No. _____

IN THE

Supreme Court of the United States

SHAKEEL A. KAHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. SHAKEEL A. KAHN, Defendant - Appellant.	No. 25-8004

Appeal from the United States District Court
for the District of Wyoming
(D.C. No. 2:17-CR-00029-ABJ-1)

Beau B. Brindley, Chicago, Illinois, for Defendant-Appellant.

Z. Seth Griswold, Assistant United States Attorney (Darin D. Smith, United States Attorney, Stephanie I. Sprecher, Assistant United States Attorney, with them on the brief), Casper, Wyoming, for Plaintiff-Appellee.

Before **HOLMES**, Chief Judge, **MATHESON**, and **FEDERICO**, Circuit Judges.

FEDERICO, Circuit Judge.

Shakeel A. Kahn, with the help of his wife, brother, employees, and patients, sold prescriptions for oxycodone and other drugs to the patrons of

his pain clinics in Wyoming and Arizona. One woman, Jessica Burch, died after overdosing on the oxycodone that he prescribed to her.

Kahn was charged with multiple crimes, including several counts of unlawful dispensing of a controlled substance via an unauthorized prescription and one count of leading a continuing criminal enterprise. Kahn was previously convicted of several charges after his first jury trial, which this court affirmed. The Supreme Court granted Kahn's subsequent petition for certiorari and ultimately vacated his convictions for legal error in a jury instruction. On remand, Kahn was tried for a second time and was convicted on seventeen of the twenty-one charges. He now appeals his convictions.

On appeal, Kahn challenges: (1) the admission of expert testimony into evidence regarding the law governing prescriptions; (2) the sufficiency of the evidence to support his convictions for leading a continuing criminal enterprise and for unlawfully dispensing a controlled substance resulting in the death of Jessica Burch; and (3) the use of a regulation to guide whether Kahn's prescriptions were authorized and lawful. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

"Because this appeal is before this court following a jury verdict, we state the facts in the light most favorable to the jury's decision." *Little v.*

Budd Co., Inc., 955 F.3d 816, 818 (10th Cir. 2020). Shakeel A. Kahn, a licensed medical doctor, operated pain clinics in Arizona and Wyoming. His brother Nabeel Khan managed the Arizona clinic, and his wife Lyn Kahn managed the Wyoming clinic. Kahn opened the Wyoming clinic after some pharmacies in Arizona stopped filling the prescriptions he wrote. Kahn's practice was to provide cookie-cutter prescriptions for opioids and other controlled substances to patients for a flat "office visit" fee. Aplt. App. II at 50–51. By the time he had moved his practice to Wyoming, he would hand out 30-day prescriptions for "120 oxycodone 15[milligram]s and 120 oxycodone 30[milligram]s" for $500. Aplt. App. XIV at 49.

According to Dr. Gina Moore, a medical expert who testified for the Government at Kahn's trial, oxycodone is a type of opioid pain medication. The medical community measures the effects of opioid medication against morphine, using a standard called morphine milligram equivalents (MME). A daily dose of greater than 100 MME is associated with a risk of overdose and addiction and the Center for Disease Control Guidelines in place at the time of these events recommended that prescriptions for greater than 90 MME be avoided. For oxycodone, 90 MME per day would translate to about 2 tablets of 30mg strength. By comparison, a 30-day prescription of 120 oxycodone 30mg pills and 120 oxycodone 15mg pills was 270 MME. In some cases, Kahn wrote prescriptions for oxycodone at as high as 950 MME.

Additionally, the likelihood of developing dependency on opioids increases dramatically when the supply of an opioid prescription is for five days or greater. Kahn's prescriptions were routinely written for a 30-day supply, with many patients receiving such a prescription *monthly*.[1]

He would provide these prescriptions proportional to the amount that patients would pay. His patients would commonly pay for the prescriptions in cash and sometimes with goods, for which he had a bartering system. For example, Kahn testified during trial that he "received firearms for medical services." Aplt. App. XX at 216.

Kahn's brother, Nabeel, enforced payment at the Arizona clinic while it was still operating. Kahn testified that he "used" Nabeel as his "boogeyman," Aplt. App. XIX at 134, to "scare certain people." Aplt. App. XX at 217. Nabeel also helped Kahn create a contract called a Drug Addiction Statement, which all patients had to sign. It purported to make patients swear that Kahn wasn't a "drug dealer," that the patient wasn't an "addict,"

[1] As will be explained in more detail later, one of Kahn's challenges on appeal relates to his conviction for engaging in a continuing criminal enterprise, which, at the risk of over-simplification, requires that he unlawfully engaged in and led the distribution of controlled substances with at least five other co-conspirators. It is helpful to compare Kahn's prescriptions to more routine oxycodone prescriptions to understand the permissible universe of inferences the jury could make about his prescribing habits and about the mental state of those with knowledge of his prescribing habits.

and it provided for a $100,000 monetary penalty for each civil or criminal action taken against Kahn or his "officers and agents" because of something the patient did or caused. Aple. Supp. App. II at 119.

Kahn would often write prescriptions without seeing patients first or performing medical exams. He would at times direct Nabeel, Lyn, and others to provide patients with their prescriptions and collect payment while he was out of town. At least three of his patients brought new patients to Kahn's clinics and would pay for their prescriptions and other fees. Kahn would sometimes negotiate prices directly with the three who were bringing new patients in without examining the new patients. When his practice in Arizona came under investigation by the Medical Board, he and his wife Lyn padded patient files with falsified information to make it look like he had performed adequate medical care and evaluations prior to writing the prescriptions. One woman, Jessica Burch, died after snorting crushed oxycodone pills prescribed to her by Kahn.

A grand jury returned a third superseding indictment against Kahn charging him with: one count of conspiracy to dispense and distribute controlled substances resulting in death, one count of possession of a firearm in furtherance of a federal drug trafficking crime, eight counts of unlawful dispensing of a controlled substance via unauthorized prescription, three counts of aiding and abetting via unauthorized

prescription the possession of a controlled substance with intent to sell, five counts of unlawful use of a telephone to facilitate the unlawful dispensing of a controlled substance, one count of engaging in a continuing criminal enterprise, and two counts of money laundering.[2]

Kahn was convicted of several charges after his first jury trial. However, the convictions were later vacated after the Supreme Court held in *Ruan v. United States* that the mens rea of the statute underlying most of the convictions, 21 U.S.C. § 841, applied to the "except as authorized" language within the statute and that a medical professional could not be held criminally liable unless they knew they were not authorized to prescribe or to fill the prescription. 597 U.S. 450, 454 (2022). On remand from the Supreme Court, this court vacated Kahn's convictions and

[2] Specifically, Kahn was charged as follows: one count of conspiracy to dispense and distribute oxycodone, alprazolam, hydromorphone, and carisoprodol resulting in death (Count 1), 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C) & (b)(2); one count of possession of firearms in furtherance of a federal drug trafficking crime, 18 U.S.C. § 924(c)(1); five counts of dispensing of oxycodone, 21 U.S.C. §§ 841(a)(1) & (b)(1)(C); three counts of aiding and abetting possession with intent to distribute oxycodone, 21 U.S.C. §§ 841(a)(1) & (b)(1)(C), 18 U.S.C. § 2; five counts of unlawful use of a communication facility, 21 U.S.C. § 843(b); three counts of aiding and abetting the dispensing of oxycodone, 21 U.S.C. §§ 841(a)(1) & (b)(1)(C), 18 U.S.C. § 2; one count of engaging in a continuing criminal enterprise (Count 21), 21 U.S.C. § 848(a), (b), & (c); and two counts of engaging in monetary transactions derived from specified unlawful activity, 18 U.S.C. § 1957. Kahn's sufficiency of the evidence challenges on appeal relate only to Counts 1 and 21, but his other challenges relate to all counts charged under 21 U.S.C. § 841.

remanded back to the district court for a new trial because the error "infected the instructions given on all counts" and was not harmless. *United States v. Kahn*, 58 F.4th 1308, 1322 (10th Cir. 2023).

Upon retrial, Kahn was convicted by the jury on seventeen of twenty-one counts. He was found not guilty on three of the eight counts of unlawful dispensing of a controlled substance via unauthorized prescription and on one of the five counts of unlawful use of a telephone to facilitate the unlawful dispensing of a controlled substance. He moved for judgment of acquittal or for a new trial, but the district court denied his motion. Thereafter he was sentenced to 48 months for the four counts of unlawful use of a telephone, 120 months for the two money laundering counts, and 240 months for the remaining ten counts, these sentences to be served concurrently, and five years as to the firearm possession count, to be served consecutively to all other sentences. Thus, his aggregated sentence was for 300 months or 25 years' imprisonment. His terms of supervised release are to be served concurrently upon his release, with five years being the longest term.

II

Kahn now brings several claims of error on appeal. He contends that the district court erred by allowing the Government's expert witnesses to "opine about the law governing [] prescriptions" and by denying his motion

for judgment of acquittal or for new trial and finding sufficient evidence to support the jury's verdict of guilty for the counts of unlawful distribution resulting in death and continuing criminal enterprise. Op. Br. at 6. He also contends that a DEA-registered prescriber, as a legal matter, cannot be held criminally liable under 21 U.S.C. § 841. We will address each claim of error in turn.

A

Kahn first challenges the admission of testimony from the Government's expert witnesses.[3] He argues the expert testimony amounted to "improper legal opinions regarding the scope of a registrant-physician's prescribing authority." Op. Br. at 26.

We review the "admission of expert testimony" for abuse of discretion. *United States v. Miller*, 891 F.3d 1220, 1226 (10th Cir. 2018) (quoting *United States v. Varma*, 691 F.2d 460, 463 (10th Cir. 1982)). "The district court abuses its discretion if the court's decision 'is arbitrary, capricious,

[3] The Government argues this challenge is waived and precluded by the law of the case doctrine. We need not address the Government's arguments on these points because Kahn's challenges to the testimony fail on the merits. *See United States v. Wells*, 873 F.3d 1241, 1250 (10th Cir. 2017) (declining to reach waiver issue where substantive argument failed on the merits); *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1035 (10th Cir. 2000) (Law of the case doctrine is "only a rule of practice in the courts and not a limit on their power." (quoting *United States v. Monsisvais*, 946 F.2d 114, 116 (10th Cir. 1991)).

whimsical or manifestly unreasonable, or when we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.'" *United States v. Chapman*, 839 F.3d 1232, 1237 (10th Cir. 2016) (quoting *United States v. Medina-Copete*, 757 F.3d 1092, 1100–01 (10th Cir. 2014)).

Although Kahn does not point to any Federal Rule of Evidence that he argues should sustain his objection, we assume he raises Rule 702 error. Under Rule 702, the trial court must exercise a gatekeeping function on expert testimony, allowing an expert to testify only if it is more likely than not that "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). For this reason, an expert witness cannot "define the legal parameters within which the jury must exercise its fact-finding function." *Specht v. Jensen*, 853 F.2d 805, 809–10 (10th Cir. 1988) (en banc). However, expert witnesses may still "refer to the law in expressing an opinion without that reference rendering the testimony inadmissible." *Id.* at 809. "[A] witness may properly be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms." *Id.* For example, "a court may permit an expert to testify that a certain weapon had to be registered with" a federal agency, as well as permit "a medical expert [to] testify[] that specific

conduct constitutes medical malpractice." *Id.* at 809–10. But a court may not permit an expert to testify to legal conclusions, such as that "warrantless searches are unlawful" or that "a warrantless search" was conducted. *Id.* at 808.

Here, the challenged testimony was offered as evidence to prove the mens rea element for the charges against Kahn under 21 U.S.C. § 841(a)(1), which prohibits "any person knowingly or intentionally" from "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance" except as authorized. 21 U.S.C. § 841(a)(1). The Supreme Court held in *Ruan v. United States* that 21 C.F.R. § 1306.04(a), the regulation that defines the proper purposes to issue prescriptions, "defin[es] the scope of a doctor's prescribing authority" using reference "to objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice.'" 597 U.S. at 467 (quoting 21 C.F.R. § 1306.04(a)). The Supreme Court also held that "[t]he Government . . . can prove knowledge of a lack of authorization through circumstantial evidence," including evidence showing that the defendant failed to meet the "objective criteria" underlying § 1306.04. *Id.* (noting "'the more unreasonable' a defendant's 'asserted beliefs or misunderstandings are,' especially as measured against objective criteria, 'the more likely the jury . . . will find that the Government has

carried its burden of proving knowledge" (alteration in original) (quoting *Cheek v. United States*, 498 U.S. 192, 203–04 (1991)).

Kahn challenges testimony from the Government's witnesses where they "claim[ed] that . . . § 1306.04 defines the scope of a practitioner's authorization" and quoted language from § 1306.04, including the phrases "legitimate medical purpose" and "usual course of professional treatment." Op. Br. at 26. He also challenges Dr. Jed Shay's testimony, elicited from his counsel on cross examination, that "a licensed physician who exercises judgment in a way that deviates from standard practices in the medical community is 'just as guilty' as one with a suspended medical license." *Id.* (quoting Aplt. App. VIII at 123–24).

The district court did not err by allowing this testimony. *Ruan* explains that the language of § 1306.04 can be used to assist the jury in evaluating evidence that goes to the "lack of authorization" element of § 841. 597 U.S. at 467. Furthermore, testimony from medical experts that a defendant's medical treatment of their patients was "illegitimate or inappropriate," as here, "falls within the limited vernacular that is available to express whether a doctor acted outside the bounds of his professional practice" and thus doesn't have a sufficiently "specialized" legal meaning that renders the testimony inadmissible. *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006); *accord United States v. Schneider*,

704 F.3d 1287, 1294 (10th Cir. 2013) ("The concern . . . is when an expert uses a specialized legal term and usurps the jury's function. The use of the phrase 'other than legitimate medical purposes' does not cause such a problem."); *United States v. Chube II*, 538 F.3d 693, 698 (7th Cir. 2008) ("When all is said and done, we agree with the Government that it is impossible sensibly to discuss the question whether a physician was acting outside the usual course of professional practice and without a legitimate medical purpose without mentioning the usual standard of care."); *see also United States v. MacKay*, 715 F.3d 807, 838 (10th Cir. 2013) (no error where expert used the phrases "cause of death" and "death resulted from" during her testimony where "she explained her observation based on the evidence in the case" instead of "tell[ing] the jury [the defendant] was guilty").

Kahn argues that authorization is "not a peripheral legal concept[,] . . . [i]t [is] the central dividing line between lawful medical practice and federal felony liability." Reply Br. at 8. We disagree with this argument because the dividing line between lawful medical practice and federal felony liability is the mens rea requirement in § 841(a)(1), which is to *knowingly and intentionally* commit the actus reus without authorization. *Ruan*, 597 U.S. at 467.

Finally, it should be noted that the testimony Kahn most strenuously objects to, that a licensed physician who deviates from standard medical

practice is "just as guilty" as one practicing without a valid license, was elicited by Kahn's own counsel on cross-examination and was not objected to at the time by either party. "[A] party who induces an erroneous ruling" is prevented "from being able to have it set aside on appeal." *United States v. Burson*, 952 F.2d 1196, 1203 (10th Cir. 1991). This testimony appears to be invited error, or at least waiver, and Kahn does not argue for plain error review of this testimony in his briefs. This court therefore will not consider that testimony as part of Kahn's appellate argument. *See United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019). In sum, there was no Rule 702 error.

B

In the district court, Kahn moved for acquittal or a new trial pursuant to Federal Rules of Criminal Procedure 29 and 33, which was denied. Kahn now challenges the district court's denial of that motion. Specifically, he challenges the sufficiency of the evidence as to Count 1, conspiracy to dispense and distribute oxycodone, alprazolam, hydromorphone, and carisoprodol resulting in death, 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C), and (b)(2), and Count 21, continuing criminal enterprise (CCE), 21 U.S.C. § 848. Both offenses carry substantial mandatory minimum sentences. *See* 21 U.S.C. §§ 841(b), 848(a).

"We review de novo the district court's denial" of a Rule 29 motion. *United States v. Hamilton*, 587 F.3d 1199, 1205 (10th Cir. 2009). "In reviewing the sufficiency of the evidence, we consider all the evidence in the light most favorable to the prosecution and determine whether 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Lowe*, 117 F.4th 1253, 1270 (10th Cir. 2024) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "We may reverse only if *no* rational trier of fact" could have found the Government met its burden of proof. *United States v. King*, 632 F.3d 646, 650 (10th Cir. 2011) (emphasis added) (quoting *United States v. Ramos-Arenas*, 596 F.3d 783, 786 (10th Cir. 2010)).

Kahn was convicted of engaging in a CCE, charged under 21 U.S.C. § 848, related to the unauthorized dispensing of oxycodone and other controlled substances, in violation of various subsections of 21 U.S.C. § 841. The Government thus had the burden of proving the following elements beyond a reasonable doubt at trial: (1) Kahn violated § 841; (2) the violations were part of a continuing series of violations; (3) Kahn committed the violations in concert with five or more persons with respect to whom he occupied a position of organizer, supervisor, or other position of management; and (4) from which he obtained substantial income or resources. *See* 21 U.S.C. § 848(c).

Here, Kahn contests only one element: that the Government adduced sufficient evidence to show that he committed the violations in concert with five or more persons and that he occupied the requisite managerial role over such persons. The district court found that Kahn exercised a managerial role over at least seven co-conspirators: (1) Nabeel Khan, his brother; (2) Lyn Kahn, his wife; (3) Stacy Drndarski, a front desk receptionist at Kahn's Arizona clinic and a patient; (4) David Drndarski, Stacy's husband and a patient; (5) Christopher Muelhausen, a patient; (6) Paul Beland, a patient; and (7) Deni Antelope, a patient. The Government, for its part, argues that it put forward enough evidence to prove that Kahn exercised a managerial role over the seven people just discussed plus Jessica Burch and her partner Anthony Vargas, for a total of nine co-conspirators. On appeal, Kahn argues that Lyn and Nabeel did not have the "requisite state of mind" necessary to be considered co-conspirators, and that he did not exercise a managerial role over Nabeel, the Drndarskis, Muelhausen, Beland, and Antelope. Op. Br. at 39–40.

Kahn's arguments are not persuasive. On this record, the district court was correct to find that, at the very least, six individuals – Lyn, Nabeel, Stacy, Muelhausen, Beland, and Antelope – acted in concert with, and under the control of Kahn to sell unauthorized prescriptions for controlled substances. We will begin with the applicable law and then

proceed to analyze Kahn's arguments as to each co-conspirator in turn, first reviewing the evidence that was adduced at trial for each.

Again, to sustain a conviction for a CCE under § 848, otherwise known as the kingpin statute, the Government must prove beyond a reasonable doubt that Kahn committed the underlying violations in concert with five or more persons and that he occupied a position of organizer, supervisor, or other position of management. The phrase "in concert with" means that "[a] conspiracy is . . . a necessary part of a CCE violation" and requires some "proof of an agreement among the persons involved in the [CCE]." *United States v. Allen*, 24 F.3d 1180, 1186 (10th Cir. 1994) (quoting *Jeffers v. United States*, 432 U.S. 137, 149–50 (1977)). To establish the existence of a conspiracy, the Government must prove that there was a "joint commitment to an 'endeavor which, if completed, would satisfy all of the elements of the underlying substantive criminal offense.'" *Ocasio v. United States*, 578 U.S. 282, 287 (2016) (quoting *Salinas v. United States*, 522 U.S. 52, 65 (1997)) (alterations accepted). It is sufficient that the Government proves the "conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support." *Id.* at 288 (quoting *Salinas*, 522 U.S. at 64). What follows then is that "innocent participants in criminal activity may not be counted as part of a continuing criminal enterprise." *United States v. Smith*, 24 F.3d 1230, 1234 (10th Cir. 1994). But the

Government also need not "prove an express or formal agreement" was reached to perpetrate the crime; rather, it is sufficient that the Government proves the existence of a "mutual understanding" to do so. *United States v. Rutland*, 705 F.3d 1238, 1250 (10th Cir. 2013) (quoting *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 474 (10th Cir. 1990)). Circumstantial evidence is "sufficient to prove the existence of" such a mutual understanding. *United States v. Brooks*, 736 F.3d 921, 938 (10th Cir. 2013).

Once it is shown that Kahn acted in concert with five or more persons, the Government must also prove that Kahn was an organizer, supervisor, or occupied some other position of management over his co-conspirators. *United States v. Apodaca*, 843 F.2d 421, 425–26 (10th Cir. 1988). The terms "organizer, supervisor, or manager" are not technical and should be given their ordinary meaning. *Id.* The statute's language is disjunctive and denotes "differing levels of managerial control and coordination." *Id.* at 426. An organizer, for instance, is a person who "puts together a number of people engaged in separate activities and arranges them in their activities in one essentially orderly operation or enterprise" and need not necessarily be "able to control those whom he or she organizes." *Id.* (first quoting 2 E. Devitt & C. Blackmar, Federal Jury Practice and Instructions § 58.21 (1977), and then quoting *United States v. Ray*, 731 F.2d 1361, 167 (9th Cir. 1984)). "[T]he defendant need not have had personal contact with each of

the five persons involved . . . [n]or must each transaction with or instruction to those persons organized or managed specifically originate with the defendant," as "mere delegation" of duties is enough. *Id.* Thus, a "defendant may not insulate himself from liability by delegating authority." *United States v. McSwain*, 197 F.3d 472, 479 (10th Cir. 1999). However, "a mere buyer-seller relationship, *without more*, [is] insufficient to establish that [the defendant] held some managerial role with respect to" the co-conspirators. *Apodaca,* 843 F.2d at 426. We now apply these legal principles to the co-conspirators.

Nabeel Khan. Nabeel helped manage Kahn's Arizona clinic, discussed office visit pricing with Kahn, advised patients of the prices for their prescriptions, drafted the Drug Addiction Statement that patients were required to sign, provided prescriptions and collected payment when Kahn was out of town, and was Kahn's "boogeyman" who enforced payment when patients tried to negotiate price reductions. Aplt. App. XX at 217. Nabeel stopped working at the Arizona clinic when Kahn moved his practice to Wyoming but would still discuss pricing with Kahn. At times, Nabeel would also accept payment from Arizona-based patients, like Stacy and David, either in person from those who were traveling to Wyoming or through the mail from others. Nabeel similarly provided prescriptions to Christopher Muelhausen when Kahn was out of town. Once, Kahn discussed

with Nabeel over the phone that two patients hadn't reimbursed him for their prescription because they didn't have the money and then "told Nabeel that he may have [another] patient that may want to buy them." Aplt. App. XVI at 33. And Kahn stored the cash he collected from patients in "the house that h[e] and Nabeel lived in" located in Arizona. *Id.* at 48.

Kahn asserts that Nabeel's behavior as described here was simply the performance of normal office duties, so Nabeel cannot be considered a CCE participant because he did not have the "requisite state of mind." Op. Br. at 40. For the same reasons, Kahn asserts Nabeel was not his supervisee. On the contrary, the record evidence here amply supports a finding that Nabeel was a CCE participant and that Kahn exercised some position of management over him. Nabeel appeared to be acting as a second in command to Kahn, at the very least helping to set prices for prescriptions and continuing to accept cash payment and provide prescriptions to patients still located in Arizona after Kahn's practice moved to Wyoming. The unusual nature of the prescriptions, paired with the payment made in cash or in goods or services, and done without a connection to medical care, at least circumstantially shows that Nabeel had a "mutual understanding" to engage with Kahn in the illicit sale of prescriptions for controlled substances. *Rutland*, 705 F.3d at 1250 (citation omitted). Nabeel did all this at the direction of Kahn, who quite literally was Nabeel's employer as the

owner of the Arizona clinic. It is difficult to imagine a clearer case of a position of management over another than the relationship of employer to employee. And Kahn never argues that Nabeel engaged in this conduct without his knowledge or approval.

