

No. 26-

IN THE
Supreme Court of the United States

OKECHUKWU DIMKPA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court’s decision in *Ruan v. United States*, 597 U.S. 450 (2022) constitutes a sufficiently “novel” intervening change in law to constitute “cause” excusing a procedural default under 28 U.S.C. § 2255.
2. Whether this Court’s holding in *Reed v. Ross*, 468 U.S. 1 (1984)—that a decision overturning a unanimous or nearly unanimous circuit interpretation of a federal criminal statute, where that interpretation was based on, if not compelled by, this Court’s own precedent, constitutes “cause” excusing procedural default—survived this Court’s later decision in *Bousley v. United States*, 523 U.S. 614 (1998).
3. If *Reed* remains good law, whether this Court’s decision in more “arguably” overturned a practice previously approved of in *United States v. Moore*, 423 U.S. 122 (1975).

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner Okechukwu Dimkpa was the defendant-appellant below. Respondent United States of America was the appellee below. There are no corporate parties involved in this case.

RELATED PROCEEDINGS

United States Court Of Appeals (Fourth Circuit):

United States v. Dimkpa, No. 23-6245, 169 F.4th 228
(4th Cir. 2026)

United States District Court (M.D.N.C.):

Dimkpa v. United States, No. 1:19-CR-443, 2023 WL
2349599, (M.D.N.C. Mar. 3, 2023).

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OPINIONS AND RULINGS BELOW

United States v. Dimkpa, 169 F.4th 228 (4th Cir. 2026)

JURISDICTION

The Judgment of the Fourth Circuit Court of Appeals judgment was entered on March 3, 2026. A timely Petition for Rehearing *en banc* was denied on May 1, 2026. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1) provides in pertinent part:

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.

STATEMENT OF THE CASE

This case presents a clear and unambiguous vehicle for this Court to clarify what constitutes a sufficiently “novel” intervening change in how a federal criminal statute

is interpreted to constitute cause excusing procedural default under *Reed v. Ross*, 468 U.S. 1 (1984) and *Bousley v. United States*, 523 U.S. 614 (1998).

At all times relevant to this petition, the defendant-petitioner Okechukwu Dimkpa was a physician duly registered under the Controlled Substances Act to distribute Schedule II controlled narcotics. Prior to this Court’s decision in *Ruan v. United States*, petitioner Dimkpa was charged by information, and pleaded guilty to, six counts of unauthorized distribution of a controlled substance in violation of 18 U.S.C. § 841(a). At the time the time petitioner’s conviction became final, the Fourth Circuit and every other circuit to have consider the matter held that a medical practitioner’s guilt under § 84 turned on whether he acted in “good faith” in issuing a charged prescription. *United States v. Sabeau*, 885 F.3d 27, 45 (1st Cir. 2018); *United States v. Vamos*, 797 F.2d 1146, 1152 (2d Cir. 1986); *United States v. Norris*, 780 F.2d 1207, 1209 n. 2; *United States v. Volkman*, 797 F.3d 377, 387 (6th Cir. 2015); *United States v. Kohli*, 847 F.3d 483, 490 (7th Cir. 2017); *United States v. Smith*, 573 F.3d 639, 649–50 n.4 (8th Cir. 2009); *United States v. Feingold*, 454 F.3d 1001, 1008 (9th Cir. 2006); *United States v. Khan*, 989 F.3d 806, 825 (10th Cir. 2021); *United States v. Ruan*, 966 F.3d 1101, 1167 (11th Cir. 2020).

In *Ruan* this Court held that a defendant’s guilt did not turn on some nebulous “good faith” standard but instead required the government to prove “*that a defendant knew or intended that his or her conduct was unauthorized.*” *Ruan v. United States*, 597 U.S. at 467 (emphasis added).

Following *Ruan*, Petitioner filed a habeas petition arguing that he would not have pleaded guilty had he known that the government was required to prove that he knew that the charged prescriptions were unauthorized and that *Ruan* represented a sufficiently novel change in the law to constitute cause under *Reed v. Ross*, 468 U.S. 1, 13–14 (1984). Appendix (“App”) 6. The government conceded that *Ruan* applies retroactively on collateral review and that the plea colloquy was deficient under *Ruan*. App.6.

Prejudice is not at issue in this case. Both the district court and the Fourth Circuit agree that Petitioner would likely not have pleaded guilty had he been told that the government is required to prove that he issued what he knew to be unauthorized prescriptions.

“Dimkpa has made a strong showing of prejudice. His sentencing materials were largely directed to his argument that he had treated Mr. Cohen as a person with complex medical needs including chronic pain and addiction, . . . implicitly contending he had not known the prescribing of oxycodone to someone using heroin and cocaine was inappropriate if that person had other legitimate medical needs supporting the prescription.”

App.26. At this point everyone concedes that petitioner’s plea was not knowingly and voluntarily entered and that he would not have entered the plea had he been correctly informed of the elements of the offense. The only question at issue in this petition is whether, in the face of overwhelming contrary appellate court law, the *mens rea*

standard articulated in *Ruan* is a sufficiently novel case to constitute cause excusing procedural default.

This case presents a significant question of national concern. Its import stretches far beyond those defendants convicted prior to *Ruan*. The question is whether a decision of statutory interpretation from this Court can only be considered sufficiently novel to constitute cause whether this Court directly overturns *its own* prior interpretation of a statute. *Reed* lists three circumstances in which an intervening case from this Court is sufficiently novel to constitute cause excusing procedural default.

“First, a decision of this Court may explicitly overrule one of our precedents. . . . Second, a decision may ‘overtur[n] a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.’ Ibid. And, finally, a decision may ‘disapprov[e] a practice this Court arguably has sanctioned in prior cases.’ Ibid.”

Reed, 468 U.S. at 17 (quoting *United States v. Johnson*, 457 U.S. 537 (1982) (abrogated by *Griffith v. Kentucky*, 479 U.S. 314 (1987))). The *Reed* Court went on to note that

“By definition, when a case falling into one of the first two categories is given retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted.”

Id. The Fourth Circuit below agreed that *Ruan* meets at least the second *Reed* criteria because *Ruan* overturned the near unanimous consensus of the circuit courts of appeal. App.13. However, the Fourth Circuit concluded that following *Bousley* “that alone is not enough to establish cause in this case.” App.12.

Indeed, the Fourth Circuit’s decision holds that at least in the absence of this Court directly overturning its own precedent, the fact that a practice has been roundly rejected by the appellate courts itself establishes that the defendant did not have cause for failing to make it. App.11-12 (“And the fact that other defendants ‘perceived and litigated’ similar claims around the same time indicates that a claim is not so ‘novel’ that it can excuse a default.”).

The Fourth Circuit is not alone in this view. *See United States v. Lyons*, 173 F.4th 491, 497–98 (3d Cir. 2026); *Simpson v. Matesanz*, 175 F.3d 200, 212 (1st Cir. 1999); *Gupta v. United States*, 913 F.3d 81, 85 (2d Cir. 2019); *United States v. Vargas-Soto*, 35 F.4th 979, 993–94 (5th Cir. 2022); *Cvijetinovic v. Eberlin*, 617 F.3d 833, 837 (6th Cir. 2010); *Evans v. Horton*, 792 F. App’x 568, 571 (10th Cir. 2019) (unpublished). *Granda v. United States*, 990 F.3d 1272, 1287–88 (11th Cir. 2021).

On the other hand, the Seventh Circuit still relies on *Reed* to determine novelty. *Cross v. United States*, 892 F.3d 288, 296 (7th Cir. 2018).

One of two things is true. (1) Either *Reed* remains good law and Petitioner is entitled to withdraw his appeal because *Ruan* overturned a near unanimous body of appellate court case law and a practice that this Court

had arguably approved of or, (2) *Bously* rendered the *Reed* factors obsolete. In either event, a definitive ruling by this Court would provide much needed clarity to the issue and save considerable briefing in the courts below.

FACTUAL AND PROCEDURAL BACKGROUND

A. Proceedings In the District Court

At all times relevant to this petition, Petitioner Okechukwu Dimkpa was a medical practitioner registered under the Controlled Substances Act (“CSA”) to distribute Schedule II controlled narcotics. Petitioner practiced in hospitals for several years before opening his own practice in Kannapolis, North Carolina. App.21. On August 23, 2019, the government charged petitioner with six counts of distributing oxycodone outside the usual course of professional medical practice and without a legitimate medical purpose in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C), R.1. Each charged prescription was issued to a single patient by the name of A.C.

Petitioner waived his right to prosecution by indictment and pleaded guilty to a bill of Information. App.22. The information and factual basis of the guilty plea allege that an expert in pain management reviewed A.C.’s medical file and opined that, based on the information contained therein, the prescriptions were issued “outside the course of usual medical practice” and “not medically legitimate.” App.66-67.

According to medical records, A.C. was seeking treatment for a chronic and longstanding pain condition. App.21.

Petitioner first began treating A.C. in April 2014. At the initial consultation, Petitioner discussed the possibility of using the drugs Vivitrol or Suboxone as alternatives to oxycodone, but A.C. declined. App.21.

Four months later in August of 2014, A.C.'s brother accompanied A.C. to an appointment with Petitioner. A.C. informed Petitioner that he was addicted to pain pills and that his brother, who ran a dental office in the area and employed A.C., "was going to fire him if he did not stop using prescription opioids." App.21.

For the next four months Petitioner switched A.C.'s prescription from oxycodone to Suboxone. App.21-22. Suboxone is a controlled substance designed, in part, to treat opioid addiction. App.21-22.

In January of 2015, Petitioner returned A.C. to oxycodone therapy for his pain. App.22. Those prescriptions continued intermittently until August of 2016. During that time, A.C. tested positive for heroin and cocaine on more than one occasion. App.22. A.C. died of "Acute Combined Drug Toxicity" on August 28, 2016. App.22.

During the plea colloquy, the defendant indicated that he understood the charges and was voluntarily and intelligently pleading guilty. App.45. However, consistent with then existing case law, the defendant was not told that the government was required to prove that the defendant knew, at the time of the prescription, that issuing said prescription was outside the scope of his authorization under the CSA. App.45-46; App.23 ("The Court then listed the dates of the offenses but again did not address the knowledge requirement.").

Nothing in either the factual basis, the defendant's plea, or the information discussed the defendant's subjective intent in issuing the charged prescriptions or informed him that the government was required to prove any level of subjective intent. *See*, App.64-68. The factual basis for the plea contained no admission that petitioner knew his prescriptions were unauthorized.

Petitioner's primary argument at sentencing was that he had treated A.C. in what he earnestly believed to be his best medical judgment. App.26-27. A.C. was a complex patient who suffered from a bona fide pain condition as well as being addicted to opioids. App.26-27.

The Court sentenced Petitioner to forty-six months on all counts to run concurrently, followed by a period of three years of supervised release. Petitioner did not file a direct appeal.

B. Circuit Court Case Law And *Ruan v. United States*

In June of 2022, after petitioner's guilty plea and sentence, the Supreme Court decided *Ruan v. United States*, 597 U.S. 450, 467 (2022). In *Ruan* this Court held that in order to obtain a conviction under §841 the government must prove that a registered medical practitioner not only knowingly issued the charged prescription but did so with the knowledge that issuing the charged prescription was outside the scope of his authorization under § 841. *Ruan v. United States*, 597 U.S. 450, 467 (2022) ("But the Government must still carry this burden. And for purposes of a criminal conviction under § 841, this requires proving that a defendant knew or intended that his or her conduct was unauthorized.").

Prior to *Ruan*, every circuit court to have addressed the question interpreted this Court’s decision in *United States v. Moore*, 423 U.S. 122 (1975) to mean that a registered medical practitioner’s guilt or innocence under § 841 was dependent upon whether the defendant acted in “good faith.” The instructions issued in *Moore* required the jury to find:

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

Moore, 423 U.S. at 138–39.

Some circuits, including the Fourth Circuit, applied a definition of good faith that amounted to essentially strict liability. *Khan*, 989 F.3d at 825; *Ruan*, 966 F.3d at 1167; App.12-13 (describing prior Fourth Circuit case law). Others imposed a standard closer to negligence. *Sabean*, 885 F.3d at 45; *Vamos*, 797 F.2d at 1152; *Li*, 819 F. App’x at 118 (unpublished); *Godofsky*, 943 F.3d at 1026; *King*, 898 F.3d at 807–08. Even the Ninth and Seventh Circuits, which were more generous to defendants, defined guilt based on subjective “good faith.” *Kohli*, 847 F.3d at 490; *Feingold*, 454 F.3d at 1008. Even there, the *mens rea* requirement was included in the good faith instruction, not the elements of the offense.¹

1. To that extent, petitioner disagrees that with the Fourth Circuit that the case law prior to *Ruan* was only “nearly”

Ruan held that the Harrison Act “good faith” standard, at least tacitly approved of in *Moore*, does not capture the *mens rea* required by §841 of the CSA.

“For one thing, § 841, like many criminal statutes, uses the familiar *mens rea* words ‘knowingly or intentionally.’ It nowhere uses words such as “good faith,” ‘objectively,’ ‘reasonable,’ or ‘honest effort.’

For another, the Government’s standard would turn a defendant’s criminal liability on the mental state of a hypothetical ‘reasonable’ doctor, not on the mental state of the defendant himself or herself.”

Ruan, 597 U.S. at 465. No circuit required the government to prove that the defendant issued what he knew to be an unauthorized prescription. *See*, App.12-13. (“In our 2006 decision in *Hurwitz*, we adopted what we believed to be the consensus position of the federal courts of appeals, holding that § 841 did not require the government to prove that a doctor knew or intended to prescribe in an unauthorized manner, but only that a doctor’s prescriptions were objectively unauthorized.”) (Citing *United States v. Hurwitz*, 459 F.3d at 479).

unanimous. App.12 n.5. While the Seventh and Ninth Circuits imposed a subjective standard, they still did so through the mechanism of a good faith instruction rather than requiring the government to prove that the defendant knew the changed prescriptions were outside the scope of his authorization under the CSA. *United States v. Kohli*, 847 F.3d 483, 489 (7th Cir. 2017); *United States v. Feingold*, 454 F.3d 1001, 1008 (9th Cir. 2006)

C. The Cause and Prejudice Standard

Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised on habeas only if the petitioner can first demonstrate either “cause” and actual “prejudice” or that he is “actually innocent,” *Bousley*, 523 U.S. at 622 (quoting *Murray v. Carrier*, 477 U.S. 478, 485 (1986); *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)).

