APPENDIX

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[redacted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
LEXINGTON

UNITED STATES OF AMERICA

V. SECOND SUPERSEDING INDICTMENT NO. 15-CR-104-SS-DCR

LONNIE W. HUBBARD

* * * * *

THE GRAND JURY CHARGES:

At all times relevant to this second superseding Indictment:

A. LONNIE W. HUBBARD:

1. **LONNIE W. HUBBARD, R. Ph.,** was a registered pharmacist and licensed to practice in Kentucky. He was permitted by the Drug Enforcement Administration (DEA) to dispense narcotic and controlled substance prescriptions and was a registrant seller for listed chemicals.

2. **HUBBARD's** pharmacy, RX DISCOUNT of BEREA, P.L.L.C., was located at 102 Prince Royal Dr., Suite 2, Berea, Madison County, in the Eastern District of Kentucky. **HUBBARD** was listed as the registered agent for the limited corporation at 102 Prince Royal Dr., Suite 2, Berea, KY.

3. Beginning in or about January 2010, the exact date unknown, through on or about December 3, 2015, **HUBBARD** dispensed through RX DISCOUNT of BEREA controlled substances and List I chemicals.

[redacted]

B. Controlled Substances

4. 21 C.F.R. § 1306.04(a) provides: "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 Controlled Substance 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."

5. Schedule II controlled substances, including oxycodone, are used with severe restrictions because of their potential for abuse, which abuse may lead to severe psychological and physical dependence.

6. Schedule III controlled substances, including hydrocodone, have a potential for abuse less than the controlled substances in Schedule II, but are drugs which, if abused, may lead to moderate and low physical dependence or high psychological dependence.

C. List I Chemicals

7. Section 1310.03 of the Code of Federal Regulations (CFR) states: "Each regulated person who engages in a regulated transaction involving a listed chemical, a

tableting machine, or an encapsulating machine shall keep a record of the transaction as specified by Section 1310.04 and file reports as specified by Section 1310.05."

8. Section 1314.05 of the Code of Federal Regulations titled "Requirements regarding packaging of non-liquid forms," states the following: "A regulated seller or mail order distributor may not sell a scheduled listed chemical product in non-liquid form (including gel caps) unless the product is packaged either in blister packs, with each blister containing no more than two dosage units or, if blister packs are technically infeasible, in unit dose packets or pouches."

9. Section 1310.06 of the CFR requires records include: "the name, address, and, if required, DEA registration number of each party to the regulated transaction; . . . the date of the regulated transaction; . . . the name, quantity and form of packaging of the listed chemical; . . . the type of identification used by the purchaser and any unique number on that identification."

10. Section 1310.07 of the CFR requires that "[E]ach regulated person who engages in a regulated transaction must identify the other party to the transaction. For domestic transaction, this shall be accomplished by having the other party present documents which would verify the identity or registration status if a registrant, of the other party to the regulated person at the time the order is placed."

11. The allegations contained in paragraphs 1 through 10 of the Introduction above are restated and incorporated herein by reference in all of the following counts.

COUNT 1
21 U.S.C. § 846

Beginning on an unknown date in January 2010, and continuing through on or about December 3, 2015, in Madison County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD

did conspire with others to knowingly and intentionally distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing Oxycodone, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1), and to knowingly and intentionally distribute a chemical, product or material, namely pseudoephedrine, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, in violation of 21 U.S.C. § 841(c)(2), all in violation of 21 U.S.C. § 846.

COUNT 2 - 14
21 U.S.C. § 841(c)(2)
18 U.S.C. § 2

Beginning on an unknown date in January 2010, and continuing through on or about December 3, 2015, and as further described below, in Madison County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by others, did distribute a listed chemical, namely, pseudoephedrine,

which may be used to manufacture a controlled substance, knowing or having reasonable cause to believe, that such listed chemical will be used to manufacture a controlled substance, namely Methamphetamine, a Schedule II controlled substance, all in violation of 21 U.S.C. § 841(c)(2) and 18 U.S.C. § 2.

Count 2	August 27, 2011
Count 3	December 11, 2012
Count 4	April 12, 2013
Count 5	July 30, 2013
Count 6	August 12, 2013
Count 7	October 28, 2013
Count 8	April 11, 2014
Count 9	May 10, 2014
Count 10	June 7, 2014
Count 11	January 20, 2015
Count 12	February 24, 2015
Count 13	April 6, 2015
Count 14	November 17, 2015

COUNT 15
21 U.S.C. § 841(a)(1)

On or about July 30, 2013, in Madison County, in the Eastern District of Kentucky,

LONNIE HUBBARD

did distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing hydrocodone, a Schedule III controlled substance, all in violation of 21 U.S.C. § 841(a)(1).

COUNTS 16 - 42
21 U.S.C. § 841(a)(1)

Beginning in or about January 2014, and continuing through December 31, 2014, and as further described below, in Madison County, in the Eastern District of Kentucky,

LONNIE W. HUBBARD

did distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing oxycodone, a Schedule II controlled substance, all in violation of 21 U.S.C. § 841(a)(1).

Count	Date	Physician	Controlled Substance
Count 16	May 3, 2014	George Jones (GA)	Oxycodone (II)
Count 17	June 25, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 18	July 23, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 19	August 20, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 20	February 15, 2014	Reny Kindelan (FL)	Oxycodone (II)
Count 21	March 15, 2014	Claude Delmas (FL)	Oxycodone (II)
Count 22	June 25, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 23	July 23, 2014	Ralph Miniet (FL)	Oxycodone (II)

Count 24	August 20, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 25	October 31, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 26	December 1, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 27	February 11, 2014	Reny Kindelan (FL)	Oxycodone (II)
Count 28	March 8, 2014	Claude Delmas (FL)	Oxycodone (II)
Count 29	April 8, 2014	Reny Kindelan (FL)	Oxycodone (II)
Count 30	August 7, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 31	September 4, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 32	October 1, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 33	October 28, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 34	November 25, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 35	August 4, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 36	August 29, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 37	September 26, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 38	November 24, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 39	August 13, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 40	September 10, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 41	October 10, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 42	November 10, 2014	Ralph Miniet (FL)	Oxycodone (II)

COUNT 43
21 U.S.C. § 841(a)(1)
18 U.S.C. § 2

On or about April 1, 2015, in Madison County, in the Eastern District of Kentucky,

LONNIE W. HUBBARD,

aided and abetted by others, did distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing oxycodone, a Schedule II controlled substance, all in violation of 21 U.S.C. § 841(a)(1).

COUNT 44
21 U.S.C. § 841(a)(1)
18 U.S.C. § 2

On or about April 30, 2015, in Madison County, in the Eastern District of Kentucky,

LONNIE W. HUBBARD,

aided and abetted by others, did distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing oxycodone, a Schedule II controlled substance, all in violation of 21 U.S.C. § 841(a)(1).

COUNT 45
21 U.S.C. § 841(a)(1)
18 U.S.C. § 2

On or about June 2, 2015, in Madison County, in the Eastern District of Kentucky,

LONNIE W. HUBBARD,

aided and abetted by others, did distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing

oxycodone, a Schedule II controlled substance, all in violation of 21 U.S.C. § 841(a)(1).

COUNT 46
21 U.S.C. § 841(a)(1)
18 U.S.C. § 2

On or about June 17, 2015, in Madison County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by others, did distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing oxycodone, a Schedule II controlled substance, all in violation of 21 U.S.C. § 841(a)(1).

COUNT 47
21 U.S.C. § 841(a)(1)
18 U.S.C. § 2

On or about July 7, 2015, in Madison County, in the Eastern District of Kentucky, and elsewhere.

LONNIE W. HUBBARD,

aided and abetted by and others, did distribute a quantity of pills containing oxycodone, a Schedule II controlled substance, all in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

COUNT 48
21 U.S.C. § 841(a)(1)
18 U.S.C. § 2

On or about September 22, 2015, in Madison County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by others, did distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing oxycodone, a Schedule II controlled substance, all in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.

COUNTS 49 - 59
21 U.S.C. § 841(a)(1)

Beginning on or about January 1, 2010, and continuing through December 3, 2015, and as further described below, in Madison County, in the Eastern District of Kentucky,

LONNIE W. HUBBARD

did distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing oxycodone, a Schedule II controlled substance, all in violation of 21 U.S.C. § 841(a)(1).

Count 49	May 9, 2012	Oliver C. James (KY)	Percocet (II)
Count 50	July 3, 2012	Oliver C. James (KY)	Percocet (II)
Count 51	July 10, 2012	Michael Katz (GA)	Oxycodone (II)
Count 52	September 14, 2012	Oliver C. James (KY)	Percocet (II)
Count 53	October 23, 2012	Oliver C. James (KY)	Percocet (II)
Count 54	October 29, 2012	George Williams (GA)	Oxycodone (II)
Count 55	May 10, 2013	Oliver C. James (KY)	Percocet (II)

Count 56	September 12, 2013	Reny Kindelan (FL)/ Dana Richards	Oxycodone (II)
Count 57	April 11, 2014	George Jones (FL)	Oxycodone (II)
Count 58	November 25, 2014	Ralph Miniet (FL)	Oxycodone (II)
Count 59	June 9, 2015	Ralph Miniet (FL)	Oxycodone (II)

COUNT 60
21 U.S.C. § 856(a)(1)

Beginning in or about January 2010, and continuing through on or about December 3, 2015, in Madison County, in the Eastern District of Kentucky,

LONNIE W. HUBBARD

did knowingly and intentionally open and maintain and manage and control, whether permanently or temporarily, a place, namely, RX DISCOUNT OF BEREA, P.L.L.C., 102 Prince Royal Drive, Suite 2, Berea, Kentucky, for the purpose of distributing and dispensing, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing oxycodone, a Schedule II controlled substance, and pseudoephedrine, a listed chemical, in violation of 21 U.S.C. § 841(a)(1) and (f)(1), all in violation of 21 U.S.C. § 856(a)(1).

COUNT 61
18 U.S.C. § 1956(h)

Beginning on an unknown date in January 2010, and continuing through on or about December 3, 2015, in Madison County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD

and another knowing that the property involved in financial transactions affecting interstate commerce represented the proceeds of some form of unlawful activity, did conspire to conduct such financial transactions, which, in fact, involved proceeds of specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, in Kentucky and elsewhere, with the intent to promote the carrying on of such specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(A)(i), and knowing that the transactions were designed in whole or in part to conceal or disguise the nature, the location, the source, the ownership, and the control of the proceeds of such specified unlawful activity, in violation of 18 U.S.C. § 1956(a)(1)(B)(i), all in violation of 18 U.S.C. § 1956(h).

COUNT 62
18 U.S.C. § 1957

On or about April 15, 2011, in Laurel County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD

did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled

substances and distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, wrote a check from the RX DISCOUNT Community Trust Bank business account ending in [redacted] in the amount of $45,000 to T. Rowe Price Trust Company, all in violation of 18 U.S.C. § 1957.

COUNT 63
18 U.S.C. § 1957
18 U.S.C. § 2

On or about November 4, 2011, in Laurel County, in the Eastern District of Kentucky,

LONNIE W. HUBBARD,

aided and abetted by another, did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, wrote a counter check for $200,000 from the RX Discount business Community Trust Bank account ending in [redacted] toward the purchase of the real property located at 245 Schell Road, London, Kentucky, all in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

[redacted]

COUNT 64
18 U.S.C. § 1957

On or about March 10, 2012, in Laurel County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD

did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, the purchase with a counter check from the RX DISCOUNT business account at Community Trust Bank ending in [redacted] to obtain a 2012 Can Am, VIN: 3JBKGCP15CP000229 from Mountain Motorsports, Kodak, Tennessee, with cashier's check #1324600 in the amount of $13,285 made payable to Mountain Motorsports, all in violation of 18 U.S.C. § 1957.

COUNT 65
18 U.S.C. § 1957
18 U.S.C. § 2

On or about October 30, 2012, in Laurel County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by another, did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, a wire transfer from the RX DISCOUNT business account at Community Trust Bank ending in [redacted] in the amount of $22,909.77, to RJF Consignments to purchase a 1971 Chevy Corvette VIN #194671S112497, all in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

COUNT 66
18 U.S.C. § 1957
18 U.S.C. § 2

On or about July 16, 2013, in Laurel County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by another, did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical,

knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, to purchase a 2010 Bryant Boat, Hull Identification #BRA22014A010, in the amount of $31,800.00, from Legacy Nissan, London, Kentucky, all in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

COUNT 67
18 U.S.C. § 1957
18 U.S.C. § 2

On or about December 26, 2013, in Laurel County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by another, did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, to purchase a 2013 Yellow Sea Doo and 2013 Karavan Trailer from Mountain Motorsports, Kodak, Tennessee, for the remaining balance of $12,000 in U.S. currency of the total purchase price of $13,500, all in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

COUNT 68
18 U.S.C. § 1957
18 U.S.C. § 2

On or about May 17, 2014, in Laurel County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by another, did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, to purchase a 2013 Mercedes C300, VIN: WDDGF8AB0DR261468 from Gordon Motorsports Louisville, Kentucky, with a counter check from the RX DISCOUNT business account at Community Trust Bank ending in [redacted] to obtain a cashier's check # 1452534 in the amount of $20,000, all in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

COUNT 69
18 U.S.C. § 1957
18 U.S.C. § 2

On or about October 30, 2014, in Pulaski County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by another, did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, a check in the amount of $40,000, from the RX DISCOUNT business account at Community Trust Bank ending in [redacted] to Wiggington Construction Inc., dba Wiggington Builders, Inc., as the down payment to purchase the real property located at 564 Shimmering Moon Drive, Somerset, Kentucky, all in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

COUNT 70
18 U.S.C. § 1957
18 U.S.C. § 2

On or about January 17, 2015, in Madison County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by another, did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical,

knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, purchased a 2014 Red Sea Doo and a 2015 double Shorelander Trailer in the amount of $13,999 from Mountain Motorsports, all in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

COUNT 71
18 U.S.C. § 1957

On or about February 27, 2015, in Pulaski County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by another, did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, a a counter check from the RX DISCOUNT business account at Community Trust Bank ending in [redacted] to obtain a cashier's check # 1490252 in the amount of $315,000 and made payable to First and Farmers Bank for Rollin Wiggington Builders Inc., to purchase the real property located at 564 Shimmering Moon Drive, Somerset, Kentucky, all in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

COUNT 72
18 U.S.C. § 1957
18 U.S.C. § 2

On or about April 23, 2015, in Laurel County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD,

aided and abetted by another, did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, a cash purchase in the amount of $25,000, to Tincher & Williams Chevrolet, to purchase a 2015 GMC Sierra Denali, VIN: 1GT120EGXFF595773, all in violation of 18 U.S.C. § 1957 and 18 U.S.C. § 2.

COUNT 73
18 U.S.C. § 1957

On or about September 4, 2015, in Pulaski County, in the Eastern District of Kentucky, and elsewhere,

LONNIE W. HUBBARD

did knowingly engage and attempt to knowingly engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified

unlawful activity, that is, the unlawful distribution and dispensation of controlled substances and the distribution of a chemical, product or material, which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that such chemical, product or material will be used to manufacture a controlled substance or a listed chemical, to wit, withdrawing $56,000 from the RX DISCOUNT business bank account ending in [redacted] and obtaining a Certificate of Deposit in the amount of $56,000, from Community Trust Bank, Somerset, Kentucky toward the purchase of a 2013 Chevrolet Corvette ZR1, VIN: 1G1YN2DT8D5800051 from Texas Direct Auto located in Stafford, Texas, all in violation of 18 U.S.C. § 1957.

FORFEITURE ALLEGATIONS
21 U.S.C. § 853
18 U.S.C. § 982(a)(1)

1. In committing the felony offenses alleged in Counts 1-60 of this second superseding Indictment, the same being punishable by imprisonment for more than one year, **LONNIE W. HUBBARD** used and intended to use the below-described property to commit and to facilitate the commission of the said controlled substance violation, and the below-described property constitutes proceeds obtained directly and indirectly as a result of the commission of the aforesaid violations of 21 U.S.C. § 841(a)(1), including, but not limited to:

REAL PROPERTY:

a) Real property and residence located 245 Schell Road, London, Kentucky, with all improvements and appurtenances thereon, in the names of Lonnie W. Hubbard

[redacted]

and Meggan A. Hubbard, and recorded in Deed Book 675, page 502, Laurel County Clerk's Office;

b) Real property and residence located at 564 Shimmering Moon Drive, Somerset, Kentucky, with all improvements and appurtenances thereon, in the names of L. W. Hubbard and M. A. Hubbard, and recorded in Deed Book 926, page 508, Pulaski County Clerk's Office;

VEHICLES/BOATS:

a) 2015 GMC Denali Sierra, VIN: 1GT120EGXFF595773;
b) 2013 Mercedes C300, VIN: WDDGF8AB0DR261468;
c) 1971 Chevrolet Corvette, VIN: 194671S112497;
d) 2010 Bryant Boat, HULL Number: BRA22014A010;
e) 2008 Black Kawasaki ZX1000E, VIN: JKAZXCE168A001434;
f) 2013 Seadoo, Hull Number: YDV19278D313;
g) Trailer bearing VIN 5A7BB2126AT001173, attached to the 2010 Bryant Boat;
h) Trailer bearing VIN 1MDKNAM12FA561079, attached to the 2013 Seadoo;
i) 2013 Corvette ZR1, VIN 1G1YN2DT8D5800051;
j) 2012 Can Am Commander, VIN 3JBKGCP15CJ000229; and
k) 2014 Sea Doo, Hull YDV33435E414.

FINANCIAL ACCOUNTS:

a) T. Rowe Price Associates, Inc., Plan ID [redacted] RX Discount of Berea [redacted] SEP-IRA in the name of Lonnie Wayne Hubbard;
b) Community Trust Bank account # [redacted] in the name of RX Discount;
c) Contents of Central Bank Account [redacted], approximate value $58,593.52;
d) $13,210.00 in U.S. Currency from safe at 564 Shimmering Moon Drive, Somerset; and
e) Certificate of Deposit in the amount of $56,000 from Community Trust Bank.

2. In committing the felony offenses alleged in Counts 61-73 of this second superseding Indictment, the same being punishable by imprisonment for more than one year, **LONNIE W. HUBBARD** shall forfeit to the United States any property, real or personal, involved in the offenses or any property traceable to such property pursuant to 18 U.S.C. § 982(a)(1), including, but not limited to, the property listed below:

[redacted]

REAL PROPERTY:

a) Real property and residence located 245 Schell Road, London, Kentucky, with all improvements and appurtenances thereon, in the names of Lonnie W. Hubbard and Meggan A. Hubbard, and recorded in Deed Book 675, page 502, Laurel County Clerk's Office;

b) Real property and residence located at 564 Shimmering Moon Drive, Somerset, Kentucky, with all improvements and appurtenances thereon, in the names of L. W. Hubbard and M. A. Hubbard, and recorded in Deed Book 926, page 508, Pulaski County Clerk's.

VEHICLES/BOATS:

a) 2015 GMC Denali Sierra, VIN: 1GT120EGXFF595773;
b) 2013 Mercedes C300, VIN: WDDGF8AB0DR261468;
c) 1971 Chevrolet Corvette, VIN: 194671S112497;
d) 2010 Bryant Boat, HULL Number: BRA22014A010;
e) 2013 Seadoo, Hull Number: YDV19278D313;
f) Trailer bearing VIN 5A7BB2126AT001173, attached to the 2010 Bryant Boat;
g) Trailer bearing VIN 1MDKNAM12FA561079, attached to the 2013 Seadoo;
h) 2013 Corvette ZR1, VIN 1G1YN2DT8D5800051;
i) 2012 Can Am Commander, VIN 3JBKGCP15CJ000229; and
j) 2014 Sea Doo, Hull YDV33435E414.

FINANCIAL ACCOUNTS:

a) T. Rowe Price Associates, Inc., Plan ID [redacted] RX Discount of Berea [redacted] SEP-IRA in the name of Lonnie Wayne Hubbard;
b) Community Trust Bank account # [redacted] in the name of RX Discount; and
c) Certificate of Deposit in the amount of $56,000 from Community Trust Bank.

By virtue of the commission of the felony offenses charged in this second superseding Indictment, any and all interest **LONNIE W. HUBBARD** have in the above-described property is vested in the United States and hereby forfeited to the United States pursuant to 21 U.S.C. § 853 and 18 U.S.C. § 982(a)(1).

If any of the property listed above, as a result of any act or omission of the

[redacted]

Defendant(s),

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the Court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty,

it is the intent of the United States to seek the forfeiture of any other property in which the defendant(s) have an interest, up to the value of the property.

A TRUE BILL

KERRY B. HARVEY
UNITED STATES ATTORNEY

PENALTIES

COUNTS 1 - 14, 16 - 59:

Oxycodone:

First Offense: Not more than 20 years imprisonment, a fine of not more than $1,000,000, and supervised release of at least 3 years

Second Offense: Not more than 30 years imprisonment, a fine of not more than $2,000,000, and supervised release of at least 6 years.

Pseudoephedrine:

Not more than 20 years imprisonment, a fine of not more than $250,000, and not more than 3 years supervised release.

COUNT 15:

First Offense: Not more than 10 years imprisonment, a fine of not more than $500,000, and supervised release of at least 2 years

Second Offense: Not more than 20 years imprisonment, a fine of not more than $1,000,000, and supervised release of at least 4 years.

COUNT 60: Not more than 20 years imprisonment, a fine of not more than $500,000.00, and supervised release of not more than 3 years.

COUNT 61: Not more than 20 years imprisonment, a fine of not more than $500,000.00, or twice the value of the funds involved in the transaction, and a term of supervised release of not more than 3 years.

COUNTS 62 - 73: Not more than 10 years imprisonment, a fine of not more than $250,000.00 and a term of supervised release of not more than 3 years.

PLUS: Forfeiture of listed assets.

PLUS: Mandatory special assessment of $100 per felony count.

PLUS: Restitution if applicable.

[redacted]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action No. 5: 15-104-SS-DCR
	)	
V.	)	
	)	
LONNIE W. HUBBARD,	)	**VERDICT FORM**
	)	
Defendant.	)	

*** *** *** ***

We the Jury unanimously find the following:

COUNT 1

With respect to Count 1 of the indictment charging Defendant Hubbard with conspiring to knowingly and intentionally distribute unlawful substances beginning on an unknown date in January 2010 and continuing through on or about December 3, 2015, we find the defendant:

Guilty X Not Guilty ___

COUNT 2

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about August 27, 2011 we find the defendant:

Guilty X Not Guilty ___

COUNT 3

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about December 11, 2012, we find the defendant:

Guilty X Not Guilty _____

COUNT 4

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about April 12, 2013, we find the defendant:

Guilty X Not Guilty _____

COUNT 5

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about July 30, 2013, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 6

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about August 12, 2013, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 8

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about April 11, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 9

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about May 10, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 10

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about June 7, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 11

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about January 20, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 12

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about February 24, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 13

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about April 6, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 14

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed pseudoephedrine on or about November 17, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 15

With respect to the charge that Defendant Hubbard illegally distributed hydrocodone on or about July 30, 2013, we find the defendant:

Guilty X Not Guilty _____

COUNT 16

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about May 3, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 17

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about June 25, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 18

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about July 23, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 19

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about August 20, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 20

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about February 15, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 21

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about March 15, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 22

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about June 25, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 23

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about July 23, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 24

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about August 20, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 25

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about October 31, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 26

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about December 1, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 27

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about February 11, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 28

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about March 8, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 29

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about April 8, 2014, we find the defendant:

Guilty _X_ Not Guilty _____

COUNT 30

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about August 7, 2014, we find the defendant:

Guilty _X_ Not Guilty _____

COUNT 31

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about September 4, 2014, we find the defendant:

Guilty _X_ Not Guilty _____

COUNT 32

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about October 1, 2014, we find the defendant:

Guilty _X_ Not Guilty _____

COUNT 33

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about October 28, 2014, we find the defendant:

Guilty _X_ Not Guilty _____

COUNT 34

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about November 25, 2014, we find the defendant:

Guilty ✓ Not Guilty ____

COUNT 35

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about August 4, 2014, we find the defendant:

Guilty ✓ Not Guilty ____

COUNT 36

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about August 29, 2014, we find the defendant:

Guilty ✓ Not Guilty ____

COUNT 37

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about September 26, 2014, we find the defendant:

Guilty ✓ Not Guilty ____

COUNT 38

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about November 24, 2014, we find the defendant:

Guilty ✓ Not Guilty ____

COUNT 39

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about August 13, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 40

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about September 10, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 41

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about October 10, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 42

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about November 10, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 43

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed oxycodone on or about April 1, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 44

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed oxycodone on or about April 30, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 45

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed oxycodone on or about June 2, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 46

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed oxycodone on or about June 17, 2015, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 48

With respect to the charge that Defendant Hubbard, aided and abetted by others, illegally distributed oxycodone on or about September 22, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 49

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about May 9, 2012, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 50

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about July 3, 2012, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 51

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about July 10, 2012, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 52

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about September 14, 2012, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 53

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about October 23, 2012, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 54

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about October 29, 2012, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 55

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about May 10, 2013, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 56

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about September 12, 2013, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 57

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about April 11, 2014, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 58

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about November 25, 2014, we, the jury, find the defendant:

Guilty ✓ Not Guilty _____

COUNT 59

With respect to the charge that Defendant Hubbard illegally distributed oxycodone on or about June 9, 2015, we find the defendant:

Guilty ✓ Not Guilty _____

COUNT 60

With respect to the charge that Defendant Hubbard opened, maintained, managed, and controlled a place for distributing pills containing oxycodone outside the scope of professional practice and not for a legitimate medical purpose, and pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufacture Methamphetamine, beginning in or about January 2010 and continuing through on or about December 3, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 61

With respect to the charge that Defendant Hubbard conspired to launder money, beginning in January 2010 and continuing through on or about December 3, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 62

With respect to the charge that Defendant Hubbard knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about April 15, 2011, we find the defendant:

Guilty X Not Guilty _____

COUNT 63

With respect to the charge that Defendant Hubbard, aided and abetted by another, knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about November 4, 2011, we find the defendant:

Guilty ✓ Not Guilty ____

COUNT 64

With respect to the charge that Defendant Hubbard knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about March 10, 2012, we find the defendant:

Guilty ✓ Not Guilty ____

COUNT 65

With respect to the charge that Defendant Hubbard, aided and abetted by another, knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about October 30, 2012, we find the defendant:

Guilty ✓ Not Guilty ____

COUNT 66

With respect to the charge that Defendant Hubbard, aided and abetted by another, knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about July 16, 2013, we find the defendant:

Guilty ✓ Not Guilty ____

COUNT 67

With respect to the charge that Defendant Hubbard, aided and abetted by another, knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about December 26, 2013, we find the defendant:

Guilty X Not Guilty _____

COUNT 68

With respect to the charge that Defendant Hubbard, aided and abetted by another, knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about May 17, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 69

With respect to the charge that Defendant Hubbard, aided and abetted by another, knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about October 30, 2014, we find the defendant:

Guilty X Not Guilty _____

COUNT 70

With respect to the charge that Defendant Hubbard, aided and abetted by another, knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about January 17, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 71

With respect to the charge that Defendant Hubbard, aided and abetted by another, knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about February 27, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 72

With respect to the charge that Defendant Hubbard, aided and abetted by another, knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about April 23, 2015, we find the defendant:

Guilty X Not Guilty _____

COUNT 73

With respect to the charge that Defendant Hubbard knowingly engaged or attempted to engage in a monetary transaction involving criminally derived property, on or about September 4, 2015, we find the defendant:

Guilty X Not Guilty _____

2/15/17
DATE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Criminal Action No. 5: 15-104-SS-DCR
	)	
V.	)	
	)	
LONNIE W. HUBBARD,	)	**JURY INSTRUCTIONS**
	)	
Defendant.	)	

INSTRUCTION NO. 1

Introduction

(1) Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.

(2) I will start by explaining your duties and the general rules that apply in every criminal case.

(3) After that, I will explain the elements, or parts, of the crimes that the defendant is accused of committing.

(4) Then, I will explain the defendant's position.

(5) Next, I will explain some rules that you must use in evaluating particular testimony and evidence.

(6) And last, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

(7) Please listen carefully to all of these instructions.

INSTRUCTION NO. 2

Jurors' Duties

(1) You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing that I have said or done during this trial was meant to influence your decision about the facts in any way.

(2) Your second duty is to take the law that I give you, apply it to the facts, and decide if the government has proved the defendant guilty beyond a reasonable doubt. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

(3) The lawyers may talk about the law during their arguments. But if what they say is different from what I say, you must follow what I say. What I say about the law controls.

(4) Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

INSTRUCTION NO. 3

Presumption of Innocence, Burden of Proof, Reasonable Doubt

(1) As you know, the defendant has pleaded not guilty to the crimes charged in the indictment. The indictment is not any evidence at all of guilt. It is just the formal way that the government tells the defendant what crime he is accused of committing. It does not even raise any suspicion of guilt.

(2) Instead, the defendant starts the trial with a clean slate, with no evidence at all against him, and the law presumes that he is innocent. This presumption of innocence stays with him unless the government presents evidence here in court that overcomes the presumption, and convinces you beyond a reasonable doubt that he is guilty.

(3) This means that the defendant has no obligation to present any evidence at all, or to prove to you in any way that he is innocent. It is up to the government to prove that he is guilty, and this burden stays on the government from start to finish. You must find the defendant not guilty unless the government convinces you beyond a reasonable doubt that he is guilty.

(4) The government must prove every element of the crimes charged beyond a reasonable doubt. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt. Possible doubts or doubts based purely on speculation are not reasonable doubts. A reasonable doubt is a doubt based on reason and common sense. It may arise from the evidence, the lack of evidence, or the nature of the evidence.

(5) Proof beyond a reasonable doubt means proof which is so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own lives. If you are convinced that the government has proved the defendant guilty beyond a reasonable doubt, say so by returning a guilty verdict. If you are not convinced, say so by returning a not guilty verdict.

INSTRUCTION NO. 4

Evidence Defined

(1) You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

(2) The evidence in this case includes only what the witnesses said while they were testifying under oath; the exhibits that I allowed into evidence; the stipulations that the lawyers agreed to; and the facts that I have judicially noticed.

(3) Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. My comments and questions are not evidence.

(4) During the trial I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record. You must completely ignore all of these things. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

(5) Make your decision based only on the evidence, as I have defined it here, and nothing else.

INSTRUCTION NO. 5

Consideration of Evidence

(1) You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

INSTRUCTION NO. 6

Direct and Circumstantial Evidence

(1) Now, some of you may have heard the terms "direct evidence" and "circumstantial evidence."

(2) Direct evidence is simply evidence like the testimony of an eyewitness which, if you believe it, directly proves a fact. If a witness testified that he saw it raining outside, and you believed him, that would be direct evidence that it was raining.

(3) Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

(4) It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, or say that one is any better evidence than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

INSTRUCTION NO. 7

Credibility of Witnesses

(1) Another part of your job as jurors is to decide how credible or believable each witness was. This is your job, not mine. It is up to you to decide if a witness's testimony was believable, and how much weight you think it deserves. You are free to believe everything that a witness said, or only part of it, or none of it at all. But you should act reasonably and carefully in making these decisions.

(2) Let me suggest some things for you to consider in evaluating each witness's testimony.

(A) Ask yourself if the witness was able to clearly see or hear the events. Sometimes even an honest witness may not have been able to see or hear what was happening, and may make a mistake.

(B) Ask yourself how good the witness's memory seemed to be. Did the witness seem able to accurately remember what happened?