Lyn Kahn. Lyn managed Kahn's Wyoming clinic. Lyn pled guilty to conspiring with Kahn "and others to commit the illegal diversion of prescription drugs." Aplt. App. II at 58. She testified for the Government at trial. She testified that Kahn wrote prescriptions in the name of her daughter, Shaina, and that Lyn filled these prescriptions, picked them up herself, and gave them to Kahn so he could give them to Nabeel. She testified that she filled patients' prescriptions in Wyoming with the knowledge that Kahn had not provided any medical care or evaluation and then would send the drugs through the mail to where the patients resided in Arizona. Sometimes those patients would travel to Wyoming from Arizona or elsewhere and stay at her home while they filled their prescriptions. For example, she testified that she and Kahn provided a letter indicating proof of residency at her home in Wyoming to Stacy Drndarski so Stacy could obtain a Wyoming driver's license to "help her . . . get her meds" more easily after a local pharmacy "stopped filling [prescriptions] for [Kahn's] patients." Aplt. App. XVI at 29.

Once, she watched Kahn remove the labels from a patient's prescription before she sent them via FedEx to a different patient who then "sent money" back to them "a day or so later." *Id.* at 35. She was aware that Kahn's practice was "cash-only" and that he "traded office visits for guns" and a "Harley-Davidson motorcycle," among other things. Aplt. App. XV at 256–58. Finally, she helped Kahn add false information to patient files when the Arizona Medical Board began investigating Kahn's practice "to make the chart[s] look better" by indicating that Kahn had provided medical care to patients when he had, in fact, not. *Id.* at 292.

Kahn argues that Lyn did not believe Kahn was doing anything wrong at the time of these events and so she did not have the requisite criminal intent to be considered a CCE participant. This argument is rendered nearly frivolous by the fact that Lyn pled guilty to engaging in a criminal conspiracy with Kahn to illegally divert prescription drugs – thereby admitting under oath to having the requisite criminal intent to be Kahn's co-conspirator for purposes of the CCE. *See Allen*, 24 F.3d at 1186. Even without the guilty plea, the record evidence here strongly supports, even more so than Nabeel, the conclusion that Lyn was a participant in the CCE.

Stacy and David Drndarski. Stacy and her husband David were initially Kahn's patients in Arizona. Stacy testified that, at her first visit, Kahn tried to "get[] to know [her] and . . . what [her] needs were . . .

medically." Aplt. App. XI at 79. But she also testified that Kahn prescribed her benzodiazepines, muscle relaxants, sleep medication, and opioids like Percocet and oxycodone during her first two visits without counseling her on side effects and, in some instances, without her having requested the specific medication. Once she began working for Kahn, she testified, "he didn't really ask . . . questions anymore" and instead just handed her the prescriptions "when [they] were leaving work." *Id.* at 79, 132.

Stacy became Kahn's employee at his Arizona clinic, and the cost of her prescriptions eventually came out of her paycheck once she was unable to afford cash payments. There were no set hours at the clinic, and Stacy would be responsible for setting up appointments with patients for their next visits. She noticed that Kahn saw pain management patients for "maybe 5, 10 minutes" at a time. *Id.* at 95. Stacy also would be "given a list to call patients" to inform them of price increases for their next visit, "[a]nd the amount was next to their name" for her to reference. *Id.* at 82. Stacy would also provide prescriptions to patients "if they came in and paid" at the direction of Kahn. *Id.* at 82–83. Stacy was aware that other patients paid in cash and sometimes traded office visits for other things of value. For instance, she testified that a man who worked at a "tire shop" traded "tires for a vehicle of . . . Kahn's" for prescriptions. *Id.* at 91. She was also aware that patients were paying for, or "sponsoring," other patients' prescriptions,

and that Kahn would give one patient all the prescriptions for multiple people and accept payment for all from that one patient. *Id.* at 101. Her husband David, also a patient of Kahn's, provided prescriptions to one of Kahn's patients in the parking lot of the Arizona clinic and received cash payment for it while Stacy waited in the car nearby. She was present when David traded "a Harley and some guns" with Kahn as payment for their prescription medication. *Id.* at 87. Eventually, David began to sell his and Stacy's medications to pay for their visits with Kahn. When pharmacies in Arizona stopped filling prescriptions written by Kahn, he asked Stacy to "record it when [she] would go up to the pharmacist to fill [a] prescription to see what they would say," which she agreed to and did. *Id.* at 138. The pharmacists would tell her that they had "issues with this . . . particular doctor." *Id.* at 139.

Stacy and David helped Kahn move his practice to Wyoming, and Stacy stopped working for Kahn once he did. Stacy began to travel to Wyoming to get her and David's medications. Sometimes, she would still pick up prescriptions from Kahn when he came back to Arizona or from Nabeel at his home. When authorities "raided" Kahn's home and Nabeel's home, Lyn contacted Stacy and informed her of the searches and "asked . . . if [she] had any contact with the police." *Id.* at 199–200. Stacy and David's home was searched by authorities shortly thereafter.

Kahn asserts that Stacy and David did not have a conspiratorial agreement with Kahn and were not his supervisees. Yet again, this argument is belied by the record evidence, which proved that Stacy and David both personally knew that Kahn was selling prescriptions for unusually high amounts of oxycodone and other substances for cash or goods, and facilitated this by trading prescriptions for cash in a parking lot and monitoring the actions of local pharmacists at his direction. And again, Stacy was his employee at his Arizona clinic, primarily tasked with calling patients to inform them that the prescription prices were going up for certain medications. We quite easily agree with the district court that the Drndarskis qualify as CCE co-conspirators with Kahn.

Christopher Muelhausen. Muelhausen was a pain patient of Kahn's for years and at the height of his addiction was using about 20 oxycodone pills per day. He sold the medication he didn't use himself to pay for his visits with Kahn. For instance, during his visits with Kahn, he would often request and be prescribed medications such as Soma or Xanax so he could then sell them or trade them on the street. At one point he "heard rumors from the other patients that [Kahn] was allowing" patients to get a prescription every two weeks rather than every thirty days, so he asked Kahn if he could also come in every two weeks. Aplt. App. IX at 262. Kahn agreed but told him "the price was going to change." *Id.* at 263. Muelhausen

began to go to the clinic every two weeks, and he would get the same prescription he was originally getting for 30 days so that, in his words, "[w]hatever I was getting prescribed . . . would be times two." *Id.* At one visit, Muelhausen wanted to talk about how high the price was for visits. Kahn told him he knew "that [Muelhausen and others] sell them for 20 bucks on the street" and that the visits "would be th[e] amount that was mentioned." *Id.* at 265–66. Muelhausen would go to visits and be visibly high or withdrawing from oxycodone, and Kahn would never comment about his condition. He testified to how a typical visit with Kahn would go: "Go in, make your payment, they would count it with a money counter, and then go see the doctor, and he would have the prescriptions already preprinted or written out." *Id.* at 271.

Muelhausen eventually began to "sponsor" other patients at Kahn's clinic, which meant he brought them to their appointments, negotiated their prescription payments for them, and sometimes helped them pay for their prescriptions. *Id.* at 280. In return, he would take a cut of their medication. For instance, Stacy testified that Muelhausen brought Jessica Burch and her partner, Anthony Vargas, to their appointments and would sometimes pay for them when they were not physically present at the office. Muelhausen would call Kahn about bringing his "friend[s]" in as new patients and Kahn would agree to see them, set up appointments, and

inform him of the cost there on the phone without knowing who the patient was or any of their medical history. *Id.* at 299. Kahn directed Muelhausen to pick up prescriptions from the clinic for other patients and coordinated with Muelhausen when pharmacies wouldn't fill prescriptions for certain patients.

Kahn argues that he wasn't aware that Muelhausen was paying for other patients' visits. Kahn argues that even if he did know, that fact is insufficient to establish a managerial role because such conduct is "incidental" to a buyer-seller relationship. Op. Br. at 41–42 (quoting *United States v. Bass*, 310 F.3d 321, 327 (5th Cir. 2002)). But Kahn did not merely sell oxycodone prescriptions to Muelhausen. The record evidence indicates that Muelhausen brought in new "patients" to see Kahn, who in turn would communicate pricing to Muelhausen directly on the phone. And Kahn directed him to pick up other patients' prescriptions and would assist Muelhausen when pharmacies wouldn't fill prescriptions. Muelhausen was akin to a street corner drug dealer, acting under the direction of the kingpin with the prescription pad – Kahn. So were Paul Beland and Deni Antelope, who we will discuss next.

Given that we agree with the district court there was sufficient evidence to prove the first five people were involved in the CCE conspiracy under Kahn's supervision, we also affirm the conviction for this crime.

Nevertheless, we soldier on to consider Kahn's arguments regarding other co-conspirators.

Paul Beland. Beland struggled with a lifelong drug addiction and was referred to Kahn as a patient by another physician in Wyoming for pain management for back pain. When Beland called to make an appointment, Lyn scheduled it and told him it would cost $500. When Beland asked what the charge was for, Lyn said "[d]on't worry; you'll get what you want." Aplt. App. V at 265–66. Beland testified that he asked for certain strengths of oxycodone tablets at his first visit because of Kahn's behavior. In Beland's words, "if he's already going to offer me 30s and 15s and he has his back turned to me, that's not a doctor. . . . If he's asking me what works for me, I'm going to tell him the most that I can that works for me." *Id.* at 285–86.

Beland would sometimes pick up his prescriptions from an employee at a vape shop owned by Kahn, paying for them in cash and receiving the prescriptions in a sealed envelope along with medical forms. He asked Kahn for his prescription of 30-milligram oxycodone to be bumped up from 120 pills to 180 pills, which Kahn provided upon request without seeing Beland or conducting an exam. Beland relocated to Massachusetts but thereafter traveled to Wyoming to get prescriptions from Kahn.

Eventually, Kahn told Beland that he would take $50 off the cost of his prescriptions for every pain patient Beland referred to him, up to three

patients maximum. Beland testified that he told Kahn specifically how many oxycodone pills each patient would be prescribed at each visit:

> [T]he patient or client would get – the pills, 120 of the 30s, 120 of the . . . 15s, the first visit. The second visit would be 180 of . . . the 30s, 180 of the 20s. And then . . . the third month, it would go up from there to the 300s because then, by now, I'm already at that 300 [of each strength oxycodone pill]. On the third – on the fourth visit I'm at the 300.

Aplt. App. VI at 20. Beland referred patients pursuant to this arrangement, even going as far as to refer his partner who did not need pain medication, so he could fill her prescriptions and take her pills for himself. After this, Beland's relationship with Kahn became a "business relationship" and "grew from there." *Id.* at 26. Beland testified that Kahn told him he knew "these are being sold on the street [and he] need[ed] [a] cut" and that Beland agreed Kahn's cut for "300 30s [and] 180 20s" would be a thousand dollars. *Id.* Beland sold some of his prescription medication to pay for travel to Wyoming and to pay Kahn his cut of the money, and then he consumed the rest of the medication, as well as heroin. He would call Lyn to get appointments for new patients, tell Kahn the dosage and amount of oxycodone he wanted, fly to Wyoming to get his cut of the medication from the new patient, and then wire money back to Kahn. Beland testified Kahn knew he was paying for patients' visits because he was "wiring [Kahn] the money . . . [via] Western Union." *Id.* at 42. He would "send a chunk of

money" to Kahn every so often as he sold the pills he was taking from the patients for whom he was paying. *Id.* at 44.

In a recorded phone call, Beland spoke with Kahn about how much oxycodone to prescribe a new patient without Kahn having ever met the patient. Kahn told Beland that the "new guy" should be prescribed less than Beland "because of the way things are right now." Aple. Supp. App. II at 19. On the same phone call, Kahn agreed to prescribe Xanax to Beland's partner on a one-time basis because "[this] shit [was] getting hot" and the "FDA's come down on Xanax and on narcotics." *Id.* at 22–23. Kahn once sold Beland prescriptions written for the Drndarskis when they couldn't pay for them with the knowledge that Beland would then "sell" the pills to others. Aplt. App. XVI at 33–35. Beland sent cash to Kahn for those prescriptions overnight through the United States Postal Service. Beland was arrested about a year after he began seeing Kahn and ended up pleading guilty to conspiring with Kahn to illegally divert prescription drugs.

Kahn argues that he did not have a managerial role over Beland because there was no conspiratorial agreement that Beland would sell his prescribed medication. Once again, we disagree. The record evidence shows that Beland brought in at least two new patients from out of state to see Kahn after negotiating with him on the phone about the price and amount of the prescriptions, and that he wired or mailed cash to Kahn for these

patients' prescriptions. For the same reasons as discussed for Muelhausen, there is sufficient evidence to show that Beland was under the managerial control of Kahn for purposes of the CCE conviction.

Deni Antelope. Finally, Antelope was Kahn's patient who, like Beland and Lyn, also pled guilty to conspiring with him to illegally divert prescription drugs and testified for the Government at his trial. At the time she was Kahn's patient, she lived in Riverton, Wyoming. She initially sought out Kahn's care because her sister told her that he was "giving out oxycodone" and she wanted to obtain it to then sell it in Riverton and on "the rez." Aplt. App. XIV at 24. Antelope almost immediately began sponsoring other patients' visits to Kahn, beginning with one of her sisters and her then-spouse. She testified that around her fourth visit, "[she] and Dr. Kahn talked about bringing more people" in to get prescriptions from him. *Id.* at 36. Kahn asked her if she "knew more people who needed pain management" and asked if she knew the street price of oxycodone. *Id.* at 36–37. Her spouse, who was in the room with her, replied that it went for about a "dollar per milligram." *Id.* at 40. By the end of the visit, Antelope had agreed to "bring more people" in to get prescriptions from Kahn. *Id.* at 48.

Antelope began bringing people to whom she was selling oxycodone for visits with Kahn. She would call Lyn to set up the appointments, bring in the new patients, and be in the room for their first visit. Kahn would

prescribe them "[t]he regular" dosage and amount that "he could start with," which was "120 oxycodone 15s and 120 oxycodone 30s." *Id.* at 49. Antelope would bring about two or three patients per day and pay the $500 for the new patients she brought to the clinic. In return for paying for their fees and incidentals for the trip to Kahn's clinic, she would take 90 of the 120 pills of each strength oxycodone they were prescribed, which she would then sell on the street. She had about 15 to 20 people who she regularly brought to the clinic to get prescriptions. In her words, "the ones that were the most addicted to [oxycodone] stayed with [her]" because they would run out of money and so they needed her to pay Kahn for their pills. *Id.* at 64–65. She would pay the fees for the patients in front of Lyn. In addition to bringing new patients into the clinic, Antelope was involved with Kahn's practice in other ways. For example, Lyn asked her to get another patient to pay his debt for a prescription he had received.

Kahn asserts that he did not have "any involvement with Antelope's pill sales" and did not have "any understanding of arrangements Antelope might make on her own with any new patients." Op. Br. at 42–43. But the record evidence shows that he informed Antelope about the amount and price of oxycodone he would sell to new patients, and he explicitly asked her to bring him new pain management patients. Kahn cannot avoid the common-sense conclusion that follows from these facts by using the words

"patient" and "pain management services" instead of "addict" and "drug dealing." *Id.* at 43. The record evidence shows that he directed Antelope to bring in new drug addicts so he could sell drugs to them at a set price. For the same reasons as discussed for Muelhausen and Beland, there is sufficient evidence to show that Antelope was under the managerial control of Kahn for purposes of the CCE conviction.

In sum, the seven individuals discussed above, at a minimum, meet the CCE element that Kahn acted in concert with "five or more other persons." 21 U.S.C. § 848(c)(2)(A). On the record before us, it is apparent that Kahn was dealing oxycodone and other controlled substances using the power of his prescription pad and his authority and status as a medical doctor. Kahn employed Lyn, Nabeel, and Stacy (who included David) in this endeavor, and directed all three to provide prescriptions to patients for payment in his stead. The evidence adduced at trial supports the conclusion that all three knew that patients were receiving prescriptions without medical exams for cash payment – in effect, that Kahn was dealing opioid medication to patients – and that they assisted him willingly in this endeavor and at his direction.

Further, there is more than a mere buyer-seller relationship between Kahn and Muelhausen, Beland, and Antelope. Kahn directed Muelhausen to pick up prescriptions for other patients. Kahn also directly negotiated

with Antelope and Beland about the prescription pricing for the patients they brought into the practice, without even seeing the patients first. Even if Kahn wasn't involved in every oxycodone exchange or didn't know about every patient who these three paid for, the "mere delegation of [his] duties" as the person who wrote the prescriptions is enough to establish a managerial role. *Apodaca*, 843 F.2d at 426. The district court was correct when it found sufficient evidence to support the jury's verdict of guilty for the CCE count.

C

Kahn also challenges the sufficiency of the evidence underlying his conviction on one count for conspiracy to distribute of oxycodone resulting in death under 21 U.S.C. § 841(a) & (b)(1)(C) in connection with the death of his patient, Jessica Burch. For this charge, the Government had to prove beyond a reasonable doubt that: (1) Kahn knowingly, intentionally and unlawfully distributed oxycodone to Jessica Burch; and (2) the oxycodone Kahn distributed to Burch caused her death. 21 U.S.C. § 841(a) & (b)(1)(C). Kahn contests that the Government adduced sufficient evidence to prove that the oxycodone Kahn provided to Burch caused her death. Specifically, he takes issue with the opinion of the Government's expert witness, Dr. Hail, which he challenges as "speculative" and as providing "no[] support" for her finding that Burch died from an oxycodone overdose.

Op. Br. at 44. Kahn's argument mostly attacks Dr. Hail's credibility as an expert and the methodology she used to reach her conclusions, as well as the information he asserts she did not properly consider. *Id.* at 44–48.

At a closer glance, Kahn's argument is simply a repackaged *Daubert* challenge to the admissibility of Dr. Hail's expert testimony. However, a *Daubert* challenge is not properly before this court on appeal because Kahn does not argue for plain error in any of his briefs.

Kahn did not bring a *Daubert* challenge to Dr. Hail's testimony before the district court until his post-trial motions following the close of evidence. *Daubert* challenges that come after the close of evidence, like Kahn's, are untimely, waived, and subject to plain error review on appeal. *Macsenti v. Becker*, 237 F.3d 1223, 1233–34 (10th Cir. 2001); *accord Brooks*, 736 F.3d at 932. Because Kahn does not affirmatively raise a *Daubert* challenge, let alone under plain error, in his appellate briefing, such a challenge will not be considered here. The *Daubert* challenge is waived, but a challenge to the general sufficiency of the evidence underlying Kahn's conviction on this count is not, so we now consider sufficiency.

The evidence presented at trial concerning Jessica Burch's death was that she had filled a prescription for oxycodone that Kahn wrote for her three days prior to her death, including 15-milligram oxycodone pills manufactured by Actavis (green-colored) and that she died with green-

colored crushed pill remnants in her nostrils. Her partner, Anthony Vargas, testified that she normally crushed and snorted her oxycodone pills and that she had passed out face down on their front lawn hours prior to her death. Additionally, there was evidence that Jessica had a history of seizures and had been hospitalized once before to be evaluated for a seizure. Jessica's mother also testified that she had medically died once when she had her gallbladder removed. Dr. Hail was also called by the Government to testify as to her expert opinion on the cause of Jessica's death.

Dr. Hail is a medical doctor who testified for the Government as an expert in emergency medicine and medical toxicology, with no objection from Kahn during trial. Dr. Hail testified to her opinion regarding the cause of death of Jessica Burch, specifically that she "would not have died but for oxycodone." Aplt. App. XVII at 219. In doing so, she ruled out traumatic (*e.g.*, gunshot wound) and natural causes of death. The primary circumstances that led Dr. Hail to conclude that Jessica died of an oxycodone overdose were that Jessica was a "young, healthy person who was known to abuse her . . . medications," that Jessica had a habit of "crush[ing] up . . . oxycodone and snort[ing] it," that there was "green powder present in her nose," and the description of her behavior "the night before she died." *Id.* at 221.

By his telling, Kahn's counsel conducted an "aggressive and thorough" cross examination of Dr. Hail where, among other things, he challenged Dr. Hail with Jessica's medical records that indicated a history of a stomach cancer diagnosis and a stroke. Op. Br. at 23. Dr. Hail testified that although this history appeared in the medical records, there was no indication that a doctor diagnosed Jessica with stomach cancer and there was no evidence that Jessica ever had a stroke. In fact, a physician had written in Jessica's records that "Jessica Burch continually reports that she has stomach cancer . . . [but] we have never found her to have anything other than chronic abdominal pain, drug-seeking behavior, and constipation," and the medical records also indicated that Jessica's history of strokes was self-reported only. Aplt. App. XVII at 297–98. Dr. Hail also testified that Jessica's medical records indicated one prior episode where Jessica was taken to Western Arizona Medical Center for a seizure, but that the medical records indicated that Jessica's behavior was "combative" and "inconsistent with what one would observe . . . in somebody with a seizure disorder." *Id.* at 221–23. Dr. Hail thus ruled any seizure disorder out as a possibility for causing Jessica's death.

On appeal, Kahn asserts that Dr. Hail's opinion was "speculative" because it assumed that Jessica was "young and healthy with no significant underlying medical history." Op. Br. at 44 (alterations and quotation

omitted). He asserts that Jessica did, in fact, have significant underlying medical history, including seizures, a stroke, and a cancer diagnosis, any of which could have been a cause of Jessica's death. To the extent Kahn asks us to weigh the trial evidence or assess Dr. Hail's credibility as a witness outside of *Daubert* gatekeeping, that is an improper task for a reviewing court. *See United States v. Moya*, 5 F.4th 1168, 1187–88 (10th Cir. 2021). The jury had the benefit of hearing Kahn's cross-examination of Dr. Hail as to the issues he raises on appeal and found that Burch died because of the oxycodone that Kahn prescribed her. On this record, there is no justification or reason to disturb the jury's verdict on this count.

D

Finally, Kahn argues that the medical regulation that covers the proper purposes for prescribing controlled substances, 21 C.F.R. § 1304.06, should have no bearing on criminal liability under the drug distribution counts he faced, charged under 21 U.S.C. § 841(a)(1). Kahn was convicted of ten drug distribution counts, which prohibit, "[*e*]*xcept as authorized* . . . [,] any person knowingly or intentionally" from "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1) (emphasis added). Section 1306.04(a) is a regulation "defining the scope of a doctor's prescribing authority. . . by reference to objective criteria such as

'legitimate medical purpose' and 'usual course' of 'professional practice.'" *Ruan*, 597 U.S. at 467 (quoting regulation). Kahn's argument is that, under the plain text of § 841, "a DEA-registered prescriber is *authorized* to issue prescriptions . . . and cannot be prosecuted under that subsection," and thus the scope of his prescribing authority under § 1306.04 is legally irrelevant. Op. Br. at 55. And since Kahn was a DEA-registered prescriber, as his argument goes, his convictions are per se invalid.

