25-5965

CASE NO. USAP6 No. 23-5822

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Plaintiff/Respondent,

v.

SAMSON KANLA ORUSA,
Defendant/Petitioner,

UNITED STATES COURT OF APPEAL FOR
THE SIXTH CIRCUIT CASE NO. 23-5822

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
CASE NO. 3:18-CR-00342-1

ON PETITION FOR WRIT OF CERTIORARI FOLLOWING A FINAL RULING BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

SAMSON KANLA ORUSA
Defendant/Petitioner
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Pennsylvania.

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Oral Argument Requested

QUESTIONS PRESENTED FOR REVIEW/ STATEMENT OF THE ISSUES

I. Whether the district court's erroneous instructions regarding what constitutes criminal liability under 21 U.S.C. section 841 (illegal distribution of oxycodone) (counts 2-23) requires reversal of the defendant's conviction for Health Care Fraud under 18 U.S.C. section 1347(counts 24-36).

Rulings of other US Courts of Appeals of different jurisdictions conflict,where legally-incorrect jury instructions concerning 841 conviction which was inextricably intertwined and interrelated as a predicate to other convictions (i.e.,structural error). Clarity from The United States Supreme Court is essential,because of the public benefits as many doctors are unneccesarily languishing in prison instead of helping ameliorate the nationwide doctors' shortages.

Dr. Orusa was charged with 841, maintaining a drug involved premises (i.e.,oxycodone) (21 U.S.C. section 856) (count 1),Health Care Fraud (18 U.S.C. section 1347), and money laundering (18 U.S.C. section 1956 & 1957)(counts 37-)

The prosecutors' indictment,opening statement,evidence,closing statement,and jury instructions told the jury time and again that all 4 categories of the crimes are inexcricably intertwined and that if the Oxycodone prescriptions issued by Dr. Orusa were illegal under 841,the submission of these bills for office visits to Medicare is fraud. The jury convicted on all 13 health care fraud charges and other crimes.

In June 27,2022,the Supreme Court in a 9-0 ruling in Ruan v. US,142 S. ct. 2370 (2022) as regards 21 U.S.C. section 841 required prosecutors to prove that physician-defendant not only objectively but also subjectively knew that he or she was prescribing a controlled substance with no legitimate medical purpose. The 841 convictions were vacated to be retried due to legally-incorrect jury instructions. 856, 1956 & 1957 were also vacated because they were intertwined with 841. Health Care Fraud convictions were not vacated even though the 841 convictions were inextricably intertwined as a predicate to the Health Care Fraud convictions.

The Sixth Circuit Court sanctioned such a departure by the district court,the Supreme Court needs to exercise it's supervisory power.

Examples of how US Courts of Appeals of different jurisdictions conflict ,where legally-incorrect jury

instructions concerning 841 conviction which was inextricably intertwined and interrelated as a predicate to other convictions;

"10th circuit";-US v. Khan (Khan II) 58 F. 4th 1308, 10th Circuit, 2023.
-841,846,aiding and abbetting the distribution of controlled substance,using a communication facility to facilitate an 841 or 846,possessing a fiream in furtherance of 846, continuing criminal enterprise, and money laundering convictions,were all remanded.

;-US v. Henson, No. 19-3062, 2023 U.S. App LEXIS 5075 @ 2,10t5h Circuit March 2,2023
-841 and Money laundering vacated.

".11th Circuit";-US v. Ignasiak, 667 F. 3d 1217, 1229, (11th Circuit 2012)
-841 & Health Care Fraud convictions were remanded.

;-US v. Ruan (Ruan II), 56 F. 4th 1291, (11th Circuit 2023),
-conspiracy charges not remanded (instructions already had subjective knowledge requirement).

"4th Circuit";-US. v. Smithers, 92 F. 43thy @ 251, (4th Circuit, 2024),
-841 & 856 convictions remanded

"6th Circuit";-US v. Anderson, 67, 4th 755 (6th circuit 2023)
-841 & health care fraud convictions upheld

II. Whether the government presented sufficient evidence of the defendant's guilt under 18 U.S.C. 1347 Other explanations for the across-the-board health care fraud convictions are lacking.

III. Whether the district court abused its discretion in denying defendant's motion for a mistrial.

The district Judge ordered the defense counsel not to interrupt with any objections while the most important witness for the prosecutors testified. On 5 occasions this witness violated the judge's previous order put in place so as not to prejudice the jurors. A mistrial was rejected by both the district court and sixth circuit stating that the defense did not object contempraneously even though he was obeying the judges order.

LIST OF PARTIES

All parties appear on the cover.

DISCLOSURE OF CORPORATE AFFILLIATIONS
AND FINANCIAL INTEREST

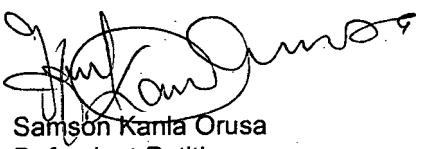
Pursuant to Supreme Court Rule 29.6, Defendant-Petitioner,Samson Kanla Orusa makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation?

   No.

2. Is there a publicly owned corporation,not a party to the petition,that has a financial interest in the outcome?

   No.



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JURISDICTIONAL STATEMENT

This is a petition for a Writ of Certiorari for a final judgement entered on May 8th 2025 by the Sixth Circuit Court of Appeals,in a criminal case involving offences against the laws of the United States (R. 393). The district court had original jurisdiction under 18 U.S.C. section 3231. Notice of Appeal was filed on August 30th,2023 (R. 395). The Sixth Circuit Court of Appeals had jurisdiction under 18 U.S.C. section 3742 and 28 U.S.C. section 1291. The Supreme Court of the United States has jurisdiction under 28 U.S.C. section 1254.

STATEMENT OF THE CASE

A. INTRODUCTION AND LEGAL POSTURE

This case involves the prosecution of a physician for illegal distribution of narcotics (841) and Health Care Fraud (1347). The defendant was a registered medical practitioner licensed under the Controlled Substance Act ("CSA") to prescribe controlled substances.

Court records and testimonies show that Dr. Orusa was Board-Certified in Internal Medicine and American Board of Interventional Pain physicians,these visits were separated. (R. 305 at 155,line 5). He was the Medical Director of a Certified Pain Clinic in Tennessee (R. 3 at 1 line 3), where all chronic pain patients must, in addition to being prescribed controlled medications,have alternative pain management modality (R.162,Exhibit 49 at 2,Item E2). He offered cortisone injection under fluoroscopy. Medical records show that patients had relief after injections of up to 90%. Patients that did not like Dr. Orusa's office protocol self-discharged. Every insurance entity including Medicare had it's own separate protocols on how they want management and biling done(R.307 at 46). With self-pay patients,there was more freedom to do more in one visit than insurance would allow. It was walk-in clinic,only new patients were allowed to make appointments (R. 305 at 154,line 16). Daily number of patiemts varied very widely,in the 30s and more.

In December of 2018,Dr. Orusa was indicted on 45 counts. A jury acquitted Dr. Orusa on nine of the drug distribution counts. Prior to sentencing,the Supreme Court issued it's decision on Ruan v. United States,597 U.S. 450 (2022). The defendant moved to vacate his conviction,arguing that the jury instructions were not consistent with Ruan (R.290 at 1-19).