(C) Ask yourself if there was anything else that may have interfered with the witness's ability to perceive or remember the events.

(D) Ask yourself how the witness acted while testifying. Did the witness appear honest? Or did the witness appear to be lying?

(E) Ask yourself if the witness had any relationship to the government or the defendant, or anything to gain or lose from the case, that might influence the witness's

testimony. Ask yourself if the witness had any bias, or prejudice, or reason for testifying that might cause the witness to lie or to slant the testimony in favor of one side or the other.

(F) Ask yourself if the witness testified inconsistently while on the witness stand, or if the witness said or did something at any other time that is inconsistent with what the witness said while testifying. If you believe that the witness was inconsistent, ask yourself if this makes the witness's testimony less believable. Sometimes it may; other times it may not. Consider whether the inconsistency was about something important, or about some unimportant detail. Ask yourself if it seemed like an innocent mistake, or if it seemed deliberate.

(G) And ask yourself how believable the witness's testimony was in light of all the other evidence. Was the witness's testimony supported or contradicted by other evidence that you found believable? If you believe that a witness's testimony was contradicted by other evidence, remember that people sometimes forget things, and that even two honest people who witness the same event may not describe it exactly the same way.

(3) These are only some of the things that you may consider in deciding how believable each witness was. You may also consider other things that you think shed some light on the witness's believability. Use your common sense and your everyday experience in dealing with other people. And then decide what testimony you believe, and how much weight you think it deserves.

INSTRUCTION NO. 8

Number of Witnesses

(1) One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

(2) Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

INSTRUCTION NO. 9

Lawyers' Objections

(1) There is one more general subject that I want to talk to you about before I begin explaining the elements of the crimes charged.

(2) The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the rules of evidence. Those rules are designed to make sure that both sides receive a fair trial.

(3) And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings are based on the rules of evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in court.

INSTRUCTION NO. 10

Introduction

(1) That concludes the part of my instructions explaining your duties and the general rules that apply in every criminal case. In a moment, I will explain the elements of the crimes that the defendant is accused of committing.

(2) But before I do that, I want to emphasize that the defendant is only on trial for the particular crimes charged in the indictment. Your job is limited to deciding whether the government has proved the crimes charged.

(3) Also keep in mind that whether anyone else should be prosecuted and convicted for these crimes is not a proper matter for you to consider. The possible guilt of others is no defense to a criminal charge. Your job is to decide if the government has proved this defendant guilty. Do not let the possible guilt of others influence your decision in any way.

INSTRUCTION NO. 11

Single Defendant Charged with Multiple Crimes

(1) The defendant has been charged with several crimes. The number of charges is no evidence of guilt, and this should not influence your decision in any way. It is your duty to separately consider the evidence that relates to each charge, and to return a separate verdict for each one. For each charge, you must decide whether the government has presented proof beyond a reasonable doubt that the defendant is guilty of that particular charge.

(2) Your decision on one charge, whether it is guilty or not guilty, should not influence your decision on any of the other charges.

INSTRUCTION NO. 12

On or About

(1) Next, I want to say a word about the dates mentioned in the indictment.

(2) The indictment charges that the crimes happened "on or about" certain dates. The government does not have to prove that the crime happened on those exact dates. But the government must prove that the crime happened reasonably close to those dates.

INSTRUCTION NO. 13

Inferring Required Mental State

(1) Next, I want to explain something about proving the defendant's state of mind.

(2) Ordinarily, there is no way that a defendant's state of mind can be proved directly, because no one can read another person's mind and tell what that person is thinking.

(3) But the defendant's state of mind can be proved indirectly from the surrounding circumstances. This includes things like what the defendant said, what the defendant did, how the defendant acted, and any other facts or circumstances in evidence that show what was in the defendant's mind.

(4) You may also consider the natural and probable results of any acts that the defendant knowingly did or did not do, and whether it is reasonable to conclude that the defendant intended those results. This, of course, is all for you to decide.

INSTRUCTION NO. 14

Deliberate Ignorance

(1) Next, I want to explain something about proving the defendant's knowledge.

(2) No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that others were using and/or distributing pseuodoephedrine or oxycodone without a legitimate medical purpose, then you may find that the defendant knew that others were using and/or distributing these substances without a legitimate medical purpose.

(3) But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that this conduct was occurring, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, negligence, or foolishness on the defendant's part is not the same as knowledge, and is not enough to convict. This, of course, is all for you to decide.

INSTRUCTION NO. 15

Actual Possession

(1) Next, I want to explain something about possession. To establish actual possession, the government must prove that the defendant had direct, physical control over the pseudoephedrine, oxycodone or hydrocodone, and knew that he had such control of it.

(2) But understand that just being present where something is located does not equal possession. The government must prove that the defendant had possession of the pseudoephedrine, oxycodone, or hydrocodone, and knew that he did, for you to find him guilty of this crime. This, of course, is all for you to decide.

INSTRUCTION NO. 16

Joint Possession

(1) One more thing about possession. The government does not have to prove that the defendant was the only one who had possession of the pseudoephedrine, oxycodone or hydrocodone. Two or more people can together share actual or constructive possession over property. And if they do, both are considered to have possession as far as the law is concerned.

(2) But remember that just being present with others who had possession is not enough to convict. The government must prove that the defendant had either actual or constructive possession of the pseudoephedrine, oxycodone or hydrocodone and knew that he did, for you to find him guilty of these crimes. This, again, is all for you to decide.

INSTRUCTION NO. 17

Conspiracy to Distribute Controlled Substances
(21 U.S.C. §§ 841(a)(1) and 846)

(1) Count 1 of the indictment charges the defendant with conspiring to knowingly and intentionally distribute or dispense two different substances:

(A) oxycodone, a controlled substance, outside the scope of professional practice and without a legitimate medical purpose in violation of 21 U.S.C. §§ 841(a)(1) and 846; and/or

(B) pseudoephedrine, a listed chemical, while knowing, intending, or having reasonable cause to believe that the pseudoephedrine will be used to manufacture a controlled substance or a listed chemical in violation of 21 U.S.C. §§ 841(c)(2) and 846.

(2) It is a crime for two or more persons to conspire, or agree, to commit a criminal act, even if they never actually achieve their goal.

(3) A conspiracy is a kind of criminal partnership. For you to find the defendant guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, that two or more persons conspired, or agreed, to commit the crime of knowingly and intentionally distributing one or both of the following:

(i) oxycodone, a controlled substance, outside the scope of professional practice and not for a legitimate medical purpose; and/or

(ii) pseudoephedrine while knowing, intending, or having reasonable cause to believe that the pseudoephedrine will be used to manufacture a controlled substance or a listed chemical; and

(B) Second, that the defendant knowingly and voluntarily joined the conspiracy. You must be convinced that the government has proved both of these elements beyond a reasonable doubt to find the defendant guilty of the conspiracy charges. Unless you unanimously agree that the defendant conspired to distribute both substances charged in Count 1, all 12 of you must find that two or more persons conspired to knowingly and intentionally distribute oxycodone, or all 12 of you must find that two or more persons conspired to knowingly and intentionally distribute pseudoephedrine.

(4) Now I will give you more detailed instructions on some of these terms:

(A) The term "**controlled substance**" means a drug or other substance included in Schedule II or III of the federal drug laws, and would include oxycodone and hydrocodone.

(B) The term "**oxycodone**" means oxycodone, its salts, isomers and salts of its isomer, or any mixture or substances containing a detectable amount of oxycodone, its salts, isomers or salts of its isomers.

(C) The term "**listed chemical**" means any list I chemical or any list II chemical.

(D) The term "**list I chemical**" means a chemical specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this subchapter and is important to the manufacture of the controlled substances, and such term includes, pseudoephedrine.

(E) The term "**distribute**" means the defendant delivered or transferred a controlled substance. The term distribute includes the actual, constructive, or attempted transfer of a controlled substance. The term distribute includes the sale of a controlled substance.

(F) The term "**deliver**" means the actual, constructive or attempted transfer of a controlled substance.

(G) The term "**dispense**" means to deliver a controlled substance to an ultimate user.

(5) Later, I will explain in more detail the criminal agreement that you must find for the first element of this charge.

INSTRUCTION NO. 18

Conspiracy to Commit Money Laundering
(18 U.S.C. §§ 1956(a)(1)(A)(i), 1956(a)(1)(B)(i), and 1956(h))

(1) Count 61 of the indictment charges that the defendant conspired to conduct financial transactions involving property that represented the proceeds of unlawful activity in violation of 18 U.S.C. § 1956.

(2) The transactions are alleged to involve the proceeds of two types of unlawful activity: first, distributing a controlled substance, hydrocodone and/or oxycodone, outside the scope of professional practice and without a legitimate medical purpose; and second, distributing a listed chemical, pseudoephedrine, while knowing, intending, or having reasonable cause to believe that the chemical would be used to manufacture a controlled substance or a listed chemical.

(3) To find the defendant guilty of conspiring to commit money laundering, the government must prove each and every one of the following elements beyond a reasonable doubt:

(A) First, two or more persons conspired, or agreed, to violate the money laundering statute; and

(B) Second, the defendant knowingly and voluntarily joined the conspiracy.

(4) A violation of the money-laundering statute would consist of the following elements:

(A) First, the defendant conducted or attempted to conduct a financial transaction.

(B) Second, the financial transaction involved property that represented the proceeds of the unlawful distribution of oxycodone, hydrocodone, and/or pseudoephedrine.

(C) Third, the defendant knew that the property involved in the financial transaction represented the proceeds of some form of unlawful activity.

(D) Fourth, the defendant conducted these transactions either:

(i) intending to promote the carrying on of the unlawful distribution of oxycodone, hydrocodone, and/or pseudoephedrine; or

(ii) knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the unlawful distribution of oxycodone, hydrocodone, and/or pseudoephedrine.

For the fourth element, the government does not have to prove that the defendant conducted these transactions both intending to promote unlawful activity and knowing that the transactions were designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of unlawful activity. Instead, all 12 of you must find that the defendant conspired to conduct a financial transaction either intending to promote the carrying on of the specified activity or all 12 of you must agree that the defendant did so knowing that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the specified unlawful activity.

(3) Now I will give you more detailed instructions on some of these terms.

(A) The term "**financial transaction**" means:

(a) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or

(b) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.

(B) The term "**financial institution**" means a currency exchanger, an issuer, redeemer, or cashier, of traveler's checks, checks, money orders, or similar instruments, a licensed sender of money, or any other person who engages as a business in the transmission of funds.

(C) The word "**conducts**" includes initiating, concluding, or participating in initiating or concluding a transaction.

(D) The word "**proceeds**" means any property derived from, obtained, retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

(E) The phrase "**knew that the property involved in a financial transaction represents the proceeds of some unlawful activity**" means that the defendant knew the property involved in the transaction represented the proceeds of some form, although not necessarily which form, of activity that constitutes a felony under state or federal law. The government does not have to prove that the defendant knew that the property involved represented proceeds of a felony as long as he knew the property involved proceeds of some form of unlawful activity.

INSTRUCTION NO. 19

Agreement

(1) Now I will give you more detailed instructions that apply to the conspiracy counts, Count 1 (conspiracy to distribute unlawful substances) and Count 61 (conspiracy to launder money). You must find these requirements as to each conspiracy.

(2) With regard to the first element—a criminal agreement—the government must prove that two or more persons conspired, or agreed, to cooperate with each other to commit the crime described in Count 1 and Count 61, respectively.

(3) This does not require proof of any formal agreement, written or spoken. Nor does this require proof that everyone involved agreed on all the details. But proof that people simply met together from time to time and talked about common interests, or engaged in similar conduct, is not enough to establish a criminal agreement. These are things that you may consider in deciding whether the government has proved an agreement. But without more they are not enough.

(4) What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to commit the crimes described in Count 1 and in Count 61.

(5) An agreement can be proved indirectly, by facts and circumstances which lead to a conclusion that an agreement existed. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

INSTRUCTION NO. 20

Defendant's Connection to the Conspiracy

(1) If you are convinced that there was a criminal agreement, then you must decide whether the government has proved that the defendant knowingly and voluntarily joined that agreement. The government must prove that the defendant knew the conspiracy's main purpose, and that the defendant voluntarily joined it intending to help advance or achieve its goals.

(2) This does not require proof that a defendant knew everything about the conspiracy, or everyone else involved, or that he was a member of it from the very beginning. Nor does it require proof that the defendant played a major role in the conspiracy, or that his/her connection to it was substantial. A slight role or connection may be enough.

(3) But proof that the defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he approved of what was happening or did not object to it. Similarly, just because the defendant may have done something that happened to help a conspiracy does not necessarily make him a conspirator. These are all things that you may consider in deciding whether the government has proved that the defendant joined a conspiracy. But without more they are not enough.

(4) A defendant's knowledge can be proved indirectly by facts and circumstances which lead to a conclusion that he knew the conspiracy's main purpose. But it is up to the government to convince you that such facts and circumstances existed in this particular case.

INSTRUCTION NO. 21

Unindicted, Unnamed, or Separately Tried Co-Conspirators

(1) Now, some of the people who may have been involved in these events are not on trial. This does not matter. There is no requirement that all members of a conspiracy be charged and prosecuted, or tried together in one proceeding.

(2) Nor is there any requirement that the names of the other conspirators be known. An indictment can charge the defendant with a conspiracy involving people whose names are not known, as long as the government can prove that the defendant conspired with one or more of them. Whether they are named or not does not matter.

INSTRUCTION NO. 22

Venue

(1) Some of the events that you have heard about happened in other places. There is no requirement that the entire conspiracy take place in Eastern District of Kentucky. But for you to return a guilty verdict on the conspiracy charge, the government must convince you that either the agreement or one of the overt acts took place here in the Eastern District of Kentucky.

(2) Unlike all of the other elements that I have described, this is just a fact that the government only has to prove by a preponderance of the evidence. This means the government only has to convince you that it is more likely than not that part of the conspiracy took place here.

(3) Remember that all other elements I have described must be proved beyond a reasonable doubt.

INSTRUCTION NO. 23

Pinkerton Liability for Substantive Offenses Committed by Others

(1) Count 1 of the indictment accuses the defendant of committing the crime of conspiring to unlawfully distribute controlled substances and/or a listed chemical. Count 61 of the indictment accuses the defendant of conspiring to launder money.

(2) There are two ways that the government can prove the defendant guilty of these crimes. The first is by convincing you that he personally committed or participated in this crime or crimes. The second is based on the legal rule that all members of a conspiracy are responsible for acts committed by the other members, as long as those acts are committed to help advance the conspiracy, and are within the reasonably foreseeable scope of the agreement.

(3) In other words, under certain circumstances, the act of one conspirator may be treated as the act of all. This means that all the conspirators may be convicted of a crime committed by only one of them, even though they did not all personally participate in that crime themselves.

(4) But for you to find the defendant guilty of conspiring to distribute unlawful substances and/or conspiring to launder money based on this legal rule, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the defendant was a member of the conspiracy charged in Count 1 and/or Count 61 of the Indictment.

(B) Second, that after he joined the conspiracy and, while he was still a member of it, one or more of the other members committed the crimes described in Count 1 and/or Count 61.

(C) Third, that the crime was committed to help advance the conspiracy.

(D) And fourth, that the crime was within the reasonably foreseeable scope of the unlawful project. The crime must have been one that the defendant could have reasonably anticipated as a necessary or natural consequence of the agreement.

(5) This does not require proof that the defendant specifically agreed or knew that the crime would be committed. But the government must prove that the crime was within the reasonable contemplation of the persons who participated in the conspiracy. No defendant is responsible for the acts of others that go beyond the fair scope of the agreement as the defendant understood it.

(6) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on the charge. If you have a reasonable doubt about any one of them, then the legal rule that the act of one conspirator is the act of all would not apply.

INSTRUCTION NO. 24

Distribution of a Controlled Substance
(21 U.S.C. § 841(a)(1))

(1) Count 15 of the indictment charges the defendant with the crime of distributing hydrocodone, a controlled substance, outside the scope of his professional practice and not for a legitimate medical purpose.

(2) Counts 16 through 59 of the indictment charge the defendant with the crime of distributing oxycodone, a controlled substance, outside the scope of professional practice and not for a legitimate medical purpose. Five of these counts (Counts 43, 44, 45, 46 and 48) assert that Defendant Hubbard was aided and abetted by another in committing the crimes alleged in those counts. I will give you further instructions on aiding and abetting in just a moment.

(3) For you to find the defendant guilty of these charges, you must find that the government has proved each of the following elements beyond a reasonable doubt:

(A) The defendant knowingly or intentionally distributed the controlled substance, outside the scope of professional practice and not for a legitimate medical purpose, and

(B) That the defendant knew at the time of distribution that the substance was a controlled substance.

(4) Now I will give you more detailed instructions on some of these terms.

(A) To prove that the defendant knowingly distributed the controlled substance, the defendant did not have to know that the substance was hydrocodone and/or oxycodone. It is enough that the defendant knew that it was some kind of controlled substance. Further, the

defendant did not have to know how much hydrocodone and/or oxycodone he distributed. It is enough that the defendant knew that he distributed some quantity of the controlled substance.

(B) The terms **"distribute" "deliver,"** and **"dispense"** as used in this instruction have the same definition as listed above in Instruction No. 17.

(5) If you are convinced that the government has proved all of these elements as to a particular charge or count, say so by returning a guilty verdict on this charge or count. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge or count.

INSTRUCTION NO. 25

Aiding and Abetting
(21 U.S.C. § 841(c)(2) and 18 U.S.C. § 2)

(1) Counts 2 through 14 (excluding Count 7) of the indictment accuse the defendant of distributing pseudoephedrine while knowing, intending, or having reasonable cause to believe that the pseudoephedrine would be used to manufacture a controlled substance or listed chemical. For you to find the defendant guilty of these charges, it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped or encouraged someone else to commit the crime. A person who does this is called an aider and abettor.

(2) But for you to find the defendant guilty of distributing pseudoephedrine, knowing, intending, or having reasonable cause to believe that such listed chemical would be used to manufacture a controlled substance or listed chemical, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, that the crime of distributing pseudoephedrine, knowing or having reasonable cause to believe that such listed chemical would be used to manufacture a controlled substance or listed chemical, was committed.

(B) Second, that the defendant helped to commit the crime or encouraged someone to commit the crime.

(C) And third, that the defendant intended to help commit or encourage the crime.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding

whether the government has proved that he/she was an aider and abettor, but without more it is not enough.

(4) What the government must prove is that the defendant did something to help or encourage the crime with the intent that the crime be committed.

(5) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on the particular charge or count. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of distributing pseudoephedrine while knowing, intending, or having reasonable cause to believe that the pseudoephedrine would be used to manufacture a controlled substance or listed chemical, as an aider and abettor.

Earlier, I advised you that Counts 43, 44, 45, 46 and 48 allege that Defendant Hubbard was aided and abetted by another in distributing oxycodone. The instructions that I have just given you regarding aiding and abetting concerning Counts 2 through 14 (excluding Count 7) apply to these counts (Counts 43, 44, 45, 46 and 48) as well.

INSTRUCTION NO. 26

Opening and Maintaining Drug-Involved Premises
(21 U.S.C. § 856(a)(1))

(1) Count 60 charges the defendant with opening and maintaining a drug-involved premises, Rx Discount of Berea, P.L.L.C., in violation of 21 U.S.C. § 856(a)(1).

(2) It is a crime to knowingly open and maintain any place for the purpose of manufacturing, distributing, or using any controlled substances. To find the defendant guilty of this offense, you must be convinced that the government has proved each of the following beyond a reasonable doubt:

(A) First, the defendant opened and maintained a place, Rx Discount of Berea, P.L.L.C., in Berea, Kentucky, for the purpose of distributing oxycodone, a controlled substance, outside the scope of professional practice and not for a legitimate medical purpose, or pseudoephedrine, a listed chemical, knowing, intending, or having reasonable cause to believe that it would be used to manufacture a controlled substance; and

(B) Second, the defendant knew that the place would be used for such purpose.

(3) Oxycodone is a controlled substance and pseudoephedrine is a listed chemical.

(4) To prove that the defendant "opened" and/or "maintained" the premises, the government must demonstrate that the defendant was more than a casual visitor of the premises. The government must show that the defendant had a substantial connection to and exercised control over the premises. In making this determination, you must consider factors such as whether the defendant rented or owned the premises, the amount of time that the defendant was present at the premises, the nature of the defendant's activities at the place, and whether the defendant supervised others at the premises.

(5) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of opening and maintaining drug-involved premises.

INSTRUCTION NO. 27

Transactions in Criminally-Derived Property
(18 U.S.C. § 1957)

(1) Counts 62 through 73 of the indictment charge the defendant with engaging or attempting to engage in a monetary transaction involving criminally derived property in violation of federal law. This is also referred to as money laundering. Several of these counts (Counts 63 and 65 through 72) allege that the defendant's actions were aided and abetted by another.

For you to find the defendant guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt with respect to the particular count:

(A) First, the defendant knowingly engaged [and/or] attempted to engage in a monetary transaction.

(B) Second, the monetary transaction was in property derived from specified unlawful activity.

(C) Third, the property had a value greater than $10,000.

(D) Fourth, the defendant knew that the transaction was in criminally derived property.

(E) Fifth, the monetary transaction took place within the United States.

(2) Now I will give you more detailed instructions on some of these terms.

(A) The term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument by, through, or to a financial institution in a way that affects interstate commerce.

(B) The term "**specified unlawful activity**" includes the manufacture, importation, sale, or distribution of a controlled substance or a listed chemical.

(C) The term "**criminally derived property**" means any property constituting, or derived from, proceeds obtained from a criminal offense.

(D) The word "**proceeds**" includes what is produced or derived from unlawful activity.

(E) The phrase "**knew that the property involved in a financial transaction represents the proceeds of some form of unlawful activity**" means that the defendant knew that the property involved in the transaction represented the proceeds of some form, though not necessarily which form, of activity that constitutes a felony under state or federal law. The government does not have to prove that the defendant knew that the property involved represented proceeds of a felony as long as he knew the property involved proceeds of some form of unlawful activity.

(3) If you are convinced that the government has proved all of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you must find the defendant not guilty of this charge.

INSTRUCTION NO. 28

Aiding and Abetting
(18 U.S.C. § 1957 and 18 U.S.C. § 2)

(1) Counts 63 and 65 through 72 charge the defendant with engaging or attempting to engage in a monetary transaction involving property derived from unlawful activity while aided or abetted by another. For you to find him guilty of these charges, it is not necessary for you to find that he personally committed the crime. You may also find him guilty if he intentionally helped or encouraged someone else to commit the crime. As I advised you earlier with respect to other counts, a person who does this is called an aider and abettor.

(2) But for you to find the defendant guilty of these charges as an aider and abettor, you must be convinced that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) First, the crime of engaging or attempting to engage in a monetary transaction involving property derived from unlawful activity, as I have previously defined it, was committed.

(B) Second, the defendant helped to commit the crime or encouraged someone else to commit the crime.

(C) And third, the defendant intended to help commit or encourage the crime.

(3) Proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. You can consider this in deciding whether the government has proved that he was an aider and abettor, but without more it is not enough.

(4) What the government must prove is that the defendant did something to help or encourage the crime with the intent that the crime be committed.

(5) If you are convinced that the government has proved all these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about any one of these elements, then you cannot find the defendant guilty of engaging or attempting to engage in a monetary transaction involving criminally derived property as an aider and abettor.

INSTRUCTION NO. 29

Attempt

(1) As I have noted, counts 62 through 73 of the indictment also charge the defendant with attempting to commit the crime of money laundering in violation of federal law. For you to find the defendant guilty of attempting to launder money, you must be convinced that the government has proved the following elements beyond a reasonable doubt:

(A) First, that the defendant intended to commit the crime of money laundering as I have explained and defined that offense.

(B) And second, that the defendant did some overt act that was a substantial step towards committing this crime.

(C) Merely preparing to commit a crime is not a substantial step. The defendant's conduct must go beyond mere preparation, and must strongly confirm that he intended to engage in a monetary transaction involving criminally derived property. But the government does not have to prove that the defendant did everything except the last necessary act to complete the crime. A substantial step beyond mere preparation is enough.

(2) If you are convinced that the government has proved both of these elements, say so by returning a guilty verdict on this charge. If you have a reasonable doubt about either one of these elements, then you must find the defendant not guilty.

INSTRUCTION NO. 29A

The Defendant maintains the position that the United States has failed to prove all elements of each individual count beyond a reasonable doubt. The Defendant maintains that the above applies to each individual Count in the Indictment.

INSTRUCTION NO. 30

Introduction

(1) That concludes the part of my instructions explaining the elements of the crimes and the defendant's position. Next I will explain some rules that you must use in considering some of the testimony and evidence.

INSTRUCTION NO. 31

Defendant's Testimony

1) You have heard the defendant testify. Earlier, I talked to you about the "credibility" or the "believability" of the witnesses. And I suggested some things for you to consider in evaluating each witness's testimony.

(2) You should consider those same things in evaluating the defendant's testimony.

INSTRUCTION NO. 32

Opinion Testimony

(1) You have heard the testimony of Paula York and Jeffrey Sagrecy, who testified as opinion witnesses.

(2) You do not have to accept Ms. York's or Mr. Sagrecy's opinions. In deciding how much weight to give to either one's opinions, you should consider the witness' qualifications and how she or he reached her or his conclusions. Also consider the other factors discussed in these instructions for weighing the credibility of witnesses.

(3) Remember that you alone decide how much of a witness's testimony to believe, and how much weight it deserves.

INSTRUCTION NO. 33

Impeachment of a Witness Other than Defendant by Prior Conviction

(1) You have heard the testimony of several witnesses who, before this trial, were convicted of various crimes.

(2) These earlier convictions were brought to your attention only as one way of helping you decide how believable his or her testimony was. Do not use it for any other purpose. It is not evidence of anything else.

INSTRUCTION NO. 34

Secondary-Evidence Summaries Admitted in Evidence

(1) During the trial you have seen or heard summary evidence in the form of charts, calculations and summaries. These charts, calculations and summaries were offered to assist you in understanding the evidence presented.

(2) The charts, calculations, and summaries are not evidence, and are only as valid and reliable as the underlying material they summarize.

INSTRUCTION NO. 35

Judicial Notice

Rockcastle, and Jackson

(1) I have decided to accept as proved the fact that Madison, Laurel, ~~and~~ Pulaski, are counties in Kentucky, and are within the Eastern District of Kentucky, even though no evidence was presented on this point. You may accept this fact as true, but you are not required to do so.

INSTRUCTION NO. 36

Introduction

(1) That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

(2) The first thing that you should do in the jury room is choose someone to be your foreperson. This person will help to guide your discussions, and will speak for you here in court.

(3) Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson.

(4) The exhibits that were admitted in evidence will be provided to you.

(5) One more thing about messages. Do not ever write down or tell anyone, including me, how you stand on your votes. For example, do not write down or tell anyone that you are split 6-6, or 8-4, or whatever your vote happens to be. That should stay secret until you are finished.

INSTRUCTION NO. 37

Experiments, Research, Investigation, and Outside Communications

(1) Remember that you must make your decision based only on the evidence that you saw and heard here in court.

(2) During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as cell phone, or computer, the Internet, any Internet service, or any social media website such as Facebook or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case.

INSTRUCTION NO. 38

Unanimous Verdict

(1) Your verdict, whether it is guilty or not guilty, must be unanimous.

(2) To find the defendant guilty, every one of you must agree that the government has overcome the presumption of innocence with evidence that proves his guilt beyond a reasonable doubt.

(3) To find him not guilty, every one of you must agree that the government has failed to convince you beyond a reasonable doubt.

(4) Either way, guilty or not guilty, your verdict must be unanimous.

INSTRUCTION NO. 39

Duty to Deliberate

(1) Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room.. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

(2) But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that—your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

(3) No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

(4) Listen carefully to what the other jurors have to say, and then decide for yourself if the government has proved the defendant guilty beyond a reasonable doubt.

INSTRUCTION NO. 40

Punishment

(1) If you decide that the government has proved the defendant guilty, then it will be my job to decide what the appropriate punishment should be.

(2) Deciding what the punishment should be is my job, not yours. It would violate your oaths as jurors to even consider the possible punishment in deciding your verdict.

(3) Your job is to look at the evidence and decide if the government has proved the defendant guilty beyond a reasonable doubt.

INSTRUCTION NO. 41

Verdict Form

(1) I have prepared a verdict form that you should use to record your verdict.

(2) If you decide that the government has proved a particular charge against the defendant beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. If you decide that the government has not proved a particular charge against him beyond a reasonable doubt, say so by having your foreperson mark the appropriate place on the form. Your foreperson should then sign the form, put the date on it, and return it to me.

INSTRUCTION NO. 42

Court Has No Opinion

(1) Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the government has proved the defendant guilty beyond a reasonable doubt.

INSTRUCTION NO. 43

Juror Notes

(1) Remember that if you elected to take notes during the trial, your notes should be used only as memory aids. You should not give your notes greater weight than your independent recollection of the evidence. You should rely upon your own independent recollection of the evidence or lack of evidence and you should not be unduly influenced by the notes of other jurors. Notes are not entitled to any more weight than the memory or impression of each juror.

(2) Whether you took notes or not, each of you must form and express your own opinion as to the facts of the case.

UNITED STATES DISTRICT COURT

Eastern District of Kentucky – Central Division at Lexington

UNITED STATES OF AMERICA
v.
Lonnie W. Hubbard

JUDGMENT IN A CRIMINAL CASE

Case Number: 5:15-CR-104-SS-DCR-1

USM Number: 19450-032

James D. Hodge
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☒ was found guilty on count(s) 1ss-6ss, 8ss-46ss, 48ss-73ss [DE #295] after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1), (c)(2); 846	Conspiracy to Distribute and Dispense Oxycodone and a Substance Used to Manufacture a Controlled Substance	12/03/2015	1ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	08/27/2011	2ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	12/11/2012	3ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	04/12/2013	4ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	07/30/2013	5ss

The defendant is sentenced as provided in pages 2 through 10 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☒ Count(s) 7ss, 47ss, Original Ind. [DE #1], and Superseding Ind. [DE #236] ☐ is ☒ are dismissed on the motion of the United States.