In *Reed*, this Court held that a sufficiently “novel” intervening change in this Court’s interpretation of law may constitute “cause” excusing procedural default in habeas. *Reed*, 468 U.S. at 15–16. A change in the law is sufficiently novel where an attorney does not have a “reasonable basis” upon which to develop a legal theory. *Id.* at 15; *Strickler v. Greene*, 527 U.S. 263, 283, n.24, (1999) (noting that “a showing that the factual or legal basis for a claim was not reasonably available to counsel . . . would constitute cause under this standard.” (citation omitted)).

The *Reed* Court identified three situations where an intervening change in the law is sufficiently novel to constitute cause (1) “a decision of this Court may explicitly overrule one of our precedents,” (2) a decision which overturns a “longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.” (3) A decision that disapproves of “a practice this Court arguably has sanctioned in prior cases.” *Id.* 16–18. (quotations to *United States v. Johnson*, 457 U.S., at 551).

The Court noted that “[b]y definition, when a case falling into one of the first two categories is given

retroactive application, there will almost certainly have been no reasonable basis upon which an attorney previously could have urged a state court to adopt the position that this Court has ultimately adopted.” *Reed*, 468 U.S. at 16–18. As to the third category, the Court determined that whether a “reasonable basis” exists turns on “how direct this Court’s sanction of the prevailing practice had been, how well entrenched the practice was *in the relevant jurisdiction* at the time of defense counsel’s failure to challenge it, and how strong the available support is from sources opposing the prevailing practice.” *Id.* (emphasis added).

In *Bousley*, 523 U.S. at 623–24, this Court clarified that “futility” in a specific jurisdiction is not sufficient to constitute cause excusing procedural default under *Reed*. In that case, the petitioner had pleaded guilty to “using” a firearm under 18 U.S.C.A. § 924(c)(1). *Bousley*, 523 U.S. at 623–24. After the petitioner’s conviction became final, this Court held that the “using” prong of § 924(c)(1) required active employment of the firearm. *Id.* 616. (See *Bailey v. United States*, 516 U.S. 137, 144 (1995)). The petitioner in *Bousley* collaterally attacked his conviction under § 2255, arguing that *Bailey* was sufficiently novel to constitute cause excusing procedural default. This Court held that petitioner’s claim would not have been sufficiently novel at the time his conviction became final because “futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time.” 523 U.S. at 622–623 (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982)).

D. Section 2255 and the Court of Appeals Decision Below

In September 2022, Petitioner filed a timely *pro se* § 2255 motion to vacate his conviction, arguing that his guilty plea was not knowing and voluntary because the district court had not informed him that the government was required to prove his subjective knowledge that the charged prescriptions were not authorized under § 841.

On, September 12, 2022, Petitioner filed a petition for release under § 2255. Petitioner argued that his guilty plea was not knowingly entered because the district court, consistent with then existing case law, did not inform him that the government was required to prove that he knew the prescriptions to be unauthorized. The government conceded that *Ruan* applies retroactively on collateral review. App.6.

The district court found that Petitioner's guilty plea was not entered intelligently because he was not informed that the government is required to establish the defendant's guilty state of mind. App.27-28. The defendant did not admit, and was not required to admit, that he knew the prescription to be unauthorized at the time it was issued. *See*, App.33-54.

The district court further held that defendant had established prejudice. App.27 (“Dr. Dimkpa probably would not have pled guilty if he had realized the government would have to prove that he knew the distribution of oxycodone was inappropriate.”). However, the district court denied the petition finding that the *Ruan* did not represent a sufficiently “novel” change in

the law to constitute “cause” for Petitioner’s failure to file a direct appeal. The district court issued a Certification of Appealability on the question of whether *Ruan* constituted sufficient cause excusing procedural default.

The Fourth Circuit affirmed. App.9 The Fourth Circuit acknowledged that *Ruan* “changed the law” in the Fourth Circuit. The court further pointed out that the Fourth Circuit’s view was, at the time Petitioner pleaded guilty, the consensus view of the Courts of Appeal. App.13. Therefore, *Ruan* meets at least the second of the three *Reed* factors. *Ruan* overturned longstanding and widespread practice to which a near-unanimous body of lower court authority had expressly agreed. App.13.

Nevertheless, the Fourth Circuit held that *Ruan* was not sufficiently “novel” because at the time his conviction became final petitioner had the “essential tools” necessary to make a *Ruan* style argument. App.13. (*quoting* *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir. 2001). Fourth Circuit reasoned that the fact that “other defendants already were pursuing what would become *Ruan* claims is good evidence that ‘the foundation for [*Ruan*] was laid’ before *Ruan* was decided in 2022.” App.16.

As to petitioner’s argument that *Ruan* overturned a practice that was at least arguably approved of in *Moore*, the Fourth Circuit held that this “Court expressly rejected the argument Dimkpa now advances, pressed in *Ruan* by the government: that *Moore* had ‘effectively endorsed’ an objective scienter standard.” The Fourth Circuit, therefore, felt bound by this Court’s analysis of *Moore*. App.17.

REASONS FOR GRANTING THE PETITION

I. Petitioner’s Case Provides a Clean Opportunity For This Court To Resolve A Circuit Split As To Whether The *Reed* Factors Constitute Sufficient “Cause” Excusing Procedural Default In Habeas After *Bousley*.

A. Ruan unambiguously qualifies under the Second and Third Circumstance Identified in *Reed*.

There is no doubt that any appeal Petitioner would have filed would have been futile in the Fourth Circuit at the time his conviction became final. *Bousley* held that “futility cannot constitute cause if it means simply that a claim was unacceptable to that particular court at that particular time.” *Bousley*, 523 U.S. at 622–623. However, it is not simply a matter of the appeal being futile in the Fourth Circuit. It would have been futile in every federal court of appeals. The language in *Reed* only requires a “near-unanimous” consensus among the federal courts. Here, the consensus was actually unanimous. This is not a case where, in one “particular court” at a “particular time”, an argument would have been futile. *Bousley*, 523 U.S. at 623 (*citing Engle v. Isaac*, 456 U.S. 107, 130 n. 35 (1982)). It was foreclosed in every or nearly every circuit.

As the Fourth Circuit noted in a different case the year before *Ruan* was issued: “We have made clear—as has “every [other] court to specifically consider the question”—that the good faith standard set out in those cases’ jury instructions ‘must be an objective one.’” *United States v. Purpera*, 844 F. App’x 614, 626–27 (4th Cir.

2021) (unpublished) (emphasis added) (quoting *Hurwitz*, 459 F.3d at 479). The Petitioner acknowledges that at the time *Purpera* was decided the Seventh and Ninth Circuits allowed for a subjective good faith defense. *United States v. Kohli*, 847 F.3d 483, 489 (7th Cir. 2017); *United States v. Feingold*, 454 F.3d 1001, 1008 (9th Cir. 2006). Even those circuits incorporated the objective *mens rea* element into the good faith instruction. *Id.* That is contrary to this Court’s explicit holding in *Ruan*. *Ruan*, 597 U.S. at 465.

Furthermore, those circuits that imposed an objective scienter did so on the basis of *Moore*. *United States v. Smithers*, 92 F.4th 237, 247 (4th Cir. 2024) (“We based that conclusion on *United States v. Moore*, 423 U.S. 122 (1975), which, we said, “strongly suggest[ed] the inquiry [under § 841, for prosecutions of medical practitioners] is an objective one.”); *United States v. Vamos*, 797 F.2d 1146, 1153 (2d Cir. 1986) (“As the Supreme Court noted in *Moore* . . . ”); *United States v. Norris*, 780 F.2d 1207, 1209 (5th Cir. 1986) (“In *United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975), the Court, in affirming the conviction of a physician under 21 U.S.C. 841, implicitly approved the following instruction . . . ”); *United States v. Godofsky*, 943 F.3d 1011, 1024 (6th Cir. 2019) (“The Court further noted, with apparent approval, that the trial court had instructed the jury . . . ”); *United States v. Smith*, 573 F.3d 639, 647 (8th Cir. 2009) (“In *Moore*, the Supreme Court impliedly approved a jury instruction that allowed a jury to find a doctor guilty of violating § 841(a) if the doctor dispensed methadone “other than in good faith for detoxification in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States.”); *United States v. Nelson*, 383 F.3d 1227,

1233 (10th Cir. 2004) (“ We hold that the instruction in the instant case correctly stated the law, based on our reading of *Moore* and the inference that necessarily follows from the wording of the applicable regulation.”).

This Court’s decision in *Ruan* was well founded and did not directly overturn *Moore*. Under *Reed*, however, the question is whether the *Ruan* overturned a practice “arguably [] sanctioned in prior cases.” *Reed*, 468 U.S. at 16–18 (emphasis added).

Given the near unanimous belief of the Circuit Court judges that *Moore* required a result different from the one ultimately reached by this Court in *Ruan*, it seems logically impossible to assert that *Moore* did not at least “arguably” endorse the statutory interpretation reached by the Circuit Courts. Not only was it argued that *Moore* imposed an objective scienter, that argument was nearly universally accepted.

The instructions issued and approved of by the Fourth Circuit, and every other circuit, at the time of Petitioner’s conviction were materially indistinguishable from the instructions issued in *Moore*, 423 U.S. at 138–39 (1975). The instruction issued in *Moore*, and approved of by this Court in the body of its decision, instructed the jury that the must find:

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

practice generally recognized and accepted in the United States.”

Moore, 423 U.S. at 138–39. The instructions issued in the Circuit Courts prior to *Ruan* were nearly identical. *See, e.g., United States v. Tran Trong Cuong*, 18 F.3d 1132, 1138 (4th Cir. 1994) (“Good faith in this context means good intentions in the honest exercise of best professional judgment as to a patient’s need. It means the doctor acted in accordance with what he believed to be proper medical practice.”); *United States v. Volkman*, 797 F.3d 377, 387 (6th Cir. 2015) (“If a physician dispenses a drug in good faith in the course of medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of accepted medical practice. That is, he has dispensed the drug lawfully.

“Good faith” in this context 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.”); *United States v. Norris*, 780 F.2d 1207, 1209 (5th Cir. 1986) (“A controlled substance is prescribed by a physician in the usual course of a professional practice, and, therefore, lawfully, if the substance is prescribed by him in good faith, medically treating a patient in accordance with a standard of medical practice generally recognized and accepted in the United States.”); *United States v. Khan*, 989 F.3d 806, 823 (10th Cir. 2021) (“‘Good faith’ connotes an attempt to act in accordance with what a reasonable physician should believe to be proper medical practice. The good faith defense requires the jury to determine whether Defendant Shakeel Kahn acted in an honest effort to prescribe for

patients’ medical conditions in accordance with generally recognized and accepted standards of practice.”); *United States v. Ruan*, 966 F.3d 1101, 1167 (11th Cir. 2020) (“The district court’s instruction told the jury that good faith was a defense to a Controlled Substances Act violation as long as the appellants’ conduct also was in accordance with the standards of medical practice generally recognized and accepted in the United States, and it highlighted that the appellants ‘maintain[ed] at all times they acted in good faith and in accordance with [that] standard.’”).

Those instructions are no longer good law following *Ruan*. *Ruan*, 597 U.S. at 465; *United States v. Smithers*, 92 F.4th 237, 247 (4th Cir. 2024) *Id.* (“[Good faith] instruction directly contravenes *Ruan*; far from helping the government, it proves Defendant’s point.”). The fact that good faith instructions nearly identical to the one issued in *Moore* are now fatal to convictions following *Ruan* would seem, by definition, to render *Ruan* a case wherein this Court overturned a practice that it had “arguably [] sanctioned in prior cases.” *Reed*, 468 U.S. at 16–18.

B. A Circuit Split Exists as to whether the Second and Third Circumstances Constituting Novelty Articulated in *Reed* Survive *Bousley*.

The Fourth Circuit decision in this case renders the second and third circumstances identified in *Reed* no longer sufficient to establish cause excusing prejudice. The only time a change in statutory construction is sufficient to establish cause, according to the Fourth Circuit, is if this Court explicitly overturns its existing precedent. Near unanimous or even entirely unanimous consensus

among the Courts of Appeal is not a sufficient justification for excusing cause. App.13.

The Fourth Circuit is not alone in holding that the first two *Reed* factors do not constitute cause excusing procedural default. In *United States v. Lyons*, 173 F.4th 491, 497–98 (3d Cir. 2026), for example, the Third Circuit held that second two *Reed* categories (This Court directly overturning long standing practice in the appellate courts, and this Court overturning a practice it had arguably previously approved of) were simply dictum that did not survive *Bousley*. *Lyons*, 173 F.4th at 496. The existence of contrary case law *itself* establishes that a claim is not sufficiently “novel” to constitute cause. *Id.* If a near unanimous body of lower court authority has expressly approved of a practice that the Supreme Court later rejects, the Federal Reporters are, by definition, replete with cases involving challenges to the practice. *Id.* 497–98; *Simpson v. Matesanz*, 175 F.3d 200, 212 (1st Cir. 1999); *Gupta v. United States*, 913 F.3d 81, 85 (2d Cir. 2019); *United States v. Vargas-Soto*, 35 F.4th 979, 993–94 (5th Cir. 2022); *Gatewood v. United States*, 979 F.3d 391, 396–97 (6th Cir. 2020); *Evans v. Horton*, 792 F. App’x 568, 571 (10th Cir. 2019) (unpublished). *Granda v. United States*, 990 F.3d 1272, 1287–88 (11th Cir. 2021).