Dr. Orusa's motion did not limit his request for a new trial solely to the CSA counts.(Id). The government argued that the money laundering and Health Care Fraud counts should be upheld. Dr. Orusa argued that the improper 841 jury instructions infected the trial as a whole, including both the health care fraud counts and the money laundering counts. (R. 327 at 4771-72)

The district court granted Dr. Orusa 's motion for a new trial with respect to (1) the maintaining drug involved premises count: (2) the controlled substance distribution counts ;and (3) the money laundering counts. (R373 at 5634-35). The court denied Dr. Orusa's motion with respect to the Health care Fraud

counts (counts 24-36). (Id.). The district court found that while the money laundering and drug involved premises counts were "inextricably intertwined " with the defendant's conviction under 841, the healthcare fraud counts were "self contained and were not infected by any Ruan factor." (Id.5614).

Dr. Orusa filed a motion to Reconsider (R. 378 at5641-4), the government responded (R. 382 at 5677-82). It was denied. (R. 405 at 5833-39) Dr. Orusa was sentenced to 84 months (R . 393). He appealed the convinction on these charges.

B. INDICTMENT AND JURY INSTRUCTIONS

Count 1 of the indictment allege that Dr. Orusa operated a medical clinic at 261 Stonecrossing Drive, Clarksville, Tennnessee for the purpose of distributing controlled substance "not for legitimate medical purposes in the usual course of legitimate medical practice and beyond the bounds of medical practice" in violation of 856(a)(1). (R. 3at 8). It details Medicare and Medicaid claims processing rules and billing procedures, and instaces of allegedly unauthorized prescriptions. (Id. 3-11) and that Medicare will only reimburse "services [that] were MEDICALLY REASONABLKE and necessary". (Id. 8) (emphasis added).

In regards to healthcare fraud counts, the indictment stated that "[t]he allegations contained in Paragraph 1 through 24 of COUNT 1 are incoporated and re-alleged as if fully set forth herein." (R. 3 at 15). The indictment alleged a scheme to defraud Medicare on four different theories.

Dr. Kennedy,a family doctor,not board-certified in family medicine nor pain medicine and has a total of 50 patients, testified that each of the prescriptions issued in the charged counts were issued outside the scope of professional practice. By contrast, defense expert, Dr. Hilgenhurgst, a double board-certified interventional pain physician and anaesthesiologist and practices both full-time, testified that he believed that each of the prescriptions to be within the scope of professional practice. (R. 309 at 4417). He found that the prscriptions were not excessive in volume by the standards of pain management. (Id. 4420). Dr. Orusa did not accept a new patient without checking the prescription monitoring program. (Id. 4421). He conducted urinalysis. (Id. 4421). The medical records envinced at least an initial physical exam, a treatment plan,and a diagnosis that supports the prescription of pain medication. (Id. 4421).

In closing argument, the government argued that the fraud counts and the drug involved premises count were intertwined. (R. 310 at 4573-74). The government argued that Dr. Orusa was running a "pill mill", therefore, billing for those services constituted a fraud. (Id. 4572;4574) ("make sure that you provide a service that is actually needed..."Make sure that you are actually treating that patient for

something that he or she needs').

REASONS FOR GRANTING THE WRIT/ ARGUMENT

I. ERRONEOUS JURY INSTRUCTIONS WERE PREJUDICIAL AS TO THE FRAUD COUNTS.

A. STANDARD OF REVIEW

The Sixth Circuit Court of Appeals (The Sixth) generally reviews jury instructions under an abuse of discretion standard. United States v. Russell, 595 F. 3d 633, 642 (6th Cir. 2010). The Sixth reviews "jury instructions as a whole in order to determine whether they adequately inform the jury of the relevant considerations and provide a sound basis in law to aid the jury in reaching it's decision." United v. Fisher, 648 Fs 3d 442 ,447 (6th Cir. 2011) (citation omitted). The Sixth will reverse a conviction "if the instructions, viewed as a whole,were confusing, misleading, and prejudicial."(Id);United States v. Frei,995 F. 3d 561,565 (6th Cir. 2021)

However,the Sixth reviews the "legal accuracy of jury instructions de novo." United States v. Pritchard, 964 F.3d 513,522 (Sixth cir 2020) (citing,United States v. Roth,628 F. 3d 827,833 (6th Cir. 2011).

B. THE JURY VERDICT ON THE DEFENDANT'S FRAUD CHARGES CANNOT BE SEPARATED FROM THE ERRONEOUS INSTRUCTIONS DEFINING THE CSA OFFENCES.

In a hearing on July 29,2022, having read Dr. Orusa's motion for a new trial (R. 295),before the prosecutors responded,the judge ordered the government to address in it's reponse to the motion for a New trial, the merits of the motion as it applies to the applicability of Ruan to the case in the current posture, including whether Ruan affects the Health Care Fraud and money laundering convictions given the disjunctive language in the Indictment.(R. 295 & 296).

The district judge ruled,and affirmed by the sixth that;

> "The conclusion that a new trial must be held on the 841 counts means that a new trial must also be held on the count of maintaining a drug premises (Count 1) and money laundering counts. This is because Count 1 of the Indictment links maintaining a drug premises to the unlawful distribution of drugs and health care fraud. Similarly,the money laundering counts.. "involved the proceeds of .....maintaining a drug-involved premises,unlawful distribution of a controlled substance ...and helthcare fraud . (R. 3 at 14-15). A new trial will not be granted on the healthcare fraud counts.....the health care fraud is not linked to illegal drug trafficking..."

At it's core,this statement is so contradictory,unjust and a blatant fraud against the defendant. . Any human with a flicker of conscience should be scared of this. The judge says here that the reason for drug involved premises is the distribution of controlled substances, and the reason for the fraud is the drug involved premises. Doesn't that make the reason for the fraud also the distribution of controlled substances? This is injustice and the ruling must be reversed.

The principal argument presented by the government for the theory of the healthcare fraud was that the prescriptions were illegally issued,therefore,Dr. Orusa's billing for the patients visits were fraudulent.

The Indictment identified four purposes of the alleged fraudulent scheme: submiitting reimbursement claims to Medicare that were

> "(a) "upcoded" ...(b) .....for services that were medically unnecessary and that were, therefore not eligible for reimbursement; (c) .....for prescriptions that were issued in violation of law or otherwise outside the bounds of accepted medical practice; and (d) ..for diverting proceeds of the fraud" (R. 3) (emphasis added)

Once the jury convicted on the unlawful-distribution,a conviction on fraud was inevitable, meaning, a violation of 841 was a sufficient (even if not a necessary) basis for conviction on the Health Care Fraud.

In that sense,this case is similar to United States v. Smithers,92 F.4th 237 (4th Cir. 2024). ,the Fourth Circuit overturned a defendant's conviction for issuing unauthorized prescriptions (841) and for maintaining a place for the purpose of unlawfully distributing controlled substances (856). The Fouth Circuit held that;

> "Reading Count 2 in conjunction with the 859 unlawful-distribution counts,we find it impossible to believe that the jury interpreted Count 2 as requiring a subjective mens rea while simultaneously and correctly interpreting the 859 predicates of Count 2 as requiring only an objective mens rea. The most obvious explanation, rooted in the understanding that juries read instructioins as a whole, is that once the jury convicted Smithers in the unlawful-distribution counts,a conviction in the maintaining-a-drug count was inevitable." (Id at 251).

