APPENDIX

APPENDIX

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 25a0080p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEFFREY CAMPBELL (23-5298); MARK DYER (23-5311),
Defendants-Appellants.

Nos. 23-5298/5311

Appeal from the United States District Court for the Western District of Kentucky at Louisville.
No. 3:17-cr-00087-1—Rebecca Grady Jennings, District Judge.

Argued: October 30, 2024

Decided and Filed: April 3, 2025

Before: CLAY, WHITE, and DAVIS, Circuit Judges.

COUNSEL

ARGUED: Ronald W. Chapman, II, CHAPMAN LAW GROUP, Troy, Michigan, for Jeffrey Campbell. Achal J. Fernando-Peiris, Melissa M. Salinas, UNIVERSITY OF MICHIGAN, Ann Arbor, Michigan, for Mark Dyer. Sofia M. Vickery, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Ronald W. Chapman, II, CHAPMAN LAW GROUP, Troy, Michigan, for Jeffrey Campbell. Achal J. Fernando-Peiris, Melissa M. Salinas, Matthew G. Rice, UNIVERSITY OF MICHIGAN, Ann Arbor, Michigan, for Mark Dyer. Sofia M. Vickery, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

OPINION

HELENE N. WHITE, Circuit Judge. Defendants-Appellants Jeffrey Campbell and Mark Dyer appeal their convictions and sentences for conspiracy to unlawfully distribute controlled substances, conspiracy to commit health-care fraud, health-care fraud, and money laundering, challenging the jury instructions, sufficiency of the evidence, and the district court's evidentiary rulings. Finding no error, we AFFIRM.

I. Background

Campbell was the owner and lead doctor at a primary-care facility called Physicians Primary Care (PPC). Dyer was a nurse practitioner at PPC. A grand jury indicted them in 2020 on nine counts alleging Campbell and Dyer overprescribed opioids to their patients, and fifteen counts alleging they engaged in a scheme to seek fraudulent reimbursements from health-insurance providers.

For the alleged overprescribing, the grand jury charged Campbell with four counts and Dyer with six counts of unlawfully distributing controlled substances; both Defendants with one count of conspiring to unlawfully distribute controlled substances; Campbell with one count of dispensing controlled substances resulting in death; and both Defendants with one count of conspiring to dispense controlled substances resulting in death. Regarding the alleged insurance-fraud scheme, the indictment alleged that Campbell and Dyer sought to obtain fraudulent reimbursements from insurance companies for certain exercise, counseling, and physical-therapy services that PPC provided. It also alleged that Campbell used the insurance proceeds to pay substantial bonuses to Dyer and other PPC employees, which further incentivized those employees to continue to fraudulently bill and order other medically unnecessary tests. For this conduct, the grand jury charged Campbell with thirteen counts and Dyer with one count of health-care fraud under 18 U.S.C. § 1347; both Defendants with one count of conspiring to commit health-care fraud under 18 U.S.C. § 1349; and both Defendants with one count of conspiracy to commit money laundering under 18 U.S.C. § 1956.

The case proceeded to trial and the jury found Campbell guilty on one count of conspiring to unlawfully distribute controlled substances, ten counts of health-care fraud and one count of conspiracy to do the same, and one count of conspiracy to commit money laundering, and found him not guilty on four counts of unlawful distribution, one count of dispensing controlled substances resulting in death and one count of conspiracy to do the same, and one count of health-care fraud. The jury found Dyer guilty on one count of conspiring to unlawfully distribute controlled substances, one count of health-care fraud and one count of conspiracy to commit the same, and one count of conspiracy to commit money laundering, and found him not guilty on six counts of unlawfully distributing controlled substances, and one count of conspiracy to distribute controlled substances resulting in death.

The district court sentenced Campbell to 105 months of imprisonment followed by three years of supervised release, and Dyer to sixty months of imprisonment followed by three years of supervised release. After Defendants appealed, the district court ordered Campbell to pay $841,395.52 in restitution and Dyer to pay $105,085 in restitution.

II. Analysis

A. Jury Instructions Issues

Defendants were convicted under 21 U.S.C. § 846, which makes it a crime to conspire to violate a drug law, specifically 21 U.S.C. § 841. Section 841 bars a defendant from "knowingly or intentionally" distributing controlled substances "[e]xcept as authorized." 21 U.S.C. § 841(a)(1). The regulation implementing this provision states that a medical practitioner is authorized to distribute controlled substances when he does so "for a legitimate medical purpose . . . acting in the usual course of his professional practice." 21 C.F.R. § 1306.04.

After Defendants' convictions, the Supreme Court decided *Ruan v. United States*, 597 U.S. 450 (2022). The Court held that "the statute's 'knowingly or intentionally' *mens rea* applies to authorization." 597 U.S. at 454. In other words, a defendant unlawfully distributes controlled substances only where he *knows* that he is "acting in an unauthorized manner, or intend[s] to do so." *Id.* Thus, liability cannot turn on "the mental state of a hypothetical 'reasonable' doctor." *Id.* at 465. Rather, to obtain a conviction, the government must prove that

the "defendant himself" subjectively knew that his acts were without a legitimate medical purpose in the usual course of his professional practice. *Id.* at 465–67.

Defendants argue that the district court did not instruct the jury on the mens rea *Ruan* requires.[1] Although the trial here occurred before *Ruan*, this court measures jury instructions against the law at "the time of appellate consideration." *United States v. Houston*, 792 F.3d 663, 667 (6th Cir. 2015). *Ruan* involved doctors who were convicted of unlawful distribution under § 841—not conspiring to unlawfully distribute under § 846, as Campbell and Dyer were. But the Supreme Court's reading of the statute still affects what the government must prove to properly convict Campbell and Dyer under § 846. Indeed, to prove a conspiracy to unlawfully distribute, the government must prove beyond a reasonable doubt that the defendant "knowingly and voluntarily joined" an "agreement" to violate Section 841. *See, e.g.*, *United States v. Potter*, 927 F.3d 446, 453 (6th Cir. 2019). And after *Ruan*, a person cannot "knowingly" agree to violate § 841 unless he agrees to commit acts he *knows* are unauthorized. 597 U.S. at 454. Thus, the government cannot prove a § 846 violation unless it proves that the conspirators in the agreement knew they were acting—or intended to act—without a legitimate medical purpose in the usual course of professional practice.

As an initial matter, the parties dispute the standard of review. "Harmless-error review applies when the defendant preserves the objection [to jury instructions] at trial, and plain-error review applies when he does not." *Houston*, 792 F.3d at 666. We need not resolve that dispute because, although Defendants have a strong argument that the jury instructions did not comply with *Ruan*, this court's precedents compel us to hold that no reversible error occurred under either standard of review.

Nowhere do the jury instructions on the unlawful distribution and conspiracy to unlawfully distribute counts clearly state that the government must prove that Defendants knew they were "acting in an unauthorized manner, or intended to do so." *Ruan*, 597 U.S. at 454. In

[1]Dyer raised this argument in his opening brief. Campbell adopted this argument in his Rule 28(i) letter. *See* F.R.A.P. 28(i) ("In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief."). The government does not dispute that Campbell properly raised this argument through adoption.

explaining the "agreement" the jury must find to convict on the conspiracy count, the district court stated that "[a] defendant ordinarily commits" a § 841 violation "when he knowingly, intentionally, and unlawfully distributes or dispenses controlled substances and he knows the substances are controlled substances." R. 507, PID 11034. Defendants rightly assert that these instructions do not explain that the conspirators in an unlawful distribution agreement must know their actions were unauthorized, an element that is especially important where the defendants are health-care professionals. Rather, the district court told the jury a defendant must know only two things: (1) that he is "distributing" substances, and (2) that "the substances are controlled." *Id.* The government notes the district court later instructed the jury that medical professionals "must not distribute and dispense controlled substances without a legitimate medical purpose or outside the usual course of medical practice." *Id.* But that admonition does not fix the problem because it still does not instruct the jury that a conspirator must subjectively *know* he lacks authorization.

The closest the district court came to discussing knowledge of a lack of authorization was in its deliberate-ignorance instruction. There, the district court told the jury:

> If you are convinced that the defendant deliberately ignored a high probability that the controlled substances were being dispensed or distributed outside the course of professional practice and not for a legitimate medical purpose or that patients were diverting these controlled substances for illegal purposes, then you may find that he [] knew this was the case. . . . Carelessness or negligence or foolishness on [the defendants'] part is not the same as knowledge and is not enough to convict.

Id. at PID 11028–29. This instruction states that the jury can infer knowledge from deliberate ignorance. But it still does not state that knowledge of a lack of authorization is a required element of the offense itself. And the court's instructions on the elements of unlawful distribution pointedly omit any reference to knowledge of a lack of authorization. Simply put, the district court never instructed the jury that it could convict Defendants only if it found that they "knew or intended that [their] . . . conduct was unauthorized." *Ruan*, 597 U.S. at 467. So it is doubtful that these instructions conveyed the mens rea *Ruan* requires for distribution.

We do not, however, write on a clean slate. Since *Ruan*, this court has issued a trio of opinions involving jury instructions nearly identical to those in this case. *See United States v.*

Anderson, 67 F.4th 755 (6th Cir. 2023); *United States v. Bauer*, 82 F.4th 522 (6th Cir. 2023); and *United States v. Stanton*, 103 F.4th 1204 (6th Cir. 2024). Those precedents require us to affirm.

First, in *Anderson*, this court held that a similar deliberate-ignorance instruction was sufficient to satisfy *Ruan*'s requirements. 67 F.4th at 766. There, a doctor was convicted of unlawful distribution under § 841. *Id.* The district court's instructions on the substantive elements of the offense did not state that the government had to prove the defendant knew he lacked authorization. *Id.* But the district court also instructed that if "the defendant deliberately ignored a high probability that the controlled substance was distributed or dispensed without a legitimate medical purpose in the usual course of professional practice," the jury could "find that the defendant knew this was the case." *Id.* And just as here, the district court explained that "[c]arelessness, or negligence, or foolishness . . . are not the same as knowledge." *Id.* We held that the deliberate-ignorance instruction "substantially cover[ed]" *Ruan*'s requirements "through the description of deliberate ignorance and the juxtaposition of 'knowledge' with '[c]arelessness, negligence, or foolishness.'" *Id.*

Next, in *Bauer*, a doctor convicted of unlawful distribution under § 841 argued that *Ruan* required reversal because the district court did not specifically instruct the jury that to be found guilty, the defendant must know he lacked authorization. 82 F.4th at 530. But the *Bauer* jury received "the same deliberate ignorance instruction" as in *Anderson*. *Id.* at 532. Conducting plain-error review, the *Bauer* court noted that "the instructions in *Anderson*—and thus here as well—do not fully comport with *Ruan*" because the jury was not "properly instructed to focus on [the defendant's] subjective knowledge and intent" to act without authorization. *Id.* at 533. But the court affirmed because "*Anderson* controls and requires that we find the jury instructions adequate." *Id.* at 533.

And finally, *Stanton* applied these holdings to an appeal challenging a conviction for conspiracy to unlawfully distribute under § 846. 103 F.4th at 1209. There, the district court instructed the jury on deliberate ignorance, but the defendant argued on appeal that "the instruction fail[ed] to follow *Ruan*." *Id.* at 1213. Citing *Anderson*, we held that "[a] deliberate ignorance instruction satisfies *Ruan* when, as here, it reminds the jury that this standard sits well above carelessness, negligence, and mistake." *Id.*

Thus, this court has consistently held that *Ruan* is satisfied where the district court provides a deliberate-ignorance instruction like the one here. Those holdings bind us. So although "the instructions in *Anderson*—and thus here as well—do not fully comport with *Ruan*," we nonetheless conclude that *Anderson* and its progeny "require[] that we find the jury instructions adequate." *Bauer*, 82 F.4th at 533.[2]

Defendants' attempts to distinguish this court's precedents are unpersuasive.