The Seventh Circuit, by contrast, appears to still recognize the viability of the second and third *Reed* factors. In *Cross v. United States*, the Seventh Circuit held that this Court’s decision in *Johnson v. United States*, 576 U.S. 591 (2015) constitutes a sufficiently novel decision to constitute cause excusing procedural default where a habeas petitioner did not challenge his residual clause sentence on direct appeal. *Cross v. United States*, 892 F.3d

288, 296 (7th Cir. 2018). The Seventh Circuit noted that a “substantial body of circuit court precedent” foreclosed such challenges. *Id.*

The second and third scenarios identified by *Reed* present even more compelling grounds to excuse Cross’s and Davis’s procedural defaults. *Johnson* abrogated a substantial body of circuit court precedent upholding the residual clause against vagueness challenges. . . . Although most of these decisions postdate Davis’s sentencing (though not Cross’s), no court ever came close to striking down the residual clause before 1992 or even suggested that it would entertain such a challenge. Finally, the Supreme Court had implicitly “sanctioned” the residual clause by interpreting it as if it were determinate.

Id. at 295–96.

The government has conceded *Ruan*’s retroactivity. *Teague v. Lane*, 489 U.S. 288 (1989), is not applicable here. *Teague* only applies to *procedural* rules. It does not apply to cases interpreting a statute in such a way as to place “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,” *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in part and dissenting in part)).

As the district court found, Petitioner made a “strong showing of prejudice.” R. 38 at 7-8. App.26. On the merits, there is no argument that Petitioner’s plea was knowingly or voluntarily entered. In pleading guilty to the charged

offense, Petitioner was not asked and did not admit to knowing wrongdoing. Nor is there any serious argument to be made that *Ruan* does not fall into the second and third example of “novelty” identified in *Reed*.

This case presents a clean vehicle for the Court to resolve whether unanimous or near unanimous contrary binding appellate court authority constitutes sufficient cause to excuse procedural default.

II. The Decision Below Was Wrongly Decided And Undermines The Interests Of Judicial Economy And Justice.

Whether the second two *Reed* factors constitute sufficient cause excusing procedural default following *Bousley* is a reoccurring question in the appellate courts. *Bousley* addressed the question of whether a petitioner can overcome procedural default when he failed to raise a claim that was the subject of a circuit split. *Bousley*, 523 U.S. at 618. Applying *Bousley* where no circuit split exists, or where the overwhelming consensus of the circuit courts was against the defendant creates a somewhat paradoxical incentive structure that undermines judicial efficiency.

Running through the appellate court decisions that reject *Reed* is a common theme: if someone made the argument, then by definition it was “available” to the petitioner. App.16 (“It is no surprise, then, that other defendants were raising Ruan-style claims well before *Ruan* was decided.”); *Simpson v. Matesanz*, 175 F.3d 200, 212 (1st Cir. 1999); *Gupta v. United States*, 913 F.3d 81, 85 (2d Cir. 2019) (citing *Whitman v. United States*, 754

F. App'x 40 (2d Cir. 2018)); *United States v. Vargas-Soto*, 35 F.4th 979, 994 (5th Cir. 2022); *Cvijetinovic v. Eberlin*, 617 F.3d 833, 837 (6th Cir. 2010); *Evans v. Horton*, 792 F. App'x 568, 571 (10th Cir. 2019) (unpublished); *Granda v. United States*, 990 F.3d 1272, 1287 (11th Cir. 2021).

The difficulty with that reasoning is that the more obvious it is that an argument is one the courts have rejected, the less “cause” a petitioner has for making it. If a change in law from unanimous appellate court consensus is not sufficient to establish cause, then a careful defense attorney will feel compelled to raise every issue no matter how profoundly unlikely to succeed. Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court’s Procedural Default Doctrine*, 4 J. App. Prac. & Process 521, 523 (2002). Indeed, “[r]equiring defense counsel to object on grounds that are clearly foreclosed by entrenched precedent subjects them to possible sanctions for raising ‘frivolous’ claims.” *Id.* 523. That result undermines the efficaciousness of appellate briefs and imposes upon the courts the burden of considering issues upon which there is binding precedent.

More than that, the logic of the Fourth Circuit shields from review exactly those cases where injustice is most likely to obtain. Like many defendants, Petitioner pleaded guilty. “Our criminal justice system is no longer dominated by trials and sentences based on them, but plea bargains . . .”. *Hunter v. United States*, 146 S. Ct. 1702, 1716 (2026) (J. Gorsuch, concurring). Petitioner pleaded guilty because and only because the Fourth Circuit, and nearly every circuit, told him that his intent in issuing the charged prescriptions was irrelevant. As the district court recognized, he would not have pleaded guilty to

intentional wrongdoing, because he did not believe he did anything wrong.

Ruan is retroactively applicable. *Ruan* narrowed “the scope of a criminal statute by interpreting its terms” in such a way as to “place particular conduct or persons covered by the statute beyond the State’s power to punish.” See *Schriro v. Summerlin*, 542 U.S. 348, 351–2 (2004) (citations omitted). Such decisions are retroactively applicable on collateral review because “they necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him.” *Summerlin*, 542 U.S. at 352 (quotation marks omitted).

Ruan turned what most circuits considered a strict liability or negligence offense into one that required specific intent. “The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.” *Morrisette v. United States*, 342 U.S. 246, 250 (1952). Yet, as central as *mens rea* is to mature systems of law, it is also uniquely an issue that it is almost impossible to prove one’s innocence on in the affirmative. If the Fourth Circuit’s logic is allowed to stand, it will be impossible for *habeas* to ever provide a plausible avenue of relief to defendants convicted under a lesser *mens rea* standard than that which is required by the law.

The question here is a simple and clean one. Petitioner did not plead to the element of the offense which separates

“innocent conduct from wrongful conduct” *Ruan*, 597 U.S. at 451. He stands convicted of an offense that he does not believe he committed, and which the government has not proven he committed. As the district court acknowledged, and the government conceded, the only reason he pleaded guilty is that the Fourth Circuit, and nearly every other circuit believed that this *Moore* imposed an objective scienter. Under *Reed*, that would constitute cause.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT,
FILED MARCH 3, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6245

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OKECHUKWU DIMKPA,

Defendant-Appellant.

OPINION

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Catherine C. Eagles, Chief District Judge. (1:19-cr-00443-CCE-1; 1:22-cv-00770-CCE-LPA)

Argued: September 9, 2025 Decided: March 3, 2026

Before DIAZ, Chief Judge, and WYNN and HARRIS, Circuit Judges.

Affirmed by published opinion. Judge Harris wrote the opinion, in which Chief Judge Diaz and Judge Wynn joined.

Appendix A

PAMELA HARRIS, Circuit Judge:

Dr. Okechukwu Dimkpa pled guilty to unlawfully distributing oxycodone in violation of 21 U.S.C. § 841(a)(1). Three years later, in *Ruan v. United States*, 597 U.S. 450, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022), the Supreme Court held that § 841's scienter provision requires the government to prove that a physician knew he was acting in an unauthorized manner when prescribing a controlled substance, such as oxycodone. Dimkpa then filed a § 2255 motion challenging his convictions under § 841, arguing that his guilty plea was not knowing and voluntary because he was not informed of the *mens rea* requirement articulated in *Ruan*.

The district court denied Dimkpa's motion, finding that Dimkpa had procedurally defaulted his *Ruan*-based claim by failing to raise it during his initial criminal proceeding, and that he had not shown cause to overcome this default. Although *Ruan* had yet to be decided when Dimkpa pled guilty, the district court reasoned, the legal basis for a *Ruan*-style claim was reasonably available to Dimkpa at that time. Accordingly, Dimkpa's *mens rea* argument was not sufficiently novel to constitute cause for his procedural default. We agree and therefore affirm the judgment of the district court.

I.

A.

Defendant Okechukwu Dimkpa, a physician, was charged with six counts of unlawfully distributing

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oxycodone, a Schedule II controlled substance, in violation of 21 U.S.C. § 841(a)(1). That statute makes it a federal crime, “[e]xcept as authorized,” for any person “knowingly or intentionally” to “manufacture, distribute, or dispense” a controlled substance. 21 U.S.C. § 841(a)(1). Registered doctors may prescribe such substances to their patients, but pursuant to federal regulations, “a prescription is only authorized when a doctor issues it ‘for a legitimate medical purpose . . . acting in the usual course of his professional practice.’” *Ruan*, 597 U.S. at 454 (alteration in original) (quoting 21 C.F.R. § 1306.04(a) (2021)).

Dimkpa’s charges corresponded to six instances in which he prescribed oxycodone to the same patient. According to the government, those prescriptions were not “authorized” under § 841 and were instead “outside the course of usual medical practice” and “not medically legitimate.” J.A. 44-45. Dimkpa was aware, the government alleged, that his patient was addicted to opioids — because his patient told him so — and nevertheless continued to prescribe oxycodone. And each of the six prescriptions in question was issued immediately after the patient tested positive for heroin or cocaine. Five days after receiving the last of his oxycodone prescriptions from Dimkpa, the patient died of an opioid-involved drug overdose.¹

Dimkpa pled guilty to all six charges in September 2019. At the plea hearing, the district court informed Dimkpa that should the case proceed to trial, the

1. More specifically, a medical examiner determined that the patient died of “Acute Combined Drug Toxicity (oxycodone, alprazolam).” J.A. 43.

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government would be required to prove each element of the charged § 841 offense beyond a reasonable doubt. And that would include, the district court explained, proof that Dimkpa had acted in an unauthorized manner by prescribing oxycodone “outside the usual course of professional practice.” J.A. 60. But consistent with then-governing Fourth Circuit precedent, the district court did not inform Dimkpa that the government would have to prove that he *knew* his prescriptions were unauthorized as outside the bounds of professional practice. *See United States v. Hurwitz*, 459 F.3d 463, 477-80 (4th Cir. 2006) (applying an objective rather than subjective standard to a physician’s “good faith” defense that his prescriptions were authorized).

Satisfied that Dimkpa’s guilty plea was knowing and voluntary, the district court accepted it and sentenced Dimkpa to 46 months of imprisonment — the low end of the applicable Sentencing Guidelines range — followed by three years of supervised release. Dimkpa did not pursue a direct appeal.

B.

In June 2022, nearly three years after Dimkpa’s 2019 guilty plea, the Supreme Court held in *Ruan v. United States* that a physician can be convicted under § 841 only if the government proves that he “knowingly or intentionally acted in an unauthorized manner.” 597 U.S. at 457. Section 841, recall, makes it unlawful, “[e]xcept as authorized[,] . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense” a controlled substance. 21 U.S.C. § 841(a)(1). In *Ruan*, the Supreme

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Court, citing the “presumption of scienter,” held that § 841’s “knowingly or intentionally” *mens rea* applies not only to the “manufacture, distribute, or dispense” clause, but also to the “except as authorized” clause. 597 U.S. at 457-59. To convict a physician under § 841, in other words, it is not enough that “a prescription was *in fact* not authorized”; the government must prove beyond a reasonable doubt that “the doctor *knew* or *intended* that the prescription was unauthorized.” *Id.* at 454-55 (emphasis in original).

Dimkpa, proceeding *pro se*, moved to vacate his § 841 convictions pursuant to 28 U.S.C. § 2255. He argued that his guilty plea was constitutionally invalid because the district court did not inform him of the scienter requirement newly recognized in *Ruan*. The government did not dispute that Dimkpa’s plea colloquy was inadequate under *Ruan*.² Instead, the government invoked the doctrine of procedural default. Dimkpa’s *Ruan* claim was barred, the government argued, because it was not raised during Dimkpa’s initial criminal proceeding or on direct appeal, and Dimkpa failed to overcome this default by showing either cause and prejudice or actual innocence.

The district court agreed with the government and denied Dimkpa’s motion. *Dimkpa v. United States*, 2023 U.S. Dist. LEXIS 35496, 2023 WL 2349599, at *1 (M.D.N.C. Mar. 3, 2023). As the court recounted, Dimkpa did not challenge the *mens rea* required to sustain a § 841 conviction at the time he pled guilty, nor

2. The government expressly conceded that *Ruan* applies retroactively on collateral review, and that Dimkpa’s § 2255 motion was timely filed.

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did he file a direct appeal from his convictions. 2023 U.S. Dist. LEXIS 35496, [WL] at *2, *4. The claim was therefore procedurally defaulted, and could be raised in post-conviction proceedings only if Dimkpa established a basis for excusing the default. 2023 U.S. Dist. LEXIS 35496, [WL] at *4. Relevant here, the district court ruled that Dimkpa’s reliance on *Ruan* — new authority that postdated his guilty plea — was not enough to demonstrate cause under the cause and prejudice standard. *Id.*

A claim based on intervening Supreme Court precedent can constitute cause for purposes of procedural default, the court explained, but only if the claim is “so novel that its legal basis [was] not reasonably available to counsel” before the Supreme Court’s decision and at the time the claim should have been raised. *Id.* (alteration in original) (quoting *Reed v. Ross*, 468 U.S. 1, 16, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984)). And here, the district court concluded, Dimpka’s *Ruan*-style claim was “reasonably available” at the time of his guilty plea in 2019, regardless of whether it could have succeeded under then-governing Fourth Circuit precedent. *See id.* (“[A]lleged futility cannot serve as ‘cause’ for a procedural default . . . if it means simply that a claim was unacceptable to that particular court at that particular time.” (alteration in original) (quoting *Whiteside v. United States*, 775 F.3d 180, 185 (4th Cir. 2014) (en banc))).