That's because jury instructions are not evluated in "isolated segments," but instead analyzed "as a whole" (Id.) (quoting United States v. Cropp,127 F. 3d 354,360 (4th Cir.1997). United States v. Clark,988 F. 2d 1459, 1468 (^th Cir. 1993).

The elements instruction on the fraud counts constitutes a correct statement of the law if read in isolation, but the good faith and elements instructions of 841 didn't. The instructions didn't require the govenment to prove that the defendant knew his prescriptions to be unauthorized in order for them to be rendered illegal. The good faith instruction included an objective definition. (R. 310 at 4600-4601). As the district court held,both instructions are directly antithetical to what's required to establish that a prescription is unauthorized or illegal under Ruan. Ruan,597 U.S. at 454-55 ("[I]s it sufficient for the government to prove that a prescription was infact not authorized,or must the government prove that the doctor knew or intended

that the prescription was unauthorized?"); (Id. 467) ("[F]or purposes of a criminal conviction under 841,this requires proving that a defendant knew or intended that his or her conduct was unauthorized.').

The good faith instruction wasn't explicitly directed towards the 841 counts,nor limited to those counts. (R. 310 at 4600-4601). It's erroneous to issue a good faith instruction that erroneously defines an objective mens rea where a knowing or intentional mens rea is required by the statute. Check v. United Sates,498 U.S. 192 , 203-204 (1991) ("We thus disagree with the Court of Appeals" requirement that a claimed good-faith believe must be objectively reasonable if it's to be considered as possibly negating the government's evidence purporting to show a defendant's awareness of the legal duty at issue. Knowledge and belief are characteristically questions of the factfinder,in this case the jury. Characterizing a particular belief as not objectively reasonable transforms the inquiry into a legal one and would prevent the jury from considering it.") (cited in,Ruan,597 U.S. at 467). This is true even where the elements instruction correctly defines the offence. Cheek, 498 U.S. at 303-204.

For example,in United States v. Khan ("Khan II") the Tenth Circuit overturned everyone of the defendant's counts of conviction,even where the element instruction directed the jury to determine whether the defendant was "knowingly and unlawfully dispensing and/or distributing oxycodone while acting and intending to act outside the usual course of professional practice and without a legitimate medical purpose (841 (a) (1))". Khan II,58 F. 4th 1308, 1312 (10thj cir. 2023) (quoting instructions issues at trial). Quoting Ruan,the Tenth Circuit noted: 841 (a) does not 'use[]words such as 'goodfaith,' 'objectively,' 'reasonable,' or 'honest effort,' and a district court cannot insert them into the jury instructions."

According to the Tenth circuit,that instruction,while directed specifically to the 841 counts,necessitated overturning a slew of subsidiary charges because it incorrectly defines what it means at a basic level for a prescription to be "illegal" or 'unauthorized". Khan II,58 F. 4th at 1322 ('For each 841 (a) (1) charge on which Dr. Khan was convicted,the instructions erroneously articulated the mens rea requirement in light of Ruan. As regards the remaining charges,the instructions pertaining to those charges are likewise predicated, at least in part,on one or more of the erroneous 841 (a) (1) instructions."). In Khan II ,the defendant didn't challenge the accuracy of the elements instructions as related to either the conspiracy count or any of the other (non 841) counts on which the defendant was convicted. Each was taken from the Tenth circuit pattern. Nor did the Tenth circuit find that the pattern conspiracy instruction was,standing alone,inaccurate. Rather, the defendant argued that by referencing the erroneous standard for determining "authorization," the district

court misled the jury on what it means for a medical paractitioner to issue an illegal prescription. Khan II,58 F. 4th at 1321. Because the government's theory of guilt as to the subsidiary charges was that the defendant acted illegally in issuing the charged prescriptions,those counts too must fall.

This case is like United States v. Ignasiak,667 F. 3d 1217,1229 (11th Cir. 2012).,where the defendant was charged with health care fraud and the issuance of unauthorized prescriptions (841). The 11th Circuit held that the district court violated the Confrontation Clause by allowing the government to introduce five autopsy reports which the witness did not author or participate in preparing. (Id. 1229). Those autopsy report were relevant only to the 841 counts. Nevertheless, the 11th Circuit reversed the defendant's conviction on health care fraud counts as well.

> " ...But all of the fraud counts shared a common denominator with the controlled substances counts:the government's overarching theory of prosecution that the Ignasiak had prescribed unnecessary or excessive quantities of controlled substances without a legitimate medical purpose and "outside the usual cource of professional practice." In this way, both the substantive fraud and dispensing controlled substances convictions were inextricably intertwined and directly related to Dr. Ignasiak's good faith defense." (Id. at 1235).

In Dr. Orusa's case the indictment indicates that the defendant atempted to defraud a health care insurance program by "causing claims to be submitted to Medicare for prescriptions that were issued in violation of law or otherwise outside the bounds of accepted medical practice ". (R. 3 at 15). That is nearly identical to the language used to define the 841 elements instruction. (R. 208 at 2037) ("The defendant opened and maintained the clinic for the purpose of distributing any controlled substance without a legitimate medical purpose in ususal course of professional medical practice or beyond the bounds of professional medical practice.")

The government explained in it's closing argument,the fraud counts could be determined solely based on the drug-involved premises count: "The next piece is the health care fraud counts 24 through 36. And, again, this all rolls up to that top count of maintaining a drug-involved premises. (R. 310 at 4572-4573).

The government's Medicare expert tetified that it was fraud for a doctor to bill for patient visits that were outside the scope of professional practice. (R. 309 at 4134). Dr. Kennedy testified that the prescriptions were issued outside the scope of professional practice or otherwise mediclally illegitimate. (R. 305 at 3561-3565).

As the government is fond of noting, jury instructions must be viewed "as a whole de novo to determine whether they accurately informed the jury of the governing law" United States v. Pinson,542 F. 3d 822, 831 (10th Cir. 2008); United States v. Harrod, 168 F.3d 887, 890 (6th Cir. 1999).

The instuctions issued in this case,when read as a whole,completely misled the jury,at a fundamental level, as to the nature of what the government must prove to establish that the prescriber has issued an "unauthorized" or illegal prescription. Under the fraud instructions, once the defendant has issued said prescription,and billed for it,he is almost definitely guilty.

The jury followed illegal instructions and convicted.Prosecutors used Dr. Kennedy and patients to buttress this market place theory. The judge told the jury that the indictment is for their delibrations,it is not evidence,but the nature of the charges (R. 3 at 25,line 12),that the opening statement is not evidence but an outline to help them understand the evidence as it comes in the trial. (R.196 at 9,11-12). For count 1, the prosecutors focused on the clinic address location as a market placefor the distribution of oxycodone being the manner and means of this crime. (R. 3 at 6) The medicare expert told the jurors that medicare claims are specific to the address location because the location is approved for a particular type of practice (R. 307 at 15,line 12), that the CPT codes for claims processing are specific for office visits. (R. 307 AT 30,line 12) The indictment, opening statements, trial and closing arguments linked all these together. Oxycodone is the main reason for the drug involved premises. It is the reason for the drug distribution. It is the main reason for the healthcare convictions. Kennedy was not a pain specialist,he deceptively used a letterhead with diplomate status of a defunct pain organization with acupuncturists and oriental medicine practitioners as members, he didn't previously look at the "Tennessee chronic pain management guidelines" (R. 306 at 19,line 8),has to be supervised by a pain specialist to practice in a pain clinic in Tennessee (R. at 10), and had received over $60,000 in payment for this work already. (R. 208,310 at 22,line 9). Strianse in closing stated;

> "..Kennedy,..relies on..government for..income..not..objective..partisan..has..compelling, monetary, vested interest..needs..be..in demand..abandoned his practice..this is the only gig.."(R. 310 at 36)

The elements of the healthcare fraud charges(R. 208,310 at 44) show that all the evidence that could lead to conviction in drug involved premises and drug distribution,could also lead to conviction in healthcare fraud charges. The jurors considered each charge separately. The closing argument was an opportunity for the prosecutors to remind the jurors that they laid out the evidence as promised, Oxycodone is the reason for all the visits and services. If the visit is not medically necessary for prescribing Oxycodone,then the billing is fraudulent.

