APPENDIX

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APPENDIX A

[FILED: NOVEMBER 21, 2024]

[DO NOT PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10781

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK MURPHY,
JENNIFER MURPHY,

Defendants-Appellants.

Appeals from the United States District Court
For the Northern District of Alabama
D.C. Docket No. 5:20-cr-00291-LSC-SGC-1

Before JORDAN, NEWSOM, and BRASHER, Circuit Judges.

BRASHER, Circuit Judge:

This criminal appeal involves two codefendants—Dr. Mark Murphy and his wife Jennifer Murphy—who operated a pain management clinic in Alabama. After a jury convicted the Murphys of drug conspiracy and healthcare fraud among other crimes, the Murphys were each sentenced to twenty years in prison. Both challenge their convictions on appeal, arguing among other things that the evidence underlying their convictions was insufficient, that the court gave an erroneous jury

instruction on their drug conspiracy charge, and that the court violated their constitutional right to present a defense when it excluded testimony of Dr. Murphy's good care for some of his patients. Separately, Mrs. Murphy argues that the court abused its discretion by denying her motion for a mistrial after a witness provided testimony the court later instructed the jury to disregard. Dr. Murphy also challenges his sentence, arguing that the district court improperly calculated drug weight and loss amount, and that his sentence was substantively unreasonable. We reject all their arguments and affirm.

I.

A.

We begin with the facts. Dr. Murphy was a licensed physician specializing in pain management. He and Mrs. Murphy, his business partner, operated a pain management clinic called North Alabama Pain Services. NAPS had two locations in Alabama—one in Decatur and the other in Madison. Despite the practice's large patient population, Dr. Murphy was the only doctor on staff. Often, though not always, NAPS employed a nurse practitioner or physician's assistant to work as a physician extender. As one extender testified, she and Dr. Murphy would work opposite one another—one would go to Madison one day while the other went to Decatur, and vice versa.

NAPS patients suffered from chronic pain issues. To manage their pain, patients sought prescriptions for opioids, including hydrocodone, oxycodone, fentanyl, and morphine. Doctors testified at trial that opioid use can cause addiction, overdose, and death. Accordingly, only medical providers registered with the Drug Enforcement Administration can prescribe drugs like oxycodone or hydrocodone. To mitigate the risks of opioid use,

prescribing physicians conduct risk-benefit analyses. For instance, an expert testified that doctors should consider whether the patient has a history of alcohol or drug dependence. Another physician explained that they should conduct a physical examination of the patient, review medical records, and create a treatment plan. And doctors use prescription monitoring programs to ensure patients are not "doctor shopping" and receiving medications elsewhere. After prescribing opioids, doctors often conduct drug tests; if those tests reveal that a patient failed to take the prescribed medication or is taking other drugs—all possible signs of drug abuse, misuse, or diversion—a doctor "better do something about it," testified one physician. And, an expert acknowledged, patients receiving steadily increasing amounts of medication should have regular office visits, including with a physician, physician assistant, or nurse practitioner—not only a nurse.

Dr. Murphy's practice was very busy. NAPS patients had an office visit every twenty-eight days to obtain their opioid prescriptions. The Decatur office saw about eighty to one hundred patients a day—and the Madison office, at least another fifty. In total, NAPS scheduled about two thousand patients a month for office visits. The clinics were so full of patients that there "wasn't a seat to be had" in the waiting room, and about twenty patients had to stand or wait outside. Sometimes, when exam rooms were full, a nurse conducted visits in the hallway or kitchen.

NAPS patients followed a standard routine to continue their prescriptions. They took a drug test at each visit. Regardless of the results of the in-house drug test, Dr. Murphy had standing orders that patients also do a comprehensive urine test, which was conducted in the NAPS clinic by an outside lab. Dr. Murphy required this extra test each visit, but insurers told him it should be

"reserved for the confirmation of results produced by the simple screen." Also, twice a year, NAPS patients underwent a nerve conduction test by a company called QBR. QBR paid the Murphys $120 for every test that insurance covered. And that was often—QBR did more tests for Dr. Murphy than for any other doctor. QBR benefited too by using the highest-paying billing code, which required testing thirteen or more nerves. Patients complained about these painful tests, which Dr. Murphy often did not discuss with them. But to get their prescriptions, many patients had to complete these tests. And even though insurers did not allow standing orders for services like the urine and nerve tests, NAPS continued to issue such orders.

On top of the tests, NAPS also doled out unnecessary and expensive braces and medicated pain creams. Those prescriptions were funneled through the urine collectors who, though employed by an outside lab, did the Murphys' bidding and at times provided them with free labor. While the urine collectors obtained the urine samples, they routinely told patients that the patients needed these products and then filled out prescription orders pre-signed by Dr. Murphy. Mrs. Murphy told the collectors and patients that Dr. Murphy wanted patients to get those products in addition to their opioids. The Murphys even gave the collectors stamped or pre-signed prescription orders with four or five different signatures so that the photocopying and pre-signing was not too obvious. The collectors sent updated prescriptions for patients every month, whiting out and changing the date before sending in the same form, regardless of whether the patient visited on the new date. So those expensive creams came every month until patients contacted the pharmacy to stop—which they regularly had to do. Some patients told the pharmacies that they had not seen Dr.

Murphy in years. Others received creams even after they died.

There was a reason the Murphys significantly over-prescribed braces and creams—money. Pharmaceutical sales representatives for those products paid the urine collectors a commission for each prescription the collectors sent in. Mrs. Murphy told the sales representatives which collectors to pay and how much. And two of the collectors whom she told the representatives to pay were her son and brother-in-law. As Dr. Murphy admitted on the stand, sales representatives seeking his business had paid his family members.

Patients could go long stretches of time without seeing Dr. Murphy because of the sheer volume of patients and because Dr. Murphy went to only one clinic a day. And because he often did not see patients at their visits, Mrs. Murphy would bring home a stack of unsigned prescriptions for Dr. Murphy to pre-sign—and he signed them days or even weeks in advance of patient appointments. For instance, Dr. Murphy signed a prescription for an August visit even though the patient did not attend that month's visit—he had died in July. Some patients complained about not seeing the doctor, and "even if they did see him, they didn't have time to discuss whatever concerns because it was so quick." Per Dr. Murphy's instructions, nurses began doing a process they dubbed a "wave by." As one nurse testified: "A wave by is when there is not enough time to actually see the patient. You were to bring them by the room Dr. Murphy was in so he could wave at them." Dr. Murphy also told his staff to use his billing code as a default, even when he did not see the patient, on the theory that he had reviewed patient charts in advance. Insurance companies do not allow that practice, witnesses testified—nurse or

extender visits use a different billing number at a lower rate. Even when Dr. Murphy was not physically present, patient records included a boilerplate statement that he was available but the "patient decline[d]" to see him.

Dr. Murphy ignored many patients' red flags. Physicians who reviewed patients' medical files testified that he ignored signs of abuse. For example, there were indicators that some patients were abusing or selling their drugs. One patient testified that he had flagged his prior alcohol abuse on his intake form, but Dr. Murphy never explained the dangers of mixing opioids and alcohol. The patient admitted he was addicted to opioids while he was a NAPS patient for several years, only overcoming that addiction after the clinic closed. Nurses or physician assistants tried to release patients for repeatedly failing drug tests but were overruled by the Murphys. The Murphys refused to release one patient who failed drug tests because they had invested in the patient's patent and believed, as one witness stated, that the patent would "get them rich." At least one nurse left NAPS— for lower-paying employment—due to the quantity of opioids that NAPS was prescribing.

Dr. Murphy was NAPS's sole doctor, but Mrs. Murphy managed its day-to-day operations. She had "[a]ll the authority" and "pretty much ran all aspects of the office," one witness stated. Witnesses further testified to aspects of her leadership, including that it involved "a lot of yelling" and "[a] lot of intimidation." She screamed at nurses and patients and would yell at a nurse to make Dr. Murphy "move faster." She referred to herself as the "bitch that ran the office." She made urine collectors clean the bathroom as "punishment." On top of her poor management, Mrs. Murphy adopted concerning business practices. She stuffed cash copays into her purse. She asked an employee to deposit copay cash at Wells Fargo,

where she held her personal accounts—and as bank records revealed, those accounts saw regular cash deposits totaling hundreds of thousands of dollars. She asked a urine collector to put co-pay cash in a hidden bag in a bathroom in her house. She told a sales representative that he "couldn't come into the office unless he brought $300 Ruth[']s Chris [Steak House]" gift cards for her "every month." And when she was angry with urine collectors, she would not let sales representatives pay them for the month.

Mrs. Murphy also ran a nonprofit organization, the Crystal Murphy Enrichment Organization. Donations to CMEO funded vacations for the Murphys' friends and family to places like Alaska, Israel, and Spain. As a urine collector testified, Mrs. Murphy gave her thousands in cash and told her to buy cashier's checks payable to CMEO. Mrs. Murphy instructed the collector that if law enforcement asked about the checks, the collector was to say that she bought them with her (instead of Mrs. Murphy's) own money. Sales representatives wishing to do business with the Murphys were also expected to donate large sums to CMEO. Mrs. Murphy would remind the representatives to pay regular donations worth several thousands of dollars a check. Some donations were for amounts as large as $10,000 and $12,000. After the Murphys began to be criminally investigated, Mrs. Murphy asked a sales representative to sign a letter stating that she had not pressured him to donate to CMEO, which he refused to do because he "knew [he] would be lying."

The Murphys' medical practice was massive in scope. Out of more than a million practitioners nationwide, Dr. Murphy was number one in dollars billed to Medicare for lab tests. He billed Medicare tens of millions of dollars for those tests and Blue Cross Blue Shield nearly $40 million

for services referred to two labs. He billed insurers over a million dollars for braces and over ten million for nerve tests. For drugs he prescribed, insurers were billed more than $160 million. As for the office visits, he billed insurers millions of dollars under his code, even for visits when he did not see the patient.

B.

A federal grand jury indicted the Murphys, along with four codefendants. Two codefendants—the ones involved in the lab tests and brace and cream fraud—pleaded guilty to healthcare fraud conspiracy. Dr. Murphy and Mrs. Murphy, along with their son and Dr. Murphy's brother (again, two of the urine collectors), proceeded to trial. After an eight-day trial, the jury convicted Dr. Murphy and Mrs. Murphy and acquitted the son and brother.

Dr. Murphy and Mrs. Murphy were convicted on the following charges: conspiring to unlawfully distribute fentanyl, oxycodone, and hydrocodone, in violation of 21 U.S.C. § 846 (Count 1); conspiring to commit healthcare fraud, in violation of 18 U.S.C. § 1349 (Count 5); five counts of healthcare fraud, in violation of 18 U.S.C. § 1347 (Counts 6 to 10); conspiring to defraud the United States by soliciting and receiving kickbacks, in violation of 18 U.S.C. § 371 (Count 11); and soliciting or receiving kickbacks involving a federal healthcare program, in violation of 42 U.S.C. § 1320a-7b(b)(1) and 18 U.S.C. § 2 (Count 22). Dr. Murphy was also convicted of a drug distribution offense, in violation of 21 U.S.C. §§ 841(a)(1) & (b)(1)(C) and 18 U.S.C. § 2 (Count 3), and Mrs. Murphy was convicted of three counts of providing a false statement to the Internal Revenue Service, in violation of 26 U.S.C. § 7206(1) (Counts 23 to 25).

After being denied judgments of acquittal at trial, the Murphys filed motions for a new trial. The district court denied those motions too, but vacated Dr. Murphy's substantive drug conviction (Count 3) after our remand decision in *United States v. Ruan*, 56 F.4th 1291 (11th Cir. 2023) ("*Ruan III*").

Stacking the statutory maximums, the district court found that the guidelines ranges were 1,140 months of imprisonment for Dr. Murphy and 1,248 months for Mrs. Murphy. The judge varied downward and sentenced both to 240 months. Though Dr. Murphy objected to his guidelines range at sentencing, challenging the drug quantity and loss calculations, the district court overruled his objections and stated it would have given the same sentence "regardless of how the guidelines issues had been resolved." Both defendants timely appealed.

II.

The Murphys raise six issues on appeal. First, the Murphys challenge the sufficiency of the evidence for their convictions. Second, they argue that they are entitled to a new trial because the district court gave the wrong jury instruction on the Count 1 drug conspiracy charge. Third, Mrs. Murphy argues that the district court abused its discretion by denying her motion for a mistrial after her tax return preparer offered testimony that the court later struck and asked the jury to disregard. Fourth, the Murphys argue that they are entitled to a new trial because the district court violated their constitutional right to present a defense when it excluded evidence of Dr. Murphy providing good care to some patients. Fifth, they argue that the court's cumulative error warrants a new trial. Finally, Dr. Murphy argues that his sentence should be vacated because the district court determined drug weight without a reliable basis and

erroneously determined intended loss instead of actual loss. We address each issue in turn.

A.

We start with the sufficiency of the evidence. We review a challenge to the sufficiency of the evidence *de novo*, construing the evidence, drawing reasonable inferences therefrom, and making credibility choices, all in favor of the jury's verdict. *See United States v. Laines*, 69 F.4th 1221, 1229 (11th Cir. 2023), *cert. denied*, 144 S. Ct. 2611 (2024); *United States v. Taylor*, 480 F.3d 1025, 1026 (11th Cir. 2007). There is sufficient evidence to support a guilty verdict if "a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *United States v. Maurya*, 25 F.4th 829, 841 (11th Cir. 2022) (quotation marks omitted). That test is the same "regardless of whether the evidence is direct or circumstantial, and no distinction is to be made between the weight given to either direct or circumstantial evidence." *United States v. Albury*, 782 F.3d 1285, 1293 (11th Cir. 2015) (quotation marks omitted). Here, we consider each of the challenged convictions, starting with drug conspiracy (Count 1).

1.

The Murphys first contend that the government failed to present sufficient evidence that they conspired together to unlawfully distribute controlled substances. *See* 21 U.S.C. § 846 (conspiracy); *id.* § 841(a)(1) (unlawful drug distribution). To establish a conspiracy to commit a drug-related offense, "the government must prove beyond a reasonable doubt that two or more persons agreed to commit a drug-related offense, that the defendant knew of the conspiracy, and that he agreed to become a member." *United States v. Louis*, 861 F.3d 1330, 1333 (11th Cir. 2017). The Murphys argue that here, there

is not enough evidence that "two or more persons agreed" to unlawfully distribute drugs. In their view, even if Dr. Murphy knew his drug prescriptions were unauthorized, the government failed to prove that *Mrs. Murphy* also knew they were unauthorized and facilitated their issuance. And without enough evidence of Mrs. Murphy's knowing participation, they argue, there was not enough evidence of a conspiracy.

The Murphys are mistaken. A defendant's knowing participation in a conspiracy can be proven by circumstantial evidence, "such as acts committed by the defendant which furthered the purpose of the conspiracy." *United States v. Bain*, 736 F.2d 1480, 1485 (11th Cir. 1984). The government need not have proven that the defendant knew "all of the details or participated in every aspect of the conspiracy." *United States v. Vernon,* 723 F.3d 1234, 1273 (11th Cir. 2013) (quotation marks omitted). Instead, it need only prove that the defendant "knew of the essential nature of the conspiracy." *United States v. Moran*, 778 F.3d 942, 960 (11th Cir. 2015) (quotation marks omitted).

Here, there was sufficient evidence that Mrs. Murphy and Dr. Murphy agreed to—or, put differently, knowingly conspired to—distribute drugs in an unauthorized manner. *See Louis*, 861 F.3d at 1333. Even if the government did not list every specific prescription Mrs. Murphy knew to be unauthorized, evidence amply established that she knew of and facilitated the issuance of unauthorized opioid prescriptions. She was the "billing contact person" for insurance agencies, and Blue Cross Blue Shield repeatedly alerted NAPS about the concerning volume of opioid prescriptions. She brought home stacks of prescriptions for Dr. Murphy to pre-sign. She and Dr. Murphy overruled nurses' attempts to release patients who failed drug tests. A jury could

reasonably conclude from this evidence that Mrs. Murphy knowingly helped Dr. Murphy to issue unauthorized drug prescriptions and thus that the two conspired to unlawfully distribute drugs.

2.

The Murphys next challenge the sufficiency of the evidence underlying their convictions for healthcare fraud conspiracy under 18 U.S.C. § 1349 (Count 5); substantive healthcare fraud under 18 U.S.C. § 1347 (Counts 6 to 10); kickback conspiracy under 18 U.S.C. § 371 (Count 11); and receiving a kickback, in violation of 42 U.S.C. § 1320a-7b(b)(1) (Count 22).

A person commits healthcare fraud (Counts 6 to 10) if "in connection with the delivery of or payment for health care benefits, items, or services," he "knowingly and willfully" executes a scheme to "defraud any health care benefit program" or to "obtain, by means of false or fraudulent pretenses" any money or property owned by a healthcare benefit program. 18 U.S.C. § 1347(a); *United States v. Grow*, 977 F.3d 1310, 1321 (11th Cir. 2020). Indeed, an element of healthcare fraud is that "the defendant acted willfully and with intent to defraud." *United States v. Scott*, 61 F.4th 855, 864 (11th Cir. 2023). To sustain a conviction for *conspiracy* to commit healthcare fraud (Count 5), the evidence must establish that: (1) the conspiracy existed; (2) the defendant knew of the conspiracy; and (3) he or she knowingly and voluntarily joined it. *See* 18 U.S.C. § 1349; *United States v. Gonzalez*, 834 F.3d 1206, 1214 (11th Cir. 2016).