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

June 30, 2017
Date of Imposition of Judgment

Signature of Judge

Honorable Danny C. Reeves, U.S. District Judge
Name and Title of Judge

July 14, 2017
Date

DEFENDANT: Lonnie W. Hubbard
CASE NUMBER: 5:15-CR-104-SS-DCR-1

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	08/12/2013	6ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	04/11/2014	8ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	05/10/2014	9ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	06/07/2014	10ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	01/20/2015	11ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	02/24/2015	12ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	04/06/2015	13ss
21:841(c)(2) and 18:2	Aiding and Abetting the Distribution of Pseudoephedrine	11/17/2015	14ss
21:841(a)(1)	Distribution of Hydrocodone	07/30/2013	15ss
21:841(a)(1)	Distribution of Oxycodone	05/03/2014	16ss
21:841(a)(1)	Distribution of Oxycodone	06/25/2014	17ss
21:841(a)(1)	Distribution of Oxycodone	07/23/2014	18ss
21:841(a)(1)	Distribution of Oxycodone	08/20/2014	19ss
21:841(a)(1)	Distribution of Oxycodone	02/15/2014	20ss
21:841(a)(1)	Distribution of Oxycodone	03/15/2014	21ss
21:841(a)(1)	Distribution of Oxycodone	06/25/2014	22ss
21:841(a)(1)	Distribution of Oxycodone	07/23/2014	23ss
21:841(a)(1)	Distribution of Oxycodone	08/20/2014	24ss
21:841(a)(1)	Distribution of Oxycodone	10/31/2014	25ss
21:841(a)(1)	Distribution of Oxycodone	12/01/2014	26ss
21:841(a)(1)	Distribution of Oxycodone	02/11/2014	27ss
21:841(a)(1)	Distribution of Oxycodone	03/08/2014	28ss
21:841(a)(1)	Distribution of Oxycodone	04/08/2014	29ss
21:841(a)(1)	Distribution of Oxycodone	08/07/2014	30ss
21:841(a)(1)	Distribution of Oxycodone	09/04/2014	31ss
21:841(a)(1)	Distribution of Oxycodone	10/01/2014	32ss
21:841(a)(1)	Distribution of Oxycodone	10/28/2014	33ss
21:841(a)(1)	Distribution of Oxycodone	11/25/2014	34ss
21:841(a)(1)	Distribution of Oxycodone	08/04/2014	35ss
21:841(a)(1)	Distribution of Oxycodone	08/29/2014	36ss
21:841(a)(1)	Distribution of Oxycodone	09/26/2014	37ss
21:841(a)(1)	Distribution of Oxycodone	11/24/2014	38ss
21:841(a)(1)	Distribution of Oxycodone	08/13/2014	39ss
21:841(a)(1)	Distribution of Oxycodone	09/10/2014	40ss
21:841(a)(1)	Distribution of Oxycodone	10/10/2014	41ss
21:841(a)(1)	Distribution of Oxycodone	11/10/2014	42ss
21:841(a)(1) and 18:2	Aiding and Abetting the Distribution of Oxycodone	04/01/2015	43ss
21:841(a)(1) and 18:2	Aiding and Abetting the Distribution of Oxycodone	04/30/2015	44ss
21:841(a)(1) and 18:2	Aiding and Abetting the Distribution of Oxycodone	06/02/2015	45ss
21:841(a)(1) and 18:2	Aiding and Abetting the Distribution of Oxycodone	06/17/2015	46ss
21:841(a)(1) and 18:2	Aiding and Abetting the Distribution of Oxycodone	09/22/2015	48ss
21:841(a)(1)	Distribution of Oxycodone	05/09/2012	49ss
21:841(a)(1)	Distribution of Oxycodone	07/03/2012	50ss
21:841(a)(1)	Distribution of Oxycodone	07/10/2012	51ss
21:841(a)(1)	Distribution of Oxycodone	09/14/2012	52ss
21:841(a)(1)	Distribution of Oxycodone	10/23/2012	53ss
21:841(a)(1)	Distribution of Oxycodone	10/29/2012	54ss
21:841(a)(1)	Distribution of Oxycodone	05/10/2013	55ss
21:841(a)(1)	Distribution of Oxycodone	09/12/2013	56ss
21:841(a)(1)	Distribution of Oxycodone	04/11/2014	57ss

DEFENDANT: Lonnie W. Hubbard
CASE NUMBER: 5:15-CR-104-SS-DCR-1

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
21:841(a)(1)	Distribution of Oxycodone	11/25/2014	58ss
21:841(a)(1)	Distribution of Oxycodone	06/09/2015	59ss
21:856(a)(1)	Maintaining a Drug-Involved Premises	12/03/2015	60ss
18:1956(h)	Conspiracy to Commit Money Laundry	12/03/2015	61ss
18:1957	Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	04/15/2011	62ss
18:1957 and 2	Aiding and Abetting Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	11/04/2011	63ss
18:1957	Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	03/10/2012	64ss
18:1957 and 2	Aiding and Abetting Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	10/30/2012	65ss
18:1957 and 2	Aiding and Abetting Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	07/16/2013	66ss
18:1957 and 2	Aiding and Abetting Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	12/26/2013	67ss
18:1957 and 2	Aiding and Abetting Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	05/17/2014	68ss
18:1957 and 2	Aiding and Abetting Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	10/30/2014	69ss
18:1957 and 2	Aiding and Abetting Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	01/17/2015	70ss
18:1957 and 2	Aiding and Abetting Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	02/27/2015	71ss
18:1957 and 2	Aiding and Abetting Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	04/23/2015	72ss
18:1957	Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity	09/04/2015	73ss

DEFENDANT: Lonnie W. Hubbard
CASE NUMBER: 5:15-CR-104-SS-DCR-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:
Cts. 1-6, 8-14, 16-46, and 48-61: 240 Months on each Count to run concurrently with each other (but consecutive with Cts. 15 and 62-73); Cts. 15 and 62-73: 120 Months on each Count to run concurrently with each other (but consecutive with Cts. 1-6, 8-14, 16-46, and 48-61); for a total term of THREE HUNDRED SIXTY (360) MONTHS

☒ The court makes the following recommendations to the Bureau of Prisons:
It is recommended that the defendant participate in a job skills and/or vocational training program.
It is recommended that the defendant participate in a mental health program.

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

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

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 UNITED STATES MARSHAL

DEFENDANT: Lonnie W. Hubbard
CASE NUMBER: 5:15-CR-104-SS-DCR-1

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

Three Years on each Count to run concurrently, for a total term of THREE (3) YEARS

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. 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.
   ☒ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(Check, if applicable.)*
4. ☒ You shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
5. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(Check, if applicable.)*
6. ☐ You must participate in an approved program for domestic violence. *(Check, if applicable.)*

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

DEFENDANT: Lonnie W. Hubbard
CASE NUMBER: 5:15-CR-104-SS-DCR-1

STANDARD CONDITIONS OF SUPERVISION

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

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Lonnie W. Hubbard
CASE NUMBER: 5:15-CR-104-SS-DCR-1

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall submit his person, residence and curtilage, office or vehicle to a search, upon direction and discretion of the United States Probation Office.

2. The defendant shall refrain from practicing as a pharmacist during the term of supervision.

3. The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless he is in compliance with the installment payment schedule.

4. The defendant shall provide the probation officer with access to any requested financial information.

5. The defendant shall not purchase, possess, use, distribute or administer any controlled substance or paraphernalia related to controlled substances, except as prescribed by a physician and shall not frequent places where controlled substances are illegally sold, used, distributed or administered.

DEFENDANT: Lonnie W. Hubbard
CASE NUMBER: 5:15-CR-104-SS-DCR-1

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 7,100.00 ($100 per ct.)	$ N/A	$ Waived	$ Community Restitution Waived

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

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

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS $ ___ $ ___

☐ Restitution amount ordered pursuant to plea agreement $ ___

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Lonnie W. Hubbard
CASE NUMBER: 5:15-CR-104-SS-DCR-1

SCHEDULE OF PAYMENTS

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

A ☒ Lump sum payment of $ 7,100.00 due immediately, balance due

☐ not later than _____, or
☒ in accordance with ☐ C, ☐ D ☐ E, or ☒ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
Any outstanding balance owed upon commencement of incarceration shall be paid in accordance with the Federal Bureau of Prisons' Inmate Financial Responsibility Program. Any outstanding balance owed upon commencement of supervision shall be paid according to a schedule set by subsequent orders of the Court.
Criminal monetary penalties are payable to:
Clerk, U. S. District Court, Eastern District of Kentucky
101 Barr Street, Room 206, Lexington KY 40507

INCLUDE CASE NUMBER WITH ALL CORRESPONDENCE

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

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

☐ Joint and Several

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

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:
The property listed on the next page is condemned and forfeited to the United States of America pursuant to 18:982 and 21:853, to wit:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

DEFENDANT: Lonnie W. Hubbard
CASE NUMBER: 5:15-CR-104-SS-DCR-1

ADDITIONAL FORFEITED PROPERTY

REAL PROPERTY:

a) Real property and residence located at 245 Schell Road, London, Kentucky, with all improvements and appurtenances thereon, in the names of Lonnie W. Hubbard and Meggan A. Hubbard, and recorded in Deed Book 675, page 502, Laurel County Clerk's Office;
b) Real property and residence located at 564 Shimmering Moon Drive, Somerset, Kentucky, with all improvements and appurtenances thereon, in the names of L.W. Hubbard and M.A. Hubbard, and recorded in Deed Book 926, page 508, Pulaski County Clerk's Office;

VEHICLES/BOATS:

a) 2015 GMC Denali Sierra, VIN: 1GT120EGXFF595773;
b) 2013 Mercedes C300, VIN: WDDGF8AB0DR261468;
c) 1971 Chevrolet Corvette, VIN: 194671S112497;
d) 2010 Bryant Boat, HULL Number: BRA22014A010;
e) 2008 Black Kawasaki ZX1000E, VIN: JKAZXCE168A001434;
f) 2013 Seadoo, Hull Number: YDV19278D313;
g) Trailer bearing VIN 5A7BB2126AT001173, attached to the 2010 Bryant Boat;
h) Trailer bearing VIN 1MDKNAM12FA561079, attached to the 2013 Seadoo;
i) 2013 Corvette ZR1, VIN 1G1YN2DT8D5800051;
j) 2012 Can Am Commander, VIN 3JBKGCP15CJ000229; and
k) 2014 Sea Doo, Hull YDV33435E414.

CURRENCY/FINANCIAL ACCOUNTS:

a) T. Rowe Price Associates, Inc., Plan ID [redacted] RX Discount of Berea [redacted] SEP-IRA in the name of Lonnie Wayne Hubbard;
b) Community Trust Bank account # [redacted] in the name of RX Discount in the amount of $201,498.82;
c) Contents of Central Bank Account # [redacted] approximate value $58,593.52, which includes the Certificate of Deposit from Community Trust Bank in the amount of $56,000;
d) $13,210.00 in U.S. Currency from safe at 564 Shimmering Moon Drive, Somerset,

UNITED STATES OF AMERICA, Plaintiff, v. LONNIE W. HUBBARD, Defendant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION
2017 U.S. Dist. LEXIS 62982
Criminal Action No. 5: 15-104-DCR
April 26, 2017, Decided
April 26, 2017, Filed

Editorial Information: Subsequent History

Affirmed by, Request denied by, Motion granted by United States v. Hubbard, 843 Fed. Appx. 667, 2019 U.S. App. LEXIS 21311, 2019 WL 11725426 (6th Cir. Ky., July 17, 2019)Motion denied by United States v. Hubbard, 2019 U.S. App. LEXIS 36444 (6th Cir., Dec. 6, 2019)Motion denied by United States v. Hubbard, 2020 U.S. Dist. LEXIS 182088 (E.D. Ky., Oct. 1, 2020)Motion denied by United States v. Hubbard, 2021 U.S. Dist. LEXIS 72893, 2021 WL 1432215 (E.D. Ky., Apr. 15, 2021)Post-conviction proceeding at, Magistrate's recommendation at United States v. Hubbard, 2021 U.S. Dist. LEXIS 218413 (E.D. Ky., Sept. 24, 2021)

Counsel **{2017 U.S. Dist. LEXIS 1}**For **Lonnie W. Hubbard**, Defendant: James D. Hodge, LEAD ATTORNEY, Hodge Law Firm, London, KY.

For USA, Plaintiff: Lauren Tanner Bradley, Ron L. Walker, Jr., LEAD ATTORNEYS, U.S. Attorney's Office, EDKY, Lexington, KY; David Y. Olinger, Jr., Katherine A. Crytzer, U.S. Attorney's Office, EDKY, Lexington, KY.

Judges: Danny C. Reeves, United States District Judge.

Opinion

Opinion by: Danny C. Reeves

Opinion

MEMORANDUM OPINION AND ORDER

Defendant Lonnie Hubbard has moved the Court for a new trial, arguing that: (i) his convictions were not supported by sufficient evidence1 and (ii) the Court improperly admitted other act evidence in violation of Fed. R. Evid. 404(b). [Record No. 371] The government disagrees, contending that Hubbard's conviction was not against the manifest weight of the evidence and that the "other act" evidence cited by Hubbard is intrinsic to the charges and is not subject to Rule 404(b). [Record No. 372] Hubbard's motion will be denied for the reasons that follow.

I.

Hubbard was a licensed Kentucky pharmacist who owned RX Discount Pharmacy in Berea, Kentucky. He was the active pharmacist at this business and also employed relief pharmacists to assist him from time-to-time. Law enforcement began investigating Hubbard after one of the relief pharmacists**{2017 U.S. Dist. LEXIS 2}** reported Hubbard's practices regrading filling out-of-state oxycodone prescriptions.

The United States indicted Hubbard and several others in December 2015. Hubbard was charged with a total of 73 counts, including charges of conspiring to illegally distribute pseudoephedrine and oxycodone; illegally distributing pseudoephedrine; illegally distributing hydrocodone; illegally distributing oxycodone; opening and maintaining a business for the purpose of illegally distributing controlled substances and pseudoephedrine; conspiring to commit money laundering; and money laundering. The Court conducted a trial, and the jury ultimately convicted Hubbard of all of the charges presented to it.2

II.

Under Federal Rule of Criminal Procedure 33, a court "may vacate any judgment and grant a new trial if the interest of justice so requires." The rule itself does not define the "interest of justice" or identify the circumstances under which a new trial is appropriate. *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010). However, courts have determined that a defendant is entitled to a new trial where, as relevant here, the "jury's verdict was against the manifest weight of the evidence" or the district court committed a substantial legal error. *Id.* (internal quotation marks and citations**{2017 U.S. Dist. LEXIS 3}** omitted). Neither showing has been made entitling Hubbard to relief in the present case.

A. Manifest Weight of the Evidence

Sustaining a motion for a new trial based on a claim that the verdict is against the manifest weight of the evidence is appropriate "only in the extraordinary circumstance where the evidence preponderates heavily against the verdict." *United States v. Hughes*, 505 F.3d 578, 592-93 (internal quotation marks and citation omitted). A district court is permitted to assess the credibility of witnesses and weigh the evidence in making this determination. *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998).3

i. Conspiracy Charge

The indictment charges Hubbard with conspiring to distribute pseudoephedrine and oxycodone in violation of 21 U.S.C. §§ 841 and 846. [Record No. 295] This required the government to prove that Hubbard conspired with others to distribute oxycodone outside the scope of his professional practice and without a legitimate medical purpose and to distribute pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufacture a controlled substance. 21 U.S.C. §§ 841, 846. The jury was instructed that, to find Hubbard guilty of this charge, they must find that the government proved: (1) an agreement to violate the drug laws; and (2) that**{2017 U.S. Dist. LEXIS 4}** Hubbard knowingly and voluntarily joined the conspiracy.

For the agreement element, the government must prove that the participants in the conspiracy came to some form of mutual understanding regarding the illegal activity. *United States v. Pearce*, 912 F.2d 159, 161 (6th Cir. 1990). It is not necessary that the government prove a formal agreement. *United States v. Hughes*, 891 F.2d 597, 601 (6th Cir. 1989) Instead, a conspiracy can be "inferred from acts done with a common purpose" and it is sufficient for the evidence to establish some tacit or implicit understanding. *Id.* "The existence of a conspiracy may be inferred from circumstantial evidence that can reasonably be interpreted as participation in the common plan." *United States v. Martinez*, 430 F.3d 317, 330 (6th Cir. 2005) (internal quotation marks omitted). Although sales alone do not establish the agreement necessary for proof of a conspiracy, "evidence of repeat purchases from a single source and large volumes of narcotics creates an inference of conspiracy." *United States v. MacLloyd*, 526 Fed. Appx. 434, 439 (6th Cir. 2013) (citations omitted). A pharmacist may conspire to distribute controlled substances illegally "by filling prescriptions of oxycodone for the benefit of numerous drug dealers and fake patients" while knowing or having reason to know that the

individuals are obtaining the drugs for illicit use. *United States v. Green*, 818 F.3d 1258, 1275 (11th Cir. 2016).

The jury's verdict convicting Hubbard of conspiring**{2017 U.S. Dist. LEXIS 5}** to distribute oxycodone in violation of 21 U.S.C. §§ 841 and 846 is not against the manifest weight of the evidence. First, the government introduced evidence of the existence of an agreement to illegally distribute oxycodone outside the scope of professional practice and not for a legitimate medical purpose. Individuals from Kentucky testified that they would travel to other states to obtain prescriptions for pain medication. These individuals confirmed that they did not have a medical need for the pain medication but, instead, were addicts who were required to travel out-of-state to obtain prescriptions because they were unable to obtain them from doctors in Kentucky. They further reported that they would use the oxycodone or sell it on the street.

There was also ample evidence showing that Hubbard knowingly agreed to distribute oxycodone outside the scope of professional practice and not for a legitimate medical purpose, and that he voluntarily joined the conspiracy by filling these prescriptions. Many government witnesses testified to the numerous "red flags"4 suggesting that Hubbard's customers were purchasing oxycodone for illicit purposes. First, the fact that so many customers were bringing prescriptions**{2017 U.S. Dist. LEXIS 6}** for pain medication from other states was an indication that these prescriptions were illegitimate. Hubbard would require cash payments to fill out-of-state oxycodone prescriptions at inflated prices. There was also evidence that customers would request pills of a certain color, which is indicative of diversion. Simply put, some colors are more valuable than others when being sold on the street.

The evidence of Hubbard's conduct in filling prescriptions also proved that he was aware that the products were intended for illegitimate uses. Witnesses testified that Hubbard told customers not to arrive early or wait outside the pharmacy because he did not want a line in front of his business. There was also evidence that Hubbard attempted to manipulate data regarding the sale of controlled substances by limiting the number of out-of-state prescriptions that he would fill each day, and that he required customers to obtain unnecessary non-controlled medications. Additionally, the government introduced video evidence in which a customer told Hubbard that he was having trouble obtaining prescriptions for controlled substances. Hubbard then provided him with information for an out-of-state pain**{2017 U.S. Dist. LEXIS 7}** clinic, stating that this clinic was the only place he knew that was "selling any."

Based on the evidence presented during trial, the jury's verdict convicting Hubbard of conspiring to distribute oxycodone outside the scope of professional practice and not for a legitimate medical purpose was not against the manifest weight of the evidence.

Likewise, the jury's verdict convicting Hubbard of conspiring to distribute pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufacture a controlled substance was not against the manifest weight of the evidence. The government introduced evidence establishing an agreement to distribute pseudoephedrine illegally. Multiple witnesses testified that they would purchase products containing pseudoephedrine from Hubbard's pharmacy. They would then sell it to others who they knew would use it to manufacture methamphetamine or manufacture methamphetamine themselves. There was also proof that Hubbard would sell pseudoephedrine products to customers who had travelled long distances to purchase it from his pharmacy because the pharmacy had a reputation for being an easy place to purchase the product. This**{2017 U.S. Dist. LEXIS 8}** evidence demonstrated an implicit agreement to distribute pseudoephedrine while knowing or having reasonable cause to believe that it would be used to manufacture methamphetamine in violation of the drug laws.

The evidence also showed that Hubbard knowingly violated the drug laws. Hubbard sold pseudoephedrine products at inflated prices, which is indicative of knowledge that the customers were purchasing the product to manufacture methamphetamine and not for the medicinal purpose for which it is intended. Additionally, Hubbard informed a law enforcement agent that he would sell pseudoephedrine to anyone with "a pulse and an ID," indicating that he adopted a lax approach to sales that facilitated the purchase of pseudoephedrine products for the purpose of manufacturing methamphetamine. The jury's conviction for conspiracy to distribute pseudoephedrine in violation of the drug laws was not against the manifest weight of the evidence.

ii. Pseudoephedrine Charges

Hubbard was convicted of several counts of distributing pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufactured a controlled substance in violation of 21 U.S.C. § 841.5 [Record No. 295]**{2017 U.S. Dist. LEXIS 9}** Hubbard argues that his pseudoephedrine convictions cannot stand because all of his pseudoephedrine sales complied with the requirements imposed by NPLEx.6 This argument is without merit.

The evidence at trial established that Hubbard sold pseudoephedrine products that were used to manufacture methamphetamine. As previously discussed, witnesses testified that they used the pseudoephedrine that Hubbard sold them to manufacture methamphetamine, or sold it to others who used it for that purpose. Additionally, law enforcement officers testified that they investigated methamphetamine labs involving individuals who had purchased the methamphetamine precursor from Hubbard's pharmacy.

The trial evidence also established that Hubbard knew or had reason to know that he was selling pseudoephedrine products to individuals who were using it to manufacture methamphetamine. The data introduced at trial established that Hubbard sold extremely large quantities of pseudoephedrine through his small, independent pharmacy. Hubbard's drug suppliers warned him that his sales of this drug were excessive when they ended their business relationship with him. *See United States v. Warhurst*, 132 Fed. Appx. 795 (11th Cir. 2005) (concluding that the defendant had knowledge that**{2017 U.S. Dist. LEXIS 10}** he was selling pseudoephedrine illegally based in part on a "call from the compliance coordinator [that] indicate[d] that [the defendant] knew [his] mass sales were a problem").

Hubbard's sales practices also indicate that he knew that his customers were using pseudoephedrine products to manufacture methamphetamine or were selling it to others who were doing so. Witnesses testified that Hubbard charged an inflated price for pseudoephedrine products. The fact that Hubbard knew that his customers were willing to pay increased prices supports the inference that he knew that they were purchasing the pseudoephedrine products for the purpose of making methamphetamine. Witnesses also testified that Hubbard had told them that he would sell pseudoephedrine to anyone with a "pulse and an ID," suggesting that he was intentionally selling large volumes of pseudoephedrine products without regard for the purpose for which the customers were purchasing it. Likewise, it is a fair and reasonable inference that Hubbard either knew or should have known that individuals were traveling long distances to purchase pseudoephedrine from his pharmacy because they were using the product to manufacture methamphetamine rather**{2017 U.S. Dist. LEXIS 11}** than for legitimate medical purposes.

The government presented more than adequate evidence to establish that Hubbard was selling pseudoephedrine products while knowing that the products were being used to manufacture methamphetamine. Hubbard's argument based on his compliance with the limitations imposed by NPLEx does not alter this conclusion. Hubbard had the ultimate responsibility for determining

whether a particular pseudoephedrine sale was appropriate, regardless of the NPLEx limits. Simply put, if he had reason to know that a person would use the product to manufacture methamphetamine, the sale was illegal. This is true regardless of whether the specific quantities that he sold complied with the limitations imposed by NPLEx. NPLEx is designed to assist pharmacists, but it is not intended to be dispositive. Here, the evidence establishes that Hubbard sold pseudoephedrine products while knowing or having reason to know that the products were being purchased to manufacture methamphetamine. His conduct violated § 841, and it is irrelevant that he complied with NPLEx limits. Accordingly, the jury's verdict on these counts was not against the manifest weight of the evidence.

*iii. Hydrocodone**{2017 U.S. Dist. LEXIS 12}** Charge*

The indictment also charged Hubbard with one count of distributing hydrocodone outside the scope of professional practice and not for a legitimate medical purpose in violation of 21 U.S.C. § 841(a)(1). [Record No. 295] Hubbard argues that his conviction on this count is against the manifest weight of the evidence because the customer had a legitimate medical need for the medication. However, the evidence introduced at trial established facts to the contrary and the conviction on this charge was not against the manifest weight of the evidence.

The government introduced evidence establishing that Hubbard filled a hydrocodone prescription for a customer who stated that she was being weaned off the medication. However, Hubbard filled two prescriptions within a seven-day period, resulting in the customer receiving all of the drug in a short amount of time-directly contravening the physician's instructions regarding weaning. Additionally, the evidence demonstrated that Hubbard filled the prescription while knowing that it was not for a legitimate medical need. Hubbard required cash as payment for the prescription, despite the customer having insurance coverage. *See Green*, 818 F.3d at 1276 (concluding that the defendants had knowledge**{2017 U.S. Dist. LEXIS 13}** that many of the pharmacy's customers were drug dealers or using drugs illicitly in part because the customers usually paid in cash, a "tell-tale sign[] of drug abuse").

iv. Oxycodone Charges

The indictment also charges Hubbard with several counts of distributing oxycodone outside the scope of professional practice and not for a legitimate medical purpose in violation of 21 U.S.C. § 841(a)(1).7 Hubbard argues that the convictions on these counts are against the manifest weight of the evidence because the customers testified that they had a legitimate medical need for the oxycodone and their medical need was verified by MRIs that Hubbard required that they provide. However, the government introduced overwhelming evidence establishing that Hubbard distributed oxycodone illegally. His conviction on these counts was not against the manifest weight of the evidence.

The evidence relating to the circumstances surrounding the prescriptions showed that that they were not for a legitimate medical need. Many of Hubbard's customers were Kentucky residents who traveled long distances to other states to obtain oxycodone prescriptions and then bring them back to Hubbard's pharmacy to be filled. *See Green*, 818 F.3d at 1276 (noting that prescriptions**{2017 U.S. Dist. LEXIS 14}** put the defendants on "clear notice" that they were for illicit use because the customers "were traveling long distances from the prescribing physician to fill prescriptions"). The physicians prescribing the oxycodone did not specialize in pain management-one physician was a gynecologist and another was a pediatrician. *See, e.g., United States v. Darji*, 609 Fed. Appx. 320, 339 (6th Cir. 2015) (concluding that the pharmacist had illegally distributed controlled substances in part because a prescribing physician was a psychiatrist, who would not normally prescribe hydrocodone). Additionally, many of the physicians were under investigation by the DEA as a result

of their controlled substance distribution practices. *See id.*

Government witnesses testified that several aspects of the customer interactions indicated that they were obtaining oxycodone for illicit use. The prescriptions were for 15mg and 30mg doses which is some indication of illicit drug use rather than for legitimate medical need. Similarly, customers would request specific colors when having their prescriptions filled, which suggests that the pills were being diverted. Certain colors have greater street value. For these reasons, several pharmacists testified that they would not be comfortable**{2017 U.S. Dist. LEXIS 15}** filling the out-of-state prescriptions that Hubbard regularly filled. *See United States v. DeBoer*, 966 F.2d 1066, 1069 (6th Cir. 1992) (discussing evidence supporting the defendant pharmacist's conviction, including that other pharmacists testified that they would not honor the prescriptions that the pharmacist filled).

Hubbard also told his customers not to wait in line before his pharmacy opened. This is additional evidence that Hubbard was aware that this activity would call attention to his pharmacy's practices. *See Green*, 818 F.3d at 1276 (stating that the "long lines of customers" indicated that the customers were abusing their prescriptions rather than obtaining the drugs for a legitimate purpose). And Hubbard would charge customers inflated fees to fill out-of-state prescriptions and would require that they pay in cash, regardless of whether they had insurance. *See Darji*, 609 Fed. Appx. at 339 (upholding the defendant pharmacist's conviction for illegally distributing controlled substances and noting that he charged highly inflated fees and did not accept insurance). On occasion, he would bill their insurance as well.

The volume of Hubbard's oxycodone sales is also some evidence that he was distributing products outside of professional practice. Several witnesses testified that Hubbard's**{2017 U.S. Dist. LEXIS 16}** oxycodone sales numbers were staggering for an independent pharmacy in the Berea, Kentucky area. *See DeBoer*, 966 F.2d at 1069 (discussing the pharmacist defendant's abnormally large amounts of controlled substance sales, which indicated that he was selling the drug illegally). Additionally, the evidence indicated that several drug suppliers terminated their business relationship with Hubbard because they were concerned with the high volume of sales of controlled substances. Many suppliers shared these concerns with Hubbard while ending their business relationship with him. *See id.* (opining that a letter from a supplier refusing to continue selling controlled substances to the defendant "because of excessive orders which placed the supplier at risk for violation DEA regulations" supported an inference that the defendant was knowingly selling controlled substances illegally).

The government also introduced evidence that Hubbard sought to manipulate his controlled substance sales numbers. Specifically, he would limit the number of out-of-state oxycodone prescriptions per day and require customers to obtain non-controlled substance medication that they did not need. This evidence demonstrates that Hubbard was**{2017 U.S. Dist. LEXIS 17}** knowingly distributing oxycodone outside the scope of professional practice. *See Darji*, 609 Fed. Appx. at 336 (discussing the pharmacist defendant's practice of intentionally manipulating his controlled substance orders and shifting prescriptions among his three pharmacies to "avoid DEA scrutiny regarding the amount of hydrocodone coming from his pharmacies").

The evidence further demonstrates that many of Hubbard's customers did not have a legitimate medical need for oxycodone. These customers testified that they obtained oxycodone based on their addictions, and not because they had medical conditions requiring it. They did not have a medical need for the medication and they were required to travel out of state to obtain prescriptions because Kentucky doctors would not write them. The customers further stated that they would obtain their prescriptions from pain clinics where they would not be treated by a physician to determine whether they had a legitimate medical need for the medication. They would, at most, undergo a cursory

physical before being provided with a prescription.

Contrary to Hubbard's contention, the MRIs required of his customers did not establish a legitimate medical need for the pain medication.**{2017 U.S. Dist. LEXIS 18}** Instead, this was attempted cover for Hubbard. Several government witnesses testified that pharmacists are responsible for verifying that a prescription is legitimate before filling it. Pharmacists often comply with this responsibility by developing a relationship with the patient, familiarizing themselves with the patient's condition, and, if necessary, calling the prescribing physician to confirm the circumstances of the prescription. Requiring an MRI would not accomplish the goal of verifying the prescription's validity, because pharmacists are not qualified to evaluate MRIs. Rather than establish a legitimate medical need, the evidence indicated that the MRIs were designed to provide documentation suggesting that illegitimate prescriptions were in fact based on a legitimate medical need.

The jury's verdict on these counts was not against the manifest weight of the evidence.

v. Remaining Charges

The indictment also charged Hubbard with several counts of money laundering in violation of 18 U.S.C. §§ 1956(h) and 1957, and with maintaining his pharmacy for the purpose of illegally distributing oxycodone and pseudoephedrine in violation of 21 U.S.C. § 856(a)(1). Hubbard does not raise any additional challenges to these charges in**{2017 U.S. Dist. LEXIS 19}** his motion, and did not do so at trial. However, each of these offenses requires proof that Hubbard distributed drugs illegally. Hubbard presumably argues that, because the government has not established that he distributed drugs illegally, the remaining convictions are against the manifest weight of the evidence. However, based on the evidence discussed previously, the government established that Hubbard illegally distributed oxycodone and pseudoephedrine. Accordingly, it established that element of each of these charges. Hubbard has failed to demonstrate that his convictions on these charges were against the manifest weight of the evidence.

B. Substantial Legal Error

Federal Rule of Criminal Procedure 33 permits a court to "vacate any judgment and grant a new trial if the interest of justice so requires." A court may grant a new trial "where substantial legal error has occurred." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010). Courts have not clearly defined the level of "substantial error" that would warrant a new trial, but the Sixth Circuit has stated that a new trial is available where "the substantial rights of the defendant have been jeopardized by errors or omissions during trial . . . ." *Id.* (quoting *United States v. Kuzniar*, 881 F.2d 466, 470 (7th Cir. 1989)).

Hubbard argues that a new trial is appropriate because**{2017 U.S. Dist. LEXIS 20}** the Court committed a substantial legal error by admitting evidence over his objection.8 He identifies evidence that he alleges constitutes "other acts" evidence admitted in violation of Federal Rule of Evidence 404(b). Specifically, Hubbard argues that the Court erred in admitting: evidence that he sold SudoGest; a photograph of large sums of cash found in Hubbard's vehicle that was taken during a traffic stop; evidence that Hubbard failed to maintain his certification to sell pseudoephedrine; evidence of "misfills" and/or forgery relating to certain prescriptions; testimony that Hubbard loaned/fronted pills; and evidence that Hubbard improperly billed insurance.

As an initial matter, even assuming error in admitting the evidence that Hubbard cites, such error would not warrant a new trial. The government presented substantial evidence to establish Hubbard's guilt. There was no shortage of proof from which the jury was able to conclude that Hubbard was guilty of the crimes charged. Given the overwhelming proof demonstrating Hubbard's guilt, the evidence that he identifies is minor. Moreover, Hubbard has not indicated that the admission of the

evidence was so prejudicial as to amount to "jeopardiz[ing]" any substantial rights.**{2017 U.S. Dist. LEXIS 21}** Accordingly, he has not demonstrated that the admission of the evidence amounted to an injustice that would warrant a new trial.