In denying Dr. Orusa 's motion as to the health care fraud counts,the Court provided four reasons:

> first, the healthcare fraud isn't linked to illegal drug trafficking. Instead it's alleged that defendant upcoded visits to CPT 99214 and 99215 , meaning that he spent 25 minutes ,or 40 minutes, respectively, with patients. The jury had more than enough evidence from which it could conclude that defendant never spent that amount of time with any patient. Second,

> defendant never mentioned the healthcare fraud counts in his motion for a new trial and only refrenced them in his reply. Third, when defendant finally raised the issue of continued validity of his healthcare fraud conviction post-Ruan,he did so only in perfunctory manner. Fourth, defendant's argument that "[t]here's no way the jury could have divorced its consinderation of its mindset on the unlawful prescription charges from its mindset regarding billing practices" neglects to coonsider that the jury was properly instructed on the healthcare fraud counts and instructed that each count is to be considered separately . (R. 373 at 22-23) (internal citations omitted.)

These reasons are not wholly supported by the record and the court's reasoning in denying Dr. Orusa's motion with regards to counts 24-36 seems wholly at odds with it's reasoning granting Dr.Orusa's motion and ordering a new trial with regards to the money laundering charges, counts 37-44.

Dr. Orusa's motion (R. 290) asked for a new trial, full stop. It didn't request for a new trial of the controlled substance distribution counts,the drug premises maintainance count,and also money laundering counts, but not the haealthcare counts. It requested a new trial writ large on every count of conviction. This is because the charges and the trial evidence as to each of the charges were wholly and inextricably intertwined.

It was the government's response (R. 312 at 16-17) in response to the judge's order that attempted to separate out different categories of charges that the motion should apply to either the health care fraud or the money laundering counts. The Court's acceptance of the government's argument as to the healthcare fraud counts and the rejection of the same argunment as to the money laundering counts is unsound, inconsistent,and should be considered a mistake of law.

Justice requires a new trial on all counts for which Dr. Orusa was convicted.

The link between the charges is not merely speculative:it's explicitly made in the indictment.

The drrug premises count is dependent on the 841 allegations. (R. 208 at 28) ("this statute makes it a federal crime to knowingly open,lease,rent use,or maintain any place,whether permanently or temporarily,for the purpose of UNLAWFULLY DISTRIBUTING CONTROLLED SUSTANCE IN VIOLATION OF FEDERAL LAW. (emphasis added)); 8/12/21 Trial Tr. (vol 8) at 63 (same). The government explicitly aknowledged the overlap between the healthcare fraud counts and the controlled substances counts in arguments to the jury. See". 8/12/21 Trial Tr. (Vol 8) at 6 ("As we go through the rest of the testimony ,you'll find that the evidence that we'll discuss when we're talking about the unlawful distribution,that the eidence that you will hear with respect to the healthare fraud actually supports this particuar count [maintaining a drug involved premises].") Yet,the jury was mis-instructed on the elements of the controlled substannce offences .

Because the government chose to indict the way they did ,and argue the way they did-expressly relating

the healthcare fraud counts to the controlled substance offences -there's no way to credibly assert that the Jury's decicion on counts 24-36 was unimpacted.

Though the court instructed the jury to consider each charge separately,that didn't cure the prejudice in the instance case. "The naive assumption that prejudicial effecs can be overcome by instructions to the jury.....all practicing lawyers know to be unmitigated fiction....." Stewart v. Cowan,528 F. 2d 79, 86 n.4 (6th Cir. 1976) (quoting Bruton v. United States, 391 U.S. 123,129 (1968). Indeed,"there are some contexts in which the risk that the jury won't or cannot,follow instructions is so great,and the consequences of faiure so vital to the defendant,that the practical and humen limitations of the jury system cannot be ignored." United States v. Range, 982 F. 2d 196, 199 (6th Cir. 1992) (quoting Bruton ,391 U.S. at 135). That's precisely the context of the instant case. The instruction does not rewrite the indictment to edit out the explicit connection between the charges. See Trial Tr. (Vol 6) at 169 ("I don't have the power.. ...to change your indictment. The indictment is what it is .."). The jury received that indictment. They saw what it said. Assuming they would ignore its express language in conjuction with the explicit argument of the government supporting that indictment language is an obvious fiction that cannot be ignored. The court found that even though the healthcare fraud convictions could provide a basis to support the money laundering convictions independent of the CSA convictions, the money laundering counts must nevertheless be vacated because the jury could have based their money laundering verdicts on the CSA conduct alone. The exact same logic requires reversal on the healthcare fraud counts as well. The indictment and the government's argument told the jury that the CSA violations (which were improperly defined based on pre-Ruan law) were an independently sufficient basis to find that Dr. Orusa committed healthcare fraud. That another possible basis existed (the purported use of improper billing codes) doesn't diminish the prejudice of the improper jury instructions on those counts, as already recognized by the court. All four of the reasons cited by the court in denying Dr. Orusa's motion with regards to the healthcare fraud counts applied with equal force and equal logic to the money laundering counts, for which the court nonetheless ordered a new trial. Dr. Orusa asks that the court be consistent in the application of its logic, and order a new trial on the healthcare fraud counts for the same reason it ordered one on the money laundering counts.

C. ERRONEOUS JURY INSTRUCTIONS WERE NOT HARMLESS AS TO THE FRAUD COUNTS.

In ruling on the defendant's post-trial motions,the district court stated that the error was harmless as to the fraud counts even where it acquitted on the underlying illegal distribution charge . (counts 28,32 and 33 related to Patient RP and counts 30 and 34 related to Patient JM) .(See Page 18 ,Supra).

That reasoning misses several important points. First, the mixed verdict cannot be used as an inference on anything because it is derived from an illegal jury instruction. Second, the fact that the jury found that the government presented insufficient evidence that specific prescription issued on a specific day was itself outside the scope of professional practice or without legitimate medical purpose,does not mean that they based their decision on the fraud counts on the governmnent's up-coding theory .

The district court notes that "the jury was properly instructed that each count is to be considered separately. " (R. 373 at 5634-5635). That instruction, however,only directs the jury "to separately consider the evidence that relates to each charge,and to return a separate verdict for each one." (R. 208 at 2028). The instruction doesn't say that the definition of what constitutes an illegal prescription provided by the district court is only relevant to the 841 counts.