In 2019, the district court reasoned, the Supreme Court had not foreclosed Dimkpa’s argument regarding the *mens rea* required to convict a physician under § 841. *Id.* Moreover, other defendants had taken advantage of that opening, raising claims just like Dimkpa’s around

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the time of Dimkpa's guilty plea. *Id.* And finally, months before Dimkpa's plea colloquy, the Supreme Court had adopted a defendant's very similar *mens rea* argument under a different statute: In *Rehaif v. United States*, 588 U.S. 225, 139 S. Ct. 2191, 204 L. Ed. 2d 594 (2019), the Supreme Court applied the same presumption of scienter it would rely on in *Ruan* and held that in a prosecution under 18 U.S.C. § 924(a)(2) for a "knowing" violation of 18 U.S.C. § 922(g), the government must prove not only that a defendant knew he possessed a firearm but also that he knew he was within a class of persons prohibited from possessing a firearm under § 922(g). 588 U.S. at 227, 229; *see Dimkpa*, 2023 U.S. Dist. LEXIS 35496, 2023 WL 2349599, at *4 & n.7 (discussing *Rehaif*). For these reasons, the district court concluded, the claim pressed by Dimkpa in his § 2255 motion was reasonably available at the time of his plea and on direct review, and the intervention of *Ruan* did not qualify as cause for his failure to raise the claim then. *Dimkpa*, 2023 U.S. Dist. LEXIS 35496, 2023 WL 2349599, at *4.³

3. The district court did find that Dimkpa could satisfy the prejudice prong of the cause and prejudice standard. His argument at sentencing focused on a claim that he did not know his prescriptions were unauthorized — specifically, that he did not know prescribing oxycodone to a patient using heroin and cocaine was medically inappropriate if the patient had other legitimate medical needs supporting the prescription. Given that argument, the district court explained, "Dimkpa probably would not have pled guilty if he had realized the government would have to prove that he knew the distribution of oxycodone was inappropriate." *Dimkpa*, 2023 U.S. Dist. LEXIS 35496, 2023 WL 2349599, at *4. But as the district court correctly recognized, prejudice alone is insufficient to overcome a procedural default; the cause prong must also be satisfied. *Id.*

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Having determined that Dimkpa could not overcome his procedural default on the basis of cause and prejudice, the district court turned to Dimkpa's remaining argument: that his procedural default could be excused by actual innocence. 2023 U.S. Dist. LEXIS 35496, [WL] at *5. But Dimkpa could not prevail on that ground, either, the court concluded: "The inference that Dr. Dimkpa knew prescribing these medicines was not appropriate is strong," and Dimkpa could not show that "in light of all the evidence available, 'it is more likely than not that no reasonable juror would have convicted him' of any charge." *Id.* (quoting *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)).

Accordingly, the district court ruled that the procedural default doctrine precluded Dimkpa from asserting his *Ruan*-based claim on collateral review, and denied Dimkpa's motion to vacate his § 841 convictions. 2023 U.S. Dist. LEXIS 35496, [WL] at *6. The district court then issued Dimkpa a certificate of appealability, and this timely appeal followed.

II.

We review the district court's denial of a § 2255 motion *de novo*. *United States v. McKinney*, 60 F.4th 188, 191 (4th Cir. 2023). On appeal, Dimkpa challenges only the district court's determination that he failed to show cause for his procedural default, maintaining that his *Ruan*-based *mens rea* claim was sufficiently novel at the time he pled guilty that his failure to raise it on direct review should be

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excused.⁴ We disagree and therefore affirm the judgment of the district court.

A.

Habeas review should not take the place of an appeal. *Bousley v. United States*, 523 U.S. 614, 621, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998). Accordingly, “[w]here a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either ‘cause’ and actual ‘prejudice,’ or that he is ‘actually innocent.’” *Id.* at 622 (citations omitted). “[A] claim that ‘is so novel that its legal basis is not reasonably available to counsel’ may constitute cause for a procedural default.” *Id.* (quoting *Reed*, 468 U.S. at 16).

That “novelty” standard is a high one. *Poyner v. Murray*, 964 F.2d 1404, 1424 (4th Cir. 1992). As the district court explained — and Dimkpa does not dispute — it is not enough that at the time Dimkpa pled guilty, Fourth Circuit precedent foreclosed application of a subjective scienter standard to § 841’s “except as authorized” clause. *See Hurwitz*, 459 F.3d at 477-80 (rejecting subjective “good faith” standard in favor of objective standard); *United States v. Smithers*, 92 F.4th 237, 247 (4th Cir. 2024) (explaining, on direct review, that it “would have been futile for [the defendant] to argue for a subjective standard” in the Fourth Circuit before *Ruan* was decided).

4. Dimkpa does not challenge the district court’s ruling that he failed to show actual innocence.

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That kind of futility, the Supreme Court has held — that a claim cannot prevail in front of a specific court at a particular point in time — cannot qualify as cause for a procedural default. *Bousley*, 523 U.S. at 623. Nor is it enough that this issue was unsettled in 2019, when Dimkpa entered his plea. The law is “often in a state of flux,” and the “mere fact that certain legal principles are unsettled” at the relevant time “does not deprive a competent attorney of a ‘reasonable basis’ for asserting a claim.” *United States v. Gaylor*, 828 F.2d 253, 256-57 (4th Cir. 1987). “[T]he question is not whether subsequent legal developments have made counsel’s task easier, but whether at the time of the default the claim was ‘available’ at all.” *Smith v. Murray*, 477 U.S. 527, 537, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986).

In *Reed v. Ross*, 468 U.S. 1, 104 S. Ct. 2901, 82 L. Ed. 2d 1 (1984), the Supreme Court identified three situations in which “the novelty of a claim could constitute cause,” *McKinney*, 60 F.4th at 194:

First, a decision of the Supreme Court may explicitly overrule one of its precedents. Second, a decision may overturn a longstanding and widespread practice to which the Supreme Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. And, finally, a decision may disapprove [of] a practice the Supreme Court arguably has sanctioned in prior cases.

Id. (cleaned up) (quoting *Reed*, 468 U.S. at 17). Dimkpa relies heavily on these *Reed* categories in making his

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argument, and we agree that this framework may helpfully inform the inquiry into whether a claim is so “novel” that it was not “reasonably available” at the time of a default. But as subsequent Supreme Court precedent makes clear, the *Reed* categories may not be dispositive, and the analysis does not stop there.

As our court has explained, after the Supreme Court decided *Reed*, it “elaborated on just what constitutes a novel claim” in *Bousley v. United States*. *United States v. Sanders*, 247 F.3d 139, 144-45 (4th Cir. 2001). There, the Court held that a claim about the scope of 18 U.S.C. § 924(c)(1)’s prohibition on “use” of a firearm was “reasonably available” for years before it was adopted by the Supreme Court. *Id.* (citing *Bousley*, 523 U.S. at 616, 622-23). In reaching that conclusion, the Court did not reference the *Reed* categories. Instead, it focused directly on the bottom-line inquiry: Was the “legal basis” for the defendant’s claim “reasonably available to counsel” at the time of the default? *Bousley*, 523 U.S. at 622; *see Sanders*, 247 F.3d at 144. And while the Court recognized that its decision narrowing the scope of § 924(c)(1) in *Bailey v. United States*, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995), had “changed the relevant legal landscape,” it still concluded that the basis for the petitioner’s claim was “reasonably available” years before *Bailey* was decided, emphasizing that other defendants already were raising *Bailey*-style claims. *Sanders*, 247 F.3d at 145 (citing *Bousley*, 523 U.S. at 622-23).

Consistent with that approach, we have held that a claim is not sufficiently “novel” to qualify as cause for a default where prior Supreme Court decisions provided a

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defendant with the “essential legal tools” for his claim. *Sanders*, 247 F.3d at 146. Even if it is only later that the Supreme Court actually settles the issue, in other words, a claim is “reasonably available” if prior precedent “laid the basis for” it. *Engle v. Isaac*, 456 U.S. 107, 131-33, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); *see, e.g., Turner v. Jabe*, 58 F.3d 924, 929 (4th Cir. 1995). And the fact that other defendants “perceived and litigated” similar claims around the same time indicates that a claim is not so “novel” that it can excuse a default. *Engle*, 456 U.S. at 134; *see, e.g., Bousley*, 523 U.S. at 622-23, 623 n.2; *Sanders*, 247 F.3d at 145; *Turner*, 58 F.3d at 929.

B.

Against that background, we turn to Dimkpa’s contention that his claim was sufficiently “novel” to constitute cause for his 2019 default. We appreciate that it was not until three years later that the Supreme Court embraced Dimkpa’s position in *Ruan*. And we recognize, as Dimkpa argues, that *Ruan*’s endorsement of a subjective *mens rea* requirement for § 841’s “except as authorized” clause “changed the law in this circuit” and many others. *United States v. Kim*, 71 F.4th 155, 160 (4th Cir. 2023). But that alone is not enough to establish cause in this case.

In our 2006 decision in *Hurwitz*, we adopted what we believed to be the consensus position of the federal courts of appeals, holding that § 841 did not require the government to prove that a doctor knew or intended to prescribe in an unauthorized manner, but only that a

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doctor's prescriptions were objectively unauthorized. 459 F.3d at 479 ("We believe that the inquiry must be an objective one, a conclusion that has been reached by every court to specifically consider the question."). And it appears that this consensus only grew in the years after *Hurwitz* was decided. *See* Brief for Defendant-Appellant at 21-22 (collecting cases).⁵ So when *Ruan* held that the government *was* required in a § 841 prosecution to prove that a doctor knowingly or intentionally acted in an unauthorized manner, it abrogated the law in multiple circuits, including our own, *see Smithers*, 92 F.4th at 250, and "changed the relevant legal landscape," *Sanders*, 247 F.3d at 145. *See Reed*, 468 U.S. at 17 (describing category of cases in which a Supreme Court decision "overturn[s] a longstanding and widespread practice to which [the Supreme Court] has not spoken, but which a near-unanimous body of lower court authority has expressly approved").

But however strong this former circuit-court consensus, it did not place the "legal basis" for Dimkpa's *Ruan*-style challenge beyond the realm of "reasonable availability" at the time of Dimkpa's default. That is primarily because of an unusual feature of this case, emphasized by the district court: Three months before Dimkpa pled guilty and six months before he was sentenced, a strikingly similar *mens rea* claim was embraced by the Supreme Court in *Rehaif v.*

5. Still, the consensus was not unanimous: The Seventh and the Ninth Circuits required the government to prove that a doctor intended to act in an unauthorized manner. *See United States v. Chube II*, 538 F.3d 693, 698 (7th Cir. 2008); *United States v. Feingold*, 454 F.3d 1001, 1008 (9th Cir. 2006).

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United States. See Dimkpa, 2023 U.S. Dist. LEXIS 35496, 2023 WL 2349599, at *4 & n.7. Whatever the state of play before *Rehaif*, after *Rehaif*, Dimkpa “plainly had at his disposal the essential legal tools with which to construct his claim.” *Sanders*, 247 F.3d at 146.

Dimkpa’s claim, again, rests on the proposition that § 841’s “knowingly or intentionally” *mens rea* modifies not only “manufacture, distribute, or dispense” — the clause immediately following it — but also the preceding “except as authorized” clause. In *Rehaif*, the Court considered an analogous (if slightly more ambitious) claim about the scope of the word “knowingly” as used in 18 U.S.C. § 924(a)(2), which penalizes anyone who “knowingly” violates a different statute, 18 U.S.C. § 922(g). 588 U.S. at 227. Section 922(g), in turn, prohibits firearm possession by certain individuals, including convicted felons and noncitizens illegally in the United States. *Id.* The defendant in *Rehaif* argued that § 924(a)(2)’s *mens rea* requirement applied across statutes to modify all elements of an antecedent § 922(g) offense. And the Supreme Court agreed, holding that § 924(a)(2)’s “knowingly” modifier is not limited to the words immediately following it, *see Ruan*, 597 U.S. at 461 (discussing *Rehaif*), and instead requires that “in a prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), the [g]overnment must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm,” *Rehaif*, 588 U.S. at 237.

Despite these parallels, *Rehaif* might be less important here if the Supreme Court had “carefully crafted [that]

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holding to avoid deciding whether [its] logic . . . applied outside the context” of the particular statutory scheme at issue. *United States v. Brown*, 868 F.3d 297, 302 (4th Cir. 2017). But the Court in *Rehaif* did exactly the opposite. It framed its holding as an application of broad and basic criminal law principles: the “universal” understanding that “an injury is criminal only if inflicted knowingly,” and the concomitant “longstanding” and “ordinary presumption in favor of scienter” when construing criminal statutes. *Rehaif*, 588 U.S. at 229, 231. It situated its holding within a “legion” of cases “emphasiz[ing] scienter’s importance in separating wrongful from innocent acts.” *Id.* at 231. And it underscored that while the presumption of scienter applies even when a statute specifies no *mens rea*, the presumption applies “with equal or greater force” when — as in § 924(a)(2) in *Rehaif*, and § 841 in this case — Congress *has* included a general scienter provision in the statutory scheme. *Id.* at 229.

Those principles apply straightforwardly to Dimkpa’s *Ruan*-style claim. And we know this because when the Supreme Court decided *Ruan* three years later, its reasoning mirrored that of *Rehaif*, and it relied on *Rehaif* throughout. In *Ruan*, as in *Rehaif*, the Court started from fundamental principles of criminal law: the maxim that “wrongdoing must be conscious to be criminal” and the presumption of scienter. *Ruan*, 597 U.S. at 457-58 (citing *Rehaif*, 588 U.S. at 229). The Court observed, again, that because § 841 contains a general scienter provision, the presumption of scienter “applies with equal or greater force” in construing its scope. *Id.* at 458 (quoting *Rehaif*, 588 U.S. at 229). The Court characterized *Rehaif*,

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specifically, as “[a]nalogous precedent” concerning “the mental state that applies to a statutory clause” — in *Ruan*, the “except as authorized” clause — “that does not immediately follow the scienter provision.” *Id.* at 461. And the Court concluded, as it had before, that application of a scienter requirement would play a “crucial role” in separating presumptively innocent acts (such as possession of a licensed firearm or prescription of medication by a physician) from wrongful conduct. *Id.* at 458-59, 464 (citing *Rehaif*, 588 U.S. at 231-32).