As for the kickback conviction (Count 22), it is unlawful to "knowingly and willfully" solicit or receive a kickback in return for (1) "referring" an individual to someone "for the furnishing or arranging for the furnishing of any item or service" paid for in part or whole

under a federal healthcare program; or in return for (2) "purchasing" or "ordering"—or arranging for or recommending the purchasing or ordering of—any good, service, or item partially or wholly paid for under a federal healthcare program. 42 U.S.C. §§ 1320a-7b(b)(1)(A)–(B). To sustain a conviction for *conspiracy* to receive healthcare kickbacks (Count 11), *see* 18 U.S.C. § 371, the evidence must establish that (1) a conspiracy existed, and the defendant (2) knew about it and (3) with knowledge, voluntarily joined it. *United States v. Howard*, 28 F.4th 180, 189 (11th Cir. 2022), *cert. denied sub nom. Bramwell v. United States*, 143 S. Ct. 165 (2022).

Dr. Murphy's only sufficiency challenge as to the healthcare fraud and kickback convictions focuses on their *mens rea* element. Specifically, he argues that the government failed to establish his "fraudulent intent" because the evidence was insufficient to prove that he did not act in "good faith." This argument falls flat, regardless of which conviction's *mens rea* element we construe it to challenge. For one, Dr. Murphy cites only his own trial testimony to argue that he acted in good faith, but the jury was "free to disbelieve" his testimony and even "consider it as substantive evidence of [his] guilt." *United States v. Rivera*, 780 F.3d 1084, 1098 (11th Cir. 2015). Second, his self-serving testimony cannot overcome the overwhelming evidence of his criminal intent. As trial testimony supported, Dr. Murphy gave standing orders to do comprehensive urine tests and nerve tests, pre-signed prescriptions as a matter of course, instructed urine collectors to use his pre-signed orders to prescribe unnecessary braces and creams, and directed his staff to use improper billing codes. Insurers were then billed millions for these services and products. And, in exchange for prescribing unnecessary nerve tests, creams, and braces, Dr. Murphy and his family received from QBR or

sales representatives hefty commissions or vacation-funding donations to CMEO. A juror could reasonably conclude from this evidence that Dr. Murphy "knowingly and willfully" defrauded a healthcare benefit program and "knowingly and willfully" received kickbacks. *See* 18 U.S.C. § 1347(a); 42 U.S.C. § 1320a-7b(b)(1). And a juror could reasonably conclude that Dr. Murphy knew of and knowingly joined a conspiracy to commit healthcare fraud and to receive kickbacks. *See* 18 U.S.C. §§ 371, 1349; *Gonzalez*, 834 F.3d at 1214; *Howard*, 28 F.4th at 189.

Mrs. Murphy's sufficiency arguments fare no better. Her appellate briefing gives no explanation for why the evidence for her healthcare fraud and kickback convictions was insufficient. Instead, it merely recites some of the elements those convictions require. So her perfunctory arguments as to these convictions are forfeited. *See Harner v. Soc. Sec. Admin., Comm'r*, 38 F.4th 892, 899 (11th Cir. 2022) ("An appellant forfeits an issue when she raises it in a perfunctory manner without supporting arguments and authority" (quotation marks omitted)); Fed. R. App. P. 28(a)(8)(A) (arguments in the appellant's brief "must contain . . . appellant's contentions and *the reasons for them*, with citations to the authorities and *parts of the record* on which the appellant relies" (emphasis added)).

3.

Mrs. Murphy also argues that the government failed to present sufficient evidence to convict her of submitting false tax returns (Counts 23 to 25) in violation of 26 U.S.C. § 7206(1).

To sustain a conviction under Section 7206(1), the government must prove four elements: (1) the defendant willfully made and subscribed to a tax return; (2) the return contained or was verified by a written declaration

that it was made under penalties of perjury; (3) the defendant did not believe the return to be true as to every material matter; and (4) the return was false as to a material matter. *See* 26 U.S.C. § 7206(1); *United States v. Clarke*, 562 F.3d 1158, 1163 (11th Cir. 2009). Mrs. Murphy argues that the evidence fell short on each element. She is wrong.

We start with the first and second elements. Sufficient evidence established that Mrs. Murphy (1) willfully made and subscribed to a tax return (2) containing a written declaration that it was made under penalty of perjury. The perjury element is easily satisfied: the Murphys' as-filed tax returns for the 2013 to 2015 tax years each contained an avowal that the return was filed under the penalty of perjury. Mrs. Murphy argues, however, that the evidence did not prove that she "made and subscribed to" those returns because they contained only asterisks in the signature location. But those asterisks do not exonerate her. As an IRS agent testified, taxpayers can use PINs to generate electronic signatures, which then appear on tax returns as asterisks, and can authorize a preparer to file those returns. Here, each of her as-filed returns bore the name and signature of a preparer, William Tapscott—who, as bank records abundantly revealed, was the Murphys' regular accountant. Documents recovered from the clinic—which Mrs. Murphy managed—further disclosed that she authorized Tapscott to file her returns. Those recovered documents included prepared but unsigned copies of tax returns with figures largely identical to those in the as-filed returns. And they included official documents entitled "IRS e-file Signature Authorization" that authorized "Tapscott Accounting Service" to file Mrs. Murphy's tax documents. A juror could reasonably infer from this evidence that Mrs. Murphy caused the 2013 to

2015 tax returns to be filed by authorizing Tapscott to submit them with her signature PIN.

The evidence was sufficient for the third and fourth elements too—i.e., (3) that Mrs. Murphy knew her tax returns contained materially false information and (4) that they actually did. To fully report her personal income on her tax returns, Mrs. Murphy needed to fully report her NAPS partnership income, which "flow[ed] through to" her personal income return. But the government presented evidence that she materially understated her NAPS partnership income by diverting substantial amounts of such income—via cash deposits—into her CMEO and personal accounts. As evidence revealed, those accounts saw large and unexplained cash deposits. Mrs. Murphy's personal accounts alone saw over $52,000 in unexplained cash deposits in 2013, over $63,000 in 2014, and over $82,000 in 2015. And in total, the cash deposits on those accounts and the CMEO account added up to about $750,000 for the 2013 to 2015 tax years. Mrs. Murphy provided no explanation at trial as to where those large cash sums came from, and a testifying IRS agent who had reviewed the Murphys' and NAPS's bank records could not identify a source of income other than NAPS income either. Witnesses testified about Mrs. Murphy's suspicious handling of copay cash—she stuffed that cash in her purse, asked urine collectors to hide the cash in her house or use it to buy cashier's checks payable to CMEO, and even asked one collector to lie to law enforcement about where the money for the cashier's checks came from. Because the cash deposits were not reported as clinic income, they were not taxed as partnership income on Mrs. Murphy's tax filings. Given the evidence of Mrs. Murphy diverting clinic partnership income to other accounts via untaxed cash deposits, a juror could reasonably conclude that she gave false

information on her personal income returns (which, again, hinged on her partnership income) and that she *knew* those returns to be materially false. The evidence underlying her tax fraud convictions is sufficient.

B.

The Murphys also argue that the jury instruction for the drug conspiracy charge was erroneous under *Ruan v. United States*, 597 U.S. 450 (2022) ("*Ruan II*"). But this argument, as we explain below, is foreclosed by our decision in *Ruan III*.

We review *de novo* whether a jury instruction "misstated the law or misled the jury to the prejudice of the objecting party." *United States v. Cochran*, 683 F.3d 1314, 1319 (11th Cir. 2012). "Where the error is the omission of an element of the crime we will reverse unless it can be shown the error was harmless beyond a reasonable doubt." *Ruan III*, 56 F.4th at 1296.

In *Ruan II*, the Supreme Court decided what *mens rea* the government needed to prove to convict a physician for unlawful prescribing under 21 U.S.C. § 841(a). The Court concluded that if a defendant was authorized to prescribe a controlled substance (for instance, a doctor defendant), the government must prove not only that the doctor knew he was prescribing the drugs, but also that he knew or intended that the prescription was unauthorized. *See Ruan II*, 597 U.S. at 454–55, 457–61. Here, the district court vacated Dr. Murphy's substantive drug distribution conviction (Count 3) under section 841, on the grounds that the jury instruction behind that conviction did not comply with *Ruan II*. The Murphys argue that because the jury instructions for the section 841 substantive drug distribution charge were given in error, the instruction for the Count 1 drug *conspiracy* charge, *see* 21 U.S.C. § 846, was erroneous too.

That logic is incorrect. *Ruan III* addressed this very issue. There, we had to decide how *Ruan II*'s holding on the *mens rea* needed for a substantive drug offense applied to a conspiracy drug offense. Though we vacated the defendants' substantive drug convictions under section 841, we held that there was no error in a section 846 drug conspiracy jury instruction nearly identical to the one the district court used here. *See Ruan III*, 56 F.4th at 1298–99. Our explanation was simple: to find a defendant guilty of conspiracy, "[t]he jury would need to find that the defendant knew the illegal object of the conspiracy." *Ruan III*, 56 F.4th at 1299. And to find that the defendant knew the "aim of [his] agreement was illegal," the jury had to find that he (1) knew he was dispensing a controlled substance and (2) knew he was doing so in an unauthorized manner. *See id.* "If the jury concluded that the defendant did not know either of these things, then they could not conclude the defendant knew the illegal object of the conspiracy and could not vote to convict." *Id.*

Here, like in *Ruan III*, the district court instructed the jury that to convict the Murphys on drug conspiracy, the jury had to find that the Murphys agreed to accomplish a shared "unlawful plan to dispense controlled substances without a legitimate medical purpose or outside the usual course of professional practice," and that they "knew the unlawful purpose of the plan and willfully joined it." *Compare with Ruan III*, 56 F.4th at 1299 (jurors instructed to convict under section 846 only if the defendants agreed to accomplish "'a shared unlawful plan to distribute or dispense . . . the alleged controlled substance or substances'" and "'knew the unlawful purpose of the plan and willfully joined it'"). Thus, like in *Ruan III*, the jury had to find that the Murphys knew their drug distribution plan was unlawful—and,

necessarily, that they knew they were dispensing drugs in an unauthorized manner. So applying *Ruan III*, we conclude the district court's instruction under section 846 conveyed the proper *mens rea* requirement to the jury.

The Murphys seem to concede that *Ruan III* runs "contrary" to their arguments, but then to ask that we abandon *Ruan III* altogether. To the extent they make this invitation, we decline it. In *United States v. Duldulao*, a defendant asked us to abandon *Ruan III* and pointed to a Tenth Circuit decision holding "that a faulty § 841 instruction 'infected' each of the defendant's convictions, including the conspiracy conviction under § 846." 87 F.4th 1239, 1253 (11th Cir. 2023) (quoting *United States v. Kahn*, 58 F.4th 1308, 1311, 1322 (10th Cir. 2023)). But we rejected the defendant's request because "the Tenth Circuit's decision in *Kahn* does not deny our prior precedent rule its force," and "under our prior panel precedent rule, *Ruan III* controls." *Duldulao*, 87 F.4th at 1253. So too here.

Seeking to evade *Ruan III*, the Murphys attack the drug conspiracy instruction's use of the language "without a legitimate medical purpose or outside the usual course of professional practice." Pointing to *Ruan II*, they argue that a doctor could know his prescription lacked such a purpose and was made outside the usual course of professional practice, but still not know the prescription was "unauthorized." But *Ruan II*—which concerned *whether* a doctor must know his prescription was unauthorized, *see* 597 U.S. at 454–55—never redefined "unauthorized." To the contrary, it explicitly "assume[d]" that "a prescription is 'authorized' and therefore lawful" only when it is "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." *Ruan II*, 597 U.S. at 455 (quoting 21 C.F.R. § 1306.04(a)). And in *Ruan III*, when reasoning

why one who knows his drug distribution plan is unlawful necessarily knows that drugs dispensed as planned are done so in an unauthorized manner, we stated that had the jury concluded the defendants "believed their actions to be for a *legitimate medical purpose*," it could not have also found they knew their plan was unlawful. 56 F.4th at 1299 (emphasis added). In other words, we recognized that a prescription "without a legitimate medical purpose" necessarily is an "unauthorized" one.

Lastly, the Murphys contend that because the drug conspiracy instruction did not define an "unlawful plan," it "incorporated" the substantive drug offense instructions given in error. But this contention fails for two reasons. First, the drug conspiracy instruction never cross-referenced the substantive drug offense instructions: for instance, the former did not instruct the jury to pull the definition of a term from the latter, even if the conspiracy and substantive instructions used some of the same terms. Second, the jury need not have first heard a fuller definition of "unlawful plan" for *Ruan III*'s logic to obtain. One does not need dictionary definitions of the words "unlawful plan," to conclude that a defendant who knows his plan to dispense drugs is unlawful also knows that in dispensing those drugs as planned he would be doing so in an unauthorized manner. *Ruan III* did not hinge its approval of the section 846 drug conspiracy instruction upon whether it first defined an "unlawful plan." Neither do we.

C.

Next, Mrs. Murphy contends that the district court abused its discretion by denying her motion for a mistrial after her accountant, Tapscott, invoked his Fifth Amendment rights and discontinued his trial testimony. The government called Tapscott, and he began his

testimony by telling the jury about his career background and his relationship with the Murphys. He had just started discussing his preparation of CMEO's taxes when the court, concerned that Tapscott might incriminate himself, stopped his testimony and advised him to obtain a lawyer. The next day, outside the jury's presence, Tapscott elected not to continue testifying. The court then instructed the jury to disregard all of Tapscott's testimony from the previous day. Later, the court repeated that instruction when the jury submitted a clarifying question about which witness's testimony to disregard. Mrs. Murphy insists, however, that the court's curative instructions were "less effective than putting a Band-Aid on a bullet wound," and so a mistrial was warranted. We disagree.

We review the denial of a motion for mistrial for an abuse of discretion. *United States v. Gallardo*, 977 F.3d 1126, 1138 n.8 (11th Cir. 2020). "A defendant is entitled to a mistrial only if [she] shows substantial prejudice, meaning that it is reasonably probable that, but for the alleged error, the outcome of the trial would have been different." *Id.* at 1138. When the court gives a curative instruction, as it did here, we presume the jury followed the instruction. *See id.* As we have stated: when a court "admi[ts] and later exclu[des] evidence, an instruction to disregard evidence withdrawn from the jury is sufficient grounds" for affirmance "unless the evidence is so highly prejudicial as to be incurable by the trial court's admonition." *United States v. Nicholson*, 24 F.4th 1341, 1354 (11th Cir. 2022) (quotation marks omitted).

Mrs. Murphy has not established such prejudice. She has failed to argue what impact, if any, Tapscott's brief un-cross-examined testimony bore on the outcome of her trial. After explaining his background in accounting, Tapscott discussed Mrs. Murphy's control of CMEO and

his cashier's check purchases for CMEO. But other witnesses, including a urine collector, a maintenance worker, and a sales representative, also testified to the same or similar facts. Tapscott's only unique testimony was that Mrs. Murphy gave him "a sheet of paper with all the expenses and the trips and stuff and the income of the [CMEO] foundation" to file tax documents for CMEO. But this minor detail on how he prepared CMEO's tax filings—or, at most, on the inadequacy of that preparation—had little to no connection to Mrs. Murphy's tax fraud charges, which alleged that she *lied* on her *personal* tax returns.

To be sure, as Mrs. Murphy observes, Tapscott also testified that he prepared her personal returns. But the jury would have known that fact even without hearing Tapscott's testimony, because "IRS e-file Signature Authorization" documents disclosed that Tapscott was authorized to file Mrs. Murphy's tax documents, and because three of her as-filed tax returns bore Tapscott's name and signature as their preparer. True, as Mrs. Murphy points out, those tax returns were formally admitted into evidence during Tapscott's later stricken testimony. But Tapscott's testimony was not necessary to the admission of these exhibits, the exhibits were admitted without objection, the government did not ask Tapscott any questions about the exhibits, and an IRS agent later discussed the exhibits without objection—and was cross-examined about them by the defense—after Tapscott's aborted testimony.

Nothing about Tapscott's testimony was so prejudicial that its admission was "incurable." *Nicholson*, 24 F.4th at 1354 (quotation marks omitted). We cannot say the district court abused its discretion by denying Mrs. Murphy's motion for a mistrial.

D.

The Murphys also challenge the district court's exclusion of good care evidence. At trial, they sought to have a few of Dr. Murphy's patients—ones not mentioned in the superseding indictment or during the government's case—testify about how he had provided them with good care. The Murphys asserted that those patients could testify, among other things, that "they received beneficial treatment," that some were prescribed fewer opioids over time, and that Mr. Murphy sometimes "discontinued" prescriptions for creams and braces that were not effective. The district court excluded the evidence, reasoning that Dr. Murphy was not charged for his acts against "every single patient," and that "showing other patients as good character evidence" was a "problem." *See* Fed. R. Evid. 404(a)(1).