"A conviction under a general verdict that may have rested on an unlawful ground violates a defendant's constitutional rights to due process." Baugh v. United States,64 F.4th 779, 781-82 (6th Cir. 2023) (citing, Stomberg v. California, 283 U.S. 359, 368 (1931)). This isn't a case where the defendant is arguing only that the government presented factually insufficient evidence on one theory and factually suffient on the other theory. Griffin v. United States, 502 U.S.46,59 (1991). Rather,the defendant is arguing that at least one of the government's theories of guilt was depended on legally erroneous instructions. Where the government presented two theories of guilt to a jury,and one of the theory includes an incorrect statement of law,generally a defendant's conviction must be overturned. McDonnell V. United States , 579 U.S. 550,579-8- (2016). The problem is that the jury may have made its decision on a legally erroneous legal theory. (Id)

D. DEFENDANT'S POST TRIAL BRIEFING ADEQUATELY PRESERVED THE QUESTION OF WHETHER ERRONEOUS JURY INSTRUCTIONS PREJUDICED DEFENDANT'S CONVICTION ON FRAUD COUNTS.

The district court determined that the defendant waived any argument as to the fraud counts because

he did not sufficiently develop those arguments in his opening post-trial motion. (R. 373 at 5634-5635; R. 405 at 5835-5836).

In his post-trial motion, the defendant asked that his convictions be vacated and the case set for a new trial because the jury instructions did not, following Ruan, accurately define what it means for a prescripption to be issued in violation of 841. (R. 290 at 1-19).

In its response brief, the government conceded that the instructions were erroneous under Ruan but argued that they weren't prejudicial to any of the individual counts,including money laundering and fraud counts. (R. 312 at 4690-4691). In reply, the defendant clalrified that the faulty instructions affected every count of the conviction. (R. 327 at 4771-4772).

"While it's well established that a party cannot raise new arguments in a reply brief,it's equally settled that a party may respond in a reply to arguments raised for the first time in opposition to a motion." Raimey v. City of Niles, No. 4:20-CV-5, 2025 WL 80364, AT 1 (N. D. Ohio Jan. 7, 2022) (citing United States v. Campbell, 279 F. 3d 392,401 (6th Cir. 2002) ("It is well-established that a party cannot raise new issues in a reply brief;he can only respond to arguments raised for the first time in opposition."));United States v. Crozier, 259 F. 3d 503,517 (6th cir. 2001.

That's what happened here: The defendant identified how the instructions were erroneous under Ruan. The judge made a request. The government responded by arguing (in part) a lack of prejudice. The defense replied.

The issue of preservaton requirements "requires that the lower court be fairly put on notice as to the substance of issue ." Nelson v. Adams USA,Inc., 529 U.S. 460,469-70 (2000). The purpose is to "enable a trial court to correct possible error in short order and without the need for an appeal." United States v. Bennett, 698 F. 3d 194, 199 (4th Cir. 2012); united States v. Bostic , 371 F. 3d 865, 871 (6th Cir. 2004) ("A specific objection provides the district court with an opportunity to address the error in the first instance and allows this court to engage in more meaningful review."); United States v. Russell,134 F. 3d 171,178-79) (3d Cir. 1998) ("[T]he crux of Rule 30 is that the district court be given notice of potential errors in the jury instructions, not that a party be 'required to adhere to any formalities of language and sytyle to preserve his objections on the record.'")

The district court had every opportunity to address the issue below. In fact, the district court did address the issue below. the district court did rule on the issue. The district court agreed that the money

laundering counts were prejudiced by the errroneous 841 instructions. The district court believed that the fraud counts weren't prejudiced. (R. 373).

Generally, appellate courts won't consider issues raised for the first time in a a reply brief. Priddy v. Edelman,883 F. 2d 438,446 (6th Cir. 1989); Iqbal v. Holder,693 F. 3d 1189,1195 n. 4 (10th Cir. 2012). The reason for that rule is;United states v. Johnson,186 F. App'x 560,564 (6th Cir. 2006) ("unless both parties have an ample opportunity to present arguments,this court may receive an incomplete picture of the legal landscape."); United States v. Leffler, 942 F. 3d 1192, 1197-98 (10th Cir. 2019) (quoting, Hill v. Kemp,478 F.3d 1236,1251 (10th Cir. 2007)). ("There are two reasons why a court of appeals treats issues raised for the first time in reply as waived: "First, to allow an appellant to raise an argument for the first time in a reply brief 'would be manifestly unfair to the appellee who, under our rules,has no opportunity for a written response.' ...Second,the rule also protects us from issuing 'an improvident or ill-advised opinion' because we didn't have the benefit of the adversarial process.")

However,raising an issue for the first time in a reply before the district court doesn't raise the same concerns or constitute waiver of the issue when presented to an appellate court.;

> "Respondents's argument that petitioner waived the issue on appeal because he raised it in his reply brief to the district court is incorrect. Respondent correctly notes that we don't normaly consider issues raised for the first time in a reply brief... But that applies to arguments raised in reply briefs at the appellate stage...In this case,the district court chose to rule on the issue and petitioner raised the issue in his appellate opening brief.. For these reasons, petitioner didn't waive the argument as a result of raising it in a reply brief to the district court. "Pinson v. Berkebile,528 F. App'x 822, 828 (10th Cir. 2013) (unpublished).

The defendant alerted the district court to the problem. The fact that the district court was alerted to the issue is clear from the fact that the district court did rule on the issue. (R. 373 at 5634-5635).

After the district court issued its ruling,the defendant filed a motion to reconsider,identifying what it believed to be errors in the district court's harmless error analysis. (R. 378 at 5641-5649). The government responded. (R. 382 at 5677-5682). This provided the district court with another opportunity to review the issue after full briefing. (R. 405 at 5833-5839).

The matter wasn't waived before the district court and certainly not before the Sixth.

II. THE GOVERNMENT PRESENTED INSUFFICIENT EVIDENCE TO ESTABLISH THE DEFENDANT'S GUILLT.

A. STANDARD OF REVIEW

The court reviews sufficiency by viewing the trial testimony and exhibits in the light most favorable to the prosecution, to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." White v. Steele, 602 F. 3d 707,710(6th Cir. 2009). However, mere speculation,even reasonable assumptions,are not sufficient. United States v. Ouedraogo,531 F. App'x 731,744 (6th Cir. 2013) (Unpublished) (quoting ,Piaskowski v. Bett,256 F.3d 687,693 (7th Cir. 2001) ("[A]lthough a jury may infer facts from other facts that are established by inference,each link in the chain of inferences must be sufficiently strong to avoid a lapse into speculation."). "[w]here the evidence taken in the light most favorable to the prosecution creates only a reasonable speculation that a defendant was present at the crime, "the charges cannot survive a sufficiency challenge. (Id.) (quoting, Newman v. Metrish, 543 F.3d 793, 797 (6th Cir. 2008).

Therefore,under a sufficiency of the evidence standard "[c]ourts must draw a difficult line between inference and speculation". White v. Steele,602 F.3d 707,711 (6th Cir. 2009). While circumstantial evidence may be sufficient to support a conviction,'there are times that it amounts to only a reasonable speculation and not to sufficient evidence.' (Id.) (citing ,Parker v. Renico,506 F.3d 444,452 (6th Cir. 2007).