First, Dyer asserts that the district court instructed the jury that it could convict only if it found that Defendants acted "knowingly and intentionally, and not in good faith." Dyer Brief at 23–24 (quoting R. 507, PID 11038). And the district court explained that "good faith" "means that the defendant acted in accordance with what he reasonably believed to be proper medical practice." R. 507, PID 11049. Dyer notes that *Ruan* rejected a similar instruction: There, the government sought to have the district court instruct the jury that a defendant lacked knowledge when he put forth an "objectively reasonable good-faith effort." *Ruan*, 597 U.S. at 452. The Court rejected that instruction because an objectively-reasonable-good-faith standard "would turn a defendant's criminal liability on the mental state of a hypothetical 'reasonable' doctor, rather than on the mental state of the defendant himself." *Id.* But Dyer's argument is foreclosed by *Bauer*, where the district court gave a nearly identical good-faith instruction, and we held that the instruction "muddied the water," but did not sufficiently distinguish "the binding nature of *Anderson*." *Id.* at 532–33.

Second, Campbell argues that the deliberate-ignorance instruction here is unique because it states: "If you are convinced that the defendant deliberately ignored a high probability that the controlled substances were being dispensed or distributed outside the course of professional practice and not for a legitimate medical purpose *or that patients were diverting these controlled substances for illegal purposes*, then you may find that he knew this was the case." R. 507, PID 11028–29 (emphasis added). Campbell asserts that this language effectively "equate[s]" patient diversion with a lack of authorization, such that the jury could "convict if [it] found that

[2]Although our precedent compels us to affirm, we once again note that "these are not the instructions that should be used in unauthorized distribution cases going forward." *Bauer*, 82 F.4th at 533.

Dr. Campbell deliberately ignored a high probability of patients diverting controlled substances for illegal purposes." Campbell Reply at 6.

Campbell attaches more significance to this language than warranted. The district court did not "equate" lack of authorization with patient diversion, and it did not state that deliberate ignorance of patient diversion satisfies an element of any crime. Rather, the district court simply instructed the jury that it could infer knowledge of patient diversion from Defendants' deliberate ignorance of a high probability of such diversion. Although Campbell is correct that the deliberate-ignorance instruction in *Anderson* did not contain similar language, this distinction does not make *Anderson* less controlling here. Just as in *Anderson*, the district court here discussed deliberate ignorance of a lack of authorization, and "juxtapose[d] . . . 'knowledge' with '[c]arelessness, negligence, or foolishness.'" *Anderson*, 67 F.4th at 766. The instructions here thus retain the core attributes this court has held "cover[] the holding of *Ruan*." *Id.*

Third, Dyer argues that "*Anderson* involved more severe conduct." Dyer Reply at 11. But that is irrelevant to whether the jury instructions were legally erroneous. The issue here is whether the district court's jury instructions "comport with *Ruan*," as interpreted by this court's precedents. *Bauer*, 82 F.4th at 532 (quotation omitted). That issue does not turn on the conduct of any particular defendant in any particular case.

Finally, Campbell argues that deliberate-ignorance instructions should be categorically barred in prosecutions under the Controlled Substances Act. As Campbell sees it, district courts use the instruction too "indiscriminately," so it should be taken off the table altogether. Campbell Brief at 25. That argument exceeds the bounds of this appeal. As we have explained, this court has repeatedly held that deliberate-ignorance instructions are proper in unlawful-distribution cases. *See, e.g.*, *Stanton*, 103 F.4th 1204, 1212–13; *Anderson*, 67 F.4th at 766.

B. Sufficiency-of-Evidence Issues

Defendants argue that the government presented insufficient evidence to support their convictions. This court reviews sufficiency-of-evidence challenges de novo. *Bauer*, 82 F.4th at 528–29. A conviction rests on sufficient evidence if "*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 (1979). In conducting this inquiry, this court considers all evidence "in the light most favorable to the prosecution." *Bauer*, 82 F.4th at 528–29.

1. Conspiracy to Unlawfully Distribute

Defendants first challenge their convictions of conspiracy to unlawfully distribute under 21 U.S.C. § 846. To convict a defendant of this crime, the government must prove beyond a reasonable doubt: (1) "an agreement to violate drug laws," (2) "knowledge and intent to join the conspiracy," and (3) "participation in the conspiracy." *United States v. Hall*, 20 F.4th 1085, 1106 (6th Cir. 2022) (citation omitted). To meet this burden, the government need not present "direct" evidence of an agreement; all that is required is "circumstantial evidence" that would allow a jury to "infer[]" a "common plan." *United States v. Beals*, 698 F.3d 248, 259 (6th Cir. 2012). Defendants argue that the government presented insufficient evidence of agreement and participation. We disagree. The government provided sufficient evidence of an agreement between Campbell and Dyer to unlawfully distribute controlled substances, their knowledge and intent to join the conspiracy, and their participation in it.

One PPC employee testified that Campbell was the "decider" at PPC and the nurse practitioners—including Dyer—did what Campbell instructed. R. 298, PID 3670. Dyer—who had limited prescribing privileges under Kentucky law—sent prescriptions across the Indiana border for Campbell to sign. Dyer refused to show his charts to PPC doctors other than Campbell. The government's experts testified that Defendants' mutual prescribing practices were often without a legitimate medical purpose in the usual course of their professional practice. PPC employees testified that Campbell left pre-signed prescriptions for nurse practitioners to hand out, prescribed opioids to patients without reviewing their medical charts, and prescribed opioids to patients who had failed drug tests. And Dyer prescribed opioids after examining patients for five minutes or less. The jury also heard testimony that PPC's parking lot and waiting area were often overcrowded and that many patients travelled great distances to reach the clinic. This court has affirmed identical convictions based on similar evidence. *See, e.g.*, *Stanton*, 103 F.4th at 1210–11 ("pre-printed" prescriptions after examinations that lasted "only a few minutes," "patients traveling long distances from out of state," and "prescriptions to patients who failed drug screens"); *United States v. Elliott*, 876 F.3d 855, 863–64 (6th Cir. 2017)

(patients traveling far distances to obtain opioid prescriptions and opioid-seeking patients crowding the parking lot).

Campbell and Dyer respond by noting that the government's experts at trial focused on five patients—four of whom were named in the indictment under the unlawful-distribution counts of which Defendants were acquitted. Thus, Defendants argue, the jury's guilty verdict on the conspiracy count must have been based solely on a conspiracy to unlawfully distribute to the one patient on which the government's experts focused who was *not* named in the indictment. Pointing to our holding that a § 846 conspiracy must "involve more than an agreement to transfer drugs from one party to another," *United States v. Wheat*, 988 F.3d 299, 308–09 (6th Cir. 2021), Defendants argue that the jury had insufficient evidence to convict on the conspiracy count.

This argument is unpersuasive. Even assuming the acquittals on the § 841 counts mean that this court must disregard the patients named in those counts, there was ample evidence to convict Defendants of conspiracy to unlawfully distribute. Although the government's experts focused their testimony on five named patients, the jury heard about countless other patients who received opioids from Campbell and Dyer. For example, Dyer saw up to fifty patients every morning, and prescribed opioids to more than 90% of them. Campbell signed many of the scripts Dyer gave to those patients, and there was testimony that Campbell prescribed opioids to other patients who had failed drug tests. At most, the acquittals on the § 841 counts mean that the jury found reasonable doubt as to whether Defendants unlawfully distributed to the four specific patients named in those counts. But the jury could still reasonably find that Defendants conspired to unlawfully distribute to other patients on other occasions.

Further, even if this verdict were legally inconsistent, that would not be a basis for reversal. When examining the sufficiency of evidence on a particular count, courts ask "whether the evidence adduced at trial could support any rational determination of guilt beyond a reasonable doubt" as to that count. *United States v. Powell*, 469 U.S. 57, 67 (1984). That analysis "should be independent of the jury's determination that evidence on another count was insufficient." *Id.* Simply put, it is impossible to know *why* a jury renders a legally inconsistent verdict. The argument that an acquittal on one count means there was insufficient evidence on another "necessarily assumes that the acquittal . . . was proper" while the conviction was

improper. *Id.* at 68. But it is just as possible that the acquittal arose "through mistake, compromise, or lenity." *Id.* at 65. Where the acquittal is mistaken, "the Government has no recourse if it wishes to correct the jury's error"—it cannot, for example, re-prosecute a defendant on the assumption that the jury mistakenly acquitted. *Id.* Thus, a defendant has no recourse based on the assumption that the error ran in the other direction. *Id.*

Resisting that conclusion, Defendants point to *United States v. Randolph*, in which this court reversed based on "inconsistency" in the jury's findings. 794 F.3d 602, 611–12 (6th Cir. 2015). But that case involved "an internal inconsistency in the same count"—namely, the jury convicted the defendant of conspiring to distribute illegal drugs, but stated on the verdict form that the amount of drugs involved was "none." *Id.* at 608, 611. *Randolph* held that this single-count inconsistency was "different" from inconsistency across "separate counts charg[ing] separate crimes in a single indictment." *Id.* at 609–11. The latter inconsistency is not a basis for reversal. *See, e.g.*, *Powell*, 469 U.S. at 67; *United States v. Lawrence*, 555 F.3d 254, 261 (6th Cir. 2009).

In sum, there was sufficient evidence to support Defendants' convictions of conspiracy to unlawfully distribute controlled substances.

2. Health-Care Fraud and Conspiracy to Commit Health-Care Fraud

Defendants argue that there was insufficient evidence to support their convictions of health-care fraud and conspiracy to commit health-care fraud under 18 U.S.C. §§ 347, 349. To prove health-care fraud, the government must prove beyond a reasonable doubt that the defendant: (1) "knowingly devised a scheme or artifice to defraud a health care 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. Persaud*, 866 F.3d 371, 380 (6th Cir. 2017) (citation omitted). To prove a conspiracy to commit health-care fraud, the government must prove beyond a reasonable doubt: (1) "an agreement" to commit health-care fraud, (2) "knowledge and intent to join the conspiracy," and (3) "an overt act constituting actual participation in the conspiracy." *United States v. Hughes*, 505 F.3d 578, 593 (6th Cir. 2007).

At trial, the government proved these counts by presenting evidence that Defendants fraudulently billed insurers for certain exercise, counseling, and physical-therapy services. The evidence established that Campbell created an exercise program at PPC called "MedFit." R. 292, PID 3125. MedFit was a "small gym set up at the clinic." *Id.* That gym had a "treadmill," "bike," "elliptical," and "weights." R. 305, PID 3916. A patient participating in MedFit would visit PPC, spend a "few minutes" with a provider while that provider checked vitals, and then exercise at the gym. R. 305, PID 3916–18; R. 298, PID 3570–71. These workouts were largely supervised by PPC employee Mark Brandenburg, who was neither a doctor nor a health-care professional of any kind; rather, he was Campbell's "pool guy." R. 305, PID 3916. PPC billed insurance companies for MedFit using the 99214 billing code. That billing code is permitted only for medical appointments that involve a detailed review of the patient's medical history, a detailed exam, and comprehensive medical decision-making.

Similarly, PPC used the 99214 code to bill insurers for PPC's physical-therapy and counseling services. PPC's medical providers had no involvement in these services—except that when a patient visited for counseling or physical therapy, a doctor or nurse practitioner would spend a few minutes checking the patient's vitals. The physical-therapy service was supervised by someone who was not a licensed physical therapist.

Defendants' primary argument is that their billing practices were actually *legal*. Defendants rely on a practice called "incident-to" billing, under which a provider can bill using the 99214 code for services provided by "mid-level practitioners" who are not doctors. Campbell Brief at 39. But the government presented evidence that Defendants' services would not qualify for incident-to billing. For example, two insurers Defendants billed—Medicare and Indiana Medicaid—permit incident-to billing only for services that are monitored and supervised by a doctor according to a doctor-created plan of care. A reasonable jury could thus conclude that Defendants' services did not meet those criteria because MedFit involved almost no interaction with any doctor. Further, the jury heard evidence that another insurer billed by

PPC—Kentucky Medicaid—did not permit incident-to billing "under any circumstances." R. 277, PID 2201.[3]

Defendants also argue there was insufficient evidence that they acted with an intent to defraud. That argument, too, is unpersuasive. In PPC's Medicare enrollment agreement, Campbell accepted responsibility for complying with Medicare regulations. And Dyer testified that he understood the requirements for 99214 billing. From this evidence, a jury could reasonably infer that Campbell and Dyer understood the requirements for the billing code they used and acted with an intent to defraud insurers by billing for services that did not meet those requirements. *See, e.g.*, *Anderson*, 67 F.4th at 770–71 (sufficient evidence of intent to defraud where defendant doctor "sign[ed] a provider agreement in which he agreed to render services in accordance with federal law").