We review a court's exclusion of evidence, including good care evidence, for an abuse of discretion. *United States v. Ifediba*, 46 F.4th 1225, 1238 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 2586 (2023); *see also United States v. Machado*, 886 F.3d 1070, 1086 (11th Cir. 2018). That standard "allows for a range of choice," which "means that sometimes we will affirm even though we might have decided the matter differently in the first instance." *Doe v. Rollins Coll.*, 77 F.4th 1340, 1347 (11th Cir. 2023), *cert. denied*, 144 S. Ct. 1056 (2024).

We cannot say the district court abused its discretion here. Federal Rule of Evidence 404(a)(1) prohibits the use of "[e]vidence of a person's character or character trait . . . to prove that on a particular occasion the person acted in accordance with the character or trait." *United States v. Ahmed*, 73 F.4th 1363, 1384 (11th Cir. 2023). As we have stated, "[e]vidence of good conduct is not admissible to negate criminal intent." *United States v. Camejo*, 929

F.2d 610, 613 (11th Cir. 1991). And, even when character evidence is admissible—for instance, to prove a pertinent trait such as honesty in a fraud case—that evidence cannot consist of specific instances of past conduct unless the trait itself is an "essential element" of the charge. *Ahmed*, 73 F.4th at 1384. Under these principles, testimony about specific instances of Dr. Murphy providing good care to some patients—for example, by discontinuing or reducing their prescriptions—cannot be used to prove whether he unlawfully dispensed drugs to other patients, or conspired to do so, as charged in the indictment. *See id.* (character testimony was correctly excluded because it would have covered a defendant's "specific acts" unrelated to his criminal charges and be used to negate criminal intent).

The Murphys contend, however, that excluding the good care evidence violated their Sixth Amendment right to present a defense. "Whether the exclusion of the evidence violated a constitutional guarantee is a legal question that we review *de novo*." *Ifediba*, 46 F.4th at 1237.

As we have stated, "[i]mplicit in a criminal defendant's constitutional rights under the Fifth and Sixth Amendments is the right to present evidence in his . . . favor." *Machado*, 886 F.3d at 1086. To decide whether a defendant's constitutional right to present a defense was violated, we engage in a two-step analysis, asking: first, whether that right was violated; and second, if so, whether the error was harmless beyond a reasonable doubt. *United States v. Hurn*, 368 F.3d 1359, 1362–63 (11th Cir. 2004).

As to the first step, we outlined in *Hurn* four categories of evidence that a defendant generally has a constitutional right to present: (1) "evidence directly

pertaining to any of the actual elements of the charged offense or an affirmative defense"; (2) "evidence pertaining to collateral matters that, through a reasonable chain of inferences, could make the existence of one or more of the elements . . . more or less certain"; (3) "evidence that is not itself tied to any of the elements … but that could have a substantial impact on the credibility of an important government witness"; and (4) "evidence that, while not directly or indirectly relevant to any of the elements of the charged events, nevertheless tends to place the story presented by the prosecution in a significantly different light, such that a reasonable jury might receive it differently." *Id.* at 1363. Importantly, "[e]ven when one of the four circumstances listed in *Hurn* is present, 'otherwise relevant evidence may sometimes validly be excluded under the [Federal] Rules of Evidence.'" *Machado*, 886 F.3d at 1085 (quoting *Hurn*, 368 F.3d at 1363 n.2). And as we observed only a few years ago, the Supreme Court "has never held that a federal rule of evidence violated a defendant's right to present a complete defense." *United States v. Mitrovic*, 890 F.3d 1217, 1222 (11th Cir. 2018).

The Murphys argue that the proffered good care evidence fell under the first, second, and fourth *Hurn* categories. We address each of these categories in turn.

The first *Hurn* category does not apply. The Murphys argue that the good care testimony directly pertained to the "knowledge" or "intent" element of their charged offenses. *See e.g.*, *Louis*, 861 F.3d at 1333 (drug conspiracy charge required proof that defendant "knew" of the conspiracy). We disagree. That Dr. Murphy knowingly or intentionally mistreated some patients is not rebutted by the fact that he treated *other* patients properly. *See United States v. Ellisor*, 522 F.3d 1255, 1270 (11th Cir. 2008) (quoting *United States v. Marrero*, 904

F.2d 251, 260 (5th Cir. 1990) ("The fact that Marrero did not overcharge in every instance in which she had an opportunity to do so is not relevant to whether she, in fact, overcharged as alleged in the indictment.")).

Hurn's second category does not help the Murphys either. They argue that the good care testimony could rebut the government's apparent "collateral" assertion that their clinic was "illegitimate"—from which, they argue, the jury could infer that Dr. Murphy knowingly prescribed drugs in an unauthorized manner. *See Hurn*, 368 F.3d at 1353. But whether Dr. Murphy mistreated the patients as alleged in the indictment and the government's case did not turn on NAPS's legitimacy as a whole. In fact, government witnesses testified about the clinic's "many aspects of good care," including, for instance, its "proper paperwork" on mental status, "a compilation of external records," "drug testing on the initial visit," and warnings "not to mix the pain medications with alcohol." But similar to above, there is no conflict between NAPS providing legitimate care to some patients at some moments, and the Murphys knowingly mistreating other patients at others. To put it differently, even if the good care testimony added to NAPS's legitimacy, doing so would not make it "more or less certain" that the Murphys knowingly mistreated the patients that trial evidence established they mistreated.

The Murphys finally rely on *Hurn*'s fourth category. They argue that the proffered good care testimony—even if irrelevant to an element of a charged offense—would place the prosecution's "story . . . in a significantly different light," *Hurn*, 368 F.3d at 1363, by dispelling the "taint of the portrayal of Dr. Murphy's clinic as illegitimate." We are not convinced. Again, evidence already suggested that NAPS was not an entirely illegitimate clinic. Witnesses testified about Dr. Murphy

or his clinic providing patients with good care. Dr. Murphy's expert testified, in his expert opinion, that Dr. Murphy had issued legitimate prescriptions for patients whose files the expert reviewed. And Dr. Murphy himself gave testimony—which the jury was free to disbelieve, *Rivera*, 780 F.3d at 1098—about his clinic's policies, procedures, and practices in treating patients; about aspects of his good care; and that he "loved [his] patients." Given this testimony in the Murphys' favor—and, given the strong evidence of the Murphys mistreating *some* patients—more good care testimony would not have casted the evidence in a "significantly" different light. *Id.* at 1363.

Our decision in *United States v. Ifediba* supports our analysis. *See* 46 F.4th 1225. There, the district court excluded good care evidence purportedly "showing that [Ifediba] provided legitimate medical treatment to some patients." *Id.* at 1238. The defendant argued that the exclusion violated his "constitutional right to present a complete defense" because his good care testimony could have placed the prosecution's story in a "'significantly different light.'" *Id.* (quoting *Hurn*, 368 F.3d at 1363). We disagreed. Evidence that "Ifediba lawfully treated some patients" was "no defense," we explained, because "the government never alleged that Ifediba unlawfully treated every patient" and even "conceded that his treatment of some patients was legitimate." *Ifediba*, 46 F.4th at 1238. The same is true here, where the government acknowledged instances of Dr. Murphy properly treating his patients but then stated that "this case . . . is about the times he didn't" provide "good care." And, we reasoned in *Ifediba*, the district court did not abuse its discretion in excluding the good care evidence because Rule 404 forbade the use of it to negate criminal intent. *Id.* That is the same reasoning we applied above.

E.

In their final challenge to their convictions, the Murphys argue that they are entitled to a new trial due to the cumulative error doctrine. Under that doctrine, "an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless error) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Chalker*, 966 F.3d 1177, 1193 (11th Cir. 2020). But here, the district court committed no errors. Because we are "left with no errors to accumulate," the Murphys' cumulative error challenge necessarily fails. *See id.* at 1193–94.

F.

We now address Dr. Murphy's sentencing challenges. We review a district court's factual findings at sentencing for clear error, and its interpretation and application of the Sentencing Guidelines *de novo*. *See United States v. Stein*, 846 F.3d 1135, 1151 (11th Cir. 2017); *United States v. Bradford*, 277 F.3d 1311, 1312 (11th Cir. 2002).

At sentencing, the district court calculated that Dr. Murphy's guidelines range, with statutory maximums stacked, *see* U.S.S.G. § 5G1.2(d), was 1,140 months in prison. The government requested a guidelines sentence of 1,140 months. Dr. Murphy requested a sentence of five years of home confinement. The district court downwardly varied and sentenced Dr. Murphy to 240 months in prison.

Dr. Murphy challenges his sentence by arguing that (1) the district court miscalculated his guidelines range by miscalculating the loss amount and drug quantity and (2) even if the court's calculations were correct, his sentence is substantively unreasonable. The government argues that, under *United States v. Keene*, 470 F.3d 1347 (11th

Cir. 2006), we need not review Dr. Murphy's guidelines objections because the district court stated it would have imposed the same sentence even absent the alleged errors and because that sentence, absent those errors, would still have been reasonable. We agree with the government: the district court made *Keene* findings, and the sentence imposed would have been reasonable even if Dr. Murphy's guidelines objections were sustained. Logically, we also conclude that under the higher guidelines range the court *did* calculate, Dr. Murphy's sentence was substantively reasonable.

1.

We first ask whether the district court made a *Keene* finding. It did. In *Keene*, we declined to consider a defendant's argument about a sentencing enhancement because "the district court told us that the enhancement made no difference to the sentence it imposed." 470 F.3d at 1348. Since then, we have held that if a district court states that it would have imposed the same sentence even absent an alleged error—i.e., makes a *Keene* finding—we will affirm the court so long as the sentence imposed, even absent the alleged error, would have been substantively reasonable. *See id.* at 1349; *United States v. Grushko*, 50 F.4th 1, 18 (11th Cir. 2022); *United States v. Goldman*, 953 F.3d 1213, 1221 (11th Cir. 2020). By declining to consider sentencing objections on appeal in such cases, we "avoid pointless reversals and unnecessary do-overs of sentence proceedings." *Grushko*, 50 F.4th at 18 (quotation marks omitted).

Here, the district court stated at sentencing that "the sentence actually given would have been the same regardless of how the guideline issues had been resolved." The court explained that "if the calculation should have been actual loss as opposed to intended loss, and Count 1

is somehow or another thrown out, I'm varying upward, and given the opportunity to resentence [Dr. Murphy], I would vary upward again for the same calculation." The court elaborated: "So, if I have to see him again, I want to make sure that's clear. . . . [I]f I somehow or another messed up those, the calculation—my sentence, I believe, would nonetheless be reasonable." These statements amounted to a *Keene* finding. *See Goldman*, 953 F.3d at 1221 (*Keene* finding present when court "stated that it would have imposed the same sentence regardless" of the value of a stolen gold bar, an issue the defendant raised as to the court's total offense calculation).

Dr. Murphy argues that the district court made no *Keene* finding because it "failed to consider any alternative to its drug weight determination." We disagree. The record establishes that the court expressly considered alternative drug quantity (and thus, drug weight). For one, it was only after Dr. Murphy objected to "drug quantity calculation" at sentencing—and after the parties debated the issue and the court overruled the objection—that the court stated the sentence would have remained regardless of how the "guideline issues" were resolved. In context, "guidelines issues" included the drug quantity calculations. Second, the court stated that if "Count 1 is thrown out"—which would entail no drug weight because Count 1 charged drug conspiracy and no other conviction factoring into sentencing involved drug quantity calculations—"there would still be 240 months."

2.

Because the district court made a *Keene* finding, we now assess whether the sentence imposed would be substantively reason-able under sentencing factors in 28 U.S.C. § 3553(a), even if the guidelines issue were "decided in the way the [Dr. Murphy] argued and the

advisory range reduced accordingly." *Keene*, 470 F.3d at 1349.

Dr. Murphy raised two guidelines issues. First, he argues that the district court's drug quantity determination was "factually baseless." Second, he argues that the court miscalculated the "loss" amount under U.S.S.G. § 2B1.1—an amount that escalated his offense level for his fraud-related convictions—because the court included "intended" instead of only "actual" loss in its calculations.

If Dr. Murphy prevailed on these two issues—i.e., if the court entirely ignored his Count 1 drug conspiracy conviction (thus reducing drug weight to zero) and calculated loss to only include "actual" loss—his total offense level would have been level 35. The district court, the government, and Dr. Murphy all agree. Based on a total offense level of 35, the guidelines range would have been—as the government and Dr. Murphy also agree—168 to 210 months.

It is Dr. Murphy's burden "to prove that his sentence is unreasonable in light of the record and § 3553(a)." *Keene*, 470 F.3d at 1350. Here, he has not established that his 240-month sentence was unreasonable if the guidelines range were 168 to 210 months.

In assessing a sentence's reasonableness, we have stated that the sentence "must be sufficient, but not greater than necessary to comply with the purposes listed in 18 U.S.C. § 3553(a)." *Grushko*, 50 F.4th at 19 (quotation marks omitted). "The court must consider all of the § 3553(a) factors, but it may give greater weight to some factors over others or even attach great weight to a single factor." *Id.* And, it need not "state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors." *United States v.*

Kuhlman, 711 F.3d 1321, 1327 (11th Cir. 2013). We will vacate a sentence only if we have a "definite and firm conviction that the district court committed a clear error of judgment in weighing" the sentencing factors. *Grushko*, 50 F.4th at 19 (quotation marks omitted).

Here, the 240-month sentence was substantively reasonable even under a guidelines range of 168 to 210 months. The district court discussed the section 3553(a) factors at length. It discussed the seriousness of the offense, pointing to the "huge amount" of money stolen, and "the lives that [the Murphys] participated in destroying" through their drug distribution and theft. *See* 18 U.S.C. § 3553(a)(2)(A). It stated that its sentence reflected "the need to promote respect for the law and to provide just punishment for this offense." *See id.* It explained that the sentence "also acts as a deterren[t] for other criminal conduct" including "other people that are considering whether or not they can steal like this." *See id.* § 3553(a)(2)(B). It considered Dr. Murphy's "characteristics," *id.* § 3553(a)(1), including that he was 66 years old. And even if Count 1 were vacated, the 240-month sentence would still be years below the statutory maximums for Counts 5 to 11 and Count 22. *See* 18 U.S.C. §§ 371, 1347, 1349; 42 U.S.C. § 1320a-7b(b)(1). Because of these reasons, we conclude that even if the guidelines range were 168 to 210 months, a sentence of 240 months—a 30-month upward variance—would be reasonable. *See Grushko*, 50 F.4th at 19–20 (a 145-month sentence on an assumed guideline range of 75 to 87 months was reasonable where district court discussed the section 3553(a) factors); *United States v. Riley*, 995 F.3d 1272, 1280 (11th Cir. 2021) ("an additional sign of the upward variance's reasonableness is the fact that Riley's 70-month sentence is more than 4 years below his 10-year statutory maximum").

3.

Left remaining is Dr. Murphy's argument that even under the guidelines range the court *did* calculate—1,140 months—the 240-month sentence is substantively unreasonable. But the foregoing considerations justify the same sentence here.

III.

For the reasons above, we **AFFIRM** the Murphys' convictions and sentences.

JORDAN, Circuit Judge, Concurring:

With the exception of Part II.D., I join Judge Brasher's thorough opinion for the court. I write separately on two of the issues raised by the Murphys.

First, I agree that the Murphys' challenge to the drug conspiracy instruction is foreclosed by our prior decision in *United States v. Ruan*, 56 F.4th 1291, 1298–99 (11th Cir. 2023) (*Ruan III*). But if we were writing on a clean slate, I would find the Tenth Circuit's contrary decision in *United States v. Kahn*, 58 F.4th 1308, 1311 (10th Cir. 2023), more persuasive.

Second, I acknowledge that under our cases—namely *United States v. Ruan*, 966 F.3d 1101, 1156–58 (11th Cir. 2020) (*Ruan I*), *vacated*, 142 S. Ct. 2895 (2022) (*Ruan II*), *reinstated in relevant part*, *Ruan III*, 956 F.4th at 1295 n.1, and *United States v. Ifediba*, 46 F.4th 1225, 1237–38 (11th Cir. 2022)—the district court did not abuse its discretion in excluding the Murphys' so-called "good care" evidence. I therefore concur in the judgment as to Part II.D. of the court's opinion.

It seems to me, however, that where—as here—the government tries to paint a medical clinic as a pill mill with hundreds of patients a day, the defendants who ran the clinic are entitled to put on evidence that many of their patients received good care under medically-accepted standards. The government's insinuation is that if proper care is not being provided most of the time, then it is a fair inference that the prescriptions for the patients mentioned in the indictment were not legitimate. The defendants should be entitled to counter the impression the government is trying to convey. *See, e.g., United States v. Word*, 129 F.3d 1209, 1212–13 (11th Cir. 1997) (reversing conviction because the defendant "was not afforded the opportunity to present evidence to counter

the government's argument" as the government's "trial strategy made this defense evidence highly significant").

APPENDIX B

[FILED: FEBRUARY 17, 2023]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA,	)	
v.	)	5:20-cr-291-LSC-SGC-1
MARK MURPHY	)	5:20-cr-291-LSC-SGC-2
and	)	
JENNIFER MURPHY,	)	
Defendants.	)	

MEMORANDUM OF OPINION AND ORDER

This cause comes before the Court on the post-trial motions filed by Defendants, Dr. Mark Murphy ("Dr. Murphy") and Jennifer Murphy. (Docs. 180, 181, 201 & 202.) For the following reasons, Docs. 180, 181, and 201 are due to be denied, and Doc. 202 is due to be granted in part and denied in part.