B. ARGUMENT.

To obtain a conviction for healthcare fraud under 18 U.S.C. section 1347,the government must prove that the defendant: "(1) knowingly devised a scheme or artifice to defraud a healthcare benefit program in connection with the delivery of or payment for health care benefits, items, or services; (2) executed or attempted to execute this scheme or artifice to defraud; and (3)acted with intent to defraud." United States v. Hunt, 521 F. 3d 636, 645 (6th Cir. 2008) (quoting, United States v. Raithatha, 385 F.3d 1013, 1021 (6th Cir. 2004)).

Assuming,arguendo that the government's theory of the case is that the defendant upcoded medical records,the evidence is woefully insufficient to establish guilt. First,there is no crime of "upcoding" records.

The crime is devising a scheme to defraud a healthcare benefit program by submitting bills that one knows to be,in some way,false. 18 U.S.C. section 1347.

A jury is allowed to infer intent from circumstantial evidence. But speculation is not enough. For example, in Fuller v. Anderson, the Sixth upheld the reversal of a defendant's conviction for aiding and abetting an arson. Fuller v. Anderson,662 F.2d 420,424 (6th Cir. 1981). The defendant was present at the scene of the arson and looking around. One could speculate based on that that the defendant was present as a lookout for his co-defendant arsonist. (Id.) But in the abscence of evidence that the defendant knew what his co-defendant was about to do (throw a molatov cocktail into the building), the defendant's conviction was nothing more than speculation as to the defendant's mens rea. (Id.)

The prosecutors falsely claim sufficient evidence supported the healthcare fraud convictions.

Considering upcoding,two professional coders testified.One was Ms. Charla Prillaman,the regional vice president of AAPC, the largest medical coding business in the USA with over 200,000 members worldwide,she does mediocal records audits, made coding presentation,had coder of the year award,served in AAPC advisory board, has provided expert opinions and testimony for administrative and judicial proceedings, and is a Certified Professional Coder (CPC) (R. 309 at 36). Kirsten Folding is the other coding expert. Both testified, there was no upcoding in counts 24,26,32,& 34 and yet the jury convicted on all,meaning,something other than upcoding was used by the jury to convict. Prillaman testified;coding is not an exact science (R. 309 at 36),and that there is an element of subjectiviy in the process.

> "...where the codes are intended to capture a value for the physicians cognitive work.. and being read by somebody who was removed in space and time from that patient,there is room for interpretation.....is that one-level difference is usually in that area of subjective understanding of a word like detail.."

..she testified that two highly trained coders might look at the selection of code by the physician and come to a different conclusion (R. 309 at 36-38). Folding testified,there is an element of subjectivity when it comes to evaluating a code that was selected by a physician (R. 307,308 at 7). The two billing experts disagreed on counts 25,28 & 29. Prillaman coded all three as level 4 (R. 309 at 22,26 & 27) and Folding coded all of them for less (R. 307,308 at 269,274 & 275). If you consider that they reviewed only 13 claims,it means that the two professional coding experts didn't agree on the coding level 23% of the time.

As to whether the defendant committed fraud by upcoding,the question is whether the defendant knew that he should have billed for the alleged visits under 99213 as opposed to 99214. To bill under 99213 the doctor's medical records must document (1)"an expanded problem focused history", (2) "an

expanded problem focused examination"and (3) "medical decision making of low complexity". (Id. 3981). The AMA commentary suggests that such visits physicians usually spend 15 minutes face-to-face with patients and/or their family. (R. 307 at 3926). By contrast, under 99214 a physician's medical records should document (1) "a detailed history" (2) a detailed examination" and (3) medical decision making of "moderate complexity. (Id. 3981) The AMA commentary suggests that physicians typically spend 25 minutes face-to-face with the patient and/or family. (Id. 3926).

In fact,as the government agreed during the instructions conference, the CPT codes are simply guidelines and that billing "outside of that guidance " is "not a violation of the criminal code" (R. 310 at 4326-4327).

This is not a case like United States v. Singh,390 F.3d 168,187(2d Cir.2004). In that case,the defendant billed under codes 99212-99215 where the patient was seen by a nurse and not the actual licensed medical practitioner. (Id)."Code 99211 is the only proper billing code for visits conducted by nurses, and even that code covers services that 'may not require the presencee of a physician.'" (Id.) (citing,AMA,CPT Guidebook 11 (1998))

By contrast, in Siddiqi v. United States,98 F.3d 1427,1439 (2d Cir.1996)(Siddiqi II) the Second Circuit held that in the abscence of an explicit prohibition on using a specific code under the circumstances presented at trial "billing under that code is at worst an attempt to bill at the outer limits permitted,not fraud." Id.,citing United States v. D'Amato,39 F.3d 1249,1261(2d Cir.1994).

> "Theory (D) being inadequate as a matter of law,we order that the conviction be vacated. We emphasize that this is not a civil billing case;it is a criminal fraud case. Each of the Mecca counts required proof that Siddiqi used code 96500 with a dishonest intent. Bsased on the present record,inference of such an intent cannot be drawn from use of the code. As noted,code 96500 allows billing for 'supervision,' a term that is,on the record, unclear. The government's principal expert on this issue was unable to provide a definition of supervision, and the government cannot be allowed to prvail on the claim that it is fraud for siddiqi not to have anticipated the definition embodied in theory (D)." Siddiqi,98 F.3d at 1439.

Here we are talking about the difference between billing at 99213 vs 99214. If there were some hard and fast rule that billing at level 99213 requires 15 minutes or that 99214 requires 25 minute visit,the government would have a point. But all three experts agreed that the times included in the AMA commentary are merely guidelines. (R. 307 at 2149,3926-27,3982). A doctor billing under 99214 doesn't thereby aver either explicitly or implicitly that he spent 25 minutes with a patient.

Instead,what doctors are left with is a series of incredibly complicated and vague standards. How,in all honesty,can a defendant know that his physical examination of a witness is "an exapanded problem focused examination" as opposed to being a "detailed examination"? More to the point, how can a jury infer from an alleged error on this point that the defendant knew he was billing under the incorrect code?

This "is not a civil billing case;it is a criminal fraud case. Each of the [fraud counts]require proof that [the defendant] used code [99214 as opposed to 99213] with a dishonest intent." Siddiqi,98 F. 3d at 1439. This is not a case where the defendant always billed at the same level of office visit,or the highest level of office visit. United states v. Janati,237 F. App'x 843,847(4th Cir. 2007) (Unpublished) ("After 1996, they billed every visit at the highest level,showing lack of any good faith concern with how to bill at the

proper level. The government's expert testified at trial that none of the charged visits came "even close " to waranting 99215"). Dr. Orusa often billed between 99213 and 99214, (R. 307 at 3924). This isn't like United States v. Hunt,521 F.3d 636,646 (6th Cir. 2008) where a doctor billed office visits that didn't occur because he wasn't in the office. Dr. Orusa didn't change the codes entered by other physicians. United States v. Raithatha, 385 F.3d 1013,1021 (6th Cir. 2004))

Concerning cloning, Prillaman said:

> "Cloning is defined as an improper repetition of a medical record without editing to the current patient encounter across time, within a ..single patient or across time,across multiple patients". Asked if she found evidence of cloning ,she said, "I did not" "A template is.. a guide that assists the physician in gathering all the pertinent information relevant to a case and putting it together in an order...according to Medicare Program Integfrity Guide specifically states that proper use of template is acceptable....the way Dr. Orusa described his patient's ..it looks like appropriate use of templated information....I would never classify changes in viltal signs as a minor variations..well,a patient with chronic illness is way differeent than the patient who presents with ,say,an acute injury....the patient isn't going to vary significantly visit to visit" (R. 309 at 30-33)

Folding said;

> "..if a patient is being seen for a particular condition,that condition is usually chronic;therefore the record or the reason the patient is seen is the same" (R. 307 & 308 at 10).