Ruan was not, of course, a carbon copy of *Rehaif*. See *id.* at 468-73 (Alito, J., concurring in the judgment) (arguing that *Rehaif* is distinguishable). But “reasonable availability” does not demand an exact match. See *Gaylor*, 828 F.2d at 256-57 (claim may be “reasonably available” before an issue is settled by the Supreme Court). For procedural default to apply, it is enough if a defendant and his counsel have available the “tools to construct their [] claim.” *Engle*, 456 U.S. at 133. And months before Dimkpa pled guilty, was sentenced, and forwent an appeal in 2019, *Rehaif* had given Dimkpa and his lawyer “the legal tools, *i.e.*, case law, necessary to conceive and argue” a *Ruan*-style claim. *Poyner*, 964 F.2d at 1424; see *Sanders*, 247 F.3d at 145-46 (applying similar reasoning to find that *Apprendi*-style claims were “reasonably available” in years before Supreme Court decided *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)).

It is no surprise, then, that other defendants were raising *Ruan*-style claims well before *Ruan* was decided.

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As the district court noted, defendants in the Fourth Circuit were bringing such challenges around the time of Dimkpa's default, *Dimkpa*, 2023 U.S. Dist. LEXIS 35496, 2023 WL 2349599, at *4, as were defendants in other circuits, *see* Response Brief of the United States at 19 & n.2 (listing cases from the Fourth Circuit and other circuits). That other defendants already were pursuing what would become *Ruan* claims is good evidence that "the foundation for [*Ruan*] was laid" before *Ruan* was decided in 2022, *Sanders*, 247 F.3d at 145, and that Dimkpa's claim was not so "novel" that it can constitute cause for a default. *See Bousley*, 523 U.S. at 622 (reasoning that petitioner's claim did not qualify as "novel" because "at the time of petitioner's plea, the Federal Reporters were replete with cases involving [similar] challenges").

Finally, we are unpersuaded by Dimkpa's argument that his claim was not "reasonably available" until *Ruan* was decided because *Ruan* overturned the Supreme Court's prior precedent in *United States v. Moore*, 423 U.S. 122, 96 S. Ct. 335, 46 L. Ed. 2d 333 (1975), or at least "disapprove[d] [of] a practice [the Supreme Court] arguably ha[d] sanctioned" in *Moore. Reed*, 468 U.S. at 17 (identifying situations in which claim might not be reasonably available to petitioner). *Ruan* did not overrule *Moore*. Instead, it distinguished it: "[T]he question in *Moore* was whether doctors could *ever* be held criminally liable under § 841. *Moore* did not directly address the question before us here regarding the *mens rea* required to convict under the statute." *Ruan*, 597 U.S. at 466 (emphasis in original) (citation omitted). Moreover, the Court expressly rejected the argument Dimkpa now

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advances, pressed in *Ruan* by the government: that *Moore* had “effectively endorsed” an objective scienter standard. *See id.* Given the Supreme Court’s own analysis of its precedent, we are not at liberty to adopt a contrary view and find that *Moore* sanctioned the objective standard later disapproved of in *Ruan*.

This case is thus distinguishable from *United States v. McKinney*, in which we found cause for a petitioner’s default of a vagueness challenge to the residual clause of 18 U.S.C. § 924(c) in the years before the Supreme Court invalidated a similar residual clause in *Johnson v. United States*, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). *See McKinney*, 60 F.4th at 191, 193-95. Until 2015, we explained, Supreme Court precedent had “effectively foreclosed” such a claim, “affirmatively uph[olding] the constitutionality of residual clauses like the one at issue.” *Id.* at 194. A claim “foreclosed” by binding Supreme Court precedent may well be “unavailable” in a way that constitutes cause for a default. *See id.*; *Reed*, 468 U.S. at 17. Here, however, the Supreme Court has expressly instructed that its decision in *Moore* did not even address, let alone foreclose, the *mens rea* claim Dimkpa defaulted. *Ruan*, 597 U.S. at 466.

Accordingly, we agree with the district court that the legal basis for Dimkpa’s *mens rea* claim was “reasonably available to him” at the time he pled guilty and then failed to pursue a direct appeal. His failure to assert that claim was therefore a procedural default for which no cause can be shown, and on that ground, collateral relief is precluded.

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III.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED

**APPENDIX B — MEMORANDUM OPINION AND
ORDER OF THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA, DATED MARCH 3, 2023**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

1:19-CR-443
1:22-CV-770

OKECHUKWU DIMKPA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Signed March 3, 2023

MEMORANDUM OPINION AND ORDER

Catherine C. Eagles, District Judge.

In 2019, Okechukwu Dimkpa, a medical doctor, pled guilty to six counts of distribution of oxycodone outside the usual course of professional practice as a physician and without a legitimate medical purpose, in violation of 21 U.S.C. § 841(a). He now moves to vacate his conviction based on the Supreme Court's decision in *Ruan v. United*

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States, 142 S. Ct. 2370 (2022), contending he was not told before his guilty plea that it is an element of the crime that he have “knowingly or intentionally acted in an unauthorized manner.”

Dr. Dimkpa did not raise this issue on direct appeal, and it is procedurally defaulted. Because Dr. Dimkpa has not shown cause and prejudice or actual innocence, he has not overcome this procedural default and his motion will be denied. But because the Fourth Circuit has not yet addressed procedural default in the *Ruan* context, a certificate of appealability shall issue.

I. Offense Conduct

Dr. Dimkpa is a medical doctor who has practiced in hospitals in the United States for a number of years, including having his own practice in Kannapolis, North Carolina. *See, e.g.*, Doc. 12 at ¶¶ 3, 54-60.¹ In October 2016, the Drug Enforcement Administration received complaints that Dr. Dimkpa was over-prescribing oxycodone, a Schedule II controlled substance. *Id.* at ¶ 3. While investigating, the DEA heard from witnesses that Dr. Dimkpa “was prescribing opioids to known ‘drug seekers’ for cash with little or no physical examination.” *Id.*²

1. The Court adopted Dr. Dimkpa’s presentence report, Doc. 12, with some changes, Doc. 16 at 1, based on his objections. *See* Doc. 11. The Court does not cite to anything in the presentence report that was not adopted.

2. The presentence report contained discussions of other patients that tended to support this characterization of Dr.

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One of Dr. Dimkpa's patients was Adam Cohen. *Id.* at ¶ 4. Mr. Cohen first saw Dr. Dimkpa in April 2014 seeking treatment for pain. *Id.* at ¶ 5. Dr. Dimkpa discussed the possibility of using the drugs Vivitrol or Suboxone as alternatives to oxycodone, but Mr. Cohen declined. *Id.* In August 2014, Mr. Cohen again visited Dr. Dimkpa, this time with his brother. *Id.* at ¶ 6. Mr. Cohen told Dr. Dimkpa that he was addicted to pain pills and that his brother, who ran a dental office in the area and employed Mr. Cohen, "was going to fire him if he did not stop using prescription opioids." *Id.* Dr. Dimkpa prescribed Suboxone to Mr. Cohen, which is designed to treat opioid addiction. *Id.* Dr. Dimkpa continued to prescribe Suboxone to Mr. Cohen for some four months. *Id.*

In January 2015, with knowledge that Mr. Cohen was addicted to opioids, Dr. Dimkpa prescribed oxycodone to Mr. Cohen. *Id.* at ¶¶ 6-7. He continued to prescribe oxycodone to Mr. Cohen until August 2016, even after Mr. Cohen routinely tested positive for heroin and cocaine. *Id.* at ¶¶ 4, 6-7. He last prescribed oxycodone to Mr. Cohen on August 23, 2016. *Id.* at ¶¶ 6-7. Mr. Cohen died on August 28, 2016, of "Acute Combined Drug Toxicity." *Id.* at ¶ 4.

According to Dr. Gene S. Kennedy, who reviewed Mr. Cohen's medical chart for investigators, Dr. Dimkpa never requested Mr. Cohen's past medical records and never conducted a creditable physical exam, and Dr. Dimkpa's

Dimkpa's practice. *See* Doc. 12 at ¶¶ 13-17. The Court struck those paragraphs, as there were "no corroborated incidents of the defendant prescribing opioids" to other patients "outside appropriate medical practice." Doc. 16 at 1.

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medical records contained no support for a chronic pain diagnosis. *Id.* at ¶ 20.³ Dr. Kennedy said that continuing to prescribe oxycodone after Mr. Cohen tested positive for cocaine and heroin was “without rationale, well outside the course of normal medical practice, and not medically legitimate.” *Id.* (cleaned up).

II. History of the Proceedings

On August 23, 2019, Dr. Dimkpa was charged via information with six counts of distribution of oxycodone, based on six times he wrote prescriptions for Mr. Cohen after Mr. Cohen tested positive for cocaine and/or heroin. Doc. 1; Doc. 2 at 3. Later that month, the parties filed a signed plea agreement, Doc. 3, and on September 11, 2019, Dr. Dimkpa pled guilty to all six counts pursuant to that plea agreement. Minute Entry 09/11/2019; Doc 3.

At the Rule 11 change of plea hearing, the following colloquy occurred between the Court and Dr. Dimkpa:

THE COURT: Okay. Dr. Dimkpa, you’ve been charged with six counts of unlawful distribution

3. Dr. Dimkpa objected to these conclusions, *see* Doc. 11, Doc. 14, and argued that he was treating Mr. Cohen, a patient struggling with chronic pain, as best as he could. He further contended that he did request Mr. Cohen’s past medical records but could not obtain them. Doc. 11 at 3. Dr. Dimkpa has not provided a transcript of the sentencing hearing, but it appears from the Statement of Reasons that the Court overruled these objections and adopted the part of the PSR containing Dr. Kennedy’s conclusions as recited here. *See* Doc. 16 at 1.

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of oxycodone. The elements of this offense are—I'm just going to tell you the elements once, and then we'll go through the dates separately for each count, okay. The elements are that you knowingly or intentionally caused to be distributed a quantity of a mixture or substance containing a detectable amount of oxycodone, a Schedule II controlled substance, knowing that at the time you intended to distribute the mixture, and you did so outside the usual course of professional practice. Do you understand those elements?

THE DEFENDANT: Yes, Your Honor.

...

THE COURT: If you plead not guilty and go to trial, the Government has to prove all of those things beyond a reasonable doubt. If you plead guilty, you're admitting each and every one of those things. Do you understand?

THE DEFENDANT: Yes, Your Honor.

Doc. 34 at 12-14. The Court then listed the dates of the offenses but again did not address the knowledge requirement. *Id.* at 13. Later in the hearing, Dr. Dimkpa admitted his guilt to all six charges of unlawful distribution. *Id.* at 18-19.

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On December 16, 2019, the Court sentenced Dr. Dimkpa to 46 months in prison followed by three years of supervised release. Minute Entry 12/16/2019; Doc. 15 at 2-3. He self-reported to prison on January 27, 2020, Doc. 15 at 2, and did not appeal.

In May 2022, Dr. Dimkpa was released from the custody of the Bureau of Prisons. *See Find an Inmate*, Fed. Bureau of Prisons, <https://www.bop.gov/inmateloc/> (last visited Mar. 1, 2023). He is now serving his three-year term of supervised release.

III. *Ruan* and the Pending Motion

In June 2022, the Supreme Court examined the elements of the same crime to which Dr. Dimkpa pled guilty and the specific part of that statute concerning drug distribution by medical professionals. 21 U.S.C. § 841(a). The Supreme Court first quoted and summarized the statutory language:

A provision of the Controlled Substances Act, codified at 21 U.S.C. § 841, makes it a federal crime, “*except as authorized*, . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance,” such as opioids. Registered doctors may prescribe these substances to their patients. But, as provided by regulation, a prescription is only authorized when a doctor issues it “for a legitimate medical purpose . . .

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acting in the usual course of his professional practice.”

Ruan v. United States, 142 S. Ct. 2370, 2374-75 (2022) (cleaned up).

The specific question at issue was whether it was “sufficient for the Government to prove that a prescription was *in fact* not authorized,” or whether the Government must “prove that the doctor *knew* or *intended* that the prescription was unauthorized.” *Id.* at 2375 (emphasis in original). The Court held that “§ 841’s ‘knowingly or intentionally’ *mens rea* applies to the ‘except as authorized’ clause. This means that once a defendant meets the burden of producing evidence that his or her conduct was ‘authorized,’ the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.” *Id.* at 2376.

Shortly after the Supreme Court’s decision in *Ruan*, Dr. Dimkpa sought vacatur of his conviction. Doc. 27. The Court directed the government to respond, Doc. 28, and briefing is now complete.

IV. Discussion

A federal prisoner may challenge a sentence imposed by a federal court if: (1) the sentence violates the Constitution or laws of the United States; (2) the sentencing court lacked jurisdiction to impose the sentence; (3) the sentence exceeds the statutory maximum;

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or (4) the sentence “is otherwise subject to collateral attack.” 28 U.S.C. § 2255(a).⁴ A sentence is “otherwise subject to collateral attack” if a petitioner shows that the proceedings suffered from “a fundamental defect which inherently results in a complete miscarriage of justice.” *United States v. Addonizio*, 442 U.S. 178, 185 (1979) (cleaned up). “This standard is only satisfied when a court is presented with exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.” *United States v. Foote*, 784 F.3d 931, 936 (4th Cir. 2015) (cleaned up).