I. Background and Procedural History

Dr. Murphy and Jennifer Murphy were indicted for crimes ranging from drug distribution conspiracy to health care fraud to kickbacks. The charges stemmed from the Murphys' operation of a pain management clinic in Decatur and Madison, Alabama. After a nearly two-week trial, on March 1, 2022, a jury found Dr. Murphy

guilty on Counts 1, 3, 5, 6-10, 11, and 22 of the Indictment. Jennifer Murphy was found guilty on Counts 1, 5, 6-10, 11, 22, and 23-25 of the Indictment. These counts were Conspiracy to Distribute Controlled Substance, in violation of 21 U.S.C. § 846 (Count 1); Controlled Substance—Sell, Distribute, or Dispense, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C) and 18 U.S.C. § 2 (Count 3); Attempt and Conspiracy to Commit Mail Fraud, in violation of 18 U.S.C. § 1349 (Count 5); five counts of Health Care Fraud, in violation of 18 U.S.C. § 1347 (Counts 6-10); Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371 (Count 11); Acts Involving Federal Health Care Programs-Illegal Renumerations, in violation of 42 U.S.C. § 1320a-7b(b)(2) and 18 U.S.C. § 2 (Count 22); and three counts of Fraud and False Statements, in violation of 26 U.S.C. § 7206(1) and 18 U.S.C. § 2 (Counts 23-25).

On April 19, 2022, Jennifer Murphy filed a Motion for Judgment of Acquittal and Motion for a New Trial (doc. 180), and Dr. Murphy filed a Motion for New Trial (doc. 181). Jennifer Murphy argued that she is entitled to an acquittal because the evidence presented by the Government was insufficient to sustain her convictions, and she argued that she is entitled to a new trial for several reasons: the weight of the evidence does not support the jury's verdict on all counts, the Court erred in denying her motion for a mistrial based upon the testimony of Government witness Williard Tapscott, the Court erred in instructing the jury as to Count 1, and the cumulative effect of all of the alleged errors. (*See* doc. 180.) Dr Murphy's sole argument in support of his motion for a new trial was that the Court erred in refusing to allow him to present evidence that he provided good medical care to other patients who were not named in the Indictment or part of the Government's case. (*See* doc.

181.) The Government filed an omnibus response in opposition to the defendants' post-trial motions. (Doc. 186).

On June 27, 2022, the Supreme Court issued its decision in *Ruan v. United States*, 142 S. Ct. 2370 (2022) ("*Ruan*"), a case from the Eleventh Circuit in which two physicians operating a pain clinic in Mobile, Alabama, Dr. John Patrick Couch and Dr. Xiulu Ruan, had been convicted of violating the Controlled Substances Act by dispensing Schedule II drugs outside the usual course of professional practice and without a legitimate medical purpose, as well as numerous other crimes. On July 11, 2022, this Court held a telephone conference with the parties to discuss the impact, if any, that the Supreme Court's holding with regard to jury instructions for a 21 U.S.C. § 841 charge had on this case. Shortly thereafter, the defendants sought leave to file supplemental briefing in support of their post-trial motions, in order to argue that *Ruan* constitutes a significant intervening change in law. This Court obliged, and on July 29, 2022, Dr. and Jennifer Murphy each filed a supplemental brief in support of their post-trial motions, and Dr. Murphy also included a motion for a judgment of acquittal. (Docs. 201 & 202.) In their supplemental motions, Dr. and Jennifer Murphy each claimed that *Ruan* requires a new trial on all charges. Each defendant incorporated the other's arguments by reference. The Government filed an omnibus response in opposition on August 12, 2022. (Doc. 204). Dr. and Jennifer Murphy filed a joint reply in support on September 2, 2022. (Doc. 208).

II. Standards of Review

Rule 29(c) of the Federal Rules of Criminal Procedure authorizes the Court, on the defendant's motion, to "enter a judgment of acquittal of any offense

for which the evidence is insufficient to sustain a conviction." On a Rule 29(c) motion for judgment of acquittal, the Court "must view the evidence in the light most favorable to the government, and determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *United States v. Miranda*, 425 F.3d 953, 959 (11th Cir. 2005) (cleaned up). A jury's verdict should stand "if there is any reasonable construction of the evidence that would have allowed the jury to find the defendant guilty beyond a reasonable doubt." *United States v. Hough*, 803 F.3d 1181, 1187 (11th Cir. 2011) (cleaned up).

Rule 33(a) of the Federal Rules of Criminal Procedure authorizes the Court to "vacate any judgment and grant a new trial if the interest of justice so requires." A motion for a new trial is addressed to the sound discretion of the trial court. *United States v. Martinez*, 763 F.2d 1297, 1312 (11th Cir. 1985).

III. Discussion

A. In light of the *Ruan* decisions, Dr. Murphy's conviction on Count 3 for dispensing a controlled substance unlawfully in violation of 21 U.S.C. § 841 (a)(1) is due to be vacated

The parties agree that Dr. Murphy's conviction on Count 3—the substantive drug distribution count—should be vacated. This Court agrees. Count 3 charged Dr. Murphy with the crime of issuing a specific controlled substance prescription unlawfully. Consistent with the law in this and multiple other circuits at the time, including *United States v. Ruan*, 966 F.3d 1101, 1165-70 (11th Cir. 2020) (vacated and remanded in *Ruan*, 142 S. Ct. 2370 (2022)) (hereinafter "*Ruan I*"), this Court instructed the jury that it could convict Dr. Murphy of this crime if it found that he (1) dispensed the prescription, (2)

knowingly and intentionally, and (3) without a legitimate medical purpose or outside the usual course of professional practice. The instructions did not expressly require the jury to find that Dr. Murphy knew that the charged prescription was without a legitimate medical purpose or outside the usual course of professional practice.

As noted, after the trial in this case, the Supreme Court held in *Ruan* that the Government must also prove an additional element: "that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so." 142 S. Ct. at 2374. However, the Supreme Court declined to apply its new standard to the facts of *Ruan* and remanded to the Eleventh Circuit to consider the issue in the first instance. *Id.* at 2382. On January 5, 2023, the Eleventh Circuit Court of Appeals issued its remand decision in *United States v. Ruan*, 56 F.4th 1291 (11th Cir. Jan. 5, 2023) (hereinafter "*Ruan II*"). On remand, the Eleventh Circuit held that the jury instruction used in the *Ruan* trial was indeed inconsistent with the Supreme Court's guidance, and that the jury was not adequately instructed that it had to find that Dr. Ruan and Dr. Couch acted with knowledge or intent in order to convict them for dispensing controlled substances in violation of the Controlled Substances Act. *Id.* at 1298. The court further found that this error was not harmless beyond a reasonable doubt for the substantive drug charges and thus vacated those convictions. *Id.* However, it concluded that the instructional error was harmless as to the other convictions in the case. *Id.* at 1299-1302. Accordingly, the Eleventh Circuit vacated the defendants' substantive drug convictions under 21 U.S.C. § 841(a) and remanded

for a new trial but affirmed the defendants' convictions on all other counts. *Id.* at 1302.[1]

The instructions that were given in *Ruan I* are substantially similar to those that were given at the trial in this case. While this Court's instructions were the law in the Eleventh Circuit when given, after *Ruan II*, they are not. The *Ruan* cases compel the conclusion that because the jury was not instructed, as to Count 3, that it must find that Dr. Murphy knew or intended that his prescription was unauthorized—that is, without a legitimate medical purpose or outside the usual course of professional practice—the instruction was erroneous. The parties further agree that the error was not harmless, and this Court agrees. *See United States v. Drury*, 396 F.3d 1303, 1314 (11th Cir. 2005) ("Plainly, a jury instruction that omits an element of the charged offense . . . is subject to harmless error analysis."); *Ruan II*, 56 F.4th at 1298 (finding the error not harmless); *United States v. Robinson*, 505 F.3d 1208, 1224-25 (11th Cir. 2007) (noting that a new trial may be appropriate where a new case conflicts with the jury instructions given at trial). Accordingly, Dr. Murphy's conviction on Count 3 is due to be vacated.

[1] As of the date of the entry of this Memorandum of Opinion and Order, the mandate has not been issued in *Ruan II*, and a petition for rehearing *en banc* has been filed.

B. The Supreme Court's holding in *Ruan* has no bearing on Dr. and Jennifer Murphy's convictions on Count 1 for conspiring to distribute or dispense controlled substances in violation of 21 U.S.C. § 846, and those convictions stand

Unlike with the substantive drug count (Count 3), *Ruan* provides no basis for vacating Dr. Murphy's or Jennifer Murphy's drug conspiracy convictions on Count 1. To violate 21 U.S.C. § 846 the Government must prove: "(1) there was an agreement between two or more people to commit a crime (in this case, unlawfully dispensing controlled substances in violation of § 841(a)(1)); (2) the defendant knew about the agreement; and (3) the defendant voluntarily joined the agreement." *Ruan II*, 56 F.4th at 1299 (quoting *United States v. Azmat*, 805 F.3d 1018, 1035 (11th Cir. 2015)). Tracking the law, this Court instructed the jury that it could convict a defendant on Count 1 only if it found that: (1) the defendant agreed with one or more others to try to accomplish a shared and unlawful plan to dispense controlled substances without a legitimate medical purpose or outside the usual course of professional practice; (2) the defendant knew the unlawful purpose of the plan and willfully joined in it; and (3) the object of the unlawful plan was to dispense controlled substances without a legitimate medical purpose or outside the usual course of professional practice. (Trial Transcript Vol. IX at 129.)

The Eleventh Circuit's recent decision on remand in *Ruan II* forecloses any argument that Dr. and Jennifer Murphy's conspiracy convictions should be vacated by virtue of the Supreme Court's holding in *Ruan*. The drug conspiracy jury instructions that were given in *Ruan I* were nearly identical to the instructions given at trial

here. The Supreme Court did not address the drug conspiracy jury instructions in *Ruan*, only the substantive drug distribution jury instructions. On remand, the Eleventh Circuit held that the error with regard to the jury instructions for the substantive drug charges was harmless to Dr. Ruan's and Dr. Couch's convictions for conspiring to dispense drugs unlawfully under 21 U.S.C. § 846. *Ruan II*, 56 F.4th at 1299 ("Because a conviction under § 846 requires the jury to find that the defendants knew of the illegal nature of the scheme and agreed to participate in it, the erroneous jury instruction for the substantive charges has a limited impact here. . . . The jury did not need an additional instruction clarifying between subjective and objective good faith for the 'except as authorized' exception, because the conspiracy instructions already required them to find that the defendant acted with subjective knowledge."). In sum, *Ruan II* compels the conclusion that this Court's instructions on Count 1 were and remain legally correct, and the Supreme Court's *Ruan* decision provides no reason to overturn Dr. and Jennifer Murphy's convictions on Count 1.

C. Dr. Murphy's argument that he is entitled to a new trial because he was not allowed to offer "good care" evidence

The Court turns to Dr. Murphy's contention that he should receive a new trial because the Court violated his constitutional right to present a complete defense by ruling that he was prohibited from offering testimony about good medical care from patients not named in the Indictment or in the Government's.

At trial, Dr. Murphy asked to call other patients—at least seven—who would testify that he provided good medical care to them in order to rebut the Government's

portrayal of his practice as an illegitimate profit center rather than a legitimate medical practice. He sought to offer evidence of "how long they have been a patient, that they were referred by other doctors, that they received beneficial treatment, that the treatment actually in many cases [sic] the opioids were decreased over time, that in some cases Dr. Murphy did recommend that they try back braces or pain creams, that sometimes they tried and they worked and sometimes they tried and they didn't and then he discontinued them . . . ." (Trial Transcript Vol. VII at 14-15.)

The Government objected, and this Court, commenting that an identical issue was addressed by the Eleventh Circuit in *Ruan* (*I*), prohibited Dr. Murphy from offering the testimony, noting as follows:

> Isn't this exactly like the *Ruan* case? Wasn't this an issue that was raised in *Ruan* with the Eleventh Circuit?
>
> . . .
>
> Well, there are specific patients that were charged, specific patients that the government has pointed to as examples. Every one of those you can bring in here. Every one of those you can put on the stand and say, didn't the doctor really see you. Every one of those, if you come up with those, I am one hundred percent behind you. The problem is, showing other patients as good character evidence to show that he acted correctly with regard to those patients, he's not charged with doing this to every single patient. In fact, there were countless witnesses that testified that he was very caring, that he looked at patients, he examined patients, that he tried to figure out what to do with them. He's not charged with doing this to every patient. He's charged with a conspiracy to do

> this with patients. Some. It may be a lot. And whatever the government has pointed to is fair game.

(*Id.* at 14, 16–17, 19–20.)

Dr. Murphy did call one patient named in the Indictment (Michael A.) and another discussed by the Government's expert witness (David G.) and was permitted to elicit testimony from them about their care. Dr. Murphy also called five patients not mentioned in the Indictment or Government's proof—John A., Margret D., Gary S., Deborah P., and Charles B.—but, as directed by the Court, did not ask them questions about the quality of Dr. Murphy's care.

Ruan I effectively forecloses Dr. Murphy's argument that he should have been allowed to present the evidence.[2] In *Ruan I*, the Eleventh Circuit rejected an identical argument made by Dr. Couch and Dr. Ruan, who had desired to present the testimony of an individual patient who would testify as to the helpful medical care that he received from Dr. Couch. In assessing the claim, the Eleventh Circuit first noted that although the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense, that right is subject to reasonable restrictions, such as the evidentiary prohibitions on irrelevant evidence or evidence whose probative value would likely be outweighed by the danger of undue delay, waste of time, or needlessly presenting cumulative evidence. *Ruan I*, 966 F.3d at 1153-55 & n.22. The Eleventh Circuit then recounted its holding in *United States v. Hurn*, 368 F.3d

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[2] Although *Ruan I* was vacated and remanded by the Supreme Court, on remand, the Eleventh Circuit held that it was adopting the reasoning from *Ruan I* on all issues except the challenge to the jury instructions used for the substantive drug charges under 21 U.S.C. § 841. *See Ruan II*, 56 F.4th at 1296 n.1.

1359 (11th Cir. 2004), which discussed four circumstances in which a district court's exclusion of a criminal defendant's evidence under the evidentiary rules might violate the Constitution. *Id.* at 1154. The court reiterated its holding in *Hurn* that in considering whether a defendant's constitutional right to present a complete defense was violated, a court should first determine whether the right was actually violated and if so, then determine whether the error was harmless beyond a reasonable doubt. *Id.* at 1155. Like Dr. Couch and Dr. Ruan argued in *Ruan I*, Dr. Murphy argues that his proposed "good care" evidence should have been admitted under the first, second, and fourth *Hurn* categories. As in *Ruan I*, all of these claims fail, but the Court will address them out of order, for reasons explained herein.

The second category of *Hurn* evidence is that which, "though not directly bearing on an element of the offense charged, tends to prove collateral matters relating to the defense." *Ruan I*, 966 F.3d at 1156 (citing *Hurn*, 368 F.3d at 1364). As the doctors did in *Ruan I*, Dr. Murphy argues that "good care" evidence would have tended to prove that he was operating a legitimate practice, as a collateral matter. The *Ruan I* court rejected that argument, noting that the *Hurn* court envisioned this category as pertaining to "evidence that tends to negate the *mens rea* of an offense." *Id.* The *Ruan I* court held that the proposed testimony would not have tended to negate the *mens rea* element of the drug offenses because the Government never alleged that the doctors' treatment of this particular witness was outside the usual course of professional practice. *Id.* ("[N]othing [the witness] would have testified about would have been probative of Couch's actions towards the patients that the government asserted were provided with illegal prescriptions . . . ."). The same logic applies here. Whether Dr. Murphy

practiced good medicine sometimes would not show that at other times he unlawfully prescribed opioids and committed health care fraud offenses.

The fourth category of *Hurn* evidence is that which "'complete[s] the picture' of the charged crimes and presents the government's evidence in a more favorable or different light that might influence a reasonable juror." *Ruan I*, 966 F.3d at 1156 (quoting *Hurn*, 368 F.3d at 1367). This circumstance "recognizes that defendants have a right to combat 'the government's selective presentation of entirely truthful evidence [that] cast[s] a defendant in an inaccurate, unfavorable light' or that makes 'entirely legitimate, normal, or accepted acts appear unusual or suspicious.'" *Id.* (quoting *Hurn*, 368 F.3d at 1366–67). As the doctors did in *Ruan I*, Dr. Murphy argues that "good care" evidence would have completed the picture by counteracting the Government's negative portrayal of his practice. The Eleventh Circuit in *Ruan I* rejected that argument, holding that the proposed testimony was not necessary to complete the picture "because it was undisputed that the [doctors] treated thousands of patients and there was no allegation that they mistreated them all." *Id.* at 1157. The Eleventh Circuit quoted portions of the government's opening and closing statements in which it emphasized that the doctors were not accused of mistreating every single patient: "There is no question . . . that there were certainly instances where Dr. Ruan and Dr. Couch did a really good job for their patients. We're not here because of that. We're here for the times that they were prescribing these drugs outside the usual course of professional practice." *Id.*

As Dr. Murphy admits, the Government described this case similarly. In opening, the Government told the jury, "this case is not about every single prescription that

Dr. Murphy wrote over the years or whether Dr. Murphy ever wrote any legitimate prescriptions ever." (Trial Transcript Vol. I at 18.) In closing, the Government stated: "Dr. Murphy did spend time with some patients. He did see patients on first visits. . . . And this case isn't about the times that Dr. Murphy may have provided good care to his patients. This is about the times he didn't." (*Id.* at Vol. IX at 13.)