Cloning therefore does not explain the jurors' convictions on all the healthcare counts.

The government can't establish that the defendant committed fraud by "cloning" medical records. Cloning is just a way of saying "cut and paste". Alice G. Gosfield, Compliance Pitfalls in Electronic Documentation,2020 HEALTH L. HANDBOOK 14 at 9. There is nothing illegitimate about using cut and paste. ("Electronic medical records will pull forward everything from the month before, which requires the physiuician to then take out things that are no longer pertinent. Yes,it's very easy to clone a medical record without even intending to.") (Id.).

The underlying question is, whether the copy and pasted information is accurate. In a criminal case, the government must prove that the inaccuracy was an intent to defraud. In this case,aspects of the patient's medical records used similar language to describe symptoms,or the examinations. (R. 308 at 4190). But the medical records, as a whole, were not identical.(Id). The language and symptioms were updated when they changed.(Id.). There is nothing incriminating,let alone criminal,in not typing the medical records from scratch each time.

Concerning complexity and time,Prillaman said;

> "..there are certain codes that are time based..but evaluation and management code section, which are the codes that we reviewed, are defined by two of three components: history, examination and complexity of medical decision making. Or, in certain cases when certain

criteria is met,then the typical time is considered a threshold time,..that greater than 50% of the visit was occupied with the physician counseling the patient ..then and only then can time be substituted for the key elements..Because 2 of 3 components,and they are defined in words such as detailed or expanded problem focused..so how much is more detailed,that might vary from reader to reader. There has never been an absolute definition."

Folding testified, time is not the only factor a physician uses when selecting a code,he could also use complexity(R.307 & 308 at 15-16). Stephen Quindoza,the Medicare expert,testfied that time isn't the only criteria for assigning a CPT code of service (R. 307 at 89). Evidence showed that the time spent with patients varied. A patient testifieed,some visits lasted much longer than others (R. 305 at 170). Another patient said "He would spent 20 minutes and sometimes longer...he always had time to talk,he sat there and let you finish,and tell him what kind of problem you were going through" (R. 305 at 149,157). Under cover video showed a face-to-face time on 10/3/17 lasting about 20 minutes R. 162,Exhibit no. 1). Testimonies of the 2 billing and coding experts showed that Dr, Orusa billed mainly based on complexity, but occassionaly billed based on time.A pole cam recording-generated time analysis was shared with jurors in an attempt to confuse them into thinking that the aggregate time Dr. Orusa spent in the medical clinic can be used to extrapolate the possible time Dr. Orusa spent with a specific patient on a specific date.

Concerning unnecessary visits and procedures,this can only be determined by a physician,not by billing specialists, or medicare expert. When Prillaman was asked about a patient clinic visits on 2 consecutive days, she said;

"that would be a clinical decision between the patient and her physician. I am not qualified to suggest whether or not it's an appropriate visit " (R. 309 at 21) and about the coder,she said "not unless they're also a doctor involved in the patient's care" (R. 309 at 22).

Folding admitted, things rarely changed with chronic pain patients from visit to visit,she said, "I am not going to make a clinical commentary" (R. 307 & 308 at 10). Quindoza testified that he is not qualified to do complexity analysis (R. 307 at 91). Patient, John Weber, testified,there are no appointments in Dr. Orusa's office (R. 305 at 154). The patients come for their visits to get their pain medications. Kennedy testified,for all the patients he reviewed,the Oxycodone prescriptions were illegal because of illegal medical practice. He cited medical record documentation, urine drug screens, physical exams that were not credible as the basis. This is the basis for the fraud. So, when the Court of Appeals panel in Cincinnatti says there is plenty of evidence to convict on the healthcare fraud,it is all related to Oxycodone,especially with the patient testifying that if they didn't come to the drug screen visits and also do the shots, Dr. Orusa will not write their scripts. The jurors were told that witnesses who were using addictive drugs during the period theytestified may have impaired memory of these events and that while a witness may be entirely truthful,they should consider that

testimony with caution(R.208,310 at 9). Weber and Daniel Bolinger testified that they came to see the doctor 4 times a month,every month. This is not true as confirmed by by Exhibit no. 75 of R.162.Weber testified that he never had injections in his lower back or told Dr. orusa he had a 50% pain relief from his pain shots.Things clearly documented in his records contempraneously . Is the medical record more relianbble or a patient that may have impaired memory now under cross examinationor previously during the office viisit.

The government called only two patient witnesses who were subjects of any fraud counts. (James Taylor (count 29) and Daniel Bolinger (count 36)). (R. 302 at 3304;R. 305 at 3426). No patient-witnesses testified regarding the remaining fraud counts (counts 24-28,30-35). The evidence on those counts was al and only the medical records and the expert witnesses.

The government didn't present evidence that any of the information contained in the medical records underlying those counts was inaccurate. Let alone that the defendant entered that information in furtherance of some scheme to defraud.

III. THE DISTRICT COURT ABUSED DISCRETION IN DENYING DR. ORUSA'S MOTION FOR A MISTRIAL

A. STANDARD OF REVIEW.

The Sixth reviews a distric court's denial of a mistrial for abuse of discretion. United States v. Moore,917 F.2d 215,220 (6th Cir. 1990).

B. ARGUMENT

On five occassions, Bushong and Kennedy willfully defied the Judge's pretrial Order barring Kennedy from using these prejudicial words; "falsified","fabricated", "fraud" "largely contrived", and "non-credible" (Refer Plaintiff's Appellant's Brief). Just before testimony, the judge reminded them of his Order and Bushong said,kennedy,counsel and US government understood (R. 305 at 2-3). Defense attorney raised an objection, and later, for some reason ,because the judge decided in his mind that this one witness is so important to the prosecutors,he ordered the defense not to raise objections during his testimony and then gave this order;

> "we're permitting, no objection,a certain degree of leading in the interest of comprehension for the jury" (R. 305 at 12).

Strianse accepted (Id at 16-17). Kennedy testified that the handwritten physical examinations were"not credible" sometimes with leading questions that has "credible" (R. 305 at 30,31,35,36,83). After the fifth violation,the judge interrupted;

> "so despite my ruling, despite my earlier reminder,..my order was not complied with.. I haveto issue some kind of curative instruction,when Mr. Bushong is done, addressing the questions and answers that violate my order..for now just let me say how profoundly disappointed I am. We end up doing what I was hoping so hard we would avoid when I reminded you of the Order,but it is what it is" (R. 305 at 88,89).

Strianse moved for a mistrial,but denied. Since Strianse didn't object contempraneously, obeying the Judge's Order, this cannot be held against the defendant,therefore the prosecutor cannot say, "Dr. Orusa has forfeited his argument for a mistrial ..", or "that this Court(i.e.,the Sixth) reviews a District Court's denial of a motion for a mistrial for plain error", or "..that objections must be made when the evidence is made to preserve the claim of error for appeal".

An expert witness cannot testfy as to the mental state of a defendant on an ultimate missue of fact.

