the act of distribution *and* lack of authorization. Our circuit has long followed this rule, even before *Ruan*. In accordance with our pre-*Ruan* caselaw, the district judge instructed the jury that the government must prove beyond a reasonable doubt that the Hofschulzes intended to distribute controlled substances *and* intended to do so in an unauthorized manner. There was no instructional error.

The Hofschulzes also argue that the judge wrongly permitted the government's medical expert to testify about the standard of care in the usual course of professional pain management. Circuit precedent says otherwise. Finally, the Hofschulzes challenge the sufficiency of the evidence to support their convictions. This argument is frivolous. We affirm.

I. Background

In June 2018 Lisa Hofschulz, a licensed nurse practitioner, was charged with one count of conspiracy to distribute controlled substances in an unauthorized manner, 21 U.S.C. §§ 841(a)(1), 846; thirteen counts of distributing controlled

substances in an unauthorized manner, *id.* § 841(a); and one count of unlawful distribution of controlled substances resulting in death, *id.* § 841(a)(1), (b)(1)(C). The grand jury also indicted Robert Hofschulz, Lisa's then ex-husband and business partner, for conspiracy and aiding and abetting four of the drug-distribution counts.

After significant delay—some necessitated by the pandemic but most instigated by the defense—the case finally proceeded to trial in August 2021. The government introduced a mountain of evidence of the defendants' guilt; a summary will suffice for present purposes. The evidence established that in late 2014 the Hofschulzes opened a "pain management clinic" in Wauwatosa, Wisconsin—a suburban community just west of Milwaukee—as a front for an opioid mill. Over the next two years, Lisa prescribed millions of opioid pills in exchange for cash-only payment. Robert, who is not a medical professional, helped Lisa set up the clinic and served as its registered agent and business manager.

For their first year in operation, the Hofschulzes ran the clinic from a single 8x8-foot room adjacent to a chiropractic office, leasing space from another couple and sometimes giving their landlords large-quantity opioid prescriptions in lieu of rent. The clinic had no exam table or medical equipment. Lisa did not take patients' vital signs, perform physical examinations, review medical records, or order imaging or tests to diagnose illness or injury.

The clinic collected a cash-only fee of $200 to $300 per visit from each patient, even though a majority were on Medicaid and thus were entitled to free medical care. Nearly all patients who visited the clinic—99 percent of them—left with a prescription for an opioid drug (sometimes more than

one). Few had conditions that justified treatment with opioids; most patients were suffering from addiction or untreated mental illness rather than seeking legitimate medical care for a confirmed injury or illness.

By late 2015 the Hofschulzes had too many "patients" (and a growing waiting list) for the one-room "clinic," so they moved to a somewhat larger temporary location in a nearby office building. They also began to bring on additional nurse practitioners, hiring only newly minted nurses who lacked work experience. Most lasted no more than a few months. Several of these short-term nurses testified at trial, explaining that they raised concerns with the Hofschulzes that the clinic's operations did not conform to standard medical practice. Their efforts to sound the alarm were rebuffed, and many of the nurses either resigned within a few months or were fired after expressing concerns about Lisa's prescribing practices and the clinic's lack of standard medical care.

One patient fatally overdosed on opioids Lisa had prescribed for him. Frank Eberl came to the clinic repeatedly for more than a year, leaving each time with opioid prescriptions in amounts appropriate for end-of-life cancer patients (he was not a cancer patient). Eberl overdosed and died four days after receiving a high-dose opioid prescription from Lisa.

For the two-year period from 2015 through 2016, Lisa wrote prescriptions for more than 2 million opioid pills, collecting over $2 million in cash from patients, many of whom were repeat customers and obviously addicted. Indeed, during this period Lisa Hofschulz was the leading

prescriber of oxycodone and methadone among all Medicaid prescribers in Wisconsin.

In July 2016 Lisa was called away from Wisconsin to tend to a family matter, so she prewrote and presigned numerous opioid prescriptions and directed two newly hired nurses—just out of nursing school—to dispense them to patients while she was gone. They refused, objecting that they had not yet completed their licensing and that dispensing prewritten prescriptions was unsafe and illegal. Robert fired one of the nurses for her refusal to comply with Lisa's instructions, replacing her with a registered nurse from a temporary agency who was willing to distribute the prewritten prescriptions. The temp-agency nurse distributed more than 550 presigned opioid prescriptions while Lisa was away.

The government also presented opinion testimony from Dr. Timothy King, a medical expert who explained the standard of care for legitimate medical practice in pain management. Finally, the government called several of the clinic's patients as witnesses; they confirmed the facts we've just described about the clinic's operations. There was more to the government's case, but further elaboration is unnecessary.

As we've noted, the Hofschulzes were charged with violating the Controlled Substances Act, which makes it a crime to "knowingly or intentionally … manufacture, distribute, or dispense … a controlled substance" "[e]xcept as authorized" by the Act. § 841(a). As relevant here, registered medical professionals may prescribe controlled substances to their patients, but a prescription is "authorized" and thus excepted under the Act only when a registered medical profession-

al issues it "for a legitimate medical purpose … acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a).

Accordingly, the judge instructed the jury on the drug-distribution counts as follows:

> For you to find a defendant guilty of distributing and dispensing a controlled substance, the government must prove the following elements beyond a reasonable doubt as to the defendant and the charge that you are considering:
>
> First, that that defendant knowingly caused to be distributed or dispensed the controlled substance alleged in the charge you are considering;
>
> Second, that that defendant *did so by intentionally distributing or dispensing the controlled substance outside the usual course of professional medical practice, and not for legitimate medical purpose*; and
>
> Third, that that defendant knew that the substance was some kind of a controlled substance. (Emphasis added.)

The judge gave an additional instruction for the charge of unlawful distribution resulting in death: "In order to establish that the oxycodone and morphine distributed by Lisa Hofschulz resulted in the death of Frank Eberl[,] the government must prove that Frank Eberl died as a result of his use of the oxycodone and morphine that Lisa Hofschulz distributed … ." This instruction also included an explana-

tion of the but-for causation standard adopted in *Burrage v. United States*, 571 U.S. 204 (2014).

The jury found both defendants guilty on all counts. Lisa moved for judgment of acquittal or alternatively, for a new trial. She argued primarily that the evidence was insufficient to prove that she had issued prescriptions without a legitimate medical purpose. The judge denied the motion, ruling that the evidence we've just recounted was easily sufficient for a reasonable jury to find that Lisa had prescribed controlled substances outside the usual course of medical practice and not for legitimate medical purposes. As the judge put it: "[A] reasonable jury could look at these facts and conclude beyond a reasonable doubt that Lisa Hofschulz was issuing prescriptions for other than a legitimate purpose—that she was issuing all of these prescriptions under these circumstances for purposes of making money, and a lot of it."

Lisa also argued that Dr. King, the government's expert, provided impermissible legal conclusions in his testimony. The judge rejected this contention, noting that Dr. King had "offered nothing more than his expert opinion on the standard of care for medical professionals."

Robert likewise moved for judgment of acquittal, challenging the sufficiency of the evidence to prove his guilt on the charges against him. The judge denied his motion too, noting that although Robert was not a medical professional, the government had introduced ample evidence for the jury to find beyond a reasonable doubt that he intentionally conspired with Lisa to unlawfully distribute controlled substances and aided and abetted the commission of the four substantive distribution crimes. Among other data-

points from the trial, the judge emphasized Robert's obvious awareness that the clinic lacked any accoutrements of legitimate medical practice and the testimony from several nurses that they had raised concerns with him about Lisa's unauthorized prescribing practices and the clinic's lack of legitimate medical care.

With the posttrial motions resolved, the judge turned to sentencing. The "death resulting" count against Lisa carried a 20-year minimum prison term; the judge imposed the minimum 20-year term on that count and concurrent sentences of varying lesser lengths on the conspiracy and remaining drug-distribution convictions. Robert was sentenced to concurrent terms of 36 months in prison on each of his five convictions.

II. Discussion

On appeal the Hofschulzes raise several claims of instructional and evidentiary error. They also challenge the sufficiency of the evidence to support their convictions.

A. Jury Instructions

The defendants' primary argument is that the jury instructions did not comply with the Supreme Court's decision in *Ruan*, which as we've noted was issued after they were sentenced. We review the accuracy of the jury instructions de novo. *United States v. Bonin*, 932 F.3d 523, 537–38 (7th Cir. 2019). The trial judge has substantial discretion to formulate the language of the instructions as long as the instructions as a whole "represent a complete and correct statement of the law." *Id.* at 538 (quotation marks omitted). If the instructions correctly stated the law, then we review the judge's phrasing of them for abuse of discretion. *Id*.

Section 841(a) makes it unlawful to "knowingly or intentionally … manufacture, distribute, or dispense … a controlled substance" "[e]xcept as authorized" by the Controlled Substances Act. In *Ruan* the Supreme Court held that "§ 841's 'knowingly or intentionally' *mens rea* applies to the 'except as authorized' clause." 597 U.S. at 457. Accordingly, to convict a medical professional for violating § 841(a), the government must "prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Id.*

Ruan involved two consolidated cases from the Tenth and Eleventh Circuits raising the same question about the statute's state-of-mind requirement as applied in cases against registered medical prescribers. As noted above, the Controlled Substances Act authorizes certain licensed and registered medical professionals to prescribe controlled substances to patients. *See* 21 U.S.C. §§ 822(a)(2), 829(a). The prescribed drug must have "a currently accepted medical use," *id.* § 812(b), and the prescription must be "for a medical purpose," *id.* § 829(c). The Act defines a "valid prescription" as one "issued for a legitimate medical purpose by an individual practitioner," *id.* § 830(b)(3)(A)(ii); the term "practitioner" includes physicians and other licensed medical professionals who are permitted by their licensing authorities to dispense controlled substances "in the course of professional practice," *id.* § 802(21).

A regulation pulls these statutory requirements together: A prescription for a controlled substance is "authorized" under the Act when it is "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a).

See also Gonzales v. Oregon, 546 U.S. 243, 257 (2006) (explaining that this regulation "restate[s] the terms of the statute itself"). We therefore assume, as *Ruan* did, "that a prescription is 'authorized' and therefore lawful if it satisfies [the § 1306.04(a)] standard." 597 U.S. at 455.

Here the district judge carefully crafted the relevant jury instruction to apply the statutory state-of-mind standard to the § 1306.04(a) requirements, as had been the practice in our circuit even prior to *Ruan*. *See, e.g.*, *United States v. Kohli*, 847 F.3d 483, 489–90 (7th Cir. 2017); *United States v. Chube II*, 538 F.3d 693, 697–98 (7th Cir. 2008). The instruction explained that the government had the burden to prove beyond a reasonable doubt that the defendants "*knowingly* caused [a controlled substance] to be distributed or dispensed" and that they "did so by *intentionally* distributing or dispensing the controlled substance outside the usual course of professional medical practice, and not for legitimate medical purpose." (Emphases added.) This is an accurate statement of the law and fully compliant with *Ruan*.

The Hofschulzes resist this conclusion, arguing that the judge was required to instruct the jury that a prescriber's good-faith belief in the legitimacy of his actions negates intent. *Ruan* does not suggest—much less mandate—that judges give such an instruction. The jury instruction here clearly explained that the government needed to prove beyond a reasonable doubt that the defendants *intentionally* distributed drugs outside the usual course of medical practice and not for a legitimate medical purpose. *Ruan* requires nothing more. Indeed, the judge went further than necessary by using the word "intentionally" alone—rather than the statutory phrase "knowingly or intentionally"—with respect

to the authorization requirement. In that sense, the instruction was subtly more favorable to the defense than it needed to be.

Taking a different tack, the Hofschulzes also suggest that *Ruan* adopted a criminal willfulness standard, which if true would require the government to prove that the prescriber knew that his conduct was illegal. But nothing in *Ruan* even hints at a criminal willfulness standard. The Court reasoned by analogy to several cases in which it had interpreted other criminal statutes to contain, at least implicitly, a "knowledge of status" or "knowledge of nonauthorization" *mens rea*. *Id.* at 461, 467. The Court did not mention a "knowledge-of-law" requirement (i.e., knowledge that conduct was illegal). The difference between the two standards "is so important … that the Supreme Court would not have adopted the broader [knowledge-of-law] reading without saying so with unmistakable clarity." *United States v. Maez*, 960 F.3d 949, 954–55 (7th Cir. 2020).

Our conclusion that the judge's instructions complied with *Ruan* aligns with a decision from the Third Circuit involving a similar challenge to materially identical pre-*Ruan* jury instructions. *See United States v. Titus*, 78 F.4th 595, 602 (3d Cir. 2023) (affirming a doctor's conviction in a case involving jury instructions that required the jury to find that he "knowingly or intentionally distributed controlled substances outside 'the usual course of professional practice and not for a legitimate medical purpose'"). The Hofschulzes draw our attention to decisions from the Tenth and Eleventh Circuits on remand from the Supreme Court in *Ruan*. *See United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023); *United States v. Ruan*, 56 F.4th 1291 (11th Cir. 2023). But the pre-*Ruan*

jury instructions in those cases lacked the intent requirement that was clearly included in the jury instructions here.

The Hofschulzes raise two additional claims of instructional error. First, they argue that the jury instruction on the "death-resulting" count erroneously imposed strict liability. Second, they claim that the judge was wrong to reject their pretrial request for an instruction explaining the difference between the civil-malpractice liability standard and the standard for criminal liability under § 841.

The first argument was not preserved, so we review only for plain error. *United States v. McClellan*, 794 F.3d 743, 753–54 (7th Cir. 2015). Before we will consider exercising our discretion to correct a forfeited error, we must first find "(1) [an] error (2) that is plain, and (3) that affects the defendant's substantial rights." *Id.* at 754 (quotation marks omitted). An error is "plain" only if it is clear or obvious under current law. *United States v. Olano*, 507 U.S. 725, 734 (1993).

There was no error here, let alone a plain error. The instruction on the death-resulting distribution count did not impose strict liability. We've already explained that the jury instructions on the § 841 counts properly applied the "knowingly or intentionally" requirement to the act of distribution *and* lack of authorization, as *Ruan* requires. The steeper penalties in § 841(b) apply "if death or serious bodily injury results from" the use of drugs involved in the underlying § 841(a) violation.

The judge's "death resulting" jury instruction correctly explained the law for this more serious variant of the offense, including the correct causation standard. The instruction also properly explained that this more serious version of

the offense "is committed regardless of whether th[e] defendant knew or should have known that death would result." That's an accurate statement of the law for the enhanced penalties in § 841(b). The death-resulting instruction thus imposed strict liability only insofar as the underlying drug-distribution instructions imposed strict liability; in other words, not at all.

The second argument was only partially preserved. The Hofschulzes made a pretrial request for a jury instruction on the difference between the civil-malpractice and criminal liability standards. The judge denied it but left the door open for them to renew the request at the end of trial if the evidence so warranted. They did not do so.

Setting that misstep aside, the claim of error is meritless. The Hofschulzes argue that the judge was required to instruct the jury on the difference between the criminal and civil liability standards because Dr. King testified that the two standards are identical. He did no such thing: as explained in more detail below, he did not offer an opinion about liability standards, criminal or civil; rather, he explained the standard of care in the usual course of professional medical practice in this context. Accordingly, the instruction was at best unnecessary and at worst potentially confusing. The judge was well within her discretion to reject it.

B. Expert Testimony

The Hofschulzes next argue that Dr. King, the government's medical expert, should not have been permitted to offer opinion testimony about whether Lisa's conduct was outside the usual course of professional practice and not for

a legitimate medical purpose. This argument rests on a misunderstanding of the rules for admission of expert testimony.

Rule 704 of the Rules of Evidence expressly provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue." FED. R. EVID. 704(a). There is a qualifier: "In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." *Id.* R. 704(b).

In *United States v. Kohli* we explained how Rule 704 applies in this specific context. 847 F.3d 483 (7th Cir. 2017). *Kohli* involved a medical expert who, like Dr. King, provided opinion testimony that the defendant's prescribing practices "were inconsistent with the usual course of professional practice and lacked a legitimate medical purpose." *Id.* at 491. We explained that this testimony "falls squarely within the parameters of Rule 704." *Id.* We noted first that Rule 704(a) explicitly permits experts to testify "about ultimate or dispositive issues in the case." *Id.* And the expert in *Kohli* did not violate the qualifier in Rule 704(b): he did not offer an opinion about the defendant's subjective mental state but instead gave his opinion about the defendant's prescribing practices "in light of his own experience and training." *Id.* The same is true here. Dr. King's testimony stayed well within the bounds of Rule 704.

In a slightly different twist on the same argument, the Hofschulzes insist that the judge wrongly permitted Dr. King to testify about the medical standard of care in relation to the "usual course of professional practice" and "legitimate medical purposes." *Kohli* forecloses this variant of the argu-

ment too. We explained there that expert testimony on the medical standard of care is not tantamount to an impermissible expert opinion on the governing legal standard "just because the two standards overlap." *Id.* at 492. "If that were the case, physicians could virtually never offer meaningful expert opinions in prosecutions under § 841(a)." *Id.*

In their final challenge to the government's expert, the Hofschulzes argue that Dr. King's testimony was at odds with the standard for guilt under § 841 and was wrong as a matter of law, effectively usurping the judge's prerogative to instruct the jury on the law. This argument is way off the mark. Like the expert in *Kohli*, Dr. King did not testify about the *legal* standard but instead gave expert testimony about the "applicable standard of care among medical professionals." *Id.* Though the medical standard of care is "no doubt closely linked to § 841(a)'s prohibition on prescribing outside the 'usual course of professional medical practice,'" *id.*, Dr. King's testimony did not invade the judge's province as the sole explainer of the law.

C. Sufficiency of the Evidence

Finally, the Hofschulzes argue that the evidence was insufficient to establish their guilt. Great deference is owed to the jury's verdict. *United States v. Beechler,* 68 F.4th 358, 368 (7th Cir. 2023). "We view the evidence in the light most favorable to the government and will overturn a conviction only if the record contains no evidence from which a reasonable juror could have found the defendant guilty." *United States v. Longstreet*, 567 F.3d 911, 918 (7th Cir. 2009). This highly demanding standard is rightly characterized as imposing "a nearly insurmountable burden." *Beechler*, 68 F.4th at 368 (quotation marks omitted).

The Hofschulzes have not come remotely close to satisfying this demanding standard. They continue to insist, as they did in their posttrial motions, that the government failed to prove that they knew their opioid prescriptions were "unauthorized." This argument is frivolous. As our summary of the trial record shows, the government presented plentiful evidence of their intent to prescribe opioids outside the usual course of professional practice and not for legitimate medical purposes. The Hofschulzes point to evidence on the other side of the ledger—mostly their own testimony claiming that they were operating a legitimate pain clinic. But the jury was entitled to reject their testimony and had ample basis to do so. In any event, we cannot "supplant the jury's credibility findings on appeal." *Kohli*, 847 F.3d at 490. Abundant evidence supports the guilty verdicts.

AFFIRMED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v.

Robert Hofschulz

JUDGMENT IN A CRIMINAL CASE

Case Number: 2018-cr-145-PP
USM Number: 16721-089

Jonathan Smith
Defendant's Attorney

Julie Stewart and Laura Kwaterski
Assistant United States Attorneys

THE DEFENDANT was found guilty of Counts One, Eight, Nine, Eleven and Twelve of the superseding indictment. The court adjudicates him guilty of these offense(s):

Title & Section	Nature of Offense	Date Concluded	Count(s)
21 U.S.C. §§841(a)(1), 841(b)(1)(C) 21 U.S.C. §846	**Conspiracy to distribute controlled substances**	**12/2016**	**1**
21 U.S.C. §§841(a)(1), 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate medical purpose**	**7/19/2016**	**8**
21 U.S.C. §§841(a)(1), 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate medical purpose**	**7/20/2016**	**9**
21 U.S.C. §§841(a)(1), 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate medical purpose**	**7/27/2016**	**11**
21 U.S.C. §§841(a)(1), 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate medical purpose**	**7/27/2016**	**12**

The court sentences the defendant as provided in this judgment. The court imposes the sentence under to the Sentencing Reform Act of 1984.

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

Date Sentence Imposed: December 10, 2021

Hon. Pamela Pepper
Chief Judge, United States District Court

Date Judgment Entered: December 17, 2021

DEFENDANT: Robert Hofschulz
CASE NUMBER: 2018-cr-145-PP

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **thirty-six (36) months on Count One; twenty-four (24) months on Count Eight to run concurrently with the sentence imposed on Count One; twenty-four (24) months on Count Nine to run concurrently with the sentences imposed on Counts One and Eight; twenty-four (24) months on Count Eleven to run concurrently with the sentences imposed on Counts One, Eight, and Nine; and twenty-four (24) months on Count Twelve to run concurrently with the sentences imposed on Counts One, Eight, Nine, and Eleven; for a total of thirty-six (36) months of incarceration**.