Additionally, many witnesses, including patients, testified about aspects of legitimate care in the practice. Patient M.A. testified that he saw Dr. Murphy every month and that, without chronic pain treatment, he would not have been able to work; patient D.G. testified about seeing Dr. Murphy monthly and having his medications reduced, and said that the pain medications improved his quality of life; and nurse practitioner Stacey Thiot testified that Dr. Murphy "[a]bsolutely" cared about his patients, stating that he treated his patients well, that pre-signing prescriptions could be characterized as an efficiency, and that she thought Dr. Murphy did a good job. Finally, the jury's acquittal of Dr. Murphy on two substantive counts of dispensing a prescription unlawfully indicates their understanding that the Government did not allege that all of the prescriptions that Dr. Murphy wrote were illegal. Dr. Murphy cannot show that "good care" evidence should have been admitted under the fourth category of *Hurn* evidence.

After the Supreme Court decided *Ruan*, Dr. Murphy added the argument in his supplemental motion for a new trial or acquittal that "good care" evidence also falls into the first *Hurn* category because it bears directly on an element of a charged offense, specifically, his intent to act without authorization in issuing prescriptions. *See Ruan I*, 966 F.3d at 1155 (the first *Hurn* category is "implicated when evidence is excluded that directly pertains to a

formal element of a charged offense") (citing *Hurn*, 368 F.3d at 1363). Dr. Murphy argues that before the Supreme Court's decision in *Ruan*, it was arguably appropriate for a court to exclude "good care" evidence as irrelevant, but that after *Ruan*, evidence of good care in other instances should be admissible to disprove that substandard care in some instances was *intentionally* substandard, as opposed to negligently so. *See* Doc. 202 at 36 ("Evidence that a physician provided bad care in ten out of ten cases supports an inference of intentional wrongdoing. Evidence that he provided good care in twenty out of thirty cases rebuts that inference and supports alternative inferences of noncriminal negligence.").

The Court does not find merit to Dr. Murphy's argument that *Ruan*'s holding concerning the *mens rea* for a 21 U.S.C. § 841 charge somehow disregards settled law that "[e]vidence of good conduct is not admissible to negate criminal intent." *United States v. Ellisor*, 522 F.3d 1255, 1270 (11th Cir. 2008) (citing *United States v. Marrero*, 904 F.2d 251, 260 (5th Cir. 1990), where "[t]he fact that Marrero did not overcharge in every instance in which she had an opportunity to do so [was] not relevant to whether she, in fact, overcharged as alleged in the indictment."). In a bank fraud case where intent is at issue, a defendant may not present evidence of all the financial institutions he dealt with and did *not* defraud. So too here, a doctor is not entitled to present evidence of all the patients he dealt with and did not prescribe illicitly to, just because the Government has alleged that in other instances he did know he was prescribing unlawfully.

In sum, the Court's exclusion of Dr. Murphy's "good care" evidence did not violate his constitutional right to present a complete defense. Finding no constitutional

violation, the Court need not determine whether the error was harmless beyond a reasonable doubt.

D. Dr. and Jennifer Murphy's arguments that they are entitled to a judgment of acquittal or a new trial on all of the remaining counts based upon insufficiency of the evidence

1. Dr. Murphy's convictions

i. Count 1: drug conspiracy

Dr. Murphy claims that he is entitled to a judgment of acquittal on Count 1 based upon insufficiency of the evidence, especially after *Ruan*. He argues that the Government presented "no direct evidence of Dr. Murphy's state of mind regarding his prescription writing." But as the Supreme Court recognized in *Ruan*, "the Government, of course, can prove knowledge of a lack of authorization through circumstantial evidence." 142 S. Ct. at 2382. There was an abundance of such circumstantial evidence presented, including through witnesses who testified about Dr. Murphy's frequent absences from the clinics and the staff's handing out of drug prescriptions to patients, and medical experts who testified about how egregious Dr. Murphy's prescribing practices were.

Additionally, Dr. Murphy testified. He admitted to the jury that he had been a doctor for decades and kept up with the rules; that nurses would see patients and hand out drug prescriptions when he was at another clinic location or out of town; that he could have but declined to hire another doctor; that he pre-signed narcotics prescriptions based on old information; that he pre-signed a drug prescription for one patient for August 2015 that the patient did not receive because he died in July 2015; that he himself described his pre-signed prescriptions as

a "standing order;" that patients went "months" if not years without seeing him; and that he made a "substantial income from the clinic."

The jury also heard Dr. Murphy make inconsistent statements. For example, after testifying that he was paid to "supervise" the nerve conduction tests, Dr. Murphy admitted on cross-examination that he was not in the room or even in the clinic for those tests, he did not interpret the test results, and he did not sign the superbills. (Trial Transcript Vol. VIII at 51.) Similarly, after testifying that he never told the Government that "I am motivated to order tests to be paid," Dr. Murphy was forced to admit that this was false, as the transcript of his interview with the Government reflected that he said that he was "motivated to administer the tests to every patient because of payment": "I'm going to say yes because I do like to be paid for services." (*Id.* at 52-53.) The jury was entitled to consider such instances of Dr. Murphy being discredited into account in determining his state of mind. "[A] statement by a defendant, if disbelieved by the jury, may be considered as substantive evidence of the defendant's guilt." *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995). In other words, "when a defendant chooses to testify, he runs the risk that if disbelieved the jury might conclude the opposite of his testimony is true." *Id.* (internal quotation marks omitted). Thus, Dr. Murphy's own testimony provided additional evidence of his guilt on Count 1.

ii. remaining counts

Dr. Murphy also challenges all of his remaining convictions: Count 5: conspiracy to commit health care fraud; Counts 6-10: substantive health care fraud; Count 11: conspiracy to defraud the United States and receive or solicit kickbacks; and Count 22: receiving a kickback from

QBR, LLC, the company that performed nerve conduction testing on patients at the clinic. As to all of these, he argues that no rational juror could have found that he acted without good faith.

Indeed, "[g]ood faith is a complete defense to the element of intent to defraud." *United States v. Williams*, 728 F.2d 1402, 1404 (11th Cir. 1984). Dr. Murphy testified at trial, often stating his belief that various practices he engaged in were legitimate. However, his testimony conflicted with abundant evidence at trial, including documents and other witness testimony. This evidence showed that he defrauded the Government by ordering medically unnecessary urine tests, prescribed medically unnecessary back braces and creams in exchange for kickbacks, and billed for services provided by nurse practitioners under his NPI, among other things. The jury was entitled to evaluate Dr. Murphy's testimony, consider his demeanor and credibility, and even believe the opposite of what he said. In this case, his testimony provided additional substantive evidence of his involvement in fraudulent practices. In sum, there is no merit to the claim that substantial evidence did not support any of Dr. Murphy's convictions.

2. Jennifer Murphy's convictions

i. Count 1: drug conspiracy

Jennifer Murphy similarly argues that the evidence was insufficient to convict her of participating in the drug conspiracy in Count 1. At trial, the Government presented far more than, as Jennifer Murphy argues in her motion, that she was married to Dr. Murphy and that she was the office administrator. Indeed, the Government presented evidence that Jennifer Murphy played a critical role. Witnesses testified that Jennifer Murphy handled the patients and ran the office, that she brought home stacks

of pre-printed prescriptions so Dr. Murphy could pre-sign them and then brought them back to the office so they could be handed out without Dr. Murphy's being there; and that she trumped medical staff decisions so that patients would keep coming, and thus keep getting their opioid prescriptions. Nurse practitioner Stacy Thiot said that she would go to either Dr. Murphy or Jennifer Murphy with questions about patients, because talking to one was like talking to the other. Sales representative Brian Bowman said that he talked to Jennifer Murphy about the concerning patient volume even before 2012. On the strength of this and other trial evidence, it was reasonable for the jury to infer that Jennifer Murphy and Dr. Murphy conspired to unlawfully dispense drugs through prescriptions at their medical practice.[3]

ii. Counts 5-10: health care fraud conspiracy and substantive health care fraud

There was also sufficient evidence of Jennifer Murphy's participation in the health care fraud conspiracy and in support of the substantive health care fraud counts charged in Counts 5-10. The jury heard evidence that the Murphys billed insurance programs for doctor visits even when Dr. Murphy did not conduct them and had a standing order for urine drug screens and nerve conduction studies on patients, including allowing employee urine collectors try to sell patients braces and creams whether they were needed or not.

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[3] Jennifer Murphy also makes a generalized objection to the jury instruction for Count 1 but merely states that she "relies on the arguments made at trial and any arguments that may be raised separately by Dr. Murphy." (Doc. 180 at 20-21.) This objection fails for the reasons given at trial, and Dr. Murphy did not make any arguments as to Count 1's jury instructions.

Jennifer Murphy again claims that the only evidence the government offered in support of her participation in the health care fraud conspiracy was that she was married to Dr. Murphy and ran the clinic. In contrast, the jury reasonably inferred that Jennifer Murphy was a key participant in the health care fraud conspiracy through abundant evidence, including: on insurance documents, she was listed as the billing contact for the practice; sales representative Brian Bowman described talking with her about billing for office visits; several witnesses described her involvement in the braces and creams side of the scheme; sales representative Don Alan Hankins said that she decided how much commission the urine collectors would receive; witness Ruth Ann Rubbo said that Jennifer Murphy would withhold brace and cream money from urine collectors if she was angry at them for something; and Bowman and Hankins would provide Jennifer Murphy with pain cream prescription forms that the urine collectors should use. There was also evidence that Jennifer Murphy signed standing orders for drug screens, even though Bowman emailed her the rules against standing orders early on, and that she, along with Dr. Murphy and on his behalf, took money from QBR for the nerve conduction tests he ordered for every patient twice a year. The jury also saw a video, shot inside the Decatur clinic, depicting Jennifer Murphy in conversation with QBR employees about those payments.

With regard to the substantive health care fraud counts, Jennifer Murphy argues that the Government failed to present evidence of her personal involvement in Dr. Murphy's brace orders and cream prescriptions. However, the jury was instructed on aiding and abetting and *Pinkerton* liability. "*Pinkerton* liability attaches notwithstanding a defendant's non-participation in the offense or lack of knowledge thereof if the substantive

offenses were a reasonably foreseeable consequence of the conspiracy." *United States v. Shabazz*, 887 F.3d 1204, 1221 (11th Cir. 2018) (cleaned up). Jennifer Murphy was liable for the substantive health care fraud charges—brace orders and cream prescriptions generated as part of the conspiracy—because those orders and prescriptions, and numerous others, were a reasonably foreseeable consequence of the conspiracy Jennifer Murphy joined.

iii. Counts 11 and 22: kickback conspiracy and taking a kickback

There was also sufficient evidence to convict Jennifer Murphy of joining a kickback conspiracy as charged in Count 11, and of taking a kickback from QBR as charged in Count 22. The jury heard evidence about a range of kickbacks, including Bowman's payments to two relatives of Jennifer Murphy (Willie Frank Murphy and Mark Murphy, Jr.); Bowman's and Hankins' and others' donations to Jennifer Murphy's nonprofit, the Crystal Murphy Enrichment Organization ("CMEO"); the free labor Jennifer Murphy received from urine collectors on other companies' payrolls; and the checks from QBR. The jury heard evidence that Jennifer Murphy solicited kickbacks and that others paid those kickbacks. The jury also heard evidence that Jennifer Murphy tried to get Hankins to hide that fact, by drafting a letter stating—falsely—that she had never pressured him to donate to her nonprofit.

Jennifer Murphy argues for acquittal on the substantive kickback count—a $14,000 check from QBR—on the theory that the check was made out to Dr. Murphy, not her. However, the evidence was that she was the conspirator who regularly sought payment from QBR, regardless of who the checks were made out to, and she

was the conspirator who regularly received the checks from QBR employees or from Sharon Luttrell acting as courier. Finally, she was liable under *Pinkerton* and as an aider and abettor.

iv. Counts 23-25: tax fraud

There was also sufficient evidence to support Jennifer Murphy's convictions on Counts 23-25, which charged her with knowingly making a false, material statement in the Murphys' jointly filed tax returns in violation of 26 U.S.C. § 7206(l). More specifically, these counts alleged falsehoods in line 17 of the Murphys' personal income tax returns for the 2013, 2014, and 2015 tax years—the line on which the Murphys reported income from the clinic in which they were both partners. The evidence showed that those income figures should have been materially higher, but that they were not because Jennifer Murphy intentionally diverted cash from the clinic coffers—to her nonprofit's account and to her personal accounts—where it would not be included in clinic income or subject to tax. Jennifer Murphy also directed kickback payments from sales representatives into the nonprofit's account—rather than into the clinic's business account—where it would not be included in clinic income or subject to tax.

In order to sustain a conviction for this charge, the Government had to prove that: (1) Jennifer Murphy made or caused to be made a tax return for the tax year charged; (2) the tax return for that year contained a written declaration that it was made under the penalties of perjury; (3) when Jennifer Murphy made or helped to make the tax return, she knew it contained false, material information; (4) when Jennifer Murphy did so, she intended to do something she knew violated the law; and (5) the false matter in the tax return related to a material

statement. Jennifer Murphy argues that she is entitled to a judgment of acquittal because the evidence did not support each of these elements. Her arguments fail.

The first element is that Jennifer Murphy made or caused to be made a tax return. Jennifer Murphy argues that the Government did not present sufficient evidence of this because no witness testified that she made these tax returns and that instead, the tax returns could have been filled out by the Murphys' tax preparer, Williard Tapscott, without input or oversight from Jennifer Murphy, or that they could have been prepared based off of information wholly provided by Dr. Murphy, not Jennifer Murphy.

However, there was sufficient evidence for the jury to find that Jennifer Murphy made the tax returns at issue. The tax returns were in evidence; IRS Special Agent Torain testified that they were filed with the IRS; they were electronically signed by both Dr. Murphy and Jennifer Murphy; and also in evidence were copies of those tax returns with a "1B" Bates stamp at the bottom, which an FBI evidence custodian explained meant they were taken from the Murphys' clinic. Those tax returns from the Murphys' clinic also included electronic authorization forms by Jennifer Murphy, evidence that Jennifer Murphy authorized her electronic signature as it appeared on the documents filed with the IRS.

The second element is that the returns were made under penalty of perjury. Jennifer Murphy argues that the Government presented no evidence that she actually signed the tax returns, noting that the returns contained asterisks indicating that they were signed electronically and that Agent Torain acknowledged that such electronic signatures can be created by a tax preparer. However, sufficient evidence was presented that she electronically

signed under penalty of perjury, considering that the tax returns themselves contain that avowal.

The third element is that Jennifer Murphy knew the tax returns contained false information. Jennifer Murphy argues that the Government did not reasonably prove what the clinic's income was for the years in question, that it was inaccurately recorded, or that she knew about it. The evidence refutes these claims. Agent Torain testified about line 17 of the Murphys' tax returns for the relevant years, explaining that partnerships reported partnership income on Forms 1065, and that income flowed through to the personal tax returns of the partners, where it would be reportable income subject to income tax. He explained that, if the partnership income was understated, line 17 of the partners' tax returns would also be understated. He explained that income to nonprofits would not be subject to tax— those organizations filed Forms 990 but their income was non-taxable. Agent Torain confirmed that, in addition to the Murphys' personal joint tax returns for 2013, 2014, and 2015, the CMEO's Forms 990 and the clinic's partnership tax returns had been filed with the IRS for those years. Agent Torain also described the evidence that the clinic's partnership income, and thus line 17 of the Murphys' tax returns, was materially understated. He explained that, as part of the investigation, records were subpoenaed for accounts associated with Dr. Murphy and Jennifer Murphy and the clinic; that those records were reviewed by agents, including himself; that the bank records for the clinic bank accounts would show income to the clinic; that he had also reviewed the records of and prepared summary charts for the CMEO account and Jennifer Murphy's personal bank accounts; and that these other accounts reflected significant additional influxes of cash during 2013, 2014, and 2015. Agent Torain testified that these additional

amounts of cash were material, and that they added up to approximately $750,000 more in income for 2013, 2014, and 2015 than the clinic bank account records reflected.

Other evidence at trial corroborated the documentary evidence that large sums of clinic cash were not deposited into the clinic bank account and were not reflected in the amount of clinic income reported in its partnership tax returns—and correspondingly line 17 of the Murphys' personal tax returns—for the relevant tax years. The jury heard that Jennifer Murphy handled copays at the front desk, and that she would sometimes put cash in her purse. Ruth Ann Rubbo testified about the garbage bag of cash in Jennifer Murphy's bathroom. Sharon Luttrell testified that Jennifer Murphy gave her cash and asked her to buy CMEO cashier's checks for Jennifer Murphy. The bank records for the CMEO account and Jennifer Murphy's personal accounts showed large cash deposits consistent with this testimony, from which the jury was free to infer that Jennifer Murphy had diverted cash from the clinic's accounts to her own.

The evidence was likewise sufficient that Jennifer Murphy knew the clinic income as reported on line 17 of her income tax returns was understated. The jury reasonably made this inference from the evidence that she took cash from the clinic, told others to convert clinic cash into cashier's checks payable to a nonprofit that would not be taxed, and solicited payments, i.e., kickbacks, from sales representatives, pharmacists, and nerve conduction testing vendors in the form of CMEO "donations."