The problem for Kahn is that the Supreme Court has already decided this issue decades ago. In *United States v. Moore*, the Supreme Court held that physicians registered under the Controlled Substances Act "can be prosecuted under § 841 when their activities fall outside the usual course of professional practice." 423 U.S. 122, 124 (1975). And, as stated earlier, in *Ruan v. United States*, the Supreme Court noted that § 1306.04 could help the Government "prove knowledge of a lack of authorization through circumstantial evidence . . . by reference to objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice.'" 597 U.S. at 467 (quoting regulation). Kahn argues that *Moore* was wrongly decided, but this court must follow Supreme Court precedent and reject his argument.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT
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Christopher M. Wolpert
Clerk of Court

Jane K. Castro
Chief Deputy Clerk

August 20, 2026

Mr. Beau B. Brindley
Beau B. Brindley Law Office
53 West Jackson Boulevard, Suite 1410
Chicago, IL 60604

RE: 25-8004, United States v. Kahn
Dist/Ag docket: 2:17-CR-00029-ABJ-1

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(d)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rule 40 and 10th Cir. R. 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Zachary Seth Griswold
Stephanie Irene Sprecher

CMW/lg

FILED
8:41 am, 1/10/25
Margaret Botkins
Clerk of Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA
vs
SHAKEEL A KAHN

Case Number: 2:17-CR-00029-ABJ-1

Defendant's Attorney(s):
Beau Brindley

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT was found guilty on counts 1sss, 2sss, 4sss, 5sss, 7sss, 9sss - 14sss, 17sss - 19sss, 21sss - 23sss after pleas of not guilty.

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title and Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C) and (b)(2)	Conspiracy to Dispense and Distribute Oxycodone, Alprazolam, Hydromorphone, and Carisoprodol Resulting in Death	November 30, 2016	1sss
18 U.S.C. § 924(c)(1)	Possession of Firearms in Furtherance of a Federal Drug Trafficking Crime	November 30, 2016	2sss
21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Dispensing of Oxycodone	September 2, 2016	4sss
21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2	Possession with Intent to Distribute Oxycodone and Aid and Abet	September 2, 2016	5sss
21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Dispensing of Oxycodone	October 1, 2016	7sss
21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2	Possession with Intent to Distribute Oxycodone and Aid and Abet	October 1, 2016	9sss
21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Possession with Intent to Distribute Oxycodone	October 2, 2016	10sss

and 18 U.S.C. § 2	and Aid and Abet		
21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2	Dispensing of Oxycodone and Aid and Abet	October 7, 2016	11sss
21 U.S.C. § 843(b)	Unlawful Use of a Communication Facility	October 3, 2016	12sss
21 U.S.C. § 843(b)	Unlawful Use of a Communication Facility	October 7, 2016	13sss
21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2	Dispensing of Oxycodone and Aid and Abet	November 9, 2016	14sss
21 U.S.C. § 843(b)	Unlawful Use of a Communication Facility	October 31, 2016	17sss
21 U.S.C. § 843(b)	Unlawful Use of a Communication Facility	November 14, 2016	18sss
21 U.S.C. §§ 841(a)(1) and (b)(1)(C) and 18 U.S.C. § 2	Dispensing of Oxycodone and Aid and Abet	November 11, 2016	19sss
21 U.S.C. § 848(a), (b) and (c)	Continuing Criminal Enterprise	November 30, 2016	21sss
18 U.S.C. § 1957	Engaging in Monetary Transactions Derived from Specified Unlawful Activity	June 9, 2014	22sss
18 U.S.C. § 1957	Engaging in Monetary Transactions Derived from Specified Unlawful Activity	November 29, 2016	23sss

The defendant is sentenced as provided in pages 4 through 10 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on counts 6sss, 8sss, 16sss, 20sss and is discharged as to such counts.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's USM No: **16483-091**

January 3, 2025
Date of Imposition of Sentence

Alan B. Johnson
Alan B. Johnson
United States District Judge

1/3/2025
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 240 months as to Counts 1sss, 4sss, 5sss, 7sss, 9sss, 10sss, 11sss, 14sss, 19sss, and 21sss; 48 months as to Counts 12sss, 13sss, 17sss and 18sss; and 120 months as to Counts 22sss and 23sss, all to be served concurrently; and 5 years as to Count 2sss, consecutive to all other counts.

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

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at

_____, with a certified copy of this Judgment.

_____
United States Marshal/Bureau of Prisons

By: _____
Authorized Agent

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of
5 years as to Counts 1sss, 2sss, 4sss, 5sss, 7sss, 9sss, 10sss, 11sss, 14sss, 19sss, and 21sss;
3 years as to Counts 22sss and 23sss; and
1 year as to Counts 12sss, 13sss, 17sss, and 18sss, all to be served concurrently.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance and must submit to one drug test within 15 days of release from imprisonment and at least at least two periodic drug tests thereafter, not to exceed ten (10) drug tests per month, for use of controlled substance, but the condition stated in this paragraph may be ameliorated or suspended by the court for any individual defendant if the defendant's presentence report or other reliable information indicates a low risk of future substance abuse by the defendant. **Mandatory drug testing is waived.**

If a fine is imposed and has not been paid upon release to supervised release, the defendant shall adhere to an installment schedule to pay that fine.

The defendant shall (A) make restitution in accordance with 18 U .S.C. §§ 2248, 2259, 2264, 2327, 3663, 3663A, and 3664; and (B) pay the assessment imposed in accordance with 18 U.S.C. § 3013. If there is a court-established payment schedule for making restitution or paying the assessment (see 18 U.S .C. § 3572(d)), the defendant shall adhere to the schedule.

The defendant shall submit to the collection of a DNA sample at the direction of the United States Probation Office if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S .C. § 14135a).

The defendant shall comply with the standard conditions that have been adopted by this Court as defined in the contents of the Standard Conditions page (if included in this judgment). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

1. The defendant shall hold no employment wherein he possesses, has access to, prescribes, or administers medication or controlled substances to another individual.

2. The defendant shall submit his or her person, property, storage facility, house, residence, office, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), or other electronic communications or data storage devices or media, to a search conducted by a United States probation officer at a reasonable time and in a reasonable manner, based

upon reasonable suspicion of contraband or evidence of a violation of a condition. Failure to submit to a search may be grounds for revocation of release. The defendant shall warn any other occupants that the premises may be subject to searches pursuant to this condition.

3. The defendant shall participate in a cognitive-behavioral treatment regimen that may include, but is not limited to, Moral Reconation Therapy, Cognitive Thinking, Thinking for a Change, or Interactive Journaling. The defendant shall actively participate in treatment until successfully discharged or until the U.S. Probation Officer has excused the defendant from the treatment regimen.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall report to the probation office in the federal judicial district where he or she is authorized to reside within 72 hours of the time the defendant was sentenced or released from imprisonment, unless the probation officer instructs the defendant to report to a different probation office or within a different time frame.

2. After initially reporting to the probation office, the defendant will receive instructions from the court or the probation officer about how and when to report to the probation officer, and the defendant shall report to the probation officer as instructed.

3. The defendant shall not knowingly leave the federal judicial district where he or she is authorized to reside without first getting permission from the court or the probation officer.

4. The defendant shall answer truthfully the questions asked by the probation officer.

5. The defendant shall live at a place approved by the probation officer. If the defendant plans to change where he or she lives or anything about his or her living arrangements (such as the people the defendant lives with), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

6. The defendant shall allow the probation officer to visit the defendant at any time at his or her home or elsewhere, and the defendant shall permit the probation officer to take any items prohibited by the conditions of the defendant's supervision that he or she observes in plain view.

7. The defendant shall work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses the defendant from doing so. If the defendant does not have full-time employment he or she shall try to find full-time employment, unless the probation officer excuses the defendant from doing so. If the defendant plans to change where the defendant works or anything about his or her work (such as the position or the job responsibilities), the defendant shall notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, the defendant shall notify the probation officer within 72 hours of becoming aware of a change or expected change.

8. The defendant shall not communicate or interact with someone the defendant knows is engaged in criminal activity. If the defendant knows someone has been convicted of a felony, the defendant shall not knowingly communicate or interact with that person without first getting the permission of the probation officer.

9. If the defendant is arrested or questioned by a law enforcement officer, the defendant shall notify the probation officer within 72 hours.

10. The defendant shall not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person, such as nunchakus or tasers).

11. The defendant shall not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.

12. If the probation officer determines that the defendant poses a risk to another person (including an organization), the probation officer may, after obtaining Court approval, require the defendant to notify the person about the risk and the defendant shall comply with that instruction. The probation officer may contact the person and confirm that the defendant has notified the person about the risk.

13. The defendant shall follow the instructions of the probation officer related to the conditions of supervision.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Restitution	Fine	
All	$1,700.00			
Notes:	($100 per count)	*** see below		

Totals: $1,700.00

The fine and/or restitution includes any costs of incarceration and/or supervision. The fine and/or restitution, which is due immediately, is inclusive of all penalties and interest, if applicable.

The defendant shall pay interest on any fine and/or restitution of more than Two Thousand Five Hundred Dollars ($2,500.00), unless the fine and/or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

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

The interest and penalties not be applied to fine and/or restitution.

*** Restitution is mandatory in this case; however, all previously imposed restitution has been paid in full and there are no additional requests for restitution.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due in full immediately.

IT IS ORDERED the defendant shall pay a special assessment fee in the amount of $1,700.00, which shall be due immediately. Court records indicate the previously imposed special assessments have been paid in full and no additional special assessment fees are applicable.

FILED
2:36 pm, 8/14/24
Margaret Botkins
Clerk of Court

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, v. SHAKEEL A. KAHN, Defendant.	Case No. 17-CR-0029-ABJ

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL

This matter came before the Court on Defendant Shakeel Kahn's Motion for a Judgment of Acquittal or, Alternatively, a New Trial (ECF 1352), the Government's response (ECF 1356), and Defendant's reply (ECF 1363). Having considered the parties' arguments, reviewed the record herein, and being otherwise fully advised, the Court finds the motion should be denied.

INTRODUCTION

Dr. Shakeel Kahn and several others were charged together in this drug conspiracy case, which generally alleged that the defendants and others conspired to unlawfully distribute controlled substances through Dr. Kahn's medical practices in Arizona and Wyoming. (ECF 356.) Dr. Kahn and his brother/codefendant, Nabeel Khan, proceeded to trial in 2019 while the other three codefendants pled guilty to various counts. After 20 days of trial in 2019, a jury found the brothers guilty of multiple charges, primarily conspiring with each other and others to commit federal controlled substances crimes based on the

prescription-writing practices of Dr. Kahn. (ECF 751.)

Based on a jury instruction error concerning the mens rea necessary for Dr. Kahn to knowingly or intentionally write unlawful prescriptions, the Tenth Circuit vacated Dr. Kahn's convictions and remanded the case back to this Court for a new trial. *United States v. Kahn*, 58 F.4th 1308, 1317 (10th Cir. 2023) ("*Kahn II*") ("To convict under the [Controlled Substances Act], 'the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.'") (quoting *Ruan v. United States*, 142 S. Ct. 2370, 2382 (2022)). Based on the Tenth Circuit's reasoning, this Court also vacated Nabeel Khan's convictions and set the brothers together for a joint retrial. (ECF 1094, 1102.) Shortly before the retrial, the Court severed the joint trial and ordered Nabeel Khan to be tried separately at a later time due to his serious chronic medical conditions.[1] (ECF 1229.) Dr. Kahn's retrial commenced as scheduled on November 6, 2023. (*Id.*) After 25 days of trial, the jury found Dr. Kahn guilty on 17 of the 21 charges and acquitted him of the remaining four. (ECF 1311.) His sentencing is pending the outcome of the instant motion.

Dr. Kahn was charged primarily with committing various drug distribution and related offenses in violation of the Controlled Substances Act, 21 U.S.C. § 801, et seq. (ECF 356.) The specific charges on which he was indicted and the jury's verdict at retrial are set forth here, grouped by statutory violation:

Count	Description	Jury Verdict
1	Conspiracy to unlawfully dispense and distribute oxycodone,	Guilty

[1] Nabeel Khan sadly succumbed to his significant medical issues shortly after Dr. Kahn's retrial was completed. (ECF 1324, 1326, 1343.)

	alprazolam, hydromorphone, and carisoprodol via unauthorized prescription, with a resulting-in-death enhancement, in violation of 21 U.S.C. §§ 846, 841(a)(1), (b)(1)(C), and (b)(2)	
2	Possession of firearms in furtherance of a federal drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)	Guilty
4	Unlawful dispensing of oxycodone via unauthorized prescription on or about 9/2/2016 to Paul Beland and Dawn (Cabana) St. George, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Guilty
6	Unlawful dispensing of oxycodone via unauthorized prescription on or about 9/30/2016 to undercover Special Agent Ryan Hieb, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Not Guilty
7	Unlawful dispensing of oxycodone via unauthorized prescription on or about 10/1/2016 to Paul Beland and Dawn (Cabana) St. George, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Guilty
11	Unlawful dispensing of oxycodone via unauthorized prescription on or about 10/7/2016 to Charles Moody, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Guilty
14	Unlawful dispensing of oxycodone via unauthorized prescription on or about 11/5/2016 through 11/9/2016 to Paul Beland, Dawn (Cabana) St. George, and Eric Plikunas, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Guilty
16	Unlawful dispensing of oxycodone via unauthorized prescription on or about 10/28/2016 to undercover Special Agent Ryan Hieb, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Not Guilty
19	Unlawful dispensing of oxycodone via unauthorized prescription on or about 11/11/2016 to David Drndarski, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Guilty
20	Unlawful dispensing of oxycodone via unauthorized prescription on or about 6/7/2016 through 6/9/2016 to Randy Moody and Charles Moody, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C)	Not Guilty
5	Aiding and abetting (via unauthorized prescription) Paul Beland's possession of oxycodone with intent to illegally redistribute on or about 9/2/2016, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2	Guilty
9	Aiding and abetting (via unauthorized prescription) Paul	Guilty

	Beland's possession of oxycodone with intent to illegally redistribute on or about 10/1/2016, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2	
10	Aiding and abetting (via unauthorized prescription) Paul Beland's possession of oxycodone with intent to illegally redistribute on or about 10/2/2016, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 18 U.S.C. § 2	Guilty
8	Unlawful use of a communication facility (telephone) to facilitate the unlawful dispensing or distribution of oxycodone on or about 10/1/2016, in violation of 21 U.S.C. § 843(b)	Not Guilty
12	Unlawful use of a communication facility (telephone) to facilitate the unlawful dispensing or distribution of oxycodone on or about 10/3/2016, in violation of 21 U.S.C. § 843(b)	Guilty
13	Unlawful use of a communication facility (telephone) to facilitate the unlawful dispensing or distribution of oxycodone on or about 10/7/2016, in violation of 21 U.S.C. § 843(b)	Guilty
17	Unlawful use of a communication facility (telephone) to facilitate the unlawful dispensing or distribution of oxycodone on or about 10/31/2016, in violation of 21 U.S.C. § 843(b)	Guilty
18	Unlawful use of a communication facility (telephone) to facilitate the unlawful dispensing or distribution of oxycodone on or about 11/14/2016, in violation of 21 U.S.C. § 843(b)	Guilty
21	Engaging in a continuing criminal enterprise (CCE) in concert with at least 5 others involving the unlawful dispensing or distribution of controlled substances from January 2011 through 11/30/2016, in violation of 21 U.S.C. § 848	Guilty
22	Engaging in a monetary transaction involving criminally-derived property with value greater than $10,000 (money laundering) concerning the wire transfer of $140,849.43 on 6/9/2014, in violation of 18 U.S.C. 1957	Guilty
23	Engaging in a monetary transaction involving criminally-derived property with value greater than $10,000 (money laundering) concerning the deposit or transfer of $13,215.00 on 11/29/2016, in violation of 18 U.S.C. 1957	Guilty

Dr. Kahn now moves for a renewed judgment of acquittal under Federal Rule of Criminal Procedure 29 or a new trial under Federal Rule of Criminal Procedure 33. (ECF 1352.) He asserts a number of trial errors warrant a new trial under Rule 33, and a lack of

evidence demands outright acquittal on all counts or, alternatively, a new trial. The Government opposes all of Dr. Kahn's requested relief.

The Court will examine Dr. Kahn's claim of trial errors warranting a new trial and then turn to his attack on the sufficiency of the evidence.

DISCUSSION PART ONE: ALLEGED TRIAL ERRORS

1. STANDARD OF ADJUDICATION FOR MOTION FOR NEW TRIAL BASED ON TRIAL ERRORS

Rule 33 allows a trial court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). When considering a motion for new trial, "the court may weigh the evidence and consider the credibility of witnesses in determining whether the verdict is contrary to the weight of the evidence such that a miscarriage of justice may have occurred." *United States v. Evans,* 42 F.3d 586, 593 (10th Cir. 1994) (internal quotation marks and citation omitted). Nonetheless, a new trial under Rule 33 "is not regarded with favor and should only be granted with great caution." *United States v. Custodio*, 141 F.3d 965, 966 (10th Cir. 1998) (quoting *United States v. Stevens*, 978 F.2d 565, 570 (10th Cir. 1992)). The Court should grant a Rule 33 motion for new trial "only in exceptional cases in which the evidence preponderates heavily against the verdict." *United States v. Cesareo-Ayala*, 576 F.3d 1120, 1126 (10th Cir. 2009) (quoting *Evans*, 42 F.3d at 593).

2. CONSIDERATION OF DR. KAHN'S ALLEGED TRIAL ERRORS

Dr. Kahn contends five alleged trial errors support his request for a new trial.

2.1 The Government's Expert Testimony Concerning "Authorization" for Prescriptions under the Controlled Substances Act

Most of the offenses involve a violation of 21 U.S.C. § 841 (and most of the other

offenses are dependent upon such violations). Section 841(a) makes it unlawful to knowingly or intentionally distribute or dispense a controlled substance "[e]xcept as authorized by this subchapter." Because Dr. Kahn was a licensed medical doctor and a DEA registrant at the times of the offenses, a primary issue at trial concerned his authorization to dispense the drugs via the challenged prescriptions and his subjective belief as to that authorization. "[A]uthorization plays a 'crucial' role in separating innocent conduct—and, in the case of doctors, socially beneficial conduct—from wrongful conduct." *Ruan v. United States*, 142 S. Ct. 2370, 2377 (2022) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)).

On this topic, the parties differed on how they thought the Court should instruct the jury. Prior to trial, Dr. Kahn proposed tying an "authorized" prescription to a medical purpose, suggesting this instruction:

> Federal law allows for controlled substance prescriptions to be issued by registered practitioners who are acting with what they believe to be a medical purpose. A registered practitioner is not authorized to issue a prescription in order to intentionally further non-medical drug use or drug dealing.

(ECF 1203-1 p. 6.) The Government contended "authorization" should be defined as it was at the first trial, in conformity with 21 C.F.R. § 1306.04, such that a prescription for controlled substances is "authorized" if it is issued for a legitimate medical purpose in the usual course of professional practice. (ECF 1213.) Dr. Kahn objected to using a federal regulation to define "authorization" and suggested it should be defined by incorporating part of Justice Alito's concurring opinion from *Ruan*, and Dr. Kahn continued to voice this

objection before and throughout the retrial.[2] (*See* ECF 1203, 1217, 1279, 1286.)

Prior to retrial, following submissions from the parties, the Court ruled that it would instruct the jury at the retrial on the issue of authorization as it had done at the first trial and in conformity with 21 C.F.R. 1306.04, i.e., that a "prescription is 'authorized' if it is issued for a legitimate medical purpose in the usual course of the provider's professional practice." (ECF 1219 p. 5.)

In reliance on the Court's pretrial order, several of the Government's expert witnesses, including DEA Diversion Investigator Robert Churchwell, Dr. Jed Shay, and Dr. Gina Moore, referenced or incorporated this definition of "authorization" in their testimony during the retrial. For example, DEA Diversion Investigator Churchwell testified that § 1306.04 defined authorization and helped to guide his investigations, and Dr. Kahn's counsel thoroughly cross-examined him about the regulation and whether it has been enacted by Congress. (*See* ECF 1289 pp. 4-24.) And Drs. Shay and Moore opined that Dr. Kahn's challenged prescriptions were not issued for a legitimate medical purpose in the usual course of professional practice. (*See* ECF 1289 pp. 4-24; ECF 1283 p. 9.)

Near the end of the retrial, Dr. Kahn offered the following refined jury instruction on the definition of "authorization":

> Title 21 U.S.C. Section 841(a)(1), which is part of the federal Controlled Substances Act, makes it unlawful for a person to knowingly or intentionally distribute or dispense a controlled substance "except as authorized." To be authorized under the law, a controlled substances prescription must be issued by an individual practitioner acting in the course of professional practice. For purposes of a registered doctor, to act in the course of professional practice means to practice medicine. For a practitioner to "practice medicine," he or she must act for a medical purpose—which means aiming to prevent, cure, or

[2] Dr. Kahn did not object to relying on the federal regulation to define "authorization" at the first trial.

> alleviate the symptoms of a disease or injury—and must believe that the treatment is a medically legitimate means of treating the relevant disease or injury. Conversely, a prescription is not authorized when it is issued for a purpose foreign to medicine, such as facilitating addiction and recreational abuse.

(ECF 1279 p. 1 n.1.) For its part, the Government continued to argue for the definition of authorization given at the first trial and incorporating federal regulation § 1304.06.

The Court held two jury instructions conferences during the retrial. (ECF 1271, 1272, 1300, 1302.) During the second instructions conference, held after the close of all evidence and the day before closing arguments, the Court heard additional argument from counsel about the issue and concluded Dr. Kahn's requested version was preferable because it hewed closer to the statutory language and did not rely on a federal regulation that was never enacted by Congress. Accordingly, over the Government's strenuous objection, the Court incorporated Dr. Kahn's refined proposed instruction, with minor changes, and instructed the jury in Instruction No. 20 in relevant part as follows:

> Title 21 U.S.C. Section 841(a)(1), which is part of the federal Controlled Substances Act, makes it unlawful for a person to knowingly or intentionally distribute or dispense a controlled substance "except as authorized." To be authorized under the law, a controlled substances prescription must be issued by an individual practitioner acting in the course of professional practice. For purposes of a registered practitioner, to act in the course of professional practice means to practice medicine. For a practitioner to practice medicine, he or she must act for a medical purpose—which means aiming to prevent, cure, or alleviate the symptoms of a disease or injury—and must believe that the treatment is a medically legitimate means of treating the relevant disease or injury. Conversely, a prescription is not authorized when it is issued for a purpose foreign to medicine, such as facilitating addiction, recreational abuse, or unlawful distribution.
>
> However, issuing an unauthorized prescription (that is, a prescription not issued for a medical purpose while acting in the course of professional practice) is not, by itself, a crime. A registered practitioner only violates 21 U.S.C. § 841(a)(1) if he or she knowingly or intentionally issues an

> unauthorized prescription **and**, at the time, knew the prescription was unauthorized or intended it to be unauthorized.

(ECF 1310 p. 25 (emphasis in original).)

Dr. Kahn now asserts that while the Court correctly instructed the jury at the end of the trial by finally adopting his proposal, it was too late; the jury had already been poisoned after hearing about 21 C.F.R. § 1306.04 from the Government's experts. He contends:

> The more likely outcome is that the jury was not able to disentangle the testimony incorrectly defining authorization based on the regulation language and, therefore, considered that incorrect standard in its deliberation. A new trial where the correct standard is used from the outset would thus be within the interest of justice.

(ECF 1352 p. 4.) The Government spends an impressive number of pages rearguing that the regulation language is the law applicable to defining "authorization" and the Court erred by deviating from it. (ECF 1356 pp. 3-16.) Consequently, says the Government, its experts did not mislead the jury and the erroneous jury instruction was only to Dr. Kahn's benefit, which would not warrant a new trial.