Notwithstanding the foregoing, there was no error in admitting the evidence under Rule 404(b). Rule 404(b) provides that, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. R. Evid. 404(b)(1). However, Rule 404(b) only applies to evidence that is "extrinsic" to the crime charged, which is evidence for which there "is a lack of temporal proximity, causal relationship, or special connections between the other acts and the charged offense." *United States v. Chalmers*, 554 Fed. Appx. 440, 450 (6th Cir. 2014). In contrast, the rule does not apply to "background" evidence or evidence that is "intrinsic" to the offense(s) charged. *Id.*

Courts have explained that the "contours of what constitutes 'intrinsic' evidence are not exactly clear . . . ." *United States v. Adams*, 722 F.3d 788, 822 (6th Cir. 2013). However, "intrinsic evidence requires a connection to the charged offense." *Id.* It includes that which is "part of a single criminal episode. Rule 404(b) is not implicated when the other crimes or wrongs evidence is part of a continuing pattern of illegal activity." *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995). The Sixth Circuit has indicated that whether evidence**{2017 U.S. Dist. LEXIS 22}** is intrinsic depends on whether there is "temporal proximity, causal relationship, or spatial connections between the other acts and the charged offense." *Chalmers*, 554 Fed. Appx. at 450, 451.

Here, the evidence in issue was intrinsic because of the close temporal, spatial, and causal link between it and the offenses charged. The evidence in question was not subject to Rule 404(b) and the Court did not err by admitting it. Hubbard's argument regarding this evidence fails.

During the period charged, Hubbard sold over 1,000 100-count bottles of SudoGest, despite the bottles' being labeled "not for retail sale." A witness testified that he purchased a bottle of the product from Hubbard and used it to manufacture methamphetamine. The indictment charged Hubbard with conspiracy to distribute pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufacture methamphetamine. Evidence that Hubbard distributed bottles of pseudoephedrine that were not for retail use and to individuals who used them to manufacture methamphetamine is direct evidence of Hubbard's guilt regarding the conspiracy charge. Accordingly, it is intrinsic evidence that is not subject to Rule 404(b).

The government also presented photographs**{2017 U.S. Dist. LEXIS 23}** of a bank bag of currency taken during an unrelated traffic stop. This evidence is intrinsic to the hydrocodone and oxycodone charges because, as previously discussed, the fact that Hubbard required his customers to pay cash for prescriptions indicated that he was knowingly distributing the pills outside of the scope of professional practice and not for a legitimate medical purpose. The photographs of cash were evidence of the large amounts of cash that Hubbard was collecting at his pharmacy and thus were intrinsic evidence that went directly to proving that Hubbard was filling a large number of illegitimate oxycodone prescriptions. These photographs also were intrinsic evidence regarding the money laundering charges.

There was a temporal, spatial, and causal proximity between the evidence relating to Hubbard's failure to maintain his certification to sell pseudoephedrine and the offenses charged. The government introduced evidence that Hubbard failed to maintain his certification during the time charged in the conspiracy count. The certification evidence was temporally related to this charge. It was also spatially and causally related because it dealt with the manner in which Hubbard**{2017 U.S. Dist. LEXIS 24}** conducted business in his pharmacy, which is where he sold all of the pseudoephedrine on which the offenses charged were based.

The government also introduced evidence that Hubbard forged and filled a prescription by signing an oxycodone prescription that the prescribing doctor had neglected to sign and also increasing its strength. Forging a doctor's signature and altering a prescription is outside the scope of professional practice for a pharmacist. Accordingly, this evidence was direct proof of the crime charged and was intrinsic evidence of that offense.

Evidence that Hubbard was loaning and fronting pills was also directly related to the crimes charged. The government presented evidence that Hubbard would provide customers with partial fills of their oxycodone prescriptions before the date for filling that the prescription itself provided. Pharmacist witnesses testified that they would not engage in this practice because they are not permitted to fill prescriptions prior to the date that they are set to be filled. This evidence demonstrated that Hubbard was distributing oxycodone outside the scope of professional practice, as charged in the indictment.

Finally, evidence that Hubbard**{2017 U.S. Dist. LEXIS 25}** improperly billed Medicare and Medicaid for various prescriptions was intrinsic to the crimes charged. When filling out-of-state oxycodone prescriptions, Hubbard would charge inflated cash prices and also bill the customer's insurance. Requiring cash payments was direct evidence that Hubbard was knowingly distributing oxycodone outside the scope of professional practice and not for a legitimate medical purpose. Additionally, the conduct was temporally related to crimes charged because it occurred contemporaneously with the offenses. It was also spatially and causally related because it occurred in the same pharmacy from which Hubbard was illegally distributing controlled substances and also dealt with the manner in which he was distributing those substances.

For these reasons, the evidence that Hubbard identifies in his motion for a new trial was intrinsic to the offenses charged. Accordingly, Rule 404(b) does not apply and Hubbard's argument that the evidence was admitted improperly fails.

III.

For the foregoing reasons, it is hereby

ORDERED that Hubbard's motion for a new trial [Record No. 371] is **DENIED**.

This 26th day of April, 2017.

Signed By:

/s/ Danny C. Reeves

United States District Judge

Footnotes

1

As will be discussed, Hubbard incorrectly makes his argument by reference to the sufficiency of the evidence. Sufficiency of the evidence is the standard that is applicable to motions for acquittal under Fed. R. Crim. P. 29. The standard applicable to a motion for a new trial is whether the conviction is against the manifest weight of the evidence.

2

The government dismissed some of the counts in the indictment before the case was submitted to the jury.

3

Hubbard often refers to the "sufficiency" of the evidence in his motion for a new trial. However, the sufficiency of the evidence is the standard of review applicable to a motion for an acquittal under Rule 29. *United States v. Hughes*, 505 F.3d 578, 592 (6th Cir. 2007). In contrast, the standard that applies for a motion for a new trial under Rule 33 is whether the jury's verdict is against the manifest weight of the evidence. *Id.* Because Hubbard filed a motion for a new trial, that is the standard under which the Court will evaluate his motion. In any event, for the reasons discussed below, there is also sufficient evidence upon which a reasonable trier of fact could have relied to convict Hubbard of the crimes charged.

4

As explained at trial, the DEA has identified numerous red flags, which indicate that a pharmacist's practices in selling controlled substances and/or listed chemicals may violate the drug laws.

5

Some of the counts of the indictment charged the illegal distribution of pseudoephedrine while aided and abetted by others in violation of 18 U.S.C. § 2. Because of the generalized nature of Hubbard's argument, this distinction is not relevant for purposes of this analysis.

6

NPLEx is a system that pharmacists use to assist them in selling pseudoephedrine products. The system imposes limits on the quantity of pseudoephedrine that an individual customer is permitted to purchase in a day or a month. Pharmacists enter a customer's information into the system and the system indicates whether the customer is permitted to purchase the pseudoephedrine.

7

Some of the oxycodone counts charged Hubbard with distribution, aided and abetted by others. This distinction is not relevant for purposes of addressing Hubbard's argument.

8

Hubbard also makes a brief argument that a new trial is appropriate because "essential elements were not proven in the trial," which raises the same challenge as his argument relating to the adequacy of the evidence supporting his convictions. For the reasons outlined in the prior section, the government introduced evidence establishing all elements of the crimes charged. This argument lacks merit.

UNITED STATES OF AMERICA, Plaintiff/Respondent, v. LONNIE W. HUBBARD, Defendant/Movant.
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, CENTRAL DIVISION
2021 U.S. Dist. LEXIS 217626
Criminal Action No. 5: 15-104-DCRandCivil Action No. 5: 21-090-DCR
November 10, 2021, Decided
November 10, 2021, Filed

Editorial Information: Prior History

United States v. Hubbard, 2021 U.S. Dist. LEXIS 218413 (E.D. Ky., Sept. 24, 2021)

Counsel **{2021 U.S. Dist. LEXIS 1}Lonnie W. Hubbard**, Petitioner (5:21-cv-00090-DCR-HAI), Pro se, Bruceton Mills, WV.

For USA, Plaintiff (5:15-cr-00104-DCR-1): Lauren Tanner Bradley, Ron L. Walker , Jr., LEAD ATTORNEYS, David Y. Olinger, Jr., U.S. Attorney's Office, EDKY, Lexington, KY.

Judges: Danny C. Reeves, Chief United States District Judge.

Opinion

Opinion by: Danny C. Reeves

Opinion

MEMORANDUM OPINION AND ORDER

Defendant/Movant Lonnie Hubbard, a former pharmacist from Berea, Kentucky, was convicted of 71 counts during an eight-day jury trial that began on February 6, 2017. [Record Nos. 350 and 388] Thereafter, Hubbard was sentenced to a 360-month term of imprisonment, to be followed by a 3-year term of supervised release. [Record No. 388, pp. 4-5]

Hubbard has now filed a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. [Record No. 499] The motion was referred to a United States Magistrate Judge for review and issuance of a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). On September 24, 2021, United States Magistrate Judge Hanly A. Ingram issued a Recommended Disposition, recommending that Hubbard's motion be denied. [Record No. 518] Hubbard filed timely objections. [Record No. 521]

Although this Court must make a *de novo* determination of those**{2021 U.S. Dist. LEXIS 2}** portions of the Magistrate Judge's recommendations to which timely objections are made, 28 U.S.C. § 636(b)(1)(C), "[i]t does not appear that Congress intended to require district court review of a magistrate's factual or legal conclusions, under a *de novo* or any other standard, when neither party objects to those findings." *Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). The undersigned has nonetheless carefully reviewed all relevant portions of the record and concludes that Hubbard's claims are entirely without merit. As a result, the Magistrate Judge's

Recommended Disposition will be adopted and Hubbard's motion will be denied.

I. Background

Hubbard was a pharmacist licensed to practice in Kentucky with over 7 years of professional experience prior to the events underlying this case. [Record No. 393, ¶¶ 28, 111] In 2009, he organized Rx Discount, PLLC, a pharmacy in Berea, Kentucky which he owned and operated through 2015. [*Id.* at ¶ 110.] Rx Discount dispensed, among other things, pseudoephedrine, oxycodone, and hydrocodone.

Drug wholesale distributors alerted Hubbard that his customers were likely diverting pseudoephedrine to manufacture methamphetamine, and at least four distributors cut ties with Hubbard's business because he refused to change his**{2021 U.S. Dist. LEXIS 3}** pseudoephedrine dispensing practices. [*Id.* at ¶ 29.] Hubbard was also aware that: a number of customers had drug-related criminal records, including methamphetamine charges; customers would travel considerable distances to purchase pseudoephedrine from his pharmacy; groups of customers would come to Rx Discount to purchase pseudoephedrine in large quantities; and customers would purchase pseudoephedrine with false identification or without identification. [*Id.* at ¶ 29.] Although Rx Discount had only one location, it was the top pseudoephedrine seller among independent pharmacies in Kentucky from 2013 through 2015 and dispensed a disproportionate amount of the drug. [*See id.* at ¶ 33.] Additionally, Rx Discount charged excessively high prices for pseudoephedrine pills. [*Id.* at ¶ 29.] When a former employee confronted Hubbard about the pharmacy's pseudoephedrine sales practices, Hubbard told her that he would deduct from her pay if she cost him money. [*Id.* at ¶ 43.] And although Rx Discount's Combat Methamphetamine Epidemic Act training certification, which was necessary for pseudoephedrine sales, lapsed on several occasions between 2011 and 2014, Hubbard's pharmacy continued to dispense**{2021 U.S. Dist. LEXIS 4}** the drug during these periods. [*Id.* at ¶ 38.]

Hubbard's pharmacy also filled oxycodone prescriptions for physicians who had lost the ability to prescribe controlled substances or were under investigation by the Drug Enforcement Administration ("DEA") for unlawful prescribing. [*Id.* at ¶ 42.] Relatedly, 28% of the controlled substance prescriptions filled at Rx Discount from 2010 through 2015 were written by out-of-state providers from as far away as Florida, an astronomically high proportion compared to retail chain (5%) and local (2%) pharmacies in Madison County over the same period. [*Id.* at ¶¶ 42, 51.] Approximately 71.4% of oxycodone dosage units dispensed by Rx Discount during this period were attributable to out-of-state providers and/or providers sanctioned by the DEA. [*Id.* at ¶ 51.] Hubbard also told a confidential informant that he required customers to purchase stool softeners to dilute the narcotics he dispensed. [*Id.* at ¶ 48.] He similarly remarked that he required customers to purchase non-controlled substances in connection with controlled substances to keep the ratio of controlled substances dispensed at a low enough level to evade scrutiny from the government. [*See id.**{2021 U.S. Dist. LEXIS 5}***]

Following an investigation into these practices, the United States brought a 38-count Indictment against Hubbard, Rx Discount, and others on December 3, 2015. [Record No. 1] The grand jury returned a 65-count Superseding Indictment on July 21, 2016. [Record No. 236]

Hubbard's attorney, James D. Hodge, filed a motion for re-arraignment on September 14, 2016. [Record No. 276] According to Hodge's affidavit, he negotiated a non-binding plea agreement with the government, represented by Assistant United States Attorney Ron L. Walker, Jr., through which Hubbard would plead guilty to one charge carrying a statutory maximum of 10 years' imprisonment.1 [Record No. 507-1, pp. 1-2] Hodge considered the proposed agreement to be in his client's "best interests" and advised Hubbard to plead guilty. [*Id.*] Hodge states that he did not advise the

defendant of a specific percentage chance of winning at trial, guarantee success at trial, or express a belief that the government would drop any charges at trial. [*Id.* at p. 2.]

Hubbard agreed to the plea deal, and the matter was set for hearing on October 12, 2016. But at the beginning of the change of plea hearing, Hodge advised the Court that**{2021 U.S. Dist. LEXIS 6}** the defendant had changed his mind and did not want to plead guilty. [Record No. 517, p. 2:25-3:3] Neither Hodge, nor Hubbard advised the Court of the reason for this decision, and there was no discussion of Hubbard's desire to obtain a binding plea agreement. The hearing transcript, which totals 5 pages, reveals that the Court and the parties immediately proceeded to reschedule the trial after Hodge advised that Hubbard would withdraw from the agreement. [*Id.* at p. 3:4-4:10.]

The grand jury returned a 73-count Second Superseding Indictment on November 3, 2016. [Record No. 295] The case proceeded to trial on February 6, 2017, and Hubbard was convicted on 71 counts relating to: distribution of pseudoephedrine, oxycodone, and hydrocodone; money laundering; and maintaining a drug-involved premises.2 [Record Nos. 350 and 393, pp. 1-2] As noted, the Court imposed a 360-month term of imprisonment, to be followed by a 3-year term of supervised release on June 30, 2017. [Record No. 388, pp. 4-5]

On appeal, counsel moved to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), identifying possible issues to contest but notifying the United States Court of Appeals for the Sixth Circuit that his arguments would be frivolous.**{2021 U.S. Dist. LEXIS 7}** [Record No. 442, p. 2] The Sixth Circuit granted the motion and appointed new counsel, who also filed a motion to withdraw under *Anders*. [*Id.*] Hubbard filed two *pro se* supplemental briefs. [*Id.* at pp. 2-3.] The Sixth Circuit did not find any non-frivolous issues to support an appeal and affirmed the Court's judgment on July 17, 2019. [*Id.* at pp. 12-13.] Hubbard filed a petition for a writ of certiorari, which the Supreme Court of the United States later denied on March 30, 2020. [Record No. 455]

Hubbard's pending § 2255 motion, dated March 27, 2021, was filed by the Clerk on April 2, 2021. [Record No. 499] Hubbard contemporaneously filed a motion requesting that the undersigned recuse from consideration of the § 2255 motion. [Record No. 500] In that motion, the defendant accused the undersigned of maintaining a blanket policy prohibiting binding plea agreements. [Record No. 500] The Court issued a Memorandum Opinion and Order denying the motion for recusal, which thoroughly explained that such a policy does not exist while outlining the procedures for accepting and rejecting binding plea agreements, which were not followed in this case because no such agreement was presented to the Court. [Record No.**{2021 U.S. Dist. LEXIS 8}** 503] Hubbard also filed a motion for leave to conduct discovery, which the Magistrate Judge denied by Order issued July 6, 2021. [Record No. 508] Hubbard filed a motion for reconsideration of the Magistrate Judge's Order, which the Court denied by Memorandum Order on July 29, 2021. [Record No. 512] After considerable briefing from all parties, the § 2255 motion is now ripe for consideration on the merits.

II. Hubbard's Claims

Hubbard alleges four claims for relief in his § 2255 motion:

> (1) "Failure of trial counsel to object to improper judicial participation (A Rule 11(c)(1) violation) and judicial misconduct during plea negotiations. Failure of trial counsel to obtain a binding plea agreement";
>
> (2) Trial counsel failed to advise the defendant certain legal concepts, including "aiding and abetting, Pinkerton Liability, [] Deliberate Ignorance," and the elements of 21 C.F.R. § 1306.04(a);
>
> (3) "Trial counsel failed to object to lay opinion witness testimony that violated Rule 704(b)"; and

(4) "Trial counsel failed to object to Count 60, which failed to state an offense" and, similarly, "[t]he district court lacked subject matter jurisdiction" over Count 60.[Record No. 499]

Section 2255 permits a prisoner in custody under a federal sentence to move the court**{2021 U.S. Dist. LEXIS 9}** that imposed the sentence to vacate, correct, or set it aside on grounds that the "sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255. "A motion brought under § 2255 must allege one of three bases as a threshold standard: (1) an error of constitutional magnitude; (2) a sentence imposed outside the statutory limits; or (3) an error of fact or law that was so fundamental as to render the entire proceeding invalid." *Weinberger v. United States*, 268 F.3d 346, 351 (6th Cir. 2001).

Hubbard's claims generally, although not entirely, proceed on ineffective assistance of counsel theories. A defendant in a criminal prosecution has a constitutional right to reasonably effective assistance of counsel for his defense. U.S. Const. amend. VI. Under the two-part test announced in *Strickland v. Washington*, a defendant challenging his conviction under § 2255 must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "When deciding ineffective-assistance claims, courts need not address both components of the inquiry 'if the defendant**{2021 U.S. Dist. LEXIS 10}** makes an insufficient showing on one.'" *Campbell v. United States*, 364 F.3d 727, 730 (6th Cir. 2004).

"Whether counsel's performance was 'deficient' under the first prong is determined by reference to 'an objective standard of reasonableness'-specifically, 'reasonableness under prevailing professional norms.'" *Hendrix v. Palmer*, 893 F.3d 906, 921 (6th Cir. 2018) (quoting *Strickland*, 466 U.S. at 688). "This inquiry 'consider[s] all the circumstances' of a particular case." *Id.* (quoting *Strickland*, 466 U.S. at 688-89). "In assessing performance, 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'" *Hutchinson v. Bell*, 303 F.3d 720, 754 (6th Cir. 2002) (quoting *Strickland*, 466 U.S. at 690-91). There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689.

Regarding the second prong of the *Strickland* test, a defendant must "affirmatively prove prejudice." *Hendrix*, 893 F.3d at 921 (quoting *Strickland*, 466 U.S. at 693). "Counsel's errors must have 'actually had an adverse effect on [the defendant's] defense.'" *Id.* (quoting *Strickland*, 466 U.S. at 693).

A. Binding Plea Agreement Arguments

Hubbard first alleges that the undersigned has issued "proclamations" against binding plea agreements. [*See* Record**{2021 U.S. Dist. LEXIS 11}** No. 499-1, pp. 4-11.] His arguments range from suggestions that such a policy impacted the plea negotiations between AUSA Walker and Hodge, such that the government did not offer a binding plea agreement because it believed it was futile, to direct accusations of "Orwellian mischief" by the Court in "circumvent[ing] appellate court review by proclaiming this policy . . . off-the-record, out of open court to prevent review" and "asking other district court members to be complicit in [the] illegal scheme." [*Id.* at pp. 4, 9.] Hubbard claims that the undersigned's "policy" amounted to judicial misconduct and improper participation in plea negotiations, faulting counsel for failing to challenge the alleged policy and negotiate a binding plea agreement. [*See id.* at pp. 6-11.]

The Court addressed the majority of the defendant's accusations, which are entirely baseless, when it denied his motion requesting recusal in the April 15, 2021 Memorandum Opinion and Order. In doing so, it explained several reasons that might merit the rejection of a binding plea agreement under Rule 11(c)(3)(A) of the Federal Rules of Criminal Procedure (a decision which may benefit a defendant) and outlined the procedure that must be followed if a court decides to reject**{2021 U.S. Dist. LEXIS 12}** a binding plea agreement and would have been followed if the Court had rejected a binding plea in this case. [Record No. 503, pp. 5-6]

The undersigned also explained that there is, in fact, no blanket policy of rejecting binding plea agreements. [*Id.* at pp. 5-7.] As the Magistrate Judge's Recommended Disposition indicates, the Court has accepted binding plea agreements in the past.3 [Record No. 518, p. 6 n. 4 (citing *United States v. Carmack*, No. 6:13-013-DCR-HAI, Record No. 35 (E.D. Ky. Dec. 26, 2013).]

Hubbard's objections to the Recommended Disposition focus on the Court's alleged judicial participation in plea negotiations through its phantom policy and corresponding misconduct, rather than his ineffective assistance of counsel claims pertaining to this issue. [Record No. 521, pp. 3-4] Rule 11(c)(1) clearly prohibits judicial participation in plea discussions between parties. But "a district court [does] not improperly participate in plea negotiations where there [is] 'no indication in the record that [the court] had discussions with counsel concerning the facts of [the defendant's] case, any aspect of sentencing, or [the defendant's] possible guilt or innocence.'" *United States v. Perez-Yanez*, 511 F. App'x 532, 536 (6th Cir. 2013) (first two alterations**{2021 U.S. Dist. LEXIS 13}** added) (quoting *United States v. Rankin*, 94 F.3d 645, 1996 WL 464982, at *2 (6th Cir. 1996) (per curiam table opinion)).

The Court did not participate in plea negotiations whatsoever. No binding plea was presented to the Court such that it could take such action, and the defendant did not indicate that his desire for a binding plea agreement was the reason for his decision to proceed to trial. Indeed, the transcript of the October 12, 2016 would-be re-arraignment hearing evidences no discussion of the defendant's dissatisfaction with his inability to procure a binding plea agreement. Thus, to the extent Hubbard directly challenges the Court's conduct in this case, his arguments are frivolous.

Notwithstanding this point, the ineffective assistance of counsel arguments themselves fail on the merits. Counsel's performance regarding plea negotiations was not deficient. Hodge did not make any guarantees regarding Hubbard's chances of success at trial. And he actually negotiated a plea agreement that he believed to be in Hubbard's "best interests." [Record No. 507-1, pp. 1-2.] This deal was, at the time and certainly in retrospect, the product of effective negotiation by Hodge. And although Hubbard states that he advised Hodge that he would only accept a binding**{2021 U.S. Dist. LEXIS 14}** plea agreement capping his term of incarceration at 5 years [Record No. 499-2, p. 3], he recognized, to some extent, the value of the deal his attorney negotiated and accepted it prior to withdrawing it later at the re-arraignment hearing. Further, counsel could not be deficient in failing to object to the non-existent policy prohibiting binding plea agreements where the government did not actually offer one.

Additionally, Hubbard has not demonstrated prejudice. "[I]n the context of plea negotiations, to demonstrate prejudice, a petitioner must establish a reasonable probability that, but for counsel's unprofessional errors, the outcome of the plea process would have been different." *Byrd v. Skipper*, 940 F.3d 248, 258 (6th Cir. 2019) (citing *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)); *cf. Strickland*, 466 U.S. at 694 (explaining that "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome."). But "a defendant has no right to be offered a plea, nor a federal right that the judge accept it . . . ." *Missouri v. Frye*, 566 U.S. 134, 148, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012) (internal citations omitted). "[B]ecause there is no right to

a plea offer, where a petitioner alleges ineffective assistance of counsel prevented plea negotiations, demonstrating prejudice requires that he establish a reasonable probability that but for counsel's errors,**{2021 U.S. Dist. LEXIS 15}** the petitioner would have received a plea offer." *Byrd*, 940 F.3d at 257 (citing *Lafler v. Cooper*, 566 U.S. 156, 163-64, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *Frye*, 566 at 148-49). "[A] petitioner must also show that he would have accepted the offer, the prosecution would not have rescinded the offer, and that the trial court would not have rejected the plea agreement." *Id.* at 257 (citations omitted). "A petitioner raising this variety of *Strickland* claim thus faces a formidable standard . . . ." *Id.*

Hubbard has not met any facet of this standard. As the United States points out, it was not obligated to entertain binding plea negotiations and "Hubbard has not provided any agreement or agreed terms forming the basis of a binding plea approved by the United States Attorney that would have been submitted" to the Court. [Record No. 507, pp. 6-7] Hodge's affidavit establishes that he discussed the "potential for binding plea agreements" with AUSA Walker [Record No. 507-1, p. 1], but there is no suggestion that these discussions materialized to the extent that the Court could conclude that there is a reasonable probability that such a binding plea offer would have been made (and not rescinded) absent assumptions regarding whether the undersigned would accept the plea.

Additionally, Hubbard has not established that**{2021 U.S. Dist. LEXIS 16}** the United States would have been willing to offer a plea bargain on *his* terms, *i.e.*, an agreement that would have capped his imprisonment at five years. He states that Hodge told him that AUSA Walker "seemed willing" to agree to such an arrangement, but such speculation falls far short of indicating a reasonable probability that he would have received the plea offer he desired. [Record No. 499-2, p. 3] And while it is clear that the United States did offer a plea agreement that would have capped the defendant's term of imprisonment at 10 years, this offer does little to evidence a willingness to negotiate a 5-year binding plea.

Further, while the undersigned does not maintain a blanket policy rejecting binding plea agreements, the defendant cannot demonstrate that the Court would have accepted a plea agreement on Hubbard's terms. When parties reach a plea agreement, the "defendant is entitled to plead guilty unless the district court can articulate a sound reason for rejecting the plea." *United States v. Cota-Luna*, 891 F.3d 639, 647 (6th Cir. 2018) (quoting *United States v. White*, 308 F. App'x 910, 915 (6th Cir. 2009)). But this is not a particularly high threshold in the context of Rule 11(c)(1)(C) binding pleas.

For example, the parties in *United States v. Sabit* negotiated a binding plea agreement under Rule 11(c)(1)(C). 797 F. App'x 218, 221 (6th Cir. 2018). The district**{2021 U.S. Dist. LEXIS 17}** judge informed the parties that he "had no categorical rule against Rule 11(c)(1)(C) agreements" but could not accept the specific plea agreement because he believed that the stipulated sentence deprived him of the discretion to sentence the defendant in accordance with the facts of the case. *Id.* at 221. The Sixth Circuit concluded that the "the district judge appropriately exercised his discretion," finding that "when a judge thinks the agreed-upon terms [of a binding plea agreement] unduly cabin his sentencing discretion, he can reject the agreement." *Id.* at 221-222 (citing *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007); *In re United States*, 503 F.3d 638, 641 (7th Cir. 2007)); *see also United States v. George*, 804 F. App'x 358, 362 (6th Cir. 2020) (finding no abuse of discretion where the district court rejected a binding plea that provided a sentence inconsistent with the 18 U.S.C. § 3553(a) factors). Put differently, "the district court owes zero deference to the sentencing determinations of the parties" and may reject a binding plea agreement when it "thinks it *might* want to impose a different sentence than the one chosen by the parties - even, say, a sentence different by only a month . . . ." *Cota-Luna*, 891 F.3d at 651 (Kethledge, J., concurring) (emphasis in original).

Assuming Hodge could have negotiated a binding plea agreement to Hubbard's liking or had challenged the Court's nonexistent policy against nonbinding{2021 U.S. Dist. LEXIS 18} plea agreements, the Court would not have been obligated to accept a binding plea if sound reasons counseled against it. Sound reasons may have included a belief that the sentence contemplated in the plea agreement inappropriately cabined the Court's sentencing discretion under the facts of the case and was not consistent with the § 3553(a) factors. Hubbard asks the Court to engage in a number of assumptions not supported by the record to reach this point in the analysis, but even if one credits his other arguments, he has not shown that there is a reasonable probability that the Court would have accepted a binding plea agreement on his stated terms, particularly in light of the seriousness of his criminal conduct.

At bottom, Hubbard's binding plea arguments are speculative and without merit. Hodge negotiated a plea agreement that would have, in fact, benefited the defendant, and the defendant made a conscious decision to withdraw from that agreement and proceed to trial despite counsel's advice to the contrary. He now seeks to blame the Court and Hodge for the sentencing consequences of *his* own decision. But dissatisfaction with his sentence, without more, is not *a* basis for *habeas* relief.

{2021 U.S. Dist. LEXIS 19}B. Failure to Advise of Legal Concepts

Hubbard next asserts that Hodge failed to advise him of several legal concepts relevant to his convictions, including: aiding and abetting liability; *Pinkerton* liability; deliberate ignorance; and the fact that he could have been convicted for his illegal distribution of hydrocodone and oxycodone charges (Counts 15 through 59 of the Second Superseding Indictment) under 21 U.S.C. § 841(a)(1) and 21 C.F.R. § 1306.04(a) upon a showing by the government of either distribution not for a legitimate medical purpose *or* distribution outside the course of professional practice. [Record No. 499-1, pp. 13-19]

Although he does not assert that the jury instructions pertaining to these concepts were erroneous, Hubbard alleges that Hodge failed to review the proposed instructions raising these issues until the eighth day of trial. [Record No. 513, pp. 7-10] He believes Hodge's purported failure prejudiced him because he was not informed of the law on these issues such that he could assess the case against him and take a plea. [*Id.* at pp. 8-9; Record No. 499-1, p. 19 ("Mr. Hodge should have realized Petitioner's arguments would fail and should have estimated his chances of winning at trial at zero while highly{2021 U.S. Dist. LEXIS 20} recommending a plea deal."); Record No. 513-2, p. 5 (claiming that with proper advice, "I would have known that my defensive arguments to the government's allegations were specious with little chance to succeed and negotiated a plea agreement."); Record No. 521, pp. 6-7 ("Petitioner alleges trial counsel failed to properly advise Petitioner on necessary legal concepts and implications and also that trial counsel misadvised Petitioner because of counsel's ignorance of the relevant law that led Petitioner further away from pleading guilty.").]

Hodge's affidavit states that he explained aiding and abetting liability on multiple occasions prior to trial, "including but not limited to, when we reviewed the Indictment together, when we discussed proposed plea agreements with AUSA Walker, when we went through the proposed jury instructions[] during trial and [while] planning cross-examination for multiple witnesses, and during trial preparation." [Record No. 507-1, p. 2] He also attests that while he may not have used the term *Pinkerton* liability, he explained liability for conspiracies and "showed Mr. Hubbard examples of drawings that illustrated conspiracy liability and explained that defendants{2021 U.S. Dist. LEXIS 21} can be liable for the reasonably foreseeable acts of co-defendants even if the defendant did not directly participate in said acts." [*Id.* at p. 3.]

Hodge states that while he may not have used the term deliberate ignorance prior to reviewing jury instructions with the defendant, he explained the issue while reviewing jury instructions and noted, *inter alia*, the facts that he "could not only be convicted for things he knew, but also for things he should have known" and that he could potentially be held liable for the "actions of his employees/clients both in his presence in and outside his presence." [*Id.*] Counsel further indicates that he and the defendant discussed the relationship between distributing without a legitimate medical purpose and distributing outside the course of professional practice "many times." [*Id.*] He similarly states that he and the defendant "went through every single jury instruction together multiple times" and that he "explained every one of them, answered any questions Mr. Hubbard had, and discussed potential changes and tactics in regards to jury instructions and formed a plan of action together [with the defendant]." [*Id.* at p. 4.]