The fourth element is that Jennifer Murphy intended to do something she knew violated the law. There was substantial evidence of this, including in the form of evidence that Jennifer Murphy concealed how she took money from the clinic. She gave Keith Turner and Sharon

Luttrell cash to buy cashier's checks for her, made payable to the CMEO. The jury was entitled to draw the reasonable inference that Jennifer Murphy used cashier's checks and cash deposits to conceal the taxable nature of the cash—to reframe taxable clinic proceeds as nontaxable charitable gifts. That inference received further support from Sharon Luttrell's testimony that Jennifer Murphy gave her specific instructions to lie about the source of the cash for the cashier's checks Luttrell bought for her. Sharon Luttrell testified that on multiple occasions Jennifer Murphy gave her cash, told her to use it to buy certified cashier's checks made out to the CMEO, and bring it back to her. Jennifer Murphy then told Luttrell that, if she was ever asked about the checks, Luttrell should "just say it's [my] money, it's not going to hurt anything. And you can take it off your income taxes, as a donation."

The fifth element is that the false matter in the tax return related to a material statement. As Agent Torain testified, there was a "material" discrepancy between (1) clinic income as reflected in the clinic bank account records and the Murphys' income tax returns, and (2) clinic income considering the large cash deposits into Jennifer Murphy's personal accounts and the CMEO account. The jury reasonably concluded that a $750,000 discrepancy in the Murphys' reported taxable income was material. The evidence therefore supported the jury's verdict on Counts 23-25.

E. Jennifer Murphy's argument that she is entitled to a new trial on all counts based on the "prejudicial spillover" from her conviction on Count 1

Jennifer Murphy argues that a new trial is required on all of the remaining counts—the non-controlled

substances offenses—because all of her convictions were obtained as a result of "prejudicial spillover" from Count 1.[4] The case relied upon by Jennifer Murphy, *United States v. Prosperi*, 201 F.3d 1335 (11th Cir. 2000), shows that prejudicial spillover only applies in cases where some counts are dismissed after trial, and the court must decide whether a new trial is needed on the remaining counts. *Id.* at 1345 (explaining that the court "must consider whether the convictions were the result of prejudicial spillover: that is, was there evidence (1) that would not have been admitted but for the dismissed charges and (2) that was improperly relied on by the jury in their consideration of the remaining charges"). Indeed, if some counts are dismissed, there is a possibility that the jury heard evidence that, without those counts, it would not have heard. Here, her argument fails because it is premised upon the assumption that this Court will vacate her conviction on Count 1, the drug conspiracy conviction, based upon *Ruan*. However, as discussed above, since no error occurred with regard to Count 1 and it is not due to be vacated, no new trial could possibly be required for other counts due to any evidence heard by the jury on Count 1.

F. Jennifer Murphy's argument that the Court erroneously denied her motion for a mistrial after Government witness Willard Tapscott invoked his right to remain silent after testifying

The Court now turns to Jennifer Murphy's argument that she deserves a new trial due to the Court's denial of her mistrial motion based upon the trial testimony of

[4] Dr. Murphy joins in this argument.

Government witness Willard Tapscott, the Murphys' long-time tax preparer.

The Government called Mr. Tapscott to testify about his preparation of the Murphys' tax returns. (Trial Transcript Vol. VI at 190-200 (direct examination).) Early into his testimony, the Court determined that he should have counsel appointed to ensure that he was aware of any incriminating implications of his testimony. (*Id.* at 200-08.) Before he was stopped by this Court, Mr. Tapscott had testified that he has been the Murphys' friend and accountant for approximately 20 years, that he also worked as a bookkeeper for the clinic, that he prepared personal tax returns for the Murphys, including for the clinic and for CMEO, that members of his family served as officers of CMEO, and that Jennifer Murphy maintained the records for CMEO and "controlled" CMEO. He recounted that he once purchased a $7,500 cashier's check payable to CMEO with a paper bag of cash provided by Jennifer Murphy. He also stated that he prepared a Form 990 for the year 2014 for the CMEO using information provided by Jennifer Murphy.

During the sidebar with the lawyers after the Court stopped him from testifying, the Government stated that Mr. Tapscott did not have a lawyer, that he had not been warned about the possibility of making incriminating statements, but that, in their view, Mr. Tapscott bore no culpability related to the drug conspiracy charged in this case. The Government further stated that they expected Mr. Tapscott to testify that he prepared the 2013, 2014, and 2015 tax returns for the clinic based off of information that he received from the Murphys, but that, in 2018, after the Government's investigation became known, he filed amendments to the returns, assessing it with additional income after learning that Jennifer Murphy had diverted

cash from the clinic into the CMEO and other bank accounts. *Id*. at 201-02.

Mr. Tapscott was excused from the stand, the trial continued, and the next morning a lawyer was appointed for Mr. Tapscott. The lawyer informed the Court and the parties that Mr. Tapscott would assert his Fifth Amendment right not to answer questions. Jennifer Murphy's counsel orally asked for a mistrial based on Mr. Tapscott's testimony, but the Court declined to grant a mistrial. The Court excused Mr. Tapscott from the trial, stated that it would direct the jury to disregard his testimony, and directed the Government not to argue in its closing argument about the cashier's check Mr. Tapscott bought. When the jury was brought back in, the Court gave the following instruction:

> Yesterday we had a witness testify by the name of Willard Tapscott, he was the individual that said he did accounting work. You are instructed that you need to disregard and shall disregard all of his testimony. Okay? So, you will not use anything that he said for any reason. Just like it didn't happen. Anybody not able to disregard his testimony? Raise your hand. Let the record reflect all of them indicated they will disregard the testimony.

(Trial Transcript Vol. VII at 31-32.) The Court reiterated that instruction later the same day:

> Ladies and gentlemen, you all had a question about who was the individual that I told you to disregard his testimony. His name was Willard Tapscott, he's about seventy odd years old, white guy, retired from the post office, and then talked about whatever and then he testified. Okay. That's who I'm talking about. Everybody understand who I'm saying? We're going to go ahead and call your first witness.

(*Id.* at 96.)

Jennifer Murphy again argues that a mistrial is warranted, on at least the three tax fraud counts (Counts 23-25). In support, she focuses on Mr. Tapscott's statement that he prepared Forms 990 for the CMEO using documents that she provided. Her theory is that Mr. Tapscott's testimony that she was directly involved in his preparation of the CMEO's tax filings suggested to the jury that she would have also been directly involved in his preparation of the Murphys' personal tax returns, including for the clinic in 2013, 2014, and 2015, the years in which it was alleged that they underrepresented their income. She argues that this would have been the only evidence linking her to the substantive tax fraud charges. Jennifer Murphy complains that she was not able to cross examine Mr. Tapscott and that, although the Court issued a limiting instruction to the jury, the damage had already been done.

The trial court has discretion whether to grant a mistrial because it "is in the best position to evaluate the prejudicial effect of a statement or evidence on the jury." *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir. 2002) (cleaned up). "When a district court gives a curative instruction, the reviewing court reverses only if the evidence is so highly prejudicial as to be incurable by the trial court's admonition." *Id.* (cleaned up). Such a level of prejudice effect exists where there is "a significant probability . . . that . . . the stricken statement had a substantial impact upon the verdict of the jury." *United States v. Arenas-Granada*, 487 F.2d 858, 859 (5th Cir. 1973).

"Generally, it is improper for either the government or the defense to call a witness for the purpose of having the witness invoke the Fifth Amendment privilege."

United States v. Feliciano-Francisco, 701 F. App'x 808, 813 (11th Cir. 2017). "Such testimony has 'dubious probative value and high potential for prejudice,' and the district court has discretion to exclude it." *Id.* at 813-14 (quoting *United States v. Lacouture*, 495 F.2d 1237, 1240 (5th Cir. 1974)). Although the Court struck the testimony of Mr. Tapscott, the Court is convinced that Jennifer Murphy suffered no prejudice from Mr. Tapscott's brief direct testimony. The testimony was not harmful to Jennifer Murphy, and even if it was, the Court's limiting instructions cured any error. The testimony was not harmful because the CMEO's Forms 990 were not the subject of the three tax fraud charges in this case. In any event, there was ample other evidence of Jennifer Murphy's guilt on the three tax fraud charges independent of Mr. Tapscott's testimony, as discussed above in section III.D.2.iv. Indeed, the two documents that were shown to Mr. Tapscott were already in evidence. Further, there is a well-recognized presumption that "juries follow the instructions they are given." *United States v. Townsend*, 630 F.3d 1003, 1014 (11th Cir. 2011). The Court sees no error in the handling of this issue.

G. Jennifer Murphy's argument that the cumulative effect of the individual errors in this case warrants a new trial

Finally, the Court addresses Jennifer Murphy's argument that she is entitled to a new trial based upon the cumulative effect of this Court's errors. "The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *United States v. Capers*, 708 F.3d 1286, 1299 (11th Cir. 2013) (cleaned up). "The harmlessness of cumulative error

is determined by conducting the same inquiry as for individual error—courts look to see whether the defendant's substantial rights were affected." *Id.* (cleaned up). Jennifer Murphy has not identified any errors here that would warrant the application of this doctrine. She also has "failed to demonstrate, or offer any explanation, for how the aggregate effect of [any] errors substantially influenced the outcome of [her] trial, as required to establish that cumulative error rendered [her] trial unfair." *Id.* Her cumulative-error claim therefore fails.

IV. Conclusion

For the reasons stated in this opinion, the following rulings are hereby made:

1) Jennifer Murphy's motion for new trial and acquittal (doc. 180) is **DENIED**;

2) Dr. Murphy's motion for new trial (doc. 181) is **DENIED**;

3) Jennifer Murphy's supplemental motion (doc. 201) is **DENIED**;[5]

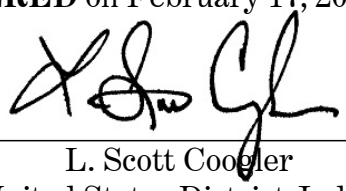
4) Dr. Murphy's supplemental motion (doc. 202) is **GRANTED IN PART and DENIED IN PART**. Insofar as the motion requests that Dr. Murphy's conviction on Count 3 be vacated, the motion is **GRANTED**. Insofar as Mark Murphy requests all other relief, the motion is **DENIED**.

---

[5] Jennifer Murphy also filed a "Renewed Motion for Judgment of Acquittal and Supplemental Motion for New Trial; or, Alternatively, Motion for Leave to File Same; and Motion to Set Briefing Schedule," (doc. 193) that the Court granted insofar as she requested leave to file a supplemental brief. To the extent that the motion requests substantive relief, it is **DENIED**.

Defendant Mark Murphy's conviction on Count 3 is hereby **VACATED** and this cause shall proceed to sentencing.

DONE and **ORDERED** on February 17, 2023.



L. Scott Coogler
United States District Judge

160704

APPENDIX C

[FILED: MARCH 17, 2025]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10781

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK MURPHY,
JENNIFER MURPHY,

Defendants-Appellants.

Appeals from the United States District Court
For the Northern District of Alabama
D.C. Docket No. 5:20-cr-00291-LSC-SGC-1

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before JORDAN, NEWSOM, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40. The Petition for Panel Rehearing also is DENIED. FRAP 40.

APPENDIX D

[FILED: MARCH 8, 2023]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA v. MARK MURPHY Defendant.	****AMENDED** JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)** Case No. 5:20-CR-291-LSC-SGC-001

The defendant, MARK MURPHY, was represented by Edward Yarbrough and Justin Adams.

At the direction of the Court, Count 3ss is VACATED. The defendant has been found not guilty on count 2ss and 4ss, and is discharged as to such counts.

The defendant was found guilty on counts 1s, 5ss, 6ss, 7ss, 8ss, 9ss, 10ss, 11ss, and 22ss after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following counts, involving the indicated offenses:

Title & Section	**Nature of Offense**	**Count Number(s)**
21 U.S.C. § 846	CONSPIRACY TO DISTRIBUTE CONTROLLED SUBSTANCE mixture containing Fentanyl, Oxycodone, Hydrocodone, Alprazolam, Clonazepam and Carisoprodol	1s
18 U.S.C. § 1349	ATTEMPT AND CONSPIRACY TO COMMIT HEALTHCARE FRAUD	5ss
18 U.S.C. §§ 1347 & 2	HEALTH CARE FRAUD	6ss-10ss
18 U.S.C. § 371	CONSPIRACY TO DEFRAUD THE UNITED STATES	11ss
42 U.S.C. § 1320a-7b(b)(l) and 18 U.S.C. § 2	ACTS INVOLVING FEDERAL HEALTH CARE PROGRAMS - ILLEGAL RENUMERATIONS	22ss

As pronounced on March 6, 2023, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $900.00, for counts 1s, 5ss, 6ss, 7ss, 8ss, 9ss, 10ss, 11ss, and 22ss, which shall be due immediately.

It is further ordered that the defendant shall 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.

Done this 8th day of March, 2023.

s/ L. Scott Coogler
L. Scott Coogler
United States District Judge

****Amended as to Page 1 to correct statute description of Count 5ss**

****Amended as to Page 6 to include forfeiture**

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 as to Count 1s, concurrent with all other Counts. **ONE HUNDRED TWENTY (120)** months as to Counts 5ss and 6ss, separately and to be served consecutively to each other. **ONE HUNDRED TWENTY (120)** months as to Counts 7ss, 8ss, 9ss, 10ss, and 22ss, separately and to be served concurrently with each other and Count 5ss. **SIXTY (60)** months as to Count 11ss, to be served concurrently with Count 5ss for a **TOTAL TERM** of **TWO HUNDRED FORTY (240)** months.

The Court makes the following recommendations to the Bureau of Prisons: That the defendant be housed in a facility close to Decatur, AL.

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

RETURN

I have executed this Judgment as follows:

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

_____
UNITED STATES MARSHAL

_____
By DEPUTY MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 120 months as to Count 1s and 36 months as to Counts 5ss-10ss, 11ss, and 22ss, to be served concurrently with each other. The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced (if placed on probation) or released from custody (if supervised release is ordered), unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when to report to the probation officer, and you must report to the probation officer as instructed.
3. You must not commit another federal, state, or local crime.
4. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person, such as

nunchakus or tasers). Revocation of supervision is mandatory for possession of a firearm.

5. You must not unlawfully possess a controlled substance.

6. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. You must contribute to the cost of drug testing unless the probation officer determines you do not have the ability to do so. Based upon a court order entered during the period of supervision for good cause shown or resulting from a positive drug test or evidence of excessive use of alcohol, you shall be placed in the Substance Abuse Intervention Program (SAIP) (or comparable program in another district).

7. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

8. You must follow the instructions of the probation officer related to the conditions of supervision.

9. You must answer truthfully the questions asked by the probation officer.

10. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change. (If

you have been convicted of a crime of violence or a drug trafficking offense, the probation office is responsible for complying with the notice provisions of 18 U.S.C. § 4042(b) and (c) if you change your residence.)

11. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

12. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as the position or the job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

13. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

14. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

15. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

16. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk, and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

17. You must fully and truthfully disclose financial information as requested by the probation officer related to the conditions of supervision. Financial information may include, but is not limited to, authorization for release of credit information, bank records, income tax returns, documentation of income and expenses, and other financial information regarding personal or business assets, debts, obligations, and/or agreements in which the defendant has a business involvement or financial interest.

18. You must support all dependents.

CONTINUATION OF STANDARD CONDITIONS OF SUPERVISED RELEASE

19. You must comply with the probation office's Policies and Procedures Concerning Court-Ordered Financial Obligations to satisfy the balance of any monetary obligation resulting from the sentence imposed in the case. Further, you must notify the probation officer of any change in your economic circumstances that might affect your ability to pay a fine, restitution, or assessment fee. If you become

more than 60 days delinquent in payments of financial obligations, you may be: (a) required to attend a financial education or employment preparation program under the administrative supervision of the probation officer; (b) placed on home detention subject to location monitoring for a maximum period of 90 days under the administrative supervision of the probation officer (and you must pay the cost of monitoring unless the probation officer determines you do not have the ability to do so); and/or (c) placed in a community corrections center for up to 180 days under the administrative supervision of the probation officer (and you must pay the cost of subsistence unless the probation officer determines you do not have the ability to do so).

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. You must cooperate in the collection of DNA under the administrative supervision of the probation officer.
2. The requirement that you submit to mandatory drug testing is suspended based upon the court's determination that you pose a low risk of future substance abuse.
3. You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664.
4. You must not incur any new debts (other than normal debts for existing utilities, rental expenses, or mortgage payments), increase existing credit lines, or open any new lines of credit without the permission

approval of the probation officer unless and until all court-ordered financial obligations have been paid in full. New debt includes contracts which obligate payments, credit agreements, and loans, including those with friends and family members.

5. You must maintain a single checking and/or savings account in your own legal name. You must deposit all personal income and monetary gains into the account(s) and must pay all personal expenses from this account.

RESTITUTION AND FORFEITURE

RESTITUTION

The Court orders restitution in the amount of **$52,728,073.84** as set out in the order entered contemporaneously in this case.

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

See Order of Forfeiture (Doc. 179).