For two reasons, the Court does not find any miscarriage of justice occurred based on this issue. First, "juries are presumed to follow the court's instructions." *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009). Dr. Kahn speculates that the jury in this case "more likely … was not able to disentangle" the Court's instructions from the testimony, but he offers no evidence in support of this assertion. Prior to opening statements, the Court told the jury that the Court would instruct it concerning the law applicable to each charge and that the jury was required to apply that law to the evidence. (ECF 1310 pp. 8, 11, 16.) Then, between the Government's and Dr. Kahn's opening statements, the Court repeated that it will provide the applicable law and "[i]f there is ever any discrepancy between what an

attorney says is the law and what the Court says, it is the Court's instructions that must control." (ECF 1251.) Following the close of evidence, the Court instructed the jury concerning the applicable law as described above, largely in conformity with Dr. Kahn's requested instruction. (ECF 1310 p. 25.) Finally, both sides fashioned their closing arguments in conformity with the Court's Instruction No. 20. There is simply nothing beyond conjecture to suggest the jury failed to apply the Court's instructions. While the presumption that juries follow the court's instructions is just that—a presumption, the interests of justice do not support granting Dr. Kahn a new trial because there is a complete dearth of evidence that would overcome the presumption. The Court ultimately agreed to instruct the jury as Dr. Kahn desired, and he has no evidentiary leg to stand on in now speculating that the jury likely failed to follow that instruction.

Second, if the Government is correct that the Court erred in instructing the jury in conformity with Dr. Kahn's proposal, the error was to Dr. Kahn's benefit. The competing definitions of "authorization" are very similar to each other, but Dr. Kahn's requested instruction was more lenient to medical practitioners in general and to Dr. Kahn's defense in particular because it condoned a practitioner's subjective intent to "act for a medical purpose—which means aiming to prevent, cure, or alleviate the symptoms of a disease or injury."[3] Dr. Kahn's problem with his defense wasn't jury confusion from the Government's experts nearly as much as it was the evidence undermining his own credibility. *See United States v. Lamy*, 521 F.3d 1257, 1266 (10th Cir. 2008) (whether a witness' improper

[3] Dr. Kahn testified at retrial that he genuinely ascribed to a treatment philosophy of prescribing high dosages of opioids, so long as the side effects remain tolerable to the patient, to alleviate the patient's pain, to improve their quality of life, and to attempt to prevent the painful condition from becoming chronic. (ECF 1299 pp. 32-34, 38-39.)

remark, as asserted here, warrants a new trial is partly dependent on whether the remark "was inconsequential in light of the other evidence of the defendant's guilt"). The Court will discuss the evidence in greater depth below as part of Dr. Kahn's request for a judgment of acquittal. For now, the Court notes the dozens of nearly identical narcotics prescriptions for different patients strongly undercut his testimony of treating each patient individually; patients often received renewed prescriptions with little or no examination or consultation, sometimes even retrieving a prescription from Dr. Kahn's family member in a parking lot or at a vape shop; and the cost for an "office visit" with Dr. Kahn usually varied with the amount of pills prescribed, with patients sometimes paying for half of an "office visit" and receiving a prescription for half their normal number of pills. Even applying Dr. Kahn's preferred instruction, a substantial amount of evidence weakened his assertions that he was genuinely pursuing a medical purpose when writing the challenged prescriptions for high-dose opioids.

If the Court correctly instructed the jury concerning Dr. Kahn's "authorization" under the Controlled Substances Act, there is no evidence suggesting the jury failed to properly apply that instruction. If the Court erred by not relying on 21 C.F.R. § 1306.04 to define "authorization," the error was to Dr. Kahn's favor. Either way, the Court does not find the interest of justice demands the jury's verdict be vacated in favor of a new trial based on this issue.

2.2 Government Counsel's Consultation with Dr. Shay and Dr. Hail During Cross-Examination

In his next claim of error, Dr. Kahn attacks Government counsel's consultation with its expert witnesses, Dr. Jed Shay and Dr. Stacey Hail, during recesses during their

examinations and/or cross-examinations. (ECF 1352 pp. 5-7.)

On the 20th day of trial, the Government called Dr. Stacey Hail as an expert witness. (ECF 1280.) Dr. Hail, an emergency medicine physician and a medical toxicologist, opined that Jessica Burch would not have died but for ingesting the oxycodone prescribed by Dr. Kahn. (ECF 1288 p. 4.) Jessica Burch's death made up the "resulting in death" enhancement of Count One.[4] (ECF 356.) During Dr. Kahn's cross-examination of Dr. Hail, the Court took a mid-morning recess for about 20 minutes. (ECF 1288 p. 39.) Upon returning to the courtroom, outside the presence of the jury, Dr. Kahn's counsel reported he had observed the Government's attorney consult with Dr. Hail during the recess and discuss substantive portions of the cross-examination and the expected upcoming cross-examination, and he asserted such was not allowed. (*Id.* pp. 39-40.) The Government agreed it consulted with Dr. Hail about the substantive content of the cross-examination, but disagreed that such consultation was impermissible. (*Id.* pp. 40-42.) Dr. Kahn's counsel asserted the consultation violated Dr. Kahn's right to effective cross-examination. Upon later discussion and consideration of the matter, Government counsel also agreed it had conferred with expert witness Dr. Jed Shay (a medical doctor board certified in pain medicine) during his testimony earlier in the retrial but could not recall their discussions with any specificity. The Court permitted Dr. Kahn's counsel to inquire into the mid-recess discussions with Dr. Hail, but determined no further corrective action was necessary on this issue during the retrial.

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[4] Unlawfully dispensing or distributing a Schedule I or II controlled substance that results in a death from the use of that substance increases the potential imprisonment from a maximum of 20 years to a minimum of 20 years and a maximum of life imprisonment. 21 U.S.C. § 841(b)(1)(C). Oxycodone is a Schedule II controlled substance.

Dr. Kahn now repeats his argument that he was deprived of his right to effectively cross-examine Drs. Hail and Shay due to the Government's consultations with them. (ECF 1352 pp. 6-7.) He relies on *Perry v. Leeke*, 488 U.S. 272 (1989), to advance this argument. *Perry* does not do the work Dr. Kahn asks of it, though.

The issue in *Perry* was whether the trial court violated the criminal defendant's Sixth Amendment right to counsel by ordering the defendant, who was testifying during trial at the time and who had just completed direct examination and was about to begin cross-examination, that he could not consult with his attorney during a 15-minute afternoon recess. *Id.* at 273-74. Neither party had requested such a restriction. *Id.* at 274. Defense counsel requested a mistrial following the recess, which the trial court denied. *Id.* The U.S. Supreme Court determined there was no violation of the defendant's constitutional right to counsel in the matter because "when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying." *Id.* at 281. "[I]n a short recess in which it is appropriate to presume that nothing but the testimony will be discussed, the testifying defendant does not have a constitutional right to advice." *Id.* at 284. The Supreme Court concluded:

> Our conclusion does not mean that trial judges must forbid consultation between a defendant and his counsel during such brief recesses. As a matter of discretion in individual cases, or of practice for individual judges, or indeed, as a matter of law in some States, it may well be appropriate to permit such consultation. We merely hold that the Federal Constitution does not compel every trial judge to allow the defendant to consult with his lawyer while his testimony is in progress if the judge decides that there is good reason to interrupt the trial for a few minutes.

Id. at 284-85. As this summary demonstrates, *Perry* stands for the proposition that the trial court has the discretion to preclude a testifying witness, including a criminal defendant, from

consulting with counsel during a short recess. Likewise, though, that same discretion does not demand the trial court preclude the testifying witness from consulting with counsel during that short recess.

In Dr. Kahn's case, the Court did not order any witness to refrain from consulting with counsel, and neither party had requested such. Additionally, neither party had requested that witnesses be sequestered under Federal Rule of Evidence 615, nor had the Court ordered sequestration sua sponte. And more specifically, the Court had entered no prophylactic order prior to recessing during the testimony of Drs. Shay and Hail (nor during the testimony of any other witness, including Dr. Kahn who testified for about 2.5 days).

In short, the Court acknowledges it "possesses considerable discretion to make prophylactic orders designed to curb possible trial abuses, 'includ[ing] broad power to sequester witnesses before, during, and after their testimony.'" *United States v. De Jongh*, 937 F.2d 1, 3 (1st Cir. 1991) (quoting *Geders v. United States*, 425 U.S. 80, 87 (1976)). During Dr. Kahn's retrial, the Court exercised its discretion to enter no such prophylactic order on its own, and therefore the Government's consultation with its expert witnesses, even during recesses while subject to cross-examination, did not violate any court order. As the First Circuit has noted, "We are aware of no rule or ethical principle suggesting, in the absence of a court order, that a prosecutor should refrain from conferring with a government witness before the start of cross-examination." *De Jongh*, 937 F.2d at 3; *see also United States v. Campuzano-Benitez*, 910 F.3d 982, 991 (7th Cir. 2018) (it was "squarely within the district court's discretion to allow" a non-party witness to confer with counsel between direct and cross-examination); *United States v. Rossetti*, 768 F.2d 12, 16 (1st Cir. 1985) (no error where

trial court refused to strike testimony of key government witness who met privately with government investigator during trial to shore up witness' anticipated testimony in light of testimony of other witnesses where there was no sequestration order).

The Court denied Dr. Kahn's mid-trial requests to strike Dr. Hail's testimony and to preclude the Government from conducting redirect examination as sanctions for its recess consultation. (ECF 1288 pp. 39-46, 58.) As then, the Court does not now find the Government's recess consultations with Dr. Hail and Dr. Shay violated any court order, any rule, any statute, or the Federal Constitution. Accordingly, the Court does not find the interest of justice demands the jury's verdict be vacated in favor of a new trial based on this issue.

2.3 The Admission of Dr. Stacey Hail's Expert Testimony Regarding Jessica Burch's Seizures

Dr. Stacey Hail, the Government's expert witness concerning the death of Jessica Burch (the subject of the "resulting in death" enhancement in Count One), opined that Ms. Burch's death was due to respiratory depression "consistent with an opioid death" and was caused by "oxycodone intoxication." (ECF 1288 p. 27; Exhibit 7012 p. 11.) She concluded Ms. Burch would not have died but for ingesting the oxycodone prescribed by Dr. Kahn and testified accordingly. (ECF 1288 p. 4; Exhibit 7012 p. 11.)

The medical examiner's report concerning Ms. Burch's death noted it had been reported that she suffered a history of seizures, including multiple seizures just a couple of days before her death. (*Id.* pp. 12, 22; Exhibit 7013.) Dr. Hail testified that, in reaching her expert conclusion, she had determined the report of seizures suggested they were more likely not "real" seizures but instead "pseudoseizures" (a/k/a "psychogenic nonepileptic

seizures"); or, alternatively but less likely, they could have been real seizures caused by benzodiazepine withdrawal. (ECF 1288 p. 73; Exhibit 7012 p. 10.) Dr. Hail also agreed on cross-examination that she was not a neurologist and was "not an expert on seizures." (*Id.* p. 12.)

Dr. Kahn now contends the Court erred by admitting Dr. Hail's testimony about seizures because she lacks sufficient expertise in the area based on "knowledge, skill, experience, training, or education" and her testimony on this subject was only speculation. (ECF 1352 p. 8 (quoting Fed. R. Evid. 702).) The Government responds that Dr. Hail testified that, as an emergency room physician, she frequently treats people suffering from seizures and she adequately explained how she reached her conclusion concerning seizures such that it wasn't based on speculation. (ECF 1356 pp. 26-27.)

The Federal Rules of Evidence contemplate the district court acting in "a gatekeeping role" to ensure a jury hears expert testimony that is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> >
> > (b) the testimony is based on sufficient facts or data;
> >
> > (c) the testimony is the product of reliable principles and methods; and
> >
> > (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. In short, before permitting a jury to assess expert testimony, the Court

functions as a gatekeeper by ensuring the expert is appropriately qualified to opine on the intended subject matter, the proposed testimony is relevant to the issues in the case and helpful to a jury, and the expert's opinion is based on reliable methodology. *See United States v. Nacchio*, 555 F.3d 1234; 1241 (10th Cir. 2009); *United States v. Avitia-Guillen*, 680 F.3d 1253, 1256 (10th Cir. 2012). Expert testimony that does not meet these requirements is not admissible at trial.

The Court denies a new trial on this issue for two reasons. First, Dr. Kahn's Rule 702/*Daubert* objection on this matter is spectacularly tardy. Despite having Dr. Hail's expert report since late 2017 or early 2018, more than five years before the 2023 retrial, and that report containing Dr. Hail's explanation about why she determined Ms. Burch did not die from a seizure (which conformed to her trial testimony), Dr. Kahn never moved under Rule 702/*Daubert* to preclude her testimony about seizures. Nor did he object to Dr. Hail's testimony about seizures or request to strike such testimony at retrial based on the argument he now presents. Instead, waiting until after the second trial, Dr. Kahn says he should get a third trial because the Court apparently failed to sua sponte preclude Dr. Hail's seizure testimony. The Court is particularly unimpressed with Dr. Kahn's timing in this instance given that Dr. Hail testified extensively concerning her conclusion about seizures and pseudoseizures at the first trial (also without objection from Dr. Kahn). (*See* ECF 833 pp. 42-45, 62-63, 86-87.) None of this was unknown or a surprise to Dr. Kahn or his counsel. The appropriate time to raise a Rule 702/*Daubert* objection to Dr. Hail's testimony was certainly prior to the testimony, and preferably prior to trial as ordered by the Court. (*See* ECF 1102 p. 6 (Discovery and Scheduling Order for Dr. Kahn's retrial ordering "all pretrial

motions (including motions in limine and *Daubert* challenges)" to be filed on or before August 18, 2023).) Accordingly, Dr. Kahn forfeited his opportunity to present this argument for the Court's consideration. *See Macsenti v. Becker*, 237 F.3d 1223, 1233-34 (10th Cir. 2001) (holding that a Rule 702/*Daubert* objection raised after the close of all the evidence was untimely and waived).

Second, and alternatively, as the Court must act as the gatekeeper of all expert testimony, it already conducted a silent, sua sponte analysis of Dr. Hail's testimony about seizures at trial and found it met the Rule 702/*Daubert* standard, and the Court continues to so find. Dr. Hail works as a certified emergency medicine physician at the Parkland Hospital Emergency Department, which "has the most emergency room visits of any single hospital in the United States." (Exhibit 7012 p. 1.) She testified she has "considerable experience dealing with people suffering from the immediate issue of a seizure" in her emergency department work. (ECF 1288 p. 12.) Thus, the Court has little reluctance in finding Dr. Hail, through her experience, training, and education, is appropriately qualified to opine on the issue of Ms. Burch's reported seizures. *See United States v. Garcia Abrego*, 141 F.3d 142, 172-73 (5th Cir. 1998) (no error where trial court permitted a physician expert witness to give an expert opinion on Valium dependency and resistance due to the physician's medical education and experience in prescribing Valium, despite the physician previously testifying that he did not consider himself an expert on Valium).

Moreover, Dr. Hail's methodology for ruling out seizures as the likely cause of Ms. Burch's death, and her reasons underlying it, were sufficiently explained and reliable to admit her testimony on the matter. Specifically, she considered the facts as presented to her, based

on both Ms. Burch's medical records and the reports of family members, and applied them to the reported history of seizure in concluding the seizures were most likely either psychogenic (pseudo) seizures or real seizures caused by benzodiazepine (Xanax) withdrawal. (Exhibit 7012 pp. 9-10.) She then found the seizures unlikely to be caused by benzodiazepine withdrawal because Ms. Burch was obtaining prescriptions for Xanax, along with Oxycodone and Soma, every two weeks from Dr. Kahn and had received the most recent prescriptions just three days prior to her death. (Exhibit 7012 pp. 7, 10.) Additionally, in reviewing the only time Ms. Burch had sought medical assistance for a reported seizure, in December 2013, Dr. Hail determined Ms. Burch's conduct was inconsistent with a "real" seizure because patients are very groggy and difficult to arouse after a true epileptic seizure, whereas Ms. Burch was agitated, uncooperative with EMS, and spoke clearly and answered all questions appropriately. (Exhibit 7012 pp. 6, 10.) Dr. Hail's conclusion that Ms. Burch's report of seizures was most likely pseudoseizures and was not the cause of her death is, therefore, sufficiently reasoned and reliable to be considered by the jury. And even if Dr. Hail's reasoning on this issue was suspect (a conclusion the Court does not reach), "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596 (1993). Dr. Hail's testimony concerning Ms. Burch's reported seizures and whether a seizure might be the culprit in her death were appropriately admissible under Rule 702/*Daubert*.

The Court does not find the interest of justice demands the jury's verdict be vacated in favor of a new trial based on this issue.

2.4 The Admission of Deni Antelope's Testimony at Retrial

Deni Antelope was a former patient of Dr. Kahn who testified as a fact witness. The bulk of Ms. Antelope's testimony concerned her own conduct in obtaining controlled substances prescriptions from Dr. Kahn and reselling the drugs on the Wind River Indian Reservation where she lived as well as her acts of "sponsoring" other patients from the reservation to see Dr. Kahn, which she testified meant she would pay for their office visit and receive a portion of the oxycodone they had been prescribed by Dr. Kahn.

Ms. Antelope's testimony from the witness stand was an issue in both trials that both sides struggled with. In the first trial, she regularly froze up and became non-responsive for extended periods of time, particularly during cross-examination. The Government explained that it discussed the issue with her prior to the second trial and encouraged her to be as responsive to the questions as possible during the retrial.

While testifying at the retrial, Ms. Antelope was indeed much more responsive and there were far fewer extended periods of unresponsiveness. However, her testimony and communication style remained difficult to follow. During a recess in her direct examination, Dr. Kahn moved to excuse her as a witness, to preclude her further testimony, and to strike her existing testimony. Dr. Kahn accurately pointed out that Ms. Antelope's testimony alleged Dr. Kahn was seeing her and other patients and writing prescriptions at a time when he could not have been doing so because he had already been arrested in connection with this case and his licenses and registrations had been suspended pending these proceedings. After hearing from both sides, the Court denied Dr. Kahn's request for relief. The Court noted that Ms. Antelope's testimony was certainly unusual and could be difficult to follow

because she seemed to answer most questions by describing chains of events, including verbatim conversations, as she accessed her memories, as if she was working her way, out loud, through the circumstances or events surrounding the eventual answer to the question. While some of her asserted dates were undoubtedly erroneous, the Court had observed Ms. Antelope closely and determined she was genuinely attempting to answer the questions posed to her to the best of her recollection, including those involving her own illegal conduct which she never tried to downplay or deny.

Dr. Kahn now renews his mid-trial objection, asserting Ms. Antelope's testimony was a "rare case in which a witness's testimony is not fit to be heard by a jury …." (ECF 1352 p. 9 (quoting *United States v. Davis*, 772 F.2d 1339, 1344 (7th Cir. 1985).) He contends, "Not only was her testimony confusing, unhelpful to the jury, and unfairly prejudicial to Dr. Kahn, but her inability to testify coherently suggests that she did not have the personal knowledge required to satisfy Federal Rule of Evidence 602." (ECF 1352 p. 9.) The Government agreed Ms. Antelope's "manner of communication was unorthodox," but asserted her testimony was helpful to the jury and the existence of other corroborating evidence shows she had sufficient personal knowledge of the matters to satisfy Rule 602. (ECF 1356 pp. 27-30.)

Rule 602 demands a fact witness' testimony be based on their personal knowledge of the matter, but "[t]his standard is not difficult to meet." *United States v. Walker*, 85 F.4th 973, 780 (10th Cir. 2023) (quoting *United States v. Gutierrez de Lopez*, 761 F.3d 1123, 1132 (10th Cir. 2014)). "A court should exclude testimony for lack of personal knowledge 'only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually

perceived or observed that which he testifies to.'" *Id.* at 980-81 (quoting *Gutierrez de Lopez*, 761 F.3d at 1132). Also referenced by Dr. Kahn concerning this issue, Rule 403 permits the exclusion of even relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Having now heard all of Ms. Antelope's testimony and considered all the evidence produced at the retrial, the Court is even more convinced that Ms. Antelope had sufficient personal knowledge of the matters she testified about. For example, she testified that after a few office visits, Dr. Kahn asked her if she knew anyone else in the area of the reservation who needed pain management, to which she said yes and started referring and "sponsoring" others to go see Dr. Kahn, and even driving some of them to his office. Other evidence corroborated that she physically brought (gave rides to) other patients to Dr. Kahn's office and paid for some or all of their office visits. Shaina Voss, Dr. Kahn's stepdaughter who worked in his Casper medical office for a time as a front desk receptionist, testified immediately following Ms. Antelope and confirmed she had observed Ms. Antelope bring in over 20 people from the reservation and pay for the office visits for most or all those other people.

Further, Ms. Antelope's errors in dates and communication difficulties did not render her testimony so incomprehensible or incredible as to create an unfair trial. Her patent date errors were subject to cross-examination and impeachment through contrary evidence (e.g., that Dr. Kahn did not practice after the charges in this case were filed), and thus ripe for the jury to evaluate. Moreover, the Court finds her timeframe errors of several months after

more than six years is likely innocent misrecollection and goes to the weight of her testimony rather than its admissibility. Her stream-of-thought responses required the jury to pay close attention to her testimony to sift the answers from the memory rehashing, but the Court observed the jury to be doing exactly that during her testimony. Counsel for both sides did an admirable job of working to limit Ms. Antelope's lengthy answers and to break down her narratives into more manageable bites for the jury. In the end, Ms. Antelope provided relevant information for the jury's consideration, and the jury was fully capable of believing all, some, or none of her testimony. The danger of unfair prejudice, confusion, or misleading the jury was not substantially outweighed by the probative value of Ms. Antelope's testimony.

The Court does not find the interest of justice demands the jury's verdict be vacated in favor of a new trial based on this issue.

2.5 Allowing the Government to Ask Leading Questions of Shaina Voss During Redirect Examination

As mentioned, Shaina Voss testified immediately following Deni Antelope at the retrial. Ms. Voss is Dr. Kahn's stepdaughter, and she worked as a front desk receptionist for his Casper medical office for a while. She was called by the Government and appeared under subpoena, testifying that she would have rather not been called to testify in the matter. About halfway through redirect examination of Ms. Voss, Defense Counsel objected to a Government attorney's question as leading. Government Counsel responded by seeking leave to "cross-exam" Ms. Voss, which the Court understood to be a request to treat her as hostile and use leading questions on redirect, which the Court granted.

Dr. Kahn did not object to the Court's ruling at the time. He now contends the

Court erred by allowing the leading questions because Ms. Voss was answering the questions posed to her and not being evasive. (ECF 1352 pp. 9-11.) He says a new trial is thus required.

> Federal Rule of Evidence 611(c) states:
>
> Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily the court should allow the leading questions:
>
> (1) on cross-examination; and
> (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

"The allowance or refusal of leading questions … on redirect examination is within the discretion of the trial court." 98 C.J.S. Witnesses § 569.

There was no error. Ms. Voss' familial relationship to the Defendant as his stepdaughter combined with her statements that she would rather not testify at the trial are enough to classify her as a "witness identified with an adverse party" under Rule 611(c), and thus the Court should "ordinarily" allow leading questions on direct or redirect. Moreover, it was the questions by the Defense on cross-examination that cemented her status as "identified with" the party adverse to the Government. Cross-examination established that Ms. Voss was reluctant to testify or talk to the Government about this case, but her mother (Dr. Kahn's wife and a codefendant in this case) encouraged her to do so for the sake of Dr. and Mrs. Kahn's young child, and it also established that Ms. Voss had asked the Government not to call her as a witness at the original trial and the retrial, but the Government did so anyway over her hesitancy.