3. Money Laundering

Defendants argue that the evidence at trial was insufficient to support their convictions for conspiring to launder money under 18 U.S.C. § 1956. To prove this crime, the government must show that the defendant: (1) knowingly and voluntarily joined an agreement to conduct a financial transaction from the proceeds of illegal activity, (2) knew the money came from illegal activity, and (3) intended to promote that activity. *United States v. Tolliver*, 949 F.3d 244, 248 (6th Cir. 2020). The government alleged that Defendants conspired to launder money by using the insurance proceeds from PPC's fraudulent billing scheme to pay employees like Dyer hefty bonuses, which incentivized further fraudulent billing and other unnecessary testing.

[3]Campbell also argues that the indictment was insufficient because it did not mention "incident-to" billing. An indictment must charge every element of a criminal offense. *See, e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). It must also be "specific enough to allow [the defendant] to plead an acquittal or conviction as a bar to future prosecutions for the same offense." *United States v. Olive*, 804 F.3d 747, 752 (6th Cir. 2015). Here, the third superseding indictment was specific about the government's health-care-fraud allegations. It stated that Defendants "fraudulently billed various health care benefit programs by coding physical therapy, counseling, and exercise . . . services using evaluation and management codes in order to obtain a higher rate of reimbursement." R. 110, PID 433–35. Defendants responded to that allegation at trial by claiming that they could bill for those services using "incident-to" billing. The government responded in turn by calling an expert who established that Defendants' services likely could not be billed as "incident-to." This latter assertion was not mentioned in the indictment because it was a response to Defendants' trial theory. Campbell has not explained why this makes the indictment insufficient.

Defendants' primary argument is that there was insufficient evidence of money laundering because there was insufficient evidence of health-care fraud—as they see it, this case does not involve the "proceeds of illegal activity" to begin with. Campbell Brief at 45. This argument is unpersuasive because there was sufficient evidence of health-care fraud.

Beyond that, Dyer argues that there was insufficient evidence to show that he knew his bonus payments were the proceeds of health-care fraud. But the jury heard evidence that Dyer signed billing sheets marked with the 99214 code, even though he knew the services provided were insufficient for that code. Accordingly, a jury could reasonably find that Dyer knew PPC was profiting from unlawful billing, and that those profits were used to pay PPC's expenses, including bonuses.

C. The District Court's Evidentiary Rulings

Dyer next argues that his conviction should be reversed based on evidentiary errors at trial. Campbell adopts these arguments in his Rule 28(i) Letter. This court generally reviews a district court's evidentiary rulings for abuse of discretion. *United States v. Dietz*, 577 F.3d 672, 688 (6th Cir. 2009). But when the objection is raised "for the first time on appeal," this court reviews for plain error. *United States v. Knowles*, 623 F.3d 381, 385 (6th Cir. 2010) (collecting cases).

1. The Testimony of Experts Denham and King

Defendants argue that the district court erred in admitting the testimony of two government experts, Denham and King. We review for abuse of discretion because Defendants preserved this objection below.

Defendants primarily argue that the district court should not have permitted Denham and King to testify to general medical standards of care. For example, the government asked Denham and King to testify to what "should have happened" if proper medical protocol was followed. R. 284, PID 2524. In Defendants' view, this testimony "set forth [a] lesser civil standard of care" by suggesting that Campbell and Dyer could be convicted for mere malpractice. Dyer Brief at 28.

We disagree. The government can prove knowledge of a lack of authorization "by reference to objective criteria," such as "objective standard[s] [of] medicine" and "accepted limits" of medical practice. *Ruan*, 597 U.S. at 467 (quotations omitted). Indeed, it is "impossible" for the government to prove that a defendant was "acting outside the usual course of professional practice . . . without mentioning the usual standard of care." *United States v. Volkman*, 736 F.3d 1013, 1023 (6th Cir. 2013) (quotations omitted), *vacated on other grounds*, 574 U.S. 955 (2014).

Defendants next argue that the district court abused its discretion in allowing Denham and King to discuss the 2016 CDC guidelines because the offenses occurred between 2010 and 2014. Given the timeline mismatch, these guidelines seem to have very little probative value here. But Defendants have not shown that this discussion of the 2016 guidelines caused any harm. In response to an objection from defense counsel, the government elicited testimony from both experts to clarify that the guidelines were published after the offense conduct. And both experts told the jury that they did not rely on the guidelines in forming their opinions. Defendants argue that the experts borrowed from the 2016 guidelines the phrase "start low, go slow"—a now-common phrase meant to signify that doctors should be cautious when prescribing opiates. Dyer Brief at 30. But King explained that this was a "general principle of medicine," and "not something that has just newly come about." R. 296, PID 3441. Overall, any testimony on these guidelines was a "minor point" that caused no harm and does not justify reversal. *United States v. Maliszewski*, 161 F.3d 992, 1008 (6th Cir. 1998).

2. The Government's Summary Bar Graph

Defendants argue that the district court erred in admitting a summary bar graph the government created that compares Dyer's bonus earnings to those of other PPC employees. Defendants argue on appeal that the graph should have been excluded under Federal Rules of Evidence 403 and 1006. At trial, Defendants objected that the graph was cumulative and not relevant. Because the arguments raised on appeal were not raised at trial, we review for plain error. *Knowles*, 623 F.3d at 385.

Defendants argue that the graph is unfairly prejudicial under Rule 403 and inadmissible under Rule 1006 because it lacks "context"—they say that Dyer earned higher bonuses for legitimate reasons, e.g., he worked longer hours and had more experience. Dyer Brief at 32–33. But Defendants do not dispute that the graph is accurate. They do not, for example, argue that Dyer made *less* in bonuses than the graph lists. What is disputed here is *why* Dyer's bonuses were so high, and both parties had the opportunity to present evidence and argument to the jury on that issue. On that point, the chart is agnostic—as it should be. A summary chart cannot be "annotated with the conclusions . . . or inferences drawn by the proponent." *United States v. Bray*, 139 F.3d 1104, 1110 (6th Cir. 1998). On its face, this chart simply conveyed factual data "accurately" and "correctly," *id.*, which means its "probative value was not substantially outweighed by any risk of unfair prejudice," *United States v. Weinstock*, 153 F.3d 272, 278 (6th Cir. 1998).

3. The Testimony of DEA Investigator Jason Smith

Defendants next argue that the district court erred in admitting the testimony of DEA Investigator Jason Smith. Defendants raised this objection below, so we review for abuse of discretion. Smith testified about "red flags" typically associated with criminal activity in opioid prescribing. R. 487, PID 9352–71. Defendants argue that this testimony required "specialized knowledge" and thus could only be "offered by an expert." Dyer Brief at 34.

Defendants' argument seems to rest on the assumption that a law-enforcement officer cannot give expert testimony unless the government formally offers him as an expert at trial, and

the district court formally deems him to be one.[4] That is not correct. A trial court "does not 'certify' or declare witnesses to be 'experts' when 'tendered' as such at trial." *United States v. Johnson*, 488 F.3d 690, 698 (6th Cir. 2007) (citation omitted). Indeed, a trial judge should "refrain from declaring before the jury that a law enforcement officer is considered an expert," *United States v. Neeley*, 308 F. App'x. 870, 876 (6th Cir. 2009), because doing so "lends a note of approval to the witness that inordinately enhances the witness's stature," *Johnson*, 488 F.3d at 697. Instead, the government "should pose qualifying and foundational questions" and then "proceed to elicit opinion testimony." *Id.* at 698. At any point, the defendant is free to object and argue that the expert is not qualified to give the opinion testimony he is offering. *Id.*

Defense counsel raised such an objection here, and the trial judge overruled it because Smith "established that he's done these types of investigations," and that he's had "training in diversion." R. 487, 9356–57. That conclusion was not an abuse of discretion. Indeed, this court has held that an officer with similar experience was qualified to testify about "the characteristics of a typical pill mill." *United States v. Gowder*, 841 F. App'x 770, 781 (6th Cir. 2020).

4. The Testimony of PPC Employee Dawn Antle

Finally, Defendants argue that the district court erred in admitting certain testimony from Dawn Antle, a former PPC employee. Antle testified that PPC prescribed "a lot" of narcotics. R. 298, PID 3564. Defendants argue that this is a "qualitative assessment" that a lay witness like Antle cannot provide. Dyer Brief at 36. Defendants raised this objection below, so we review for abuse of discretion.

In full context, the government's trial counsel asked: "from the patient charts that you reviewed, what percentage of [PPC] patients were on narcotics?" R. 298, PID 3564. Antle responded, "I'd say a good 90 percent. A lot." *Id.* Counsel then asked, "based on the patients you saw and the patient files that you saw . . . from your personal knowledge, what was the . . . overall assessment of narcotic prescribing based on what you saw?" *Id.* at 3565. Antle responded, "[t]here were a lot of narcotics. A lot of high-dose narcotics." *Id.*

[4]The government identified Smith as an expert witness before trial.

Antle's first answer was purely factual and was "rationally based on [her] perception." Fed. R. Evid. 701. Although her second answer included a more qualitative assessment, any error in admitting that answer was harmless and cumulative of other evidence showing that Campbell and Dyer prescribed opioids in ways well outside of professional norms. *See infra* Part B.1.

D. Sentencing and Restitution Issues

1. Drug Quantity Calculation

Dyer argues that the district court wrongly calculated "drug quantity" in determining his sentence. Dyer Brief at 47–49. The Sentencing Guidelines require a sentencing judge to calculate the quantity of drugs for which a defendant is responsible in determining the defendant's base offense level. U.S.S.G. § 2D1.1. "[A]n estimate will suffice," if supported by a preponderance of the evidence. *United States v. Jeross*, 521 F.3d 562, 570 (6th Cir. 2008) (quotation omitted). A district court should not punish a defendant based on an estimate that is "greater than" the quantity for which he is "*actually* responsible." *Id.* (quotation omitted). Because this calculation is a factual finding, this court reviews it for clear error. *Id.*

Here, the district court calculated Dyer's drug quantity by using the weight of drugs prescribed to seven patients. Dyer argues that there was insufficient evidence to "show these seven prescriptions were unlawful." Dyer Brief at 48. But three separate experts agreed that the prescriptions listed in those patient files had no legitimate medical purpose and were outside the usual course of Dyer's professional practice. Dyer responds that his own experts contradicted the government's. But the district court was entitled to credit the government's experts over those of the defense. *See, e.g.*, *United States v. Mosley*, 53 F.4th 947, 962 (6th Cir. 2022) ("we afford great weight to the district court's credibility determinations" in calculating drug quantity).

Of course, where there is conflicting testimony as to drug quantity, the trial court should "err on the side of caution." *United States v. Walton*, 908 F.2d 1289, 1302 (6th Cir. 1990). But the district court did so. The district court selected seven patient files out of "thousands and thousands and thousands of files" involved in a "seven-year conspiracy." R. 428, PID 7503.

Then, to offset the possibility that any of the prescriptions within the files might be legitimate, the district court reduced its calculation by one-third. *Id.* at 7505. And the district court refused to consider any of the patients named in the indictment's acquitted counts. *Id.* It is thus highly unlikely that the district court punished Dyer for a drug quantity "greater" than the quantity for which he was "*actually* responsible." *Jeross*, 521 F.3d at 570. The district court's calculation was supported by a preponderance of the evidence.

2. Use of Intended Loss Instead of Actual Loss

Defendants argue that the district court erred in using the "intended loss" of Defendants' crimes to calculate their sentence. The Sentencing Guidelines direct a district court to increase a defendant's offense level based on the amount of "loss" the defendant caused. U.S.S.G. § 2B1.1(b). In its commentary on the Guidelines, the Sentencing Commission explained that "loss" means "the greater of actual loss or intended loss." U.S.S.G. § 2B1.1 cmt. n.3(A). But this court defers to Guidelines commentary only where the text of the Guideline itself is "genuinely ambiguous" after exhausting "all the traditional tools of statutory construction." *United States v. You*, 74 F.4th 378, 397 (6th Cir. 2023) (quoting *Kisor v. Wilkie*, 588 U.S. 558, 575 (2019)). Defendants argue that the Guidelines are not ambiguous—as they see it, "loss" can only mean "actual loss," not "intended loss." Dyer Brief at 51–52; Campbell Brief at 50.

Our precedent forecloses this argument. In *You*, this court held that the Guidelines are sufficiently ambiguous to permit considering the commentary, so a district court may properly consider intended loss. 74 F.4th at 397–98. Thus, the district court did not err.