APPENDIX E

[FILED: MARCH 8, 2023]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA v. JENNIFER MURPHY Defendant.	****AMENDED** JUDGMENT IN A CRIMINAL CASE (For Offenses Committed On or After November 1, 1987)** Case No. 5:20-CR-291-LSC-SGC-002

The defendant, JENNIFER MURPHY, was represented by Clayton Tartt and Suzanne Norman.

The defendant was found guilty on counts 1ss, 5ss, 6ss, 7ss, 8ss, 9ss, 10ss, 11ss, 22ss, 23ss, 24ss, and 25ss after a plea of not guilty. Accordingly, the defendant is adjudged guilty of the following counts, involving the indicated offenses:

Title & Section	**Nature of Offense**	**Count Number(s)**
21 U.S.C. § 846	CONSPIRACY TO DISTRIBUTE CONTROLLED SUBSTANCE mixture containing Fentanyl, Oxycodone, Hydrocodone, Alprazolam, Clonazepam and Carisoprodol	1ss
18 U.S.C. § 1349	ATTEMPT AND CONSPIRACY TO COMMIT HEALTHCARE FRAUD	5ss
18 U.S.C. §§ 1347 & 2	HEALTH CARE FRAUD	6ss-10ss
18 U.S.C. § 371	CONSPIRACY TO DEFRAUD THE UNITED STATES	11ss
42 U.S.C. § 1320a-7b(b)(l) and 18 U.S.C. § 2	ACTS INVOLVING FEDERAL HEALTH CARE PROGRAMS - ILLEGAL RENUMERATIONS	22ss
26 U.S.C. § 7206(1) & 18 U.S.C. § 2	FRAUD AND FALSE STATEMENTS	23ss-25ss

As pronounced on March 6, 2023, the defendant is sentenced as provided in pages 2 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $1,200.00, for counts 1ss, 5ss, 6ss, 7ss, 8ss, 9ss, 10ss, 11ss, 22ss, 23ss, 24ss, and 25ss, which shall be due immediately.

It is further ordered that the defendant shall 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.

Done this 8th day of March, 2023.

s/ L. Scott Coogler
L. Scott Coogler
United States District Judge

****Amended as to Page 1 to correct statute description of Count 5ss**

****Amended as to Page 6 to include forfeiture**

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 as to Count 1ss, concurrent with all other Counts. **ONE HUNDRED TWENTY (120)** months as to Counts 5ss and 6ss, separately and to be served consecutively to each other. **ONE HUNDRED TWENTY (120)** months as to Counts 7ss, 8ss, 9ss, 10ss, and 22ss, separately and to be served concurrently with each other and Count 5ss. **SIXTY (60)** months as to Count 11ss, to be served concurrently with Count 5ss. **THIRTY-SIX (36)** months as to Counts 23ss, 24ss, and 25ss, separately and to be served concurrently with each other and Count 5ss for a **TOTAL TERM** of **TWO HUNDRED FORTY (240)** months.

The Court makes the following recommendations to the Bureau of Prisons: That the defendant be housed in a facility close to Lewisburg, TN.

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

RETURN

I have executed this Judgment as follows:

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

_____
UNITED STATES MARSHAL

_____
By DEPUTY MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 120 months as to Counts 1ss, 36 months as to Counts 5ss-11ss and 22ss, and 12 months as to Counts 23ss-25ss. The Probation Office shall provide the defendant with a copy of the standard conditions and any special conditions of supervised release.

STANDARD CONDITIONS OF SUPERVISED RELEASE

While the defendant is on supervised release pursuant to this Judgment:

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of the time you were sentenced (if placed on probation) or released from custody (if supervised release is ordered), unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when to report to the probation officer, and you must report to the probation officer as instructed.
3. You must not commit another federal, state, or local crime.
4. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified, for the specific purpose of causing bodily injury or death to another person, such as

nunchakus or tasers). Revocation of supervision is mandatory for possession of a firearm.

5. You must not unlawfully possess a controlled substance.

6. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court. You must contribute to the cost of drug testing unless the probation officer determines you do not have the ability to do so. Based upon a court order entered during the period of supervision for good cause shown or resulting from a positive drug test or evidence of excessive use of alcohol, you shall be placed in the Substance Abuse Intervention Program (SAIP) (or comparable program in another district).

7. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.

8. You must follow the instructions of the probation officer related to the conditions of supervision.

9. You must answer truthfully the questions asked by the probation officer.

10. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change. (If

you have been convicted of a crime of violence or a drug trafficking offense, the probation office is responsible for complying with the notice provisions of 18 U.S.C. § 4042(b) and (c) if you change your residence.)

11. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.

12. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment, you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as the position or the job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.

13. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.

14. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.

15. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

16. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk, and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.

17. You must fully and truthfully disclose financial information as requested by the probation officer related to the conditions of supervision. Financial information may include, but is not limited to, authorization for release of credit information, bank records, income tax returns, documentation of income and expenses, and other financial information regarding personal or business assets, debts, obligations, and/or agreements in which the defendant has a business involvement or financial interest.

18. You must support all dependents.

CONTINUATION OF STANDARD CONDITIONS OF SUPERVISED RELEASE

19. You must comply with the probation office's Policies and Procedures Concerning Court-Ordered Financial Obligations to satisfy the balance of any monetary obligation resulting from the sentence imposed in the case. Further, you must notify the probation officer of any change in your economic circumstances that might affect your ability to pay a fine, restitution, or assessment fee. If you become

more than 60 days delinquent in payments of financial obligations, you may be: (a) required to attend a financial education or employment preparation program under the administrative supervision of the probation officer; (b) placed on home detention subject to location monitoring for a maximum period of 90 days under the administrative supervision of the probation officer (and you must pay the cost of monitoring unless the probation officer determines you do not have the ability to do so); and/or (c) placed in a community corrections center for up to 180 days under the administrative supervision of the probation officer (and you must pay the cost of subsistence unless the probation officer determines you do not have the ability to do so).

SPECIAL CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1. You must cooperate in the collection of DNA under the administrative supervision of the probation officer.
2. The requirement that you submit to mandatory drug testing is suspended based upon the court's determination that you pose a low risk of future substance abuse.
3. You must make restitution in accordance with 18 U.S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664.
4. You must not incur any new debts (other than normal debts for existing utilities, rental expenses, or mortgage payments), increase existing credit lines, or open any new lines of credit without the permission

approval of the probation officer unless and until all court-ordered financial obligations have been paid in full. New debt includes contracts which obligate payments, credit agreements, and loans, including those with friends and family members.

5. You must maintain a single checking and/or savings account in your own legal name. You must deposit all personal income and monetary gains into the account(s) and must pay all personal expenses from this account.

6. Restitution to IRS in the amount of $377,132.00

RESTITUTION AND FORFEITURE

RESTITUTION

The Court orders restitution in the amounts of **$52,728,073.84** and **$377,132.00** as set out in the order entered contemporaneously in this case.

FORFEITURE

The defendant is ordered to forfeit the following property to the United States:

See Order of Forfeiture (Doc. 179).

APPENDIX F

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

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

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

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

(b) Penalties

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

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

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

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

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

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

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

(IV) any compound, mixture, or preparation which contains any quantity of any of the

substances referred to in subclauses (I) through (III);

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

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

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

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

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

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

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or

$10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

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

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

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

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

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

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

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

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

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

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

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of

marihuana, or 100 or more marihuana plants regardless of weight; or

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

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No

person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

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

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

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such

substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

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

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has

become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

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

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

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

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

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

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

or both.

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

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

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

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

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

(7) PENALTIES FOR DISTRIBUTION.-

(A) IN GENERAL.-Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled

substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

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

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally-

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

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

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

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

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

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

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

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

(e) Ten-year injunction as additional penalty

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

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a

recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

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

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

(B) the person is not an authorized purchaser;

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

(2) As used in this subsection:

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

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

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking

procedures prescribed by section 553 of title 5, to be used in committing rape or sexual assault.

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

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

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

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

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate

purpose for using any "date rape drug" for which a prescription is not required.

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

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

(1) In general

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

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

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

(2) Examples

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

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

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or

dispensation by means of the Internet in violation of section 829(e) of this title;

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

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

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

(3) Inapplicability

(A) This subsection does not apply to-

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

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

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

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

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

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

(4) Knowing or intentional violation

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

APPENDIX G

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX H

21 C.F.R. § 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.

(b) A prescription may not be issued in order for an individual practitioner to obtain controlled substances for supplying the individual practitioner for the purpose of general dispensing to patients.

(c) A prescription may not be issued for "detoxification treatment" or "maintenance treatment," unless the prescription is for a Schedule III, IV, or V narcotic drug approved by the Food and Drug Administration specifically for use in maintenance or detoxification treatment and the practitioner is in compliance with requirements in § 1301.28 of this chapter.

(d) A prescription may be issued by a qualifying practitioner, as defined in section 303(g)(2)G)(iii) of the Act (21 U.S.C. 823(g)(2)(G)(iii), in accordance with § 1306.05 for a Schedule III, IV, or V controlled substance for the purpose of maintenance or detoxification

treatment for the purposes of administration in accordance with section 309A of the Act (21 U.S.C. 829a) and § 1306.07(f). Such prescription issued by a qualifying practitioner shall not be used to supply any practitioner with a stock of controlled substances for the purpose of general dispensing to patients.

APPENDIX I

[FILED: FEBRUARY 25, 2022]

UNITED STATES DIRSTICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

UNITED STATES OF AMERICA, v. MARK MURPHY, JENNIFER MURPHY, MARK MURPHY, JR., and WILLIE FRANK MURPHY, Defendants.	)	Case No.: 5:20-cr-291-LSC-SGC

Members of the Jury:

It is now my duty to instruct you on the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions — what we call your deliberations.

It will be your duty to decide whether the Government has proved beyond a reasonable doubt the specific facts necessary to find the Defendants guilty of the crimes charged in the indictment.

You must make your decision only on the basis of the testimony and other evidence presented here during the trial; and you must not be influenced in any way by either sympathy or prejudice for or against the Defendants or the Government.

You must also follow the law as I explain it to you whether you agree with that law or not; and you must follow all of my instructions as a whole. You may not single out, or disregard, any of the Court's instructions on the law.

The indictment or formal charge against any Defendant is not evidence of guilt. Indeed, every Defendant is presumed by the law to be innocent. The law does not require a Defendant to prove innocence or to produce any evidence at all. A Defendant does not have to testify and if a Defendant elects not to testify, you cannot consider that in any way during your deliberations. As to each Defendant and each charge, the Government has the burden of proving such Defendant guilty beyond a reasonable doubt, and if it fails to do so you must find that Defendant not guilty.

Thus, while the Government's burden of proof is a strict or heavy burden, it is not necessary that a Defendant's guilt be proved beyond all possible doubt. As to each Defendant, the Government's proof only has to exclude any "reasonable doubt" concerning that Defendant's guilt.

A "reasonable doubt" is a real doubt, based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Reasonable doubt may arise from the evidence or from a lack of evidence.

Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. If you are convinced that a Defendant has been proved guilty beyond a reasonable doubt, say so. If you are not convinced, say so.

As I said earlier, you must consider only the evidence that I have admitted in the case. The term "evidence" includes the testimony of the witnesses and the exhibits admitted in the record. Remember that anything the lawyers say is not evidence in this case. It is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

You should not assume from anything I may have said that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own decision concerning the facts.

In considering the evidence you may make deductions and reach conclusions which reason and common sense lead you to make; and you should not be concerned about whether the evidence is direct or circumstantial. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eyewitness. "Circumstantial evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, any fact in dispute. The law makes no distinction between the weight you may give to either direct or circumstantial evidence.

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling.

Certain charts and summaries of other records have been used in this case that present what the government contends is supported by the evidence presented in this

trial. You must determine for yourself if the summary charts reflect what has been proven by the evidence.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the witness impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

You have heard from expert witnesses in this case. When scientific, technical or other specialized knowledge might be helpful, a person who has special training or experience in that field is allowed to state an opinion about the matter.

But that doesn't mean you must accept the witness's opinion. As with any other witness's testimony, you must decide for yourself whether to rely upon the opinion.

In this case, the Government has made plea agreements with Codefendants in exchange for their testimony. Such "plea bargaining," as it's called, provides for the possibility of a lesser sentence than the Codefendants would normally face. Plea bargaining is lawful and proper, and the rules of this court expressly provide for it.

But a witness who hopes to gain more favorable treatment may have a reason to make a false statement in order to strike a good bargain with the Government.

So while a witness of that kind may be entirely truthful when testifying, you should consider that testimony with more caution than the testimony of other witnesses. And the fact that a witness has pleaded guilty to an offense isn't evidence of the guilt of any other person.

You should also ask yourself whether there was evidence tending to prove that a witness testified falsely or inaccurately concerning some important fact; or, whether there was evidence that at some other time a witness said or did something, or failed to say or do something, which was different from the testimony the witness gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether it was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

The fact that a witness has been convicted of a felony offense, or a crime involving dishonesty or false statement, is another factor you may consider in deciding whether you believe that witness.

Evidence of a defendant's character traits may create reasonable doubt.

You should consider testimony that a defendant is an honest and law-abiding citizen along with all the other evidence to decide whether the Government has proved

beyond a reasonable doubt that a Defendant has committed the charged offenses.

During the trial, you heard evidence of acts allegedly done by one or more Defendants on other occasions that may be similar to acts with which that Defendant is currently charged. You must not consider any of this evidence to decide whether that Defendant engaged in the activity alleged in the indictment. This evidence is admitted and may be considered by you for the limited purpose of assisting you in determining whether [the Defendant had the state of mind or intent necessary to commit the crime charged in the indictment] [the Defendant had a motive or the opportunity to commit the acts charged in the indictment] [the Defendant acted according to a plan or in preparation to commit a crime] [the Defendant committed the acts charged in the indictment by accident or mistake].

At this time I will explain the indictment. I will not read it to you at length because you will be given a copy of the indictment for reference during your deliberations.

The indictment charges a number of separate crimes, called "counts." Each count has a number. You'll be given a copy of the indictment to refer to during your deliberations. There are four basic categories of counts: drug, health care fraud, kickback, and tax counts.

Count 1 charges that Defendants Mark Murphy and Jennifer Murphy conspired to unlawfully distribute or dispense controlled substances through prescriptions that were not issued for a legitimate medical purpose in the usual course of professional practice.

Counts 2, 3, and 4 charge what are called "substantive offenses." Each of these counts charge that Defendant Mark Murphy unlawfully distributed or dispensed

controlled substances by issuing a certain prescription on a certain date.

Count 5 charges that Defendants Mark Murphy and Jennifer Murphy knowingly and willfully conspired to commit healthcare fraud.

Counts 6 through 10 charge Defendants Mark Murphy and Jennifer Murphy with substantive offenses — specific instances of health care fraud.

Count 11 charges that all Defendants knowingly and willfully conspired to defraud the United States and to solicit and receive kickbacks and bribes for the referral of items or services for Medicare or TRICARE patients.

Counts 19, 20, and 22 each charge one or more Defendants with substantive offenses — receiving kickbacks on certain dates.

Counts 23 through 25 charge that Defendant Jennifer Murphy willfully made and subscribed false tax returns.

I will explain the law governing each of these offenses in a moment.

But first note that Counts 1, 5, and 11 do not charge any Defendants with committing substantive offenses — each of these Counts charge a conspiracy to commit substantive offenses.

I will also give you specific instructions on conspiracy.

Counts 2, 3, and 4 charge Defendant Mark Murphy with unlawful distribution or dispensing of controlled substances. It is a crime for a physician to knowingly or intentionally distribute or dispense a controlled substance unless it was done within the usual course of professional practice and for a legitimate medical purpose. "Dispense" means to prescribe a controlled substance or deliver a prescribed controlled substance to an end user.

"Distribute" means to deliver, other than by dispensing, a controlled substance.

For a controlled substance to be lawfully dispensed by a prescription, the prescription must have been issued by a practitioner both within the usual course of professional practice and for a legitimate medical purpose. If the prescription was issued either (1) not for a legitimate medical purpose, or (2) outside the usual course of professional practice, then the prescription was not lawfully issued and constitutes the unlawful dispensing of a controlled substance. Defendant Mark Murphy can be found guilty of Count 2, 3, or 4, only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant dispensed by prescription a controlled substance as charged below:

Count	**Date Prescription Issued**	**Patient**	**Substance**
2	January 26, 2016	C.P.	Morphine Sulfate IR 30 mg tab
3	January 4, 2016	M.A.	Oxycodone HCL 30 mg
4	January 27, 2016	C.H.	Fentanyl 25 mcg/hr patch

(2) the Defendant did so knowingly and intentionally;

(3) the Defendant did so without a legitimate medical purpose or outside the usual course of professional practice.

For purposes of this case, I instruct you that the substances listed above are controlled substances.

To prove that the Defendant "knowingly" dispensed a controlled substance, it is not necessary that the Defendant knew the substance was a particular drug name. It is enough that the Defendant knew that it was some kind of controlled substance.

The term "usual course of professional practice" means acting in accordance with a standard of medical

practice generally recognized and accepted in the United States. You have heard evidence about what constitutes the usual course of professional practice for the prescription of controlled substances, and you are to weigh that evidence the same way that you would weigh any other evidence in this case.

In making medical judgments concerning the appropriate treatment of an individual, practitioners do have discretion to choose among a wide range of available options. So if a practitioner writes a prescription in good faith in the course of medically treating a patient, then the doctor has distributed the drug lawfully.