Dr. Kahn specifically attacks the Government's leading question about Deni Antelope bringing in more than 20 people from the reservation for office visits with Dr.

Kahn, which Ms. Voss said was "correct." This leading question in particular was appropriate because it directly responded to testimony on cross-examination that suggested Deni Antelope only came into the office with her husband as well, and it cast doubt on Ms. Voss' statement immediately prior suggesting that Deni Antelope only brought in and paid for the visits of her family members. *See United States v. Wiley*, 846 F.2d 150, 156 (2d Cir. 1988) ("Redirect examination may be used to rebut false impressions that arise from cross-examination … and the scope of such an examination [including whether to allow leading questions] is a matter confided to the district court's discretion.") (citations omitted). Dr. Kahn points out Ms. Voss testified at the first trial that Deni Antelope paid for "maybe five or six" other patients, thus contending the Government "provided a false memory" to Ms. Voss through the leading question. (ECF 1352 p. 11.) The Court's decision to allow leading questions for the second half of redirect examination was not erroneous under the rules, and Ms. Voss' discrepancy in testimony between the two trials was fertile ground for inquiry during recross-examination, which the Court permitted (though Defense Counsel did not ask anything more concerning Deni Antelope on recross).

The Court did not abuse its discretion in allowing the Government to ask leading questions of Ms. Voss during the second half of redirect examination, and the interest of justice does not demand the jury's verdict be vacated in favor of a new trial based on this issue.

2.6 Cumulative Error Warranting a New Trial Under Rule 33

Dr. Kahn did not expressly argue the issue of cumulative error in his motion or reply (*see* ECF 1352, 1363), but the Government notes that even the accumulation of harmless

(non-prejudicial) errors can warrant a new trial in the interest of justice. "Any error, including cumulative error, that is sufficient to require reversal on appeal is a proper ground for granting a new trial under Rule 33." *United States v. Medeiros*, 647 F. Supp. 3d 1130, 1168 (D.N.M. 2022), *aff'd*, No. 23-2019, 2023 WL 8752921 (10th Cir. Dec. 19, 2023) (citing *United States v. Walters*, 89 F. Supp. 2d 1206, 1213 (D. Kan. 2000)). However, as detailed above, the Court does not find any trial errors, harmless or otherwise, support Dr. Kahn's request for a new trial. Accordingly, the motion for a new trial based on trial errors will be denied.

DISCUSSION PART TWO: SUFFICIENCY OF THE EVIDENCE

The Court will now turn to Dr. Kahn's sufficiency-of-the-evidence arguments.

1. STANDARD OF ADJUDICATION FOR SUFFICIENCY OF THE EVIDENCE CLAIMS

Dr. Kahn contends the Government presented insufficient evidence to sustain guilty verdicts on the various convictions and, consequently, the Court should enter judgments of acquittal on all counts under Federal Rule of Criminal Procedure 29. Alternatively, argues Dr. Kahn, the evidence "preponderates heavily against" the guilty findings, and therefore a new trial is warranted under Federal Rule of Criminal Procedure 33 based on the relative weakness of the evidence.

Under Rule 29, "the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). To assess the sufficiency of the evidence in support of a charge, the Court must "view the evidence, both direct and circumstantial, in the light most favorable to the government, and without weighing conflicting evidence or considering the credibility of witnesses, determine whether that evidence, if believed, would establish each element of the

crime." *United States v. Fuller*, 751 F.3d 1150, 1153 (10th Cir. 2014) (quoting *United States v. White*, 673 F.2d 299, 301-02 (10th Cir. 1982)); *see United States v. Brown*, 50 F. App'x 970, 976 (10th Cir. 2002) (reversing a district court's judgment of acquittal where the district court "substituted its judgment of the merits of the case for that of the jury, weighted conflicting testimony from Thompson, and questioned Thompson's credibility as a witness"). "A judgment of acquittal is appropriate only if a finding of an element of a crime beyond a reasonable doubt could not have been based on evidence and inferences reasonably drawn from evidence or where the guilty verdict rested only on a series of inferences." *United States v. Garcia*, 74 F.4th 1073, 1117 (10th Cir.), *cert. denied sub nom. Troup v. United States*, 144 S. Ct. 400 (2023), *and cert. denied sub nom. Gallegos v. United States*, 144 S. Ct. 608 (2024).

Rule 33 permits the trial court to "vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). In a recent unpublished decision, the Tenth Circuit explained how a Rule 33 motion for new trial based on a lack of evidence differs from a Rule 29 motion for judgment of acquittal, and that difference also accounts for why the decision on the Rule 29 motion is subject to a de novo review on appeal while the Rule 33 motion decision is reviewed for an abuse of discretion.

> A motion for new trial should be granted if, after weighing the evidence and the credibility of the witnesses, the court determines that the verdict is contrary to the weight of the evidence such that a miscarriage of justice may have occurred." [*United States v.*] *Garcia*, 182 F.3d [1165,] 1170 [(10th Cir. 1999)] (quotations omitted).
>
> A district court may grant a Rule 33 motion even when the conviction is "supported with legally sufficient evidence" if it is "nevertheless against the weight of the evidence." *United States v. Fields*, 516 F.3d 923, 949 n.14 (10th Cir. 2008). Appellate courts seldom assume the role of the factfinder and reweigh the evidence in this situation. *See United States v. Cesareo-Ayala*, 576

> F.3d 1120, 1126 (10th Cir. 2009) (noting that a "district court, which has viewed the trial evidence first-hand, may order a new trial when it perceives that the jury improperly weighed some of that evidence; but it would be a rare case in which an appellate court could make that kind of judgment"). "[T]he trial judge who presided at the trial of the case" and decided "the motion for a new trial[] ha[s] first-hand knowledge of the entire matter and is in a much better position than we, as an appellate court, to judge the merits of the motion." *United States v. Draper*, 762 F.2d 81, 83 (10th Cir. 1985).

United States v. Medeiros, No. 23-2019, 2023 WL 8752921, at *5 (10th Cir. Dec. 19, 2023) (alterations in original). A trial court should grant a Rule 33 motion for new trial based on weakness of the evidence "only in exceptional cases in which the evidence preponderates heavily against the verdict." *United States v. Cesareo-Ayala*, 576 F.3d 1120, 1126 (10th Cir. 2009).[5]

2. BRIEF SUMMARY OF THE EVIDENCE PRODUCED AT RETRIAL

The evidence produced at the six-week retrial established that Dr. Kahn started a general medical practice in Arizona in 2008, shortly after completing a medical residency in Wyoming. Later that year, his brother/codefendant, Nabeel Khan, joined him in Arizona and began helping to manage Dr. Kahn's practice. Nabeel Khan had no medical background, but he checked patients in, took their vitals, and took their payments. Nabeel

[5] The Tenth Circuit has been less than consistent concerning the standard to apply when considering a Rule 33 motion for new trial grounded in a sufficiency-of-the-evidence argument. *Compare United States v. Dewberry*, 790 F.3d 1022, 1028 (10th Cir. 2015) (stating that "[s]ufficiency-of-the-evidence challenges made in a Rule 29 or Rule 33 motion **are adjudicated** and reviewed under the same standard," and applying the Rule 29 standard) (emphasis added), *and United States v. Cordova*, 25 F.4th 817, 824-25 (10th Cir. 2022) (applying the Rule 29 standard to a Rule 33 motion for new trial challenging the sufficiency of the evidence), *with United States v. Medeiros*, No. 23-2019, 2023 WL 8752921, at *5 (10th Cir. Dec. 19, 2023) (unpublished) (applying the more lenient "against the weight of the evidence" standard to a Rule 33 motion for new trial challenging the sufficiency of the evidence). The Court is applying both standards of adjudication in this matter for three reasons: (1) the language of Rule 29 is different from Rule 33, which suggests their standards of adjudication are different; (2) a decision on a Rule 29 motion is reviewed de novo on appeal while a decision on a Rule 33 motion is reviewed on appeal for an abuse of discretion, which also suggests their standards of adjudication should be different; and (3) Dr. Kahn has presented sufficiency-of-the-evidence arguments under both standards, so the Court finds it only fair to consider both.

was also seen to wear a firearm in a holster on his hip occasionally in the office.

After Nabeel's arrival, Dr. Kahn shifted his practice from a general family practice towards pain management, eventually becoming exclusively a pain management practice. He regularly prescribed his pain management patients large doses of controlled substances, primarily oxycodone (an opioid), alprazolam (an anti-anxiety benzodiazepine), and carisoprodol (a muscle relaxant).[6] Dr. Kahn generally scheduled his pain management patients to come into the office every month to receive a prescription for a 30-day supply of pills. The amount of pills prescribed usually aligned closely with what the patients paid for their monthly "office visit," and most "office visits" cost $500 and upwards. For example, if a patient could only afford half the cost of their monthly "office visit," Dr. Kahn would prescribe half the patient's normal number of monthly pills and the patient could return later with the other half of the payment to receive a prescription for the remaining amount of their normal monthly pills. Around the time of becoming a pain management practice, Dr. Kahn also shifted to primarily a "cash-only" business and stopped accepting insurance, though he did accept some payments in personal property, such as firearms and a motorcycle, with Nabeel determining how many "office visits" each item was worth. Dr. Kahn discussed with at least a few patients the "street price" of the oxycodone pills, and Nabeel spoke with at least one patient about a television news report concerning the cost of oxycodone on the street.

In 2013, Nabeel, who had obtained a law degree from a correspondence/online law

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[6] Dr. Gina Moore, the Government's expert witness in pharmacy practice, testified that the combination of an opioid, a benzodiazepine, and a muscle relaxant is known in street lingo as "the trinity" because these drugs are purported to provide a higher euphoric effect when taken together.

school, helped Dr. Kahn draft a "Drug Addiction Statement," which all patients were required to sign thereafter at every visit. Signing the statement meant the patient agreed that Dr. Kahn was not and never has been "a drug dealer," that the patient was not an "addict," and that the patient would be liable to Dr. Kahn for liquidated damages of $100,000 for any civil or criminal action brought against Dr. Kahn resulting from the patient's actions. Dr. Jed Shay, the Government's expert witness on pain management practices and addiction, testified that he had never used or seen anything similar to this statement and it was not an appropriate way to assess a patient for addiction.

After a few years, certain pharmacies in Arizona started refusing to fill narcotics prescriptions issued by Dr. Kahn and reported his prescribing practices to the Arizona medical board. In 2015, Dr. Kahn opened a second pain management practice in Casper, Wyoming, while also continuing to see patients in Arizona. He maintained offices and residences in both states, but began spending more of his time in Wyoming. Nabeel managed the Arizona office while Dr. Kahn's wife/codefendant, Lyn Kahn, a certified nursing assistant (CNA), managed the Casper office.

Dr. Kahn wrote prescriptions for patients in both states and often provided those prescriptions to the patient without actually seeing the patient in an office visit, all the while still collecting the "office visit" fee. For example, Paul Beland was a patient at the Casper office who had moved from Casper to Massachusetts and traveled back to Casper for his monthly appointments. In November 2015, while Beland still lived in Casper, Dr. Kahn told Beland that he would be out of town and unavailable for Beland's scheduled monthly visit. So he instructed Beland to instead go to "Vape World" (a vape shop owned by Dr. Kahn) in

Casper. Dr. Kahn explained that he would give Beland's prescriptions to the vape shop employee, who would collect Beland's $500 payment (for his "office visit") and provide the prescriptions to Beland. (Exhibit 1062.) Beland testified that after he did as instructed and received his two oxycodone prescriptions (one for 180 30-milligram oxycodone pills and the other for 180 15-milligram oxycodone pills) from the vape shop employee, he was surprised because he had not even seen a doctor or been to the doctor's office for that month. Beland also described a time in January 2016 where his "office visit" in Casper involved him paying Lyn Kahn while she handed him his prescriptions in the medical office, with Beland never seeing Dr. Kahn that month.

Similarly, Chris Muehlhausen was a patient of Dr. Kahn's in Arizona. He testified that starting in late 2015 and into 2016 (after Dr. Kahn had moved to Wyoming), his "office visits" often consisted of him paying Nabeel at the front desk window in the Arizona office and having Nabeel hand him his prescriptions, with Muehlhausen never seeing a doctor, not being examined, and not having his vitals taken. Multiple communications (emails and text messages) between Muehlhausen and Dr. Kahn indicate Dr. Kahn had prewritten Muehlhausen's prescriptions even before Muehlhausen had sought to make an appointment. (*See, e.g.*, Exhibit 1072 p. 2 (Dr. Kahn responding to Muehlhausen's request for an appointment with, "Let me talk to my bro & let you know in a bit. He has your scripts in AZ.").) Muehlhausen also described an incident where he received his prescriptions in the parking lot of the Arizona medical office from David and Stacy Drndarski (Stacy Drndarski worked as a front desk receptionist for Dr. Kahn in the Arizona office for a time). (*See* Exhibit 1070.) For most or all of Muehlhausen's "office visits" where he never saw a

doctor, a falsified record was entered into Muehlhausen's patient file suggesting he had seen Dr. Kahn and had undergone a physical examination that included having his weight, temperature, pulse, and blood pressure taken. (*Compare* Exhibit 1074 (April 3, 2016 messages between Dr. Kahn and Muehlhausen where Dr. Kahn says he will be out of Arizona until April 7, 2016, and Muehlhausen could pick up his prescriptions from Nabeel on April 5, 2016) *with* Exhibit 3020 p. 316 (handwritten progress note, signed by Dr. Kahn, reflecting an alleged April 5, 2016 office visit for Muehlhausen where his weight, temperature, blood pressure, oxygen saturation, and BMI were purportedly recorded).)

For some patients (with their agreement or at their request), Dr. Kahn started scheduling them for office visits about every two weeks rather than every month, and thus doubling their monthly prescriptions. For example, on May 25, 2015, Dr. Kahn wrote prescriptions for Muehlhausen for 240 oxycodone-30mg and 180 oxycodone-15mg (among others), and then he wrote prescriptions for Muehlhausen for the same drugs, dosages, and quantities on June 8, 2015. (Exhibit 3020 pp. 163, 170.) For each of these "office visits," Dr. Kahn charged Muehlhausen $1,650. (Exhibit 6146 pp. 35, 37.) Thus, in the Summer of 2015, Muehlhausen was receiving prescriptions for 480 30-milligram oxycodone pills and 360 15-milligram oxycodone pills every month, and he was paying $3,300 per month to Dr. Kahn.

The more controlled substances a patient was prescribed, the more money Dr. Kahn charged them. At trial, Dr. Kahn testified that he charged a patient more money when they received more oxycodone because they then required more monitoring to ensure they were not abusing or diverting the controlled substances. Several patients testified to the opposite,

though, stating that as Dr. Kahn had more "office visits" with the patient, he actually spent less time with them and they were subjected to little monitoring or scrutiny, with an astounding number of those "office visits" not actually occurring (more examples of which will be discussed below).

Dr. Jed Shay, the Government's expert witness on pain management practices and addiction, reviewed 22 of Dr. Kahn's patient files to evaluate his prescribing practices. He opined at trial that many of the prescriptions Dr. Kahn wrote were outside the usual course of professional practice and not for a legitimate medical purpose. Among the various reasons Dr. Shay gave for his opinion included that Dr. Kahn (1) started many patients on high-dose narcotics who were potentially opioid-naïve, (2) adjusted the price of an "office visit" depending on the quantity and dosages of narcotics being prescribed, (3) wrote a prescription for half the normal quantity of pills if a patient could only afford half of an "office visit" fee (4) usually wrote two immediate release prescriptions for oxycodone (e.g., 30-milligram and 15-milligram) for reports of chronic pain rather one extended release and one immediate release, (5) doubled the amount of narcotics for some patients by increasing their monthly visits to every two weeks, (6) increased narcotic dosages and/or quantities with no justification except that the patient asked for it, and (7) either did not regularly monitor patients through drug screens and similar means or did not pay attention to the results of any monitoring that was done.

The specific patients discussed above are only examples, and similar refrains were repeated throughout the six-week retrial. The Court will not rehash the entirety of the trial evidence and testimony here, but suffice it to say that it painted a vivid picture of Dr. Kahn

selling prescriptions for controlled substances, primarily cookie-cutter prescriptions for oxycodone, rather than providing individualized medical care to his patients. Generally, he identified the charges as being for "office visits," but even that wasn't always the case. (*See* Exhibit 1067 (Dr. Kahn email to Paul Beland stating that Beland still owed Dr. Kahn "$300 for the emergency Methadone script").) Against this generalized backdrop, the Court turns to Dr. Kahn's specific sufficiency-of-the-evidence arguments.

3. CONSIDERATION OF THE SUFFICIENCY OF THE EVIDENCE

Dr. Kahn contends all his convictions are unsupported by sufficient evidence, and he understandably begins by attacking his conviction on one of the more punitive charges.

3.1 Continuing Criminal Enterprise (Count 21)

Dr. Kahn starts by challenging his conviction in Count Twenty-One for engaging in a continuing criminal enterprise (CCE). (ECF 1352 pp. 11-16; ECF 1363 pp. 13-18.) A person is guilty of engaging in a CCE if:

> (1) he violates any provision of [the federal controlled substances laws] the punishment for which is a felony, and
> (2) such violation is a part of a continuing series of violations of [the federal controlled substances laws]—
> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
> (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c). The five elements of the CCE charge are:

> (1) Defendant Shakeel Kahn violated the federal Controlled Substances Act as charged in Counts One, Four through Fourteen, and Sixteen through Twenty of the indictment;
> (2) Such violations were part of a continuing series of violations of the federal Controlled Substances Act. These violations must be

> connected together as a series of related or ongoing activities, as distinguished from isolated and disconnected acts. You must unanimously agree on which of at least three of these underlying violations has been proved;
>
> (3) Defendant Shakeel Kahn committed these violations in concert (or by common design or plan) with five or more other persons, each of whom knew that the prescriptions were unauthorized under the law. The five other persons need not have acted at the same time or in concert with each other. You need not unanimously agree on the identity of any other persons acting in concert with the Defendant, so long as each of you finds that there were in fact five or more other persons;
>
> (4) Defendant Shakeel Kahn was an organizer, supervisor, or manager of those five or more other persons; and
>
> (5) Defendant Shakeel Kahn obtained substantial income or resources from the series of violations.

(ECF 1310 pp. 63-64.)

Dr. Kahn contends the evidence at trial failed to prove the third and fourth elements of this charge—that he committed drug violations in concert with at least five others and that he was an organizer, supervisor, or manager of the others. (ECF 1352 p. 13.) He also asserts the CCE statute was never intended to apply to DEA registrants like himself. (*Id.* pp. 15-16.)

Taking the last point first, this argument doesn't get off the ground. The CCE statute, 21 U.S.C. § 848, punishes "[a]ny person who engages in a continuing criminal enterprise." A DEA registrant is included within the category of "any person," and nothing in the statute suggests otherwise. *Cf. United States v. Moore*, 423 U.S. 122, 131 (1975) (holding that 21 U.S.C. § 841 reaches "any person" by its plain language and does not exempt registrants). Section 848 does not exempt physicians or any other DEA registrant, as Congress could have done if it so desired. And Dr. Kahn is certainly not the first DEA registrant to be convicted of engaging in a CCE in violation of § 848. *E.g., United States v.*

Fuchs, 467 F.3d 889 (5th Cir. 2006). Accordingly, Dr. Kahn is not exempted from prosecution under 21 U.S.C. § 848 because of his status as a physician or DEA registrant.

The Government presented sufficient evidence to prove Dr. Kahn committed federal drug violations in concert with at least five other people and was an organizer, supervisor, or manager of those people. Dr. Kahn was the central component because it was his medical license and DEA registrations that were required to divert the controlled substances (primarily oxycodone) to non-medical purposes through unauthorized prescriptions.

As recounted already, Dr. Kahn employed his brother/codefendant, Nabeel Khan, to help manage his medical office in Fort Mohave, Arizona. Dr. Kahn and Nabeel both set the prices for "office visits" based on the prescriptions for the patient. (*See* Exhibit 1099.) And they drafted the "Drug Addiction Statement" each patient was required to sign affirming that Dr. Kahn was not a "drug dealer." When patients asked about prices or price reductions for their "office visits," Dr. Kahn would direct them to Nabeel as the "boogeyman" or price enforcer.[7] Dr. Kahn instructed Nabeel to provide certain patients, such as Muehlhausen, with their prescriptions and collect their payment when Dr. Kahn was not in town for their "office visit." Nabeel understood, at a minimum, that these patients were buying prescriptions for very high doses of narcotics from Dr. Kahn in exchange for money (or other items of value such as firearms and a motorcycle) rather than receiving individualized medical care, and he assisted Dr. Kahn in that endeavor by delivering those prescriptions and collecting their money in situations unconnected with medical care.

[7] In 2015, a few years after moving to Arizona, Nabeel had a partial foot amputation due to his diabetes, which caused him severe pain. Whether before or after his partial foot amputation, Nabeel was a large man who often carried a firearm in a holster around the office.

Nabeel even discussed the street price of the narcotics with at least one patient in reference to a television program he had watched. Thus, Dr. Kahn and Nabeel acted in concert, with Dr. Kahn as the primary manager, to commit federal drug violations by selling unauthorized prescriptions for controlled substances (prescriptions not issued for a medical purpose in the course of professional practice) in exchange for money.

Dr. Kahn employed his wife/codefendant, Lyn Kahn, to help manage his medical office in Casper, Wyoming. Mrs. Kahn pled guilty to conspiring with Dr. Kahn and others to commit the illegal diversion of prescription drugs. Specifically, she admitted under oath that Dr. Kahn wrote narcotics prescriptions in the name of Shaina Voss, Lyn Kahn's daughter, which were obtained from the pharmacy by Mrs. Kahn or Ms. Voss and then provided to Dr. Kahn so that he could give the narcotics to his brother, Nabeel, after his partial foot amputation. (ECF 714 pp. 23-25.) And the trial evidence established her role as the Casper office manager was similar to Nabeel's role in Arizona in that Dr. Kahn would write prescriptions for patients and direct Mrs. Kahn to provide the patient, such as Paul Beland, with the prescriptions and take their payment when Dr. Kahn was not available for an "office visit." Mrs. Kahn understood, at a minimum, that these patients were buying prescriptions for very high doses of narcotics from Dr. Kahn in exchange for money rather than receiving individualized medical care, and she assisted Dr. Kahn in that endeavor by delivering those prescriptions and collecting their money in situations unconnected with medical care. For example, Mrs. Kahn helped Dr. Kahn fill the Drndarskis prescriptions and mail them to the Drndarskis in Arizona without any office visit or medical assessment having occurred. Moreover, the trial evidence also established that when Dr. Kahn's

prescribing practices were under investigation by the Arizona Medical Board, Dr. Kahn and Mrs. Kahn added false information to pad patient files to make it look like the patients had received medical care and monitoring that was never done. Thus, Dr. Kahn and Lyn Kahn acted in concert, with Dr. Kahn as the primary manager, to commit federal drug violations by diverting controlled substances in an unlawful manner and by selling unauthorized prescriptions for controlled substances (prescriptions not issued for a medical purpose in the course of professional practice) in exchange for money.