☒ The court makes the following recommendations to the Bureau of Prisons:
Defendant be placed at FCI – Oxford or as close as possible to the Northern District of Florida.

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

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the Probation or Pretrial Services Office **by the end of the day on December 17, 2021.**

RETURN

I have executed this judgment as follows:

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

_____
United States Marshal

_____
By: Deputy United States Marshal

DEFENDANT: Robert Hofschulz
CASE NUMBER: 2018-cr-145-PP

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **three (3) years on Count One; three (3) years on Count Eight to run concurrently with the sentence imposed on Count One; three (3) years on Count Nine to run concurrently with the sentences imposed on Counts One and Eight; three (3) years on Count Eleven to run concurrently with the sentences imposed on Counts One, Eight and Nine; and three (3) years on Count Twelve to run concurrently with the sentences imposed for Counts One, Eight, Nine and Eleven; for a total of three (3) years of supervised release**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons and shall report to the probation officer in a manner and frequency as reasonably directed by the Court or probation officer. The defendant shall not commit another federal, state or local crime. The defendant shall not unlawfully possess a controlled substance and shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
☒ The defendant shall not own, possess, or have under the defendant's control a firearm, ammunition, explosive device or dangerous weapon.
☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

CONDITIONS OF SUPERVISION

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must not illegally possess any controlled substance. The defendant must refrain from any unlawful use of controlled substance. The Court finds there is a low risk of future substance abuse by the defendant and therefore suspends the drug testing requirements;
3. Unless directed otherwise by the probation officer, the defendant must report to the probation office in the federal judicial district where they defendant resides within 72 hours of release from imprisonment;
4. After initially reporting to the probation office, the defendant will receive instructions from the Court or the probation officer about how and when the defendant must report to the probation officer, and the defendant must report to the probation officer as instructed;
5. The defendant must not own, possess, or have under the defendant's control a firearm, ammunition, destructive device, or dangerous weapon;
6. The defendant must not knowingly leave the federal judicial district without first getting permission from the Court or the probation officer;

7. The defendant must follow the instructions of the probation officer designed to make sure the defendant complies with the conditions of supervision;
8. The defendant must answer truthfully the questions asked by the probation officer related to the conditions of supervision subject to his Fifth Amendment right against self-incrimination;
9. The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant must tell the probation officer at least ten calendar days before the change. If telling the probation officer in advance is not possible due to unanticipated circumstances, the defendant must tell the probation officer within 72 hours of the change;
10. If the defendant knows someone is committing a crime, or is planning to commit a crime, the defendant must not knowingly communicate or interact with the person in any way;
11. The defendant must allow the probation officer to visit the defendant at reasonable times, at home or other reasonable locations, and the defendant must permit the probation officer to take any items prohibited by the conditions of supervision that the probation officer observes in plain view;
12. If the defendant is arrested or questioned by law enforcement officer, the defendant must tell the probation officer within 72 hours; and
13. The defendant must not make any agreement with a law enforcement agency to as an informer or a special agent without first getting the permission of the Court.

DEFENDANT: Robert Hofschulz
CASE NUMBER: 2018-cr-145-PP

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the attached page.

Total Special Assessment	**Total Fine**	**Total Restitution**
$500.00	**None.**	**None.**

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

PAYEE	**AMOUNT**
TOTAL:	**None**

If a defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

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

☐ Restitution amount ordered pursuant to plea agreement: $_____.

☐ The defendant must pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that the interest requirement is waived for the ☐ fine ☐ restitution.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: Robert Hofschulz
CASE NUMBER: 2018-cr-145-PP

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

The defendant's obligation to pay the $500 special assessment begins immediately.

The court recommends that the defendant participate in the Inmate Financial Responsibility Program.

The defendant must make all criminal monetary penalty payments, except any payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, to the clerk of court.

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

Payments shall be applied in the following order: (1) special assessment, (2) restitution principal and (3) costs (if any, including cost of prosecution and court costs).

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

☐ The defendant shall pay the cost of prosecution; or ☐ The defendant shall pay the following court costs:

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: $2,265,380, joint and several with co-defendant Lisa Hofschulz, representing proceeds derived from the defendants' conspiracy to distribute and distribution of controlled substances outside of a professional medical practice and not for a legitimate medical purpose.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA

v.

Lisa Hofschulz

JUDGMENT IN A CRIMINAL CASE

Case Number: 2018-cr-145-PP
USM Number: 16720-089

Beau Brindley, Vadim Glozman and Michael Thompson
Defendant's Attorneys

Julie Stewart and Laura Kwaterski
Assistant United States Attorneys

THE DEFENDANT was found guilty of Counts One through Fifteen of the superseding indictment. The court adjudicates her guilty of these offenses:

Title & Section	Nature of Offense	Date Concluded	Count(s)
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Conspiracy to distribute controlled substances outside of a professional medical practice and not for a legitimate medical purpose**	**12/2016**	**1**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**7/29/2015**	**2**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**8/3/2015**	**3**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**8/12/2015**	**4**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**9/3/2015**	**5**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**1/25/2016**	**6**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**2/16/2016**	**7**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**7/19/2016**	**8**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**7/20/2016**	**9**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**7/20/2016**	**10**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**7/27/2016**	**11**

21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**7/27/2016**	**12**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**8/29/2016**	**13**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 21 U.S.C. §846	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose**	**11/14/2016**	**14**
21 U.S.C. §§841(a)(1) and 841(b)(1)(C) 18 U.S.C. §2	**Distribution of controlled substances outside of a professional medical practice and not for a legitimate purpose, resulting in the death of a patient**	**11/19/2015**	**15**

The court sentences the defendant as provided in this judgment. The court imposes the sentence under to the Sentencing Reform Act of 1984.

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

Date Sentence Imposed: December 10, 2021

Hon. Pamela Pepper
Chief Judge, United States District Court

Date Judgment Entered: December 17, 2021

DEFENDANT: Lisa Hofschulz
CASE NUMBER: 2018-cr-145-PP

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of **two-hundred forty (240) months' imprisonment on Count Fifteen; sixty (60) months on Count One, to run concurrently with the sentence imposed for Count Fifteen; forty-eight (48) months on Count Two to run concurrently with the sentence imposed for Counts Fifteen and One; forty-eight (48) months on Count Three to run concurrently with the sentence imposed for Counts Fifteen, One and Two; forty-eight (48) months on Count Four to run concurrently with the sentence imposed for Counts Fifteen and One through Three; forty-eight (48) months on Count Five to run concurrently with the sentenced imposed for Counts Fifteen and One through Four; forty-eight (48) months on Count Six to run concurrently with the sentence imposed for Counts Fifteen and One through Five; forty-eight (48) months on Count Seven to run concurrently with the sentence imposed for Counts Fifteen and One through Six; forty-eight (48) months on Count Eight to run concurrently with the sentence imposed for Counts Fifteen and One through Seven; forty-eight (48) months on Count Nine to run concurrently with the sentence imposed for Counts Fifteen and One through Eight; forty-eight (48) months on Count Ten to run concurrently with the sentence imposed for Counts Fifteen and One through Nine; forty-eight (48) months on Count Eleven to run concurrently with the sentence imposed for Counts Fifteen and One through Ten; forty-eight (48) months on Count Twelve to run concurrently with the sentence imposed for Counts Fifteen and One through Eleven; forty-eight (48) months on Count Thirteen to run concurrently with the sentence imposed for Counts Fifteen and One through Twelve; forty-eight (48) months on Count Fourteen to run concurrently with the sentence imposed for Counts Fifteen and One through Thirteen; for a total sentence of two-hundred forty (240) months of incarceration**.

☒ The court makes the following recommendations to the Bureau of Prisons:
Defendant be placed at FCI – Danbury (Connecticut), FCI – Coleman (Florida) or as close as possible to the Northern District of Florida.

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

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

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

_____
United States Marshal

_____
By: Deputy United States Marshal

AO 245B (Rev. 09/11) Judgment in a Criminal Case
DEFENDANT: Lisa Hofschulz
CASE NUMBER: 2018-cr-145-PP

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **thirty-six (36) months for Count One; thirty-six (36) months for Count Two to run concurrently to the sentence imposed for Count One; thirty-six (36) months for Count Three to run concurrently to the sentence imposed for Counts One and Two; thirty-six (36) months for Count Four to run concurrently to the sentence imposed for Counts One through Three; thirty-six (36) months for Count Five to run concurrently to the sentence imposed for Counts One through Four; thirty-six (36) months for Count Six to run concurrently to the sentence imposed for Counts One through Five; thirty-six (36) months for Count Seven to run concurrently to the sentence imposed for Counts One through Six; thirty-six (36) months for Count Eight to run concurrently to the sentence imposed for Counts One through Seven; thirty-six (36) months for Count Nine to run concurrently to the sentence imposed for Counts One through Eight; thirty-six (36) months for Count Ten to run concurrently to the sentence imposed for Counts One through Nine; thirty-six (36) months for Count Eleven to run concurrently to the sentence imposed for Counts One through Ten; thirty-six (36) months for Count Twelve to run concurrently to the sentence imposed for Counts One through Eleven; thirty-six (36) months for Count Thirteen to run concurrently to the sentence imposed for Counts One through Twelve; thirty-six (36) months on Count Fourteen to run concurrently to the sentence imposed for Counts One through Thirteen; thirty-six (36) months on Count Fifteen to run concurrently to the sentence imposed for Counts One through Fourteen, for a total of thirty-six (36) months of supervised release**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons and shall report to the probation officer in a manner and frequency as reasonably directed by the Court or probation officer. The defendant shall not commit another federal, state or local crime. The defendant shall not unlawfully possess a controlled substance and shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☒ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse.
☒ The defendant shall not own, possess, or have under the defendant's control a firearm, ammunition, explosive device or dangerous weapon.
☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
☐ The defendant shall participate in an approved program for domestic violence.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

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

CONDITIONS OF SUPERVISION

1. The defendant must not commit another federal, state, or local crime;
2. The defendant must not illegally possess any controlled substance. The defendant must refrain from any unlawful use of controlled substance. The Court finds there is a low risk of future substance abuse by the defendant and therefore suspends the drug testing requirements;
3. Unless directed otherwise by the probation officer, the defendant must report to the probation office in the federal judicial district where the defendant resides within 72 hours of release from imprisonment;
4. After initially reporting to the probation office, the defendant will receive instructions from the Court or the probation officer about how and when the defendant must report

to the probation officer, and the defendant must report to the probation officer as instructed;

5. The defendant must not own, possess, or have under the defendant's control a firearm, ammunition, destructive device, or dangerous weapon;
6. The defendant must not knowingly leave the federal judicial district without first getting permission from the Court or the probation officer;
7. The defendant must follow the instructions of the probation officer designed to make sure the defendant complies with the conditions of supervision;
8. The defendant must answer truthfully the questions asked by the probation officer related to the conditions of supervision subject to her Fifth Amendment right against self-incrimination;
9. The defendant must live at a place approved by the probation officer. If the defendant plans to change where the defendant lives or anything about the defendant's living arrangements (such as the people the defendant lives with), the defendant must tell the probation officer at least ten calendar days before the change. If telling the probation officer in advance is not possible due to unanticipated circumstances, the defendant must tell the probation officer within 72 hours of the change;
10. If the defendant knows someone is committing a crime, or is planning to commit a crime, the defendant must not knowingly communicate or interact with the person in any way;
11. The defendant must allow the probation officer to visit the defendant at reasonable times, at home or other reasonable locations, and the defendant must permit the probation officer to take any items prohibited by the conditions of supervision that the probation officer observes in plain view;
12. If the defendant is arrested or questioned by law enforcement officer, the defendant must tell the probation officer within 72 hours; and
13. The defendant must not make any agreement with a law enforcement agency to as an informer or a special agent without first getting the permission of the Court.

DEFENDANT: Lisa Hofschulz
CASE NUMBER: 2018-cr-145-PP

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments on the attached page.

Total Special Assessment	Total Fine	Total Restitution
$1,500.00	**None**	**$5,665.99**

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

PAYEE	AMOUNT
Barbara Strehlow	$5,665.99
TOTAL:	**$5,665.99**

If a defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid before the United States is paid.

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

☐ Restitution amount ordered pursuant to plea agreement: $_____.

☐ The defendant must pay interest on any fine or restitution of more than $2,500.00, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that the interest requirement is waived for the ☐ fine ☐ restitution.

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

The defendant's obligation to pay the $1,500 special assessment and the $5,665.99 restitution begins immediately.

The court recommends that the defendant participate in the Inmate Financial Responsibility Program.

The defendant must make all criminal monetary penalty payments, except any payments made through the Bureau of Prisons' Inmate Financial Responsibility Program, to the clerk of court.

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

Payments shall be applied in the following order: (1) special assessment, (2) restitution principal and (3) costs (if any, including cost of prosecution and court costs).

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

☐ The defendant shall pay the cost of prosecution; or ☐ The defendant shall pay the following court costs:

☒ The defendant shall forfeit the defendant's interest in the following property to the United States: $2,265,380, joint and several with co-defendant Robert Hofschulz, representing proceeds derived from the defendants' conspiracy to distribute and distribution of controlled substances outside of a professional medical practice and not for a legitimate medical purpose.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 18-cr-145-pp

v.

LISA HOFSCHULZ,
and ROBERT HOFSCHULZ,

Defendants.

PRELIMINARY RULING ON DISPUTED PROPOSED JURY INSTRUCTIONS (DKT. NO. 115 at 20-39)

This case is scheduled for a jury trial starting August 2, 2021. Dkt. No. 151. The parties have submitted proposed jury instructions. Dkt. No. 115 at pp. 20-39. Normally the court would wait to rule on disputed jury instructions until after presentation of the evidence; depending on what evidence is admitted at trial, some proposed instructions become unnecessary and others must be modified. Here, the government has asked the court to rule on the disputed instructions sooner.

This order provides the parties with the court's preliminary ruling on specific, disputed instructions. The court emphasizes the preliminary nature of this ruling; as it explains later in the decision, if certain evidence comes in at trial, the court may be required to modify the conclusions it reaches here.

A. Background

On June 26, 2018, the grand jury issued an indictment charging Lisa and Robert Hofshulz with knowingly and intentionally conspiring with each other and others to distribute controlled substances outside of a professional medical practice and not for a legitimate medical purpose in violation of 21 U.S.C. §§841(a)(1), 841(b)(1)(C) and 846. Dkt. No. 1 at 1-5. The indictment alleged that Lisa Hofschulz, an advanced nurse practitioner, had owned and operated a medical clinic called Clinical Pain Consultants since December 2014; that she was registered with the DEA and authorized to prescribe oxycodone, morphine, fentanyl, methadone, lorazepam and Adderall. Id. at 1-2. It alleged that Robert Hofshulz was not such a registered prescriber, id. at 2, but that he did become CPC's registered agent in December 2014, id. at 3. The grand jury charged that Lisa Hofschulz prescribed "excessive dosages of controlled substances outside of a professional medical practice and not for a legitimate medical purpose especially oxycodone and methadone." Id. at 4. It alleged that Lisa and Robert Hofschulz hired other prescribers to prescribe in the same way as Lisa Hofschulz, and directed a person not authorized to issue prescriptions to distribute them when authorized prescribers refused to do so. Id. at 4.

The indictment also included thirteen counts of knowingly and intentionally distributing and dispensing unlawfully certain controlled substances to certain patients on certain dates, outside of a professional medical practice and not for a legitimate medical purpose; all thirteen counts

named Lisa Hofschulz as a defendant and four also named Robert Hofschulz. Id. at 6-7.

Eight months later, on February 26, 2019, the grand jury returned a superseding indictment. Dkt. No. 29. The superseding indictment added a fifteenth count, alleged solely against Lisa Hofschulz:

> 1. On or about November 19, 2015, in the State and Eastern District of Wisconsin,
>
> **LISA HOFSCHULZ**,
>
> Knowingly and intentionally distributed Oxycodone and Morphine, both Schedule II controlled substances, to F.E. outside of a professional medical practice and not for a legitimate medical purpose.
>
> 2. The death of F.E. resulted from the use of the Oxycodone and Morphine distributed by Lisa Hofschulz.
>
> All in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(C), and Title 18, United States Code, Section 2.

Id. at 8.

B. The Parties' Proposed Instructions

While the government has proposed many of the Seventh Circuit's pattern criminal jury instructions and several "special"—that is, non-pattern—instructions, the defendants have proposed their own versions of only a few instructions and the parties do not dispute some of those. This preliminary ruling addresses only those instructions the parties have indicated they dispute.

1. *Elements of 21 U.S.C. § 841(a)(1)*

The government has proposed the following instruction:

Controlled Substances – Illegal Distribution

To sustain the charge of distributing or dispensing unlawfully a controlled substance, as charged in all counts of the indictment, the United States must prove the following propositions:

First, that the defendant knowingly distributed or dispensed a controlled substance(s) or attempted to do so;

Second, that the defendant did so by prescribing the controlled substance(s) outside of the usual course of professional medical practice and not for a legitimate medical purpose; and

Third, that the defendant knew that the substance was some kind of a controlled substance.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Dkt. No. 115 at 23.

Defendant Robert Hofshulz has proposed no alternative to this instruction.

Defendant Lisa Hofschulz has proposed the following alternative:

Controlled Substances – Illegal Distribution

To sustain the charge of distributing or dispensing unlawfully a controlled substance, as charged in each count of the indictment, the government just prove the following propositions:

First, that the defendant knowingly distributed or dispensed a controlled substance(s);

Second, that the defendant knew that the substance was some kind of controlled substance;

> Third, that the defendant distributed or dispensed the controlled substance(s) outside the usual course of professional practice and not for a legitimate medical purpose; and
>
> Fourth, that the defendant did so knowingly and intentionally.
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty. If, on the other hand, you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

Dkt. No. 115 at 32.

2. *Definition of Knowingly*

Among the Seventh Circuit pattern instructions the government has proposed is Pattern Instruction 4.10. Dkt. No. 115 at 20. That instruction reads:

> **4.10 DEFINITION OF KNOWINGLY**
>
> A person acts "knowingly" if he realizes what he is doing and is aware of the nature of his conduct, and does not act through ignorance, mistake, or accident. [In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said.]
>
> [You may find that the defendant acted knowingly if you find beyond a reasonable doubt that he believed it was highly probable that [state fact as to which knowledge is in question, *e.g.*, "drugs were in the suitcase," "the financial transaction was false,"] and that he took deliberate action to avoid learning that fact. You may not find that the defendant acted knowingly if he was merely mistaken or careless in not discovering the truth, or if he failed to make an effort to discovery the truth.]

The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit (2020 Ed.), Instruction 4.10.

Defendant Robert Hofschulz has not proposed an alternative to the pattern instruction.

Defendant Lisa Hofschulz proposes the following alternative:

Definition of Knowingly

> A person acts knowingly if she realizes what he [sic] is doing and is aware of the nature of her conduct, and does not act through ignorance, mistake, or accident. In the context of this case, this means that the government must prove beyond a reasonable doubt that Lisa Hofschulz knew that her prescribing of the controlled substance at issue was both outside the usual course of medical practice and not for a legitimate medical purpose.

Dkt. No. 115 at 34.

3. *Instructions Related to Illegal Prescription of Controlled Substances*

The government has proposed the following instructions:

Outside the Usual Course of Professional Medical Practice and Not for a Legitimate Purpose

> Federal law authorizes registered medical practitioners to dispense a controlled substance by issuing a lawful prescription. Registered practitioners are exempt from criminal liability if they distribute or dispense controlled substances for a legitimate medical purpose while acting in the usual course of professional practice. A registered practitioner violates Section 841(a)(1) of Title 21 of the United States Code if the practitioner distributes or dispenses a controlled substance without a legitimate medical purpose and outside the usual course of standard professional practice.
>
> A prescriber's own treatment methods do not themselves establish what constitutes professional medical practice. In determining whether the defendant's conduct was outside the usual course of professional medical practice, you should consider the testimony you have heard relating to what has been characterized during the trial as the norms of professional practice. You should consider the defendant's actions as a whole, the circumstances surrounding them, and the extent of severity of any violations of professional norms you find the defendant may have committed.

Dkt. No. 115 at 24.

Good Faith in the Usual Course of Professional Medical Practice

> The Defendant may not be convicted if she dispenses or causes to be dispensed controlled substances in good faith in accordance with the standards of professional medical practice generally recognized and accepted in the United States. Only the lawful acts of a prescriber, however, are exempted from prosecution under the law. Good faith in this context means an observance of conduct in accordance with what the prescriber should reasonably believe to be proper medical practice defined by generally recognized and accepted standards of professional medical practice. In determining whether the defendant acted in good faith in the usual course of professional medical practice, you may consider all of the evidence in the case which relates to that conduct.