Dr. Dimkpa contends that he was not told when he pled guilty that it is an element of this crime that he knew he was acting in an unauthorized manner or that he intended to act in an unauthorized manner. *See Ruan v. United States*, 142 S. Ct. 2370, 2375 (2022). Because the Court did not explicitly tell Dr. Dimkpa about this element when he pled guilty, *see* Doc. 34 at 12-14, he says his guilty plea was not knowing and voluntary.⁵ He also

4. A motion for relief under 28 U.S.C. § 2255 must normally be brought within one year of the date that the petitioner’s judgment became final; there are narrow exceptions, *see* 28 U.S.C. § 2255(f), one of which the government says applies here. *See* Doc. 32 at 3-4. Courts do not usually raise timeliness issues *sua sponte*, and no reason appears to consider it here in light of the government’s implicit waiver. *See generally Wood v. Milyard*, 566 U.S. 463, 472-73 (2012).

5. Because omission of the *mens rea* element from the plea colloquy “does not affect the entire framework within which the proceeding occur[ed],” automatic reversal is not required, even on direct appeal. *Greer v. United States*, 141 S. Ct. 2090, 2100 (2021).

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says that the government's evidence was insufficient to prove his guilt. *See* Doc. 27 at 2.

Dr. Dimkpa's claim is procedurally defaulted. If raised by the government, a claim is procedurally defaulted and subject to dismissal if it could have been made on direct appeal but is raised for the first time in post-conviction proceedings. *See Bousley v. United States*, 523 U.S. 614, 621 (1998). Such is the case here, as Dr. Dimkpa did not file a direct appeal and the government has raised the procedural default. *See* Doc. 32.

"Two showings excuse a procedural default: a defendant's demonstration of 'either cause and actual prejudice or that he is actually innocent.'" *United States v. McKinney*, ___ F.4th ___, 2023 WL 2028440, at *3 (4th Cir. 2023) (citing *Bousley*, 523 U.S. at 622). Dr. Dimkpa's argument that the government did not have a factual basis for the guilty plea does not meet this test; the evidence summarized in the presentence report, Doc. 12, and the government's proffer, Doc. 2, easily support an inference that Dr. Dimkpa knew his acts were inappropriate. *See* Doc. 12 at 25. But his argument about his guilty plea requires closer consideration.

A. Cause and Prejudice

To demonstrate actual prejudice on collateral review of a guilty plea, a defendant must show it is likely that "had he known of the error" he "would not have pled

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guilty.” *McKinney*, 2023 WL 2028440, at *6.⁶ As to the involuntariness of his guilty plea, Dr. Dimkpa has made a strong showing of prejudice. His sentencing materials were largely directed to his argument that he had treated Mr. Cohen as a person with complex medical needs including chronic pain and addiction, *see* Doc. 14, implicitly contending he had not known the prescribing of oxycodone to someone using heroin and cocaine was inappropriate if that person had other legitimate medical needs supporting the prescription. That is what Dr. Dimkpa says now, *see e.g.*, Doc. 37 at 8, and it is consistent with what was presented earlier in this case. Dr. Dimkpa probably would not have pled guilty if he had realized the government would have to prove that he knew the distribution of oxycodone was inappropriate. *See McKinney*, 2023 WL 2028440, at *6.

But prejudice alone, without good cause, is not sufficient to overcome the procedural default. And Dr. Dimkpa has not shown good cause.

“Generally, the existence of cause for procedural default turns on whether some objective factor external to the defense prevented counsel from raising the claim on direct appeal.” *McKinney*, 2023 WL 2028440, at *3 (cleaned up). Dr. Dimkpa states that he did not previously raise this issue, on appeal or otherwise, because it was “not available” until June 2022 when the Supreme Court decided *Ruan*. Doc. 27 at 13-14.

6. In *McKinney*, the Fourth Circuit cited the test established in *United States v. Dominguez Benitez*, 542 U.S. 74 (2004), a direct appeal.

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A change in the law constitutes “cause” only if “a constitutional claim [was] so novel that its legal basis [was] not reasonably available to counsel.” *Reed v. Ross*, 468 U.S. 1, 16 (1984); *see also McKinney*, 2023 WL 2028440, at *3. “[A]lleged futility cannot serve as ‘cause’ for a procedural default in the context of collateral review . . . if it means simply that a claim was unacceptable to that particular court at that particular time.” *Whiteside v. United States*, 775 F.3d 180, 185 (4th Cir. 2014) (en banc) (citing *Bousley*, 523 U.S. at 623).

Dr. Dimkpa cannot demonstrate that the argument was not reasonably available at the time of his guilty plea. Dr. Dimkpa’s argument had not been foreclosed by the Supreme Court, *see Ruan*, 142 S. Ct. at 2381 (noting that a past case discussing this general issue “did not directly address . . . the *mens rea* required to convict under the statute”), and defendants continued to raise these challenges. *See, e.g., United States v. Purpera*, Nos. 18-CR-19, 19-CR-16, 2020 WL 5237521, at *3 (W.D. Va. Sept. 2, 2020) (appeal pending). Indeed, the Supreme Court had been persuaded by defense arguments addressing the knowledge requirement in another statute just a few months before Dr. Dimkpa’s guilty plea.⁷ This argument

7. On June 21, 2019, just a few months before Dr. Dimkpa’s guilty plea on September 11, 2019, the Supreme Court examined whether the word “knowingly” in 18 U.S.C. § 924(a)(2) modified and applied to the requirement that a person have a status that makes it a crime to possess a firearm. *Rehaif v. United States*, 139 S. Ct. 2191 (2019). The Court held that it did. *Id.* at 2195-2197 (so holding, noting that “[t]he cases in which we have emphasized scienter’s importance in separating wrongful from innocent acts are legion” and collecting cases).

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was reasonably available to Dr. Dimkpa. *See Bousley*, 523 U.S. at 623; *Whiteside*, 775 F.3d at 185; *cf. Reed*, 468 U.S. at 16.

B. Actual Innocence Following a Guilty Plea

A claim of actual innocence can also overcome procedural default. *See McKinney*, 2023 WL 2028440, at *2-3. To prevail on actual innocence, Dr. Dimkpa must establish that, in light of all the evidence available, “it is more likely than not that no reasonable juror would have convicted him” of any charge. *Bousley*, 523 U.S. at 623.

Dr. Dimkpa has not demonstrated actual innocence. He has not filed any additional evidence to support this claim, and the facts in the record support the opposite finding. *See* Doc. 2 at 3-4 (showing that Dr. Dimkpa prescribed oxycodone to Mr. Cohen on multiple occasions “despite the fact that [Mr. Cohen] had just tested positive for heroin and/or cocaine” and that an expert concluded that this conduct was “outside the course of usual medical practice” and “not medically legitimate”); Doc. 12 at ¶¶ 4, 7-8, 20 (same); *id.* at ¶ 20 (expert statements that Dr. Dimkpa never requested Mr. Cohen’s past medical records or conducted a “credible physical exam”); *id.* at 25 (addendum to the presentence report in which the Probation Officer stated that “[t]he indicia of [Mr.] Cohen’s addiction and abuse clearly reflects the defendant knew or had reason to know that the prescriptions he issued beginning on January 29, 2015, were for illegitimate purposes or were not within the scope of usual medical practice. Furthermore, the fact that [Mr.] Cohen had

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legitimate medical problems is not sufficient to reflect that the defendant prescribed medications in good faith”).

Dr. Dimkpa did file written and chronological summaries of Mr. Cohen’s medical treatment before sentencing, *see* Docs. 11-1 and 11-2, that generally show that Mr. Cohen complained of chronic pain to Dr. Dimkpa. *See, e.g.*, Doc. 11-1 at 2-4, 7; Doc. 11-2 at 13-15, 35-36. He contended at his sentencing hearing that he had prescribed oxycodone to Mr. Cohen in an effort to help him with his chronic pain issues after making a “medical assessment,” Doc. 14 at 4, recognizing that if he did not prescribe oxycodone Mr. Cohen was likely to return to street drugs such as heroin. *See id.* at 5-6.

But Dr. Dimkpa knew Mr. Cohen was a drug addict who wanted pain medicine because of his addiction; Mr. Cohen’s brother told him so. Doc. 12 at ¶ 6; *see also* Doc. 14 at 4 (Dr. Dimkpa’s sentencing memorandum acknowledging this fact). And he knew that despite the oxycodone prescriptions, Mr. Cohen was using cocaine and heroin. *See, e.g.*, Doc. 11-2 at 29 (Dr. Dimkpa’s medical records showing Mr. Cohen tested positive for cocaine); *id.* at 31 (same); *id.* at 16 (same for heroin metabolite); *id.* at 20 (same); *see also* Doc. 14 at 5, 9. He knew that Mr. Cohen was not following his recommendations to seek treatment from a long-term pain management specialist. Doc. 14 at 5. Yet he continued to prescribe oxycodone over a span of nineteen months. *See* Doc. 12 at ¶¶ 6-7.

The inference that Dr. Dimkpa knew prescribing these medicines was not appropriate is strong. Even

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assuming that a jury might credit the evidence that Mr. Cohen was experiencing ongoing pain and presented complex issues because of his addiction, Dr. Dimkpa has presented no evidence that any other medical professional would have considered it to be appropriate medical care to continue to prescribe oxycodone to an addict known to be using heroin and cocaine. A rational juror would be skeptical of Dr. Dimkpa's assertion that he did not know this was unauthorized. Those assertions, on their own, are not enough to show that it is more likely than not that no reasonable juror would have convicted him of any of his six charges. *See Bousley*, 523 U.S. at 623.

V. Conclusion

Dr. Dimkpa's claim for collateral relief is procedurally defaulted. Because he has not established cause or actual innocence, his motion to vacate will be denied.

The Court is aware of no published case by the Fourth Circuit addressing the application of either the cause-and-prejudice exception or the actual-innocence exception to the procedural default of an involuntary guilty plea argument in the *Ruan* context. In *McKinney*, ___ F.4th ___, 2023 WL 2028440 (4th Cir. 2023), the Fourth Circuit recently addressed procedural default of a claim of an involuntary guilty plea in the § 2255 context, but that case concerned acts which were no longer a crime because of changes in the case law, a quite different situation than here. Dr. Dimkpa has raised a substantial question about how the Supreme Court's decision in *Ruan* affects procedurally defaulted claims, and this issue may

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impact his constitutional rights concerning a knowing and voluntary guilty plea. Therefore, the Court will issue a certificate of appealability so that the appellate court can evaluate the case and determine whether the procedural default rule has been appropriately applied here, should Dr. Dimkpa appeal.

IT IS THEREFORE ORDERED AND ADJUDGED
that:

1. The petitioner's motion to vacate, set aside, or correct sentence, Doc. 27, is **DENIED**.
2. The Court issues a certificate of appealability.

This the 3rd day of March, 2023.

/s/ Catherine C. Eagles
UNITED STATES DISTRICT JUDGE

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**APPENDIX C — ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT,
FILED MAY 1, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6245
(1:19-cr-00443-CCE-1)
(1:22-cv-00770-CCE-LPA)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

OKECHUKWU DIMKPA,

Defendant-Appellant.

Filed May 1, 2026

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

**APPENDIX D — EXPEDITED TRANSCRIPT OF
CHANGE OF PLEA FOR THE UNITED STATES
DISTRICT COURT, MIDDLE DISTRICT OF NORTH
CAROLINA, DATED SEPTEMBER 11, 2019**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

Case No. 1:19CR443-1

UNITED STATES OF AMERICA

vs.

OKECHUKWU DIMKPA,

Defendant.

Greensboro, North Carolina

September 11, 2019

2:05 p.m.

**EXPEDITED TRANSCRIPT OF CHANGE OF
PLEA AT ARRAIGNMENT HEARING
BEFORE THE HONORABLE CATHERINE C. EAGLES
UNITED STATES DISTRICT JUDGE**

[2]PROCEEDINGS

(Defendant present.)

MR. DEFRANCO: Your Honor, may Mr. Lee and
I approach briefly?

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THE COURT: You may. Does it need to be on the record?

MR. DEFRANCO: I don't think so.

MR. LEE: No.

(A bench conference was held, not recorded.)

THE COURT: Okay.

MR. DEFRANCO: Your Honor, the next matter is on for plea at arraignment. It's United States of America versus Okechukwu Dimkpa, 1:19CR443-1. He's represented by Bruce Lee, Your Honor.

THE COURT: Good afternoon, Mr. Lee.

MR. LEE: Good afternoon, Your Honor.

THE COURT: Have you had enough time to consult with your client and to review the discovery and other relevant information?

MR. LEE: Yes, Your Honor.

THE COURT: And are you ready to proceed with the change of plea hearing?

MR. LEE: Yes, Your Honor.

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THE COURT: And is it -- can you tell me how to pronounce his last name?

[3]MR. LEE: Dimkpa.

THE COURT: Dimkpa?

THE DEFENDANT: Yes, ma'am, that's correct.

THE COURT: It's confusing with that "k" and that "p" together.

THE DEFENDANT: The "k" and "p" together, yes.

THE COURT: So Dimkpa?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. And it's Dr. Dimkpa, correct?

MR. LEE: Yes, ma'am.

And we want you to take a stab at his first name.

THE COURT: That's okay.

MR. LEE: Okay.

THE COURT: I would do my best, but it would probably not come out very well with my Arkansas accent.

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All right. Do you believe that Dr. Dimkpa understands the charges and the nature of this hearing?

MR. LEE: Yes, I do, Your Honor.

THE COURT: And does he want to enter a plea of guilty, pursuant to a plea agreement, to six counts of unlawful distribution of oxycodone?

MR. LEE: Yes, Your Honor.

THE COURT: Has anyone made any threats or promises to induce that guilty plea, other than the promises in the plea agreement?

[4]MR. LEE: No, Your Honor.

THE COURT: Is it your recommendation that the Court accept his -- accept his guilty plea?

MR. LEE: Yes, Your Honor.

THE COURT: Okay. Dr. Dimkpa, good afternoon.

THE DEFENDANT: Good afternoon.

THE COURT: The courtroom deputy will swear or affirm you to give truthful answers to my questions.

(The Defendant was duly sworn.)

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THE COURT: All right. Dr. Dimkpa, you are under oath, and it is a crime to tell me a lie.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Tell me your full name.