David and Stacy Drndarski were also individuals who Dr. Kahn acted in concert with and managed. The Drndarskis started out as pain management patients. In Summer 2012, Dr. Kahn employed Stacy Drndarski as a front desk receptionist in his Arizona medical office, where she worked with Nabeel and Dr. Kahn. She testified that if a patient didn't have enough money for the full cost of the appointment, Dr. Kahn would only write them a partial month's worth of their medication. Then he would write another prescription for the remainder of the medication and leave it with Ms. Drndarski at the front desk, and he directed that she could provide the remainder prescription to the patient if the patient came back in and paid the balance of the charge. At some point, Dr. Kahn and Nabeel stated to Ms. Drndarski while she worked there that they had seen a television program that reported oxycodone pills were selling for one dollar per milligram. She also observed Chris Muehlhausen "sponsoring" at least two other patients, Anthony Vargas and Jessica Burch, by bringing them to Dr. Kahn's office and paying for their appointments. She testified Muehlhausen would occasionally pay for Vargas and Burch's appointments when Vargas and Burch weren't even there, Nabeel would provide all three patient charts to Dr. Kahn, and

Dr. Kahn would give all three patients' prescriptions to Muehlhausen after talking to him. (*See* Exhibit 1092 (Dr. Kahn confirming to Muehlhausen that Muehlhausen would receive his and Vargas' prescriptions from Nabeel after Muehlhausen informed Dr. Kahn that Vargas could not attend his appointment).) And on at least one occasion, the Drndarskis provided prescriptions written by Dr. Kahn to Muehlhausen in the parking lot of the Arizona clinic and collected his "office visit" payment; indeed, Muehlhausen testified that it was David Drndarski that handed him his prescriptions and took his money while Stacy Drndarski waited in the vehicle. The Drndarskis understood, at a minimum, that Muehlhausen was buying prescriptions for very high doses of narcotics from Dr. Kahn in exchange for money rather than receiving individualized medical care, and the Drndarskis assisted Dr. Kahn in that endeavor by delivering those prescriptions and collecting Muehlhausen's money in at least one situation unconnected with medical care. Thus, Dr. Kahn and the Drndarskis acted in concert, with Dr. Kahn as the primary manager, to commit federal drug violations by selling unauthorized prescriptions for controlled substances (prescriptions not issued for a medical purpose in the course of professional practice) in exchange for money.

Dr. Kahn acted in concert with and managed Christopher Muehlhausen to extend his unlawful prescriptions-for-money practice. Dr. Kahn confronted Muehlhausen about selling the pills, asserting he knew they sell for $20 on the street, and Muehlhausen responded by stating that's not the price they go for around Fort Mohave, Arizona, and that they only sell for $15 in that area. And as noted earlier, Dr. Kahn pre-wrote prescriptions for Muehlhausen and left those prescriptions with Nabeel to later give to Muehlhausen in

exchange for Muehlhausen's payment, and Dr. Kahn then entered a record into Muehlhausen's file suggesting an office visit had occurred that included his vitals being recorded.[8] Dr. Kahn also knew Muehlhausen was bringing new patients to his office to obtain narcotics prescriptions, and Dr. Kahn even set the prices for those new patients' "office visits" through Muehlhausen rather than with the new patient and without having even seen the new patient to assess their medical care needs. (Exhibit 1093 (Muehlhausen telling Dr. Kahn he will bring along a friend to see Dr. Kahn during Muehlhausen's appointment, with Dr. Kahn telling Muehlhausen that it will cost the new patient a $2,100 new patient fee and $1,700 thereafter, and Muehlhausen responding that he thought it was still $1,600 for a new patient's first visit and $1,200 thereafter); Exhibit 1097.) Dr. Kahn even directed Muehlhausen to pick up Anthony Vargas' prescriptions from the Arizona office. (Exhibit 1089.) Muehlhausen understood, at a minimum, that Dr. Kahn was selling prescriptions for very high doses of narcotics in exchange for money rather than providing individualized medical care to patients, and he assisted Dr. Kahn in that endeavor by arranging with Dr. Kahn to bring others to purchase similar narcotics prescriptions at prices that were set without connection to the patients' actual needs. Thus, Dr. Kahn and Chris Muehlhausen acted in concert, with Dr. Kahn as the primary manager, to commit federal

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[8] *Compare* Exhibit 1070 (Dr. Kahn arranged for the Drndarskis to provide Muehlhausen his prescriptions and collect his money in the parking lot of the Arizona clinic on December 17, 2015), *with* Exhibit 3020 p. 269 (Dr. Kahn's progress note indicating an alleged office visit with Muehlhausen on December 15, 2015, where Muehlhausen's vitals temperature, pulse, blood pressure, and oxygen saturation were purportedly measured); *compare* Exhibit 1071 (Dr. Kahn informing Muehlhausen on January 3, 2016, that Dr. Kahn would not be back in Arizona until January 16th and noting that Nabeel "has scripts for you"), *with* Exhibit 3020 p. 274 (Dr. Kahn's progress note indicating an alleged office visit with Muehlhausen in Arizona on January 4, 2016, again with purported vitals recorded); *compare* Exhibit 1075 (Dr. Kahn reporting he is in Wyoming and arranging for Muehlhausen to collect his prescriptions from Nabeel, who already has them, on Monday, July 4, 2016), *with* Exhibit 3020 p. 353 (Dr. Kahn's progress note indicating an alleged office visit with Muehlhausen in Arizona on July 4, 2016, again with purported vitals recorded).

drug violations by selling unauthorized prescriptions for controlled substances (prescriptions not issued for a medical purpose in the course of professional practice) in exchange for money.

Similar to Muehlhausen, Dr. Kahn acted in concert with and managed Paul Beland to extend his unlawful prescriptions-for-money practice. Paul Beland was a patient at Dr. Kahn's Casper office. The trial evidence and testimony established that at Beland's first appointment on October 14, 2015, he received prescriptions for 120 30-milligram oxycodone pills and 180 15-milligram oxycodone pills. (Exhibit 3002 p. 16.) He received 180 of each the next month (*id.*), which was when Beland picked up his prescriptions from Dr. Kahn's vape shop and never saw Dr. Kahn that month. Via text message exchange, Dr. Kahn instructed Beland to collect his prescriptions from the vape shop, and Beland responded that he wanted a "minimum" of 180 of each oxycodone strength (i.e., 60 more 30-milligram pills) (Exhibit 1062 p. 4), which Dr. Kahn provided (despite having no office visit with or examination of Beland that month). Like Lyn Kahn, Beland was a codefendant in this case who pled guilty to conspiring with Dr. Kahn and others to commit the illegal diversion of prescription drugs. Beland's conspiracy with Dr. Kahn is perhaps best shown by a recorded phone conversation between the two. Beland "recruited" his wife, Dawn Marie (Cabana) St. George, and other patients to see Dr. Kahn to obtain narcotics prescriptions. For at least one of Beland's "recruits," Eric Plikunas, Dr. Kahn and Beland talked on the phone and coordinated which prescriptions for oxycodone the new patient would receive at his first visit (with Dr. Kahn having never met the patient, having never examined the patient, or even knowing the patient's name). During this recorded phone call

on October 31, 2016, Dr. Kahn suggested "the new guy" should be prescribed "[a] little bit less" than what Beland was then receiving "because of the way things are right now," and Beland agreed, noting that he told the new patient he would start out at "120, 120" (120 30-milligram oxycodone pills and 120 lower-dosage oxycodone pills)[9] and then the new patient could move up to "180, 180" thereafter. (Exhibit 1040-B p. 9.) Later in the same conversation, Beland informed Dr. Kahn that he had just filled his prescriptions when he had recently been arrested and taken to jail, and so he had to start taking the pills as prescribed while at jail to avoid having them confiscated, and, despite how the prescribed number of pills "would kill a goddam elephant" according to Beland, he couldn't risk his pills being confiscated because he needed his money and "can't donate them." (*Id.* p. 10.) And still in the same phone call, Beland asked Dr. Kahn to prescribe 120 Xanax (a benzodiazepine) for his wife, and Dr. Kahn agreed to do it only on a one-time basis because the "shit is getting hot" with the FDA scrutinizing Xanax and narcotics more closely, and Beland offered to pay extra money for the "extra prescription" to which Dr. Kahn agreed. (*Id.* pp. 12-13.) And as noted herein previously, Dr. Kahn emailed Beland informing Beland that he still owed "$300 for the emergency Methadone script." (Exhibit 1067.) In short, Dr. Kahn's behavior in relation to Beland was quintessential drug dealing and conspiracy to commit drug crimes. Beland understood, at a minimum, that Dr. Kahn was selling prescriptions for very high doses of narcotics in exchange for money rather than providing individualized medical care to patients, and he assisted Dr. Kahn in that endeavor by arranging with Dr. Kahn to bring others to purchase similar narcotics prescriptions at prices

[9] Five days after this phone call, the new patient, Eric Plikunas, indeed received prescriptions for 120 30-milligram oxycodone pills and 120 20 milligram-oxycodone pills. (Exhibit 4070-A; Exhibit 3039.)

that were set without connection to the patients' actual needs and at dosages that were largely set by Beland. Thus, Dr. Kahn and Paul Beland acted in concert, with Dr. Kahn as the primary manager, to commit federal drug violations by selling unauthorized prescriptions for controlled substances (prescriptions not issued for a medical purpose in the course of professional practice) in exchange for money.

Dr. Kahn also acted in concert with and managed Deni Antelope to extend his unlawful prescriptions-for-money practice. After a few visits with Antelope, Dr. Kahn asked her about the street price of oxycodone in the area of the Wind River Indian Reservation, and after Dr. Kahn told her it was okay and she could relax, and after her husband (who was also seeing Dr. Kahn as a patient) entered the exam room, Antelope and her husband told Dr. Kahn they were selling the oxycodone pills for one dollar per milligram. Dr. Kahn then asked them if they knew more people in the reservation area who wanted help with their pain, which they confirmed, and Dr. Kahn told Antelope and her husband to bring others to his office. Dr. Kahn also told Antelope and her husband that the new patients should already have prescriptions for pain medications and should bring their records with them. Antelope began referring several people to Dr. Kahn by making an appointment for them and going with them to their initial appointment, where each new patient received prescriptions for 120 30-milligram oxycodone pills and 120 15-milligram oxycodone pills, and their office visit fee was $500. For that initial visit, Antelope would pay Dr. Kahn's fee and for the trip expenses, and in exchange Antelope would get 90 of each pill while the new patient received the remaining 30 of each. Dr. Kahn knew that Antelope was bringing in these new patients and paying at least their initial fee of $500. Antelope also learned from

her sister that, upon request, Dr. Kahn would prescribe more oxycodone 30-milligram pills for a higher fee, so Antelope requested the same increase at her next appointment, and Dr. Kahn agreed to increase her to 150 30-milligram oxycodone pills with an increased "office visit" fee, which Antelope agreed to pay. As a further example of Antelope's work in concert with Dr. Kahn's prescriptions-for-money practice, Lyn Kahn called Antelope complaining that a third person, Rodney Willow, had received a prescription and not paid Dr. Kahn for it, and Mrs. Kahn asked Antelope to talk to Rodney Willow about it to tell him he needed to pay his debt. To say the least, a doctor's office talking to one patient about another patient's prescription and debt as part of debt collection efforts is inappropriate and underscores the cooperation between Antelope and the Kahns. Antelope understood, at a minimum, that Dr. Kahn was selling prescriptions for very high doses of narcotics in exchange for money rather than providing individualized medical care to patients, and she assisted Dr. Kahn in that endeavor by arranging with Dr. Kahn to bring others to purchase similar narcotics prescriptions at prices that were set without connection to the patients' actual needs, with Antelope usually paying those fees and often even attending the patient's examination. Thus, Dr. Kahn and Deni Antelope acted in concert, with Dr. Kahn as the primary manager, to commit federal drug violations by selling unauthorized prescriptions for controlled substances (prescriptions not issued for a medical purpose in the course of professional practice) in exchange for money.

The Court has here reviewed and found at least six others (Nabeel Khan, Lyn Kahn, the Drndarskis, Chris Muehlhausen, Paul Beland, and Deni Antelope) who Dr. Kahn acted in concert with and managed or directed to commit federal drug crimes as part of his

prescriptions-for-sale practice, but a case could be argued for others as well (such as Jessica Burch, to whom Dr. Kahn provided Anthony Vargas' prescriptions while Vargas was in jail, or Shawna Thacker, to whom Dr. Kahn stated he knew she was selling her pills and later filled her prescriptions in Wyoming and mailed them to her in Arizona and received money wires in exchange with no office visit). For purposes of considering the request for a new trial under Rule 33, the Court found the testimony summarized or described here to be credible and supported by the documentary evidence.

The trial evidence established that Dr. Kahn issued unauthorized prescriptions for controlled substances that he knew to be unauthorized at the time, and his coconspirators also knew were unauthorized at the time. The definition of "authorization" pursued by Dr. Kahn and accepted by the Court described an authorized prescription as one issued for a medical purpose—meaning to prevent, cure, or alleviate the symptoms of a disease or injury—and not "for a purpose foreign to medicine, such as facilitating addiction, recreational abuse, or unlawful distribution." (Jury Instruction No. 20, ECF 1310 p. 25.) As already discussed, Dr. Kahn wrote numerous cookie-cutter narcotics prescriptions that did not take into account the patient's true medical needs, and many of those did not actually involve an "office visit" despite Dr. Kahn's fabrication of such a record. These narcotics prescriptions provided so many pills (often providing for hundreds of 30-milligram oxycodone pills per month for a single patient) that it was obvious at least some of those pills were headed toward facilitating addiction, recreational abuse, or otherwise unlawful redistribution. And Dr. Kahn knew it. He increased dosages by a huge amount without counseling the patient on associated dangers (for example, doubling Muehlhausen's

prescriptions by writing his formerly monthly prescriptions every two weeks); he discussed the street prices of oxycodone with some patients and talked to others about how he knew they were selling their pills; and the prescriptions had little to do with the patient's medical needs (for example, setting oxycodone dosages and quantities with Beland concerning other patients). Additionally, the Government provided a good review of the several times Dr. Kahn was counseled by others about his opioid-prescribing practices, including his own responses to the Arizona Medical Board wherein he claimed he knew about ***and followed*** the guidelines of the American Academy of Pain Management (AAPM), the Veterans Administration/Department of Defense (VA/DOD), and the American Society of Interventional Pain Physicians (ASIPP), but he testified at trial that he disagreed with these guidelines and deviated from them substantially. (*See* ECF 1356 pp. 40-44.) To be sure, Dr. Kahn testified extensively at trial that he provided these high-dose narcotics prescriptions in a legitimate attempt to alleviate his patient's symptoms of pain, but to the extent the Court must weigh the evidence and credibility as part of its Rule 33 review, the Court finds Dr. Kahn's testimony incredulous in the face of the mountain of contrary evidence. Dr. Kahn's own statements made prior to facing federal charges, captured via wiretap or search warrant, are his undoing. He expressly sold Beland a methadone prescription, agreed with Beland over the phone to prescribe Xanax to Dawn (Cabana) St. George for an additional fee, and told Beland he did not want to start the new patient (Eric Plikunas), who Dr. Kahn had never met, on the same dosages and quantities that Beland was receiving and agreed the new patient could start with "120, 120." He wrote a number of very high-dose narcotics prescriptions for Muehlhausen and others (including Anthony Vargas) in Arizona while

knowing that they were not receiving any medical care or consultation when they simply picked up their prescriptions from Nabeel and paid the "office visit" fees, the amounts of which were obviously based on the quantity and dosages of pills and not on any actual office visit or medical consultation. Dr. Kahn wrote multitudinous prescriptions that were for feeding addiction, recreational abuse, or otherwise unlawful redistribution rather than for a medical purpose, and his own words and conduct along with the surrounding circumstantial evidence convincingly establishes that he knew those prescriptions were not authorized under the law.

His coconspirators knew it too. Nabeel knew the pre-written prescriptions for high-dose opioids that he was handing out to patients through the window at the Arizona office while collecting their payments were not connected to any timely medical consultation; he also helped Dr. Kahn set the prices that tracked the amounts of narcotics prescribed; and he helped draft the "Drug Addiction Statement" that warned patients not to call Dr. Kahn a drug dealer. Mrs. Kahn had worked at a legitimate medical clinic before working for Dr. Kahn; she knew handing pre-written prescriptions for high-dose opioids to patients (such as Beland) at the Casper office unconnected to any concurrent medical consultation was not the practice of medicine, just like she knew that filling the Drndarskis' prescriptions and mailing the pills to Arizona was not responsive to their actual medical needs. Stacy Drndarski knew that when Muehlhausen was obtaining prescriptions for other patients who were not present that it was unconnected with legitimate medical care, and the Drndarskis knew when they handed Muehlhausen his prescriptions in a parking lot while collecting his money that it was not part of a medical purpose resulting from an actual medical

consultation. Muehlhausen knew when Dr. Kahn informed him of the prices for a new patient's narcotics prescriptions and Dr. Kahn had not yet even met the patient that those prescriptions were not based on any attempt to alleviate symptoms of pain or injury. Beland knew when Dr. Kahn and he agreed to what the dosages and quantities of a new patient's narcotics prescriptions would be over the phone prior to Dr. Kahn ever meeting the new patient that those prescriptions lacked a medically legitimate means of treating a relevant disease or injury. And Antelope knew when she was bringing new patient after new patient to Dr. Kahn's practice while paying the same $500 fee so that each new patient would receive the same 120/120 prescriptions that those prescriptions were to feed addiction, recreational abuse, or other unlawful redistribution.

The Court has recounted only a fraction of the evidence and testimony presented at the six-week trial, but suffice it to say that sufficient evidence supports the jury's finding of guilt on the charge of engaging in a continuing criminal enterprise in Count Twenty-One. The Court therefore will not enter a judgment of acquittal under Rule 29 on this count. Moreover, even after weighing the evidence and judging the credibility of the witnesses, the Court does not find that the evidence as a whole preponderates heavily against the verdict of guilt. Therefore, the Court will not grant a new trial under Rule 33 on Count Twenty-One.

3.2 Drug Conspiracy and Resulting-in-Death Enhancement (Count 1)

Dr. Kahn next challenges his conviction for engaging in a drug conspiracy in Count One and its sentencing enhancement for resulting in the death of Jessica Burch. (ECF 1352 pp. 16-21.) Federal law makes it unlawful to conspire to distribute or dispense controlled

substances except as authorized. 21 U.S.C. §§ 846, 841(a). For this charge, the Government had to prove:

(1) Dr. Kahn agreed with one or more others to distribute or dispense controlled substances without authorization while knowing or intending it to be unauthorized;
(2) Dr. Kahn knew the essential objectives of the conspiracy;
(3) Dr. Kahn knowingly and voluntarily involved himself in the conspiracy; and
(4) There was interdependence among the members of the conspiracy.

(ECF 1310 p. 33.)

As the Court already discussed in relation to the continuing-criminal-enterprise charge, Dr. Kahn's willing participation in distributing or dispensing oxycodone and other drugs outside his authorization (i.e., without a medical purpose) while knowing or intending the distributing or dispensing to be unauthorized was well established by the trial evidence. Dr. Kahn also knew the essential objectives of the scheme were to distribute large amounts of controlled substances in exchange for money, largely to facilitate addiction, abuse, and/or illegal redistribution. As the only one with prescription-issuing authority at the time, Dr. Kahn knowingly and voluntarily participated in the conspiracy, largely managing and directing it. And there was plenty of interdependence among the various members; as but one example, Beland brought new patients to Dr. Kahn's office and he and Dr. Kahn discussed and settled on the new patient's prescription regimen prior to Dr. Kahn ever meeting the new patient.

Dr. Kahn makes much of the fact that no express agreement existed between him and his patients, and in fact most patients testified they did not expressly tell Dr. Kahn they were abusing or selling their medications because they were afraid he might cut off their supply. All accurate. However, it's well established in the law that "the government does

not have to prove an express or formal agreement was made" to prove a criminal conspiracy. *United States v. Rutland*, 705 F.3d 1238, 1250 (10th Cir. 2013). Instead, the Government "merely has to show the coconspirators 'tacitly came to a mutual understanding.'" *Id.* (quoting *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 474 (10th Cir. 1990)). Dr. Kahn's conduct in prescribing conscience-shocking quantities and dosages of oxycodone while providing no real supervision over his patients' use of the drug, including regularly providing prescriptions without office visits, examinations, or consultations, help to establish that he and his patients tacitly agreed that he would issue these prescriptions with the only patient obligation being payment. Moreover, Dr. Kahn's own conversations demonstrated that he knew multiple patients were illegally redistributing their pills, and he at least tacitly agreed to allow them to do so. The Court mentions two examples briefly here, but each is discussed in greater detail in Section 3.3. below. In a recorded phone call between Dr. Kahn and Mrs. Kahn, Dr. Kahn made clear he knew Charles Moody was selling his pills, and Dr. Kahn had loaned C. Moody some cash to get his prescriptions from the pharmacy and travel back home, asserting to his wife that C. Moody would pay them back after finishing his "business" near his hometown, "if you know what I mean." (Exhibit 1015-B pp. 5-6.) As a C. Moody was a disabled retiree, Dr. Kahn meant that C. Moody's "business" was selling pills. And in another recorded phone call, Paul Beland discussed with Dr. Kahn how he had not been taking his pills as prescribed, how his prescription was enough to "kill a goddam elephant," and how he couldn't risk having his pills confiscated by law enforcement, stating, "I gotta, you know, I need my money. I can't donate them." (Exhibit 1040-B p. 10.) Dr. Kahn reacted to Beland's assertions like it was old news that he was not taking all his

oxycodone pills and was selling at least some of them, responding with only, "Yeah." (*Id.*) This is more than sufficient to show Dr. Kahn and at least some of his patients "tacitly came to a mutual understanding" that he would prescribe them huge amounts of oxycodone in exchange for money while knowing at least some of the drug was headed for the nonmedical purpose of illegal redistribution on the street.

The evidence and testimony at trial was sufficient for the jury to convict Dr. Kahn of the drug conspiracy charged in Count One, and the evidence does not preponderate heavily against the verdict of guilt. Therefore, the Court will not enter a judgment of acquittal under Rule 29 or grant a new trial under Rule 33 as to the drug conspiracy charged in Count One.

Dr. Kahn also challenges the "resulting in death" enhancement of which the jury also convicted him. The standard penalty for unauthorized distribution or dispensing a Schedule II controlled substance (oxycodone, in this case) is imprisonment for up to 20 years with no minimum. 21 U.S.C. § 841(b)(1)(C). However, "if death or serious bodily injury results from the use of such substance," the term of imprisonment is increased to not less than 20 years and up to life. *Id.* Attacking the testimony of Dr. Stacey Hail, Dr. Kahn says there was insufficient evidence to show that Jessica Burch would not have died but for the drug conspiracy charged in Count One. (ECF 1352 pp. 16-21.)

As recounted earlier, Dr. Hail is an emergency medicine physician and a medical toxicologist who offered expert testimony at the retrial (and first trial) opining that Jessica Burch would not have died but for the respiratory depression resulting from ingesting the oxycodone prescribed by Dr. Kahn. (ECF 1288 p. 4.) Dr. Hail testified Ms. Burch's death was "consistent with an opioid death" and was caused by "oxycodone intoxication." (ECF

1288 p. 27; Exhibit 7012 p. 11.) Dr. Kahn's current attempt to cast additional doubt on Dr. Hail's testimony is spirited but largely misplaced. The Court cannot and does not consider Dr. Kahn's various citations to online medical websites or articles discussing respiratory arrest, epilepsy, and seizures (ECF 1352 pp. 17-19 nn. 1-9) in this post-trial motion because these resources were never presented at trial, admitted into evidence, or used to confront Dr. Hail. *See Third Wave Techs., Inc. v. Stratagene Corp.*, 405 F. Supp. 2d 991, 997 (W.D. Wis. 2005) ("Although it should go without saying, I will add that a party cannot obtain judgment as a matter of law or the grant of a new trial in reliance on evidence that was never admitted at trial, … on issues never raised until the filing of the post-trial motions or on arguments forfeited before or during trial."); *Campus Sweater & Sportswear Co. v. M. B. Kahn Const. Co.*, 515 F. Supp. 64, 86 (D.S.C. 1979) (exhibit never admitted into evidence could not be considered on motion for new trial).