3. The Intended-Loss Calculation

Defendants also appeal the district court's calculation of intended loss. The district court calculated Defendants' intended loss by summing all insurance claims Defendants submitted between January 2012 and December 2014 for the exercise, counselling, and physical-therapy services related to the health-care-fraud counts. Under that metric, the district court found that Campbell was responsible for $3.9 million in intended loss and Dyer was responsible for $601,467.

Defendants argue that the district court used an unreliable data set, failed to account for their knowledge of common insurance-reimbursement practices, and failed to credit the value of services rendered. Accounting for these alleged errors, Campbell argues that his loss should have been calculated at around $437,000. Dyer argues his loss should have been calculated at $100,000.

We need not resolve these objections because any error in the intended-loss calculation was harmless. When a district court "misapplie[s] the Guidelines," we may still affirm if "the error did not affect the district court's selection of the sentence imposed." *Williams v. United States*, 503 U.S. 193, 203 (1992). In deciding whether a Guidelines error is harmless, we examine how the district court's "application of an incorrect[] higher Guidelines range" affected "the sentence [the defendant] received." *Molina-Martinez v. United States*, 578 U.S. 189, 201 (2016). We also consider "relevant statements by the judge" to determine whether "the district court thought the sentence it chose was appropriate irrespective of the Guidelines range." *Id.* A Guideline-calculation error is harmless where the district court states it "would impose the same sentence" regardless of the error, *United States v. Obi*, 542 F.3d 148, 156 (6th Cir. 2008), and explains how "proper use of the [18 U.S.C.] § 3553(a) factors" "independently supports" the sentence, *United States v. O'Georgia*, 569 F.3d 281, 288 (6th Cir. 2009).

Here, any error in the intended-loss calculation did not affect Defendants' sentences. Applying the intended-loss figures Defendants challenge, the district court determined that Campbell's Guidelines range was 210–262 months, and Dyer's was 97–121 months. But the court found that the sentencing factors under 18 U.S.C. § 3553(a) required a sentence well outside the Guidelines range: 105 months for Campbell and sixty months for Dyer. As the district court saw it, these sentences were long enough to provide "just punishment" and reflect the Defendant's "very serious" crimes. R. 428, PID 7557–58, 7565. And they also aligned with "other sentences given out in similar cases" and accounted for the fact that Defendants were not "candidate[s] for recidivism" and had strong "family ties." *Id.* at 7559, 7562, 7565. The court thus concluded that "consider[ing] the [18 U.S.C. §] 3553 factors as a whole," it "would have sentenced [Defendants] the same regardless" of Defendants' "objections to the guideline range." *Id.* at 7562, 7567.

Further, if the district court had adopted Defendants' intended-loss calculations, Campbell's Guidelines range would have been 121–151 months, and Dyer's Guidelines range would have been 87–108 months. *See* U.S.S.G. §§ 2B1.1, 3D1.4. But the sentences the district court imposed fall well below even these more favorable Guidelines ranges. In sum, the record makes clear that any error in the intended-loss calculation "did not affect the district court's selection of the sentence imposed." *Williams*, 503 U.S. at 203.

4. Restitution

Defendants also argue that the district court erred in calculating restitution. That argument is beyond the scope of this appeal. *See Manrique v. United States*, 581 U.S. 116 (2017). A district court may sometimes enter an initial judgment "imposing certain aspects of a defendant's sentence" while "deferring a determination of the amount of restitution until entry of a later, amended judgment." *Id.* at 118. In those cases, a defendant must file a notice of appeal as to the restitution "following the amended judgment." *Id.* If the defendant files only "a single notice of appeal" "between the initial judgment and the amended judgment," then the "later-determined restitution amount" is outside the scope of the appeal. *Id.* This requirement is a mandatory claims-processing rule, so when the government timely raises the issue, this court has no "discretion to overlook" the error. *Id.* at 125.

Here, the district court initially entered judgment on April 21, 2023, and stated that restitution would "be determined by further order[]." R. 420, PID 7347; R.421, PID 7355. Defendants then appealed. Nearly nine months later, on January 10, 2024, the district court entered its restitution order. But Defendants did not file an additional notice of appeal. They have thus failed to "invoke appellate review of the later-determined restitution amount." *Manrique*, 581 U.S. at 118. And because the government has timely raised the issue, this court cannot consider Defendants' objections to the restitution order. *Id.* at 125.

III. Conclusion

For the foregoing reasons, we affirm Defendants' convictions and sentences.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:17-cr-87-RGJ

JEFFREY CAMPBELL, MARK DYER, PHYSICIANS PRIMARY CARE, PLLC. — Defendants

* * * * *

ORDER

This matter came before the Court for a jury trial in Louisville, Kentucky on May 4, 2021; May 7, 2021; May 10 through May 14, 2021; May 17 through May 21, 2021; May 24 through May 28, 2021; June 1 through June 4, 2021; and June 7 through June 11, 2021. There appeared Mr. Joseph R. Ansari, Ms. Lettricea Jefferson-Webb and Mr. Christopher Tieke, Assistant United States Attorneys; Defendant, Jeffrey Campbell and Physicians Primary Care, PLLC with counsel, Mr. Ronald W. Chapman II, Ms. Ashli Summer McKeiver and Mr. C. Dean Furman, retained counsel. Defendant, Mark Dyer with counsel, Mr. William M. Butler, Jr. The Court's official reporter was April Dowell, and assisting during the trial, Dena Legg and Becky Boyd. The jury notified the Court of a verdict on June 11, 2021 and District Judge Benjamin Beaton received the verdict. The polling of the jury was waived by counsel for Jeffrey Campbell, but polling was requested by counsel for Mark Dyer; therefore, the jury was polled.

IT IS HEREBY ORDERED as follows:

(1) That Defendant Jeffrey Campbell is adjudicated guilty as to Counts 1, 10, 11-19, 22, and 24 of the Third Superseding Indictment.

(2) That Defendant Mark Dyer is adjudicated guilty as to Counts 1, 10, 22 and 24 of the Third Superseding Indictment.

(3) That Defendant Physicians Primary Care, PLLC is adjudicated guilty as to Counts 1, 10 of the Third Superseding Indictment.

(4) That Defendant Jeffrey Campbell is adjudicated not guilty as to Counts 2, 3, 4, 5, 6, 7 and 23 of the Third Superseding Indictment.

(5) That Defendant Mark Dyer is adjudicated not guilty as to Counts 2, 3, 4, 5, 6, 8, 9 of the Third Superseding Indictment.

(6) That Defendant Physicians Primary Care, PLLC is adjudicated not guilty as to Counts 6 and 23 of the Third Superseding Indictment.

In order to proceed under the Sentencing Reform Act of 1984 (Pub. L. 98-473, Title II, c. 2, Sections 211-239), 18 U.S.C. Sections 3551-3559, **IT IS HEREBY FURTHER ORDERED** as follows:

(1) **Sentencing proceedings** are set in this case for **September 8, 2021 at 10:00 a.m. as to defendant Mark Dyer** before the Honorable Rebecca Grady Jennings, United States District Judge, in the Gene Snyder U.S. Courthouse, Louisville, Kentucky.

(2) **Sentencing proceedings** are set in this case for **September 8, 2021 at 1:30 p.m. as to defendant Jeffrey Campbell and Physicians Primary Care** before the Honorable Rebecca Grady Jennings, United States District Judge, in the Gene Snyder U.S. Courthouse, Louisville, Kentucky.

(3) The Defendant and defense counsel shall meet with the probation officer for an interview promptly, and in no event later than ten (10) days from the date of this Order. It shall be the responsibility of defense counsel to contact the probation officer to ascertain the time and place of the interview, unless defense counsel's attendance is waived.

(4) Not less than thirty-five (35) days prior to the date set for sentencing, the Probation Officer shall provide a copy of the Presentence Investigation Report to the Defendant and to counsel for both the Defendant and the United States. Within fourteen (14) days thereafter, counsel shall contact the Probation Office and opposing counsel to notify the parties as to whether or not there are any objections to any material information, sentencing classifications, sentencing guideline ranges, and policy statements contained in or omitted from the Report. Any objections shall be in writing. **Notice to the Probation Office and opposing counsel must be given even if no objection exists.**

(5) After receiving counsel's notice of whether there are (or are not) objections, the Probation Officer shall conduct any further investigation and make any revisions to the Presentence Investigation Report that may be necessary. The Probation Officer may require counsel for both parties to meet with the officer to discuss unresolved factual and legal issues.

(6) Not less than ten (10) days prior to the date of the sentencing hearing, the Probation Officer shall submit the Presentence Investigation Report to the sentencing Judge. The Report shall be accompanied by the written objections of counsel and an addendum setting forth any objections counsel may have made that have not been resolved, together with the officer's comments thereon. The Probation Officer shall provide a copy of any addendum to the Presentence Investigation Report, including any revisions thereof, to the Defendant, counsel for the Defendant, and the United States.

(7) Not less than twenty (20) days prior to the sentencing hearing, the parties shall communicate with each other to discuss the scope of the sentencing hearing and make certain disclosures. Each party shall disclose to the other if it intends to argue for a non-guideline sentence. The parties shall disclose whether they intend to call witnesses at the hearing and, if so,

the nature of the testimony shall be revealed. The parties shall disclose the identity of any expert witness and exchange a written summary of the witness's opinions, the bases and reasons for the opinions, and the witness's qualifications.

(8) For any sentencing in which testimony is expected, the parties shall estimate the length of time required for the sentencing hearing and communicate same to Andrea Morgan, Case Manager for Judge Jennings, not less than ten (10) days prior to the sentencing hearing.

(9) Not less than ten (10) days prior to the sentencing hearing, the parties **shall** file a Sentencing Memorandum in support of their respective positions on any unresolved objections to the Presentence Investigation Report, including any objections to the calculation of the advisory sentencing guidelines contained therein. Furthermore, in the event a non-guideline sentence is advocated, the Sentencing Memorandum shall address any departures or variances requested as well as the factors of 18 U.S.C. § 3553(a).

(10) Except with regard to any objection made under Paragraph 8 that has not been resolved, the Presentence Investigation Report may be accepted by the Court as accurate. The Court, for good cause shown, may allow new objections to be raised at any time before the imposition of sentence. In resolving disputed issues of fact, the Court may consider any reliable information presented by the Probation Officer, the Defendant, or the United States.

(11) The time set forth in this Order may be modified by the Court for good cause shown, except that the ten (10) day period provided for disclosure of the Presentence Investigation Report pursuant to 18 U.S.C. § 3552(d) may be diminished only with the consent of the Defendant.

(12) Nothing in this Order requires the disclosure of any portions of the Presentence Investigation Report that are not disclosable under Criminal Rule 32.

(13) The Presentence Investigation Report shall be deemed to have been disclosed:

(a) When the Report is physically delivered to counsel;

(b) One day after the Report's availability is orally communicated to counsel; or

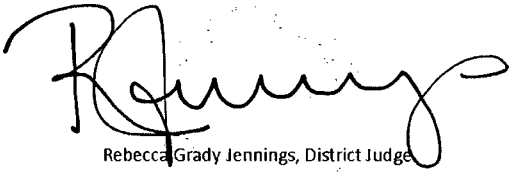
(c) Three (3) days after notice of its availability is mailed to counsel, or the date of availability reflected in the notice, whichever is later.

(14) It shall be the responsibility of counsel for the Defendant to disclose the Report to the Defendant.

(15) The general conditions of probation as set forth in Probation Form 7A shall apply to the Defendant if placed on probation or supervised release, and all persons placed on probation or supervised release shall submit to photographs by the Probation Officer as a condition of probation or supervised release.

The United States stated that there is now a presumption for detention, but the defendants are not a danger nor a risk of flight, Due to the fact that the previous bonds were personal recognizance bonds without conditions, and a jury now having found the defendants guilty to some of the charges contained in the indictment, the Court believe a unsecured bond with conditions is appropriate.

IT IS FINALLY ORDERED that the Defendants were placed on $25,000 unsecured bonds with conditions and shall remain on these conditions pending further orders of the Court.



Rebecca Grady Jennings, District Judge
United States District Court

Copies to: Counsel of record
Probation Office

Court Reporter: April Dowell, Dena Legg and Becky Boyd

No. 23-5311

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARK DYER,

Defendant-Appellant.