And importantly, Hubbard**{2021 U.S. Dist. LEXIS 22}** faults counsel for failing to recognize the strength of the government's position on these issues and failing to advise him to plead guilty. But Hodge *did* negotiate a plea deal he deemed to be in the best interests of his client and advised him to plead guilty. It was Hubbard who ultimately rejected the deal. Based on the foregoing, Hubbard is unable to demonstrate constitutionally inadequate performance.

Notwithstanding this failure, Hubbard has not demonstrated prejudice. Hubbard has not shown that he would have been able to negotiate a plea agreement suitable to him after he rejected the favorable agreement negotiated by counsel. [*See* Record No. 499, pp. 9-11.] His conclusory assertions that he would have negotiated a plea with better advice on these legal concepts "fall far short of showing actual prejudice." *Cross v. Stovall*, 238 F. App'x 32, 39-40 (6th Cir. 2007). He had no right to a different plea offer as a matter of course, and he cannot show that the government would have offered him another deal on terms that he found suitable. And based on his other arguments, only a binding plea agreement capping his term of imprisonment at 5 years could satisfy the defendant. Hubbard cannot demonstrate that the Court would have accepted such**{2021 U.S. Dist. LEXIS 23}** a plea.

Hubbard's objections to the Recommended Disposition challenge the proposition that he would have only accepted a binding plea had he been fully advised of the legal concepts he discusses and his likelihood of success. [Record No. 521, pp. 7-8] He claims that he would have accepted another non-binding plea had he been advised of these legal concepts. [*Id.*] He also seems to suggest that he can demonstrate prejudice because better advice would have influenced him to accept the original plea deal, an agreement which would have likely been accepted by the Court. [*Id.* at pp. 8-9.]

Put simply, these assertions are not credible. Hubbard's filings in this § 2255 proceeding have incessantly blamed counsel and the Court for his failure to obtain a binding plea agreement on *his* preferred terms. Moreover, Hubbard claims that he told counsel that he would *only* accept a binding plea on these terms. It is easy for Hubbard to now contend that he would accept any plea agreement set in front of him with information on certain legal issues. But he has not established this to be true. Instead, Hubbard has failed to demonstrate prejudice even if counsel should have provided better or earlier advice regarding**{2021 U.S. Dist. LEXIS 24}** the legal concepts he cites.

C. Failure to Object to Lay Witness Testimony that Violated Rule 704(b)

Hubbard faults his attorney for failing to object to ten separate statements by four investigators during his testimony at trial, claiming that they constituted impermissible ultimate issue testimony under Federal Rule of Evidence 704(b). [Record No. 499-1, pp. 20-24] The first five of these statements were made by Jill Lee, a pharmacist employed by the Drug Enforcement and Professional Practice Branch of the Kentucky Office of Inspector General who interviewed Hubbard.

[*See* Record Nos. 427, p. 197:8-18 and 499-1, pp. 21-22.] Specifically, Hubbard claims that Hodge should have objected to the following testimony, which was offered in the context of identifying "red flags" associated with Hubbard's practices:

(1) Lee's concern that groups of customers receiving "cookie-cutter pattern" prescriptions from Rx Discount were "[groups of] patients that are known abusers and diverters of pills" [Record No. 427, pp. 205:10-207:6];

(2) Lee's belief that customers were "probably making methamphetamine out of this product [, *i.e.*, pseudoephedrine]," based on the high price and lack of variety of pseudoephedrine products at Rx Discount [*id.{2021 U.S. Dist. LEXIS 25}* at pp. 218:11-219:8];

(3) A statement that, based on Lee's experience, "[y]ou know [those customers are] probably abusing [prescriptions], and those are the patients that you should be addressing that you shouldn't be filling prescriptions for," made when asked whether a pharmacist would normally accept payment to fill prescriptions faster or before those ordered by other patients, as Hubbard admitted to doing [*id.* at p. 221:9-21];

(4) Lee's statement that Hubbard's interview remarks indicated to her that he was "basically just ignoring the patients that were coming in there, what -- the clientele that they were abusing and diverting and still filling these prescriptions that were not legitimate prescriptions" [*id.* at 222:8-15]; and

(5) Lee's testimony that Hubbard's admission that he wanted to limit out-of-state prescriptions he filled "indicated to [her] that he probably knew that that was -- they were not legitimate prescriptions and that he shouldn't be filling them, so he was trying to limit them." [*id.* at p. 226:10-15.][Record No. 499-1, pp. 21-22.]

Hubbard claims that Hodge should have objected to testimony from Shannon Allen, a pharmacist employed as an inspector for the Kentucky**{2021 U.S. Dist. LEXIS 26}** Board of Pharmacy who also interviewed Hubbard. [*See* Record Nos. 431, pp. 8:18-9:25, 18:23-19:3 and 499-1, pp. 22-23.] Hubbard takes issue with counsel's failure to object to two pieces of Allen's testimony, which were made in the context of identifying "red flags" evident in audio recordings of her interview with Hubbard:

(1) Allen's statement, after reviewing an audio segment of Hubbard's interview, that "[w]hen a customer comes to a pharmacy to buy pseudoephed[rine], we educate all pharmacists that you do ask why -- why are you buying it? If it's for a stuffy nose, that's great. But you don't just not ask and sell it to anybody that walks up" [Record No. 431, pp. 31:23-32:2];4 and

(2) Allen's observation that "you start rearranging when people get prescriptions filled so that way you can kind of cover your tracks," made while explaining why Hubbard's "patients were told to wait to get their prescription, either that evening, [or] later the next day" [*id.* at p. 33:11-22.][Record No. 499-1, pp. 22-23]

Hubbard next complains that counsel should have objected to two statements made by Paula York, a pharmacist employed by the Kentucky Inspector General who investigates violations of**{2021 U.S. Dist. LEXIS 27}** the Kentucky Controlled Substance Act. [Record Nos. 429, p. 22:11-15 and 499-1, pp. 23-24] He specifically contests the following statements made by York:

(1) A statement that she "can't foresee any situation where you would need to prescribe a 15 milligram [oxycodone dose] and 30 milligram [oxycodone dose] together to the same patient," made in the context of describing red flags associated with unlawful prescribing and filling of prescriptions [Record No. 429, pp. 30:8-32:5-11]; and

(2) York's remark that "Lonnie Hubbard did not fulfill his corresponding responsibility by making sure the prescriptions were for a legitimate medical need on the 7,500 prescriptions that I identified," in response to a question about her "opinion as to whether Lonnie Hubbard and RX Discount were acting within the standards of professional practice of pharmacists." [*Id.* at p. 44:5-12][Record No. 499-1, pp. 23-24] Finally, Hubbard contends that his attonrey should have objected DEA Diversion Investigator Luis Altamirano's determination that individuals "traveled to these Georgia and Florida clinics to obtain controlled substances where there was no legitimate medical need, and returned to Kentucky to fill**{2021 U.S. Dist. LEXIS 28}** these prescriptions at RX Discount of Berea." [Record Nos. 425, pp 101:23-102:1 and 499-1, p. 24]

Rule 704(b) of the Federal Rules of Evidence provides that, "in a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." But "[l]aw enforcement officers may testify concerning the methods and techniques employed in an area of criminal activity and to establish 'modus operandi' of particular crimes." *United States v. Pearce*, 912 F.2d 159, 163 (6th Cir. 1990). In evaluating expert opinion testimony from a law enforcement officer under Rule 704(b), courts consider whether the witness "actually referred to the intent of the defendant or, instead, simply described in general terms the common practices of those who clearly do possess the requisite intent, leaving unstated the inference that the defendant, having been caught engaging in more or less the same practices, also possessed the requisite intent." *United States v. Combs*, 369 F.3d 925, 940 (6th Cir. 2004) (quoting *United States v. Frost*, 125 F.3d 346, 383-84 (6th Cir. 1997)).

When considered in their respective contexts, nearly all of the contested statements are investigators' conclusions based on their experiences with common practices (red flags) of pharmacists and pharmacies, like Hubbard and Rx Discount, that engage**{2021 U.S. Dist. LEXIS 29}** in unlawful conduct. The defendant broadly asserts that the ten statements were inappropriate ultimate issue testimony because they concern his knowledge and intent; however, they tend to support an *inference* of knowledge and intent without inappropriately informing the jury that he had the requisite mental state for any of the crimes charged. And some testimony, such as York's second statement, bear more on his actions than intent, while others, such as Diversion Investigator Altamirano's statement do not, standing alone, necessarily bear on the defendant's acts or mental state. Generally, the Court can find no reason why Hodge should have objected to these statements on Rule 704(b) grounds.

But even if any statement did violate the rule, the defendant has not demonstrated prejudice. As the Magistrate Judge concluded, "Hubbard fails to state why he would have been acquitted if the ten complained of statements had been objected to and excluded" and likewise "fails to provide any reasoning as to why the entirety of the other testimony provided over the course of the eight-day trial would have been insufficient for his conviction." [Record No. 518, p. 12 (citing *Brucker v. United States*, 1:08-CR-5,**{2021 U.S. Dist. LEXIS 30}** 2012 U.S. Dist. LEXIS 13987, 2012 WL 381593, at *11 (E.D. Tenn. Feb. 6, 2012) ("Nevertheless, even assuming counsel was deficient for failing to object to such testimony, [the defendant] has not demonstrated that but for counsel's failure to object to the testimony there is a reasonable probability the outcome of the trial would have been different.").]

Hubbard objects that his *pro se* motion should be construed liberally and asserts that he has argued that he would have reasonably been acquitted. [Record No. 521, pp. 10-12] But he makes no specific argument regarding the insufficiency of the other evidence at trial. And "[l]iberal construction does not require a court to conjure allegations on a litigant's behalf."5 *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004) (alteration in original) (quoting *Erwin v. Edwards*, 22 F. App'x 579, 580 (6th Cir.

2001)).

Hubbard's only attempt to specifically articulate prejudice is his assertion that Hodge's failure to object to these ten statements subjected him to plain error review on appeal. [*See, e.g.*, Record Nos. 499-1, p. 25 and 521, pp. 11-12.] What Hubbard means by this is not clear. He may be referencing the Sixth Circuit's determination that the lack of a dual-role cautionary jury instruction regarding the investigators' lay and expert opinion testimony was not plain error because: (1) the jury understood how to weigh**{2021 U.S. Dist. LEXIS 31}** these investigators' opinions due to an instruction regarding York that the Court did, in fact, give; and (2) the concerns of Lee and Allen were corroborated by other witnesses.6 [Record No. 442, pp. 6-7] If he intends to challenge this point (which is an issue separate from his Rule 704(b) challenges), he has not shown prejudice stemming from counsel's failure to act because, as the Sixth Circuit found, the jury was instructed how to evaluate mixed fact and opinion testimony and these opinions were supported by other evidence. He has not shown that, but for counsel's failure to act on this issue during trial, there is a reasonable probability that he would have been acquitted.

Alternatively, Hubbard may be asserting that he was prejudiced because he *would have been* subjected to plain error review on the Rule 704(b) issue, which was not addressed on direct appeal [*see* Record No. 442], due to counsel's failure to object to the ten statements he contests. But again, he has failed to demonstrate prejudice. He has not shown that there was a reasonable probability that the results of trial would have been different if counsel had lodged successful objections to any of them.

Hubbard's arguments regarding**{2021 U.S. Dist. LEXIS 32}** the ten statements made by investigators are without merit. Accordingly, relief is not warranted on this claim.

D. Alleged Deficiencies in Count 60

Finally, Hubbard asserts that his conviction on Count 60 should be vacated. Count 60 alleged that Hubbard:

> did knowingly and intentionally open and maintain and manage and control, whether permanently or temporarily, a place, namely, RX DISCOUNT . . . for the purpose of distributing and dispensing, outside the scope of professional practice and not for a legitimate medical purpose, a quantity of pills containing oxycodone, a Schedule II controlled substance, and pseudoephedrine, a listed chemical, in violation of 21 U.S.C. § 841(a)(l) and (t)(l), all in violation of 21 U.S.C. § 856(a)(l).[Record No. 295, p. 11] The Court instructed the jury that oxycodone is a controlled substance and pseudoephedrine is a listed chemical. [Record No. 360, p. 35] The instructions also provided that a conviction on this charge required a finding that:
>
> the defendant opened and maintained . . . Rx Discount . . . for the purpose of distributing oxycodone, a controlled substance, outside the scope of professional practice and not for a legitimate medical purpose, or pseudoephedrine, a listed chemical, knowing,**{2021 U.S. Dist. LEXIS 33}** intending, or having reasonable cause to believe that it would be used to manufacture a controlled substance.[*Id.*] The instructions indicated that Hubbard could be convicted if the jury found that he "opened, maintained, managed, and controlled a place for distributing pills containing oxycodone outside the scope of professional practice and not for a legitimate medical purpose, and pseudoephedrine while knowing, intending, or having reasonable cause to believe that it would be used to manufacture Methamphetamine . . . ." [Record No. 361, p. 13]

The relevant statute, which criminalizes the maintenance of drug-involved premises, states: "Except as authorized by this subchapter, it shall be unlawful to . . . knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing,

distributing, or using any controlled substance." 21 U.S.C. § 856(a)(1). Hubbard contends that the inclusion of pseudoephedrine in Count 60 renders the charge defective because it is a listed chemical rather than a controlled substance. [Record No. 499-1, pp. 26-28] His argument takes various, but related forms. First, he claims that Count 60 fails to state a cognizable offense.**{2021 U.S. Dist. LEXIS 34}** [*Id.* at p. 26.] Second, he asserts that the Court lacks subject matter jurisdiction over Count 60 because it failed to state an offense. [*Id.* at p. 27.] Third, he alleges that Hodge's failure to object to Count 60 constituted ineffective assistance of counsel. [*Id.* at pp. 27-28.]

The Magistrate Judge correctly found that this issue was already litigated during Hubbard's direct appeal. [Record No. 518, pp. 13-15] In a *pro se* brief on appeal, Hubbard claimed that "pseudoephedrine is not an element of § 856(a)(1)" because it is a listed chemical and that Count 60 failed to state an offense. *United States v. Hubbard*, No. 17-5853, Record No. 31, p. 18 (6th Cir. June 4, 2018). The Sixth Circuit considered, but summarily rejected this argument:

> Nor can any non-frivolous argument be raised in connection with the jury instructions on the charge of operating and maintaining a drug-involved premises, Count 60 of the indictment, or that count's failure to state an offense. The record reflects that the district court changed the instructions based on Hubbard's concerns that jurors might believe that distributing pseudoephedrine was, in and of itself, illegal.[Record No. 442, p. 8] "It is . . . well settled**{2021 U.S. Dist. LEXIS 35}** that a § 2255 motion may not be employed to relitigate an issue that was raised and considered on direct appeal absent highly exceptional circumstances, such as an intervening change in the law." *Jones v. United States*, 178 F.3d 790, 796 (6th Cir. 1999) (citing *Davis v. United States*, 417 U.S. 333, 345, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974); *Oliver v. United States*, 90 F.3d 177, 180 (6th Cir. 1996)). Hubbard cites no intervening change in law. Indeed, he cites no authority in support of his interpretation of the § 856(a)(1).

Hubbard objects that the Court must address his jurisdictional argument regardless of the Sixth Circuit's decision, arguing that it must *sua sponte* assess jurisdiction. [Record No. 521, pp. 13-14] But the Sixth Circuit found that there were not *any* non-frivolous arguments concerning this issue which, as the Magistrate Judge notes [Record No. 518, p. 14], would appear to encompass jurisdictional arguments. Additionally, his jurisdictional claim proceeds on the same argument as his argument on appeal, namely, that the inclusion of pseudoephedrine rendered the charge defective because it is not a controlled substance.

But even if this were not true, he offers no reason to vacate his conviction on a jurisdictional basis. He has presented no caselaw indicating that the charge was defective. Moreover, as the United States argues [Record No. 507, p. 16], § 856(a)(1) can be violated in a**{2021 U.S. Dist. LEXIS 36}** number of ways that do not involve using a premises to unlawfully distribute a controlled substance, including by maintaining a place for the purpose of *manufacturing* any controlled substance. The jury instructions and verdict form drew this distinction by indicating that the relevant consideration regarding pseudoephedrine was whether Hubbard knew that Rx Discount was distributing pseudoephedrine used to manufacture methamphetamine. And methamphetamine *is* a Schedule II controlled substance. *See, e.g.*, Controlled Substances - Alphabetical Order, Drug Enforcement Administration, https://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf (last visited November 8, 2021).

Hubbard also objects to the Magistrate Judge's conclusion that he "cannot show any prejudice from trial counsel's failure to raise a frivolous objection." [Record Nos. 518, p. 15 and 521, pp. 14-15] He notes that the ineffective assistance of counsel claim is different from the other Count 60 contentions in that it asserts that his Count 60 arguments were discarded on appeal as invited errors because Hodge argued for and approved the relevant wording of the jury instructions. [*See* Record No. 521,

pp. 14-15.]{2021 U.S. Dist. LEXIS 37}

A cursory reading of the Sixth Circuit's brief commentary on this issue reveals that this is not true. Hubbard's central claim, here and on appeal, is that the charge *itself*, rather than jury instructions, was defective and failed to state an offense. While the Sixth Circuit noted that the Court had changed the final instructions in accordance with counsel's concerns regarding the facial legality of pseudoephedrine distribution, it also explicitly found there to be no non-frivolous argument regarding Count 60 or its alleged failure to state an offense. By ruling on the charge itself, which is unrelated to Hodge's actions, the Sixth Circuit did not restrict its analysis to invited error considerations, if it contemplated this doctrine in the first place. *See, e.g., United States v. Demmler*, 655 F.3d 451, 458 (6th Cir. 2011) (explaining that the invited error doctrine provides that "when a party has himself *provoked* the court to commit an error, that party may not complain of the error on appeal unless that error would result in manifest injustice) (emphasis added).

Regardless, Hubbard has not met the requirements of *Strickland* for this claim. He has not shown that the inclusion of pseudoephedrine in Count 60 rendered the charge defective such{2021 U.S. Dist. LEXIS 38} that Hodge should have raised this issue. He has accordingly failed to demonstrate deficient performance or prejudice.7 Hubbard's Count 60 arguments are entirely without merit and do not warrant relief.

III. Evidentiary Hearing

Hubbard requests an evidentiary hearing regarding his § 2255 motion. [Record No. 499-1, pp. 3-4] "Unless the [§ 2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255(b). However, "no hearing is required if the petitioner's allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Arredondo v. United States*, 178 F.3d 778, 782 (6th Cir. 1999) (internal quotation marks and citation omitted).

The record in this case includes, *inter alia*, counsel's affidavit, the change of plea hearing transcript, trial transcripts, and the defendant's direct appeal. The defendant's claims are comprised of arguments that are contradicted by the record, inherently incredible, and conclusions rather{2021 U.S. Dist. LEXIS 39} than statements of fact. Therefore, the request for an evidentiary hearing will be denied.

IV. Certificate of Appealability

The Court must issue or deny a certificate of appealability when it enters a final order that is adverse to the movant in a § 2255 proceeding. Rule 11 of the Rules Governing § 2255 Proceedings for the United States District Courts; 28 U.S.C. § 2253(c)(1)(B). A certificate of appealability may be issued only when the defendant has "made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To satisfy this burden, the defendant must show that reasonable jurists could debate whether the petition should have been resolved in a different way or that the issues involved were adequate to proceed further. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). For rulings on the merits, the defendant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* When a motion is denied on procedural grounds, a certificate of appealability may issue when the defendant establishes that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

Reasonable jurists would not{2021 U.S. Dist. LEXIS 40} debate this Court's conclusions. The defendant's primary ground for relief is premised on a nonexistent policy of the Court, the Court did not meddle in plea negotiations, and the defendant has not demonstrated that his representation relating to the binding plea issue was defective or prejudicial. He also cannot demonstrate constitutionally inadequate representation for his ineffective assistance of counsel claim relating to Hodge's alleged failure to advise him of certain legal concepts and recommend a plea of guilty. The trial testimony he contests is generally acceptable under Rule 704(b) of the Federal Rules of Evidence, but even if it were not, Hubbard has not demonstrated that he was prejudiced by counsel's failure to object to it. Finally, the Count 60 defect argument has already been addressed by the Sixth Circuit, and he has not demonstrated that the charge was, in fact, defective. Further, he has not established ineffective assistance of counsel in connection with Count 60. Accordingly, no certificate of appealability will issue.

V. Conclusion

Based on the foregoing analysis and discussion, it is hereby **ORDERED** as follows:

1. Defendant/Movant Lonnie Hubbard's motion to vacate, set aside, or correct a sentence pursuant{2021 U.S. Dist. LEXIS 41} to 28 U.S.C. § 2255 [Record No. 499] is **DENIED**.

2. The Magistrate Judge's Recommended Disposition [Record No. 518] is **ADOPTED** and **INCORPORATED** here in full. Hubbard's objections [Record No. 521] are **OVERRULED**.

3. Hubbard's request for an evidentiary hearing is **DENIED**.

4. A Certificate of Appealability shall not issue.

Dated: November 10, 2021.

/s/ Danny C. Reeves

Danny C. Reeves, Chief Judge

United States District Court

Eastern District of Kentucky

Footnotes

1

Hubbard disputes Hodge's assertion that the deal would have resulted in a 10-year maximum term of imprisonment and claims that this plea agreement provided for a plea of guilty to a distribution of pseudoephedrine charge in violation of 21 U.S.C. § 841(c)(2), which would have carried a 20-year statutory maximum term of imprisonment. [Record No. 513-2, p. 2] But the § 841(c)(2) charges were first alleged in the Superseding Indictment [Record No. 236], and the proposed plea agreement presented to the United States Probation Office demonstrates that the government planned to dismiss, *inter alia*, the Superseding Indictment in exchange for a guilty plea to the § 843(a)(7) charge brought in Count 2 of the original Indictment, which carried a statutory maximum of 10 years' imprisonment. [*See* Record No. 1, pp. 5, 26] Thus, Hodge's affidavit accurately indicates that the negotiated agreement would have resulted in a 10-year maximum term of imprisonment.

2

The other two counts of the Second Superseding Indictment were dismissed upon motion of the

United States at trial. [Record No. 356]
3

Hubbard's objections acknowledge that the undersigned may not refuse to consider or reject "all" binding plea agreements in light of the *Carmack* case, but he continues to allege that the undersigned has a policy of doing so. [Record No. 521, p. 2, n. 1] Needless to say, this concession weakens his argument.
4

Hubbard's argument regarding the propriety of this particular statement is not entirely clear. He variously indicates that, consistent with his overarching argument, it was improper ultimate issue testimony, while also asserting that Allen misstated the law by indicating that he had a "legal duty" to ask every customer why he sought to purchase pseudoephedrine. [*See* Record Nos. 499-1, pp. 22-25 and 521, pp. 12-13.] He additionally claims that this "legal duty" testimony misled the Court during sentencing proceedings and requests an evidentiary hearing on this specific issue to determine whether he should be resentenced. [Record No. 521, pp. 12-13] But Hubbard misconstrues Allen's statement. She did not testify about such a "legal duty," as this statement, like those of Lee, York, and Altamirano, concerned "red flags" evident in facts revealed during the investigation of his practices. [*See* Record No. 431, pp. 31:22-32:2.]
5

Hubbard's objections include a recurring rejoinder that the Court should construe his filings liberally when assessing his arguments of prejudice. [Record No. 521, pp. 6-7, 11-12] In Hubbard's estimation, liberal construction means that the Court should grant relief despite the fact that he has not demonstrated prejudice. But this is not the applicable standard. He is responsible for affirmatively demonstrating prejudice. *Hendrix*, 893 F.3d at 921.
6

It seems likely that this is what Hubbard references when he discusses the plain error prejudice because he repeatedly emphasizes that these investigators were lay witnesses. [*See, e.g.*, Record No. 499-1, pp. 19-25.]
7

It is also worth noting that Hubbard does not, and cannot reasonably, contest that he could have been convicted for maintaining a premises for the purpose of unlawfully distributing oxycodone under § 856(a)(1) as charged in the Second Superseding Indictment. [*See* Record No. 295, p. 11.]

LONNIE W. HUBBARD, Petitioner, v. S. BROWN, Acting Warden, Respondent.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
2022 U.S. Dist. LEXIS 232666
Civil Action No. 5:22-CV-196
December 28, 2022, Decided
December 28, 2022, Filed

Editorial Information: Subsequent History

Affirmed by, Habeas corpus proceeding at Hubbard v. Brown, 2023 U.S. App. LEXIS 19501 (4th Cir. W. Va., July 28, 2023)

Editorial Information: Prior History

Hubbard v. Brown, 2022 U.S. Dist. LEXIS 207045, 2022 WL 16942252 (N.D. W. Va., Oct. 19, 2022)

Counsel **{2022 U.S. Dist. LEXIS 1}Lonnie W. Hubbard**, Petitioner, Pro se, BRUCETON MILLS, WV.

Judges: JOHN PRESTON BAILEY, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: JOHN PRESTON BAILEY

Opinion

ORDER RE-ADOPTING REPORT AND RECOMMENDATIONS

The above referenced case is before this Court upon Magistrate Judge Mazzone's recommendation that petitioner's Petition for Habeas Corpus Pursuant to 28 U.S.C. § 2241 [Doc. 1] be denied and dismissed without prejudice. For the reasons that follow, this Court will adopt the R&R.

I. BACKGROUND

Petitioner is a federal inmate housed at FCI Hazleton and is challenging the legality of his conviction from the Eastern District of Kentucky.1 On December 3, 2015, July 21, 2016, and November 3, 2016, petitioner was charged in a series of indictments with a total of seventy-three (73) counts related to drug distribution while petitioner was a registered pharmacist licensed to practice in Kentucky. During an eight day trial, the United States moved to dismiss two of the counts, and at the end of the trial petitioner was found guilty on all remaining counts. On June 30, 2017, petitioner was sentenced to a term of three-hundred and sixty months imprisonment for one count of conspiracy to distribute and dispense oxycodone and a substance used to manufacture**{2022 U.S. Dist. LEXIS 2}** a controlled substance in violation of 21 U.S.C. § 846; twelve counts of aiding and abetting the distribution of pseudoephedrine in violation of 21 U.S.C. § 841(c)(2) and 18 U.S.C. § 2; one count of distribution of hydrocodone in violation of 21 U.S.C. § 841(a)(1); thirty-eight counts of distribution of oxycodone in violation of 21 U.S.C. § 841(a)(1); five counts of aiding and abetting the distribution of oxycodone in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; one count of maintaining a drug-involved premise in violation of 21 U.S.C. § 856(a)(1); one count of conspiracy to commit

money laundry in violation of 18 U.S.C. § 1956(h); three counts of engaging in monetary transactions in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957; and nine counts of aiding and abetting in monetary transactions in property derived from specified unlawful activity in violation of 18 U.S.C. § 1957 and 2. Petitioner appealed, but the Sixth Circuit affirmed the judgment of the district court. The Supreme Court denied his petition for writ of certiorari.

On April 2, 2021, petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody Under 28 U.S.C. § 2255, in which he alleged ineffective assistance of counsel. The district court denied the petition and the Sixth Circuit denied a certificate of appealability.**{2022 U.S. Dist. LEXIS 3}**

II. STANDARD OF REVIEW

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the magistrate judge's findings to which objection is made. However, the Court is not required to review, under a *de novo* or any other standard, the factual or legal conclusions of the magistrate judge as to those portions of the findings or recommendation to which no objections are addressed. ***Thomas v. Am***, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). Nor is this Court required to conduct a *de novo* review when the party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." ***Orpiano v. Johnson***, 687 F.2d 44, 47 (4th Cir. 1982).

In addition, failure to file timely objections constitutes a waiver of *de novo* review and the right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); ***Snyder v. Ridenour***, 889 F.2d 1363, 1366 (4th Cir. 1989); ***United States v. Schronce***, 727 F.2d 91, 94 (4th Cir. 1984). *Pro se* filings must be liberally construed and held to a less stringent standard than those drafted by licensed attorneys, however, courts are not required to create objections where none exist. ***Haines v. Kerner***, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); ***Gordon v. Leeke***, 574 F.2d 1147, 1151 (4th Cir. 1971).

Here, objections to Magistrate Judge Mazzone's R&R were due within fourteen (14) days of receipt, pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure. No objections were filed and this Court entered an order Adopting the R&R. *See* [Doc. 9]. Petitioner informed this Court that**{2022 U.S. Dist. LEXIS 4}** he never received the R&R. *See* [Doc. 10 & 11]. This Court permitted petitioner to file his objections by December 20, 2022. *See* [Doc. 13]. Petitioner filed his objections [Doc. 15] on December 19, 2022. Accordingly, this Court will review the portions of the R&R to which objection was filed under a *de novo* standard of review. The remainder of the R&R will be reviewed for clear error.

III. DISCUSSION

In the petition, petitioner challenges the validity of his conviction under § 841 following the decision in ***Ruan v. United States***, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022). Petitioner specifically claims that in light of the ***Ruan*** decision, the crimes for which he was convicted are no longer deemed criminal. *See* [Doc. 1]. Petitioner contends that he has met all three prongs of the test set forth in ***In re Jones***, 226 F.3d 328 (4th Cir. 2000). In particular, he contends that he met the second prong of ***Jones*** because subsequent to his appeal and first § 2255 motion, the ***Ruan*** case was decided and his convictions under § 841 should therefore be reversed. Petitioner also contends that the remaining convictions, for conspiracy, maintaining a drug-involved premise, and money laundering, are all dependent on the convictions under § 841. For relief, petitioner asks this Court to vacate his convictions.

21 U.S.C. § 841 makes it unlawful, "except**{2022 U.S. Dist. LEXIS 5}** as authorized, . . . for any

person to knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance." In ***Ruan***, the Supreme Court held that "§ 841's 'knowingly or intentionally' *mens rea* applies to the 'except as authorized' clause. This means that once a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." ***Ruan***, 142 S. Ct. at 2376.

Generally, 28 U.S.C. § 2255 provides the exclusive means for a prisoner in federal custody to test the legality of his detention. However, § 2255(e) contains a savings clause, which allows a district court to consider a habeas petition brought by a federal prisoner under § 2241 where § 2255 is "inadequate or ineffective to test the legality" of the detention. 28 U.S.C. § 2255; *see also* ***United States v. Poole***, 531 F.3d 263, 270 (4th Cir. 2008). The fact that relief under § 2255 is procedurally barred does not render the remedy inadequate or ineffective to test the legality of a prisoner's detention. ***In re Jones***, 226 F.3d 328, 332 (4th Cir. 2000). In the Fourth Circuit, a § 2255 petition is only inadequate or ineffective to test the legality of detention when:

> (1) [A]t the time of conviction, settled**{2022 U.S. Dist. LEXIS 6}** law in this circuit or the Supreme Court established the legality of the conviction; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gatekeeping provision of § 2255 because the new rule is not one of constitutional law.***Poole***, 531 F.3d at 269 (quoting ***In re Jones***, 226 F.3d at 333-34).