Dkt. No. 115 at 25.

Defendant Robert Hofschulz does not appear to object to these two instructions. Dkt. No. 115 at 29 ("In addition to those instructions sought by the Government, Robert Hofschulz seeks the Court to give . . . ."). He asks, however, that the court give an additional good faith instruction as to him. He asks the court to give Seventh Circuit Pattern Jury Instruction 6.11:

6.11 GOOD FAITH—TAX AND OTHER TECHNICAL STATUTE CASES

> A person does not act willfully if he believes in good faith that he is acting within the law, or that his actions comply with the law. Therefore, if the defendant actually believed that what he was doing was in accord with the [tax; currency structuring; other technical statute] laws, then he did not willfully [evade taxes; fail to file tax returns; make a false statement on a tax return; other charged offense]. This is so even if the defendant's belief was not objectively reasonable, as long as he held the belief in good faith. However, you may consider the reasonableness of the defendant's belief, together with all the other evidence in the case, in determining whether the defendant held that belief in good faith.

The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit (2020 Ed.), Instruction 6.11.

Defendant Lisa Hofschulz proposes an alternative instruction to those proposed by the government:

Good Faith in the Usual Course of Professional Medical Practice

A licensed practitioner such as Lisa Hofschulz is authorized to prescribe drugs only when she is acting as a medical practitioner. In making a medical judgment concerning the right treatment for an individual patient, medical practitioners have discretion to choose among a wide range of available options. Therefore, in determining whether Lisa Hofschulz acted knowingly without a legitimate medical purpose, you should examine all of her actions and the totality of the circumstances surrounding those actions.

Lisa Hofschulz contends that she prescribed controlled substances in good faith. The offenses charged in the indictment require proof that Lisa Hofschulz knowingly and intentionally distributed controlled substances outside the usual course of professional practice and not for a legitimate medical purpose. If you find that Lisa Hofschulz acted in good faith, that would be a complete defense for these charges because good faith on the part of Lisa Hofschulz would be inconsistent with her acting knowingly and intentionally. A person acts in good faith when he or she has an honestly held belief of the truth of the statements being given to them even though the belief turns out to be inaccurate or incorrect. God faith in this context means good intentions and the honest exercise of professional judgment as to a patient's medical needs.

Lisa Hofschulz does not have the burden of proving good faith. Good faith is a defense because it is inconsistent with the requirement of the offenses that she acted knowingly and intentionally. As I have instructed you, the government must prove Lisa Hofschulz's mental state beyond a reasonable doubt. In deciding whether the Government proved that Lisa Hofschulz acted knowingly and intentionally, or instead whether Lisa Hofschulz acted in good faith, you should consider all the evidence presented in the case that may bear on Lisa Hofschulz's state of mind.

If you find from the evidence that the government failed to prove beyond a reasonable doubt that Lisa Hofschulz acted knowingly or intentionally, or that the government failed to prove any other element as to any one of the counts, you must find Lisa Hofschulz not guilty as to that count. If, on the other hand, you find that the government proved beyond a reasonable doubt each of the

elements as to any count, then you should find Lisa Hofschulz guilty as to that count.

Dkt. No. 115 at 35.

4. *Standard of Care Instruction*

Lisa Hofschulz has proposed the following instruction:

Not Malpractice

In your experiences, some of you may be familiar with or have heard of medical malpractice or the standard of care. This is not a medical malpractice case. Those terms are used in civil cases when a patient is seeking damages. Medical malpractice is the unwarranted departure from generally accepted standards of medical practice allegedly resulting in injury to a patient. This, however, is a criminal case, and you must apply the instructions I am giving to you now and determine whether Lisa Hofschulz distributed or dispensed a controlled substance outside the usual course of professional practice and not for a legitimate medical purples. You are not deciding whether Lisa Hofschulz should be liable for medical malpractice.

Dkt. No. 115 at 39.

The government objects to this instruction. Id.

C. Analysis

1. *Governing Law*

The indictment alleges that the defendants conspired to violate, or violated, 21 U.S.C. §841(a)(1). That statute states:

(a) Unlawful Acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

Most commonly, the government brings charges for violations of §841(a)(1) against defendants who have no legal authority to distribute or dispense controlled substances. The Seventh Circuit has two pattern instructions for cases alleging violations of 21 U.S.C. §841(a)(1), both of which were intended for that circumstance—a case in which the defendant had no legal authority to distribute or dispense controlled substances. The first—an instruction on the elements of distribution of a controlled substance—requires the government to prove beyond a reasonable doubt that the defendant knowingly distributed a particular controlled substance and that she knew the substance was some kind of controlled substance. The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit (2020 Ed.), p. 880. The second—an instruction on the elements of possession with intent to distribute—requires the government to prove beyond a reasonable doubt that the defendant knowingly possessed a particular controlled substance, that she intended to distribute that person to another person and that she knew it was some kind of controlled substance. Id., p. 883.

Neither of these instructions fits the circumstances of this case, in which the defendant accused of having violated the statute is a registered prescriber authorized to possess and distribute controlled substances knowing that they are controlled substances. A person registered and authorized to prescribe controlled substances would not violate the statute simply because she possessed a controlled substance, intended to distribute it to another person and knew it was a controlled substance; while those elements describe a *crime*

for someone who is not a licensed prescriber, they describe the *job* of someone who is a licensed prescriber.

In December 1975, the Supreme Court decided United States v. Moore, 423 U.S. 122 (1975). A doctor had been charged with, tried for and convicted of violating 21 U.S.C. §841(a)(1) by unlawfully distributing and dispensing methadone. Id. at 124-25. The D.C. Court of Appeals, while assuming that the defendant had acted wrongfully (the defendant admitted that he had not observed "generally accepted medical practices," had run a large-scale operation writing hundreds of methadone prescriptions a day to patients who received only "the most perfunctory" examinations before being prescribed the amount of the drug they requested, id. at 126-27), held that the doctor could not be prosecuted under §841 and that Congress had intended for registered physicians to be prosecuted only under 21 U.S.C. §§842 and 843. Id. at 127-28.

The Supreme Court disagreed. It concluded that in enacting §841, "Congress was concerned with the nature of the drug transaction, rather than with the status of the defendant." Id. at 134. In noting that the House Committee Report on what became the Controlled Substances Act stated that the bill "makes transactions outside the legitimate distribution chain illegal," the Court stated that the "most sensible interpretation" of that language was that a violation "was intended to turn on whether the 'transaction' falls within or without legitimate channels." Id. at 135.

In response to the defendant's argument that the specific conduct prohibited by §841 is authorized for a registered prescriber, the Supreme Court noted that '[t]he trial judge assumed that a physician's activities are authorized only if they are within the usual course of professional practice." Id. at 138. The trial judge had told the jury that to convict the defendant, it must find

> beyond a reasonable doubt that a physician, who knowingly or intentionally, did dispense or distribute methadone) by prescription, did so other than in good faith for detoxification in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States.

Id. at 138-39. The Court recounted that the court of appeals had not addressed the defendant's argument because it had concluded that doctors could not be prosecuted under §841, but that it had suggested that if a doctor *could* be prosecuted under that section, "he could not be prosecuted merely because his activities fall outside the 'usual course of practice.'" Id. at 139.

Again, the Supreme Court disagreed. It cited various provisions of the Controlled Substances Act that "reflect the intent of Congress to confine authorized medical practice within accepted limits." Id. at 141-42. In particular, the Court referenced §802(2), which defined a "practitioner" as someone who dispensed drugs "in the course of professional practice or research." Id. at 141. The Moore Court concluded that there was sufficient evidence presented at trial "for the jury to find that respondent's conduct exceeded the bounds of 'professional practice.'" Id. at 142. The Court said,

> As detailed above, he gave inadequate physical examinations or none at all. He ignored the results of the tests he did make. He did not give methadone at the clinic and took no precautions against its

> misuse and diversion. He did not regulate the dosage at all, prescribing as much and as frequently as the patient demanded. He did not charge for medical services rendered, but graduated his fee according to the number of tablets desired. In practical effect, he acted as a large-scale "pusher" not as a physician.

Id. at 142-43.

Ten months before the Supreme Court issued its decision in Moore, the Seventh Circuit had faced the same issue. In United States v. Green, 511 F.2d 1062 (7th Cir. 1975), the defendants (physicians and a pharmacist) had been convicted of illegally "dispensing or distributing of controlled substances pursuant to prescriptions allegedly issued without a legitimate medical purpose or outside the usual course of professional practice" in violation of §841(a) and 21 C.F.R. §306.04(a)[1]. Green, 511 F.2d at 1063. The defendants challenged their convictions based on the D.C. Court of Appeals' decision in Moore—the one the Supreme Court later would overturn. Id. at 1067-68. As the Supreme Court would do ten months later, the Seventh Circuit concluded that §841 "does not exclude physicians from its coverage." Id. at 1069. The court then considered "precisely what type of dispensing or distributing is authorized by the exception clause of section 841." Id. The court looked to 21 C.F.R. §306.04(a), which "provide[d] that a prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by a practitioner acting in the usual course of his professional practice." Id. The court concluded that the regulation did not expand the criminal statute, and that the defendants had violated the statute because "there were wholesale sales of

[1] Now 21 C.F.R. §1306.04.

prescriptions without even the pretense of a legitimate medical purpose or standard medical procedures." Id. at 1070.

One of the Green defendants challenged the jury instruction "on what constituted a defense by a physician to an action under section 841(a)." Id. at 1071. The judge had instructed the jury that it was a defense "if the substance is prescribed by [the physician] in good faith in medically treating a patient." Id.[2] The defendant argued that the court should have given "an instruction that would have established a defense on the mere showing that a controlled substance was prescribed by a physician for his patient's own use." Id. The Seventh Circuit rejected this argument, finding that the proffered instruction was "too broad" and would have had the effect of applying the rationale used by the court of appeals in Moore. Id. The court stated,

> We have decided that a prescription issued by a physician that is so far removed from a physician's professional responsibilities (i.e.

[2] The entire instruction given by the trial judge read: "Federal law authorizes a licensed physician to prescribe controlled substances of the kinds charged in the indictment, if the drug is prescribed in the course of the physician's professional practice. The defendant [] is a licensed physician. It is therefore a defense to the charges in this indictment that the controlled substances were prescribed by him in the course of his professional practice. A controlled substance is prescribed by a physician in the course of his professional practice, and therefore lawfully, if the substance is prescribed by him in good faith in medically treating a patient. In order to determine whether or not a prescription or prescriptions were issued in the course of a defendant physician's professional practice, you may consider all of the evidence of circumstances surrounding the prescribing of the substance in question, the statements of the parties to the prescription transaction, any expert testimony as to what is the usual course of medical practice, and any other competent evidence bearing on the purpose for which the substances in question were prescribed. Unless you find beyond a reasonable doubt that an act of prescribing charged in the indictment against a physician defendant was not done by the defendant physician in the course of his professional practice,, then you should not find him guilty." Green, 511 F.2d at 1071 n.22.

> more than mere technical violations of his authorization) violates section 841(a). The 'good faith medical treatment' instruction seems to be an accurate reflection of this holding and in no way was prejudicial to the defendant's case.

Id.

The current iteration of the regulation referenced in Green is 21 C.F.R. §1306.04(a)—which states:

> **§1306.04 Purpose of issue of prescription.**
>
> (a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

Later in 2007—after the Supreme Court had issued its decision in Moore—the Seventh Circuit decided United States v. Bek, 493 F.3d 790 (7th Cir. 2007). The defendant doctor in Bek ran a pain-management clinic in Indiana; the jury convicted him of, among other things, illegally prescribing controlled substances. Id. at 795. On appeal, the defendant argued that the evidence was insufficient to support his convictions for "unauthorized distribution of controlled substances because the government's experts testified as to the civil 'standard of care' rather than the higher criminal 'course of professional practice' standard." Id. at 798. As the Seventh Circuit put it,

"[e]ssentially, Bek argues that the government's evidence proved malpractice, not criminal conduct." Id.

Citing the Supreme Court's decision in Moore and its own decision in Green, the Seventh Circuit said that to convict a registered practitioner of violating §841(a), "the government must show that he prescribed controlled substances outside 'the course of professional practice.'" Id. The court found that the defendant's concerns about the jury being misled were "allayed by the jury instructions, which he did not contest." Id.

> The instructions stated that the government had to prove that Bek distributed controlled substances "other than for a legitimate medical purpose or not within the bounds of professional medical or pharmaceutical practice." The court also specifically instructed the jury that "[i]n determining whether the defendant's conduct was within the bounds of professional medical practice, you should consider the testimony you have heard relating to what has been characterized during trial as the 'norms' of professional practice." We must presume that the jury followed these proper instructions, *see Laxton v. Bartow*, 421 F.3d 565, 573 (7th Cir. 2005), and relied upon the evidence of the norms of professional practice to determine whether Bek's conduct fell outside the "course of professional practice."

Id. at 798-99.

The court went on to conclude that the evidence presented at trial satisfied "the criminal standard":

> Witnesses described practices inconsistent with legitimate medical care: uniform, superficial, and careless medical examinations (e.g., blood pressures taken through clothing); exceedingly poor record-keeping, which one expert called "astonishing" (e.g., reporting temperatures of 98.6° for nearly every patient); and a disregard of blatant signs of drug abuse. The experts testified that Bek prescribed the "same menu" and same dosages of drugs to different patients, regardless of body build and kidney function. Further, they noted that contrary to accepted medical practice, Bek prescribed multiple medications having the same effects (e.g., two muscle

> relaxants prescribed at a time), and drugs that are dangerous when taken in combination. And, they concluded that Bek's conduct "was for other than legitimate medical purpose." The jury had more than enough evidence to determine that Bek had a general practice of prescribing controlled substances outside the course of professional conduct.

Id. at 799.

The following year, the Seventh Circuit decided United States v. Chube II, 538 F.3d 693 (7th Cir. 2008). The defendants, medical doctor siblings, were convicted of unlawful distribution of controlled substances. Id. at 694-95. On appeal, the defendants argued that "their convictions . . . assess their actions by reference to the standard of care applicable in a civil malpractice suit, but the proper standard is the one found in the Controlled Substances Act ("CSA"), which authorizes the conviction of a registered practitioner only if the prescription was written without a legitimate medical purpose and outside the scope of professional practice." Id. at 695. The defendants alleged that the testimony of the government's expert witnesses "conflated the civil and criminal standards of care and thus created a risk that the jury found liability not because it concluded that the Doctors' acts of prescribing medication fell outside the scope of legitimate medical practice, but instead because it thought they had been careless." Id. at 696. The "battleground of the litigation . . . was whether the Doctors knew that no legitimate medical reason existed for prescribing painkillers to" the patients who had testified. Id.

The defendants had filed a pretrial motion *in limine*, arguing that the court should have excluded some or all the testimony of two government experts. Id. at 697.

> Dr. [Theodore] Parran, who specialize[d] in internal medicine and addiction medicine, evaluated all 98 patient files in the record. Based on that review, he concluded that the prescribing "was not done consistent with the usual standards of medical practice" and thus was not done with a "legitimate medical purpose." Dr. [Robert] Barkin was called as an expert on pharmacology. Though not a medical doctor, Dr. Barkin received his doctorate in clinical pharmacy in 1984 and is board-certified by various associates for pain management and forensic medicine. Like Dr. Parran, Dr. Barkin testified solely on the basis of the patient charts, although he reviewed only a selection. He, too, concluded that the prescriptions in the carts that he reviewed were issued "[o]utside the scope of medical practice, not for legitimate purposes."

Id. at 696-97.

The defendants described the purpose of their motion *in limine* as a "request that [the trial court] enter a preliminary ruling prohibiting the Government from introducing any evidence at trial that the Chubes' treatment of patients did not conform to the 'standards of medical practice', or any other evidence that would be suggestive of a violation of the civil standard of care applicable in medical malpractice cases." Id. at 697. The government characterized the purpose of the motion as an attempt to exclude all expert testimony "that would suggest a violation of the standard of care applicable in civil medical malpractice cases." Id. The government conceded that "the expert testimony would not be conclusive on the question of the Doctors' criminal liability," but argued that the evidence was relevant "to circumstantially establishing that the defendants had knowingly and intentionally distributed drugs as mere pill-pushers rather than in course of a professional medical practice." Id. The defendants replied that they agreed the testimony had some relevance; they were trying only to limit any portion of the evidence that

"tended to conflate the civil and criminal standards, not to exclude it entirely." Id. The Seventh Circuit concluded that the district court had not abused its discretion in denying the motion, given the defendants' concession that the experts' testimony had some relevance and their insistence that they were not trying to exclude the expert testimony entirely. Id.

The defendants also argued that the court should have stricken or excluded the experts' testimony during the trial "once it became clear that the testimony was creating precisely the type of confusion that the motion *in limine* sought to prevent." Id. The defendants argued that the expert testimony "reduce[d] the Government's burden from the standard of criminal intent to the negligence requirement that applies to civil malpractice." Id.

To address this argument, the Seventh Circuit returned to the proof required to convict registered prescribers under §841(a).

> In order to support a violation of the CSA, the jury had to find that the Doctors knowingly and intentionally acted "outside the course of professional practice" and without a legitimate medical purpose." An implementing regulation issued under the CSA, 21 C.F.R. § 1306.04, reiterates this standard: "A prescription for a controlled substance[,] to be effective[,] must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." See, *e.g.*, *United States v. Bek*, 493 F.3d 790, 798 (7th Cir. 2007) ("[T]o convict … a practitioner registered to distribute controlled substances[] of violating § 841(a)(1), the government must show that he prescribed controlled substances outside 'the course of professional practice.'"); see also *United States v. Moore*, 423 U.S. 122, 138-43 . . . (1975). As one court summarized it:
>
> > [T]o convict a practitioner under § 841(a), the government must prove (1) that the practitioner distributed controlled substances, (2) that the distribution of those controlled substances was outside the usual course of professional practice and without a legitimate medical purpose, and (3)

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

United States v. Feingold, 454 F.3d 1001, 1008 (9th Cir. 2006).

Id. at 697-98.

Against this backdrop, the Seventh Circuit agreed with the government "that it is impossible sensibly to discuss the question whether a physician was acting outside the usual course of professional practice and without a legitimate medical purpose without mentioning the usual standard of care." Id. at 698. The court conceded that the experts "did not, every time, spell out the fact that something more than conduct below the usual standard of care was needed to show an absence of a valid medical purpose," and noted that at a pretrial motions hearing, the district court had indicated that the government possibly could proceed on a theory that the defendants "didn't do the proper work-up." Id. But the court found that typically during the trial itself, the jury heard from the experts "(1) an opinion from the expert that no legitimate medical purpose existed for the prescription in question; and (2) a clarification from the court that the 'standard of care' is an issue distinct from the question of 'legality.'" Id. The court concluded that the district court did not abuse its discretion in allowing the challenged lines of questioning of the experts and concluded "that a properly instructed jury could keep the relevant concepts straight." Id. at 699.

That led the Seventh Circuit to the defendants' challenge to the jury instructions. The trial court had given the following instructions:

> A controlled substance is prescribed by a physician in the course of his professional practice, and therefore lawfully, if the substance is prescribed by him in good faith in medically treating a patient.
>
> Good faith means good intentions and the honest exercise of good professional judgment as to a patient's medical needs. Good faith means an observance of conduct in accordance with what the physician should reasonably believe to be proper medical care.
>
> In order to determine whether or not a prescription or prescriptions were issued in the course of a defendant physician's professional practice, you may consider all of the evidence of circumstances surrounding the prescribing of the substance in question, the statements of the parties to the prescription transactions, any expert testimony as to what is the usual course of medical practice, and any other competent evidence bearing on the purpose for which the substances in question were prescribed.
>
> Unless you find beyond a reasonable doubt that an act of prescribing charged in the Superseding Indictment was not done in the course of his professional practice, then you should find the defendant you are considering not guilty of the charge you are considering.

Id.

The Seventh Circuit opined that there were "several points at which the instructions make clear that unlawful-distribution liability cannot attach unless no legitimate medical purpose existed for their prescription," including the instructions' elaboration on the meaning of "in the course of professional practice" and "no legitimate medical purpose." Id. The court also observed that the trial court had "permitted defense counsel to draw out the distinctions between the civil and criminal burdens during opening statements, cross-examinations, and closing arguments." Id.

The court then stated,

> Though it is true that the jury instructions did not spell out the distinction between the civil and criminal burdens of proof as expressly as the court did in a case reviewed by the Fourth Circuit, see *United States v. Alerre*, 430 F.3d 681, 687 & n.5 (4th Cir. 2005), there is no one right way to convey the governing standards. This is particularly true where, as here, the defense made no effort even to propose the desired instruction. If it were vital to the defense that the jury receive further clarification on this issue, then the defense should have submitted a proposed instruction.