ORDER

BEFORE: CLAY, WHITE, and DAVIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

Kelly L. Stephens, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
Kelly L. Stephens
Clerk
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988
Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: July 31, 2025

Ms. Melissa M. Salinas
Federal Appellate Litigation Clinic
701 S. State Street
2058 Jeffries Hall
Ann Arbor, MI 48109

Re: Case No. 23-5311, *USA v. Mark Dyer*
Originating Case No.: 3:17-cr-00087-2

Dear Ms. Salinas,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Kelly Stephens
En Banc Coordinator: Beverly
Direct Dial No. 513-564-7077

cc: Mr. Mark Dyer
Ms. Sofia Vickery
Ms. Monica Wheatley

Enclosure

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

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

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

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

(b) Penalties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person

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

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

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

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

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

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

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

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

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

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

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

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

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

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

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

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a

term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be

sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

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

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

of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

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

impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

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

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

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

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

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

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

or both.

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

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

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

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

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

(7) Penalties for distribution

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

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

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

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally--

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

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

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

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

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

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being

manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

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

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

(e) Ten-year injunction as additional penalty

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

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

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

(g) Internet sales of date rape drugs

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

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

(B) the person is not an authorized purchaser;

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

(2) As used in this subsection:

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

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

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

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

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

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by

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

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

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

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

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

(1) In general

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

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

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

(2) Examples

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

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

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

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

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

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

(3) Inapplicability

(A) This subsection does not apply to--

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

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

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

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

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

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

(4) Knowing or intentional violation

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

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

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

21 C.F.R. § 1306.04 Purpose of issue of prescription.

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

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

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

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

(d) A prescription may be issued by a qualifying practitioner, as defined in section 303(g)(2)G)(iii) of the Act (21 U.S.C. 823(g)(2)(G)(iii), in accordance with § 1306.05 for a Schedule III, IV, or V controlled substance for the purpose of maintenance or detoxification treatment for the purposes of administration in accordance with section 309A of the Act (21 U.S.C. 829a) and § 1306.07(f). Such

prescription issued by a qualifying practitioner shall not be used to supply any practitioner with a stock of controlled substances for the purpose of general dispensing to patients.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA — Plaintiff

v. — Criminal Action No. 3:17-cr-87-RGJ

JEFFREY CAMPBELL, MARK DYER, PHYSICIANS PRIMARY CARE, PLLC — Defendants

* * * * *

JURY INSTRUCTIONS

TABLE OF CONTENTS

INFERRING REQUIRED MENTAL STATE

(1) Next, I want to explain something about proving a 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 a 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.

DELIBERATE IGNORANCE

(1) Next, I want to explain something about proving a defendant's knowledge regarding Counts 1 through 9, which allege that the defendants illegally dispensed or distributed controlled substances outside the course of professional practice and not for a legitimate medical purpose.

(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 the controlled substances were being dispensed or distributed outside the course of professional practice and not for a legitimate medical purpose, or that patients were diverting these controlled substances for illegal purposes, then you may find that he knew this was the case.

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

STANDARD OF CARE

You've heard the phrase "standard of care" used during the trial by several witnesses. When you go to see a doctor or nurse practioner as a patient, the doctor or nurse practioner must treat you in a manner that meets the applicable standard of care that doctors or nurse practitioners of similar training would have given to you under the same circumstances. If a doctor or nurse practioner fails to provide you with that care, he may be found negligent in a civil lawsuit.

This case is not about whether the defendant acted negligently or whether he committed malpractice. Rather, in order for you to find the defendant guilty, you must find that the government has proved to you beyond a reasonable doubt that the defendant's action was not for a legitimate medical purpose in the usual course of professional practice.

DEFINITION OF THE CRIME

Count 1: Conspiracy to Unlawfully Distribute and Dispense Controlled Substances

Count 1 of the indictment charges Jeffrey Campbell, Mark Dyer, and Physicians Primary Care, PLLC, with conspiring to dispense or distribute controlled substances in violation of federal law on or about and between January 1, 2009 and December 1, 2016.

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

First, that two or more persons conspired, or agreed, to commit the crime of unlawful distribution of controlled substances.

Second, that the defendants knowingly and voluntarily joined the conspiracy.

A defendant ordinarily commits the crime of unlawfully distributing or dispensing controlled substances when he knowingly, intentionally, and unlawfully distributes or dispenses controlled substances, and he knows the substances are controlled substances. A defendant being a physician or nurse practitioner, of course, is authorized by law, with certain limitations, to write prescriptions for the controlled substances mentioned in the evidence. However, this right to prescribe is not absolute. A physician or nurse practitioner must not distribute and dispense the controlled substances without a legitimate medical purpose or outside the usual course of medical practice.

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

(A) 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 of illegal distribution of controlled substances.

(1) 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.

(2) 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 crime of illegal distribution of controlled substances. This is essential.

(3) 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.

4) One more point about the agreement. The indictment accuses the defendants of conspiring to commit several drug crimes. The government does not have to prove that the defendants agreed to commit all these crimes. But the government must prove an agreement to commit at least one of them for you to return a guilty verdict on the conspiracy charge.

(B) With regard to the second element—the defendant's connection to the conspiracy—

the government must prove that the defendants knowingly and voluntarily joined that agreement.

(1) The government must prove that the defendant knew the conspiracy's main purpose and voluntarily joined the conspiracy 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 a defendant played a major role in the conspiracy, or that his connection to it was substantial. A slight role or connection may be enough.

(3) The government must only prove that the defendants knew that the drug was a controlled substance.

(4) But proof that a defendant simply knew about a conspiracy, or was present at times, or associated with members of the group, is not enough, even if he or she approved of what was happening or did not object to it. Similarly, just because a 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 a defendant joined a conspiracy. But without more they are not enough.

(5) 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.

You must be convinced that the government has proved all of these elements beyond a reasonable doubt in order to find the defendant guilty of the conspiracy charge.

(C) You are instructed that the following substances are controlled substances within the meaning of Title 21, United States Code, Section 841(a)(1) and are further instructed that:

As a matter of law, the following are Schedule II controlled substances: Hydrocodone[1] (Lortab, Vicodin, Norco, Hydrocodone-Acetaminophen, Hydrocodone-Ibuprofen), Lisdexamfetamine (Vyvanse), Methadone (Methadose), Oxycodone (Percocet, Oxycodone-Acetaminophen), and Oxymorphone (Opana).

As a matter of law, the following are Schedule III controlled substances: Hydrocodone[2] (Lortab, Vicodin, Norco, Hydrocodone-Acetaminophen, Hydrocodone-Ibuprofen).

As a matter of law, the following are Schedule IV controlled substances: Alprazolam (Xanax), Carisoprodol (Soma), Clonazepam (Klonopin), Diazepam (Valium), Temazepam (Restoril), Zolpidem (Ambien and Ambien CR).

[1] The Administrator of the Drug Enforcement Administration rescheduled hydrocodone combination products from Schedule III to Schedule II on August 22, 2014. Effective October 6, 2014, hydrocodone combination products are included in Schedule II. Single-entity hydrocodone products have always been classified as Schedule II.

[2] For all dates prior to October 6, 2014, hydrocodone combination products are included in Schedule III.

Counts 2-5: Unlawful Distribution and Dispensing of Controlled Substances

Counts 2-5 of the indictment charges that on or about the dates alleged therein, Jeffrey Campbell and Mark Dyer knowingly and intentionally distributed and dispensed, and caused to be distributed and dispensed Oxycodone and Methadone, Schedule II controlled substances, to the patients listed below in violation of 21 U.S.C. § 841:

COUNT	DATES	DRUG(S)	PATIENTS
2	December 6, 2012 through April 19, 2014	Methadone	Brandon McDonald
3	November 14, 2013 through April 22, 2014	Oxycodone Methadone	Constance McFarland
4	July 23, 2013 through April 15, 2014	Oxycodone	Brenda Singleton
5	July 31, 2013 through April 18, 2014	Methadone	Michelle Smith

For you to find a 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:

(A) The defendant distributed and dispensed a controlled substance as alleged in Counts 2-5 of the indictment;

(B) That the particular prescription was issued outside the course of professional practice and for no legitimate medical purpose.

(C) That the defendant acted knowingly and intentionally, and not in good faith.

Now I will give you more detailed instructions about unanimity on specific acts alleged in Counts 2-5. Jeffrey Campbell and Mark Dyer are charged in Counts 2-5 with unlawfully distributing and dispensing controlled substances between the relevant timeframes and to the specific patients listed for each count. The government is not required to prove that every prescription distributed and dispensed by the defendants was unlawful. However, the government is required to prove that at least one of the controlled substances distributed and dispensed by the

defendants to the specified patients during the relevant timeframes was unlawfully distributed. You cannot find that the government has proven this unless you agree unanimously on which particular prescription was unlawfully distributed and dispensed.

For example, in Count 2, if some of you were to find that the government has proved beyond a reasonable doubt that Mark Dyer unlawfully distributed and dispensed Methadone to Brandon McDonald on February 28, 2013, and the rest of you were to find that the government has proved beyond a reasonable doubt that Mark Dyer unlawfully distributed and dispensed Methadone to Brandon McDonald on December 6, 2012, then there would be no unanimous agreement on which distribution of Methadone was unlawful.

Likewise and as to Count 2, if some of you were to find that the government has proved beyond a reasonable doubt that Dr. Campbell unlawfully distributed and dispensed Methadone to Mr. McDonald on September 13, 2013, and the rest of you were to find that the government has proved beyond a reasonable doubt that Dr. Campbell unlawfully distributed and dispensed Methadone to him on August 19, 2013, then there would be no unanimous agreement on which distribution of Methadone was unlawful.

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.

Count 6: Conspiracy to Unlawfully Distribute and Dispense a Controlled Substance Resulting in Death

Count 6 of the indictment charges Jeffrey Campbell and Mark Dyer with conspiracy to distribute Oxycodone causing death or serious physical injury on or about October 14, 2013. Oxycodone is a controlled substance. It is a crime for two or more persons to conspire, or agree, to commit a drug crime, even if they never actually achieve their goal.

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

First, two or more persons conspired, or agreed, to distribute a controlled substance outside the course of professional practice and for no legitimate medical purpose;

Second, the defendant knowingly and voluntarily joined the conspiracy;

Third, Christy Martin would not have sustained serious bodily injury or died but-for the use of that same Oxycodone.

Fourth, the defendant was part of the of the distribution chain that placed the Oxycodone into the hands of Christy Martin.

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

(A) 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 of unlawful distribution of controlled substances.

(1) 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.

(2) 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 crime of illegal distribution of controlled substances. This is essential.

(3) 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.

(B) With regard to the second element—the defendant's connection to the conspiracy—the government must prove that the defendants knowingly and voluntarily joined that agreement.

(1) The government must prove that the defendant knew the conspiracy's main purpose and voluntarily joined the conspiracy intending to help advance or achieve its goals. You must consider each defendant separately in this regard.

(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 a defendant played a

major role in the conspiracy, or that his connection to it was substantial. A slight role or connection may be enough.

(3) The government must only prove that the defendants knew that the drug was a controlled substance.

(4) But proof that a 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 a 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 a defendant joined a conspiracy. But without more they are not enough.

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

(C) With regard to the third element – What the government must prove, beyond a reasonable doubt, is that the Oxycodone distributed and dispensed by the defendant resulted in the death or serious physical injury of Christy Martin. To establish that a death or serious physical injury resulted from the defendant's conduct, the government need not prove that the death or serious physical injury was foreseeable to the defendant, but the government must prove beyond a reasonable doubt that the death or serious physical injury would not have occurred had

the Oxycodone the defendant prescribed not been ingested by Christy Martin. In other words, the government does not have the burden of establishing that the defendant intended that death or serious physical injury resulted from the distribution or ingestion of the Oxycodone. Nor does the government have the burden of establishing that the defendant knew, or should have known, that death or serious physical injury would result from the distribution or ingestion of the Oxycodone.

The government is required to prove that Oxycodone was the but-for cause of Christy Martin's death or serious physical injury. But-for causation means that without using the controlled substance, Christy Martin would not have died. But-for causation can exist where the use of the controlled substance combines with other factors to produce death so long as death would not have occurred without the incremental effect of the Oxycodone.

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.

Count 7: Unlawful Distribution of a Controlled Substance Resulting in Death

Jeffrey Campbell is charged in Count 7 with the crime of distributing Oxycodone resulting in death on or about October 14, 2013. Oxycodone is a controlled substance. 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:

(A) Jeffrey Campbell distributed and dispensed a prescription for Oxycodone to Christy Martin.