The Fourth Circuit found that the savings clause may apply to certain sentencing challenges. It explained:

> [W]e conclude that § 2255 is inadequate and ineffective to test the legality of a sentence when: (1) at the time of sentencing, settled law of this circuit or the Supreme Court established the legality of the sentence; (2) subsequent to the prisoner's direct appeal and first § 2255 motion, the aforementioned settled substantive law changed and was deemed to apply retroactively on collateral review; (3) the prisoner is unable to meet the gatekeeping provisions of § 2255(h)(2) for second or successive motions; and (4) due to this retroactive change, the sentence now presents an error sufficiently grave to be deemed a fundamental defect.***United States v. Wheeler***, 886 F.3d 415,429 (4th Cir. 2018). Because the requirements of the savings clause are jurisdictional, a § 2241 petitioner**{2022 U.S. Dist. LEXIS 7}** relying on the § 2255(e) savings clause must meet either the ***Jones*** test (if challenging the legality of his conviction) or the ***Wheeler*** test (if challenging the legality of his sentence) for the court to have subject-matter jurisdiction to evaluate the merits of the petitioner's claims. *See* ***Wheeler***, 886 F.3d at 423-26.

Here, the magistrate judge found that the petition should be dismissed because petitioner cannot meet the tests under ***Jones*** or ***Wheeler***. First, the magistrate found that the petitioner could not meet the second prong of the ***Jones*** test. In particular, the magistrate found that the crimes for which petitioner was convicted remains criminal offenses and he therefore cannot meet the second element of ***Jones***. [Doc. 6 at 8-9]. The R&R notes that "although courts have not evaluated the application of ***Ruan*** to the ***Jones*** test, the application of ***Rehaif v. United States***, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019) provides an analogous example." [Id. at 8]. In ***Rehaif***, the Supreme Court held that the "knowingly" *mens rea* in 18 U.S.C. § 922(g) applied to defendant's knowledge of the fact that he belonged to the relevant category of persons barred from possessing a firearm. 139 S. Ct. at 2200. However, the R&R notes that "this Court found that ***Rehaif*** did not change the substantive law as required by the second element of Jones." [Id. at 8].**{2022 U.S. Dist. LEXIS 8}** Similarly, in ***Ruan***, the Supreme Court held that "[21 U.S.C.] § 841's 'knowingly or intentionally' *mens*

rea applies to the 'except as authorized' clause. This means that once a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove beyond a reasonable doubt that the defendant knowingly or intentional acted in an unauthorized manner." ***Ruan*** 142 S. Ct. at 2376. Thus, the magistrate concluded that "[a]s with Rehaif, the decision in ***Ruan***, clarified the scope of the knowledge requirement, but the statute in question remained a criminal offense." [Doc. 6 at 9].

Next, the magistrate concluded that the petitioner could not meet the **Wheeler** test. The R&R acknowledges that the petitioner specifically challenges his conviction, not his sentence. However, the magistrate found that the petitioner could not meet the ***Wheeler*** test to challenge his sentence as ***Ruan*** has not been deemed to apply retroactively. [Id. at 9].

On December 19, 2022, petitioner filed his objections to the R&R. Therein, petitioner raises three (3) objections to the R&R. First, petitioner objects to the R&R's finding that he cannot meet the second prong of the ***Jones*** test. *See* [Doc. 15 at 2-8]. Specifically, petitioner cites**{2022 U.S. Dist. LEXIS 9}** a number of cases, including ***Ruan v. United States***, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022), ***Hahn v. Moseley***, 931 F.3d 295 (4th Cir. 2019), ***Greer v. United States***, 141 S. Ct 2090, 210 L. Ed. 2d 121 (2021), and ***Moore v. Warden of FCI Edgefield***, 557 F.Supp.3d 704 (D.S.C Aug. 27, 2021) (Wooten, J.), to argue the magistrate judge's rationale and interpretation of the second prong of ***Jones*** is erroneous. See [id.]. Second, petitioner objects to the magistrate judge's finding that "the conduct for which petitioner was convicted is still illegal" arguing that the magistrate judge did not evaluate the conduct petitioner was convicted for under § 841. [Id. at 8]. Third, petitioner objects to the magistrate judge's finding that he cannot meet the ***Wheeler*** test to challenge his sentence because ***Ruan*** has not been deemed to apply retroactively. [Id. at 9-10]. In support, petitioner argues that ***Ruan*** created a new substantive rule and that new substantive rules apply retroactively to cases on collateral review. [Id. at 9-10].

A *de novo* review of Magistrate Judge Mazzone's R&R and the grounds in support of petitioner's objections leads this Court to conclude that petitioner has failed to demonstrate satisfaction of the § 2255 savings clause for the reasons contained in the R&R and herein. Accordingly, petitioner's objections are overruled.

IV. CONCLUSION

Upon careful review of the above, it is the opinion of this Court that the **Report and Recommendation [Doc.{2022 U.S. Dist. LEXIS 10} 6]** should be, and is, hereby **ORDERED RE-ADOPTED** for the reasons more fully stated in the magistrate judge's report. Accordingly, the petitioner's objections **[Doc. 15]** are **OVERRULED**. This Court **ORDERS** that the § 2241 petition **[Doc. 1]** be **DENIED** and **DISMISSED WITHOUT PREJUDICE.**

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to any counsel of record and to mail a copy to the *pro se* petitioner.

DATED: December 28, 2022.

/s/ John Preston Bailey

JOHN PRESTON BAILEY

UNITED STATES DISTRICT JUDGE

Footnotes

1

Unless otherwise specified, the information contained in the "Background" section of this opinion is take from petitioner's criminal docket available on PACER. *See* ***United States v. Hubbard et al***, 5:15-CR-104-DCR-HAI-1 (E.D. Ky. 2016).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION
(at Lexington)

UNITED STATES OF AMERICA, Plaintiff/Respondent, V. LONNIE W. HUBBARD, Defendant/Movant.	)	Criminal Action No. 5: 15-104-DCR and Civil Action No. 5: 21-090-DCR **MEMORANDUM ORDER**

*** *** *** ***

Defendant/Movant Lonnie Hubbard has filed a motion to reopen his earlier collateral proceedings challenging his conviction and sentence pursuant to Federal Rule of Civil Procedure 60(b)(6). [Record No. 539] The motion has been fully briefed. [*See* Record Nos. 542 and 543.] Hubbard's motion raises new claims for relief and, therefore, constitutes a second or successive § 2255. As a result, the matter will be transferred to the United States Court of Appeals for the Sixth Circuit. The relief sought from this Court will be denied.

I. Background

Hubbard was a pharmacist convicted of "71 counts relating to: distribution of pseudoephedrine, oxycodone, and hydrocodone; money laundering; and maintaining a drug-involved premises." [Record No. 522 (citing Record Nos. 350 and 393, pp. 1-2)] In 2021, he filed a motion with this Court under 28 United States Code § 2255, alleging:

> (1) "Failure of trial counsel to object to improper judicial participation (A Rule 11(c)(1) violation) and judicial misconduct during plea negotiations. Failure of trial counsel to obtain a binding plea agreement";

(2) Trial counsel failed to advise the defendant certain legal concepts, including "aiding and abetting, Pinkerton Liability, [] Deliberate Ignorance," and the elements of 21 C.F.R. § 1306.04(a);

(3) "Trial counsel failed to object to lay opinion witness testimony that violated Rule 704(b)"; and

(4) "Trial counsel failed to object to Count 60, which failed to state an offense" and, similarly, "[t]he district court lacked subject matter jurisdiction" over Count 60.

[*See* Record No. 499.] The Court denied this motion [Record No. 523], explaining these claims were without merit. [*Id.* at 31]

In April of 2024, the Sixth Circuit denied Hubbard's motion to recall the mandate that was issued after his convictions and sentence were affirmed in *United States v. Hubbard*, 843 F. App'x 667 (6th Cir. 2019). *See United States v. Hubbard*, No. 17-5853, 2024 WL 4502287, at *1 (6th Cir. Apr. 23, 2024). There, Hubbard argued that the United States Supreme Court's statutory interpretation of 21 U.S.C. § 841 in *Ruan v. United States*, 597 U.S. 450 (2022), could be retroactively applied to his conviction.

In denying the motion, the Sixth Circuit explained that "changes in statutory interpretation are 'not the type of unforeseen contingency which warrants recall of the mandate to permit yet another round of appellate review.'" *Hubbard*, WL 4502287 at *2 (quoting *United States v. Saikaly*, 424 F.3d 514, 518 (6th Cir. 2005). It further clarified "[t]he proper remedy to attack a conviction in a criminal proceeding that has become final is a motion to vacate under § 2255; 'the fact that such remedy is no longer available does not warrant a recall of the mandate.'" *Id.* (quoting *Saikaly*, 424 F.3d at 517-18)). Hubbard now attempts to recycle these claims in the form of a Rule 60(b)(6) motion.

II. Hubbard's 60(b)(6) Motion is a New § 2255 Claim in Disguise.

"[A] motion that attempts to raise a new substantive claim for habeas relief should be considered as a § 2255 motion[.]" *In re Nailor*, 487 F.3d 1018, 1023 (6th Cir. 2007) (citing *United States v. Nelson*, 465 F.3d 1145, 1148-49 (10th Cir. 2006)). In *Nailor*, the Sixth Circuit determined that the petitioner's motion under Rule 60(b)(6) "was actually a second or successive § 2255 motion in disguise" because it either "could be read to attack the district court's resolution of his previous § 2255 motion" or "could be read to raise a new claim for relief." *Nailor*, 487 F.3d at 1023; *see also Gonzalez v. Crosby,* 545 U.S. 524, 531 (2005) ("[S]uch a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition and should be treated accordingly.") And for a successive § 2255 petition to be allowed, the court of appeals must certify that it contains:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

See 28 U.S.C. § 2255(h).

Hubbard claims his motion under Rule 60(b)(6) serves to elucidate "some defect in the integrity of the federal habeas proceedings." [*See* Record No. 539, p. 8.] However, he actually raises new substantive grounds for relief. Hubbard asserts that the Supreme Court's holding in *Ruan v. United States*, 597 U.S. 450 (2022), dictates that the jury instructions in his case were improper because he lacked the subjective intent to act in an unauthorized manner under 21 U.S.C. § 841. He also contests aspects of his sentencing.

Despite Hubbard's attempt to classify these substantive claims as instances of injustice under Rule 60(b)(6), allowing him to reopen his settled § 2255 motion would "impermissibly circumvent the requirement that a successive habeas petition be precertified by the court of appeals as falling within an exception to the successive-petition bar." *Nailor*, 487 F.3d at 1023.

III. Conclusion

Defendant Hubbard's arguments are plainly substantive and do not involve (1) newly discovered evidence which would be sufficient to establish no reasonable factfinder could find him guilty or (2) a new rule of constitutional law made retroactive to cases on collateral review. Instead, the motion [Record No. 539] constitutes a second or successive motion for collateral relief under 28 U.S.C. § 2255. Accordingly, it is hereby

ORDERED as follows:

1. The Clerk of the Court is **DIRECTED** to transfer Hubbard's motion to the United States Court of Appeals for the Sixth Circuit in accordance with 28 U.S.C. § 2244 and Rule 9 of the Rules Governing Section 2255 Cases in the United States District Courts.

2. To the extent that Defendant Hubbard seeks relief from this Court through his recent filing [Record No. 539], his request is **DENIED**.

Dated: December 10, 2024.

Danny C. Reeves, Chief Judge
United States District Court
Eastern District of Kentucky

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE W. HUBBARD, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
843 Fed. Appx. 667; 2019 U.S. App. LEXIS 21311
No. 17-5853
July 17, 2019, Filed

Notice:

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Editorial Information: Subsequent History

Rehearing denied by United States v. Hubbard, 2019 U.S. App. LEXIS 34435 (6th Cir., Nov. 19, 2019)US Supreme Court certiorari denied by Hubbard v. United States, 140 S. Ct. 2628, 206 L. Ed. 2d 509, 2020 U.S. LEXIS 1941 (U.S., Mar. 30, 2020)Habeas corpus proceeding at, Magistrate's recommendation at Hubbard v. Brown, 2022 U.S. Dist. LEXIS 207045 (N.D. W. Va., Oct. 19, 2022)

Editorial Information: Prior History

{2019 U.S. App. LEXIS 1}ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY.United States v. Hubbard, 2017 U.S. Dist. LEXIS 62982, 2017 WL 1503996 (E.D. Ky., Apr. 26, 2017)

Counsel For United States of America, Plaintiff - Appellee: Charles P. Wisdom Jr., Assistant U.S. Attorney, Ron L. Walker Jr., Assistant U.S. Attorney, Office of the U.S. Attorney, Lexington, KY.

Lonnie W. Hubbard, Defendant - Appellant, Pro se, Bruceton Mills, WV.

Judges: Before: MOORE, GRIFFIN, and MURPHY, Circuit Judges.

CASE SUMMARY Defendant's conviction for conspiracy to distribute prescription medication was upheld because there were no errors in admission of evidence; evidence that defendant, pharmacist, "loaned" pills to patients without prescriptions or before refill date of prescription and that practice was illegal was intertwined with distribution of oxycodone counts.

OVERVIEW: HOLDINGS: [1]-There were no errors in the admission of evidence because evidence that defendant, a pharmacist, "loaned" pills to patients without prescriptions or before the refill date of the prescription and that the practice was illegal was intertwined with the distribution of oxycodone counts; a photograph of cash was relevant to proving his cash drug sales and money laundering; [2]-A rational jury could have found that defendant knowingly and unlawfully distributed oxycodone because he ignored numerous red flags about the prescriptions that were coming into his pharmacy, warnings from colleagues and industry professionals, and common sense; he was made aware by drug wholesalers that he was selling too much oxycodone; [3]-Because the record did not show that the district court chose

defendant's sentence arbitrarily, the within-guidelines 360-month sentence was not unreasonable.

OUTCOME: Counsel's motion to withdraw granted. Judgment affirmed.

LexisNexis Headnotes

Evidence > Relevance > Prior Acts, Crimes & Wrongs

Fed. R. Evid. 404(b) provides in part that evidence of a crime, wrongs, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character. Res gestae evidence, also described as "background" or "intrinsic" evidence, is an exception to the Rule 404(b) bar on propensity evidence, however.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Evidence

An appellate court reviews a district court's evidentiary rulings for an abuse of discretion.

Evidence > Relevance > Relevant Evidence

All evidence tending to prove guilt is prejudicial to a criminal defendant. If it were otherwise, the prosecution would not produce it as evidence and the court would not admit it as relevant.

Criminal Law & Procedure > Trials > Motions for Acquittal
Criminal Law & Procedure > Appeals > Reviewability > Preservation for Review > Requirements

An appellate court will not entertain a defendant's challenge to the sufficiency of the evidence on appeal unless the defendant moved for a judgment of acquittal under Fed. R. Crim. P. 29 at the close of the government's case-in-chief and at the close of all the evidence. Specificity in a Rule 29 motion is not required, but when a defendant makes a motion on specific grounds, all grounds not specified in the motion are waived.

Evidence > Procedural Considerations > Burdens of Proof > Proof Beyond Reasonable Doubt

When reviewing a conviction for insufficient evidence, an appellate court must inquire whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. An appellate court will reverse a judgment for insufficiency of evidence only if, viewing the record as a whole, the judgment is not supported by substantial and competent evidence.

Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Elements

Federal law states that it shall be unlawful for any person knowingly or intentionally to distribute a controlled substance. 21 U.S.C.S. § 841(a)(1). The language in § 841(a)(1) and 21 C.F.R. § 1306.04(a) defines a pharmacist's responsibilities that give rise to conduct that constitutes an unlawful distribution of a prescription drug. Knowingly distributing prescriptions outside the course of professional practice is a sufficient condition to convict a defendant under the criminal statutes relating to controlled substances.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Jury Instructions

When a defendant did not object to the lack of a jury instruction in the trial court, appellate review is

limited to plain error, deciding whether the instructions, when taken as a whole, were so clearly wrong as to produce a grave miscarriage of justice.

Evidence > Testimony > Lay Witnesses > Opinion Testimony > Rational Basis
Evidence > Testimony > Lay Witnesses > Opinion Testimony > Personal Perceptions
Evidence > Testimony > Lay Witnesses > Opinion Testimony > Helpfulness
Evidence > Testimony > Lay Witnesses > Opinion Testimony > Nonspecialized Knowledge

Fed. R. Evid. 701 allows non-experts to give testimony in the form of an opinion only to the extent the testimony is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Fed. R. Evid. 702.

Criminal Law & Procedure > Sentencing > Appeals > Proportionality Review
Criminal Law & Procedure > Sentencing > Imposition > Factors

An appellate court reviews criminal sentences for both substantive and procedural reasonableness. When considering whether a sentence is procedurally reasonable, a court must ensure that the district court committed no significant procedural error, such as failing to calculate, or improperly calculating, the guidelines range, treating the guidelines as mandatory, failing to consider the 18 U.S.C.S. § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence, including an explanation for any deviation from the guidelines range.

Evidence > Procedural Considerations > Burdens of Proof > Preponderance of Evidence

An appellate court reviews a trial court's factual findings regarding the application of a sentencing enhancement for clear error. The government must prove that a defendant's conduct warrants the enhancement by a preponderance of the evidence.

Criminal Law & Procedure > Sentencing > Imposition > Factors

Drug-quantity approximations for the purpose of calculating a sentence are not clearly erroneous if they are supported by competent evidence and err on the side of caution.

Criminal Law & Procedure > Sentencing > Appeals > Proportionality Review

Substantive reasonableness focuses on whether a sentence is too long or too short. An appellate court presumes that a within-guidelines sentence is reasonable.

Criminal Law & Procedure > Sentencing > Forfeitures

Criminal forfeiture is a punishment for violating federal drug laws.

Criminal Law & Procedure > Sentencing > Appeals > Proportionality Review

Punishment should be proportional to the crime, but the proportionality required forbids only extreme sentences that are grossly disproportionate to the crime.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > New Trial

When considering a motion for a new trial, district judges may act as a thirteenth juror, assessing the

credibility of witnesses and the weight of the evidence. The role of a court of appeals is not to sit as a "thirteenth juror" and re-weigh the evidence, but to examine the evidence to determine whether a district court's ruling that the verdict is not against the manifest weight of the evidence was a clear and manifest abuse of discretion.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial
Criminal Law & Procedure > Appeals > Reversible Errors > Cumulative Errors

To warrant a new trial, the cumulative effect of any errors must have deprived the defendant of a trial consistent with constitutional guarantees of due process. Where no individual ruling has been shown to be erroneous, however, there is no "error" to consider, and the cumulative error doctrine does not warrant reversal.

Opinion

{843 Fed. Appx. 669} ORDER

Lonnie W. Hubbard, a federal prisoner, appeals his convictions for conspiracy to distribute prescription medication and seventy related counts and the 360-month term of imprisonment imposed by the district court. Counsel indicates that Hubbard has directed counsel to request oral argument but moves to withdraw. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2015, the United States filed a thirty-eight count indictment against Hubbard, a pharmacist; his company, Rx Discount of Berea, PLLC ("Rx Discount"); his wife; and six others. The indictment alleged that the defendants conspired to distribute oxycodone and pseudoephedrine; distributed oxycodone, pseudoephedrine, and hydrocodone; failed to obtain proper**{2019 U.S. App. LEXIS 2}** identification from persons purchasing pseudoephedrine; maintained a drug premises; and conspired to commit money laundering and other fraudulent financial transactions. Two superseding indictments were subsequently filed, bringing the total number of charges against Hubbard to seventy-three. An eight-day trial was held in February 2017. During trial, Counts 7 and 47 were dismissed on the motion of the United States. The jury found Hubbard guilty on the remaining seventy-one charges and the district court imposed a total term of imprisonment of 360 months, to be followed by three years of supervised release. The district court also ordered criminal forfeiture of real and personal property, as well as cash. Hubbard filed a motion for a new trial, which was overruled.

On appeal, Hubbard's counsel filed a motion to withdraw, pursuant to *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and Sixth Circuit Rule 12(c)(4)(C), notifying this court of a lack of good-faith issues to appeal. Appellate counsel explained that, after a review of the court record and transcripts, as well as correspondence with Hubbard, he identified the following issues of possible merit: (1) the district court erred in admitting improper character evidence, in violation of Federal Rule of Evidence 404(b), as well as certain**{2019 U.S. App. LEXIS 3}** other evidence; (2) the evidence was insufficient to **{843 Fed. Appx. 670}** convict Hubbard of crimes where he was merely acting as a pharmacist and no conspiracy was demonstrated; (3) the district court erred in permitting opinion testimony by case agents absent a dual-role cautionary jury instruction; (4) the district court otherwise failed to instruct the jury properly as to conspiracy, deliberate ignorance, and operating and maintaining a drug-involved premises; and (5) the district

court erred in sentencing Hubbard to 360 months of incarceration and ordering criminal forfeiture. Counsel determined that these arguments would be frivolous, however. Hubbard responded to counsel's motion to withdraw, raising the potential claims submitted by counsel and also alleging that (6) the district court erred by denying his motion for a new trial; (7) his indictment was constructively amended; (8) cumulative error violated his right to due process and a fair trial; and (9) Count 60 of the indictment failed to state an offense.

We subsequently entered an order granting counsel's motion to withdraw, appointing new counsel under the Criminal Justice Act, and allowing the filing of supplemental briefs following the appointment**{2019 U.S. App. LEXIS 4}** of counsel. Although new counsel was appointed, he filed a motion to withdraw, pursuant to *Anders*, stating that he had nothing to add to original counsel's brief. He did not supplement his motion with a supplemental *Anders* brief. Hubbard filed a supplemental response, restating the arguments raised in his original response. After independently examining the record pursuant to *Penson v. Ohio*, 488 U.S. 75, 82-83, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988), and the briefs of counsel and Hubbard, the panel agrees that counsel's motion to withdraw should be granted because no grounds for appeal can be sustained.

Admission of Evidence

First, there are no apparent errors in the admission of evidence. Prior to trial, Hubbard filed a motion in limine to exclude certain evidence, which the district court overruled. Hubbard now asserts that the following evidence was improperly admitted under Rule 404(b) because it was unfairly prejudicial: (a) evidence that Hubbard's self-certification of online training to sell certain chemicals had lapsed during the time of the conspiracy; (b) a photograph of cash taken during a traffic stop; (c) evidence of misfiled prescriptions; (d) evidence of fronting pills; (e) evidence of double-billing; and (f) improperly selling pseudoephedrine in bottles**{2019 U.S. App. LEXIS 5}** rather than blister packs.

Rule 404(b) provides, in relevant part, that "[e]vidence of a crime, wrongs, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." "Res gestae evidence, also described as 'background' or 'intrinsic' evidence, is 'an exception' to the Rule 404(b) bar on propensity evidence," however. *United States v. Gibbs*, 797 F.3d 416, 423 (6th Cir. 2015) (quoting *United States v. Adams*, 722 F.3d 788, 810 (6th Cir. 2013)). We review a district court's evidentiary rulings for an abuse of discretion. *United States v. Rodriguez-Lopez*, 565 F.3d 312, 314 (6th Cir. 2009).

The record demonstrates that the district court analyzed the challenged evidence pursuant to the analysis developed in this circuit. *See United States v. Ayoub*, 498 F.3d 532, 547 (6th Cir. 2007). The court determined, however, that the evidence was not actually propensity evidence under Rule 404(b), but rather was intrinsic to the crimes charged. No arguable issue could be raised on appeal that this was an abuse of discretion. The lapse of Hubbard's self-certification and his selling of pseudoephedrine in bottles rather **{843 Fed. Appx. 671}** than blister packs were relevant to the conspiracy and pseudoephedrine charges (Counts 1, 2-6, 8-14), as well as defenses to be raised. Evidence of misfilled prescriptions was intrinsic to the conspiracy and distribution charges where there was evidence that**{2019 U.S. App. LEXIS 6}** Hubbard filled a prescription for oxycodone in July 2015, during the time of the conspiracy, that was not signed by a physician and that he filled the 5 mg prescription with 10 mg pills. Evidence that Hubbard "loaned" pills to patients without prescriptions or before the refill date of the prescription and that the practice was illegal was intertwined with the distribution of oxycodone counts (Counts 49-59). Evidence that Hubbard required patients to pay cash for medications and then also billed Medicare or Medicaid was relevant to the distribution counts (Counts 16-42). And the photograph of the cash was relevant to proving his cash drug sales and money laundering (Counts 62-73).

Hubbard's overriding argument with respect to the admission of this evidence appears to be that it was prejudicial because there were alternative, innocent explanations for these facts. Even if this evidence has alternative explanations, however, those explanations do not make it irrelevant to the charged acts. "*[A]ll* evidence tending to prove guilt is prejudicial to a criminal defendant. If it were otherwise, the [prosecution] would not produce it as evidence and the court would not admit it as relevant."**{2019 U.S. App. LEXIS 7}** *Bey v. Bagley*, 500 F.3d 514, 522 (6th Cir. 2007). Thus, there is no good-faith basis to argue that the district court abused its discretion by admitting this evidence.

Sufficiency of the Evidence

Next, no arguable issue for appeal could be raised in connection with the sufficiency of the evidence. We will not entertain a defendant's challenge to the sufficiency of the evidence on appeal unless the defendant moved for a judgment of acquittal under Rule 29 at the close of the government's case-in-chief and at the close of all the evidence. *United States v. Williams*, 940 F.2d 176, 180 (6th Cir. 1991). Specificity in a Rule 29 motion is not required, but when a defendant makes a motion on specific grounds, all grounds not specified in the motion are waived. *United States v. Dandy*, 998 F.2d 1344, 1356-57 (6th Cir. 1993).

At the close of the government's case-in-chief, Hubbard's counsel moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29 for insufficient evidence. Counsel stated, "I think specifically mention [sic] was 49 through 59 on the . . . second superseding indictment. I don't think they put any information on at all about lack of medical need . . . of those people on those counts." At the close of all the evidence, Hubbard's counsel stated "the defense would renew our Rule 29 motions, same reasons and same specifics as 49 through 59 counts." Because Hubbard's Rule 29 motion was made as to**{2019 U.S. App. LEXIS 8}** Counts 49 to 59 only, which related to the distribution of oxycodone, his challenges to the sufficiency of the evidence as to his other convictions are forfeited.

When reviewing a conviction for insufficient evidence, we must inquire "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). We will "reverse a judgment for insufficiency of evidence only if, viewing the record as a whole, the judgment is not supported by substantial and competent evidence." *United States v. Blakeney*, 942 F.2d 1001, 1010 (6th Cir. 1991).

{843 Fed. Appx. 672} Federal law states that: "[i]t shall be unlawful for any person knowingly or intentionally to . . . distribute . . . a controlled substance." 21 U.S.C. § 841(a)(1). This court long ago held that "the language in § 841(a)(1) and 21 C.F.R. § 1306.04(a) clearly defines the pharmacist's responsibilities that give rise to conduct that constitutes an unlawful distribution of a prescription drug." *United States v. DeBoer*, 966 F.2d 1066, 1068-69 (6th Cir. 1992). "[K]nowingly distributing prescriptions outside the course of professional practice is a sufficient condition to convict a defendant under the criminal statutes relating to controlled substances." *United States v. Volkman*, 797 F.3d 377, 386 (6th Cir. 2015) (citation omitted).

Viewing the evidence presented in a light most**{2019 U.S. App. LEXIS 9}** favorable to the government, a rational jury could find that Hubbard knowingly and unlawfully distributed oxycodone. According to his own testimony, Hubbard worked as a pharmacist for about eleven years before he opened Rx Discount, and he was aware that he had a legal duty to ascertain his customers' medical needs. However, the evidence established that Hubbard ignored numerous red flags about the prescriptions that were coming into his pharmacy in contravention of standard pharmacy practice, warnings from colleagues and industry professionals, and even common sense. The evidence

demonstrated that he did the bare minimum to "establish" a relationship with the individuals who were coming to purchase controlled substances, he asked few-if any-questions of the purchasers of controlled substances regarding their legitimate medical needs, and he continued to sell to individuals that had been arrested for offenses involving controlled substances. Moreover, other pharmacists in the community would not fill the prescriptions that Hubbard was filling, and Hubbard was made aware by multiple drug wholesalers that he was selling too much oxycodone. Despite Hubbard's argument that he filled prescriptions**{2019 U.S. App. LEXIS 10}** for customers who testified at trial that they had real injuries and medical needs that required prescription medication, a jury could rationally conclude that Hubbard abdicated his duty as a pharmacist to ensure that each of those prescriptions was for a legitimate medical need, even in light of the witnesses' alleged injuries or conditions. No arguable issue could be raised on appeal to challenge the sufficiency of the evidence as it related to Counts 49 to 59.

Jury Instructions

Hubbard next challenges several aspects of the jury instructions. He first asserts that the district court erred in permitting opinion testimony by case agents Jill Lee, Shannon Allen, and Paula York absent a dual-role cautionary jury instruction. Because Hubbard did not object to the lack of such an instruction below, our review is limited to plain error, deciding "whether the instructions, when taken as a whole, were so clearly wrong as to produce a grave miscarriage of justice." *United States v. Miller*, 734 F.3d 530, 538 (6th Cir. 2013) (quoting *United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992)).

Federal Rule of Evidence 701 allows non-experts to give "testimony in the form of an opinion" only to the extent the testimony "is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or**{2019 U.S. App. LEXIS 11}** to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of [Federal] Rule [of Evidence] 702." Lee, Allen, and York-who were all licensed pharmacists-testified as to their training and what they had experienced while working in or observing other pharmacies. **{843 Fed. Appx. 673}** They provided opinions that the practices of Rx Discount were outside the norm and that Hubbard was not meeting his obligation to ensure that the drugs he was dispensing were for legitimate medical needs. With respect to York, the district court instructed the jury that she testified as an opinion witness and it was up to the jury to decide how much weight to give to her opinion; in doing so, the court instructed that the jury could consider her qualifications and how she reached her conclusions.

While neither Lee nor Allen could have explained why they would be concerned about the practices of Rx Discount without speaking about their specialized knowledge of the pharmacy industry, any error in failing to give a cautionary instruction as to Lee and Allen did not affect Hubbard's substantial rights. Because of the instruction given on York's testimony, the jury was**{2019 U.S. App. LEXIS 12}** aware of how to evaluate a witness's opinion and many of the concerns that Lee and Allen raised were also raised by other witnesses, including two other pharmacists whose opinions Hubbard has not challenged. No non-frivolous issue could be raised on appeal that the failure of the district court to give a cautionary instruction as to Lee and Allen resulted in a grave miscarriage of justice.

Hubbard next argues that the district court otherwise failed to instruct the jury properly as to conspiracy, making it unclear as to whether the jury knew that, to find him guilty, they had to find that he conspired to distribute oxycodone, pseudoephedrine, or both. He also claimed that this resulted in a constructive amendment of his indictment. The record refutes Hubbard's claim, however, and establishes that the jury was clearly instructed as to conspiracy. No non-frivolous argument could therefore be raised as to this instruction or regarding a claim that Hubbard's indictment was

constructively amended.

Hubbard next challenges the instruction on his state of mind. In part, this instruction stated: "if you're convinced that the defendant deliberately ignored a high probability that others were using**{2019 U.S. App. LEXIS 13}** and/or distributing pseudoephedrine or oxycodone without a legitimate medical purpose, then you may find that the defendant knew that others were using and/or distributing these substances without a legitimate medical purpose." Hubbard argues that the instruction was misleading in that pseudoephedrine does not require a medical purpose to be sold and that there were no allegations that "others were using" pseudoephedrine illegally. He asserts that this allowed the jury to convict him of selling pseudoephedrine recklessly.

No arguable issue could be raised in connection with this instruction. Counsel did not object to the instruction and no plain error is evident. There was testimony by multiple witnesses that they used the pseudoephedrine purchased at Rx Discount to manufacture methamphetamine-an illegal activity. Hubbard's recklessness argument also fails. The district court specifically instructed the jury that "[c]arelessness, negligence, or foolishness . . . is not the same as knowledge, and it's not enough to convict."