Id.

The Alerre decision to which the Chube court referred "assess[ed] the proper relationship between the civil and criminal standards of liability for a physician who has prescribed drugs." Alerre, 430 F.3d at 689. The Alerre court indicated that an "enhanced analysis" of the traditional §841(a)(1) elements applied "to persons who are properly registered with the DEA," explaining that under 21 U.S.C. §822, "such persons—including doctors—are authorized to distribute controlled substances to the extent authorized by their registrations." Id. The court discussed the Supreme Court's conclusion in Moore that registered doctors could be held criminally liable under §841 when their activities fell "outside the usual course of professional practice," id. at 690 (quoting Moore, 423 U.S. at 124), then explained that "[i]n discussing the proper application of the criminal standard, we have observed that 'a licensed physician who prescribes controlled substances outside the bounds of his professional medical practice is subject to prosecution and is no different than a large-scale pusher,'" id. (citing United States v. Tran Trong Cuong, 18 F.3d 1132, 1137 (4th Cir. 1994)). The court contrasted that with the South Carolina standard for civil medical malpractice, where a plaintiff must show "(1) 'the

generally recognized practices and procedures that would be exercised by competent practitioners in a defendant doctor's field of medicine under the same or similar circumstances,' and (2) 'that the defendant doctor departed from the recognized and generally accepted standards, practices, and procedures.'" Id. (quoting Gooding v. St. Francis Xavier Hosp., 487 S.E.2d 596, 599 (1997)).

The Alerre court explained that in Tran Trong Cuong, it had

> observed that a criminal prosecution requires "proof beyond a reasonable doubt that the doctor was acting outside the bounds of professional medical practice." *Tran Trong Cuong*, 18 F.3d at 1137. [The Tran Trong Cuong decision] elaborated that, in such a situation, a physician's authority to prescribe drugs is being used "not for treatment of a patient, but for the purpose of assisting another in the maintenance of a drug habit or of dispensing controlled substances for other than a legitimate medical purpose, i.e. the personal profit of the physician." *Id.* We concluded that the instructions in Tran's trial not only comported with the criminal standard, but also required the prosecution to prove that the physician had written prescriptions "without a legitimate medical purpose," arguably a more stringent requirement then the criminal standard announced in *Moore*, inuring "to [the] defendant's benefit." *Id.* at 1137-38.

Id. at 690-91.

The Alerre court then turned to the defendants' arguments that the lawyers—prosecution and defense—had "erroneously conflated the criminal standard with the civil standard and that, as a result, they were tried and convicted for civil malpractice rather than for the criminal distribution of drugs." Id. at 691. The trial court had given several jury instructions, including an instruction that the jury "could not convict on the distribution and drug conspiracy charges if it found only that the defendants' practices fell 'below

that line of what a reasonable physician would have done.'" Id. at 687. The court told the jury that "in order to convict on the distribution and drug conspiracy charges, the jury was obliged to find beyond a reasonable doubt that the defendants were selling drugs, or conspiring to do so, and not practicing medicine." Id.

The appellate court noted that the trial court had given the same jury instructions as the ones the Fourth Circuit had approved in the Tran Trong Cuong case, but that it had "more clearly articulated the distinction between the civil standard and the criminal standard." Id. at 691 n.9. It noted that the trial court had "cautioned the jury about the standard-of-care evidence" and "explained the degree of proof (i.e., proof beyond a reasonable doubt) necessary for a criminal conviction." Id.

The Fourth Circuit quoted the "standard-of-care" instruction the trial court had given:

> There has been some mention … of the standard of care. I'm not so sure the word[] malpractice ha[s] not been used. Those words relate to civil actions. When you see a doctor, as a patient, that doctor must treat you in a way so as to meet the standard of care that physicians of similar training would have given you under the same or similar circumstances….
>
> That's not what we're talking about. We're not talking about these physicians acting better or worse than other physicians. We're talking about whether or not these physicians prescribed a controlled substance outside the bounds of their professional practice.

Id. at 687 n.5. It also explained that

> [t]he court further instructed the jury that "[i]f you find that a defendant acted in good faith in dispensing the drugs charged …, then you must find that defendant not guilty." J.A. 1298. The court

> then addressed the standard-of-care evidence and instructed the jury that the critical issue on the distribution and drug conspiracy charges was not whether the defendants had acted negligently, but "whether or not these physicians prescribed a controlled substance outside the bounds of their professional practice.' J.A. 1299.

Id. at 691 n.9.

In responding to the defendants' argument that the lawyers improperly conflated criminal and civil standards and thus that they were convicted of malpractice, the Fourth Circuit concluded that "the jury was correctly instructed on the applicable legal principles." Id. at 692. The appellate court stated that

> [t]he trial court was careful to spell out the differences between the criminal standard and the civil standard. Indeed, it admonished the jury that the defendants could only be convicted under the criminal standard, and it emphasized that they could not be convicted if they had dispensed the controlled substances at issue "in good faith."

Id.

The instructions the Fourth Circuit had approved in Tran Trong Cuong were as follows:

> The third element, no legitimate medical purpose. The final element the government must prove beyond a reasonable doubt is that the defendant prescribed the drug other than for legitimate medical purpose and not in the usual course of medical practice.
>
> In making a medical judgment concerning the right to treatment for an individual patient physicians have discretion to choose among the wide range of available options. Therefore, in determining whether defendant acted without a legitimate medical purpose, you should examine all the defendant's actions and the circumstances surrounding them.
>
> For example, evidence that a doctor warns his patients to fill their prescription at different drug stores, prescribes drugs without performing any physical examinations or only very superficial ones, or ask [sic] patients about the amount or type of drugs they want,

> may suggest that the doctor is not acting for a legitimate medical purpose other than a [sic] outside the usual course of medical practice. These examples are neither conclusive nor exhaustive. They are simply meant to give you an idea of the kind of behavior from which you may conclude that a doctor was not prescribing drugs for a legitimate medical purpose and was not acting in the usual course of medical practice.
>
> A doctor dispenses a drug in good faith in medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of medical practice. That is, he has dispensed the drug lawfully. Good faith in this context means good intentions in the honest exercise of best professional judgment as to a patient's need. It means the doctor acted in accordance with what he believed to be proper medical practice.[3]
>
> If you find the defendant acted in good faith in dispensing the drug, then you must find him not guilty.

Tran Trong Cuong, 18 F.3d 1132, 1137-38 (4th Cir. 1994).

The Seventh Circuit again had occasion to discuss the elements of unlawful prescription of controlled substances in 2012 when it decided United States v. Pellman, 668 F.3d 918 (7th Cir. 2012). Pellman, a medical doctor, was convicted of distributing fentanyl in violation of §841(a)(1). Id. at 919. In addressing Pellman's argument that the government was required to introduce expert testimony to prove the elements of the unlawful prescription charges, the Seventh Circuit reviewed what the government was required to prove:

> Typically, to convict a person of violation 21 U.S.C. § 841(a)(1), the government must establish that the defendant knowingly possessed with an intent to distribute a controlled substance, and that the defendant knew that the substance was controlled. *See United*

[3] In its opposition to Lisa Hofschulz's proposed elements instruction, the government asks that if the court "believes that the proposed instructions are unclear as to the third element," it add language suggested by 3 Leonard B. Sand, *et al.*, *Modern Federal jury Instructions*, Instruction 56-18. Dkt. No. 115 at 33. The government then quotes almost identical language to the language used by the Tran Trong Cuong court.

> *States v. Bek*, 493 F.3d 790, 798 (7th Cir. 2007). Where the defendant is a physician, however, the government must also show that he prescribed controlled substances (1) "outside the course of professional practice" and (2) without a "legitimate medical purpose." *Id.*; *see also United States v. Chube*, 538 F.3d 693, 697-98 (7th Cir. 2008); 21 C.F.R. § 1306.04(a) ("A prescription for a controlled substance[,] to be effective[,], must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.").

Id. at 923-24.

Most recently, the Seventh Circuit addressed the jury instruction issue in United States v. Kohli, 847 F.3d 483 (7th Cir. 2017). The defendant—an Illinois physician who specialized in pain management—was convicted on several counts of "prescribing narcotics without a legitimate medical purpose in violation of § 841(a) of the Controlled Substances Act." Id. at 486. He argued on appeal that he was entitled to an acquittal "because the evidence did not establish that he intentionally engaged in any unlawful conduct." Id. at 489. In analyzing that argument, the Seventh Circuit recited the elements of the offense:

> To convict a prescribing physician under § 841(a) of the Controlled Substances Act, the government must prove that the physician knowingly prescribed a controlled substance outside the usual course of professional medical practice and without a legitimate medical purpose. *United States v. Pellmann*, 668 F.3d 918, 923, (7th Cir. 2012); *Chube II*, 538 F.3d at 698; 21 C.F.R. § 1306.04(a). In other words, the evidence must show that the physician not only intentionally distributed drugs but that he intentionally "act[ed] as a pusher rather than a medical professional." See *Chube II*, 538 F.3d at 698; see also *United States v. Moore*, 423 U.S. 122, 138-43 . . . (1975).

Id. at 489-90.

After concluding that the government had presented "ample evidence establishing that Dr. Kohli intentionally abandoned his role as a medical professional and unlawfully dispensed controlled substances with no legitimate medical purpose," the court addressed Dr. Kohli's argument that because the evidence showed he gave the prescriptions to patients "who suffered from documented medical conditions associated with chronic pain" and that the evidence showed that those patients "exhibited addictive behaviors," "the jury must have convicted him on the erroneous belief that the Controlled Substances Act categorically criminalizes prescribing narcotics to patients who happen to suffer from addiction disorder in addition to chronic pain." Id. at 490. The appellate court described this argument as missing the mark.

> The issue before the jury was not simply whether Dr. Kohli prescribed narcotics to drug addicts. That, in itself, is certainly not a violation of the Controlled Substances Act. Rather, the issue was whether he deliberately prescribed outside the bounds of medicine and without a genuine medical basis.
>
> * * * * *
>
> To be clear, we agree with Dr. Kohli that physicians are not automatically liable under § 841(a) whenever they prescribe narcotics to a patient who happens to be addicted; but we add that neither are they automatically immune from liability whenever a patient who is obviously misusing their prescription happens to suffer from chronic pain. The Controlled Substances Act does not give physicians carte balance to prescribe controlled drugs for a non-medical purpose simply because the immediate recipient of the prescription has an illness that the drugs could in theory alleviate if used properly. In every case, the critical inquiry is whether the relevant prescriptions were made for a valid medical purpose and within the usual course of professional practice. Here, a jury could reasonably conclude that they were not.

Id. at 490-91 (footnote omitted).

The court also rejected the defendant's argument that the district court erred in allowing the government's expert to testify about "applicable legal standards." Id. at 491. The court noted that the expert "testified that he believed certain of Dr. Kohli's prescriptions were inconsistent with the usual course of professional practice and lacked a legitimate medical purpose." Id. The Seventh Circuit concluded "that testimony tracks the elements necessary to sustain a conviction for illegal dispensation, see 21 C.F.R. § 1306.04(a)," and that while that testimony embodied an opinion about a dispositive issue in the case, such opinions are allowed under Fed. R. Evid. 704(a). Id. The court similarly rejected the defendant's argument challenging the expert's testimony about the applicable legal standard:

> It is true that Dr. Parran's testimony touched on the applicable standard of care among medical professionals—a standard that is no doubt closely linked to § 841(a)'s prohibition on prescribing outside the "usual course of professional medical practice." But testimony on the standard of care is not converted into an impermissible jury instruction on the governing legal standard just because the two standards overlap. If that were the case, physicians could virtually never offer meaningful expert opinions in prosecutions under § 841(a). See *Chube II*, 538 F.3d at 698 (recognizing that "it is impossible sensibly to discuss the question whether a physician was acting outside the usual course of professional practice and without a legitimate medical purpose without mentioning the usual standard of care"). Dr. Parran did not lecture the jury about the legal meaning or application of § 841(a), but simply opined that certain of Dr. Kohli's actions were medically unjustified and contrary to standard professional medical practice. That opinion was within Dr. Parran's area of expertise and was not inappropriate under Rule 704 or otherwise.

Id. at 492.

Finally, Dr. Kohli argued on appeal that "the district court erroneously instructed the jury that a finding of civil malpractice was sufficient to support a

conviction." Id. at 494. Dr. Kohli's counsel did not object to the jury instructions at the time the trial court gave them, so the Seventh Circuit reviewed them for plain error. Id. It found no such error:

> The court instructed the jury to convict Dr. Kohli of illegally dispensing controlled substances under § 841(a) only if the jury found, beyond a reasonable doubt, that Dr. Kohli (1) knowingly and intentionally prescribed controlled substances (2) outside the usual course of professional medical practice, and (3) for no legitimate medical purpose. That is exactly what the statute requires to support a conviction. See 21 U.S.C. § 841(a); 21 C.F.R. § 1306.04(a). The district court thus correctly spelled out each of the elements of the offense, and clearly articulated the appropriate burden of proof governing criminal liability. The court further instructed the jury that it should *not* convict Dr. Kohli if it found that he made the relevant prescriptions in good faith.
>
> We see no support for Dr. Kohli's argument that the district court somehow conflated the standards for civil and criminal liability, or that it otherwise misled the jury into believing that it could find Dr. Kohli criminally liable for engaging in mere civil malpractice. The district court's jury instructions fairly and accurately stated the law and do not warrant reversal.

Id.

The following are the instructions that the Kohli trial court gave the jury:

> In order for you to find the Defendant guilty of a charge of causing the illegal dispensation of a Schedule II controlled substance, the Government must prove the following elements beyond a reasonable doubt as to the charge that you are considering:
>
> 1: That the Defendant knowingly caused to be dispensed the controlled substance alleged in the charge you are considering;
>
> 2: That the Defendant did so by intentionally prescribing the controlled substance outside the usual course of professional medical practice, and not for legitimate medical purpose; and
>
> 3: That the Defendant knew that the substance was some kind of a controlled substance.

If you find from your consideration of all the evidence that the Government has proved each of these elements beyond a reasonable doubt as to the charge you are considering, then you should find the Defendant guilty of that charge. If, on the other hand, you find from your consideration of all the evidence that the Government has failed to prove any one of these elements beyond a reasonable doubt as to the charge you are considering, then you should find the Defendant not guilty of that charge.

The term dispense means to deliver a controlled substance to the ultimate user by or pursuant to the lawful order of a practitioner. The term *practitioner* means a physician or other person licensed, registered, or otherwise permitted by the United States to distribute, dispense or administer a controlled substance in the course of professional practice.

With respect to the charges of causing illegal dispensation of a controlled substance in Counts 4 through 13, the Government must prove beyond a reasonable doubt that the Defendant caused to be dispensed to the patient the specific controlled substance while acting outside the usual course of professional medical practice and not for legitimate medical purpose. A physician's own treatment methods do not themselves establish what constitutes professional medical practice. In determining whether Defendant's conduct was outside the usual course of professional medical practice, you should consider the testimony you have heard relating to what has been characterized during the trial as the norms of professional practice. You should consider the Defendant's actions as a whole, the circumstances surrounding them, and the extent of severity of any violations of professional norms you find the Defendant may have committed.

With respect to charges of causing the illegal dispensation of a controlled substance in Counts 4 through 13, the Defendant may not be convicted if he dispenses or causes to be dispensed controlled substances in good faith to patients in the usual course of professional medical practice. Only the lawful acts of a physician, however, are exempted from prosecution under the law. The Defendant may not be convicted if he merely made an honest effort to treat his patients in compliance with an accepted standard of practical practice.

A controlled substance is dispensed or caused to be dispensed by a physician in the usual course of his professional medical practice, and, therefore, lawfully if the substance is dispensed or caused to be dispensed by him in good faith in medically treating a

> patient. Good faith in this context means good intentions and the honest exercise of good professional judgment as to the patient's medical needs.
>
> Good faith means an observance of conduct in accordance with what the physician should reasonably believe to be proper medical practice.
>
> In determining whether the Defendant acted in good faith in the usual course of professional medical practice, you may consider all the evidence in the case which relates to that conduct.

United States v. Kohli, Case No. 14-cr-40038-JPG (S.D. Ill.), Dkt. No. 173 at Page ID #5121-23.

2. *Elements Instruction*

The government opposes the elements instruction proposed by Lisa Hofschulz, arguing that it "adds a *mens rea* component as a separate element." Dkt. No. 115 at 33. The government argues that the defendant's "proposed addition of a fourth element is confusing and unnecessary." Id. And it asserts that the version of the instruction it has proposed is the version the Seventh Circuit affirmed in Kohli (and that that version is "the same as provided for in 3 Leonard B. Sand et al., Modern Federal Jury Instructions, Instruction 56-15."). Id. at 32. In support of her version, Lisa Hofschulz cites United States v. Szyman, Case No. 16-cr-95 (E.D. Wis.), Dkt. No. 49 at 6-7. Id.

The instruction that the government proposes is not identical to the instruction the trial court gave in Kohli (and that the Seventh Circuit said was "exactly what the statute required to support a conviction"). The government's version of the second element—the element regarding prescribing outside of the usual course of professional medical practice and not for a legitimate

purpose—omits one word that the Kohli instruction included: "intentionally." Dkt. No. 115 at 23. The government proposes the following as the second element:

> that the defendant did so by prescribing the controlled substance(s) outside of the usual course of professional medical practice and not for a legitimate medical purpose;

id., while the Kohli court gave the following as the second element:

> That the Defendant did so by *intentionally* prescribing the controlled substance outside the usual course of professional medical practice, and not for legitimate medical purpose.

Kohli, Case No. 14-cr-40038-JPG, Dkt. No. 173 at Page ID #5121 (emphasis added).

It is appropriate to reference the *mens rea* requirement in the "outside of the usual course and not for a legitimate medical purpose" element. Section 841(a) states that it is unlawful for anyone to "knowingly and intentionally" engage in the activities it describes. Both the government and Lisa Hofschulz include the "knowingly" requirement in the language of the other two elements; each phrases the instruction as requiring the government to prove that the defendant "knowingly" distributed or dispensed the controlled substance, and to prove that the defendant "knew" that the substance was some sort of controlled substance. The government has not explained why the same should not be true for the "outside of the usual course and not for a legitimate medical purpose" element, particularly when the Seventh Circuit has found that a version of the element that contained the "intentionally" language was "exactly" what the statute required to support a conviction.

The Seventh Circuit also has implied in one decision and stated in another that the "outside of the usual course and not for legitimate medical purpose" element is subject to the same *mens rea* requirement as the other two elements. In Chube II, the court referenced the Ninth Circuit's decision in Feingold, in which it stated that to sustain a conviction, the government must prove

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

Chube II, 538 F.3d at 697-98 (quoting Feingold, 454 F.3d at 1008). And in Kohli, the court explicitly stated that to convict a prescriber under §841(a), the government "must prove that the physician knowingly prescribed a controlled substance outside the usual course of professional medical practice and without a legitimate medical purpose" and clarified that the "evidence must show that the physician not only intentionally distributed drugs but that he intentionally 'act[ed] as a pusher rather than a medical professional.'" Kohli, 847 F.3d at 489-90 (citing Chube II, 538 F.3d at 698; Moore, 423 U.S. at 138-43).

Teasing out the *mens rea* requirement and stating it as a fourth, separate element as Lisa Hofschulz proposes, however, does not make sense. If two of the elements already contain a *mens rea* requirement, adding a separate *mens rea* requirement after the first three elements would be redundant as to the two elements that already include that requirement. It makes more sense to include

the *mens rea* requirement in the "outside the usual course and without legitimate medical purpose requirement," just as it is included in the other two elements.

The court will give a version of the elements instruction that the Kohli court gave:

> For you to find a defendant guilty of distributing and dispensing a controlled substance, the government must prove the following elements beyond a reasonable doubt as to the defendant and the charge that you are considering:
>
> First, that that defendant knowingly caused to be distributed or dispensed the controlled substance alleged in the charge you are considering;
>
> Second, that that defendant did so by intentionally distributing or dispensing the controlled substance outside the usual course of professional medical practice, and not for legitimate medical purpose; and
>
> Third, that that defendant knew that the substance was some kind of a controlled substance.
>
> If you find from your consideration of all the evidence that the government has proved each of these elements beyond a reasonable doubt as to the defendant and the charge you are considering, then you should find that defendant guilty of that charge. If, on the other hand, you find from your consideration of all the evidence that the government has failed to prove any one of these elements beyond a reasonable doubt as to the defendant and the charge you are considering, then you should find the defendant not guilty of that charge.