In this context, good faith has a specific meaning. It means that a defendant engaged in an honest exercise of what he should reasonably believe to be proper medical practice.

This means that a physician's own individual treatment methods or his own personal belief that the prescribed drugs were beneficial to the patients do not by themselves constitute good faith. Instead, to constitute good faith, the practitioner must be acting in a reasonable attempt to comply with accepted standards of medical practice.

The Defendant does not have to prove to you that he acted in good faith. Instead, the burden of proof is on the Government to prove to you beyond a reasonable doubt that the Defendant acted outside the course of usual professional practice without a legitimate medical purpose.

In considering whether a defendant acted with a legitimate medical purpose in the usual course of professional practice, you should consider all of the Defendant's actions and the circumstances surrounding them.

Count 1 charges that Defendants Mark Murphy and Jennifer Murphy conspired to unlawfully distribute and dispense controlled substances.

Title 21, United States Code, Section 846 makes it a separate Federal crime or offense for anyone to conspire, or agree with someone else, to knowingly or intentionally distribute or dispense a controlled substance without a legitimate medical purpose or outside the usual course of professional practice.

A "conspiracy" is an agreement by two or more persons to commit an unlawful act. In other words, it is a kind of partnership for criminal purposes. Every member of the conspiracy becomes the agent or partner of every other member. The Government does not have to prove that all of the people named in the indictment were members of the plan, or that those who were members made any kind of formal agreement. The heart of a conspiracy is the making of the unlawful plan itself, so the Government does not have to prove that the conspirators succeeded in carrying out the plan.

The Defendant can be found guilty only if all the following facts are proved beyond a reasonable doubt:

(1) two or more people in some way agreed to try to accomplish a shared and unlawful plan to dispense controlled substances without a legitimate medical purpose or outside the usual course of professional practice;

(2) the Defendant knew the unlawful purpose of the plan and willfully joined in it; and

(3) the object of the unlawful plan was to dispense controlled substances without a legitimate medical purpose or outside the usual course of professional practice.

A person may be a conspirator even without knowing all the details of the unlawful plan or the names and identities of all the other alleged conspirators.

If the Defendant played only a minor part in the plan but had a general understanding of the unlawful purpose of the plan – and willfully joined in the plan on at least one occasion – that's sufficient for you to find the Defendant guilty.

But simply being present at the scene of an event or merely associating with certain people and discussing common goals and interests doesn't establish proof of a conspiracy. Also a person who doesn't know about a conspiracy but happens to act in a way that advances some purpose of one doesn't automatically become a conspirator.

Count 5 charges that Defendants Mark Murphy and Jennifer Murphy conspired to commit health care fraud.

It's a Federal crime to knowingly and willfully conspire or agree with someone to do something that, if actually carried out, would result in the crime of healthcare fraud.

A Defendant can be found guilty of this conspiracy offense only if all the following facts are proved beyond a reasonable doubt:

(1) two or more persons, in some way or manner, agreed to try to accomplish a common and unlawful plan to commit health care fraud, as charged in the indictment; and

(2) the Defendant knew the unlawful purpose of the plan and willfully joined in it.

Defendants Mark Murphy and Jennifer Murphy are charged in counts 6 through 10 with committing the substantive offense of healthcare fraud.

It's a Federal crime to knowingly and willfully execute, or attempt to execute, a scheme or artifice to

defraud a health-care benefit program, or to get any of the money or property owned by, or under the custody or control of, a health-care benefit program by means of false or fraudulent pretenses, representations, or promises.

A Defendant can be found guilty of this offense only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant knowingly executed, or attempted to execute, a scheme or artifice to defraud a health-care benefit program, or to obtain money or property owned by, or under the custody or control of, a health-care benefit program by using false or fraudulent pretenses, representations, or promises;

(2) the health care benefit program affected interstate commerce;

(3) the false or fraudulent pretenses, representations, or promises related to a material fact;

(4) the Defendant acted willfully and intended to defraud; and

(5) the Defendant did so in connection with the delivery of or payment for health-care benefits, items, or services.

"Health-care benefit program" means any public or private plan or contract, affecting commerce, under which any medical benefit, item, or service is provided to any individual, and includes any individual or entity that is providing a medical benefit, item, or service for which payment may be made under the plan or contract.

A health-care benefit program affects interstate commerce if the program had any impact on the movement of any money, goods, services, or persons from one state to another or between another country and the United States. The Government need only prove that the health care program itself either engaged in interstate commerce or that its activity affected interstate

commerce to any degree. The Government need not prove that a Defendant engaged in interstate commerce or that the acts of a Defendant affected interstate commerce.

A "scheme to defraud" includes any plan or course of action intended to deceive or cheat someone out of money or property by using false or fraudulent pretenses, representations, or promises relating to a material fact.

A statement or representation is "false" or "fraudulent" if it is about a material fact that the speaker knows is untrue or makes with reckless indifference as to the truth and makes with intent to defraud. A statement or representation may be "false" or "fraudulent" when it's a half truth or effectively conceals a material fact and is made with the intent to defraud.

A "material fact" is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is "material" if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false.

To act with "intent to defraud" means to do something with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury. Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud.

The Government doesn't have to prove all the details alleged in the indictment about the precise nature and purpose of the scheme. The Government also doesn't have to prove that the alleged scheme actually succeeded in defrauding anyone. What must be proved beyond a reasonable doubt is that the Defendant knowingly attempted or carried out a scheme substantially similar to the one alleged in the indictment.

"Good faith" is a complete defense to a charge that requires intent to defraud. A defendant isn't required to prove good faith. The Government must prove intent to defraud beyond a reasonable doubt.

An honestly held opinion or an honestly formed belief cannot be fraudulent intent — even if the opinion or belief is mistaken. Similarly, evidence of a mistake in judgment, an error in management, or carelessness can't establish fraudulent intent.

But an honest belief that a business venture would ultimately succeed doesn't constitute good faith if the Defendant intended to deceive others by making representations the Defendant knew to be false or fraudulent.

Count 11 charges all Defendants with conspiring to defraud the United States and to receive and/or solicit health care kickbacks.

It is a Federal crime for anyone to conspire or agree with someone else to defraud the United States or any of its agencies. To "defraud" the United States or any of its agencies means to cheat the Government out of property or money or to interfere with any of its lawful governmental functions by deceit, craft, or trickery. The defendants are charged with conspiring to defraud two United States agencies—the United States Department of Health and Human Services in its administration and oversight of the Medicare program, and the United States Department of Defense in its administration and oversight of TRICARE.

The objects of the alleged conspiracy were to defraud the United States and to receive and/or solicit health care kickbacks. I will separately explain the elements of those crimes to you in a moment.

As I previously explained to you, it is a Federal crime for anyone to conspire or agree with someone else to do

something that would be another Federal crime if it was actually carried out.

The Government does not have to prove that the members planned together all the details of the plan or the "overt acts" that the indictment charges would be carried out in an effort to commit the intended crime.

The Defendants can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt as to each Defendant:

(1) two or more persons in some way agreed to try to accomplish a shared and unlawful plan, that is to defraud the United States and to receive or solicit health care kickbacks;

(2) the Defendant knew the unlawful purpose of the plan and willfully joined in it;

(3) during the conspiracy, one of the conspirators knowingly engaged in at least one overt act as described in the indictment; and

(4) the overt act was committed at or about the time alleged and with the purpose of carrying out or accomplishing some object of the conspiracy.

An "overt act" is any transaction or event, even one that may be entirely innocent when viewed alone, that a conspirator commits to accomplish some object of the conspiracy.

The Government does not have to prove that a Defendant willfully conspired to both a) defraud the United States and b) solicit and/or receive kickbacks. It is sufficient if the Government proves beyond a reasonable doubt that a Defendant willfully conspired to commit one of those objects. But to return a verdict of guilty, you must all agree on which object or objects the Defendant conspired to commit.

While Count 11 charges the Defendants with conspiracy, the Defendants are charged separately in

Counts 19, 20, and 22 with the substantive crimes of receiving health care kickbacks; therefore I will explain the elements of that crime.

Title 42, United States Code, Section 1320a-7b makes it a Federal crime for anyone to solicit and/or receive any remuneration—including a kickback or bribe—to a person to induce such person to purchase, order, arrange for, or recommend purchasing or ordering any item or service that would be paid for, in whole or in part, by a Federal health care program.

A Defendant can be found guilty of that offense only if all of the following facts are proved beyond a reasonable doubt as to the Defendant:

(1) the Defendant solicited or received any remuneration (including a kickback or bribe);

(2) the receipt or solicitation of the remuneration was made to induce the person to purchase, order, arrange for, or recommend purchasing or ordering any item or service paid for, in whole or in part, by a Federal health care program; and

(3) the Defendant acted knowingly and willfully.

The Government need not prove that the only or primary purpose of the remuneration that was paid was to induce the purchase, order, arrangement, or recommendation for an item or service. If the Government proves beyond a reasonable doubt that one of the Defendant's purposes in soliciting or receiving the remuneration was to induce the purchase, order, arrangement, or recommendation, that is sufficient.

The term "remuneration" means the transfer of anything of value from one person or entity to another person or entity. Remuneration can be paid directly or indirectly, overtly or covertly.

Defendants Mark Murphy, Jr., and Willie Frank Murphy are charged with knowingly and willfully

receiving kickbacks from Brian Bowman and/or his companies OrthoPlus and Compass in exchange for inducing the referral of various medical products. You are instructed that you are not to consider the payment of salary or wages from Aegis Sciences Corporation or Compass to be kickbacks.

The term "Federal health care program" means any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government.

Please consult the chart on page 38 of the indictment in deciding each of Counts 19, 20, and 22.

Defendant Jennifer Murphy is charged in Counts 23 through 25 with preparing and filing false tax returns for the 2013, 2014, and 2015 tax years.

It's a Federal crime to willfully and knowingly prepare and file a false tax return or other tax-related documents.

The Defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt:

(1) the Defendant made or caused to be made a tax return for the tax year charged;

(2) the tax return for that year contained a written declaration that it was made under the penalty of perjury;

(3) when the Defendant made or helped to make the tax return, she knew it contained false material information;

(4) when the Defendant did so, she intended to do something she knew violated the law;

(5) the false matter in the tax return related to a material statement.

The government has the burden of proving each of these five elements beyond a reasonable doubt, for each of the years in question.

A declaration is "false" if it is untrue when it is made and the person making it knows it is untrue. A declaration in a document is "false" if it is untrue when the document is used and the person using it knows it is untrue.

A declaration is "material" if it concerns a matter of significance or importance, not a minor or insignificant or trivial detail.

The Government does not have to show that any taxes were not paid because of the false return, or that any additional taxes are due. It only has to prove that the Defendant intentionally helped to file a materially false return, which Defendant knew violated the law.

A false matter is "material" if the matter was capable of influencing the Internal Revenue Service.

Good-Faith is a complete defense as to Counts 23, 24, and 25 since good-faith on the part of the Defendant is inconsistent with willfulness, and willfulness is an essential part of the charges. If the Defendant acted in good faith, sincerely believing herself to be exempt by the law from the withholding of income taxes, then the Defendant did not intentionally violate a known legal duty – that is, the Defendant did not act "willfully." The burden of proof is not on the Defendant to prove good-faith intent because the Defendant does not need to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted willfully as charged.

Intent and motive must not be confused. "Motive" is what prompts a person to act. It is why the person acts.

"Intent" refers to the state of mind with which the act is done. If you find beyond a reasonable doubt that the Defendant specifically intended to do something that is against the law and voluntarily committed the acts that

make up the crime, then the element of "willfulness" is satisfied, even if the Defendant believed that violating the law was religiously, politically, or morally required or that ultimate good would result.

Now I need to go over a few more matters that generally apply in your consideration of the charges in the indictment. It's possible to prove a Defendant guilty of a crime even without evidence that the Defendant personally performed every act charged.

Ordinarily, any act a person can do may be done by directing another person, or "agent." Or it may be done by acting with or under the direction of others.

A Defendant "aids and abets" a person if the Defendant intentionally joins with the person to commit a crime.

A Defendant is criminally responsible for the acts of another person if the Defendant aids and abets the other person. A Defendant is also responsible if the Defendant willfully directs or authorizes the acts of an agent, employee, or other associate.

But finding that a Defendant is criminally responsible for the acts of another person requires proof that the Defendant intentionally associated with or participated in the crime — not just proof that the Defendant was simply present at the scene of a crime or knew about it.

In other words, you must find beyond a reasonable doubt that the Defendant was a willful participant and not merely a knowing spectator.

During a conspiracy, if a conspirator commits a crime to advance the conspiracy toward its goals, then in some cases a coconspirator may be guilty of the crime even though the coconspirator did not participate directly in the crime.

So regarding Count 5 (health care fraud conspiracy) and Defendants Mark Murphy and Jennifer Murphy, if

you have first found either of those Defendants guilty of the crime of conspiracy as charged in Count 5, you may also find that Defendant guilty of any of the crimes charged in Counts 6 through 10 even though the Defendant did not personally participate in the crime. Likewise, regarding Count 11 (conspiracy to defraud the United States and solicit and receive kickbacks) and Defendants Mark Murphy and Jennifer Murphy, if you have first found either of those Defendants guilty of the crime of conspiracy as charged in Count 11, you may also find that Defendant guilty of any of the crimes charged in Counts 19, 20 and 22 even though the Defendant did not personally participate in the crime.

To do so, you must find beyond a reasonable doubt:

(1) during the conspiracy a conspirator committed the additional crime charged to further the conspiracy's purpose;

(2) the Defendant was a knowing and willful member of the conspiracy when the crime was committed; and

(3) it was reasonably foreseeable that a coconspirator would commit the crime as a consequence of the conspiracy.

If a Defendant's knowledge of a fact is an essential part of a crime, it's enough that the Defendant was aware of a high probability that the fact existed — unless the Defendant actually believed the fact didn't exist.

To give an example from a different kind of case, if a defendant possesses a package and believes it contains a controlled substance but deliberately avoids learning that it contains the controlled substance so he or she can deny knowledge of the package's contents, that would be enough to be deemed knowledge.

So in this case, to determine whether a Defendant knew a fact that is an essential part of a crime charged, you may find that a defendant had knowledge if you

determine beyond a reasonable doubt that the Defendant (1) actually knew the fact, or (2) had every reason to know but deliberately closed his or her eyes.

But I must emphasize that negligence, carelessness, or foolishness isn't enough to prove that the Defendant knew the fact.

Intentional concealment by a person during or immediately after a crime has been committed, or after that person is accused of a crime, is not, of course, sufficient in itself to establish the guilt of that person. But concealment under those circumstances is a fact which, if proved, may be considered by the jury in light of all the other evidence in the case in determining the guilt or innocence of that person.

Whether or not a Defendant's conduct constituted concealment is exclusively for you, as the Jury, to determine. And if you do so determine, whether or not that concealment showed a consciousness of guilt on his or her part, and the significance to be attached to that evidence, are also matters exclusively for you as a jury to determine.

I remind you that in your consideration of any evidence of concealment, if you should find that there was concealment, you should also consider that there may be reasons for this which are fully consistent with innocence. These may include fear of being apprehended, unwillingness to confront the police, or reluctance to confront the witness.

And may I also suggest to you that a feeling of guilt does not necessarily reflect actual guilt of a crime which you may be considering.

Where a statute specifies multiple alternative ways in which an offense may be committed, the indictment may allege the multiple ways in the conjunctive, that is, by using the word "and." If only one of the alternatives is

proved beyond a reasonable doubt, that is sufficient for conviction, so long as you agree unanimously as to that alternative.

You will note that the indictment charges that the offense was committed "on or about" a certain date. The Government does not have to prove with certainty the exact date of the alleged offense. It is sufficient if the Government proves beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged.

The word "knowingly," as that term is used in the indictment or in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or accident.

Except for Counts 23, 24, and 25, the word "willfully," as that term is used in the indictment or in these instructions, means that the act was committed voluntarily and purposely, with the intent to do something the law forbids; that is with bad purpose either to disobey or disregard the law. While a person must have acted with the intent to do something the law forbids before you can find that person acted "willfully," the person need not be aware of the specific law or rule that his or her conduct may be violating.

As to Counts 23, 24, and 25—the tax offenses charged against Defendant Jennifer Murphy — the word "willfully" means that the act was done voluntarily and purposely with the specific intent to violate a known legal duty, that is, with the intent to do something the law forbids.

Disagreement with the law or a belief that the law is wrong does not excuse willful conduct.

While all Defendants are charged in the indictment, the case as to each Defendant should be considered

separately and individually. The fact that you may find any one of the Defendants guilty or not guilty of the offense charged does not mean that your verdict as to the other Defendant must be the same.

I caution you, members of the Jury, that you are here to determine from the evidence in this case whether each Defendant is guilty or not guilty. Each Defendant is on trial only for the specific offense or offenses charged against such Defendant in the indictment.

Also, the question of punishment should never be considered by the jury in any way in deciding the case. If a Defendant is convicted the matter of punishment is for the Judge alone to determine later.

Any verdict you reach in the jury room, whether guilty or not guilty, must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to reexamine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges - - judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

Form of verdicts has been prepared for your convenience.

You will take the verdict forms to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict forms, date and sign them, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.