THE DEFENDANT: Okechukwu Dimkpa.

THE COURT: How old are you?

THE DEFENDANT: Fifty years old.

THE COURT: And you're a medical doctor?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Where did you go to school?

THE DEFENDANT: Rostov State Medical University in Russia.

(Court reporter requested clarification.)

THE COURT: Say it again.

THE DEFENDANT: Rostov State Medical University.

[5]THE COURT: And where is that?

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THE DEFENDANT: It's in Russia.

THE COURT: In Russia?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Do you take any prescription medicine?

THE DEFENDANT: No, Your Honor.

THE COURT: Have you recently been treated for any mental illness or addictions?

THE DEFENDANT: No, Your Honor.

THE COURT: When was the last time you had any alcohol, drugs, or medicine?

THE DEFENDANT: None. Never, Your Honor.

THE COURT: And are -- and you don't take any -- haven't had any prescription medicine --

THE DEFENDANT: No, Your Honor.

THE COURT: -- in several months at least?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you able to hear me and understand what is going on today?

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THE DEFENDANT: Yes, Your Honor.

THE COURT: How long have you been in the United States?

THE DEFENDANT: From 2006, I think.

THE COURT: So 13 years?

[6]THE DEFENDANT: Yes, Your Honor.

THE COURT: And --

THE DEFENDANT: No -- excuse me -- 1996.

THE COURT: 1996.

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. So well over 20 years then?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. Your English is very good. Do you have any trouble understanding English?

THE DEFENDANT: No, Your Honor.

THE COURT: And can you read English?

THE DEFENDANT: Yes, Your Honor.

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THE COURT: Did you study it before you moved here?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And did you receive a copy of the information, which is the written charge against you, signed by the prosecutor?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Were you able to read it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you understand the information and the charges you are facing?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Have you had enough time to talk to your lawyer about your case?

[7]THE DEFENDANT: Yes, Your Honor.

THE COURT: And have you fully discussed the charges with him and talked to him about your situation, the evidence against you, and any defenses you might have?

THE DEFENDANT: Yes, Your Honor.

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THE COURT: Have you talked to him about the penalties for these crimes and the consequences of a guilty plea?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you satisfied with his representation?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Now, we are here this afternoon because you have signed a written plea agreement indicating you want to plead guilty to six counts of unlawful distribution of oxycodone pursuant to a plea agreement.

Before you can do that, I have a number of things to ask you to be sure that's a knowing and voluntary guilty plea, and to be sure we're all on the same page about your plea agreement and the penalties for this crime and your expectations about what's going to happen.

After we go through all of those things, I will ask you how you plead to these charges, and you'll let me know guilty or not guilty. Even though you've signed a written plea agreement, you can change your mind while we're talking and decide that you would rather have a trial; and if that's what happens, you just tell me at any point.

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[8]Once you plead guilty, if you do, and I accept your guilty plea, that is very, very hard to get set aside. So you do need to be sure before you plead guilty.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Any questions about how we will proceed this afternoon?

THE DEFENDANT: No, Your Honor.

THE COURT: Am I talking too fast for you?

THE DEFENDANT: No, Your Honor.

THE COURT: Okay. You appear to be following along, but sometimes I talk too fast. So if I do, you just stop me. I'll be glad to slow down.

Now, a person charged with a crime in the United States has a number of rights associated with a fair trial. You have the right to plead not guilty to any and all charges, and to have a jury decide whether you are guilty or not guilty. If you plead not guilty, at trial you are presumed innocent, and the burden of proof is on the Government to prove your guilt beyond a reasonable doubt. This means the Government must prove each and every element of the crime charged beyond a reasonable doubt before you can be found guilty of that charge.

Do you understand those rights?

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THE DEFENDANT: Yes, Your Honor.

THE COURT: You have the right to the assistance of [9]counsel at all stages of the proceedings, including a trial; and if you plead not guilty, Mr. Lee will continue to represent you; and if for some reason he cannot and you cannot afford to hire another attorney, the Court will appoint a lawyer to represent you at no cost to you.

Do you understand that right?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You have a right to be present for the trial, and to see and hear the testimony of all the witnesses. We would have a jury sit over there in the jury box. They would listen to all of the evidence, the Government's evidence and any evidence you wanted to present, and the jury would decide whether you were guilty or not guilty.

You could be present -- you can be present for the entire trial, and you should be present. You can confront the witnesses, and your lawyer can ask the Government's witnesses questions on cross-examination. You can present evidence, if you wish, though you're not required to do so; and if you have witnesses you want to call to testify, you can make them come to court at no cost to you.

You can also testify if you want to, though you have an absolute privilege not to testify; and if you choose not to testify or not to present evidence, the Court will instruct

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the jury not to consider this in any way in determining your guilt.

Do you understand these rights?

[10]THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions about any of these rights related to trial I've just summarized for you?

THE DEFENDANT: No questions, Your Honor.

THE COURT: You also have a right to have these charges presented to the grand jury. The grand jury makes a preliminary determination that there's probable cause to believe a crime has been committed and that you committed it. It's a preliminary matter before a jury trial that we just talked about. You do have that right, and I want to be sure you understand that.

Do you have any questions about your rights to have the case presented to the grand jury?

THE DEFENDANT: No, Your Honor.

THE COURT: If you plead guilty today, you're giving up your right to a jury trial and other important rights.

Do you understand that?

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THE DEFENDANT: Yes, Your Honor.

THE COURT: And your plea agreement calls for you to give up your right to have the matter presented to the grand jury, and I see here you've signed a form agreeing to that.

Is that right as well?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Okay. I see you've got a written plea agreement, and it looks like you signed it on page 7.

[11]Do you have a copy of it there, Mr. Lee?

MR. LEE: Yes, Your Honor. He has it before him.

THE COURT: All right. Is that your signature on page 7, Dr. Dimkpa?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And it looks like there is a plea bargain in this case in paragraph 5.

Can you summarize that, Mr. Lee?

MR. LEE: Your Honor, the plea bargain in this case is that if Dr. Dimkpa qualifies for a two-level reduction in the offense level, the Government will recommend one additional level, and he understands that the Court is not bound by that recommendation.

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THE COURT: All right. And it looks like he's agreeing to the amount of the offense -- I mean amount of the drugs?

MR. LEE: Yes, Your Honor, in paragraph (e).

Also, Your Honor, part of the plea agreement in (f) and important is he agrees to surrender his DEA registration numbers. There are two of those numbers.

THE COURT: Okay. All right. Mr. Dimkpa, is that accurate?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anybody made any other promises to you in exchange for your guilty plea?

[12]THE DEFENDANT: No, Your Honor.

THE COURT: And does the written plea agreement contain all of the terms and conditions of your plea arrangement with the Government?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions at all about the plea agreement?

THE DEFENDANT: No, Your Honor.

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THE COURT: In the plea agreement, the Government has agreed to make a recommendation about your guideline calculation and acceptance of responsibility. That is a recommendation only. It is not binding on the Court. If the Court does not follow that recommendation, that is not a reason to withdraw your guilty plea.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anyone threatened you or otherwise attempted to force you to plead guilty against your wishes?

THE DEFENDANT: No, Your Honor.

THE COURT: And can I ask counsel, the agreement about the drug amount, that's relevant to guideline calculation. We're not talking about any sort of mandatory minimum?

MR. LEE: No, Your Honor.

MR. DEFRANCO: That's correct.

THE COURT: Okay. Dr. Dimkpa, you've been charged [13]with six counts of unlawful distribution of oxycodone. The elements of this offense are -- I'm just going to tell you the elements once, and then we'll go through the dates separately for each count, okay.

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The elements are that you knowingly or intentionally caused to be distributed a quantity of a mixture or substance containing a detectable amount of oxycodone, a Schedule II controlled substance, knowing that at the time you intended to distribute the mixture, and you did so outside the usual course of professional practice.

Do you understand those elements?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And for Count One -- I think all of these offenses occurred in Cabarrus County, according to the information, and the dates of distribution are: On June 4th, 2015, that's Count One. July 1st, 2015, that's Count Two. July 23rd, 2015, that's Count Three. September 16th, 2015, that's Count Four. Count Five is October 12th, 2015, and Count Six is December 7th, 2015.

Do you understand the elements?

THE DEFENDANT: Yes, Your Honor.

THE COURT: If you plead not guilty and go to trial, the Government has to prove all of those things beyond a reasonable doubt. If you plead guilty, you're admitting each and every one of those things.

[14]Do you understand?

THE DEFENDANT: Yes, Your Honor.

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THE COURT: This offense carries a possible prison term of up to 20 years followed by supervised release for at least three years, and that's the penalty for each one of those six offenses. So in theory, that's 120 years.

Do you understand that?

THE DEFENDANT: Yes, Your Honor.

THE COURT: A fine of up to a million dollars can be imposed on each count or twice the gross gain or loss caused by the crime should that be greater. Forfeiture and restitution are authorized by statute, and it is required by law that you pay a special assessment of a hundred dollars on each count. So that's going to be \$600 you're going to have to pay.

Do you have any questions about those penalties?

THE DEFENDANT: No, Your Honor.

THE COURT: Parole has been abolished, and if you are sentenced to prison, you will not get out early on parole.

If you do get an active prison sentence, the Court will be required to impose supervised release after that prison term. It would have to be at least three years by statute, and it could be as long as life. The Court will decide at your sentencing hearing how long the supervised release period should be and what the conditions are that you'll have to comply with when you get out of prison if you get an active [15]sentence.

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If you violate those conditions, the Court can revoke your supervised release and send you back to prison, and that additional prison term can be substantial, and it can be followed by more time on supervised release.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions about supervised release?

THE DEFENDANT: No, Your Honor.

THE COURT: There are other consequences to a guilty plea. You will have a felony -- you will have six felony convictions, and it will be illegal for you to possess a firearm or ammunition. You will lose certain civil rights, at least for a time, such as the right to vote, the right to hold public office, and the right to serve on a jury. And if you are not a citizen, your guilty plea may well affect your immigration status, and you will almost certainly be deported.

Where were you born?

THE DEFENDANT: I was born in Nigeria.

THE COURT: In Nigeria?

THE DEFENDANT: Yes, Your Honor.

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THE COURT: Are you a citizen –

THE DEFENDANT: Yes, Your Honor.

THE COURT: -- of the United States?

[16]THE DEFENDANT: Yes, Your Honor.

THE COURT: Since when?

THE DEFENDANT: Since 2011.

THE COURT: Okay. Now, let's turn to sentencing. If you plead guilty and the Court accepts your guilty plea, your sentencing hearing will be in the fall or early winter.

In the meantime, the probation office will prepare a presentence report. That report will have a lot of information in it about you and your background and circumstances and about the crimes that you've pled guilty to. It will also contain a proposed sentencing guideline range calculated specifically for your case and taking into account things like the nature of the crimes, any actual harm from the crime, any other relevant conduct, and any prior criminal history, things like that.

Do you have any questions about that so far?

THE DEFENDANT: No, Your Honor.

THE COURT: You and your attorney, as well as the Government, will have a chance to review that report. If

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there are mistakes in it or if you disagree with the way your guideline range is calculated, you can object to that, and your attorney will file objections. At your sentencing hearing, I will resolve any objections, and I always make the final determination about the guideline range whether there are objections or not.

The Court always considers the guideline range once it has [17]figured out what it is. It's important, but it is not binding. It is advisory only. So the Court will take it into account, but another sentence may be more appropriate in a particular case.

The Court will decide your sentence only after considering the presentence report and any other evidence, the guideline range, any statements and arguments by the lawyers, and any statement that you make to me.

Do you understand how the sentencing process works?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You've been nodding along with me, so I assume Mr. Lee explained this to you before?

THE DEFENDANT: Yes, Your Honor.

THE COURT: All right. And do you have any questions about how it works?

THE DEFENDANT: No, Your Honor.

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THE COURT: As you can see, no one today knows what your sentence is going to be, and no one today knows what your guideline range is going to be. Your attorney may have suggested some numbers to you as possibilities based on his experience with the guidelines, but those are estimates only. So any numbers your attorney has suggested to you are not binding on the Court, and if your guideline range or your sentence turns out to be different from those estimates, that is not a reason to withdraw your guilty plea.

[18]Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Has anybody made any promises or guarantees to you about your guideline range or your sentence?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anybody promised you, you will get probation?

THE DEFENDANT: No, Your Honor.

THE COURT: You and the Government have certain rights to appeal any sentence that the Court imposes.

Do you have questions about your appeal rights?

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THE DEFENDANT: No, Your Honor.

THE COURT: If you plead guilty, you're admitting the elements of these six crimes, you're giving up your constitutional rights to a trial, and you are accepting the terms of the written plea agreement.

Do you understand?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions at all about anything we've talked about here today or otherwise about your case?

THE DEFENDANT: No, Your Honor.

THE COURT: How do you plead to six counts of unlawful distribution of oxycodone?

THE DEFENDANT: Guilty.

[19]THE COURT: And are you pleading guilty because you are, in fact, guilty?

THE DEFENDANT: Yes, Your Honor.

THE COURT: You're admitting that you're guilty of all six crimes; is that right?

THE DEFENDANT: Yes, Your Honor.

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THE COURT: The Court accepts the waiver as to his rights to have the case presented to the grand jury; and the Court finds that the Defendant is competent and capable of entering an informed plea, he is aware of the nature of the charges and the consequences of a guilty plea, and his plea of guilty is knowing and voluntary.

I saw the written factual basis provided by the Government and filed -- well, my copy doesn't show it was filed, but I assume it was.

Have you seen it?

MR. LEE: I've seen it, Your Honor. It was filed, but it doesn't have a file stamp on it. It's on PACER, so I assume that it was filed.

THE COURT: If it's there, it's been filed.

You've gone over it with Dr. Dimkpa?

MR. LEE: I have, Your Honor.

THE COURT: And, Dr. Dimkpa, have you seen that written factual basis provided by the Government summarizing the evidence against you in a little more detail?