Hubbard also argued that it was plain error for the district court not to instruct on "good faith." No non-frivolous argument could be raised in connection with this**{2019 U.S. App. LEXIS 14}** claim, however. Not only did counsel not object to the lack of a good-faith instruction, but also the judge reviewed with the jury the provisions of 21 U.S.C. § 841(a)(1) and further instructed them that, in order to convict Hubbard, they had to find that he was aware that he was distributing oxycodone without a legitimate medical purpose and that the pseudoephedrine **{843 Fed. Appx. 674}** he was selling was being used to manufacture illegal drugs. These instructions effectively informed the jury of the good-faith defense. *See United States v. Carroll*, 518 F.2d 187, 189-90 (6th Cir. 1975) (citing *White v. United States*, 399 F.2d 813, 816-17 (8th Cir. 1968)).

Nor can any non-frivolous argument be raised in connection with the jury instructions on the charge of operating and maintaining a drug-involved premises, Count 60 of the indictment, or that count's failure to state an offense. The record reflects that the district court changed the instructions based on Hubbard's concerns that jurors might believe that distributing pseudoephedrine was, in and of itself, illegal.

Sentence

Next, no arguable issue can be raised on appeal concerning Hubbard's sentence. We review criminal sentences for both substantive and procedural reasonableness. *Gall v. United States*, 552 U.S. 38, 51, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). When considering whether a sentence is procedurally reasonable, the court must

> ensure that the district court committed**{2019 U.S. App. LEXIS 15}** no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range.*Id.*

Hubbard first argues that his sentence is procedurally unreasonable because the district court erred in applying the following enhancements: a two-level enhancement for abusing a position of trust; a two-level enhancement for maintaining a premises for distribution of controlled substances; a four-level enhancement for being an organizer or leader of criminal activity that involved five or more participants; a two-level enhancement for obstructing justice; and a two-level enhancement because the offense involved sophisticated money laundering. Additionally, Hubbard challenges the

district court's calculation of his drug quantity.

We review a court's factual findings regarding the application of an enhancement for clear error. *United States v. Begley*, 602 F. App'x 622, 625 (6th Cir. 2015). The government must prove that a defendant's conduct warrants the enhancement by a preponderance of**{2019 U.S. App. LEXIS 16}** the evidence. *United States v. Wright*, 747 F.3d 399, 412 (6th Cir. 2014).

After reviewing the record, we conclude that no arguable issue could be raised on appeal concerning the challenged enhancements, as each was supported by a preponderance of the evidence. As a pharmacist, Hubbard abused his position of trust, *see* USSG § 3B1.3; Hubbard's conviction for maintaining a premises for distribution of controlled substances more than meets the preponderance standard for application of that enhancement, *see* USSG § 2D1.1(b)(12); Hubbard had decision-making authority over the pharmacy and controlled his employees, which was sufficient to apply the organizer/leader enhancement, *see* USSG § 3B1.1(a); Hubbard engaged in behavior designed to avoid detection and testified falsely about certain matters, which supported the obstruction-of-justice enhancement, *see* USSG § 3C1.1; and Hubbard's money laundering activities involved "layering," which was sufficient to apply the sophisticated-money-laundering enhancement, *see* USSG § 2S1.1(b)(3).

Hubbard also disputes the calculated drug quantity. Drug-quantity approximations are not clearly erroneous if they **{843 Fed. Appx. 675}** are "supported by competent evidence" and "err on the side of caution." *United States v. Hernandez*, 227 F.3d 686, 699 (6th Cir. 2000). The district court thoroughly discussed the objection to the calculation. With respect to the pseudoephedrine,**{2019 U.S. App. LEXIS 17}** the court noted that the calculation was "conservative by about 50 percent." With respect to oxycodone, the district court explained that the evidence supported a "logical inference" that the out-of-state prescriptions were improper and "that the defendant knew that and was soliciting those individuals that were drug-seeking." The district court also noted that, for the calculation to lower Hubbard's base offense level to 37, it would have to be below a marijuana equivalency of 90,000 kilograms. Even assuming that some of the prescriptions were legitimate, it would not make enough difference to affect Hubbard because the probation officer's conservative calculation was more than three times the amount needed to get to base offense level 38. Because a rational basis supported the drug quantity, no arguable issue could be raised that it was improperly calculated or that Hubbard's sentence is procedurally unreasonable on this basis.

Hubbard also challenges the substantive reasonableness of his sentence. "Substantive reasonableness focuses on whether a 'sentence is too long (if a defendant appeals) or too short (if the government appeals).'" *United States v. Parrish*, 915 F.3d 1043, 1047 (6th Cir. 2019) (quoting *United States v. Rayyan*, 885 F.3d 436, 442 (6th Cir. 2018). Moreover, we presume that a within-guidelines**{2019 U.S. App. LEXIS 18}** sentence is reasonable. *United States v. Vonner*, 516 F.3d 382, 389 (6th Cir. 2008) (en banc).

Hubbard's presentence report calculated his advisory sentencing guidelines range as life imprisonment based on a total offense level of 43 and a criminal history category of I. Because the statutorily authorized maximum sentences were less than the minimum of the advisory guidelines range, the statutory maximum sentences became the guidelines range: 240 months for each of Counts 1-6, 8-14, 16-46, and 48-61; and 120 months for each of Counts 15 and 62-73. Hubbard requested a variance on the basis of his history and characteristics and the sentences being imposed on medical professionals around the country. The government argued that the information on other sentences was insufficient to compare with Hubbard and that a sentence in the guidelines range would be appropriate.

The district court stated that it had considered the information provided by both parties and

conducted its own research regarding drug sentences and the need to avoid unwanted sentencing disparities. Considering all of that information, the district court concluded that a variance was not warranted and denied Hubbard's motion. The district court then explained that it had considered{2019 U.S. App. LEXIS 19} the relevant sentencing factors in 18 U.S.C. § 3553(a). The court highlighted the fact that Hubbard held a position of trust within the community and violated that trust; when confronted, he tried to claim deliberate ignorance and failed to accept responsibility, even after the jury found him guilty; Hubbard's motive was greed; and the drug quantity involved was "astounding" and the highest the court had ever seen. The district court stated that Hubbard had created a lot of damage to his community through his distribution of thousands and thousands of pills and that, to curb the epidemic of prescription drug abuse in Kentucky, Hubbard was one of the individuals that needed to be guarded against. Considering the nature of Hubbard's conduct and the volume of the drugs being sold, the district court concluded that an appropriate sentence would be 30 years, or 360 months. {843 Fed. Appx. 676} Because the record does not demonstrate that the district court chose Hubbard's sentence arbitrarily, based it on an impermissible factor, or unreasonably weighed any factor, no good-faith argument could be raised on appeal that the within-guidelines 360-month sentence was substantively unreasonable.

Hubbard also challenges the district{2019 U.S. App. LEXIS 20} court's order that he forfeit real property, vehicles and boats, and certain amounts of currency on the basis that the forfeiture order violates the Eighth Amendment, no conspiracy was proven, and the drug quantity was inflated. Criminal forfeiture is a punishment for violating federal drug laws. *Libretti v. United States*, 516 U.S. 29, 39, 116 S. Ct. 356, 133 L. Ed. 2d 271 (1995). Punishment should be proportional to the crime, but the proportionality required "forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Graham v. Florida*, 560 U.S. 48, 60, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Kennedy, J., concurring in part and concurring in judgment). The evidence at trial established that Hubbard used more than two million dollars in cash from the sale of controlled substances to purchase real estate, vehicles, a boat, recreational water vehicles, and to open a retirement account. The order of forfeiture required that he surrender the items purchased with those proceeds as well as the remainder of the cash obtained from the sales. The order was not therefore "grossly disproportionate." Moreover, the jury's verdict forecloses Hubbard's argument that no conspiracy was proven, and the drug quantity was very conservatively calculated, as discussed above.

Hubbard's Pro Se Arguments

Hubbard makes two other arguments in his pro{2019 U.S. App. LEXIS 21} se brief: that the district court erred by denying his motion for a new trial, and that cumulative error violated his rights to due process and a fair trial. Neither argument will support a non-frivolous claim on appeal.

When considering a motion for a new trial, district judges "may act as a thirteenth juror, assessing the credibility of witnesses and the weight of the evidence." *United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2007) (citing *United States v. Lutz*, 154 F.3d 581, 589 (6th Cir. 1998)).

> The role of the court of appeals, however, is not to sit as a "thirteenth juror" and re-weigh the evidence, but to examine the evidence to determine whether the district court's ruling that the verdict is not against the manifest weight of the evidence was "a clear and manifest abuse of discretion."*Lutz*, 154 F.3d at 589 (quoting *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988)).

Hubbard's motion for a new trial was based on his claims that the government failed to demonstrate that he knew or should have known that the pseudoephedrine he was selling would be used to manufacture methamphetamine and failed to prove a lack of medical need in dispensing a controlled

substance. He also argued that bad acts were improperly introduced despite his motion in limine. As explained herein, these alleged errors would not support viable claims on appeal. Because these claims lacked{2019 U.S. App. LEXIS 22} merit, the district court did not abuse its discretion by denying Hubbard's motion for a new trial.

To warrant a new trial, the cumulative effect of any errors must have "deprived [the defendant] of a trial consistent with constitutional guarantees of due process." *Hernandez*, 227 F.3d at 697. Where, as in this case, no individual ruling has been {843 Fed. Appx. 677} shown to be erroneous, however, there is no "error" to consider, and the cumulative error doctrine does not warrant reversal. *United States v. Deitz*, 577 F.3d 672, 697 (6th Cir. 2009).

Additional Review

Finally, a review of the remaining trial record reveals no other non-frivolous issue to support an appeal. There were no arguable issues apparent during the parties' discovery, no violation of Hubbard's right to a speedy trial, voir dire was unremarkable, and there are no allegations of prosecutorial misconduct. Further, any claims regarding the ineffective assistance of counsel would be properly raised in a post-conviction proceeding, "where the record regarding counsel's performance can be developed in more detail," rather than on direct appeal. *United States v. Lopez-Medina*, 461 F.3d 724, 737 (6th Cir. 2006).

Hubbard's request that counsel participate in oral argument is **DENIED**. We **GRANT** counsel's motion to withdraw and **AFFIRM** the judgment of the district court.

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE W. HUBBARD, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2019 U.S. App. LEXIS 34435
No. 17-5853
November 19, 2019, Filed

Editorial Information: Subsequent History

Motion denied by United States v. Hubbard, 2024 U.S. App. LEXIS 9855 (6th Cir., Apr. 23, 2024)

Editorial Information: Prior History

United States v. Hubbard, 843 Fed. Appx. 667, 2019 U.S. App. LEXIS 21311, 2019 WL 11725426 (6th Cir. Ky., July 17, 2019)

Counsel {2019 U.S. App. LEXIS 1}For United States of America, Plaintiff - Appellee: Charles P. Wisdom Jr., Assistant U.S. Attorney, Ron L. Walker Jr., Assistant U.S. Attorney, Office of the U.S. Attorney, Lexington, KY.

Lonnie W. Hubbard, Defendant - Appellant, Pro se, Bruceton Mills, WV.

Judges: Before: MOORE, GRIFFIN, and MURPHY, Circuit Judges.

Opinion

ORDER

Lonnie W. Hubbard, a pro se federal prisoner, has filed a petition for rehearing of this court's order of July 17, 2019, that affirmed his convictions for conspiracy to distribute prescription medication and seventy related counts and the 360-month term of imprisonment imposed by the district court.

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P. 40(a).

We therefore **DENY** Hubbard's petition for rehearing.

UNITED STATES OF AMERICA, Plaintiff - Appellee v. LONNIE W. HUBBARD, Defendant - Appellant
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2019 U.S. App. LEXIS 36444
Case No. 17-5853
December 6, 2019, Decided

Editorial Information: Prior History

United States v. Hubbard, 2017 U.S. Dist. LEXIS 62982, 2017 WL 1503996 (E.D. Ky., Apr. 26, 2017)

Counsel {2019 U.S. App. LEXIS 1}For United States of America, Plaintiff - Appellee: Charles P. Wisdom Jr., Assistant U.S. Attorney, Ron L. Walker Jr., Assistant U.S. Attorney, Office of the U.S. Attorney, Lexington, KY.

Lonnie W. Hubbard, Defendant - Appellant, Pro se, Bruceton Mills, WV.

Judges: BEFORE: MOORE, GRIFFIN, and MURPHY, Circuit Judges.

Opinion

ORDER

Upon consideration of Appellant's motion to recall the mandate,

It is **ORDERED** that the motion is hereby **DENIED**.

Issued: December 06, 2019

19450032

LONNIE W. HUBBARD, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2022 U.S. App. LEXIS 16383
No. 21-6114
June 14, 2022, Filed

Editorial Information: Subsequent History

Rehearing denied by Hubbard v. United States, 2022 U.S. App. LEXIS 21242 (6th Cir., Aug. 1, 2022)

Editorial Information: Prior History

United States v. Hubbard, 2021 U.S. Dist. LEXIS 72893, 2021 WL 1432215 (E.D. Ky., Apr. 15, 2021)

Counsel {2022 U.S. App. LEXIS 1}For LONNIE W. HUBBARD, Petitioner - Appellant: Lonnie W. Hubbard, F.C.I. Hazelton, Bruceton Mills, WV.

For UNITED STATES OF AMERICA, Respondent - Appellee: Charles P. Wisdom Jr., Assistant U.S. Attorney, Lauren Tanner Bradley, Office of the U.S. Attorney, Lexington, KY.

Judges: Before: KETHLEDGE, Circuit Judge.

Opinion

ORDER

Lonnie W. Hubbard, a pro se federal prisoner, appeals the judgment of the district court denying his 28 U.S.C. § 2255 motion to vacate his sentence. The court construes Hubbard's notice of appeal as an application for a certificate of appealability. *See* Fed. R. App. P. 22(b)(2).

In 2015, the United States filed a 38-count indictment against Hubbard, a pharmacist; his company, Rx Discount of Berea, PLLC ("Rx Discount"); his wife; and six others. A grand jury returned a 65-count superseding indictment on July 21, 2016. The superseding indictment alleged that the defendants conspired to distribute oxycodone and pseudoephedrine; distributed oxycodone and pseudoephedrine; distributed hydrocodone; failed to obtain proper identification from persons purchasing pseudoephedrine; maintained a drug premises (the pharmacy); and conspired to commit money laundering and other fraudulent financial transactions.

In September 2016, Hubbard's{2022 U.S. App. LEXIS 2} counsel filed a motion for re-arraignment. The parties had negotiated a plea agreement whereby Hubbard would plead guilty to distributing pseudoephedrine knowing it would be used to manufacture methamphetamine, in violation of 21 U.S.C. § 843(a)(7), which carried a maximum of 10 years of imprisonment, and the United States would dismiss the superseding indictment. A change-of-plea hearing was set, but at the hearing counsel advised the court that Hubbard had changed his mind and did not want to plead guilty.

Three weeks later, a grand jury returned a second superseding indictment, bringing the total number of charges against Hubbard to 73. An eight-day trial was held in February 2017. During trial, Counts 7 and 47 were dismissed on the motion of the United States. The jury found Hubbard guilty on the remaining 71 charges, and the district court imposed a total term of imprisonment of 360 months, to

be followed by three years of supervised release.

On appeal, Hubbard's counsel filed a motion to withdraw, pursuant to *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and Sixth Circuit Rule 12(c)(4)(C), notifying this court of a lack of good faith issues to appeal. This court found no arguable issues, granted counsel's motion to withdraw, and affirmed Hubbard's conviction and sentence.**{2022 U.S. App. LEXIS 3}** *United States v. Hubbard*, 843 F. App'x 667 (6th Cir. 2019).

Hubbard filed his § 2255 motion to vacate in March 2021, claiming that counsel was ineffective for the following reasons: (1) failing to object to improper judicial participation and misconduct during plea negotiations and failing to obtain a binding plea agreement; (2) failing to advise Hubbard on certain legal concepts, which affected the plea process; (3) failing to object to opinion testimony by lay witnesses that violated Federal Rule of Evidence 704(b); and (4) failing to object to Count 60, which failed to state an offense and did not invoke the district court's subject-matter jurisdiction.

A magistrate judge determined that Hubbard's claims lacked merit and recommended denying Hubbard's motion to vacate. Over Hubbard's objections, the district court adopted the magistrate judge's report, denied Hubbard's motion to vacate, and declined to issue a certificate of appealability.

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). He may do so by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003) (citing *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000)). A certificate of appealability analysis is not the**{2022 U.S. App. LEXIS 4}** same as "a merits analysis." *Buck v. Davis*, 580 U.S. 100, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017). Instead, the certificate of appealability analysis is limited "to a threshold inquiry into the underlying merit of [the] claims," and whether "the District Court's decision was debatable." *Id.* at 774 (quoting *Miller-El*, 537 U.S. at 327, 348).

Hubbard's claims all asserted that counsel was ineffective. In *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court set forth a two-part test for determining whether the assistance of counsel is constitutionally ineffective. First, a defendant must show that counsel's errors were so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687. Second, a defendant must show that counsel's deficient performance prejudiced the defense. *Id.* To show prejudice under *Strickland*, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In his first claim, Hubbard says that counsel's performance was deficient when he failed to object to improper judicial participation and misconduct during plea negotiations and failed to obtain a binding plea agreement. Specifically, Hubbard asserts that the district court judge had a "broad policy and practice of refusing to consider and to categorically**{2022 U.S. App. LEXIS 5}** reject all binding plea agreements" and that his trial counsel performed unreasonably when he did not object to the judge's policy and insist that the judge accept a binding agreement.

Reasonable jurists would not debate the district court's denial of this claim. First, Hubbard failed to substantiate his claim that the district court judge had a policy or practice of rejecting all Federal Rule of Criminal Procedure 11(c)(1)(C) plea agreements, which bind the court to impose an agreed-upon sentence if it accepts the agreement. Indeed, the magistrate judge noted instances where the district court judge has, in fact, accepted such agreements. Furthermore, the district court judge did not participate in the plea negotiations, there was no binding plea agreement presented to

the court that could have been rejected, and Hubbard did not assert before the trial court that the lack of a binding agreement was the reason he decided not to plead guilty.

Second, Hubbard cannot establish that he was prejudiced by counsel's failure to negotiate a binding plea agreement. Although "the *Strickland* standard extends generally to the plea process," *Chaidez v. United States*, 568 U.S. 342, 349, 133 S. Ct. 1103, 185 L. Ed. 2d 149 (2013), "there is no constitutional right to plea bargain." *Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977). Hubbard's § 2255 motion explains that he was "[c]onsidering trial**{2022 U.S. App. LEXIS 6}** unless a binding plea agreement could be obtained." And in a declaration attached to his § 2255 motion, Hubbard indicated that the maximum sentence he would have accepted was five years with the condition that all but one charge would be dropped. Nevertheless, there is no indication that the government would have agreed to such terms. Hubbard declares only that trial counsel allegedly told him that the prosecutor "seemed willing" to agree to such an arrangement. This statement falls well short of establishing that such an agreement was possible. *See Wogenstahl v. Mitchell*, 668 F.3d 307, 343 (6th Cir. 2012). This is especially true considering that the parties reached a different agreement whereby Hubbard's maximum sentence was 10 years. The district court's rejection of this claim is therefore not debatable.

In his second claim, Hubbard asserts that counsel failed to advise him as to certain legal concepts and erroneously explained the elements of 21 U.S.C. § 841(a)(1), which criminalizes the unauthorized distribution of controlled substances. Hubbard claims that, if he had known about these concepts, he would have known he had "little chance to succeed" at trial and would have "negotiated a plea agreement" prior to trial.

Reasonable jurists would not debate the district**{2022 U.S. App. LEXIS 7}** court's denial of this claim. Even if counsel was deficient in this regard, Hubbard cannot establish that he was prejudiced. In the context of plea negotiations, a defendant must show that the outcome of the plea process would likely have been different with competent advice. *See Missouri v. Frye*, 566 U.S. 134, 148, 132 S. Ct. 1399, 182 L. Ed. 2d 379 (2012). Although Hubbard claims that he would have negotiated a plea agreement if counsel had explained these terms, the fact is that the parties did negotiate a plea agreement that counsel believed was in Hubbard's best interest, but from which Hubbard decided to withdraw. And Hubbard does not claim that, if counsel had properly explained everything to him, he would have decided not to withdraw from the negotiated agreement. Because Hubbard cannot establish what type of deal he would have otherwise negotiated or that the government was willing to negotiate after he rejected the agreed-upon deal, no prejudice is evident. Moreover, Hubbard's pleadings indicate that he was willing to accept only a binding agreement, which he had no ability to compel the government to offer. Under these circumstances, Hubbard cannot show that he would have persisted in his guilty plea but for counsel's deficient performance. This claim**{2022 U.S. App. LEXIS 8}** does not deserve encouragement to proceed further.

In his third claim, Hubbard alleges that counsel performed ineffectively by failing to object to 10 instances of expert opinion testimony about his intent, which violated Federal Rule of Evidence 704(b). However, none of the identified witnesses were qualified by the court as expert witnesses. Moreover, as the district court recognized, some of the challenged statements concerned Hubbard's actions-not his intent-and some statements did not bear on either. Accordingly, there was no basis for counsel to object on Rule 704(b) grounds, and thus no deficient performance.

In his final claim, Hubbard alleges that counsel was ineffective for failing to object to Count 60, which Hubbard contends failed to state an offense and did not invoke the district court's subject-matter jurisdiction. Reasonable jurists would not debate the denial of this claim, because this court rejected Hubbard's argument on direct appeal that Count 60 failed to state an offense. *Hubbard*, 843 F. App'x

at 670.

For the foregoing reasons, Hubbard's application for a certificate of appealability is **DENIED**.

LONNIE W. HUBBARD, Petitioner-Appellant, v. UNITED STATES OF AMERICA, Respondent-Appellee.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2022 U.S. App. LEXIS 21242
No. 21-6114
August 1, 2022, Filed

Editorial Information: Prior History

Hubbard v. United States, 2022 U.S. App. LEXIS 16383 (6th Cir., June 14, 2022)

Counsel {2022 U.S. App. LEXIS 1}For **LONNIE W. HUBBARD**, Petitioner - Appellant: **Lonnie W. Hubbard**, F.C.I. Hazelton, Bruceton Mills, WV.

For UNITED STATES OF AMERICA, Respondent - Appellee: Charles P. Wisdom Jr., Assistant U.S. Attorney, Lauren Tanner Bradley, Office of the U.S. Attorney, Lexington, KY.

Judges: Before: SUTTON, Chief Judge; GUY and COLE, Circuit Judges.

Opinion

ORDER

Lonnie W. Hubbard, a pro se federal prisoner, petitions for rehearing of this court's June 14, 2022, order denying him a certificate of appealability to appeal the order of the district court. The district court's order denied his 28 U.S.C. § 2255 motion to vacate his sentence alleging the ineffective assistance of counsel.

After consideration, we conclude that Hubbard has failed to establish that rehearing is necessary. Because the court did not misapprehend or overlook any point of law or fact, Hubbard's petition is **DENIED**. *See* Fed. R. App. P. 40(a).

LONNIE W. HUBBARD, Petitioner - Appellant, v. S. BROWN, Acting Warden, Respondent - Appellee.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
2023 U.S. App. LEXIS 19501
No. 23-6023
July 28, 2023, Decided
July 25, 2023, Submitted

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2023 U.S. App. LEXIS 1}Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. (5:22-cv-00196-JPB). John Preston Bailey, District Judge.Hubbard v. Brown, 2022 U.S. Dist. LEXIS 232666, 2022 WL 17975454 (N.D. W. Va., Dec. 28, 2022)

Disposition:
AFFIRMED.

Counsel **Lonnie W. Hubbard**, Appellant, Pro se.
Judges: Before WYNN and HEYTENS, Circuit Judges, and FLOYD, Senior Circuit Judge.

Opinion

PER CURIAM:

Lonnie W. Hubbard, a federal prisoner, appeals the district court's order accepting the recommendation of the magistrate judge and denying relief on Hubbard's 28 U.S.C. § 2241 petition in which Hubbard sought to challenge his conviction by way of the savings clause in 28 U.S.C. § 2255. The United States Supreme Court recently held that "§ 2255(e)'s saving clause does not permit a prisoner asserting an intervening change in statutory interpretation to circumvent [the Antiterrorism and Effective Death Penalty Act of 1996]'s restrictions on second or successive § 2255 motions by filing a § 2241 petition." *Jones v. Hendrix*, 599 U.S. 465, 143 S. Ct. 1857, 2023 WL 4110233, *5 (U.S. 2023). Hubbard therefore cannot pursue his claims in a § 2241 petition. Accordingly, we affirm the district court's order denying relief.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LONNIE W. HUBBARD, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT
2024 U.S. App. LEXIS 9855
No. 17-5853
April 23, 2024, Filed

Editorial Information: Subsequent History

US Supreme Court certiorari denied by Hubbard v. United States, 2024 U.S. LEXIS 4152 (U.S., Oct. 15, 2024)

Editorial Information: Prior History

United States v. Hubbard, 2019 U.S. App. LEXIS 34435 (6th Cir., Nov. 19, 2019)

Counsel **{2024 U.S. App. LEXIS 1}**For UNITED STATES OF AMERICA, Plaintiff - Appellee: Charles P. Wisdom Jr., Assistant U.S. Attorney, Office of the U.S. Attorney, Lexington, KY; Ron L. Walker Jr., Assistant U.S. Attorney, Office of the U.S. Attorney, Lexington, KY.

LONNIE W. HUBBARD, Defendant - Appellant, **Lonnie W. Hubbard**, F.C.I. Hazelton, Pro se, Bruceton Mills, WV.

Judges: Before: MURPHY, Circuit Judge.

Opinion

ORDER

Lonnie W. Hubbard, a pro se federal prisoner, moves to recall the mandate in this case, which was issued on November 19, 2019, after this court granted counsel's motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and affirmed Hubbard's convictions and 360-month sentence. *United States v. Hubbard*, 843 F. App'x 667 (6th Cir. 2019).

In 2015, the United States filed a thirty-eight-count indictment against Hubbard, a pharmacist; his company, Rx Discount of Berea, PLLC; his wife; and six others. The indictment alleged that the defendants conspired to distribute oxycodone and pseudoephedrine, distributed oxycodone and pseudoephedrine, distributed hydrocodone, failed to obtain proper identification from persons purchasing pseudoephedrine, maintained a drug premises (the pharmacy), and conspired to commit money laundering and other fraudulent financial transactions. Two superseding indictments were subsequently**{2024 U.S. App. LEXIS 2}** filed, bringing the total number of charges against Hubbard to seventy-three. An eight-day trial was held in February 2017, and two counts were dismissed by the government. The jury found Hubbard guilty on the remaining seventy-one charges, and the district court imposed a total term of imprisonment of 360 months, to be followed by three years of supervised release. The district court also ordered criminal forfeiture of real and personal property, as well as cash. Hubbard filed a motion for a new trial, which was denied.

On appeal, Hubbard's counsel filed an *Anders* motion, requesting permission to withdraw because of a lack of any good-faith issues to appeal. Hubbard filed a response. Substitute counsel was thereafter appointed, moved to withdraw, but did not supplement his motion with an *Anders* brief.

After a review of the record, the panel found that no appealable issues could be raised. The panel therefore granted counsel's motion to withdraw and affirmed the judgment of the district court. A petition for rehearing was also denied.

In December 2019, Hubbard filed a motion to recall the mandate, arguing that his right to appellate counsel was denied when this court allowed his second appellate**{2024 U.S. App. LEXIS 3}** counsel to withdraw. His motion was denied, and the Supreme Court subsequently denied a petition for a writ of certiorari. *Hubbard v. United States*, 140 S. Ct. 2628, 206 L. Ed. 2d 509 (2020). Hubbard filed a 28 U.S.C. § 2255 motion to vacate, which the district court denied. This court denied a certificate of appealability. *Hubbard v. United States*, No. 21-6114 (6th Cir. June 14, 2022).

In the current motion to recall the mandate, filed March 4, 2024, Hubbard asserts that his direct appeal should be reopened to address certain issues stemming from the Supreme Court's decision in *Ruan v. United States*, 597 U.S. 450, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022). In *Ruan*, the Supreme Court held that the crime of unauthorized distribution includes as an element that the defendant subjectively knew that the distribution was unauthorized; it is not sufficient that the distribution was objectively unauthorized. *Id.* at 2375. Given the decision in *Ruan*, Hubbard raises the following issues: (1) whether sufficient evidence existed to convict him of Counts 49-59 (distribution of oxycodone), (2) whether the district court erred by instructing the jury on the elements of distribution of oxycodone, (3) whether sufficient evidence existed to find him guilty of maintaining a drug premises and money laundering, (4) whether the district court erred by ordering criminal forfeiture of criminally derived property, and (5) whether the district court**{2024 U.S. App. LEXIS 4}** erred by denying Hubbard's motion for a new trial. Hubbard argues that he cannot collaterally attack his conviction under § 2255 on the basis of *Ruan* because it was not made retroactive on collateral review and did not announce a new rule of constitutional law. He therefore asserts that he has no avenue to challenge his now "invalid" convictions and these extraordinary circumstances warrant the recall of this court's mandate.

The court has the inherent authority to recall its mandate. *Patterson v. Haskins*, 470 F.3d 645, 661-62 (6th Cir. 2006). But "such power should only be exercised in extraordinary circumstances because of the profound interests in repose attached to a court of appeals mandate." *United States v. Saikaly*, 424 F.3d 514, 517 (6th Cir. 2005). The power to recall a mandate "is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998). The party "'seeking recall of a mandate must demonstrate good cause for that action through a showing of exceptional circumstances,' including, but not limited to 'fraud upon the court, clarification of an outstanding mandate, [or] correction of a clerical mistake.'" *Patterson*, 470 F.3d at 662 (quoting *BellSouth Corp. v. FCC*, 96 F.3d 849, 851 52 (6th Cir. 1996)).

Such exceptional circumstances do not exist in this case. *Ruan* was decided five years after Hubbard was convicted. This court has recognized that changes in statutory**{2024 U.S. App. LEXIS 5}** interpretation are "not the type of unforeseen contingency which warrants recall of the mandate to permit yet another round of appellate review." *Saikaly, 424* F.3d at 518. The proper remedy to attack a conviction in a criminal proceeding that has become final is a motion to vacate under § 2255; "the fact that such remedy is no longer available does not warrant a recall of the mandate." *Id.* at 517-18 (citing *United States v. Fraser*, 407 F.3d 9, 10-11 (1st Cir. 2005); *United States v. Ford*, 383 F.3d 567, 568 (7th Cir. 2004) (per curiam); *Bottone v. United States*, 350 F.3d 59, 64 (2d Cir. 2003); *United States v. Falls*, 129 F. App'x 420, 420-21 (10th Cir. 2005)).

Hubbard's motion to recall this court's mandate is **DENIED**.

ENTERED BY ORDER OF THE COURT

No. 24-6108

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

In re: LONNIE W. HUBBARD,

Movant.

ORDER

Before: SUHRHEINRICH, WHITE, and RITZ, Circuit Judges.

Pro se federal prisoner Lonnie W. Hubbard has pending before the court a motion for an order authorizing the district court to consider a second or successive 28 U.S.C. § 2255 motion to vacate, set aside, or correct his sentence. The government opposes the motion. But Hubbard contends that the district court erred in construing his Federal Rule of Civil Procedure 60(b)(6) motion for relief from the judgment as a second § 2255 motion and transferring it to this court. *See In re Sims*, 111 F.3d 45, 47 (6th Cir. 1997) (per curiam). Accordingly, Hubbard moves the court to transfer his motion to the district court. Hubbard's Rule 60(b)(6) motion added a new claim for relief from his convictions, *see Gonzalez v. Crosby*, 545 U.S. 525, 532 (2005), so the district court correctly transferred it. And because Hubbard's new claim does not satisfy the requirements of 28 U.S.C. § 2255(h) for second or successive § 2255 motions, we deny his motion for authorization.