The government has asked that if the court "believes that [its] proposed instructions are unclear as to the third element," the court include three paragraphs suggested by 3 Leonard B. Sand, *et al.*, *Modern Federal Jury Instructions*, Instruction 56-18. Dkt. No. 115 at 33. Lisa Hofschulz included one of those paragraphs in her proposed good faith instruction:

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

Id. at 33, 35. The Fourth Circuit approved this instruction in Tran Trong Cuong and Alerre. Because it appears that both the government and the defense want this instruction, and because it does not contradict Supreme Court or Seventh Circuit law, the court will include this paragraph.

As to the second paragraph the government seeks—a paragraph describing all the ways in which a prescriber might act not for a legitimate medical purpose and outside the course of professional medical practice—the court will withhold judgment on whether to include it. It is not common for jury instructions to describe specific illegal behavior. In a traditional §841(a)(1) prosecution, the court does not instruct the jury that "evidence that a person talks in code during telephone conversations, has a hidden compartment in his car, possesses large amounts of unexplained cash, or possesses gram-weight scales and packaging materials may suggest that the person is illegally selling controlled substances." The government is free to make those arguments, and the defense to rebut them, but it is the jury's responsibility to decide whether those actions are outside the course of professional medical practice and not for a legitimate medical purpose.

3. *Definition of Knowingly*

The government has proposed Seventh Circuit pattern instruction 4.10, while Lisa Hofschulz proposes to add to that instruction the sentence, "In the

context of this case, this means that the government must prove beyond a reasonable doubt that Lisa Hofschulz knew that her prescribing of the controlled substance at issue was both outside the usual course of medical practice and not for a legitimate medical purpose." Dkt. No. 115 at 34. The court will give the Seventh Circuit pattern instruction and will not include the sentence Lisa Hofshulz has proposed.

The court has determined that it will include the word "intentionally" in the "outside the usual course of medical practice and not for a legitimate medical purpose" instruction. The inclusion of that *mens rea* requirement will reiterate for the jury that it must find that the defendant intended to distribute or dispense the controlled substance outside the usual course of medical practice and not for a legitimate medical purpose. Stating the same as part of the definition of "knowingly" is redundant. Further, the inclusion of the language Lisa Hofschulz proposes would render the "knowingly" definition inapplicable to co-defendant Robert Hofschulz, who also has been charged with unlawfully prescribing controlled substances.

The court notes that the first paragraph of pattern instruction 4.10 includes alternative language in brackets. That language reads, "In deciding whether the defendant acted knowingly, you may consider all of the evidence, including what the defendant did or said." The William J. Bauer Pattern Criminal Jury Instructions of the Seventh Circuit (2020 Ed.), Instruction 4.10. The court usually includes that bracketed language, and in this case, including

that language comports with the instructions the trial courts gave in Chube II and Kohli.

4. *Good Faith*

a. Robert Hofschulz's proposed instruction

Robert Hofshulz has asked the court to give Seventh Circuit Pattern Instruction 6.11, entitled "Good Faith." Dkt. No. 115 at 29. The Committee Comment to this instruction states:

> When a defendant is accused of violating a complex and technical statute, such as a criminal tax statute, the term "willfully" has been construed to require proof that the defendant acted with knowledge that his conduct violated a legal duty. *Ratzlaf v. United States*, 510 U.S. 135, 144-46 (1994); *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Wheeler*, 540 F.3d 683, 689 (7th Cir. 2008); *United States v. Murphy*, 469 F.3d 1130, 1138 (7th Cir. 2006).

Robert Hofshulz argues that because he had no medical training and did not author any prescriptions, he is entitled to "this discussion in order to treat the case as a whole fairly and accurately as it applies to him." Dkt. No. 115 at 29. He cites United States v. Koster, 163 F.3d 1008 (7th Cir. 1998) in support of his request.

The court will not give Seventh Circuit Pattern Instruction 6.11. The instruction, as both its title and the Committee Comment make clear, is designed to be given in cases involving alleged violations of complex technical statutes, and in cases in which the *mens rea* requirement is "willful" action. The grand jury did not charge Robert Hofschulz with violating a criminal tax statute or some other complex, "technical" statute—it has charged him with

conspiring to unlawfully distribute and prescribe controlled substances and unlawfully distributing such substances. The *mens rea* requirement for violations of 21 U.S.C. §841 is "knowingly and intentionally," not "willfully."

The Koster case does not persuade the court otherwise. Koster involved a thirty-count indictment charging the defendant with defrauding the Commodity Credit Corporation. Id. at 1009. As the government points out, the district court refused to give a good faith instruction in Koster; the Seventh Circuit affirmed, finding that the *mens rea* requirements in the instructions regarding the elements of the crimes with which the defendant had been charged encompassed a good faith defense, because "[a]n action taken in good faith is the other side of an action taken knowingly." Id. at 1012 (citing United States v. Schwartz, 787 F.2d 257, 265 (7th Cir. 1986)).

b. Lisa Hofschulz's proposed instruction

The government has agreed that the court should give a good faith instruction and as evidenced from the discussion of the governing case law, such instructions are common in unlawful prescription cases. The parties dispute the content of the instruction.

The portions of Lisa Hofschulz's proposed instruction to which the government most vehemently objects are the following:

> If you find that Lisa Hofschulz acted in good faith, that would be a complete defense for these charges because good faith on the part of Lisa Hofschulz would be inconsistent with her acting knowingly and intentionally. A person acts in good faith when he or she has an honestly held belief of the truth of the statements being given to them even though the belief turns out to be inaccurate or incorrect.

Dkt. No. 115 at 35. The next paragraph of the proposed instruction says that "[g]ood faith is a defense because it is inconsistent with the requirement of the offenses that she acted knowingly and intentionally." Id. These portions reflect a subjective good faith standard; the instruction tells the jury that if Lisa Hofshulz believed that what she was doing was right for a particular patient, she could not be found guilty of unlawfully prescribing to such a patient—even if what she was doing was outside the course of professional medical conduct and was not for a legitimate medical purpose.

The government argues that the circuit courts that have considered the good faith defense as it relates to unlawful prescription cases all have concluded that the good faith defense is subject to an *objective*, not a *subjective*, standard and cites cases from five circuits holding as much. In 2006, the Fourth Circuit agreed with the defendant doctor that good faith "generally" was relevant to a jury's determination of whether a doctor acted outside the bounds of medical practice and with a legitimate medical purpose. United States v. Hurwitz, 459 F.3d 463, 476 (4th Cir. 2006). But the good faith instruction the defendant in Hurwitz had proposed defined good faith as meaning "the doctor acted according to what *he believed to be proper medical practice*." Id. at 478. The Fourth Circuit stated, "This proposed instruction clearly sets forth a subjective standard, permitting Hurwitz to decide for himself what constitutes proper medical treatment." Id. The court concluded that the instruction was improper, opining that "allowing criminal liability to turn on whether the defendant-doctor complied with his own idiosyncratic view

of proper medical practices is inconsistent with the Supreme Court's decision in *Moore*." Id.

The Fourth Circuit since has reiterated that holding in United States v. Purpera, 844 F. App'x 614, 626 (4th Cir. 2021), rejecting a proposed good faith instruction that defined good faith as meaning that "the doctor acted in accordance with (what he reasonably believed to be) the standard of medical practice generally recognized and accepted in the United States." The court stated that, like the instruction it had rejected in Hurwitz, the Purpera instruction "permits a doctor 'to decide for himself what constitutes proper medical treatment,' thereby setting forth a standard for good faith that is entirely subjective." Id. at 627.

The Purpera court explained that the defendant had asserted that his proposed instruction was similar to one the Sixth Circuit had approved in United States v. Voorhies, 663 F.2d 30, 34 (6th Cir. 1981), which "defined good faith as 'an observance of conduct in accordance with what the physician *should* reasonably believe to be proper medical practice.'" Id. (quoting Voorhies, 663 F.2d at 34). The Fourth Circuit characterized the Voorhies instruction as "meaningfully different from one that is based on what the physician *actually* believed." Id. It explained that "[a] jury tasked with assessing what a physician *should have* believed must apply an objective standard," while "determining what a doctor *actually* believed requires a jury to assess the doctor's subjective point of view." Id.

The Eleventh Circuit reached the same conclusion in United States v. Williams, 445 F.3d 1302, 1309 (11th Cir. 2006) and United States v. Merrill, 513 F.3d 1293 (11th Cir. 2008). In Merrill, the defendant had proposed an instruction that focused on the defendant doctor's subjective intent; in rejecting the defendant's argument that the district court should have given his instruction, the Eleventh Circuit stated:

> We have already indicated that a good faith instruction focusing on the physician's subjective intent, like the one proposed by Merill, "fails to introduce any objective standard by which a physician's prescribing behavior can be judged." *United States v. Williams*, 445 F.3d 1302, 1309 (11th Cir. 2006), *abrogated on other grounds*, *United States v. Lewis*, 492 F.3d 1219 (11th Cir. 2007) (en banc).
>
> The appropriate focus is not on the subjective intent of the doctor, but rather it rests on whether the physician prescribes medicine "in accordance with a standard of medical practice generally recognized and accepted in the United States." *Id.* (quoting *United States v. Moore*, 423 U.S. 122, 139 . . . (1975)). In *Williams*, we affirmed a trial court's instruction like the one given here which focuses on whether the doctor acted in accordance with a generally-accepted standard of medical practice. Therefore, we find that the district court neither committed plain error nor abused its discretion in not giving Merill's proposed jury instruction.

Merrill, 513 F.3d at 1306.

In United States v. Wexler, 522 F.3d 194 (2d Cir. 2008), the defendant asked the trial court to include language in the instructions regarding "good intentions," arguing, "If you have good intentions, it doesn't matter if you made a mistake. It only matters if you didn't have good intentions." Wexler, 522 F.3d at 205. The district court declined to include the language the defendant requested, opining that "good intentions is too loosey goosey a formulation and will lead to juror confusion." Id. The Second Circuit found that the district

court did not err in refusing to include the requested language, stating in part that "the inclusion of a good-intentions component of good faith may very well contradict the objective standard of reasonableness required for a finding of good faith." Id. at 206.

In United States v. Smith, 573 F.3d 639, 647 (8th Cir. 2009), the defendant argued that the language of 21 C.F.R. §1306.04—requiring that for a prescription to be effective, it must be issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of *his* professional practice" (emphasis added)—meant that "'his professional practice' [was] to be judged with reference to the particular practices of the issuing doctor, as opposed to generally accepted medical practices." The Eighth Circuit disagreed, finding that the physician's practice "must still comport with the tenants of medical professionalism." Id. at 648. The court stated, referencing its own precedent, that "[w]e are . . . not at liberty to eliminate the requirement that an issuing practitioner's practice be objectively 'professional,' even assuming that we are required by the regulation to consider 'his' particular practice." Id. (citing Moore, 423 U.S. at 140-43; referencing United States v. Katz, 445 F.3d 1023 (8th Cir. 2006)). It concluded that it was "not improper to measure the 'usual course of professional practice' under § 841(a)(1) and § 1306.04 with reference to generally recognized and accepted medical practices and not a doctor's self-defined particular practice," noting that the defendant's proposed interpretation "would allow an individual doctor to define the parameters of his or her practice and effectively shield the practitioner from criminal liability

despite the fact that the practitioner may be acting as nothing more than a 'large-scale pusher.'" Id. at 648-49 (citing Moore, 423 U.S. at 143).

A defendant had put forward this same interpretation of §1306.04(a) years earlier in United States v. Norris, 780 F.2d 1207 (5th Cir. 1986). The Fifth Circuit—as would the Eighth Circuit twenty years later—rejected the argument, succinctly stating that "[o]ne person's treatment methods do not alone constitute a medical practice," and finding that the trial court "correctly rejected Norris' proposed charge premised on a theory that a standard medical practice may be based on an entirely subjective standard." Id. at 1209.

In Purpera, the Fourth Circuit discussed the Sixth Circuit's ruling in Voorhies. Twenty-eight years later, the Sixth Circuit reiterated its ruling from Voorhies. In United States v. Godofsky, 943 F.3d 1011, 1015 (6th Cir. 2019), the defendant requested a good faith instruction that defined good faith as meaning that "the defendant acted in accordance with what he reasonably believed to be proper medical practice." Id. at 1016. The trial court refused to give that instruction—in fact, refused to give a good faith instruction at all. Id. at 1017. The Sixth Circuit characterized the defendant's argument in support of the instruction as an argument that "even though he knowingly an intentionally violated professional medical practices and prescribed oxycodone for no legitimate medical purpose (as the jury found), he cannot be convicted because he personally believes that such unprofessional and illegitimate actions were nonetheless beneficial to his patients." Id. at 1026. The Sixth Circuit rejected that argument, stating "that is not the law." Id.

This court agrees with these circuit courts—whether a defendant charged with unlawfully prescribing controlled substances acted in good faith must be determined using an *objective* standard, not a subjective one. The subjective standard Lisa Hofschulz proposes does not comport with Moore, and as some of the courts above have noted, it would nullify §1306.04(a) by allowing each individual prescriber to decide the "course of professional medical practice."

More broadly, the instructions proposed by the government contain, for the most part, language that either the Supreme Court or the Seventh Circuit has found does not constitute error. The court recounts the government's instructions below, and where applicable, identifies the source of the language; the government's proposed language is italicized and the matching language from Supreme Court or Seventh Circuit case law is in bold.

Outside the Usual Course of Professional Medical Practice and Not for a Legitimate Purpose (Dkt. No. 115 at 24)

> *Federal law authorizes registered medical practitioners to dispense a controlled substance by issuing a lawful prescription.*
>
> "**Federal law authorizes** a licensed physician **to** prescribe **controlled substances** of the kinds charged in the indictment, if the drug is prescribed in the course of the physician's professional practice." Green, 511 F.2d at 1071 n.22.
>
> *Registered practitioners are exempt from criminal liability if they distribute or dispense controlled substances for a legitimate purpose while acting in the usual course of professional practice. A registered practitioner violates Section 841(a)(1) of Title 21 of the United States Code if the practitioner distributes or dispenses a controlled substance without a legitimate medical purpose and outside the usual course of standard medical practice.*
>
> [The court could find no matching language for this portion of the instruction in any of the cases discussed above.]

A prescriber's own treatment methods do not themselves establish what constitutes professional medical practice. In determining whether the defendant's conduct was outside the usual course of professional medical practice, you should consider the testimony you have heard relating to what has been characterized during the trial as the norms of professional practice. You should consider the defendant's actions as a whole, the circumstances surrounding them, and the extent of severity of any violations of professional norms you find the defendant may have committed.

"**A** physician's **own treatment methods do not themselves establish what constitutes professional medical practice. In determining whether Defendant's conduct was outside the usual course of professional medical practice, you should consider the testimony you have heard relating to what has been characterized during the trial as the norms of professional practice. You should consider the Defendant's actions as a whole, the circumstances surrounding them, and the extent of severity of any violations of professional norms you find the Defendant may have committed**." Kohli, Case No. 14-cr-40038-JPG (S.D. Ill.), Dkt. No. 173 at Page ID #5122. See also, Bek, 493 F.3d at 798-99 ("**[i]n determining whether the defendant's conduct was within the bounds of professional medical practice, you should consider the testimony you have heard relating to what has been characterized during trial as the 'norms' of professional practice**.").

Good Faith in the Usual Course of Professional Medical Practice (Dkt. No. 115 at 25)

The Defendant may not be convicted if she dispenses or causes to be dispensed controlled substances in good faith in accordance with the standards of professional medical practice generally recognized and accepted in the United States.

"**[T]he Defendant may not be convicted if he dispenses or causes to be dispensed controlled substances in good faith** to patients in the usual course of professional medical practice." Kohli, Case No. 14-cr-40038-JPG (S.D. Ill.), Dkt. No. 173 at Page ID #5123.

The jury must find "beyond a reasonable doubt that a physician, who knowingly or intentionally did dispense or distribute methadone) by prescription, did so other than in good faith for detoxification in the usual course of a professional practice and **in accordance with a standard of medical practice generally**

recognized and accepted in the United States." Moore, 423 U.S. at 138-39.

Only the lawful acts of a prescriber, however, are exempted from prosecution under the law.

"Only the lawful acts of a physician**, however, are exempted from prosecution under the law."** Kohli, Case No. 14-cr-40038-JPG (S.D. Ill.), Dkt. No. 173 at Page ID #5123.

Good faith in this context means an observance of conduct in accordance with what the prescriber should reasonably believe to be proper medical practice defined by generally recognized and accepted standards of professional medical practice.

"**Good faith means an observance of conduct in accordance with what the** physician **should reasonably believe to be proper medical** care." Chube II, 538 F.3d at 699.

In determining whether the defendant acted in good faith in the usual course of professional medical practice, you may consider all of the evidence in the case which relates to that conduct.

"In determining whether the Defendant acted in good faith in the usual course of professional medical practice, you may consider all the evidence in the case which relates to that conduct." Kohli, Case No. 14-cr-38-JPG (S.D. Ill.), Dkt. No. 173 at Page ID #5123.

While some of the language in the government's proposed instructions may be duplicative of the elements instruction, the government's proposed instructions generally comport with the law in this circuit. As far as the court can tell, neither the Supreme Court nor the Seventh Circuit has addressed the instruction proposed by Lisa Hofschulz, and as the court has explained, much of that instruction incorrectly states the law. The court will not give the good faith instruction proposed by Lisa Hofschulz.

5. *Standard of Care*

The discussion of the governing law reveals that in some unlawful prescription cases, events at trial prompted the defendants to argue on appeal that the jury might have thought it was being called upon to decide whether the defendant was liable for civil malpractice, rather than for criminal conduct. In at least one case, the language used by the government's expert was the basis for that argument. In another, language used by the court at a pretrial conference gave rise to the concern. Perhaps the language used by the lawyers in questioning and arguing gave rise to the concern.

Under Wisconsin law, a civil claim for medical malpractice "requires the following four elements: (1) a breach of (2) a duty owed (3) that results in (4) an injury or injuries, or damages. . . . In short, a claim for medical malpractice requires a negligent act or omission that causes an injury." Paul v. Skemp, 242 Wis. 2d 507, 520 (Wis. 2001).

As required by §1306.04(a), the elements instruction the court has agreed to give requires the government to prove beyond a reasonable doubt that the defendant distributed or dispensed controlled substances "outside the usual course of professional practice and not for a legitimate medical purpose." It does not mention breach or duty or injury or damages. The cases described in this decision did not involve defendants who made a one-time mistake; they involve defendants who repeatedly prescribed medication without first performing any significant examination or evaluation, based on what the patient requested, so frequently that experts testified it would not have

occurred in the usual course of professional practice. They involve defendants who repeatedly dispensed medications to known addicts and at such prices that experts testified the prescriptions could not have been for legitimate medical purposes. Assuming the evidence presented at trial in this case is similar, the court agrees with the government that there is no reason or rationale for instructing a criminal jury about malpractice. While the notion of "usual course of practice" brings to a lawyer's mind the similar concept of "standard of care," a phrase common in malpractice cases, the court suspects that non-lawyer jurors are less likely to think that way, particularly if they are instructed at the beginning and the end of the trial that the government must prove all the elements of the offense beyond a reasonable doubt.

At this point, the court does not plan to give Lisa Hofschulz's proposed instruction titled "Not Malpractice." Dkt. No. 115 at 39. If, however, witnesses or parties use language at trial that implies or states that the jury may find the defendants guilty if they were negligent, the court will reconsider this ruling.

D. Conclusion

The court **PRELIMINARILY ORDERS** that it will give the instructions proposed by the government, and not the instructions proposed by Robert Hofschulz and Lisa Hofschulz. Dkt. No. 115 at 20-39.

The court **ORDERS** that this ruling is subject to review and revision if the evidence at trial requires it.

Dated in Milwaukee, Wisconsin this 12th day of July, 2021.

BY THE COURT:

HON. PAMELA PEPPER
Chief United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 18-cr-145-pp

LISA HOFSCHULZ,
and ROBERT HOFSCHULZ,

Defendants.

ORDER DENYING ROBERT HOFSCHULZ'S MOTION FOR ACQUITTAL (DKT. NO. 173); DENYING LISA HOFSCHULZ'S MOTION FOR NEW TRIAL (DKT. NO. 183) AND GRANTING THE GOVERNMENT'S AMENDED MOTION FOR FORFEITURE OF PROPERTY (DKT. NO. 182)

The grand jury charged the defendants with conspiracy to sell, distribute or dispense controlled substances outside of a professional medical practice and not for a legitimate purpose; it also charged Lisa Hofschulz with thirteen substantive counts of distributing and dispensing controlled substances outside of a professional medical practice and not for a legitimate medical purpose and Robert Hofschulz with four substantive counts of that same offense. Dkt. No. 29. Finally, it charged Lisa Hofschulz with knowingly and intentionally distributing Oxycodone and morphine outside of a professional practice and not for a legitimate purpose, alleging that this act resulted in the death of F.E. Id. at 8. On August 13, 2021, after a two-week trial, a jury found the defendants guilty on all counts. Dkt. No. 168.