[20]THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you have any questions about it?

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THE DEFENDANT: No, Your Honor.

THE COURT: Mr. Lee, are there objections to the factual basis?

MR. LEE: No, Your Honor.

THE COURT: Do you agree and stipulate it provides an independent basis in fact for each element of all six crimes?

MR. LEE: I do.

THE COURT: Anything the Government wants to add?

MR. DEFRANCO: No, Your Honor, only that the factual basis was filed August 26th.

THE COURT: Okay. Thank you. I don't know why my copy doesn't have that printed.

MR. LEE: Mine wasn't stamped either, Your Honor.

THE COURT: Okay. The Court finds that the Defendant's plea of guilty is supported by an independent basis in fact containing each of the essential elements of the offense. His plea of guilty is accepted, and the defendant, Dr. Dimkpa, is adjudged guilty of six counts of unlawful distribution of oxycodone.

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The Court directs the probation office to prepare a presentence report.

They'll want to interview you, Dr. Dimkpa, and your attorney can be present with you for that interview.

[21]I believe you all told me at the bench this is not a mandatory detention offense, and I take it he's -- this is an information, so he hasn't been before the magistrate judge?

MR. LEE: He has, Your Honor, this morning.

THE COURT: He went this morning. Okay.

MR. LEE: And he was released with the condition to surrender his passport, which he's going to do in Salisbury tomorrow.

THE COURT: Okay. And those conditions are agreeable to the Government?

MR. DEFRANCO: Yes, Your Honor.

THE COURT: Okay. I'll let him remain out of custody pending sentencing subject to the terms and conditions imposed by the magistrate judge.

I can do sentencing on December 16th at 2:00, unless somebody knows there's a reason that won't work? No?

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MR. LEE: No, Your Honor, I think it will work.

THE COURT: Monday, December 16th at 2:00.

Dr. Dimkpa, sometimes these things have to be rearranged or postponed for some reason or another, but assuming that doesn't happen, I'll see you in court on that day. Just stay in touch with Mr. Lee about scheduling.

Do you have any questions for me?

THE DEFENDANT: No, Your Honor.

THE COURT: Have I forgotten anything? No?

[22]MR. DEFRANCO: No, Your Honor.

THE COURT: All right. Thank you.

MR. LEE: Thank you.

THE DEFENDANT: Thank you.

MR. DEFRANCO: Thank you, Your Honor.

(Proceedings concluded at 2:26 p.m.)

**APPENDIX E — PLEA AGREEMENT OF THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA,
FILED AUGUST 26, 2019**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

1:19CR443-1

UNITED STATES OF AMERICA

v.

OKECHUKWU DIMKPA

Filed August 26, 2019

PLEA AGREEMENT

NOW COME the United States of America, by and through Matthew G. T. Martin, United States Attorney for the Middle District of North Carolina, and the defendant. OKECHUKWU DIMKPA, in his own person and through his attorney, Bruce A. Lee, and state as follows:

1. The defendant, OKECHUKWU DIMKPA, is presently charged in an Information in case number 1:19CR443-1, which charges him in Counts One, Two, Three, Four, Five, and Six with violations of Title 21. United States Code, Section 841(a)(1) and (b)(1)(C).

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2. The defendant, OKECHUKWU DIMKPA, will enter a voluntary plea of guilty to the Information herein. The nature of these charges and the elements of these charges, which must be proved by the United States beyond a reasonable doubt before the defendant can be found guilty thereof, have been explained to him by his attorney.

a. The defendant understands that as to the Information herein he shall be sentenced to a term of imprisonment of not more than twenty years, a fine not to exceed \$1,000,000, or both, as to each count. If any person derived pecuniary gain from the offense, or if the offense resulted in pecuniary loss to a person other than the defendant, OKECHUKWU DIMKPA, the defendant may, in the alternative, be fined not more than the greater of twice the gross gain or twice the gross loss unless the Court determines that imposition of a fine in this manner would unduly complicate or prolong the sentencing process. The fine provisions are subject to the provisions of Title 18, United States Code, Section 3571, entitled Sentence of Fine. Any sentence imposing a term, of imprisonment shall impose a term of supervised release of at least three years in addition to such term of imprisonment.

b. The defendant, OKECHUKWU DIMKPA, also understands that, as to the Information herein, the Court may order that the defendant make restitution in accordance with Title 18, United States Code, Section 3663(c)(1).

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c. The defendant, OKECHUKWU DIMKPA, further understands that the sentence to be imposed upon him is within the discretion of the sentencing court subject to the statutory maximum and mandatory minimum penalties set forth above. The sentencing court is not bound by the sentencing range prescribed by the United States Sentencing Guidelines. Nevertheless, the sentencing court is required to consult the Guidelines and take them into account when sentencing. In so doing, the sentencing court will first calculate, after making the appropriate findings of fact, the sentencing range prescribed by the Guidelines, and then will consider that range as well as other relevant factors set forth in the Guidelines and those factors set forth in Title 18, United States Code, Section 3553(a) before imposing the sentence.

d. The defendant, OKECHUKWU DIMKPA, understands that if he is not a citizen of the United States that entering a plea of guilty may have adverse consequences with respect to his immigration status. The defendant, OKECHUKWU DIMKPA, nevertheless wishes to enter a voluntary plea of guilty regardless of any immigration consequences his guilty plea might entail, even if such consequence might include automatic removal and possibly permanent exclusion from the United States. The defendant, OKECHUKWU DIMKPA, further understands that in the event he is a naturalized citizen, entering a plea of guilty may result in denaturalization proceedings being instituted against him leading to his removal and possible permanent exclusion from the United States.

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3. By voluntarily pleading guilty to the Information herein, the defendant, OKECHUKWU DIMKPA, knowingly waives and gives up his constitutional rights to plead not guilty, to compel the United States to prove his guilt beyond a reasonable doubt, not to be compelled to incriminate himself, to confront and cross-examine the witnesses against him, to have a jury or judge determine, his guilt on the evidence presented, and other constitutional rights which attend a defendant on trial in a criminal case.

4. The defendant, OKECHUKWU DIMKPA, is going to plead guilty to the Information herein because he is, in fact, guilty and not because of any threats or promises.

5. The extent of the plea bargaining in this case is as follows:

a. It is understood that if the Court determines at the time of sentencing that the defendant, OKECHUKWU DIMKPA, qualifies for a 2-point decrease in the offense level under Section 3E1.1(a) of the Sentencing Guidelines and that the offense level prior to the operation of Section 3E1.1(a) is 16 or greater, then the United States will recommend a decrease in the offense level by 1 additional level pursuant to Section 3E1.1(b) of the Sentencing Guidelines. This portion of the Plea Agreement is made pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure.

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b. The defendant, OKECHUKWU DIMKPA, hereby abandons interest in, and consents to the official use, destruction, or other disposition of each item seized and/or maintained by any law enforcement agency during the course of the investigation, unless such item is specifically provided for in another section of this plea agreement. The defendant, OKECHUKWU DIMKPA, waives any and all notice of any proceeding to implement the official use, destruction, or other disposition of such items.

c. The United States of America and the defendant, OKECHUKWU DIMKPA, agree and stipulate that there is a sufficient factual basis to support the material allegations contained in the Information.

d. It is further agreed that the defendant, OKECHUKWU DIMKPA, will waive in open court prosecution by indictment and consent to be charged in an information.

e. The defendant agrees that the substance involved in the offense alleged in the Information herein is approximately 24,000 mg of oxycodone (actual), which is the equivalent of at least 150 kilograms but less than 170 kilograms of marihuana, pursuant to U.S.S.G. § 2D1.1 comment. (n.(8)(D)).

f. The defendant agrees to surrender his DEA registration numbers FD5949067 and BD9370848.

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6. The defendant, OKECHUKWU DIMKPA, agrees that pursuant to Title 18, United States Code, Section 3613, all monetary penalties, including restitution imposed by the Court, shall be due immediately upon judgment and subject to immediate enforcement by the United States. The defendant agrees that if the Court imposes a schedule of payments, the schedule of payments shall be merely a schedule of minimum payments and shall not be a limitation on the methods available to the United States to enforce the judgment.

7. The defendant, OKECHUKWU DIMKPA, agrees that his debt resulting from the criminal monetary penalties due under the criminal judgment will be submitted to the Treasury Offset Program even if he is current in his payments under any Court imposed payment schedule.

8. It is further understood that the United States and the defendant, OKECHUKWU DIMKPA, reserve the right to bring to the Court's attention any facts deemed relevant for purposes of sentencing.

9. The defendant, OKECHUKWU DIMKPA, further understands and agrees that pursuant to Title 18, United States Code, Section 3013, for any offense committed on or after October 11, 1996, the defendant shall pay an assessment to the Court of \$100 for each offense to which he is pleading guilty. This payment shall be made at the time of sentencing by cash or money order made payable to the Clerk of the United States District Court. If the defendant is indigent and cannot make the

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special assessment payment at the time of sentencing, then the defendant agrees to participate in the Inmate Financial Responsibility Program for purposes of paying such special assessment.

10. No agreements, representations, or understandings have been made between the parties in this case other than those which are explicitly set forth in this Plea Agreement, and none will be entered into unless executed in writing and signed by all the parties.

This the 22nd day of August, 2019.

MATTHEW G.T. MARTIN	<u>/s/ Bruce A. Lee</u>
United States Attorney	BRUCE A. LEE
	Attorney for Defendant

<u>/s/ Michael A. DeFranco</u>	<u>/s/ Okechukwu Dimkpa</u>
MICHAEL A. DeFRANCO	OKECHUKWU DIMKPA
NCSB #23072	Defendant
Assistant United States Attorney	
101 S. Edgeworth St., 4th Flr.	
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336/333-5351	

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**APPENDIX F — FACTUAL BASIS FOR PLEA OF
THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF NORTH CAROLINA,
DATED AUGUST 26, 2019**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
NORTH CAROLINA

1:19CR443-1

UNITED STATES OF AMERICA

v.

OKECHUKWU DIMKPA

FACTUAL BASIS

NOW COMES the United States of America, by and through Matthew G.T. Martin, United States Attorney for the Middle District of North Carolina, and as a factual basis under Rule 11, Fed. R. Crim. P., states as follows:

In October of 2016, the Drug Enforcement Administration (DEA) received complaints that Dr. Okechukwu Dimkpa, an Internist, was over-prescribing prescription medication, specifically oxycodone, a Schedule II controlled substance. At that time, Dr. Dimkpa owned and operated Care Plus Medical Clinic in Kannapolis, North Carolina. After conducting multiple interviews, DEA investigators learned that Dr. Dimkpa was prescribing opioids to known “drug seekers” with

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little or no physical examination and for cash. According to multiple witnesses, Dr. Dimkpa charged \$400 for an initial consultation and \$300 for each subsequent visit.

The investigation soon focused on one of Dr. Dimkpa's patients, Adam Cohen, who died in Florida on August 28, 2016, five days after receiving a prescription for oxycodone from Dr. Dimkpa. The Miami-Dade County Medical Examiner determined that Adam Cohen died of "Acute Combined Drug Toxicity (oxycodone, alprazolam)." Investigators obtained Adam Cohen's CSRS (controlled substance reporting system) data which shows that Dr. Dimkpa was prescribing him oxycodone despite the fact that he was routinely testing positive for heroin and cocaine.

Adam Cohen first saw Dr. Dimkpa on April 28, 2014. Dr. Dimkpa's intake sheet indicates Adam sought treatment for "pain." According to Dr. Dimkpa, on June 12, 2014, he discussed with Adam the possibility of using the drugs vivitrol or suboxone as alternatives to oxycodone. Dr. Dimkpa noted on a July 1, 2014, appointment that Adam stated he was not ready to try suboxone and on July 15, 2014, he was still complaining of pain. Dr. Dimkpa noted no change after a July 29, 2014, visit by Adam Cohen.

Investigators were able to locate and interview Adam Cohen's brother Jeff, who owned a dental office nearby Dr. Dimkpa's clinic. Jeff Cohen advised that his brother Adam approached him in August of 2014, seeking help with his addiction to pain pills. In response, Jeff accompanied Adam to an appointment with Dr. Dimkpa. In Jeff's presence, Adam advised Dr. Dimkpa that he did not have back

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pain; rather he was addicted to pain pills. Adam further advised that his brother, for when he worked, was going to fire him if he didn't stop using prescription opioids. In response, Dr. Dimkpa prescribed suboxone (designed to treat opioid addiction) to Adam. For approximately four months Dr. Dimkpa prescribed suboxone to Adam. For reasons unknown, in January of 2015 Dr. Dimkpa again began prescribing oxycodone periodically to Adam until his death on August 28, 2016. The data shows that Adam received an oxycodone prescription from Dr. Dimkpa just five days before his death.

The CSRS data shows multiple dates on which Dr. Dimkpa prescribed oxycodone to Adam despite the fact that he had just tested positive for heroin and/or cocaine.

- 6/4/15: 180 mg of oxycodone/oxycontin after positive heroin test.
- 7/1/15: 120 mg of oxycodone/oxycontin after positive heroin test.
- 7/23/15: 180 mg of oxycodone after positive heroin test.
- 9/16/15: 210 mg of oxycodone/oxycontin after positive cocaine test.
- 10/12/15: 210 mg of oxycodone/oxycontin after positive cocaine test.
- 12/7/15: 180 mg of oxycodone after positive cocaine test.

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In furtherance of the investigation Dr. Gene Kennedy reviewed Dr. Dimkpa's medical chart for Adam Cohen. Dr. Kennedy concluded that, in his expert medical opinion, Dr. Dimkpa's prescription of oxycodone to Adam Cohen was "outside the course of usual medical practice" and "not medically legitimate."

This the 26th day of August, 2019.

Respectfully submitted,

MATTHEW G.T. MARTIN
United States Attorney

/S/ MICHAEL A. DeFRANCO
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