(B) The particular prescription was issued outside the course of professional practice and for no legitimate medical purpose.

(C) That Jeffrey Campbell acted knowingly and intentionally, and not in good faith.

(D) That Christy Martin would not have sustained serious bodily injury and died but-for the use of that same Oxycodone distributed by Jeffrey Campbell.

With regard to the fourth element – What the government must prove, beyond a reasonable doubt, is that the Oxycodone distributed and dispensed by the defendant resulted in the death or serious physical injury of Christy Martin. To establish that a death or serious physical injury resulted from the defendant's conduct, the government need not prove that the death or serious physical injury was foreseeable to the defendant, but the government must prove beyond a reasonable doubt that the death or serious physical injury would not have occurred had the Oxycodone the defendant prescribed not been ingested by Christy Martin. In other words, the government does not have the burden of establishing that the defendant intended that death or serious physical injury resulted from the distribution or ingestion of the Oxycodone. Nor does the

government have the burden of establishing that the defendant knew, or should have known, that death or serious physical injury would result from the distribution or ingestion of the Oxycodone.

The government is required to prove that Oxycodone was the but-for cause of Christy Martin's death or serious physical injury. But-for causation means that without using the controlled substance, Christy Martin would not have died. But-for causation can exist where the use of the controlled substance combines with other factors to produce death so long as death would not have occurred without the incremental effect of the Oxycodone.

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.

Counts 8 and 9: Unlawful Distribution of a Controlled Substance

Counts 8-9 of the indictment charge that on or about the dates alleged therein, Mark Dyer knowingly and intentionally distributed and dispensed, and caused to be distributed and dispensed Hydrocodone, a Schedule III controlled substance, to the patients listed below in violation of 21 U.S.C. § 841:

COUNT	DATES	DRUG	PATIENTS
8	July 31, 2013 through April 18, 2014	Hydrocodone	Michelle Smith
9	December 6, 2012 through April 19, 2014	Hydrocodone	Brandon McDonald

For you to find Mark Dyer guilty of this crime, you must find that the government has proved each and every one of the following elements beyond a reasonable doubt:

(A) The defendant distributed and dispensed a controlled substance as alleged in Counts 8-9 of the indictment;

(B) That the particular prescription was issued outside the course of professional practice and for no legitimate medical purpose.

(C) That the defendant acted knowingly and intentionally, and not in good faith.

Now I will give you more detailed instructions about unanimity on specific acts alleged in Counts 8-9. Mark Dyer is charged in Counts 8-9 with unlawfully distributing and dispensing controlled substances between the relevant timeframes and to the specific patients listed for each count. The government is not required to prove that every prescription distributed and dispensed by Mark Dyer was unlawful. However, the government is required to prove that at least one of the controlled substances distributed and dispensed by Mark Dyer to the specified patients during the relevant timeframes was unlawfully distributed. You cannot find that the government has proven this unless you agree unanimously on which particular prescription was unlawfully

distributed and dispensed.

For example, in Count 8, if some of you were to find that the government has proved beyond a reasonable doubt that Mark Dyer unlawfully distributed and dispensed Hydrocodone to Michelle Smith on August 26, 2013, and the rest of you were to find that the government has proved beyond a reasonable doubt that Mark Dyer unlawfully distributed and dispensed Methadone to Michelle Smith on September 26, 2013, then there would be no unanimous agreement on which distribution of Hydrocodone was unlawful.

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 Mark Dyer not guilty of this charge.

Definitions for Counts 1-9—Unlawful Distribution of a Controlled Substance

(1) Now I will give you more detailed instructions on some of the terms used in Counts 1-9.

(A) The term "distribute" means a defendant delivered or transferred a controlled substance, other than by administering or dispensing that substance, and includes issuing a prescription.

(B) The term "dispense" means to deliver a controlled substance to an ultimate user by a practitioner or pursuant to the lawful order of a practitioner. Dispensing includes filling a prescription issued by a practitioner.

(C) To prove that a defendant "knowingly" distributed a controlled substance, a defendant did not have to know what the controlled substance was. It is enough that a defendant knew that it was some kind of controlled substance. Further, a defendant did not have to know how much of the controlled substance he distributed. It is enough that a defendant knew he distributed some quantity of a controlled substance.

(D) The term "practitioner" means a physician, nurse practitioner, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices to distribute and dispense a controlled substance in the usual course of professional practice.

(E) The term "usual course of professional practice" means that the practioner has acted in accordance with a standard of medical practice generally recognized and accepted in the United States. A physician's or nurse practitioner's own individual

treatment methods do not, by themselves, establish what constitutes a "usual course of professional practice." In making medical judgments concerning the appropriate treatment for an individual, however, physicians have discretion to choose among a wide range of available options.

(F) The term "good faith" means good intentions and an honest exercise of professional judgment as to a patient's medical needs. It means that the defendant acted in accordance with what he reasonably believed to be proper medical practice. In considering whether the defendant acted with a legitimate medical purpose in the course of usual professional practice, you should consider all of the defendant's actions and the circumstances surrounding them. The defendant does not have to prove to you that he acted in good faith; rather, the burden of proof is on the government to prove to you beyond a reasonable doubt that the defendant acted without a legitimate medical purpose outside the course of usual professional practice. If a physician or nurse practitioner dispenses a drug in good faith in the course of medically treating a patient, then the doctor or nurse practitioner dispensed the drug for a legitimate medical purpose in the usual course of accepted medical practice. That is, he has dispensed the drug lawfully.

Aiding and Abetting—Unlawful Distribution of Controlled Substances

(1) For you to find the defendants guilty of unlawful distribution of a controlled substance, it is not necessary for you to find that the defendant committed the crime. You may also find the defendant guilty if the defendant 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 unlawful distribution of a controlled substance 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, that the crime of unlawful distribution was committed.

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

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 unlawful distribution as an aider and abettor.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

UNITED STATES OF AMERICA,	)	Case No. 3:17-CR-00087-RGJ
Plaintiff,	)	
v.	)	
JEFFREY CAMPBELL, MARK DYER, and PHYSICIANS PRIMARY CARE, PLLC,	)	
	)	June 7, 2021
Defendants.	)	Louisville, Kentucky

* * * * *

TRANSCRIPT OF JURY INSTRUCTIONS CONFERENCE
AT JURY TRIAL
BEFORE HONORABLE REBECCA GRADY JENNINGS
UNITED STATES DISTRICT JUDGE

* * * * *

APPEARANCES:

For United States: Joseph R. Ansari
Lettricea Jefferson-Webb
Christopher C. Tieke
U.S. Attorney's Office
717 West Broadway
Louisville, KY 40202

[Defendants present.]

Dena Legg, RDR, CRR, CCR-KY
Official Court Reporter
232 U.S. Courthouse
Louisville, KY 40202
(502) 625-3778

Proceedings recorded by mechanical stenography, transcript produced by computer.

APPEARANCES (Continued):

For Defendants Jeffrey Campbell
and Physicians Primary Care, PLLC:
Ronald W. Chapman II
Ashli Summer McKeivier
Chapman Law Group
1441 W. Long Lake Road, Suite 310
Troy, MI 48098

For Defendant Mark Dyer:
William M. Butler, Jr.
500 W. Jefferson Street, Suite 1520
Louisville, KY 40202

want to say it was either Masden or Lola King. I think it might have been Lola King. I can't specifically --

THE COURT: I actually think it might have been --

MS. JEFFERSON-WEBB: I did Lola.

THE COURT: What?

MS. JEFFERSON-WEBB: It was --

MS. MCKEIVIER: Okay. Then it was Mr. Ansari who asked the question. Maybe Dr. Allen, Dr. Allen, Kenneth Allen?

MR. ANSARI: I don't remember. I might have said, "Hey, I didn't charge you" is probably what I would have said --

THE COURT: Okay.

MR. ANSARI: -- which I would have been wrong. The grand jury didn't charge him is probably what I should have said.

THE COURT: Here's what I'm gonna do: I'm gonna mess around with that second sentence of that first paragraph and the title. We'll take a look at it, and I'll see if I can come back with something that meets everybody somewhere close to reality.

All right. Number of Witnesses?

MR. CHAPMAN: No objection.

THE COURT: Inferring Mental -- Inferring Required Mental State?

MS. MCKEIVIER: Is that newly added?

THE COURT: I don't think so.

MR. CHAPMAN: No objection.

THE COURT: Deliberate Ignorance?

MS. MCKEIVIER: Yes, we have an objection to that one being included in its entirety. There is no evidence that there was any -- or no allegation that there was deliberate ignorance. In fact, it was quite the opposite in this case.

There was tons of testimony with regards to the fact that there was a billing department and that there were outside consultants. In fact, many of the witnesses that were called by the Government were specifically testifying to that. I remember clearly Kelly Humphries in regard -- and not only that, I think there was Doreen Doyle and others in the billing department. So I don't believe that deliberate ignorance applies in this case at all.

MR. CHAPMAN: And if I may further that, Your Honor. I'm sorry, but the defendant must make an affirmative step -- that's what the Sixth Circuit has decided with respect to deliberate ignorance -- an affirmative step to avoid learning the truth about something. And it's incumbent upon the Government to show that affirmative step.

And I have no idea at this point in time, and I haven't seen anything that indicates that Dr. Campbell took a step towards trying not to learn what was going on in his practice.

MR. ANSARI: I think it goes to -- one, it's in the *Volkman* instructions. This is always given. But, two, I think it's always -- it's the deliberate ignorance of using UDSs and

not paying attention to the UDSs to actually do something with them. So it's all these tests being given and not using the tests to do it. It's there as a front, but it's -- it's to immunize them, but it's not being used to further the treatment or ferret out the diversion.

THE COURT: Which is why you have it listed for Counts 1 through 9 and not the entirety; correct?

MR. ANSARI: I mean, I think it would go to all the counts because if you've got unnecessary testing, at least --

THE COURT: Well, one of my questions for you is -- it came out of, I believe, your stuff. And it was specific to Counts 1 through 9, and I was curious as to why 1 through 9.

MR. ANSARI: Because Mr. Tieke made a mistake, I think, on those. We would ask for it to be all. I mean, that's the same argument for all the testing.

MS. MCKEIVIER: I'm sorry. I'm missing the argument on where deliberate ignorance goes toward the testing.

MR. ANSARI: To the unnecessary testing where they're not following up. I mean, they're doing the testing, but they're not following up with it to do anything with it.

THE COURT: Okay. But these were for the drug counts. That's my question to you. This is the drug counts. It was included in your instructions, and if you read through it, it's specific to controlled substances.

MR. ANSARI: That's what it appears to be.

THE COURT: That is what it appears to be, Mr. Ansari. So that goes to my whole -- I mean, I hear ya on the testing, but that's not what the instruction was for.

When we drafted this, I think it may have been put in here based on the witness who -- the consultant witness, who I suspect had other things to say that did not come into evidence in her testimony, and I suspect it went to that.

MR. ANSARI: Or others.

THE COURT: Or others.

MR. ANSARI: Yes, ma'am.

THE COURT: Well, that's the one I'm thinking of because I think there was stuff that we had talked about that was changed later. And to the extent that he, you know, chose not to look into things or do things -- okay. So the argument from the United States is what on the drug part?

MR. ANSARI: Well, it goes back to all the testing/ urinary drug screens that were used -- that were given but not used to do anything with; and so that's the deliberate ignorance as to the distribution.

MR. CHAPMAN: Your Honor, the deliberate ignorance can't be boiled down -- can't be used to lower the mens rea requirement to simple malfeasance, and that's in essence what it does if you do what the Government is asking you to do.

They're saying that because there are these risk stratification measures in place and from time to time people

may fail to follow them, that shows an affirmative step to avoid learning of the actual truth with the patient.

Here's the issue with deliberate ignorance as given: First of all, we have no actual cases of diversion. Deliberate ignorance isn't just deliberately ignoring the high probability of something. It must be deliberately ignoring the actual fact.

Take the example of the suitcase full of cocaine at the airport. That person just picks up the suitcase and decides to carry it on a plane, knows exactly what's in it but decides not to ask any questions and decides not to learn what's in the suitcase. There's actually cocaine in the suitcase.

The Government is changing deliberate ignorance in this case and in every other drug case where it's offered to require the defendant to engage in some sort of compliance measure, and if they don't completely adhere to that compliance measure, they are now deliberately ignorant.