On September 13, 2021, defendant Robert Hofschulz filed a motion for judgment of acquittal. Dkt. No. 173. On October 20, 2021, defendant Lisa Hofschulz filed a motion for new trial and a motion for judgment of acquittal. Dkt. No. 183. That same day—October 20, 2021—the government filed an amended motion for forfeiture of property as to both defendants. Dkt. No. 182.

I. Procedural Background

On June 26, 2018, the grand jury returned a fourteen-count indictment charging Lisa and Robert Hofschulz with distributing and conspiring to distribute controlled substances outside of a professional medical practice and not for a legitimate medical purpose. Dkt. No. 1. The indictment included one count of conspiracy to distribute and thirteen counts of distribution under 21 U.S.C. 841(a)(1). Id. Robert Hofschulz was charged in four of the distribution counts, while Lisa Hofschulz was charged in all thirteen. Id. The defendants were not detained pending trial. The indictment included a two-paragraph forfeiture notice. Id. at 8.

On February 26, 2019, the grand jury returned a superseding indictment. Dkt. No. 29. The superseding indictment repeated the fourteen charges from the original indictment and added a charge against Lisa Hofschulz for distribution of a controlled substance resulting in the death of patient F. E. Dkt. No. 29 at 8. The superseding indictment included an identical forfeiture notice as the original indictment. Id. at 9.

On April 12, 2019, Lisa Hofschulz filed a motion to suppress evidence of the toxicology report, autopsy report, death certificate and any other evidence

regarding the cause of F.E.'s death. Dkt. No. 33. Magistrate Judge William E. Duffin issued a report recommending that this court deny that motion. Dkt. No. 37. Lisa Hofschulz timely filed an objection to the recommendation. Dkt. No. 42. On July 19, 2019, this court overruled Lisa Hofschulz's objections, adopted Judge Duffin's recommendation and denied Lisa Hofschulz's motion to suppress. Dkt. No. 44.

On August 2, 2019, one of Lisa Hofschulz's attorneys, Ronald W. Chapman II, filed a motion to withdraw, dkt. no. 45, which the court granted, dkt. no. 48. On September 18, 2019, Lisa Hofschulz filed a motion for continuance, asking that the dates for the final pretrial conference and the trial be pushed back ninety days. Dkt. No. 58. The court granted the motion, scheduling the final pretrial conference for January 31, 2020 and the trial for February 18, 2020. Dkt. No. 59.

On September 27, 2019, Lisa Hofschulz filed a motion to substitute as her counsel Attorneys Beau Brindley and Michael Thompson.[1] Dkt. No. 60. The government responded it did not object to the substitution so long as it did not impact the trial date. Dkt. No. 61. Attorney Brindley then filed a reply, stating that he was scheduled to be in trial in the Northern District of Illinois on February 18, 2020 and thus could not participate in Lisa Hofschulz's trial on the date the court had scheduled it. Dkt. No. 62. The court scheduled an October 15, 2019 hearing on the motion to substitute counsel. Lisa Hofschulz

[1] She filed this motion only nine days after the court, over the government's vehement objections, had agreed to adjourn the trial to February 18, 2020 to allow the defense to resolve issues with an expert witness. Dkt. No. 64 at 3.

then filed a motion to continue *that* hearing, explaining that her attorney was scheduled to begin a trial in Cook County, Illinois on October 15, 2019. Dkt. No. 63. The court canceled the hearing but emphasized that it was not going to adjourn the February 2020 trial date; the court withheld ruling on the motion to substitute counsel to allow Lisa Hofschulz to determine whether she still wished to retain an attorney who had stated that he was not available on the scheduled trial date. Dkt. No 64. On October 21, 2019, Lisa Hofschulz filed a status report confirming that attorney Brindley was her counsel of choice and stating that Attorney Brindley had confirmed that "if necessary, he will be ready and available to try this case on February 18, 2020 as scheduled." Dkt. No. 65. The court granted the motion to substitute the following day. Dkt. No. 66.

As the February 18, 2020 trial date approached, the government began filing trial documents. On December 20, 2019, the government filed its notice of expert disclosures, listing Dr. Timothy King, Anesthesiologist; Dr. Brian Linert, Forensic Pathologist; Anthony Baize, Inspector General for the Wisconsin Department of Health and Human Services; and Laura Reid, Diversion Investigator for the United States Drug Enforcement Administration (DEA). Dkt. No. 69. On January 17, 2020, the government filed its motions *in limine*. Dkt. No. 70. A week later, the government filed its pretrial report. Dkt. No. 71. Neither defendant filed anything.

On January 30, 2020—the day before the January 31, 2020 final pretrial conference and with the trial set for February 18, 2020—Lisa Hofschulz filed a

motion to continue the trial. Dkt. No. 72. In the eight-page motion, Attorney Beau Brindley explained that several trials had been rescheduled in other districts in ways he could not have foreseen when advised Lisa Hofschulz that he could be ready for the February 2020 trial. Id. at 1-3. He also explained that in the midst of these scheduling changes, his wife's emotional support animal had suffered a series of health conditions that culminated in his passing away, negatively impacting Attorney Brindley's wife's emotional state. Id. at 3-5. He concluded that the combination of events—the trial preparations for the other cases, the trial schedule and the issues in his personal life—had left him emotionally and physically exhausted; he stated that his wife needed him and that he could not be prepared for trial in this case by February 18, 2020. Id. at 6-8.

The court held the pretrial conference the next day, at which time the government opposed the motion to adjourn. Dkt. No. 78 at 1. Attorney Brindley responded that he needed only a short adjournment, and advised the court that "if the court forced him to go to trial February 18, he would have to stand up and state that he was unprepared to proceed." Id. The court denied the defendant's motion to continue trial that same day and continued the final pretrial conference to February 14, 2020 to address the motions *in limine*. Dkt. No. 78.

On February 3, 2020, Lisa Hofschulz filed her proposed *voir dire* and jury instructions. Dkt. No. 75. The court docketed its proposed draft *venire* orientation, *voir dire* questions and preliminary jury instructions. Dkt. No. 79.

On February 13, 2020, Lisa Hofschulz filed a second motion to continue. Dkt. No. 80. The motion again discussed Attorney Brindley's substantial trial schedule and personal issues; it also discussed a recent injury suffered by Lisa Hofschulz. Id. On February 14, 2020, the court held the remainder of the final pretrial conference. Dkt. No. 82. The court granted in part and deferred ruling in part the government's motions *in limine*. Dkt. Nos. 82, 87. The court also explained that it was not going to grant counsel's second motion to adjourn the trial. Id. at 1. The court noted that counsel had not provided any medical records demonstrating that participating in the trial would threaten Lisa Hofschulz's health. Id. The court stated that it would start the trial on Tuesday, February 18, 2020, as scheduled, and that it would not adjourn the trial absent evidence from a doctor showing that it would pose a serious risk to Lisa Hofschulz's health if the trial were to take place. Dkt. No. 87 at 2.

On February 17, 2020, Lisa Hofschulz filed a motion for competency evaluation. Dkt. No. 83. The motion stated that on February 10, 2020, Lisa Hofschulz "collapsed . . . lost consciousness, fell to the pavement, struck her head, and was totally unresponsive." Id. at 1. She said she was taken to Northwestern Hospital by emergency services where she was unable to effectively breath on her own. Id. Lisa Hofschulz also filed a motion to reconsider her request to continue or, in the alternative, to withdraw counsel. Dkt. No. 85. The motion stated that Attorney Brindley would be ethically bound to withdraw in the absence of a continuance, because he was unprepared. Id. at 1. Attorney Brindley also filed a signed note from Dr. James N. Lampe,

which stated that Lampe had seen Brindley on February 17, 2020 for a crisis evaluation. Dkt. No. 86. In his note, Dr. Lampe stated, "[i]t is my professional opinion that a mental and physical break from his work and from general life demands is needed at this time in order to effect recovery without risking increased symptoms." Id.

On the morning of February 18, 2020, the parties assembled in the courtroom for what was to be the jury trial. Dkt. No. 88. The court noted that Lisa Hofschulz had not provided medical evidence showing that a trial would be dangerous to her health. Id. at 1. It stated that the document from Northwestern Memorial Hospital, called an After Visit Summary, did not support her assertions about the seriousness of her condition. Id. Addressing Lisa Hofschulz's motion to reconsider the court's denial of her motions for continuance or, in the alternative, to allow Attorney Brindley to withdraw, the court stated that "while its congested calendar played a role in its decision to deny the motions to continue, the main reason it had denied the motions was because the court had deep concerns that the defendant was trying to game the system by delaying the trial." Id. at 2. The court then recounted the arguments presented by Attorney Brindley and stated that it believed the defendant had engaged in gamesmanship. Id.

After a brief recess, the court advised Lisa Hofschulz that if she wanted to continue with Attorney Brindley as her counsel, the case would proceed to trial that day. If Attorney Brindley was not prepared to proceed that day, the court said, it would allow him to withdraw and Lisa Hofshulz would need to

find new counsel. Id. at 3. After consulting with Lisa Hofschulz, Attorney Brindley informed the court that while Lisa Hofschulz wanted him to continue as her lawyer, ethically he was required to withdraw because he was not prepared. Id. The court allowed Attorney Brindley to withdraw, adjourned the trial and scheduled a status conference for February 28, 2020 by which time Lisa Hofschulz should attempt to find new counsel. Id.

On February 20, 2020, the court issued an extensive order denying Lisa Hofschulz's second motion to continue, deferring ruling on her motion for a competency evaluation, denying her motion to reconsider her request to continue and granting Attorney Brindley's motion to withdraw as counsel. Dkt. No. 89. That same day, it entered a text-only order terminating Attorney Thompson's representation as well, because he was Attorney Brindley's assistant at the Law of Offices of Beau B. Brindley. Dkt. No. 90.

At the February 27, 2020 status conference, Lisa Hofschulz reiterated that Attorney Brindley was her counsel of choice, but told the court that she was making arrangements to retain Vadim Glozman; she asked for twenty-one days to make the necessary financial arrangements. Dkt. No. 95 at 1. The government requested a trial date as soon as possible, suggesting that the court might ask one of its colleagues to take already-scheduled trials so that this one could proceed. Id. The court adjourned the hearing to March 13, 2020, so that it could review its calendar and so that it could stay on top of Lisa Hofschulz's progress in hiring a new lawyer. Id. at 2. At the March 13, 2020 conference, Attorney Glozman appeared and explained that Lisa Hofschulz had

agreed to his representation as the lead attorney "on the condition that the court allow him to have Attorney Beau Brindley as his co-counsel." Dkt. No. 99 at 1. The court explained that it would not allow Attorney Brindley to act as co-counsel given its concerns about his candor with the court. Id. at 2. Noting that the newly emergent COVID-19 pandemic might affect any scheduled trial date, the court scheduled a final pretrial conference for November 18, 2020 and trial for December 7, 2020. Id. at 2. The court made clear that any attorney Lisa Hofschulz wanted to retain must be ready to go to trial on that date. Id. at 2-3. The court ordered the parties to disclose the identities of all expert witnesses and any reports no later than sixty days before November 19, 2020. Id. at 3.

On March 27, 2020, Attorney Glozman filed a notice of attorney appearance. Dkt. No. 101. That same day, Lisa Hofschulz filed a motion for reconsideration of denial of counsel of choice. Dkt. No. 102. On September 1, 2020, the government filed a motion requesting a status conference. Dkt. No. 106. The court scheduled a status conference for September 15, 2020. On September 14, 2020, the court granted Lisa Hofschulz's motion to reconsider its decision to remove Attorney Brindley from representation. Dkt. No. 107. The court reversed its previous decision and permitted Attorneys Brindley and Thompson to represent Lisa Hofschulz with lead counsel Glozman. Id.

At the September 14, 2020 status conference, Lisa Hofschulz and her attorneys confirmed that she was ready to move forward with the December 7, 2020 trial. Dkt. No. 112 at 1. The parties stated that they did not need to resubmit motions or other trial documents filed before the last trial unless

those documents needed to be updated. Id. The court ordered that motions *in limine* were due October 14, 2020 and responses were due by October 21, 2020. Dkt. No. 110. The court ordered that the final pretrial report was due October 21, 2020. Id.

On September 21, 2020, the government filed a notice of plaintiff's expert disclosures. Dkt. No. 111. On October 14, 2020, the government filed its motions *in limine*, dkt. no. 113, and amended those motions on October 16, 2020, dkt. no. 114. The parties filed a joint pretrial report on October 21, 2020. Dkt. No. 115. On October 28, 2020, the court held a final pretrial conference in which it granted in part, denied in part and deferred ruling in part on the government's consolidated motions *in limine* and denied as moot Lisa Hofschulz's motion for a competency evaluation. Dkt. No. 116-117. During this hearing, the court and the parties discussed the potential impact of the COVID-19 pandemic on the pending trial. Id.

On November 3, 2020, the court held a status conference and removed the final pretrial and conference from the calendar. Dkt. No. 119. The court explained that the number of confirmed positive cases of COVID-19 in Wisconsin had climbed since the last hearing and told the parties that it was too great a risk to jurors and the parties to hold a trial at that time. Id. at 1. The parties agreed to the adjournment. Id. Lisa Hofschulz's attorney made an oral motion for a twenty-one-day extension from the November 7, 2020 deadline for his expert to prepare his report, and the court granted that motion. Id. at 1-2. The court ordered that the defense expert's report and

supporting documents were due on November 30, 2020. Id. at 2. The court also scheduled a status conference for December 7, 2020. Id.

At the December 7 status conference, the court scheduled a final pretrial conference for February 18, 2021 and a jury trial for March 15, 2021 through March 26, 2021. Dkt. No. 123. Several days later, the court ordered the parties to file proposed jury instructions and any changes to the joint pretrial report by February 11, 2021. Dkt. No. 124.

On January 19, 2021, the government filed a motion to exclude the testimony of the defendant's expert, James Halikas, under Daubert v. Merrell Dow Pharmaceuticals. Dkt. No. 125. On February 2, 2021, the government filed a motion for an in-person final pretrial conference. Dkt. No. 128. Lisa Hofschulz opposed this motion, dkt. no. 135, and the court held a status conference to discuss the matter, dkt. nos. 140, 144. At the conference, the parties expressed their concerns about the trial proceeding as scheduled in March. Dkt. No. 144 at 1-2. The court determined that it would leave the February 18, 2021 final pretrial conference on the calendar and granted the government's motion to conduct the final pretrial conference in person for those parties wishing to appear in person. Id. at 2-3.

On February 17, 2021, the defendants filed a joint motion to adjourn the trial, citing the high COVID-19 numbers in the state. Dkt. No. 145. On February 18, 2021, the court held the final pretrial conference. Dkt. Nos. 149-151. The court adjourned the March 15, 2021 trial and rescheduled it for August 2, 2021. Id. at 2-3. The court also ordered Lisa Hofschulz to provide the

government with an amended report for Dr. Halikas by March 22, 2021 and described what must be included in that report. Id. at 3. On February 22, 2021, the court denied the government's motion to exclude the testimony of Dr. James Halikas. Dkt. No. 152.

On March 10, 2021, the government filed a supplement to its proposed jury instructions. Dkt. No. 153. On July 1, 2021, the government filed another motion to exclude the testimony of Dr. James Halikas under Daubert. Dkt. No. 155.

On July 12, 2021, the court issued an order regarding disputed proposed jury instructions, preliminarily concluding that it would give the jury instructions proposed by the government and not those proposed by the defendants. Dkt. No. 158. The court added that its ruling was subject to review and revision based on the evidence presented at trial. Id. On July 23, 2021, the court denied the government's second motion to exclude the testimony of Dr. Halikas but restricted his testimony to the mechanics of addiction and the prescription of drugs. Dkt. No. 161.

On July 26, 2021, the court docketed its proposed draft *venire* orientation, *voir dire* questions and preliminary jury instructions. Dkt. No. 162. The jury trial began August 2, 2021 and the jury returned its verdict on August 13, 2021, finding both defendants guilty verdict on all counts. Dkt. No. 169.

On August 19, 2021, the government filed its first motion for order of forfeiture. Dkt. No. 173. On September 13, 2021, Robert Hofschulz filed a motion for acquittal. Dkt. No. 173. That same day, Lisa Hofschulz filed a

motion for a thirty-day extension of time to file her post-trial motions, explaining that her counsel was unable to file motions within thirty days of the trial because the transcripts that he had ordered had not been completed. Dkt. No. 174. The court granted Lisa Hofschulz's motion, giving her until October 20, 2021 to file her post-trial motions. Dkt. No. 178. The court also denied without prejudice the government's motion for entry of a preliminary order of forfeiture. Id.

On October 15, 2021, Lisa Hofschulz filed a motion to continue sentencing, asserting that her post-trial motions would be extensive and that the government would need sufficient time to respond. Dkt. No. 179. Additionally, Attorney Brindley stated that he was scheduled to appear in Riverside, California on October 29, 2021 for another trial and that there was inherent uncertainty about what date that trial would actually begin. Id. at 1-2. Lisa Hofschulz also directed the court to four *cert* petitions pending before the Supreme Court, the resolution of which could impact this case. Id. at 2-3. The court granted the motion and rescheduled sentencing from November 2, 2021 to December 10, 2021 while making clear that its decision was not based on the cases pending before the Supreme Court. Dkt. No. 189.

On October 20, 2021, the government filed an amended motion for forfeiture of property. Dkt. No. 182. That same day, Lisa Hofschulz filed a motion for new trial and a motion for a judgment of acquittal. Dkt. No. 183.

II. Robert Hofschulz's Motion (Dkt. No. 173)

Robert Hofschulz asks the court for an entry of judgment of acquittal under Federal Rule of Criminal Procedure 29(c) as to Counts 1, 8, 9, 11 and 12 of the indictment. Dkt. No. 173 at 1. He asserts that the motion is based on "insufficiency of the evidence as to each element of each count in that no rational trier of fact could have found the essential elements of the crimes beyond a reasonable doubt." Id. The motion consists of one paragraph.

The government points out that the court denied Robert Hofschulz's motion for acquittal at the close of the government's case. Dkt. No. 194 at 1. The government asserts that the court "found there was ample evidence for the jury to convict Mr. Hofschulz," and argues that the reasons the court gave for denying the motion at the close of the government's evidence apply "with equal (and arguably more) force now that the jury has found Defendant guilty of all counts." Id.

A court considering a Rule 29 motion asks "whether, after viewing the evidence in light most favorable to the government, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt." United States v. Torres-Chavez, 744 F.3d 988, 993 (7th Cir. 2014) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). The movant "bears a heavy, indeed, nearly insurmountable, burden." United States v. Warren, 593 F.3d 540, 546 (7th Cir. 2010). The court must defer to the credibility determinations of the jury and may overturn a verdict "only when the record contains no evidence, regardless of how it is weighed, from which the jury

could find guilt beyond a reasonable doubt." Torres-Chavez, 744 F.3d at 993 (citing United States v. Blassingame, 193 F.3d 271, 284 (7th Cir. 1999)).

The jury convicted Robert Hofschulz of one count of conspiring to distribute controlled substances outside of a professional medical practice and not for a legitimate purpose and four substantive counts of distributing controlled substances outside of a professional medical practice and not for a legitimate purpose. Dkt. No. 169 at 4. When he moved for acquittal under Fed. R. Crim. P. 29(a) at the close of the government's evidence closing, his attorney gave a more detailed argument on how the evidence was purportedly insufficient. Dkt. No. 188 at 11-13. Counsel argued that Robert Hofschulz was not a provider or a prescriber, that there was no evidence that he was in a room during any patient exam or interaction, that there was no evidence that he discussed what to prescribe or how much or to whom. Id. at 12. He argued that no patient had identified Robert Hofschulz from the clinic. Id. He argued that Robert Hofschulz was not medically trained. Id. He also relied on arguments made by Lisa Hofschulz's counsel. Id. at 11.

In denying Robert Hofschulz's motion at the close of the government's case, the court concluded that there was sufficient evidence to sustain a conviction on all counts. Id. at 15. It stated the evidence showed that three different nurse practitioners made Robert Hofschulz aware that what was happening at the clinic was not within the regular course of a professional medical practice—not just that the clinic was prescribing high doses but that there were no examinations being conducted, that there were pill count issues

and that there were discrepancies in the urinalysis results. Id. at 16. The clinic was not providing any examinations while nonetheless prescribing high doses of narcotics. Id. The court found that one clinic staff member had emailed Robert Hofschulz, mentioning that she refused to hand out pre-signed prescriptions; this prompted Robert Hofschulz to hire a nurse—Donna Kowske—for a period when Lisa Hofschulz was to be out of town. Id. The court stated, "apparently the purpose of hiring [the nurse] was to hand out prescriptions even though Lisa Hofschulz was not going to be seeing the patients for whom those prescriptions were going to be written." Id.