As previously discussed, Dr. Hail's expertise on the matters on which she testified was well established by her education, training, and experience. She explained her reasoning based on her differential diagnosis as applied to the facts and circumstances surrounding Ms. Burch's death. And Dr. Kahn did not present a counter expert. Nonetheless, Dr. Kahn's counsel's cross-examination of Dr. Hail was aggressive and thorough, and it highlighted conflicting evidence and the weaker areas of Dr. Hail's testimony. In weighing evidence and judging credibility under Rule 33, though, the Court finds the inroads made on Dr. Kahn's behalf in cross-examination were not enough to nullify Dr. Hail's expert testimony. Additional evidence supported or was consistent with Dr. Hail's opinions. For example, other evidence established that: (1) Ms. Burch filled prescriptions written by Dr. Kahn just

three days prior to her death; (2) those prescriptions included 180 30-milligram oxycodone pills and 180 15-milligram oxycodone pills (Exhibits 7047, 7048); (3) Anthony Vargas, Ms. Burch's live-in boyfriend, testified Ms. Burch often abused her prescription drugs by crushing them up and snorting them (ECF 1294 p. 21); (4) Vargas testified that Ms. Burch was acting high from the drugs in the hours prior to her death, including passing out in the front lawn facedown (*id.* p. 35.); (5) the oxycodone 15-milligram pills that Ms. Burch had just filled were manufactured by Actavis (Exhibit 7048 p. 2); and (6) Ms. Burch died with crushed pill remnants that were green in color in and around her nostrils (Exhibits 7041, 7042). And Dr. Hail testified without opposition or contradiction that her research determined the 15-milligram oxycodones manufactured by Actavis were green in color.[10] (*See* ECF 1288 pp. 28-29.)

Considering this evidence altogether, it is sufficient to support the jury's finding that Jessica Burch's death resulted from her use of oxycodone distributed and/or dispensed by Dr. Kahn as part of the drug conspiracy charged in Count One. Additionally, the overall weight of the evidence does not preponderate heavily against the jury's determination. Therefore, the Court will not enter a judgment of acquittal under Rule 29 or grant a new trial under Rule 33 concerning the "resulting in death" enhancement of Count One.

3.3 Substantive Distributions and Aiding-and-Abetting (Counts 11, 19, 4, 5, 7, 9, 14)

In his final challenge to the jury's verdict, Dr. Kahn contends his convictions for the

[10] To be sure, Dr. Kahn's counsel questioned Dr. Hail on the fact that Xanax pills are green in color, too, and that Vargas reported he saw pieces of Xanax around Ms. Burch's nose at the time of her death. It was not disputed, though, that the 15-milligram oxycodone pills manufactured by Actavis and received from the pharmacy by Ms. Burch three days prior were also green.

substantive distribution and aiding-and-abetting charges cannot stand. (ECF 1352 pp. 22-26.)

3.3.1 Count Eleven – Unlawfully Distributing or Dispensing Oxycodone to Charles Moody

Count Eleven charged Dr. Kahn with unlawfully dispensing or distributing oxycodone to Charles Moody on or about October 7, 2016. (ECF 356 p. 12; ECF 1310 pp. 44-45.) Dr. Kahn argues the evidence showed that the prescriptions he issued to Charles Moody were solely to treat his very real pain, for which he was previously on high-dose opioids before ever seeing Dr. Kahn. (ECF 1352 p. 22.)

Charles Moody was indeed a long-time sufferer of chronic back pain and a long-time user of oxycodone before meeting Dr. Kahn. At his first appointment with Dr. Kahn in April 2012, C. Moody reported he was taking four 30-milligram oxycodone tablets every 6 hours, for a total of 480 pills in a month (16 pills per day), with no mention of taking methadone. (Exhibit 3017 pp. 13, 666.) In a theme repeated throughout the trial, Dr. Kahn increased his patient's access to opioids from the get-go. Within a couple of weeks, Dr. Kahn prescribed C. Moody the same monthly quantity and dosage of oxycodone (16 pills per day, designated for breakthrough pain) on top of a prescription for 240 ten-milligram tabs of methadone (8 pills per day, designated for chronic pain) per month. (*See id.* pp. 21, 26, 27, 36.) By July 2012, Dr. Kahn was prescribing him the same 240 methadone tablets and had increased his 30-milligram oxycodones to 600 per month (20 per day). (*See* id. pp. 55, 61.) These prescriptions continued until May 2015, when Dr. Kahn increased the 30-milligram oxycodone prescription to 720 tablets per month (24 per day) while keeping the methadone prescription the same. (*Id.* p. 539.) Near the end of Dr. Kahn's practicing, in

August 2016, he increased the oxycodone prescription to 780 tablets per month (26 per day) and continued the methadone prescription for 240 tablets (8 per day). (*Id.* p. 653.) Relevant to Count Eleven, Dr. Kahn issued prescriptions to C. Moody in early October 2016 for 240 10-milligram methadone tablets and 780 30-milligram oxycodone tablets. (Exhibit 2007 p. 9.)

By itself, these large prescriptions for narcotics might raise suspicions, but they are not enough to show Dr. Kahn issued them without authorization (without a medical purpose) while knowing they were unauthorized. However, when coupled with Dr. Kahn's own words captured in a wiretap, the evidence establishes Dr. Kahn, at least on the occasion charged, essentially "fronted" the narcotics to Charles Moody knowing that C. Moody would sell some of the drugs and use that money to pay Dr. Kahn's exorbitant "office visit" fee.

In a recorded phone call from October 7, 2016, Dr. Kahn told Lyn Kahn he had seen Charles Moody in the Casper office earlier that day, and they discussed C. Moody's debt and repayment plans:

S. Kahn:	So I have fourteen hundred dollars because I had to loan him [C. Moody] five [hundred dollars] --
L. Kahn:	Oh my God!
S. Kahn:	-- to get back -- cause he's got to get back to Portland to do something.
…	
S. Kahn:	So, he [C. Moody] owes us seventeen hundred right now. He's gonna get it because he's heading back to Portland 'cause he's gotta go do -- his meds are only four hundred or something and something dollars. He's gonna get them -- get out tonight, get to Portland and then he's gonna send us the money.
L. Kahn:	That's what he said last time.
S. Kahn:	Well, he'll do it. Just had, his kid was in an accident. He's got, he's got uh, he's got he's got business, he's got business up there to finish, if you know what I mean.
L. Kahn:	Yeah.

> S. Kahn: He said he's got quite a bit of business up there right now which has to be taken care of by tomorrow. [Mumbles] Like I say, honey, he's, he's uh, [Clears throat] [U/I] right, right now. So he said, "Don't you worry about it. I got lots of it."

(Exhibit 1015-B pp. 5-6.)

Dr. Kahn knew very well since first seeing Charles Moody in April 2012 that C. Moody was a disabled retiree in his 60s. (Exhibit 3017 p. 1.) In light of C. Moody's unemployment, Dr. Kahn and Lyn Kahn understood that C. Moody's "quite a bit of business up there," "if you know what I mean," meant that C. Moody was borrowing money from Dr. Kahn to fill the prescriptions and then would sell some of the meds in the Portland area to pay Dr. Kahn for the loan and the debt remaining on his "office visit." Combined with reasonable inferences arising from the massive amounts of pills he was prescribing, Dr. Kahn knew his prescription for 780 oxycodone tablets he wrote for C. Moody in October 2016 was unauthorized because at least some of the pills would be diverted by C. Moody for unlawful redistribution, in turn likely facilitating addiction or recreational abuse.

The trial evidence was sufficient to support the jury's finding of guilt in Count Eleven, and the overall weight of the evidence does not preponderate heavily against the verdict. Therefore, the Court will not enter a judgment of acquittal under Rule 29 or grant a new trial under Rule 33 on Count Eleven.

3.3.2 Count Nineteen – Unlawfully Distributing or Dispensing Oxycodone to David Drndarski

Count Nineteen charged Dr. Kahn with unlawfully dispensing or distributing oxycodone to David Drndarski on or about November 11, 2016. (ECF 356 p. 15; ECF 1310 pp. 44-45.) Dr. Kahn argues the same as he did with Charles Moody—that the

evidence showed only that the prescriptions he issued to David Drndarski were solely to treat his very real pain. (ECF 1352 p. 22.)

Count Nineteen concerned the final oxycodone prescriptions written for David Drndarski, which was in early November 2016 for 300 30-milligram oxycodone tablets and 180 15-milligram oxycodone tablets (along with some Xanax and buprenorphine). (Exhibit 2004 p. 8; Exhibit 9170.) Though still a lot of opioids, this is certainly less than the eye-popping prescriptions he wrote for Charles Moody. Nonetheless, the circumstances surrounding these oxycodone prescriptions establish that they were written not for a medical purpose but instead to feed addiction and/or facilitate recreational abuse and unlawful redistribution, and Dr. Kahn knew it.

The subject oxycodone prescriptions followed a falling-out between the Drndarskis and the Kahns concerning the prices charged by Dr. Kahn for the prescriptions. At that time, because the Kahns lived in Casper and the Drndarskis remained in Arizona, there were many prescriptions that Dr. Kahn wrote for the Drndarskis and had filled at a Wyoming pharmacy, were picked up from the pharmacy by Lyn Kahn, and were then mailed by the Kahns to the Drndarskis or the Drndarskis would collect them during a trip to Wyoming. (*See, e.g.*, Exhibit 4079 (showing Lyn Kahn picked up the Drndarskis' prescription medications from a Casper pharmacy in March 2016).) The Drndarskis would then pay the cost of the "office visit" (which usually never occurred) plus the costs of the pharmacy fill and shipping to Nabeel Khan or by depositing the money into the Kahns' bank account. (*See, e.g.*, Exhibit 1085 p. 2.) Before the couples' fight, Dr. Kahn had last written prescriptions for the Drndarskis in early August 2016. (Exhibit 2004 p. 8; Exhibit 2005 p.

6.) These prescriptions appear to have become the subject of the fight. (*See* Exhibit 9053 (picture of an empty prescription pill bottle seized from Dr. Kahn's residence in Casper that previously held the early August 2016 prescription for David Drndarski's 15-milligram oxycodone and which appears to have never made it down to the Drndarskis in Arizona).) The dispute involved the Kahns having picked up the Drndarskis' prescriptions at that time, but the Drndarskis disagreed with how much the Kahns were trying to charge them for that "office visit." As a result of the couples' quarrel, the Drndarskis did not receive the pills that had been picked up by the Kahns nor did they receive any prescriptions for a couple of months thereafter. (Exhibit 2004 p. 8; Exhibit 2005 p. 6.) The Drndarskis both testified to suffering from opioid withdrawal during that time. Finally, in early November 2016, Stacy Drndarski broke the silence and made the effort to patch things up with the Kahns, which included text messaging an apology to Lyn Kahn. (Exhibit 1104.) Mrs. Kahn responded kindly, and soon the couples were again on speaking terms. (*Id.*) A couple of days later, Stacy Drndarski texted Dr. Kahn to ask if they could have only David Drndarski's prescriptions for November 2016 because they did not have enough money for both David's and Stacy's. (Exhibit 1099 p. 1; Exhibit 1085 p. 2.) Stacy specified they would buy both her and David's prescriptions the following month when they had more money. Dr. Kahn submitted David's prescriptions to a Casper pharmacy, and the Kahns picked them up later that day and agreed to FedEx the pills to the Drndarskis. (*Id.* pp. 2-6; Exhibit 4008-DD.) Dr. Kahn informed Stacy that the cost would be $1,200 (ostensibly for David's non-existent November 2016 "office visit") plus the costs of the pharmacy fill and shipping, which Stacy agreed to pay. (Exhibit 1099 p. 6.) The Kahns overnighted the pills from David's

prescriptions to the Drndarskis. (Exhibit 10050.) The Kahns did not fill nor did the Drndarskis receive any prescriptions for Stacy for November 2016. (*See* Exhibit 2005 p. 6.)

Dr. Kahn knew these prescriptions lacked a medical purpose when written. He knew he had not prescribed any narcotics (or any other medications) to the Drndarskis for three months, and he did not see David Drndarski (the intended prescription recipient) for any sort of "office visit" at the time he wrote the prescriptions or in the months leading up to November 2016. Indeed, there is nothing to suggest Dr. Kahn even talked to David Drndarski since their falling out in August 2016; instead, he negotiated David's prescriptions with Stacy via text message while having not seen either of them in several months. Dr. Kahn had no idea how David's (or Stacy's) pain was; he had no idea if the Drndarskis had taken any oxycodone in the intervening months and were potentially opioid-naïve again; and he had no idea if there was a medical need to prescribe David Drndarski a high-dose narcotic at that time. What Dr. Kahn knew was that Stacy Drndarski offered to pay him $1,200 for oxycodone prescriptions matching David's oxycodone prescriptions from months prior, and Dr. Kahn obliged. By the definition advocated for by Dr. Kahn and given at trial, these prescriptions were not "authorized" because they were not connected to any then-relevant medical purpose, and he well knew it was unconnected to the practice of medicine. It was, at a minimum, to facilitate the Drndarskis' addiction and likely to help them make enough money through illegal redistribution to afford both Drndarskis' prescriptions the next month.

The trial evidence was sufficient to support the jury's finding of guilt in Count Nineteen, and the overall weight of the evidence does not preponderate heavily against the

verdict. Therefore, the Court will not enter a judgment of acquittal under Rule 29 or grant a new trial under Rule 33 on Count Nineteen.

3.3.3 Counts Four and Five, Seven and Nine (and Ten), and Fourteen – Unlawfully Distributing or Dispensing Oxycodone and Aiding and Abetting Beland's Possession of Oxycodone with Intent to Distribute

Dr. Kahn next says the charges of distributing or dispensing oxycodone to Paul Beland and his recruits, Dawn (Cabana) St. George and Eric Plikunas, along with the charges for aiding and abetting Beland's possession with intent to distribute cannot withstand Rule 29 or Rule 33 scrutiny. (ECF 1352 pp. 22-26.) Dr. Kahn again argues these people had legitimate pain conditions that he was trying to treat, they lied to him and tricked him, and these charges largely rely on the untrustworthy testimony of Beland. (*Id.*)

The Court finds Counts Four, Five, Seven, Nine, Ten[11], and Fourteen are all supported by sufficient evidence under the Rule 29 standard and the weight of the evidence does not preponderate against the convictions under Rule 33. The Court will first address Counts Four, Five, Seven, Nine, and Ten due to their similarities, then turn to Count Fourteen.

Counts Four, Five, Seven, Nine, and Ten

Counts Four and Five both concern oxycodone prescriptions Dr. Kahn wrote for Paul Beland and Dawn (Cabana) St. George on September 2, 2016, with Count Four alleging Dr. Kahn unlawfully distributed or dispensed oxycodone to them by issuing unauthorized prescriptions while knowing they were unauthorized and Count Five alleging Dr. Kahn aided and abetted Beland in possessing oxycodone knowing Beland intended to unlawfully

[11] Dr. Kahn's motion did not address Count Ten, but the alleged conduct in Count Ten runs hand-in-hand with Counts Seven and Nine, as will be discussed, and therefore the Court will treat them together.

redistribute it. (ECF 356 p. 10; ECF 1310 pp. 43-45, 56-59.) At the time, Dr. Kahn wrote prescriptions for each of them for 300 30-milligram oxycodone tablets and 180 20-milligram oxycodone tablets. (Exhibits 4056-PB.1, 4070-DC.1.) These are the same dosages and quantities Dr. Kahn had been prescribing for Beland and St. George for several months prior. (Exhibits 2001, 2003.)

Counts Seven, Nine, and Ten concern oxycodone prescriptions Dr. Kahn wrote for Beland and St. George on October 1, 2016, with Count Seven alleging another instance of substantive distribution or dispensing based on knowingly unauthorized oxycodone prescriptions (similar to Count Four) while Counts Nine and Ten allege two more instances of aiding and abetting Beland in his possession with intent to distribute (similar to Count Five). (ECF 356 pp. 11-12; ECF 1310 pp. 43-45, 56-59.) The prescriptions written on October 1, 2016, for Beland and St. George are the same as the month prior (300 30s and 180 20s for each). (Exhibits 4056-PB.2, 4070-DC.2, 4012-PB.1, 4028.) And again, these are the same dosages and quantities Dr. Kahn had been prescribing for Beland and St. George for several months prior. (Exhibits 2001, 2003.) It appears the Government charged Counts Nine and Ten separately because Beland and St. George filled their 30-milligram prescriptions on October 1, 2016 (the date identified in Count Nine), and then filled their 20-milligram prescriptions the following day on October 2, 2016 (the date identified in Count Ten).[12]

Along with the sheer quantity of pills in these subject prescriptions from September

[12] While the only conduct of Dr. Kahn's supporting the aiding-and-abetting charges concerned the prescriptions he wrote on October 1, 2016, Counts Nine and Ten also charged Beland, a codefendant, with possession with intent to distribute, which might explain why these counts were separated in the indictment. The parties can address how these two counts should be considered at Dr. Kahn's sentencing hearing.

and October 2016, and the reasonable inferences that can be taken therefrom, additional evidence supporting the Government's allegation that these prescriptions were unauthorized and that Dr. Kahn knew they were unauthorized comes from the testimony of Paul Beland. On the first day of Beland's testimony (the sixth day of trial), he testified that after four or five months of seeing Dr. Kahn (while Beland was still receiving 180 oxy-30s and 180 oxy-20s), during an office visit, Dr. Kahn asserted he knew Beland was selling at least some of the pills on the street and Dr. Kahn wanted his "cut" of the profits. Beland testified that Dr. Kahn then said he could prescribe 300 oxycodone-30s (instead of 180) but it was going to cost Beland a larger office visit fee. Beland testified that when he asked how much it would cost, Dr. Kahn looked up to the ceiling and said, "A thousand dollars." Beland agreed, and from then on paid $1,000 for each office visit and received prescriptions for 300 30-milligram oxycodone pills and 180 20-milligram oxycodone pills.

It would be an understatement to say Paul Beland's credibility was challenged during cross-examination. Defense Counsel spent a good deal of time undercutting several areas of Beland's testimony. As but one example, Beland admitted on cross-examination that his testimony under oath to this Court at his change-of-plea hearing in 2018 about his first appointment with Dr. Kahn was very inconsistent with his trial testimony in 2023 about the same appointment. However, other evidence buttresses Beland's testimony concerning his agreement to pay more for 300 oxycodone-30s. Specifically, Dr. Kahn began prescribing Beland 300 oxy-30s in late February 2016 (Exhibit 2001). This was also about 4.5 months after Beland started seeing Dr. Kahn. (*Id.*) The fact that Dr. Kahn indeed jumped up the pill quantity and the time thereof are both consistent with Beland's subject testimony. And

the Court recounted earlier herein the evidence establishing a conspiracy between Dr. Kahn and Beland, which need not be repeated here.

If believed, Paul Beland's testimony sufficiently establishes that Dr. Kahn issued prescriptions in September and October 2016 that were knowingly unauthorized because he knew at least some of the oxycodone pills he was prescribing for Beland were going to the non-medical purpose of being sold on the street, for which Dr. Kahn was to receive his "cut." This is sufficient evidence for a jury to convict Dr. Kahn of distribution or dispensing in Counts Four and Seven as well as aiding and abetting in Counts Five, Nine, and Ten. Therefore, a judgment of acquittal under Rule 29 is not warranted.

Applying the Rule 33 standard, the Court certainly found some of Beland's trial testimony of questionable value. However, based on the other supporting evidence and combined with the clear conspiracy between Dr. Kahn and Beland captured in the wiretap recording of October 31, 2016, discussed earlier, the Court does not find the portion of Beland's testimony discussed here to be untrustworthy. Having considered the weight of the evidence and the credibility of the witnesses, the Court finds it does not preponderate heavily against the jury's finding of guilt on Counts Four, Five, Seven, Nine, and Ten, and a new trial under Rule 33 is not warranted on these convictions.

Count Fourteen

The evidence supporting Count Fourteen is the same as and a bit more than that underlying the other distribution/dispensing charges concerning Beland. Count Fourteen alleged Dr. Kahn unlawfully distributed or dispensed oxycodone on or about November 5-9, 2016, to Paul Beland, Dawn (Cabana) St. George, and/or Eric Plikunas. (ECF 356 p. 13;

ECF 1310 pp. 44-45.) First and foremost, the same evidence undergirding the convictions in Counts Four and Seven (i.e., Beland's testimony about the agreement to pay a higher "office visit" fee in exchange for 300 oxycodone-30s because Dr. Kahn knew some of them were being sold on the street) also supports the jury's finding of guilt as to Count Fourteen. Based solely on the same reasoning, the conviction on Count Fourteen is not subject to a judgment of acquittal or new trial.

More than that, though, the conduct underlying Count Fourteen post-dates the October 31, 2016, recorded phone call between Dr. Kahn and Beland, and once again it is Dr. Kahn's own conversation that is his biggest undoing. In that conversation, recounted in part above, Beland informed Dr. Kahn that he had just filled his prescriptions when he had recently been arrested and taken to jail in Casper, and so he had to start taking the pills as prescribed while in jail to avoid having them confiscated by law enforcement. (Exhibit 1040-B p. 10.) Beland described becoming very sick from taking the oxycodone as prescribed and said that amount "would kill a goddam elephant, what I was on." (*Id.*) This showed Beland was not taking his oxycodone pills as prescribed, to which Dr. Kahn responded with a rather nonchalant, "Yeah." (*Id.*) Beland continued, telling Dr. Kahn that he had to take the pills while in jail and couldn't risk having them confiscated because upon his release, "I gotta, you know, I need my money. I can't donate them." (*Id.*) To which Dr. Kahn again responded, "Yeah." (*Id.*) Thus, Dr. Kahn understood Beland had not been taking the oxycodone as prescribed and was instead selling at least some of it for money, and Beland was fearful he would not be able to do so if his pills were confiscated while he was in jail. Dr. Kahn knew when he wrote Beland another set of prescriptions for oxycodone a few

days later that Beland would sell at least some of it, likely on its way to facilitate addiction or recreational abuse.

The trial evidence was sufficient to support the jury's finding of guilt in Count Fourteen, and the overall weight of the evidence does not preponderate heavily against the verdict. Therefore, the Court will not enter a judgment of acquittal under Rule 29 or grant a new trial under Rule 33 on Count Fourteen.

CONCLUSION AND ORDER

The Court has reviewed Dr. Kahn's asserted trial errors and alleged evidentiary deficiencies. The Court does not find any alleged trial error requires a new trial in the interests of justice under Fed. R. Crim. P. 33. Additionally, the Court finds Dr. Kahn's convictions are supported by sufficient evidence under both the Fed. R. Crim. P. 29 and Fed. R. Crim. P. 33 standards.

IT IS THEREFORE ORDERED that Defendant Shakeel Kahn's Motion for a Judgment of Acquittal or, Alternatively, a New Trial (ECF 1352) is **DENIED**.

DATED: August 14, 2024.

Alan B. Johnson
United States District Judge

FILED

4:24 pm, 10/27/23

Margaret Botkins
Clerk of Court

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHAKEEL A. KAHN, and
NABEEL AZIZ KHAN,

Defendants.