That's problematic. It lowers the mens rea requirement and lowers the actus reus requirement for these types of charges and should only be really used where there's actual signs of abuse and diversion going on. For instance, a patient recruiter coming into the room paying large amounts of cash for a controlled substance, real types of diversion issues going on, not just failing to see the urine drug screen here or there. It's just not enough for a deliberate ignorance instruction, Your Honor.

MR. ANSARI: It also goes to the notes in the file, like the DEA notes, the diversion notes, the fact that someone tests negative for something. That all goes to diversion, and since *Volkman*, every published case now that I can see in the Sixth Circuit includes those instructions.

THE COURT: All right. I'm going to take a look back at *Volkman* and see how it's included there. We have included this in all of our other health care fraud cases on this line. So I'll take a look at that.

MR. CHAPMAN: I think we have a recent case on the issue that has really kind of thrown that into question. I'll try to pull it, Your Honor, and maybe even provide a bench brief, if that's okay, on the issue.

THE COURT: That's fine.

MR. CHAPMAN: Okay.

THE COURT: All right.

MR. ANSARI: Is that the *Godofsky* case?

MR. CHAPMAN: I think that's it.

MR. ANSARI: That goes to -- not deliberate ignorance.

MR. CHAPMAN: You're talking about good faith? No, this is not the good faith one. Yeah, there's a deliberate ignorance one.

MR. BUTLER: Your Honor, I apologize for interrupting, but does anybody have any aspirin?

MS. MCKEIVIER: I get it from Ms. Campbell. I'm

sorry.

MR. BUTLER: I mean, this is a crazy request, but I really need some, not Tylenol. I'm talking about aspirin.

(Off-the-record discussion.)

THE COURT: Entity Responsibility? It's really all you, Chapman Law Group.

MS. MCKEIVIER: No.

MR. CHAPMAN: No, Your Honor.

THE COURT: Lawyers' Objections? It's really all of you.

MS. MCKEIVIER: No.

MR. CHAPMAN: I've never objected.

THE COURT: Definition of Crimes?

Okay. On or About?

MS. MCKEIVIER: No.

THE COURT: All right. I did change this, I believe, possibly from the earlier instruction in which my folks had literally listed out all of them, and I moved it into this section so it would be a lot clearer. It made no sense the way it was done before.

Separate Considerations -- Multiple Defendants Charged With Same Crimes?

MR. ANSARI: No.

THE COURT: Medicare Civil Rules and Regulations?

MR. CHAPMAN: Oh, Your Honor, can we have this not

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

UNITED STATES OF AMERICA

v.

THIRD SUPERSEDING INDICTMENT

NO. 3:17CR-87-RGJ

18 U.S.C. § 2
18 U.S.C. § 982(a)(1)(7)
18 U.S.C. § 1347
18 U.S.C. § 1349
18 U.S.C. § 1956(h)
18 U.S.C. § 1956(a)(1)(A)(i)
21 U.S.C. § 841(a)(1)
21 U.S.C. § 841(b)(1)(C)
21 U.S.C. § 841(b)(1)(E)(i)
21 U.S.C. § 841(b)(2)
21 U.S.C. § 846
21 U.S.C. § 853

JEFFREY CAMPBELL
MARK DYER
JACQUELINE DAVIS
PHYSICIANS PRIMARY CARE, PLLC

The Grand Jury charges:

COUNT 1
(*Conspiracy-Unlawful Distribution and Dispensing of Controlled Substances*)

Beginning no later than January 1, 2009, and continuing through on or about December 1, 2016, in the Western District of Kentucky, Jefferson County, Kentucky, and elsewhere, **JEFFREY CAMPBELL**, **MARK DYER**, **JACQUELINE DAVIS**, and **PHYSICIANS PRIMARY CARE, PLLC**, defendants herein, and others, did knowingly and intentionally combine, conspire, confederate and agree with each other and with others known and unknown to the Grand Jury, to knowingly and intentionally distribute and dispense, and caused to be distributed and dispensed, Schedule II, III and IV controlled substances to patients, without a legitimate medical purpose and outside of the usual course of professional medical practice.

In violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C), 841(b)(1)(E)(i), 841(b)(2), and 846.

The Grand Jury further charges:

COUNTS 2-5

(Unlawful Distribution and Dispensing of Controlled Substances-Schedule II)

During the date ranges listed below, in the Western District of Kentucky, Jefferson County, Kentucky, and elsewhere, **JEFFREY CAMPBELL** and **MARK DYER**, defendants herein, aided and abetted by others known and unknown to the Grand Jury, knowingly and intentionally distributed and dispensed, and caused to be distributed and dispensed, Schedule II controlled substances to the patients listed below, without a legitimate medical purpose and outside of the usual course of professional medical practice:

COUNTS	DATES	DRUG(s)	PATIENTS
2	December 6, 2012 through April 19, 2014	Methadone	B.M.
3	November 14, 2013 through April 22, 2014	Oxycodone Methadone	C.M.
4	July 23, 2013 through April 15, 2014	Oxycodone	B.S.
5	July 31, 2013 through April 18, 2014	Methadone	M.S.

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C); and Title 18, United States Code, Section 2.

The Grand Jury further charges:

COUNT 6

(Conspiracy-Unlawful Distribution and Dispensing of Controlled Substance Resulting in Death)

On or about October 14, 2013, in the Western District of Kentucky, Jefferson County, Kentucky, and elsewhere, **MARK DYER** and **JEFFREY CAMPBELL**, defendants herein, and others, known and unknown to the Grand Jury, did knowingly and intentionally combine, conspire, confederate and agree with each other and with others, to knowingly and intentionally distribute and dispense, and caused to be distributed and dispensed, a Schedule II controlled substance, Oxycodone, not for a legitimate medical purpose and outside of the usual course of professional medical practice to C.M., whose serious physical injury and death on or about October 22, 2013, resulted from the use of the substance so dispensed.

In violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C) and 846.

The Grand Jury further charges:

COUNT 7

(Unlawful Distribution and Dispensing of Controlled Substance Resulting in Death)

On or about October 14, 2013, in the Western District of Kentucky, Jefferson County, Kentucky, and elsewhere, **JEFFREY CAMPBELL**, defendant herein, aided and abetted by others known and unknown to the Grand Jury, did knowingly and intentionally distribute and dispense, and caused to be distributed and dispensed, a Schedule II controlled substance, Oxycodone, not for a legitimate medical purpose and outside of the usual course of professional medical practice to C.M., whose serious physical injury and death on or about October 22, 2013, resulted from the use of the substance so dispensed.

In violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(C) and Title 18, United States Code, Section 2.

The Grand Jury further charges:

COUNTS 8-9

(Unlawful Distribution and Dispensing of Controlled Substances-Hydrocodone)

During the date ranges listed below, in the Western District of Kentucky, Jefferson County, Kentucky, and elsewhere, **MARK DYER**, defendant herein, aided and abetted by others known and unknown to the Grand Jury, knowingly and intentionally distributed and dispensed, and caused to be distributed and dispensed Hydrocodone, a Schedule III controlled substance, to the patients listed below, without a legitimate medical purpose and outside of the usual course of professional medical practice:

COUNTS	**DATES**	**PATIENTS**
8	July 31, 2013 through April 18, 2014	M.S.
9	December 6, 2012 through April 19, 2014	B.M.

In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(E)(i); and Title 18, United States Code, Section 2.

The Grand Jury further charges:

COUNT 10

(Conspiracy – Health Care Fraud)

On or about and between January 1, 2009, and continuing through December 1, 2016, in the Western District of Kentucky, Jefferson County, Kentucky, **JEFFREY CAMPBELL, MARK DYER, JACQUELINE DAVIS**, and **PHYSICIANS PRIMARY CARE, PLLC**, defendants herein, and others, did knowingly and willfully combine, conspire and confederate and agree with each other and others, known and unknown to the Grand Jury, to violate Title 18, United States Code, Section 1347, that is, to knowingly and willfully execute, and attempt to

execute, a scheme and artifice to obtain, by means of false or fraudulent pretenses, representations, and promises, money and property owned by and under the custody or control of health care benefit programs, in connection with the delivery of, and payment for, health care benefits, items, and services, to wit: **JEFFREY CAMPBELL, MARK DYER, JACQUELINE DAVIS**, and **PHYSICIANS PRIMARY CARE, PLLC**, and others, falsely and fraudulently billed various health care benefit programs by coding physical therapy, counseling, and exercise (Med Fit Program) services using evaluation and management codes in order to obtain a higher rate of reimbursement and billed for medically unnecessary tests, such as nerve conduction studies, MRIs, CT Scans, X-rays, Urinary Drug Screens (UDSs), and ANSAR tests.

In violation of Title 18, United States Code, Section 1349.

The Grand Jury further charges:

COUNTS 11-21
(*Health Care Fraud-Fraudulent Coding*)

On or about the dates listed below, in the Western District of Kentucky, Jefferson County, Kentucky, and elsewhere, **JEFFREY CAMPBELL**, defendant herein, aided and abetted by others known and unknown to the Grand Jury, knowingly and willfully executed, and attempted to execute, a scheme and artifice to obtain, by means of false or fraudulent pretenses, representations, and promises, money and property owned by and under the custody or control of health care benefit programs, in connection with the delivery of and payment for health care benefits, items, and services, to wit: **JEFFREY CAMPBELL** falsely and fraudulently billed various health care benefit programs by coding physical therapy, counseling, and exercise (Med

Fit Program) services using evaluation and management codes in order to obtain a higher reimbursement rate for the below listed patients:

COUNTS	DATES	PATIENT	SERVICE PERFORMED	E&M CODE BILLED
11	August 26, 2013	R.C.	Physical Therapy	99214
12	April 10, 2014	H.H.	Med Fit (exercise)	99214
13	August 12, 2013	E.L.	Counseling	99214
14	February 14, 2014	B.M.	Physical Therapy	99214
15	February 19, 2013	D.P.	Counseling	99214
16	April 7, 2014	B.S.	Med Fit (exercise)	99214
17	July 31, 2013	M.S.	Counseling	99214
18	April 15, 2013	T.B.	Med Fit (exercise)	99214
19	August 1, 2013	K.B.	Counseling	99214
20	February 20, 2013	S.B.	Counseling	99214
21	September 13, 2013	N.A.	Counseling	99214

In violation of Title 18, United States Code, Sections 1347 and 2.

The Grand Jury further charges:

COUNT 22
(*Health Care Fraud-Physical Therapy*)

On or about and between April 1, 2013, and March 31, 2014, in the Western District of Kentucky, Jefferson County, Kentucky, and elsewhere, **JEFFREY CAMPBELL** and **MARK DYER**, defendants herein, and others, aided and abetted by each other and others known and unknown to the Grand Jury, knowingly and willfully executed, and attempted to execute, a scheme and artifice to obtain, by means of false or fraudulent pretenses, representations, and

promises, money and property owned by and under the custody and control of health care benefit programs, in connection with the delivery of and payment for health care benefits, items, and services, to wit: **JEFFREY CAMPBELL** and **MARK DYER**, and others, falsely and fraudulently billed various health care benefit programs for physical therapy services using evaluation and management codes as if a physician performed a service on the patients, but in reality, a non-physician and non-physical therapist performed the service on the patients.

In violation of Title 18, United States Code, Sections 1347 and 2.

The Grand Jury further charges:

COUNT 23
(*Health Care Fraud-Proove Biosciences*)

On or about and between August 6, 2013, and June 1, 2014, in the Western District of Kentucky, Jefferson County, Kentucky, and elsewhere, **JEFFREY CAMPBELL** and **PHYSICIANS PRIMARY CARE, PLLC**, defendants herein, aided and abetted by each other and others known and unknown to the Grand Jury, knowingly and willfully executed, and attempted to execute, a scheme and artifice to obtain, by means of false or fraudulent pretenses, representations, and promises, money and property owned by and under the custody and control of health care benefit programs, in connection with the delivery of and payment for health care benefits, items, and services, to wit: **JEFFREY CAMPBELL** and **PHYSICIANS PRIMARY CARE, PLLC**, and others, caused Proove Biosciences, Inc., a genetic lab company, to falsely and fraudulently bill various health care benefit programs for genetic tests administered to Physicians Primary Care patients that were not medically necessary and never interpreted.