There was also evidence that the nurse practitioners had pointed out to Robert Hofschulz their concerns about the fact that the clinic did not have a collaborating physician. Id. Robert Hofschulz then become involved in what the court described as the "rather strange dance" of bringing in Dr. Purtock, an anesthesiologist, and having him sign an agreement. Id. The evidence indicated that Dr. Purtock came to the clinic only two or three times to have lunch, id. at 16-17, and the evidence did not indicate that Dr. Purtock acted in a consulting capacity at any point, id. at 17.

The court recounted that the evidence indicated Robert Hofschulz would have had reason to know that the clinic did not have much of the equipment one would expect to see in a medical clinic, such as examining tables (there was only one in the office). Id. The court concluded that a reasonable jury could determine that Robert and Lisa Hofschulz conspired with each other to run a "practice that was outside the regular course of medical practice in the

United States," and that there was no "need for Mr. Hofschulz to have had medical knowledge to have had notice of these issues and to proceed as if he didn't." Id.

Regarding the substantive counts, the court observed that each of them involved the nurse, Donna Kowske, handing out pre-signed prescriptions to patients Lisa Hofschulz had not seen (because Lisa Hofschulz was out of town). Id.

After the court issued that ruling, the defendants presented their evidence. Robert Hofschulz took the stand and testified. The court can infer from the jury's verdict that it did not find his testimony credible. During deliberations, the jury asked the court whether one defendant could be "charged with conspiracy and not the other." Dkt. No. 168 at 1. After consulting with the parties, the court responded, "Please carefully review Instruction No. 4.07 [Separate Consideration—Multiple Defendants Charged with Same or Multiple Crimes] and Instruction No. 5.09 [Conspiracy—Definition of Conspiracy]." Id. at 2. After receiving this response, the jury returned a guilty verdict against Robert Hofschulz on the conspiracy count and the substantive counts.

Robert Hofschulz's post-trial motion raised no new arguments. He has not met the "nearly insurmountable" burden under Rule 29(c) and the court cannot conclude that the extensive record contains no evidence from which a reasonable jury could find guilty beyond a reasonable doubt. The court will deny Robert Hofschulz's motion for a judgment of acquittal.

III. Lisa Hofschulz's Motions (Dkt. No. 183)

A. Motion for Judgment of Acquittal

1. *Parties' Arguments*

Lisa Hofschulz moves for a judgment of acquittal under Fed. R. Crim. P. 29(c), arguing that the evidence was not sufficient for a reasonable jury to find that she issued prescriptions without a legitimate medical purpose.[2] Dkt. No. 183 at 1-2.

Lisa Hofschulz argues the evidence showed that she had a legitimate medical purpose in prescribing the medications to each of the patients in the counts of conviction. Beginning with C.H., Lisa Hofschulz asserts that C.H. had a "documented history of a very real and very painful condition" of which Lisa Hofschulz had been given proof. Id. at 2. Lisa Hofschulz argues that C.H. had received opiate medications from other providers, had told Lisa Hofschulz that she was suffering and had told Lisa Hofschulz that the medications Lisa Hofschulz had prescribed were working. Id. Although C.H. acknowledged at trial that she had lied to Lisa Hofschulz, Lisa Hofschulz emphasizes that C.H. testified that Lisa Hofschulz was trying to help her by prescribing the medications. Id. Lisa Hofschulz asserts that given that testimony, "it is not possible for the government to prove beyond a reasonable doubt that [C.H.'s]

[2] Lisa Hofschulz concedes that "[v]iewing the evidence in the light most favorable to the government, it can be assumed that the government produced sufficient evidence to meet its burden in regards to establishing that the prescriptions were written outside the usual course of professional practice." Dkt. No. 183 at 1-2.

prescriptions were intentionally written for no legitimate medical purpose." Id. at 2-3.

Lisa Hofschulz argues that K.K. "suffered from a very serious and very real painful condition," and like C.H. testified that Lisa Hofschulz was trying to help her by prescribing her medication. Id. at 3. Lisa Hofschulz asserts that D.T., the mother of R.Z., testified that R.Z. "suffered from excruciating pain" as a result of having been shot, that R.Z.'s mental health issues prevented him from getting treatment from other providers and that Lisa Hofschulz was the only person who would help. Id. at 3-4. Lisa Hofschulz argues that while her "records may have been improper, she may not have required enough visits, and her procedures may have been out of the ordinary when treating [R.Z.]," D.T. testified that the treatments helped R.Z.'s pain. Id. at 4. Lisa Hofschulz makes similar arguments about patients R.M., F.E., A.T., I.M. and P.G., each of whom had expressed and/or presented evidence to Lisa Hofschulz of a history of pain and each of whom (except F.E., who is deceased) had said that the medications Lisa Hofschulz prescribed helped with the pain. Id. at 4-5. Lisa Hofschulz explains that she provided these patients with prescriptions to help control their pain. Id.

Lisa Hofschulz acknowledges that C.W. testified that he had not been in pain; she asserts that C.W. went to her for the purpose of deceiving and manipulating her into giving him pain medications. Id. at 6. She says that C.W. lied about his abuse of pain medications and brought in pictures of a past car accident to try to convince her. Id. Lisa Hofschulz argues that "[n]othing about

the lack of oversight or requirement of additional records changes the fact that this patient did all he could to convince Lisa Hofschulz he was in pain," and that "[t]here is no evidence that she disbelieved him." Id.

Lisa Hofschulz asserts that the court erred in its analysis of the Rule 29 motion she brought during the trial. Id. She faults the court for pointing out that her argument at trial focused only on the "legitimate medical purpose" element and not on the "outside the scope of professional practice" element. Id. She argues that the government must prove *both* that she wrote the prescriptions outside the usual course of profession practice *and* that she wrote them with no legitimate medical purpose. Id. at 6-7 (citing United States v. Kohli, 847 F.3d 483, 489-91 (7th Cir. 2017)). She emphasizes that this is a conjunctive test, asserting that "[i]f there was a legitimate medical purpose (i.e. if the patient had a documented painful condition) to which the practitioner responded with prescriptions, then the usual course of professional practice is irrelevant in this Circuit." Id. at 7.

The government responds that Lisa Hofschulz prescribed medication without a legitimate medical purpose because she prescribed to patients who: "(1) had a known history of drug abuse (F.E., K.K., A.T.); (2) sought early refills (C.W.); (3) engaged in doctor shopping (P.G., K.K., C.H, A.T.); and (4) displayed alarmingly irregular toxicology results (P.G., F.E., C.H., K.K., R.M., I.M., A.T.)." Dkt. No. 191 at 4. It compares this pattern to the conduct of the defendant in Kohli, whose conviction for the same offense was affirmed by the Seventh Circuit. Id. at 3. The government asserts that Lisa Hofschulz

> often prescribed opiates to (1) patients she rarely (or never) examined or evaluated (R.Z., A.T., R.M., J.P.); (2) patients who presented her with no imaging results or normal imaging results (R.Z., C.W., and A.Z.); (3) and patients who had a history of other doctors discontinuing or recommending discontinuing opiate therapy (F.E., K.K.).

Id. at 4. The government points to evidence that Lisa Hofschulz prescribed dangerous combinations of drugs (such as benzodiazepines and opioids) and drugs that posed risks to her patients based on their medical conditions (pregnancy, heart conditions, alcoholism). Id. It further points to evidence showing that other medical professionals at the clinic had opined to Lisa Hofschulz that some of her prescriptions either were unnecessary or that the dosages were too high. Id. at 4-5. Lastly, the government highlights Dr. King's expert opinion that Lisa Hofschulz was not practicing medicine at all, because she did not formulate a legitimate diagnosis of any condition for which prescription of opiates would be appropriate and because she continued to prescribe the same (and sometimes higher) doses "without any objective evidence that the patients were experiencing *functional* improvement." Id. at 5.

The government argues that all this evidence, together, provides a basis for a reasonable jury to find that Lisa Hofschulz was not prescribing medication with a legitimate medical purpose. Id. (citing Kohli, 847 F.3d at 490-91; United States v. Bek, 493 F.3d 790, 799-800 (7th Cir. 2007); Akhtar-Zaidi v. Drug Enforcement Administration, 841 F.3d 707, 712 (6th Cir. 2016); United States v. Armstrong, Criminal No. 05-130, 2007 WL 809509, *3 (E.D. La. Mar. 14, 2007)).

Lisa Hofschulz replies that the evidence the government points to speaks to whether she acted within the usual course of professional medical practice, rather than whether she had a legitimate medical purpose behind her prescriptions. Dkt. No. 200 at 1-2. She says that even if her "practices were not as careful as they should have been or she was too accepting of excuses offered by her patients for inconsistent urinalysis results," that does not demonstrate that she had anything other than a legitimate purpose in issuing the prescriptions. Id. She also asserts that the government misstated the evidence and the law in its response "to make similarities" to the Kohli facts "more prevalent than they are." Id. at 3. She further attacks the government's interpretation of certain evidence relating to substance abuse, refill procedures, "doctor shopping" and irregular toxicology. Id. Lisa Hofschulz then repeats her core argument—that "[t]he *purpose* for which Lisa Hofschulz *intended* to write each and every prescription was for the treatment of a legitimate pain condition"—and asks the court to consider the relevance and impact of those cases in which the Supreme Court has granted *certiorari*, Kahn v. United States (21-5261) and Ruan v. United States (20-1410). Id. at 5-7.

2. *Analysis*

The Seventh Circuit has held that "[t]o convict a prescribing physician under § 841(a) of the Controlled Substances Act, the government must prove that the physician knowingly prescribed a controlled substance outside the usual course of professional medical practice and without a legitimate medical purpose." Kohli, 847 F.3d at 489-90 (citing United States v. Pellmann, 668 F.3d

918, 923 (7th Cir. 2012)); United States v. Chube II, 538 F.3d 693, 698 (7th Cir. 2008); 21 C.F.R. §1306.04(a)).

In Kohli, the Seventh Circuit stated

> In this case, the government presented ample evidence establishing that Dr. Kohli intentionally abandoned his role as a medical professional and unlawfully dispensed controlled substances with no legitimate medical purpose. Indeed, Dr. Kohli's own patient files . . . showed that he regularly prescribed highly addictive and potentially dangerous Schedule II opioids to patients who (1) had a known history of drug abuse; (2) repeatedly sought early refills based on dubious claims that their medications had disappeared; (3) frequently "multi-sourced" their prescriptions by simultaneously obtaining additional quantities of controlled substances from other providers; and (4) displayed alarmingly irregular toxicology results suggesting both obvious drug abuse and possible secondary drug dealing. Based on this evidence, a reasonable jury could infer that Dr. Kohli knowingly prescribed controlled substances to patients who were issuing thee prescriptions, and thus that he deliberately made the prescriptions outside the ordinary scope of professional practice and with no acceptable medical justification.

Kohli, 847 F.3d at 490.

The court acknowledged that Dr. Kohli had presented conflicting evidence, such as his own testimony that he had provided prescriptions to his patients in a good-faith effort to manage their chronic pain. Id. It observed, however, that the jury was not required to believe that evidence and that credibility questions were reserved to the jury. Id. (citations omitted). In response to Kohli's argument that the jury must have erroneously believed that it was a crime to prescribe narcotics to patients who, in addition to suffering from chronic pain, are addicted to pain medication, the court stated that "the issue was whether [Kohli] deliberately prescribed outside the bounds of medicine and without a genuine medical basis," and concluded that the

government had presented substantial evidence that he had. Id. at 490-491. The court stated,

> A rational jury could thus conclude that those prescriptions were essentially non-medical in nature and served no legitimate medical purpose—regardless of whether the patients were addicted to the drugs (non-addicted patients can misuse drugs too), and regardless of whether they suffered from medical conditions that might otherwise warrant treatment with those same drugs under different circumstances.

Id. at 491.

The Seventh Circuit reached a similar conclusion in Bek. The defendant in Bek was charged with the same crime as Lisa Hofschulz under 21 U.S.C. §841(a)(1). Recounting the evidence presented to the jury, the Seventh Circuit stated that

> [w]itnesses described practices inconsistent with legitimate medical care: uniform, superficial, and careless medical examinations (e.g., blood pressures taken through clothing); exceedingly poor record-keeping, which one expert called "astonishing" (e.g., reporting temperatures of 98.6° for nearly every patient); and a disregard of blatant signs of drug abuse. The experts testified that Bek prescribed the "same menu" and same dosages of drugs to different patients, regardless of body build and kidney function. Further, they noted that contrary to accepted medical practice, Bek prescribed multiple medications having the same effects (e.g., two muscle relaxants prescribed at a time), and drugs that are dangerous when taken in combination.

Bek, 493 F.3d at 799. The court affirmed the conviction on all but one count (regarding a patient whose medical records were not produced and about whom no expert testified, id.).

Much of Lisa Hofschulz's argument relates to her disagreement with the jury instruction the court gave. Prior to trial, she asked the court to give the following "good faith" instruction:

> Lisa Hofschulz contends that she prescribed controlled substances in good faith. The offenses charged in the indictment require proof that Lisa Hofschulz knowingly and intentionally distributed controlled substances outside the usual course of professional practice and not for a legitimate medical purpose. If you find that Lisa Hofschulz acted in good faith, that would be a complete defense for these charges because good faith on the part of Lisa Hofschulz would be inconsistent with her acting knowingly and intentionally. A person acts in good faith when he or she has an honestly held belief of the truth of the statements being given to them even though the belief turns out to be inaccurate or incorrect. Good faith in this context means good intentions and the honest exercise of professional judgment as to a patient's medical needs.

Dkt. No. 158 at 8. She also asked the court to give the following instruction:

> In your experiences, some of you may be familiar with or have heard of medical malpractice or the standard of care. This is not a medical malpractice case. Those terms are used in civil cases when a patient is seeking damages. Medical malpractice is the unwarranted departure from generally accepted standards of medical practice allegedly resulting in injury to a patient. This, however, is a criminal case, and you must apply the instructions I am giving to you now and determine whether Lisa Hofschulz distributed or dispensed a controlled substance outside the usual course of professional practice and not for a legitimate medical purples. You are not deciding whether Lisa Hofschulz should be liable for medical malpractice.

Id. at 9.

Reviewing Supreme Court and Seventh Circuit precedent (including Kohli and Bek), as well as decisions from other circuits, the court declined to give these instructions. It concluded that the standard for determining whether a defendant acted in good faith was objective, not subjective; the court reasoned that a subjective standard would leave to each individual medical prescriber the definition of "course of professional medical practice." Id. at 45.

At trial and in this post-trial motion, Lisa Hofschulz presents a slightly different version of a "good faith" test. She implies that a prescriber always

issues a prescription for a legitimate medical purpose if she is told by a patient that the patient is in pain. She testified that her job was to reduce or alleviate pain. She testified that if a patient's urinalysis test showed that the patient was drinking to excess or using drugs other than what she had prescribed, that was a message to her that she was not effectively treating that patient's pain. If the patient went through his or her pills too quickly, that was an indication that Lisa Hofschulz was not effectively treating the patient's pain. She testified that it was not her job to question her patients' complaints of pain or to challenge them. In essence, her position was that if a patient told her the patient was in pain, her job was to give that patient whatever drugs it took to cause the patient to report a decrease in or cessation of that pain, and that that was a "legitimate medical purpose." The only other witness who testified that this theory constituted a legitimate medical purpose was Lisa Hofschulz's expert, Dr. Halikas. Dr. Halikas's testimony stood in stark contrast to that of the government's expert, Dr. King, and arguably stood in stark contrast to logic.

There was more than sufficient evidence for a reasonable jury to conclude that Lisa Hofschulz prescribed medication with no legitimate medical purpose. The evidence showed that Lisa Hofschulz routinely prescribed highly addictive opioids to patients who had not provided her with imaging and without obtaining imaging herself. It showed occasions where she increased prescriptions when patients were reporting improvements on their current levels of medication. It showed that she prescribed medications without first

taking a patient's vital signs or conducting an examination. It showed that she continued to prescribe powerful controlled substances to people who were abusing alcohol or other drugs or who failed pill counts. It showed that she continued to prescribe medications to patients who had tested negative for the drugs she had prescribed them. It showed that she prescribed medication to at least one patient—R.Z.—who had not come into the office. It showed that she prescribed powerful controlled substances to someone who was pregnant. It showed that she accepted only cash payments at a flat rate for returning patients.[3] It showed that when she was out of town, she came up with a system to ensure that those patients continued to make those cash payments. Despite testimony that she could have written up to three signed prescriptions at a time, dated them one month apart and given the three months' worth of prescriptions to the patients before leaving town, Lisa Hofschulz (and Robert Hofschulz) required those patients to come in, pay their $200 flat fee and get the prescriptions (that Lisa Hofschulz had written and sent overnight from out of state) from nurse Donna Kowske—who could not lawfully write prescriptions—ensuring that she would receive the flat rate for multiple visits from each patient while she was gone. She handed out prescriptions to individuals who came in under the influence of drugs and alcohol, who were visibly unwell (F.E. was skeletal at the time Lisa Hofschulz gave him his last

[3] The evidence showed that some of these patients had BadgerCare, Wisconsin's health care coverage program for low-income residents; patients were allowed to use BadgerCare to pay for their urinalysis tests, but not for prescriptions.

prescription before his death, and he arrived back home having soiled his pants) and to individuals who did not visit her office (such as with R.Z. and R.M.).

A reasonable jury could look at these facts and determine that Lisa Hofschulz was prescribing high doses of medication to her patients for a purpose other than a legitimate medical one—the purpose of making money. The fact that some or many of the patients actually were in pain or had lied about being in pain does not preclude a jury's determination that she did not issue the prescriptions for a legitimate medical purpose.

Lisa Hofschulz spills much ink arguing that these facts may be relevant to the question of whether she prescribed medication outside the usual course of professional medical practice—the element she now concedes that the government presented sufficient evidence to prove—but that they are not relevant to the question of whether she prescribed medication for a legitimate medical purpose. This argument appears to be an effort to skirt the court's conclusion in its order ruling on the jury instructions that an individual provider cannot decide for him- or herself the "usual course of professional medical practice." But a reasonable jury could look at these facts and conclude beyond a reasonable doubt that Lisa Hofschulz was issuing prescriptions for other than a legitimate medical purpose—that she was issuing all of these prescriptions under these circumstances for the purposes of making money, and a lot of it. The jury rejected Lisa Hofschulz's version of events, which it was

entitled to do. Kohli, 847 F.3d at 490 (stating that the jury was not required to believe the defendant's testimony).

The court will deny Lisa Hofschulz's motion for a judgment of acquittal.

B. Motion for New Trial

Lisa Hofschulz also moved for a new trial under Fed. R. Crim. P. 33. Dkt. No. 183 at 7. That rule provides that, on "the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a).

Lisa Hofschulz moves for a new trial on six grounds: (1) jury instructions; (2) improper expert opinions; (3) prosecutorial misconduct; (4) irrelevant and prejudicial evidence; (5) improper legal conclusions; and (6) a catch-all for miscellaneous objections.

1. *Jury Instructions*

Lisa Hofschulz first argues that the court erred by denying the good faith instruction that she had requested. Dkt. No. 183 at 7-8. She incorporates all her previous arguments. Id. at 8 (citing dkt. nos. 77, 144, 153).

The court thoroughly addressed this issue in its fifty-page ruling on the jury instructions. Dkt. No. 158. The court provided a brief history of §841 as it relates to convictions of licensed medical providers and explained that "whether a defendant charged with unlawfully prescribing controlled substances acted in good faith must be determined using an *objective* standard, not a subjective one." Id. at 45. The court's order included an analysis of Supreme Court and Court of Appeals decisions, each of which led it to believe that an objective

standard applied. Id. at 38-45 ("The subjective standard Lisa Hofschulz proposes does not comport with Moore [423 U.S. 122 (1975)], and as some of the courts above have noted, it would nullify [21 C.F.R.] §1306.04(a) by allowing each individual prescriber to decide the 'course of professional medical practice.'"). The court also concluded that the government's proposed instructions were not inconsistent with the language previously affirmed by the Seventh Circuit and the Supreme Court. Id. at 45-47.

Lisa Hofschulz disagrees with the court's conclusion and believes that the resolution of the cases in which the Supreme Court has accepted *certiorari* will prove the court's analysis wrong. That remains to be seen. But Lisa Hofschulz has presented no argument or case law that convinces the court that its analysis was flawed. Lisa Hofschulz is not entitled to a new trial based on the jury instructions.