In 2017, a federal jury convicted Hubbard, a former pharmacist, of multiple drug-trafficking and money-laundering offenses. Relevant here, the jury convicted Hubbard of 44 counts of distributing oxycodone outside the scope of professional practice and not for a legitimate medical purpose, in violation of 21 U.S.C. § 841(a). The district court sentenced Hubbard to a total term of 360 months of imprisonment. We affirmed. *United States v. Hubbard*, 843 F. App'x 667 (6th Cir. 2019).

In April 2021, Hubbard filed a § 2255 motion in the district court, raising ineffective-assistance-of-trial-counsel and subject-matter jurisdiction claims. The district court denied the motion, *Hubbard v. United States*, No. 5:15-104-DCR, 2021 WL 5235981 (E.D. Ky. Nov. 10, 2021), and we denied Hubbard a certificate of appealability, *Hubbard v. United States*, No. 21-6114, 2022 WL 16955061 (6th Cir. June 14, 2022).

In June 2022, the Supreme Court issued its opinion in *Ruan v. United States*, 597 U.S. 450 (2022). *Ruan* held that to secure a conviction for the unauthorized distribution of a controlled substance under § 841(a)(1), the government must prove that the defendant subjectively knew that the distribution was unauthorized. *See id.* at 454. Consequently, if "a defendant produces evidence that he or she was authorized to dispense controlled substances, the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so." *Id.*

Arguing that the district court's § 841(a)(1) jury instruction did not comport with *Ruan*, Hubbard moved to recall the mandate in his direct appeal. We denied the motion because "changes in statutory interpretation are 'not the type of unforeseen contingency which warrants recall of the mandate to permit yet another round of appellate review.'" *United States v. Hubbard*, No. 17-5853, 2024 WL 4502287, at *2 (6th Cir. Apr. 23, 2024) (quoting *United States v. Saikaly*, 424 F.3d 514, 518 (6th Cir. 2005)), *cert. denied*, 145 S. Ct. 396 (2024).[1]

Hubbard then filed a Rule 60(b)(6) motion in the district court, arguing that *Ruan* invalidated his § 841(a)(1) convictions and therefore presented an exceptional circumstance that justified reopening his § 2255 proceedings. As stated above, the district court transferred the motion to this court. Hubbard filed a corrected application for authorization, but he does not present a new claim. Instead, Hubbard asks us to return the case to the district court for a decision on the merits of his Rule 60(b)(6) motion.

[1] The Fourth Circuit also rejected Hubbard's attempt to raise a *Ruan* claim in a 28 U.S.C. § 2241 habeas corpus petition. *See Hubbard v. Brown*, No. 23-6023, 2023 WL 4839396 (4th Cir. July 28, 2023) (per curiam).

A motion, however captioned, is a second or successive motion to vacate if the movant raises a new ground for relief from his conviction or sentence. *Gonzalez*, 545 U.S. at 532. Here, Hubbard's Rule 60(b)(6) motion challenged the validity of his § 841(a)(1) convictions under *Ruan*. This was a new ground for relief. Accordingly, the district court correctly transferred the motion to this court. *See In re Sims*, 111 F.3d at 47. We therefore deny Hubbard's motion to transfer the case to the district court.

And inasmuch as Hubbard does not cite newly discovered evidence demonstrating that he is actually innocent and concedes that *Ruan* did not establish a new rule of constitutional law that applies retroactively to his case, we **DENY** the motion for authorization. *See* 28 U.S.C. § 2255(h).

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-6108

In re: LONNIE W. HUBBARD,

Movant.

Before: SUHRHEINRICH, WHITE, and RITZ, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon the motion by Lonnie W. Hubbard to authorize the district court to consider a second or successive 28 U.S.C. § 2255 motion to vacate sentence.

UPON FULL REVIEW of the record and any submissions by the parties,

IT IS ORDERED that the motion for authorization is DENIED.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens

Kelly L. Stephens, Clerk

Lonnie W. Hubbard, Petitioner v. United States.
SUPREME COURT OF THE UNITED STATES
140 S. Ct. 2628; 206 L. Ed. 2d 509; 2020 U.S. LEXIS 1941; 88 U.S.L.W. 3318
No. 19-7797.
March 30, 2020, Decided

Editorial Information: Prior History

United States v. Hubbard, 843 Fed. Appx. 667, 2019 U.S. App. LEXIS 21311, 2019 WL 11725426 (6th Cir. Ky., July 17, 2019)

Judges: {2020 U.S. LEXIS 1}Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

Lonnie W. Hubbard, Petitioner v. United States.
SUPREME COURT OF THE UNITED STATES
2024 U.S. LEXIS 4152
No. 24-5474.
October 15, 2024, Decided

Editorial Information: Prior History

United States v. Hubbard, 2024 U.S. App. LEXIS 9855 (6th Cir., Apr. 23, 2024)

Judges: {2024 U.S. LEXIS 1}Roberts, Thomas, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett, Jackson.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

UNITED STATES ATTORNEY'S OFFICE
Ron L. Walker, Jr., AUSA
260 W. Vine Street, Suite 300
Lexington, KY 40507

07/26/23

re: The Supreme Court in Jones v. Hendrix, 2023 U.S. LEXIS 2632, No. 21-857, (June 22, 2023), ruled 28 U.S.C. § 2255(e)'s saving clause did not permit a federal prisoner asserting a change in statutory interpretation an avenue or vehicle for relief when he could not file a second or successive § 2255 motion by filing a habeas petition under 28 U.S.C. § 2241.

Dear Mr. Walker,

This is Lonnie W. Hubbard, erstwhile pharmacist, whom you helped convict in February of 2017, 15-CR-104-SS-DCR. See Superseding Indictment R. 295, 1160-1184. Last year, I was blessed by the Supreme Court's decision in Ruan v. United States, 142 S. Ct. 2370 (June 26, 2022), which clarified the mens rea scienter element for § 841's distribution of a controlled substance offense to include the "knowingly and intentionally" element and how it applies to the "except as authorized" clause. The Court ruled that the government must prove beyond a reasonable doubt that the defendant knowingly acted unauthorized, or intended to do so. Id. at 2375. Post-Ruan, the essential elements to convict a pharmacist to a § 841(a)(1) conviction are: 1) that the defendant knowingly or intentionally dispensed a controlled substance, and 2) that the defendant knowingly or intentionally dispensed the prescription to be used without a legitimate medical purpose and outside the course of professional practice.

On Aug. 15, 2022, I filed a § 2241 petition in the Northern District of West Virginia (Clarksburg) for relief of the § 841(a)(1) convictions based on Ruan's new interpretive statutory gloss. The district court promptly dismissed the petition due to Judge John Bailey's rationale and interpretation in an analogous Rehaif v. United States case explaining that Rehaif did not change the substantive law according to the Fourth Circuit's In re Jones test, which gives the district court jurisdiction to hear the petition on the merits of the claim. See Hubbard v. Brown, Civil Action No. 5:22-cv-196, 2022 U.S. Dist LEXIS 232666 (N.D. W. Va., Dec. 28, 2022). I subsequently appealed the district court's decision to the Fourth Circuit and have been awaiting a favorable appellate decision.

However, as you may know, the Supreme Court in Jones v. Hendrix held that 2255(e)'s saving clause cannot be utilized by prisoners involving

statutory interpretation because that avenue/vehicle is intended strictly for § 2255 habeas corpus motions where the inmate's sentencing judge is best equipped to hear the inmate's allegation of constitutional error and purported prejudice affecting his substantial rights. However, now, through no fault of my own, I do not have an avenue to utilize the Supreme Court's recent interpretation of § 841 in Ruan that rendered my convictions no longer illegal because of Jones v. Hendrix. My § 2241 petition is doomed to fail!

Let me explain why I believe the § 841(a)(1) convictions in the second superseding indictment are no longer illegal as defined by the Supreme Court's gloss in Ruan. If you look at Counts 15 through 59 of the indictment which alleges a violation of 21 U.S.C. § 841(a)(1), with or without aiding or abetting, you will notice that the essential element of "knowingly or intentionally" is not mentioned in the counts or charges. But as we know, that does not mean the indictment is defective or fatally flawed. The Supreme Court in Neder v. United States, 527 U.S. 1 (1999), has ruled that the omission of an essential element from a criminal indictment is not structural error, nor is it fatal to the indictment if that error can be found to be harmless error under Rule 52(a) of Fed. Rules of Crim. Procedure. In other words, it is harmless error if it is beyond a reasonable doubt, the omitted element of materiality was uncontested and was supported by overwhelming evidence, such that the jury verdict would have been the same absent the error and therefore not affecting the defendant's substantial rights. However, as you know, I specifically contested this essential element at every step of the prosecution's case repeatedly asserting a lack of guilty knowledge into dispensing unauthorized prescriptions. Moreover, there was not overwhelming evidence that I did, in fact, knowingly or intentionally dispense unauthorized prescriptions. Quite frankly, there was no way a jury could have known what the essential elements were for § 841 because, we did not know what the essential elements were for § 841.

Specifically, the jury instruction that was given to the jury, R. 360, PID 1858-59, Instruction No. 24, explained to the jury that in order to convict me of a § 841 conviction, they had to find the following essential elements:

"(A) The defendant knowingly or intentionally distributed the controlled substance, outside the scope of professional practice and not for a legitimate medical purpose, and (B) That the defendant knew at the time of distribution that the substance was a controlled substance..."

Additionally, the jury was instructed by the Sixth Circuit's Pattern jury instruction on deliberate ignorance, R. 360, PID 1843, Instruction No. 14,

"Next, I want to explain something about proving the defendant's knowledge. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that others were using and/or distributing pseudoephedrine or oxycodone without a legitimate medical purpose, then you may find that the defendant knew the others were using and/or distributing these substances without a legitimate medical purpose.

But to find this, you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that this conduct was occurring, and that the defendant deliberately closed his eyes to what was obvious. Carelessness, negligence, or foolishness on the defendant's part in not the same as knowledge, and is not enough to convict...."

Mr. Walker, taken together as a whole, these two jury instructions could not have informed the jury about the high mens rea scienter element required to convict as described in the Ruan decision.

First, in instruction No. 24, the jury was not informed that I had to "knowingly" dispense a controlled substance prescription and that I had to "knowingly" dispense it without a legitimate medical purpose outside the course of professional practice. Instead, the jury instruction told the jury the "knowing or intentional" element applied only to the act of distributing or dispensing (precisely like the Supreme Court's rejection in Ruan.) Remember, the government cannot prove knowledge by naivete, greed, mal-practice, incompetence, recklessness, stupidity or bad judgment alone. I had to "knowingly" dispense controlled substance prescriptions for the illegal reason of dispensing without a medical purpose outside the scope of professional practice. The verdict forms do not assuage the problem that the jury was not informed of the proper essential elements of § 841(a)(1) either. They only briefly list the charges without clarification.

Second, the deliberate ignorance jury instruction does not remedy the other jury instruction's lack of mentioning the correct mens rea element. Mr. Walker I realize the recent Sixth Circuit's holding in United States v. Anderson, No. 21-3073, __ F.4th __, 2023 U.S. App. LEXIS 9080 (6th Cir. April 17, 2023) seems to foreclose the above negative implication argument because there the deliberate ignorance jury instruction in Anderson specifically covered the holding in Ruan by referring continuously to the "knowledge of the defendant", his "deliberate ignorance", and if he "knew that the

prescriptions were dispensed illegitimately." See also United States v. Sakkal, 2023 U.S. App. LEXIS 13489 (6th Cir. May 31, 2023).

However, there is a marked difference between my deliberate jury instruction and the one found in Anderson and Sakkal. My deliberate ignorance jury instruction states, "If you are convinced that the defendant deliberately ignored a high probability that others were using and/or distributing pseudopphedrine or oxycodone without a legitimate medical purpose, then you may find that the defendant knew others were using and/or distributing these substances without a legitimate medical purpose." This part of the instruction allows the jury to impart blame on me if there existed a high probability that "others" were "distributing" oxycodone without a legitimate medical purpose. Mr. Walker, in my trial we know that several witnesses testified to distributing their medications to others after the prescriptions were filled diverting them. Did the jury convict me on the § 841 charges because I ignored the probability that these witnesses were doing so? Another reading and interpretation of this part of the instruction allows blame on the defendant if "others" were "using" oxycodone without a legitimate medical purpose. Did the jury convict me on the § 841 charges because I ignored the probability that these customers were using oxycodone inappropriately? Again, several witnesses testified to the fact that they may have at one time required oxycodone for pain relief, but had escalated their dosages and quantities because of an existing addiction. The instruction cannot save itself because it concludes by reinforcing that to find blame, "you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability 'that this conduct' was occurring, and that the defendant deliberately closed his eyes to what was obvious." The instruction contains words like "others" and "using" which create ambiguities and generalizations of the elements of the crime and in no way solves the other jury instructions limitations or comports to Ruan's mens rea requirements as required by the Supreme Court's ruling.

Therefore, the Sixth Circuit's rationale in Anderson cannot be utilized here to clean-up and salvage Ruan's requirements and claim harmless error. I either understood and intended to dispense controlled substances without a legitimate medical purpose outside the usual course of professional practice (which was not proven at trial), or I ignored a high probability that the prescriptions dispensed were without a legitimate medical purpose outside

the usual course of professional practice. One or the other, and both jury instructions clearly fail to inform the jury of the correct essential elements required by Ruan. This due process error is not harmless as described in Rule 52(a) and is ultimately a constitutional violation of my right to a fair trial.

My § 841(a)(1) convictions cannot stand because no evidence was presented as to my knowledge of knowingly filling unauthorized prescriptions, or that I intended to do so. Whether viewed as a matter of the Fifth Amendment's guarantee of due process or the Sixth Amendment's promise of a fair trial by jury, or both, a deprivation of those essential rights seriously impugned the fairness, integrity and public reputation of the judicial proceedings and as such cannot be considered harmless error according to Rule 52(a) and Neder.

Please Mr. Walker, Ron ... I ask that you submit a motion to dismiss the second superseding indictment pursuant to Federal Rules of Criminal Procedure 48(a) because of the facts and Supreme Court gloss of Ruan as described above in violation of my constitutional rights giving me an unjust sentence. Please take a couple months to consider my request. Please respond and let me know your answer and why or why not you agree with my assessment of Ruan and the essential elements of the jury instructions as described in the second superseding indictment. Only the government can file a Rule 48(a) motion and district courts must grant prosecutors leave to dismiss charges unless dismissal is "clearly contrary to manifest public interest." Rinaldi v. United States, 434 U.S. 22, 30 (1977).

Thank you for your consideration and time on this important matter. It has been nearly seven years since trial and my life has been totally devasted because of the jury's uninformed dedision that does not comport to Ruan's high mens rea standard. Please respond,

Sincerely,

Lonnie W. Hubbard #19450-032

7-26-23

P.S. I am moving to a low-security prison in Memphis, TN. I do not know the address yet. Please find me from the BOP find an inmate locater function.

Federal Correctional Institution-Hazelton
P.O. Box 5000
Bruceton Mills, WV 26525

UNITED STATES ATTORNEY'S OFFICE
Ron L. Walker, Jr., AUSA
260 W. Vine Street, Suite 300
Lexington, KY 40507

re: Proposed motion for a show cause order

Dear Mr. Walker,

This is Lonnie W. Hubbard again asking you to file a motion to dismiss the second superseding indictment pursuant to Fed. R. Crim. Proc. 48(a) because of the facts in Hubbard's case and the Supreme Court gloss of Ruan. I have given you over two months to consider my request without any answer from your office. All I am asking is an answer on why you agree or disagree with my assessment of Ruan and the omitted essential element of the mens rea in the jury instructions.

I am sending you a proposed motion that I plan to follow in one month if I have not received an answer from the Attorney's Office. I believe it is clear that the jury made an uninformed decision due to the lack of clarity in the jury instructions without regard to the high mens rea or scienter element required by the Supreme Court in Ruan.

Thank you for your time and consideration in this important matter. Please remember your ethical responsibilities as a public service employee and AUSA prosecutor. Please respond,

Sincerely,

Lonnie W. Hubbard #19450-032

FCI Memphis
P.O. Box 34550
Memphis, TN 38184-0550
(new address)

10/09/2023

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
(LEXINGTON)

UNITED STATES OF AMERICA, Plaintiff, v. LONNIE W. HUBBARD, Defendant.	Crim. Action No. 15-CR-104-SS-DCR -sui juris- Judge Reeves

DEFENDANT'S MOTION FOR A SHOW CAUSE ORDER

SUBMITS WITH SOLICITUDE, Lonnie W. Hubbard, sui juris, asks this Honorable Court to issue an order requiring the government to show cause as to why the government should not move for dismissal of the Second Superseding Indictment under Federal Rule of Criminal Procedure 48(a). Defendant Hubbard requests a hearing on this motion.

I. JURISDICTION

This Court has jurisdiction to adjudicate under 18 U.S.C. § 3231 and 28 U.S.C. § 1651 (district courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions"). District courts maintain "some measure of jurisdiction over criminal prosecution ... even after conviction and appeal." Rice v. Rivera, 617 F.3d 802, 809 (4th Cir. 2010) (holding that a district court possesses jurisdiction to adjudicate a motion to vacate under Fed. R. Crim. P. 48(a) after conviction and direct appeal); see also United States v. Smith, 467 F.3d 785, 788 (D.C. Cir. 2006) ("district courts retain some reservoir of jurisdiction ... to entertain motions after final judgment.").

II. INTRODUCTION

On February 16, 2017, the jury convicted Hubbard to 43 counts of 21 U.S.C. § 841(a)(1) without the government notifying the jury of the correct mens rea requirement as statutorily interpreted by the Supreme Court in Ruan v. United States, 142 S. Ct. 2370 (June 26, 2022) in the indictment, the verdict forms,

or the jury instructions. Most importantly, the Supreme Court held that § 841's knowingly or intentionally mens rea applied to the "except as authorized" clause. This meant that in a § 841 prosecution in which a defendant met his burden of production under 21 U.S.C. § 885 (which Hubbard as a pharmacist did), the government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. Hubbard asserts that his own trial counsel, the government, the district court, and even the Sixth Circuit Court of Appeals evaluated the jury instructions under an incorrect understanding of § 841's scienter requirement resulting in Hubbard's conviction and sentence affirmation of 30 years' imprisonment. This error cannot be found to be harmless error as described in Neder v. United States, 527 U.S. 1 (1999).

On July 26, 2023, Hubbard wrote a letter addressed to the U.S. Attorney's Office requesting AUSA Ron L. Walker Jr. to "submit a motion to dismiss the second superseding indictment pursuant to Federal Rules of Criminal Procedure 48(a) because of the facts and Supreme Court gloss of Ruan." (see Appendix A Letter to U.S. Attorney's Office page 5). However as of today's date, the U.S. Attorney's Office has failed to file a motion to dismiss the criminal indictment under rule 48(a), and has failed to state why the government refuses to answer Hubbard's request. Therefore, Hubbard moves this Honorable Court to issue an order requiring the government to show cause why the government should not move for a dismissal of the second superseding indictment under Fed. R. of Crim. Proc. 48(a).

A. FACTS KNOWN TO THE GOVERNMENT

Based upon facts known to the government, Counts 15 through 59 of the second superseding indictment, which allege a violation of 21 U.S.C. § 841(a)(1) with or without aiding and abetting, did not list or mention the required

essential element of "knowingly or intentionally" in the counts of charge. This essential element was also excluded from the verdict forms meaning that the jury would have had to be notified of the correct mens rea and essential elements from the jury instructions to convict Hubbard.

Based upon facts known to the government, jury instruction No. 24, R. 360, PID 1858-59, was precisely like the one rejected by the Supreme Court in Ruan because it told the jury the "knowing or intentional" element applied only to the act of distributing or dispensing. There was nothing in the jury instruction that informed the jury that the defendant had to knowingly act in an unauthorized manner.

Based upon facts known to the government, jury instruction No. 14, R. 360, PID 1843, failed to cure the other jury instruction's omitted mens rea and ambiguously allowed the jury to impart blame on Hubbard because it contained the words "others" were "distributing" oxycodone/pseudoephedrine without a legitimate medical purpose. Moreover, the jury instruction ambiguously contained the word "using" which allowed generalizations and blame to be assigned to Hubbard. Taken together, these ambiguities furthered the misstatement of the essential element from the previous instruction because numerous customers admitted to diverting oxycodone inappropriately after Hubbard legally filled their prescriptions satisfying the jury instruction's guidance for finding guilty when others distributed or were using controlled substances.

III. GROUNDS TO GRANT SHOW CAUSE ORDER

A. This motion presents an opportunity for the government to correct an injustice and comply with President Biden's Order requiring the executive branch of government to ensure that "no one should be required to serve an excessive prison sentence." Ex. Order No. 14074 at § 1 (May 25, 2022).

B. A government attorney is required to act "in a manner reasonably calculated to advance the government client's lawful objectives with reasonable competence and diligence." Restatement (Third) of the Law Governing Lawyers § f (Am. Law Inst., 2000). A minimum amount of investigation should convince a competent and diligent attorney (prosecutor) that continuation of a lengthy sentence by an unlawful verdict by an uninformed jury cannot accomplish the government's objective of exercising reasonable competence and diligence lawfully.

C. While the prosecution was misinterpreting the essential elements of § 841(a)(1), the government (through the jury instructions) was lowering the burden of proof. A prosecutor cannot prove a defendant's knowledge by demonstrating his naivete, greed, malpractice, incompetence, recklessness or stupidity as explained by the Supreme Court in Ruan. Again, Ruan requires that the government prove beyond a reasonable doubt that the defendant acted in an unauthorized way. Yes, deliberate ignorance can show a defendant's subjective knowledge; But not when the deliberate ignorance jury instruction is an incorrect statement of the law, not when it is written with ambiguities and generalizations, and not when it did not remedy the error of the other jury instruction's omitted mens rea requirement as described in Ruan.

D. A prosecutor has an ethical responsibility as a minister of justice; One who has basic obligations of public service. A prosecutor "shall put forth honest effort in the performance of [his] duties" and he shall "place loyalty to the Constitution, the laws, and ethical principles" thereof. See 5 C.F.R. § 2635.101(b)(1) and (5) Basic obligation of public service.

E. Hubbard was sentenced to a 30 year term of imprisonment and is suffering a significant trial penalty. It was Hubbard's constitutional right to enjoy the right to an impartial jury, a fair trial under the Sixth

Amendment and the Fifth Amendment guarantee of due process. Hubbard's denial of his Fifth & Sixth Amendment rights seriously impugned the fairness, integrity and public reputation of the judicial proceedings, and as such, cannot be considered to be harmless error under Rule 52(a) or Neder.

IV. CONCLUSION

WHEREFORE, Hubbard asks this Honorable Court to issue an order requiring the government to show cause as to why the government should not move for a dismissal of the second superseding indictment pursuant to Fed. R. Crim. Proc. 48(a). Hubbard requests a hearing on this motion.

Respectfully submitted,

Date

Lonnie W. Hubbard
#19450-032
FCI Memphis
P.O. Box 34550
Memphis, TN 38184-0550
Defendant, sui juris

U.S. Department of Justice

United States Attorney's Office
Eastern District of Kentucky

260 West Vine Street, Suite 300
Lexington, Kentucky 40507-1612

Phone: (859) 685-4889
Fax: (859) 233-2658

October 20, 2023

Lonnie Hubbard # 14950-032
FCI-Memphis
P.O. Box 34550
Memphis, TN 38184-0550

RE: Proposed motion request

Dear Mr. Hubbard:

Thank you for your letter dated October 9, 2023, reminding me of your initial request.

In response to your request to dismiss counts of the Superseding Indictment in your case, I must respectfully decline your request. Admittedly, neither the indictment nor the jury instructions contained the now required *mens rea* language as set forth in *United States v. Ruan,* 142 S.Ct. 2370 (2022). However, recent Sixth Circuit decisions have ruled that dismissal is not required for cases tried before *Ruan* where a deliberate ignorance instruction was also given. *United States v. Anderson*, 67 F.4th 755 (6th Cir. 2023); *United States v. Sakkal*, 2023 WL 373678, at *6 (6th Cir. 2023); *United States v. Hofstetter*, 80 F.4th 725 (6th Cir. 2023); *United States v. Bauer*, 82 F.4th 522 (6th Cir. 2023). The deliberate ignorance instruction was given in your case. Jury Instruction No. 14.

Sincerely,

CARLTON S. SHIER, IV
UNITED STATES ATTORNEY

Ron L. Walker Jr.

By: Ron L. Walker Jr.
Chief, Criminal Division

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Kelly L. Stephens
Clerk

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POTTER STEWART U.S. COURTHOUSE
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www.ca6.uscourts.gov

Filed: April 28, 2025

Mr. Lonnie W. Hubbard
F.C.I. Memphis
P.O. Box 34550
Memphis, TN 38134

Re: Case No. 24-6108, *In re: Lonnie Hubbard*
Originating Case No. : 5:15-cr-00104-1 : 5:21-cv-00090

Dear Mr. Hubbard,

The court denied your 28 U.S.C. § 2244 application by order filed April 07, 2025. The order was self-executing the day it was filed and a mandate does not issue.

The court's decision in In re King, 190 F.3d 479 (6th Cir. 1999), cert denied, 2000 WL 305924 (U.S. Mar 27, 2000)(No. 99-7952) prohibits the court from revisiting its decision no matter how such a request is styled. King held that under § 2244(b)(3) the grant or denial of an authorization to file a second or successive habeas corpus petition "shall not be appealable" nor "subject to a petition for rehearing or for a writ of certiorari." The reason for seeking rehearing or reconsideration does not matter.

In re King further instructed the clerk's office to return any party petitions seeking rehearing or rehearing en banc of the panel decision to grant or deny a request to file a second or successive writ of habeas corpus in the district court. All such petitions which have been received have been returned to the sender without the court taking any action. If there is anything new to which you want to bring the court's attention, you will need to file a new § 2244 application.

Sincerely yours,

s/Sharday S. Swain
Case Manager
Direct Dial No. 513-564-7027

cc: Mr. Charles P. Wisdom Jr.

Enclosure

§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b) (1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both. If the offense involves a pre-retail medical product (as defined in section 670 [18 USCS § 670]) the punishment for the offense shall be the same as the punishment for an offense under section 670 [18 USCS § 670] unless the punishment under this subsection is greater.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are—

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title [18 USCS § 3077], but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate, and, with respect to offenses over which the Department of Homeland Security has jurisdiction, by such components of the Department of Homeland Security as the Secretary of Homeland Security may direct, and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury, the Secretary of Homeland Security, and

the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Secretary of Homeland Security, the Postal Service, and the Attorney General.

(f) As used in this section—

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title [18 USCS § 1956(c)(5)]) by, through, or to a financial institution (as defined in section 1956 of this title [18 USCS § 1956]), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title [18 USCS § 1956(c)(4)(B)], but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the terms "specified unlawful activity" and "proceeds" shall have the meaning given those terms in section 1956 of this title [18 USCS § 1956].

§ 853. Criminal forfeitures

(a) Property subject to criminal forfeiture. Any person convicted of a violation of this title or title III punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law—

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 408 of this title (21 U.S.C. 848), the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this title or title III, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part [21 USCS §§ 841 et seq.], a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Meaning of term "property". Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) Third party transfers. All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (n) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) Rebuttable presumption. There is a rebuttable presumption at trial that any property of

a person convicted of a felony under this title or title III is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that—

(1) such property was acquired by such person during the period of the violation of this title or title III or within a reasonable time after such period; and

(2) there was no likely source for such property other than the violation of this title or title III.

(e) Protective orders.

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of this title or title III for which criminal forfeiture may be ordered under this section and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than fourteen days after the date on which it is entered, unless extended for good

cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(4) Order to repatriate and deposit.

(A) In general. Pursuant to its authority to enter a pretrial restraining order under this section, the court may order a defendant to repatriate any property that may be seized and forfeited, and to deposit that property pending trial in the registry of the court, or with the United States Marshals Service or the Secretary of the Treasury, in an interest-bearing account, if appropriate.

(B) Failure to comply. Failure to comply with an order under this subsection, or an order to repatriate property under subsection (p), shall be punishable as a civil or criminal contempt of court, and may also result in an enhancement of the sentence of the defendant under the obstruction of justice provision of the Federal Sentencing Guidelines.

(f) Warrant of seizure. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant. If the court determines that there is probable cause to believe that the property to be seized would, in the event of conviction, be subject to forfeiture and that an order under subsection (e) may not be sufficient to assure the availability of the property for forfeiture, the court shall issue a warrant authorizing the seizure of such property.

(g) Execution. Upon entry of an order of forfeiture under this section, the court shall authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to or derived from property ordered forfeited under this section may be used to offset ordinary and necessary expenses to the property which are required by law, or which are necessary to protect the interests of the United States or third parties.

(h) Disposition of property. Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any

property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with him or on his behalf be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with him or on his behalf, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm, or loss to him.

(i) Authority of the Attorney General. With respect to property ordered forfeited under this section, the Attorney General is authorized to—

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this title, or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this section;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States, in accordance with the provisions of section 511(e) of this title (21 U.S.C. 881(e)), of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(j) Applicability of civil forfeiture provisions. Except to the extent that they are inconsistent with the provisions of this section, the provisions of section 511(d) of this title (21 U.S.C. 881(d)) shall apply to a criminal forfeiture under this section.

(k) Bar on intervention. Except as provided in subsection (n), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(l) Jurisdiction to enter orders. The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(m) Depositions. In order to facilitate the identification and location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States, the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(n) Third party interests.

(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may

present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(o) Construction. The provisions of this section shall be liberally construed to effectuate its remedial purposes.

(p) Forfeiture of substitute property.

(1) In general. Paragraph (2) of this subsection shall apply, if any property described in subsection (a), as a result of any act or omission of the defendant—

(A) cannot be located upon the exercise of due diligence;

(B) has been transferred or sold to, or deposited with, a third party;

(C) has been placed beyond the jurisdiction of the court;

(D) has been substantially diminished in value; or

(E) has been commingled with other property which cannot be divided without difficulty.

(2) Substitute property. In any case described in any of subparagraphs (A) through (E) of paragraph (1), the court shall order the forfeiture of any other property of the defendant, up to the value of any property described in subparagraphs (A) through (E) of paragraph (1), as applicable.

(3) Return of property to jurisdiction. In the case of property described in paragraph (1)(C), the court may, in addition to any other action authorized by this subsection, order the defendant to return the property to the jurisdiction of the court so that the property may be seized and forfeited.

(q) Restitution for cleanup of clandestine laboratory sites. The court, when sentencing a defendant convicted of an offense under this title or title III involving the manufacture, the possession, or the possession with intent to distribute, of amphetamine or methamphetamine, shall—

(1) order restitution as provided in sections 3612 and 3664 of title 18, United States Code [18 USCS §§ 3612 and 3664];

(2) order the defendant to reimburse the United States, the State or local government concerned, or both the United States and the State or local government concerned for the costs incurred by the United States or the State or local government concerned, as the case may be, for the cleanup associated with the manufacture of amphetamine or methamphetamine by the defendant, or on premises or in property that the defendant owns, resides, or does business in; and

(3) order restitution to any person injured as a result of the offense as provided in section 3663A of title 18, United States Code [18 USCS § 3663A].