In violation of Title 18, United States Code, Sections 1347 and 2.

The Grand Jury further charges:

COUNT 24
(Conspiracy- Money Laundering)

On or about and between June 1, 2012 and December 31, 2015, in the Western District of Kentucky, Jefferson County and elsewhere, **JEFFREY CAMPBELL**, **MARK DYER**, and **JACQUELINE DAVIS**, defendants herein, did knowingly combine, conspire, and agree with each other and with other persons known and unknown to the Grand Jury to commit offenses against the United States in violation of Title 18, United States Code, Section 1956, to wit:

> to knowingly conduct and attempt to conduct a financial transaction affecting interstate or foreign commerce, which involved the proceeds of a specified unlawful activity, that is a conspiracy to commit healthcare fraud, in violation of Title 18, United States Code, Section 1349, with the intent to promote the carrying on of specified unlawful activity, that is causing the filing of fraudulent claims with various health care benefit programs for the purpose of financial gain, and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction represented proceeds of some form of unlawful activity in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i).

MANNER AND MEANS

The manner and means used to accomplish the objectives of the conspiracy included, among others, the following: as owner of PHYSICIANS PRIMARY CARE, PLLC, **JEFFREY CAMPBELL** established a bonus program to promote the billing of medical procedures and tests that were medically unnecessary for the purpose of bolstering revenues in the form of increased reimbursements received from private insurance, Medicare, and Medicaid. During the conspiracy period, bonus payments were made to **MARK DYER** and **JACQUELINE DAVIS**, and other practitioners, based on a point value system that directly corresponded to the number of patients treated and medical procedures and tests ordered and billed, including those that were

medically unnecessary. The bonus payments were made from funds derived from specified unlawful activity, that being conspiracy to commit health care fraud.

In violation of Title 18, United States Code, Section 1956(h) and 1956(a)(1)(A)(i).

NOTICE OF FORFEITURE

1. The Grand Jury realleges counts 1-24 of this Indictment, as set forth above, and incorporates the counts by reference as if the same were fully set forth herein.

2. As a result of committing violations of Title 18, United States Code, Sections 1347, 1349 and 1956; and Title 21, United States Code, Sections 841 and 846; as alleged in this Indictment, **JEFFREY CAMPBELL, MARK DYER, JACQUELINE DAVIS** and **PHYSICIANS PRIMARY CARE, PLLC**, defendants herein, shall forfeit to the United States any and all property constituting, or derived from proceeds defendants obtained, directly or indirectly, as a result of the offenses alleged in this Indictment, and any property which facilitated or was involved in such offenses, including but not limited to:

a. Money Judgment for the proceeds of these offenses; and

b. Defendants' licenses to practice medicine;

3. If any of the above-described forfeitable property, as a result of any act or omission of the defendants,

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;

it is the intent of the United States, pursuant to 21 U.S.C. § 853(p), to seek forfeiture of any other property of the defendant up to the value of the above-described forfeitable property.

Pursuant to Title 18, United States Code, Sections 982(a)(1)(7), and Title 21, United States Code, Section 853.

A TRUE BILL.

[redacted]

FOREPERSON

Russell M. Coleman

RUSSELL M. COLEMAN
UNITED STATES ATTORNEY

RCM:LJW:JRA:20190116

UNITED STATES OF AMERICA v. **JEFFREY CAMPBELL, MARK DYER, JACQUELINE DAVIS and PHYSICIANS PRIMARY CARE, PLLC**

PENALTIES

Count 1:	NM 20 yrs/$1,000,000 fine/both/NM 3 yrs. Supervised Release (each count)
Counts 2-5:	NM 20 yrs/$1,000,000 fine/both/NM 3 yrs. Supervised Release (each count)
Count 6:	NL 20 yrs./NM Life/$1,000,000/both/NL 3 yrs. Supervised Release
Count 7:	NL 20 yrs./NM Life/$1,000,000/both/NL 3 yrs. Supervised Release
Counts 8-23:	NM 10 yrs/$250,000 fine/both/NM 3 yrs. Supervised Release (each count)
Count 24:	NM 20 yrs/$500,000 fine/both/NM 3 yrs. Supervised Release

Forfeiture

NOTICE

ANY PERSON CONVICTED OF AN OFFENSE AGAINST THE UNITED STATES SHALL BE SUBJECT TO SPECIAL ASSESSMENTS, FINES, RESTITUTION & COSTS.

SPECIAL ASSESSMENTS

18 U.S.C. § 3013 requires that a special assessment shall be imposed for each count of a conviction of offenses committed after November 11, 1984, as follows:

Misdemeanor:	$ 25 per count/individual $125 per count/other	Felony:	$100 per count/individual $400 per count/other

FINES

In addition to any of the above assessments, you may also be sentenced to pay a fine. Such fine is due immediately unless the court issues an order requiring payment by a date certain or sets out an installment schedule. You shall provide the United States Attorney's Office with a current mailing address for the entire period that any part of the fine remains unpaid, or you may be held in contempt of court. 18 U.S.C. § 3571, 3572, 3611, 3612

Failure to pay fine as ordered may subject you to the following:

1. **INTEREST** and **PENALTIES** as applicable by law according to last date of offense.

   For offenses occurring after December 12, 1987:

   No **INTEREST** will accrue on fines under $2,500.00.

   INTEREST will accrue according to the Federal Civil Post-Judgment Interest Rate in effect at the time of sentencing. This rate changes monthly. Interest accrues from the first business day following the two week period after the date a fine is imposed.

   PENALTIES of:

   10% of fine balance if payment more than 30 days late.

   15% of fine balance if payment more than 90 days late.

2. Recordation of a **LIEN** shall have the same force and effect as a tax lien.

3. Continuous **GARNISHMENT** may apply until your fine is paid.

18 U.S.C. §§ 3612, 3613

If you **WILLFULLY** refuse to pay your fine, you shall be subject to an **ADDITIONAL FINE** of not more than the greater of **$10,000** or twice the unpaid balance of the fine; or **IMPRISONMENT** for not more than 1 year or both. 18 U.S.C. § 3615

RESTITUTION

If you are convicted of an offense under Title 18, U.S.C., or under certain air piracy offenses, you may also be ordered to make restitution to any victim of the offense, in addition to, or in lieu of any other penalty authorized by law. 18 U.S.C. § 3663

APPEAL

If you appeal your conviction and the sentence to pay your fine is stayed pending appeal, the court shall require:

1. That you deposit the entire fine amount (or the amount due under an installment schedule during the time of your appeal) in an escrow account with the U.S. District Court Clerk, or

2. Give bond for payment thereof.

18 U.S.C. § 3572(g)

PAYMENTS

If you are ordered to make payments to the U.S. District Court Clerk's Office, certified checks or money orders should be made payable to the Clerk, U.S. District Court and delivered to the appropriate division office listed below:

LOUISVILLE:
Clerk, U.S. District Court
106 Gene Snyder U.S. Courthouse
601 West Broadway
Louisville, KY 40202
502/625-3500

BOWLING GREEN:
Clerk, U.S. District Court
120 Federal Building
241 East Main Street
Bowling Green, KY 42101
270/393-2500

OWENSBORO:
Clerk, U.S. District Court
126 Federal Building
423 Frederica
Owensboro, KY 42301
270/689-4400

PADUCAH:
Clerk, U.S. District Court
127 Federal Building
501 Broadway
Paducah, KY 42001
270/415-6400

If the court finds that you have the present ability to pay, an order may direct imprisonment until payment is made.

FORM DBD-34
JUN.85

No. 3:17CR-87-RGJ

UNITED STATES DISTRICT COURT

Western District of Kentucky
At Louisville

THE UNITED STATES OF AMERICA

vs.

JEFFREY CAMPBELL, MARK DYER
JACQUELINE DAVIS
PHYSICIANS PRIMARY CARE, PLLC

THIRD SUPERSEDING INDICTMENT

COUNT 1
Conspiracy-Unlawful Distribution and Dispensing of Controlled Substances
21 U.S.C. §§841(a)(1), 841(b)(1)(C), 841(b)(1)(E)(i), 841(b)(2), and 846

COUNTS 2, 3, 4, 5
Unlawful Distribution and Dispensing of Controlled Substances-Schedule II
18 U.S.C. §2

COUNT 6
Conspiracy-Unlawful Distribution and Dispensing of Controlled Substance Resulting in Death
21 U.S.C. §§841(a)(1), 841(b)(1)(C) and 846

COUNT 7
Unlawful Distribution and Dispensing of Controlled Substance Resulting in Death
21 U.S.C. §§841(a)(1), 841(b)(1)(C)
18 U.S.C. §2

COUNTS 8, 9
Unlawful Distribution and Dispensing of Controlled Substances-Hydrocodone
21 U.S.C. §§841(a)(1) and 841(b)(1)(E)(i)
18 U.S.C. §2

COUNT 10
Conspiracy – Health Care Fraud
18 U.S.C. §§1349

COUNTS 11-21
Health Care Fraud-Fraudulent Coding
18 U.S.C. §§1347 and 2

COUNT 22
Health Care Fraud-Physical Therapy
18 U.S.C. §§1347 and 2

COUNT 23
Health Care Fraud-Proove Biosciences
18 U.S.C. §§1347 and 2

COUNT 24
Conspiracy- Money Laundering
18 U.S.C. §§1956(h) and 1956(a)(1)(A)(i)

FORFEITURE

A true bill.

[redacted]

Foreperson

FILED
VANESSA L. ARMSTRONG, CLERK
JAN - 7 2020
U.S. DISTRICT COURT
WEST'N. DIST. KENTUCKY

Filed in open court this 7th day of January, 2020.

Clerk

Bail, $

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

Filed: September 06, 2023

Ms. Melissa M. Salinas
Federal Appellate Litigation Clinic
701 S. State Street
2058 Jeffries Hall
Ann Arbor, MI 48109

Re: Case No. 23-5311, *USA v. Mark Dyer*
Originating Case No. : 3:17-cr-00087-2

Dear Counsel,

This confirms your appointment to represent the defendant in the above appeal under the Criminal Justice Act, 18 U.S.C. § 3006A.

You must file your appearance form and order transcript within 14 days of this letter. The appearance form and instructions for the transcript order process can be found on this court's website. Please note that transcript ordering in CJA-eligible cases is a two-part process, requiring that you complete both the financing of the transcript (following the district court's procedures) and ordering the transcript (following the court of appeals' docketing procedures). Additional information regarding the special requirements of financing and ordering transcripts in CJA cases can be found on this court's website at http://www.ca6.uscourts.gov/criminal-justice-act under "Guidelines for Transcripts in CJA Cases."

Under § 230.66.40(a) of the *Guide*, "the expense of specialized typesetting, layout, or binding of appellate or other legal briefs (including Supreme Court booklets) exceeding requirements for individuals represented under the CJA, regardless of the printing method utilized, is **not** reimbursable." (emphasis added) "The reasonable cost of laser printing, photocopying, or similar duplication expenses is," however, "reimbursable." *Id.* § 230.66.40(b).

The Supreme Court does not require the special booklet format when a petitioner is proceeding IFP. *See* S. Ct. R. 39.3. Instead, counsel may print their petition on 8.5x11 paper, stapling in the top-left corner, and must mail an original and ten copies of the cert. petition and appendix. *See* Guide to Filing *IFP* Cases; S. Ct. R. 33.2. Expenses above the costs for production consistent with S. Ct. R. 39.3 will not be reimbursed.

Following this letter, you will receive a notice of your appointment in the eVoucher system. That will enable you to log into the eVoucher system and track your time and expenses in that system. To receive payment for your services at the close of the case you will submit your voucher electronically via eVoucher. Instructions for using eVoucher can be found on this court's website. Your voucher must be submitted electronically no later than 45 days after the final disposition of the appeal. *No further notice will be provided that a voucher is due*. Questions regarding your voucher may be directed to the Clerk's Office at 513-564-7041.

Finally, if you become aware that your client has financial resources not previously disclosed or is no longer eligible for appointed counsel under the Criminal Justice Act, please contact the Clerk or Chief Deputy for guidance.

Sincerely yours,

s/Ken Loomis
Administrative Deputy
Direct Dial No. 513-564-7067

cc: Mr. Terry M. Cushing
Mr. Mark Dyer
Ms. Patricia J. Elder
Mr. Christopher Charles Tieke
Mr. James J. Vilt Jr.
Ms. Monica Wheatley