2. *Improper Expert Opinions*

Lisa Hofschulz next argues that the court erred by allowing several nurse practitioners "to testify to their opinions about whether certain treatments of patients at her clinic were outside the usual course of professional practice, over her objection." Dkt. No. 183 at 9. She takes issue with this testimony because the government did not identify the nurse practitioners as expert witnesses prior to trial and, she says, the court should not have permitted them to offer opinions on matters reserved for expert opinion, such as whether Lisa Hofschulz was operating outside the usual medical practice. Id.

The government responds that the nurse practitioners testified about their own experiences and observations while working for Lisa Hofschulz. Dkt. No. 191 at 9. The government insists that it elicited this testimony for the purpose of demonstrating that the defendants had notice of the problems in the operation of their clinic and the dangers posed to the patients. Id. It says that this testimony went to the defendants' knowledge and intent. Id. The government also contends that the opinions were intended to rebut any argument that it cherry-picked a handful of patients from an otherwise legitimate pain clinic. Id. at 9-10.

Lisa Hofschulz replies that the nurse practitioners' testimony was offered to show that the "example patients" were representative of the clinic's general practice. Dkt. No. 200 at 12. She says the testimony was offered to demonstrate the practices as a whole and therefore was not lay opinion but opinion based on expertise. Id.

"Lay testimony that is in the form of an opinion is permissible if it is rationally based on the witness's perception, helpful to understand the witness's testimony, and not based on specialized knowledge." United States v. Bowling, 952 F.3d 861, 868 (7th Cir. 2020) (citing Fed. R. Evid. 701). "The Federal Rules of Evidence limit—but do not bar—lay witnesses' ability to testify as to their opinions and inferences, even about ultimate issues in the case." United States v. Locke, 643 F.3d 235, 239 (7th Cir. 2011).

The nurse practitioners testified based on their own knowledge. They testified to their observations through the lens of their education and training,

offering their views about how the defendants' clinic operated during their employment and—perhaps more important—the concerns they had shared with the defendants. The nurse practitioners had specialized knowledge, but they testified about things they had seen and heard. They testified as fact witnesses, within the context of their understanding of their jobs.

Lisa Hofschulz is not entitled to a new trial based on improper expert opinions.

3. *Prosecutorial Misconduct*

Lisa Hofschulz argues that the prosecution deliberately misled the jury during closing argument. Dkt. No. 183 at 9. Specifically, she says that "government counsel deliberately misled the jury during closing arguments by arguing that Lisa Hofschulz made up or invented her description of [F.E.]'s kidney disease." Id. She directs the court to the portion of the government's closing argument in which the prosecutor stated,

> [t]here's no record, there's no documentation of anything Lisa said about [F.E.] in this supposed end state renal failure. She wrote a lot of random stuff down in that record, she copied and pasted that he fell yesterday at the VA, she talked about a surgery on his buttocks. Okay. Those are relevant. More relevant than end stage renal failure? It doesn't make sense. But it's a pretty nice story. The records show that [F.E.]'s health conditions were controlled in 2013.

Id. at 10 (quoting dkt. no. 176 at 35-36). Lisa Hofschulz insists that the government's statements could have altered the jury's view of her credibility. Id. Lisa Hofschulz says that this alleged intentional misconduct requires a new trial and dismissal with prejudice of Count Fifteen. Id.

The government responds:

> Specifically, Defendant claims that the United States lied to the jury about F.E. having end stage renal failure. Notably, the United States never made any representation about whether or not F.E. actually had end stage renal failure. Indeed, whether F.E. had end stage renal failure was irrelevant. Nobody ever claimed renal failure killed F.E. So the only thing that mattered was what Ms. Hofschulz *knew* about F.E.'s health conditions when she was prescribing him opioids, and how, if at all, that knowledge impacted her prescribing. Thus, the United States argued that the jury could infer that, despite her testimony to the contrary, Ms. Hofschulz had no knowledge of F.E.'s "end stage renal failure" based on the totality of her patient files. An argument for an inference is not a misrepresentation.

Id. at 10-11. The government also argues that the V.A. records (which the defendant did not seek to admit at trial) did not show that F.E. was in end-stage renal failure. Id. at 11.

Lisa Hofschulz's reply repeats her initial argument. She adds that her testimony, through deductive reasoning, must have been based on her conversations with F.E. Dkt. No. 200 at 13.

"The district court has broad discretion in deciding whether to grant a new trial based on prosecutorial misconduct." United States v. Freeman, 650 F.3d 673, 683 (7th Cir. 2011). "The inquiry is two-fold: first, whether there was prosecutorial misconduct; second, whether it prejudiced the defendant." Id. "Whether a prosecutor's comments to the jury rise to the level of prosecutorial misconduct depends initially on whether the prosecutor's conduct was improper." United States v. Turner, 651 F.3d 743, 751 (7th Cir. 2011).

The government's statement during closing was not improper, because it did not mischaracterize the evidence.

Lisa Hofschulz testified that F.E. was in end-stage renal failure when she was treating him (to explain why she was prescribing the types and amounts of

drugs she had been prescribing). The evidence showed, however, that her notes of her interactions with F.E. did not mention end-stage renal failure. The government argued in closing—accurately—that Lisa Hofschulz's own records did not support her claim that she knew of or was aware of a diagnosis of end stage renal failure (and argued that if Lisa Hofschulz had bothered to write in her notes that F.E. fell or had surgery on his buttocks, one would think she would have written something as notable as the fact that he was in end-stage renal failure if she has been aware of such information). The V.A. medical records provided by the defense do not support Lisa Hofschulz's assertion that F.E. was in end-stage renal failure. The documents state that F.E. was *at risk* for renal failure, not that he was *in* end-stage renal failure. See dkt. no. 184 at 1 at 1; dkt. no. 184-2 at 2; dkt. no. 184-3 at 2. The government did not mischaracterize evidence by stating that there was no record or documentation of Lisa Hofschulz's claim that F.E. was in end-stage renal failure when she was treating him.

Because the government's statement was not improper, the court need not address the rest of the analysis. Lisa Hofschulz is not entitled to a new trial based prosecutorial misconduct.

4. *Irrelevant and Prejudicial Evidence*

Lisa Hofschulz next argues that the court admitted over her objection irrelevant and prejudicial evidence related to involvement in child abuse by one of her patients. Dkt. No. 183 at 11. She argues that "[a] patient being involved in criminal conduct unrelated to drug abuse or misuse of the medications she

was prescribing had no bearing on whether the prescriptions she issued for that patient were for a legitimate medical purpose or in the usual course of professional medical practice." Id.

The government responds by clarifying that while the defense did object to the testimony relating to child abuse, she did so on the basis of hearsay and improper impeachment, not on relevance or undue prejudice. Dkt. No. 191 at 19. It asserts that Lisa Hofschulz's failure to challenge the evidence as prejudicial or irrelevant constitutes waiver of the argument. Id. (citing Williams v. Jader Fuel Co., Inc., 944 F.2d 1388, 1405 (7th Cir. 1991); Hale v. Firestone Tire & Rubber Co., 756 F.2d 1322, 1333-34 (8th Cir. 1985); United States v. Broadnax, 475 F. Supp. 2d 783, 795 (N.D. Ind. 2007)).

The government also argues that the evidence was relevant and not unduly prejudicial. Id. at 20. It asserts that the questions posed to Lisa Hofschulz on cross-examination relating to the DOJ's child abuse investigation were aimed at eliciting testimony that Lisa Hofschulz had knowledge that several of her patients had been involved in the conduct from which the investigation arose. Id. The government argues it is relevant whether she knew these patients were abusing prescription drugs and causing harm to children while on those drugs. Id.

"When a defendant does not object to the admission of evidence during the trial, the objection is waived and cannot be raised for the first time in a motion for new trial or on appeal." Naeem v. McKesson Drug Co., 444 F.3d 593, 610 (7th Cir. 2006) (citing United States v. Hack, 205 F.2d 723, 727 (7th

Cir. 1953)); United States v. Lampkins, 47 F.3d 175, 179 (7th Cir. 1995) ("Raising the issue in his post-trial motion 'does not cure [the defendant's] wavier of the objection by failing to raise it at trial.'") (quoting United States v. Huels, 31 F.3d 476, 479 n.1 (7th Cir. 1994)).

Lisa Hofschulz did not object on the ground of prejudice during this portion of the testimony. While she made several objections, her objections challenged the questions and testimony as hearsay, "improper pro[ff]er" and improper impeachment. Dkt. No. 191-9 at 2, 9. Lisa Hofschulz's first objection stated,

> Judge, I am going to object to hearsay to anything about what she's been told about some set of facts. I am [s]truck because counsel is presenting this as if there are facts and then asking the witness to stating in the form of the questions that these things are a matter of fact that these things happened and asked the witness if she knows about it. Asking if she knows about it is one thing. Suggesting it is a matter of a fact asking it happened is something else. This is about her being told to something. I object to hearsay.

Id. at 2. In her second and third objections, which were addressed during the same side bar, her attorney stated,

> I object first to the statement that's not what she told the nursing board the same way my statement to Dr. King is improper pro[ff]er. This is too. And then the second thing I object to is improper impeachment. What it says is they told me that there was an allegation and it happened earlier and it was about a man did. And the next sentence is also [R. L]. It doesn't say that that was part of what they told her at the time. That may have been knowledge she had subsequent so. I am saying this is directly inconsistent. It is not. She answered these questions. I don't think we can get anymore out of this. I think at this point it will be asked and answered. I don't think it is directly impeaching.

Id. at 9. None of these objections challenge the relevance or prejudicial effect of the questions or testimony. Lisa Hofschulz has waived any relevance or prejudice objections on this issue.

Even if the defendant had made a Rule 403 objection during the trial, the court likely would have overruled it. Whether Lisa Hofschulz had reason to know that her patients were abusing drugs that she had prescribed, and whether she then continued to prescribe those drugs despite that knowledge, is relevant to whether she had a legitimate medical purpose for prescribing the drugs. The facts underlying the DOJ investigation, as revealed through cross-examination, supported the government's theory that Lisa Hofschulz knew her patients were abusing the drugs she had prescribed to them. The testimony was not unduly prejudicial because the portions relating to child abuse related to the conduct of others, not Lisa Hofschulz. The portions related to Lisa Hofschulz involved her prescriptions to patients and their abuse of those drugs.

Lisa Hofschulz is not entitled to a new trial based on the testimony regarding the DOJ investigation into one or more of her patients' involvement in child abuse.

5. *Improper Legal Conclusions*

Lisa Hofschulz next argues that the court improperly allowed Dr. King, the government's expert witness, to provide legal conclusions during his testimony. Dkt. No. 183 at 12.

The government responds that Lisa Hofschulz failed to point to any specific portion of Dr. King's testimony; it assumes that she is referring to his

testimony "that Ms. Hofschulz's prescriptions were issued outside the usual course of professional practice and not for a legitimate medical purpose." Dkt. No. 191 at 20. The government contends that this argument is precluded by Kohli. Id. (citing Kohli, 847 F.3d at 491-92).

Like Lisa Hofschulz, the defendant in Kohli argued "that the district court erred by allowing Dr. Parran to testify about applicable legal standards and legally dispositive issues in violation of Federal Rule of Evidence 704."[4] 847 F.3d at 491. The Seventh Circuit stated that Rule 704 allows experts to testify about an ultimate issue in the case. Id. (citing Fed. R. Evid. 704(a). What an expert may *not* do is state an opinion about "whether the defendant did nor did not have a mental state or condition that constitutes an element of the crime charged or of a defense." Id. (citing Fed. R. Evid. 704(b)) (quotation marks omitted). The Kohli court concluded that Dr. Parran's testimony "touch[ing] on the applicable standard of care among medical professionals—a standard that is no doubt closely linked to § 841(a)'s prohibition on prescribing outside the 'usual course of professional medical practice'" was appropriate expert testimony. Id. at 492 (citing Chube II, 538 F.3d at 698).

Dr. King's testimony offered nothing more than his expert opinion on the standard of care for medical professionals such as Lisa Hofschulz. The defendant has not pointed to any specific lines of testimony in which Dr. King strayed outside the boundaries of his role under Fed. R. Evid. 704(a).

[4] Dr. Parran was an addiction specialist and internal medicine physician. Kohli, 847 F.3d at 487.

Lisa Hofschulz is not entitled to a new trial based on Dr. King's testimony as it relates to any legal conclusions.

6. *Other Objections*

Finally, Lisa Hofschulz "moves for a new trial based on all of her other objections made before and during the trial, each of which was improperly overruled by the court." Dkt. No. 183 at 12. She notes that this includes the period during which she was "deprived counsel of her choice." Id.

The government addresses this as an omnibus motion based on the cumulative impact of her overruled objections. Dkt. No. 191 at 21. Addressing Lisa Hofschulz's argument about her right to counsel of choice, the government asserts that the *court* did not deprive her of this right; it granted Attorney Brindley's motion to withdraw. Id. (citing dkt. no. 89). The government notes that several months later, the court reversed that decision and allowed Attorney Brindley to represent Lisa Hofschulz. Id. (citing dkt. nos. 102, 107).

To demonstrate cumulative error, the defendant must show that "(1) 'at least two errors were committed in the course of the trial,' and (2) 'considered together along with the entire record, the multiple errors so infected the jury's deliberation that they denied the petitioner a fundamentally fair trial.'" United States v. Chavez, 12 F.4th 716, 732 (7th Cir. 2021) (quoting United States v. Marchan, 935 F.3d 540, 549 (7th Cir. 2019)).

The defendant specifically points to a single alleged error—the court depriving her of her counsel of choice. Otherwise, she refers generally to her

other objections before and during trial. The one alleged error the defendant specifically identifies had no meaningful effect on the outcome of the case.

The day before the scheduled February 18, 2020 trial, Attorney Brindley filed a motion asking the court to adjourn that trial or, in the alternative, to allow him to withdraw as counsel. Dkt. No. 85. The court denied the motion to adjourn the trial but granted his motion to withdraw. Dkt. No. 90. In its order, the court recounted the various justifications Attorney Brindley had provided for his multiple requests to adjourn the trial. Perceiving a lack of candor by Attorney Brindley, the court granted his request to withdraw and gave Lisa Hofschulz time to hire a new attorney. On September 14, 2020, on the request of Lisa Hofschulz and Attorney Glozman, the court reversed its decision and permitted Attorney Brindley to rejoin the case with Mr. Glozman remaining the lead counsel. Dkt. No. 107.

Between the date that Attorney Brindley withdrew from the case and the date the court allowed him to resume representation, nothing of any significance occurred in the case; indeed, the pandemic struck less than a month later and the court suspended all jury trials. The court held two status conferences in that time. Attorney Brindley was back in his representative capacity by September 14, 2020, nearly a year before the August 2, 2021 trial. He mounted a tenacious defense which included expert and lay witness testimony and many exhibits. He participated in pretrial motions practice. Attorney Brindley has presented no evidence that his seven-month absence,

ending more than a year before trial, affected Lisa Hofschulz's ability to mount a vigorous defense at the August 2021 trial.

Lisa Hofschulz is not entitled to a new trial based on the cumulative effect of her overruled objections.

IV. Amended Motion for Forfeiture of Property (Dkt. No. 182)

On October 13, 2021, the court denied without prejudice the government's original motion for entry of preliminary order of forfeiture. Dkt. No. 178. It did so because (1) the amount the government sought in its motion was inexplicably different than the amount referenced in its August 11, 2021 memorandum; and (2) the government failed to explain how it arrived at that amount. Id. at 2. The court instructed the government to attach any relevant evidence, such as evidence presented at trial, to its any amended motion. Id. at 3.

According to the forfeiture notice,

> 1. Upon conviction of the controlled substance offense alleged in Count One of this Indictment, pursuant to Title 21 United States Code, Section 853, any property constituting, or derived from, proceeds obtained directly or indirectly, as a result of the violation and any property used, or intended to be used, in any manner or part, to commit or to facilitate the commission of the violation, including but not limited to a sum of money equal to the amount of proceeds obtained as a result of the offense.
>
> 2. If any of the property described above, as a result of any act or omission by a defendant: cannot be located upon the exercise of due diligence; has been transferred or sold to, or deposited with, a third person; has been placed beyond the jurisdiction of the Court; has been substantially diminished in value; or has been commingled with other property which cannot be subdivided without difficulty, the United States of America shall be entitled to forfeiture of substitute property, pursuant to 21 U.S.C. § 853(p).

Dkt. No. 1 at 8.

The government asks for an entry of a preliminary order of forfeiture in the amount of $2,265,380. Dkt. No. 182 at ¶8. The amended motion explains that this calculation is based on "the analysis of the tax returns of Clinical Pain Consultants, Lisa Hofschulz, and Robert Hofschulz." Id. at ¶5. The government attached evidence supporting this figure to the amended motion as Exhibit A. Dkt. No. 182-1. It clarifies that the earlier amount—$2,246,082—came from "an analysis of CPC's JP Morgan Chase account." Dkt. No. 182 at ¶6. It attached a document supporting this figure as Exhibit B. Dkt. No. 182-2. The government asserts that the amount derived from tax records is a more accurate reflection of the gross receipts resulting from the defendants' conduct. Dkt. No. 182 at ¶7.

Lisa Hofschulz argues that the amount the government requests is "grossly excessive and unsupported by any evidence that has ever been presented to the Court." Dkt. No. 196. She argues that the government has not demonstrated that all the amount requested was derived from her criminal conduct. Id. at 1 (citing 21 U.S.C. §853(a)(1)). She asserts that the government has not established that all her profits from CPC were proceeds of criminal activity. Id. at 2.

Robert Hofschulz makes a similar argument. He says that "1) the amount the Government seeks is vastly disproportionate to proceeds [Robert Hofschulz] received from [CPC] and 2) there exists an insufficient nexus between his

conduct and the forfeiture sought and granting the Government's request would be unjust as applied to him." Dkt. No. 199 at 2.

Section 853(a)(1) of Title 21 states that person convicted of a violation of the federal drug laws "shall forfeit" any property "constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation." Section 853(d) says that there is a rebuttable presumption "at trial that any property of a person convicted of a felony under this subchapter or subchapter II is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II or within a reasonable time after such period; and (2) there was no likely source for such property other than the violation of this subchapter or subchapter II."

Federal Rule of Criminal Procedure 32.2(b)(1)(A) puts the burden on the court to determine—"as soon as practical after a verdict or finding of guilty"—what property is subject to forfeiture. It states that "[i]f the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay." Rule 32.2(b)(1)(B) says that the court may base that determination on evidence already in the record, as well as any additional evidence the parties may submit that the court accepts as relevant and reliable. And if the forfeiture is contested, either party may request that the court conduct a hearing. Neither defendant has requested a hearing.

The defendants were convicted of conspiring to distribute controlled substances at CPC. Dkt. No. 169. From their work at CPC, they amassed $2,265,380, based on their tax records. This amount was the basis for the analysis provided by IRS Agent Michael Magner at trial. Dkt. No. 182 at ¶5 (citing dkt. no. 182-1).

The defendants appear to argue that the government has not demonstrated, by a preponderance of the evidence, that there was no likely source for any of this money other than unlawful prescription of controlled substances. They imply that surely some of the income the clinic took in was from prescriptions issued in the usual course of professional medical practice and for a legitimate medical purpose. But the government presented evidence at trial that Lisa Hofschulz's practices generally were not consistent with the usual course of professional medical practice and not for legitimate medical purposes. From failing to conduct examinations to prescribing drugs without seeing imaging to refusing to accept insurance and demanding cash payments for every office visit to continuing to prescribe medications to individuals despite clear evidence of drug abuse, the evidence presented over the two weeks of trial showed by a preponderance of the evidence that the operation of the clinic was outside the usual course of the medical profession and not for legitimate medical purposes.

The court will grant the government's amended motion for entry of a preliminary order of forfeiture.

V. Conclusion

The court **DENIES** Robert Hofschulz's motion for judgment of acquittal. Dkt. No. 173.

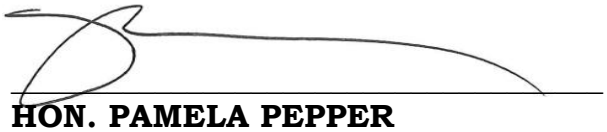
The court **DENIES** Lisa Hofschulz's motion for judgment of acquittal and new trial. Dkt. No. 183.

The court **GRANTS** the government's amended motion for entry of a preliminary order of forfeiture. Dkt. No. 182.

The court **ORDERS** that a money judgment in the amount of $2,265,380, representing proceeds derived from the defendants' conspiracy to distribute and distribution of controlled substances outside of a professional medical practice and not for a legitimate medical purpose is levied against defendants Lisa Hofschulz and Robert Hofschulz.

Dated in Milwaukee, Wisconsin this 9th day of December, 2021.

BY THE COURT:



HON. PAMELA PEPPER
Chief United States District Judge