United States v. Warshak, 631 F 3d 266, 324 (6th Cir. 2010) ("Under Federal Rule of Evidence 704(b),an expert witness isn't [permitted to opine on the issue of 'whether the defendant did or didn't have the mental state or condition constituting an element of the crime charged or of a defense thereto.'" (quoting, United States v. Combs, 369 F. 3d 925, 940 (6th Cir. 2004)). An expert witness cannot issue unreliable testimony outside the scope of expertise. Under Daubert, the district court has an obligation to act as gatekeeper to ensure that expert testimony is "both relevant and reliable". Kumbo tire co v. Carmichael, 526 U.S. 137,141 (1999).

Dr. Kennedy isn't an expert on ferreting out fraud. Daubert v. Merrell Dow Pharms.,509 U.S. 579,592 (1993) (finding that expert testimony "is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.") (emphasis added). The court's ruling was not ambiguous:

> "THE COURT: I don't think that is appropriate ,Dr. Kennedy. It's not your place to tell the jury what is or what isn't fraudulent ,and it's certainly not your place to tell them what is or isn't credible. That 's their job ,not yours,...
>
> But I am--well, I've already expressed. I am concerned about his use of words like "credible" to the jury,"fraudulent" to the--that is for them [the jury]."(R. 220 at 2528-2529).

When deciding whether to grant a mistrial based on improper testimony,the Sixth considers five things.

First,was the testimony elicited by the prosecutor?,and the answer is yes and this favors Dr. Orusa. The offending remarks were directly and repeatedly solicited, and the government's line of questioning was manifestly unreasonable.

Secondly,did the testimony violate a pretrial Order? and the answer is yes and this favors Dr. orusa.

Thirdly,did the Court give a curative instruction that was immediate, clear and forceful? and the answer is no,and that favors Dr. Orusa. The curative instruction wasn't immediate;it wasn't even on the same day;but on a different day from the day of evidence. As argued by trial counsel,the existernce of a limiting instruction cannot cure all errors when the limiting testimony directly involved opining on the credibility of the defendant's records and,therefore,on his state of mind,where the defendant didn't take the stand and the records were the only thing that spoke for him.

Fourthly, was the improper testimony only a small part of the evidence against the defendant? and the answer is that this is a major part of the evidence and this favors Dr. orusa. this error was especially prejudicial to the fraud counts. the legitimate scope of Dr. Kennedy's opinipn was limited by the court to conclusions regarding medical necessity and whether Dr. Orusa was operating within the scope of medical

practice. The questions presented by the state turned him into an expert witness as to whether the defendant had the intent to commit fraud. As argued above,See.Sec,II,Supra,the evidence against the defendant as to fraud was far from overwhelming. Credibility is at the core of the healthcare fraud charges. At trial there were four groups of charges and all the evidencewere laid out in one piece for the jurors to sort out what amount of evidence,if any,to give one charge versus the other. Kennedy was the star witness, his testimony carried the most weight,and he testified early. Other witnesses only added to his evidence. Based on this testimony alone,the jurors could convict on any one of the charges in all four categories, let alone the healthcare fraud charges. The coding experts andthe medicare experts only used what's is in the medical records to testfy,but when the physician,where the defendant is also a physician,now says that the record isn't credible,the jurors believed that and convicted. This is major,hence that's why the Judge ordered against it,and why the prosecutors violated it.

Fifthly, specifically, did the prosecutor act in bad faith? and the answer is yes. In response to the district court's order to show cause,the prosecutor provided a lengthy explanation as to how he came to violate the order (R. 241 at 2713-2719),following counsel's defense. But even what counsel sought to do was get around the strict confines of the order,while still running afoul of its purpose. The point of the district court's order was to prohibit Dr. Kennedy from testifying that the records include false information. The counsel stated that the district court prohited only use of the words that start with letter "f" i.e., 'fraud', 'fraudulent', 'falsified' and 'fabricated". (Id. 2716). Eliciting from the witness the substitute word 'credible" for word "fraudulent' is just a means of trying to find a work around that allows the expert to give the very same opinion the district court prohibited. With all respect to the government ,that isn't good faith attempt to comply with the order. He attempted to skirt around what he (erroneously believed) to be the technical terms of the district court's order. It's also an example of counsel intentionally eliciting information that did violate the order. (Id. 2716). The judge told the prosecutors and Kennedy at the Daubert hearing, in the order, and before Kennedy's testimony. They knew the judge said, there will be no objections,and Strianse agreed to obey. Only the judge could object. Bushong and Kennedy willfully violated the judge's Order;they knew the depth of impact it would have on the jurors. Either of them could have refused to violate the Order at the prompting of the other.

Incidentally, Bushong has a track record of not acting in good faith. The following are just a few facts and evidence out of the 14 incidents described on pages 9-11 of the "Petition for Panel Rehearing ..", proving

Bushong didn't act in good faith:

(1) the judge didn't think that it was done in good faith [a]when he asked Bushong to address the questions and answers that violated his order (R. 305 at 88), and, [b] when this had just ensued during Kennedy's testimony;

> THE COURT: "..you just don't listen,Mr. Bushong to anything I say..Now the next thing, Mr. Bushong, you need to stop these side comments about the evidence. Totally inappropriate,incredibly unprofessional. ...Very unprofessional and very rude to the Court.." (R. 305 at 15,16).

(2) Bushong in opening statement said, Insurance patients were required to go to defendant's clinic four times every month when he knew it was untrue (R. 162 Exh 75),

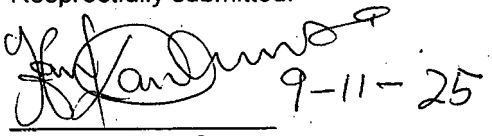
(3) Bushong elicited from Kennedy that Dr. Orusa's interpretation and clinical utility of urine drug test results were outside the course of usual medical practice when Bushong knew that the guidelines leaves the standard of care to the individual doctor to develop his or her own protocol regarding drug testing (R. 306 at 5,6) (R. 162 at ,Exh 49,pg 25).

Bushong didn't act in good fait as page 12 of the jurrors' instruction define's it; "an honest exercise of professional judgement". This lack of good faith was habitual,recurrent,persistent and reflected in the lack of respect for the Court and the dispensation of justice.

CONCLUSION

Petitioner,Samson kanla Orusa,respectfully requests that The Supreme Court of The United States vacate his remaining convictions and remand for a new trial.

Resprectfully submitted.



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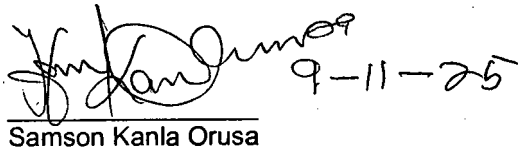
CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this petition contains 8606 words, 25 pages, exclusive of the items listed in Rule 33.1(d),and therefore complies with the limitations on length of a 'writ of certiorari petition' set forth at rule 33.2(b) and 33.1(g) of the Rules of the Supreme Court of the United States.



9-11-25

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner believes that Issue I regarding the impact of Ruan error on the Health care Fraud Counts for which the defendant currently stands convicted, as well as issues II and III regarding the defendant's sufficiency of the evidence arguments, and the denial of a motion for mistrial presents unique circumstances that can be further developed in oral argument. Petitioner therefore requests that oral argument be granted.