Case No. 17-CR-0029-ABJ

ORDER GRANTING IN PART AND DENYING IN PART SHAKEEL KAHN'S OBJECTIONS TO GOVERNMENT'S EXPERT WITNESS DESIGNATIONS

The Government timely filed a Notice of Intent to Offer Expert Testimony (ECF 1122) and later supplemented that notice (ECF 1141). Four weeks after it was due (*see* ECF 1102 p. 6), Shakeel Kahn filed a Response to Government's Expert Notice (ECF 1186), which sought to exclude portions of the proposed testimony of several Government experts. The Government submitted a written response to the objections (ECF 1208), and the parties addressed the matter at the September 22, 2023 motions hearing (ECF 1194, 1195).

STANDARD OF REVIEW FOR EXPERT TESTIMONY CHALLENGES

The Federal Rules of Evidence contemplate the district court acting in "a gatekeeping role" to ensure a jury hears expert testimony that is both relevant and reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). A trial court has broad discretion in determining the admissibility of expert testimony. *Taylor v. Cooper Tire & Rubber Co.*, 130 F.3d 1395, 1397 (10th Cir. 1997). The proponent of the expert testimony bears the burden of proving the foundational requirements of Federal Rule of Evidence 702 by a preponderance of

the evidence. *Daubert*, 509 U.S. 579, 592 (1993); *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 141, (1999). Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

In short, before permitting a jury to assess expert testimony, the Court functions as a gatekeeper by ensuring the proposed testimony is relevant (helpful) to the issues in the case, the expert is appropriately qualified to opine on the intended subject matter, and the expert's opinion is based on a reliable methodology applied to sufficient underlying data. *See United States v. Nacchio*, 555 F.3d 1234; 1241 (10th Cir. 2009); *United States v. Avitia-Guillen*, 680 F.3d 1253, 1256 (10th Cir. 2012). Expert testimony that does not meet these requirements is not admissible at trial.

DISCUSSION

Defendants[1] object to portions of proposed testimony from several different expert witnesses. First up, though, is the timeliness and potential forfeiture of Defendants' current objections.

1. Defendants' expert testimony objections are forfeited.

The expert testimony noticed by the Government that is now challenged by Defendants

[1] The Court refers to both Defendants because it previously granted Nabeel Khan's motion to join all of Shakeel Kahn's motions. (ECF 1187, 1188.)

was timely noticed, nearly verbatim, prior to the first trial. Defendants specify that they object to the following portions of the Government's expert witness designations, but all were noticed prior to the first trial (and several portions were noticed multiple times prior to the first trial).

(A) As to Dr. Jed Shay:

(1) Thereafter, Dr. Shay will provide expert opinion based on the "Federation of State Medical Boards Model Policy for the Use of Opioid Analgesics in Treatment of Chronic Pain" and "The Doctors Company Closed Claims 2007-2015: Factors Contributing to Poor Patient Outcomes in Claims Related to Opioids." (Noticed for first trial at ECF 504 p. 3, ECF 267 p. 3; Noticed for second trial at ECF 1122 p. 3; Challenged at ECF 1186 p. 3.)

(2) Defendant S. Kahn's treatment of "pain management patients" was outside the scope of professional practice and no legitimate medical purpose justified the prescriptions Defendant S. Kahn wrote and the drugs he dispensed. (Noticed for first trial at ECF 504 pp. 3-4, ECF 267 p. 3; Noticed for second trial at ECF 1122 pp. 3-4; Challenged at ECF 1186 p. 3.)

(3) Physicians who choose not to utilize the PDMP database are intentionally "flying blind" as well as sacrificing their patients' safety. (Noticed for first trial at ECF 504 p. 3, ECF 267 p. 3; Noticed for second trial at ECF 1122 pp. 3; Challenged at ECF 1186 p. 7 n.1.)

(B) As to Pharmacists CoriAnn Morgan, Bruce Berg, and Jason Cory:

(1) Pharmacists, CoriAnn Morgan, Bruce Berg, and Jason Cory will testify as percipient witnesses and may offer an opinion to explain their actions taken related to the facts of this case. (Noticed for first trial at ECF 504 p. 7; Noticed for second trial at ECF 1122 p. 7; Challenged at ECF 1186 p. 4.)

(C) As to Dr. Gina Moore:

(1) Ms. Moore will provide an explanation of the role of federal and state laws and regulations, the judicial system and process, and administrative agencies, and how they directly affect pharmacy practice. These include the federal Food, Drug & Cosmetics Act, the Federal and States of Wyoming and Arizona Controlled Substances Acts, State Board of Pharmacy for Arizona and Wyoming, their rules and regulations and

pharmacy inspections, and miscellaneous state and federal laws. (Noticed for first trial at ECF 504 p. 8; Noticed for second trial at ECF 1141 pp. 1-2[2], ECF 1122 p. 9; Challenged at ECF 1186 p. 4.)

(2) Additionally, Ms. Moore will testify about the standards of practice for a pharmacist under federal and state laws (including Wyoming and Arizona). Including pharmacists equal and corresponding responsibility to ensure that prescriptions are for a legitimate medical purpose and how a pharmacist can meet that responsibility. She will also provide information on when and how a pharmacist may become obligated to overrule or refuse to fill a physician's prescription. (Noticed for first trial at ECF 504 p. 8; Noticed for second trial at ECF 1141 p. 2, ECF 1122 pp. 9-10; Challenged at ECF 1186 p. 4.)

(3) Further, Ms. Moore will provide information about drug utilization reviews including morphine milligram equivalent standards and the dangers of exceeding the standard. (Noticed for first trial at ECF 504 p. 9; Noticed for second trial at ECF 1141 p. 2, ECF 1122 p. 10; Challenged at ECF 1186 p. 4.)

(D) As to Special Agent Ryan Cox:

(1) The controlled substances involved in this case were possessed for distribution and not entirely for personal consumption. (Noticed for first trial at ECF 504 p. 6, ECF 267 p. 5; Noticed for second trial at ECF 1122 p. 6; Challenged at ECF 1186 p. 4.)

(2) Various items are commonly used and maintained in order to facilitate drug transactions. (Noticed for first trial at ECF 504 p. 6, ECF 267 p. 5; Noticed for second trial at ECF 1122 p. 6; Challenged at ECF 1186 p. 4.)

(3) Modus operandi of drug traffickers. (Noticed for first trial at ECF 504 p. 6, ECF 267 p. 5; Noticed for second trial at ECF 1122 p. 7; Challenged at ECF 1186 p. 4.)

(4) Individuals selling controlled substances maintain paper or electronic records of debts owed to them for drug transactions. (Noticed for first trial at ECF 504 p. 6, ECF 267 p. 5; Noticed for second trial at ECF 1122 p. 7; Challenged at ECF 1186 p. 4.)

(5) Individuals in the drug trafficking business will often wire money for payment of controlled substances. (Noticed for first trial at ECF 504 p. 6, ECF 267 p. 5; Noticed for second trial at ECF 1122 p. 7; Challenged at

[2] Prior to ECF 1141, the Government referred to this witness as "Ms. Moore," and in ECF 1141 as "Dr. Moore." The Court understands it to be the same individual.

ECF 1186 p. 5.)

(6) Agent Cox will further testify to the process taken to obtain an intercept order for wire communications and the technical process taken to intercept the wire communications. (Noticed for first trial at ECF 504 p. 7, ECF 267 p. 5; Noticed for second trial at ECF 1122 p. 7; Challenged at ECF 1186 p. 5.)

(E) As to Diversion Investigators Robert Churchwell and Kevin Skidmore:

(1) How the amount of opioid medication prescribed by Defendant S. Kahn converts to Morphine Milligram Equivalents (MME) and how Defendant S. Kahn's MME's per person differ from the Center for Disease Control recommendations. (Noticed for first trial at ECF 504 p. 9, ECF 267 p. 7; Noticed for second trial at ECF 1122 p. 10; Challenged at ECF 1186 p. 5.)

(2) The "red flags" of doctor drug diversion: including a brief, or non-existent, physical examination or medical history; prescribing pursuant to patient request; out-of-state patients travelling long distances for monthly prescription refills; prescribing despite indications of addiction and drug-seeking behaviors; drug seeking behaviors, such as requests for early refills, specific requests for certain drugs, reluctance to change medication or try alternate therapies, bad drug screens, claims that drugs were lost or stolen, anonymous tips that the patient is abusing or diverting drugs, obtaining prescriptions from multiple providers. (Noticed for first trial at ECF 641 p. 2 (Skidmore); ECF 504 p. 9 (Churchwell), ECF 267 pp. 7-8 (Churchwell); Noticed for second trial at ECF 1122 p. 11; Challenged at ECF 1186 p. 5.)

Prior to the first trial, the Court provided a deadline for the parties to submit their challenges to the opposing side's expert witnesses. (ECF 447 p. 8.) Despite the near-identical nature of the Government's notices, Defendants did not then present any of the objections they present now.[3] Nor have Defendants, as part of their instant objections, identified anything in the trial transcripts demonstrating an objection to any of this expert testimony based on

[3] Prior to the first trial, Nabeel Khan challenged the Government's designation of David Drndarski as an expert witness on the basis that the Government's designation was incomplete and could not show compliance with Daubert/Rule 702. (ECF 577.) The Court granted that motion and limited David Drndarski to testifying solely as a fact witness. (ECF 675 p. 2.) Additionally, Lyn Kahn challenged the Government's designation of Investigator Kevin Skidmore as untimely and duplicative of Investigator Robert Churchwell's designation. (ECF 652.) The Court granted that motion, precluding the Government from calling Investigator Skidmore as an expert witness, due to its untimely notice. (ECF 663.) These matters will be further addressed below in this Order.

Daubert/Rule 702 during the trial. (*See* ECF 1186.[4]) For example, at the first trial, Dr. Shay discussed at length the model policy advanced by the Federation of State Medical Boards, to which Defendants now object. (Trial Tr. Vol. IV 14:4-23:24, 45:4-15, 70:11-22, 81:8-17, 99:18-105:9.) Defendants never lodged any objection to this testimony at trial, based on Daubert/Rule 702 or otherwise. Finally, Defendants did not present this issue as a plain error on appeal. *See United States v. Khan*, 989 F.3d 806 (10th Cir. 2021), *vacated and remanded on other grounds sub nom. Ruan v. United States*, 142 S. Ct. 2370 (2022); *see also Avitia-Guillen*, 680 F.3d at 1256 ("When a party fails entirely to object to expert testimony at or before trial, we review only for plain error."). Consequently, Defendants forfeited their opportunity to subject this expert testimony to the Daubert/Rule 702 standard. *See Macsenti v. Becker*, 237 F.3d 1223, 1231 (10th Cir. 2001) ("We are convinced that Defendant forfeited the opportunity to subject the expert testimony of Dr. Sullivan and plaintiff's other experts to a *Daubert* challenge by failure to make a timely objection before that testimony was admitted."). "When no objection is raised, district courts are not required to make 'explicit on-the-record rulings,' because we assume that the district court consistently and continually performed a trustworthiness analysis sub silentio of all evidence introduced at trial." *Avitia-Guillen*, 680 F.3d at 1257 (quoting *Goebel v. Denver & Rio Grande W. R.R. Co.*, 215 F.3d 1083, 1088 n.2 (10th Cir. 2000)).

Allowing Defendants to now challenge this proffered testimony would be particularly inappropriate when considering the law of the case doctrine. That doctrine says "that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *see also United States v. Monsisvais*, 946 F.2d 114, 116 (10th Cir. 1991) ("[w]hen a case is appealed and

[4] The Court reviewed the few citations to the trial transcripts appearing in Shakeel Kahn's Response to Government's Expert Notice (all at ECF 1186 p. 10) and found no objections lodged by Defense Counsel within those portions of the trial transcripts.

remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand") (emphasis in original) (quoting 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.404[1], at 119 (2d ed. 1991)). In this case, for example, the Tenth Circuit affirmed this Court's decisions on the several search warrants, *Khan*, 989 F.3d at 814-22, and those decisions were not appealed to the U.S. Supreme Court. Those affirmed decisions constitute the law of the case, and they are not now subject to revisiting on remand. In parallel to the law of the case doctrine, were the Court to now consider these new expert witness challenges, Defendants would be prospering from their prior failures (or decisions not) to raise the issues before the first trial, during the first trial, or on appeal. Essentially, Defendants are trying to evade the law of the case doctrine by not raising these objections at the first trial or direct appeal. The Court will not countenance Defendants' attempt to sidestep their previously-ordered deadlines and multiple prior opportunities to timely challenge the Government's expert witness designations during the first trial and direct appeal. Defendants' time for submitting these objections to the Government's expert designations expired literally years ago; Defendants' default on this matter is well and truly complete, and they have offered no sufficient reason for the Court to excuse that default.

2. **Despite the forfeiture, the Government's expert witness testimony remains subject to the Court's Daubert/Rule 702 gatekeeping function at the retrial.**

Defendants' objections to the Government's proposed expert testimony are years overdue. Nonetheless, all expert testimony must satisfy the Daubert/Rule 702 requirements of being given on a relevant issue by a qualified witness and resulting from a reliable methodology applied to sufficient underlying facts. No party has a blank check concerning expert testimony. *See Avitia-Guillen*, 680 F.3d at 1257 (the trial court consistently and continually performs a trustworthiness analysis of all evidence introduced at trial).

Particularly applicable to this retrial in light of *Ruan v. United States*, 142 S. Ct. 2370 (2022), is Federal Rule of Evidence 704, which allows an expert to opine on an ultimate issue in the case (so long as the opinion is otherwise trustworthy) but precludes an expert from specifically opining about whether a defendant did or did not have the necessary mens rea to commit the crime charged. Fed. R. Evid. 704(a), (b). For example, as to the charges involving a violation of 21 U.S.C. § 841(a)(1) (distributing or dispensing controlled substances), the Government will have to prove the associated prescriptions issued by Shakeel Kahn were "unauthorized" under the law (the actus reus). Whether a prescription is outside "'the scope of a doctor's prescribing authority' remains tethered 'to objective criteria such as legitimate medical purpose and usual course of professional practice.'" *United States v. Kahn*, 58 F.4th 1308, 1319 (10th Cir. 2023) ("*Kahn II*") (quoting *Ruan*, 142 S. Ct. at 2382)). Expert testimony is appropriate, and potentially necessary, to help the jury understand the contours of an authorized versus unauthorized prescription. And under Rule 704(a), it would not be objectionable for a qualified expert to opine on whether a certain prescription was unauthorized under the objective criteria. *See United States v. Johnston*, 322 F. App'x 660, 667 (11th Cir. 2009) (finding no error where the expert witness "testified as to the appropriate standard of care in the medical field and gave her opinion that the prescriptions 'were written without any legitimate medical purpose'"). It would, however, violate Rule 704(b) and be improper for an expert to opine on whether Shakeel Kahn subjectively knew the prescription was unauthorized or intended it to be unauthorized (the mens rea). *See United States v. Draine*, 26 F.4th 1178, 1191 (10th Cir. 2022) ("As interpreted, Rule 704(b) only prevents experts from expressly stating the final conclusion or inference as to a defendant's actual mental state.") (quoting *United States v. Richard*, 969 F.2d 849, 854 (10th Cir. 1992)); *United States v. Goodman*, 633 F.3d 963, 970 (10th Cir. 2011) ("It is

only as to the last step in the inferential process—a conclusion as to the defendant's actual mental state—that Rule 704(b) commands the expert to be silent." (quotations omitted)).

In light of *Ruan* and *Kahn II*, the Court will be especially sensitive to an expert opining about a person "intentionally" or "knowingly" conducting themselves in a certain way (e.g., "Physicians who choose not to utilize the PDMP database are intentionally 'flying blind' as well as sacrificing their patients' safety").

> Rule 704(b) "do[es] not prevent an expert from drawing conclusions about intent, so long as the expert does not profess to know a defendant's intent," *United States v. Schneider*, 704 F.3d 1287, 1294 (10th Cir. 2013), or whether the defendant "acted with the necessary mens rea," *United States v. Wood*, 207 F.3d 1222, 1236 (10th Cir. 2000).

Draine, 26 F.4th at 1191. While not necessarily precluded so long as the opinion does not touch upon the mens rea element of a charge, the attorneys would do well to advise their witnesses to tread carefully with such statements.

Additionally, the Court will instruct the jury on the law to be applied in this case, not the lawyers or the witnesses. As the Court noted previously, when it comes to the actus reus of a § 841(a)(1) violation by a medical provider, it will instruct the jury that "a prescription is 'authorized' if it is issued for a legitimate medical purpose in the usual course of the provider's professional practice." (ECF 1219 p. 5.) Contrary to Defendants' contention (ECF 1186 p. 8), the Court is not likely to attempt to define for the jury the phrase "legitimate medical purpose in the usual course of the provider's professional practice." *See United States v. Lovern*, 590 F.3d 1095, 1100 (10th Cir. 2009) (approving of the government's attempt to establish the physicians' and pharmacist's conduct was outside the usual course of professional practice "through witnesses and documentary proof at trial focused on the contemporary norms of the medical profession"); *United States v. Sims-Robertson*, No. 92-1076, 1994 WL 12212, at *5 (6th Cir. Jan.

18, 1994) (noting the Sixth Circuit has "consistently upheld convictions under [§ 841(a)(1)] in cases where the standard of conduct of the professional was derived from testimony concerning general standards of acceptable conduct"). The Supreme Court described "legitimate medical purpose" and "usual course of … professional practice" as "objective criteria." *Ruan*, 142 S. Ct. at 2382. And notably, the Court did not define the phrases at the first trial (*see* ECF 741) and Defendants have not proffered a definition of these phrases (*see* ECF 1203-1, 1204-1.) This matter is not set in stone as jury instructions will take their final form based on the presentations and issues at trial, but the phrase "legitimate medical purpose in the usual course of the provider's professional practice" currently appears particularly amenable to the use of expert testimony to help the jury understand its meaning and limitations rather than defined by a jury instruction. *See United States v. Armstrong*, 550 F.3d 382, 389 (5th Cir. 2008) ("expert testimony may be both permissible and useful" to show a prescription was not for a legitimate medical purpose in the usual course of professional practice), *overruled on other grounds*, *United States v. Balleza*, 613 F.3d 432, 433 n.1 (5th Cir. 2010) (per curiam); *but see United States v. Smurthwaite*, 590 F.2d 889, 892 (10th Cir. 1979) ("we hold that it was not essential to support this conviction [for violating § 841(a)(1) by a physician] that any evidence of the usual course of a professional practice be presented"); *United States v. August*, 984 F.2d 705, 713 (6th Cir. 1992) ("There are no specific guidelines concerning what is required to support a conclusion that an accused acted outside the usual course of professional practice.").

Similarly, how certain statutes, regulations, or guidelines may shape the standards of practice for medical providers is appropriate fodder for qualified expert witnesses because they can be helpful to explain the scope of "usual course of … professional practice." To the extent these statutes, regulations, or guidelines are "vague" or "subject to debate and evolving

standards" (ECF 1186 pp. 9-10), they are fertile ground for cross-examination. Any such shortcomings are "best addressed through vigorous cross examination, rebuttal expert testimony, and presentation of contrary evidence, whereby the trier of fact will determine what weight, if any, should be attributed to" the expert's opinions. *Becerra v. Schultz*, 499 F. Supp. 3d 1142, 1149 (D. Wyo. 2020). But their alleged lack of well-defined parameters does not render them an inadmissible topic of expert testimony. The Court agrees with Defendants that "it is not sufficient for the government to prove that the defendant violated a state medical board standard, a CFR, or even any other provision of the CSA" to prove a violation of § 841. (ECF 1186 p. 11.) Nonetheless, expert testimony concerning such a violation is not precluded by Daubert/Rule 702 or Rule 704 because (1) it may help to define the scope of "usual course of … professional practice," and (2) it may be a relevant "reference to objective criteria" that helps to establish a defendant's subjective knowledge or intent. *Ruan*, 142 S. Ct. at 2382.

Further, Agent Cox's challenged expert testimony (ECF 1186 pp. 12-13) is not precluded by Daubert/Rule 702 or Rule 704. Agent Cox's challenged testimony is relevant to both the actus reus and the mens rea. For example, that some of the quantities of controlled substances involved in this case may be indicative of addiction or illegal redistribution rather than solely for compliant personal consumption is probative of whether a prescription was issued for a legitimate medical purpose in the usual course of the provider's professional practice. *Cf Ruan*, 142 S. Ct. at 2389 (Alito, J., concurring) ("A doctor who knows that he or she is acting for a purpose foreign to medicine—such as facilitating addiction or recreational drug abuse—is not protected by the CSA's authorization to distribute controlled substances by prescription."). And a prescription not issued for a legitimate medical purpose in the usual course of the provider's professional practice establishes the actus reus of a § 841 violation (issuance of a prescription not

authorized under the law) and is evidence of the defendant's mens rea (the defendant knew or intended the prescription to be unauthorized).

Finally, the challenged "red flag" expert testimony (ECF 1186 pp. 13-14) is not precluded by Daubert/Rule 702 or Rule 704, but it will be cabined. Defendants contend the testimony concerning the various "red flags" surrounding Shakeel Kahn's opioid prescribing practices is simply improper "drug courier profile" evidence. (*Id.*) Not so. A "red flag" in this context has been described as a "circumstance that does or should raise a reasonable suspicion as to the validity of a prescription." *In re Nat'l Prescription Opiate Litig.*, 589 F. Supp. 3d 790, 821 (N.D. Ohio 2022). "'[R]ed flag' is not a scientific term of art." *United States v. Iwas*, No. 18-20769, 2023 WL 6702114, at *4 (E.D. Mich. Oct. 12, 2023). "Red flags" in this context are "synonymous with 'warning signs,'" *United States v. Johnston*, 322 F. App'x 660, 667 (11th Cir. 2009), not with the creation or application of an improper or questionably-accurate criminal profile.

The red flags to be discussed in this case, such as prescribing upon a brief or non-existent physical examination and prescribing in the face of drug-seeking behaviors, are relevant because they are indicative of both the actus reus and mens rea that are at issue. *See Iwas*, 2023 WL 6702114, at *3 (observing that red flag evidence "is highly probative of the legitimacy of prescriptions and a pharmacist's knowledge thereof"). This red flag testimony can help a jury identify illicit prescription practices "because average jurors are not equipped to spot the seemingly innocent signs of a pill mill." *United States v. Stapleton*, No. CRIM. 12-11-AR-(1), 2013 WL 5966122, at *5 (E.D. Ky. Nov. 8, 2013). Such evidence is not "unhelpful or irrelevant or otherwise improper simply because this case arose in the context of pharmaceutical rather than street drugs." *United States v. Lovern*, 590 F.3d 1095, 1102 (10th Cir. 2009). The

Government's proposed red flag testimony in this case is not akin to improper testimony that a defendant fit a particular criminal profile, which is "inherently prejudicial because of the potential for including innocent citizens." *United States v. Hernandez-Cuartas*, 717 F.2d 552, 555 (11th Cir. 1983).

Nonetheless, the Court agrees with the other district courts that have precluded red flag experts from testifying that a particular defendant or medical office meets the red flags, as that is an issue that is better left to the jury to decide. The Eastern District of Michigan explained in *Iwas*:

> While it is proper for the government to introduce evidence about the indicators of a pharmacy operating illegally, such as red flags indicating controlled substances are being diverted, the witnesses should not testify that Beacon Pointe Pharmacy *meets* those characteristics. As Judge Thapar explained during his time as a district judge:
>
> > When a law enforcement expert offers a "point by point examination of profile characteristics with specific reference" to the defendant, there is a particularly acute risk the jury will convict simply because the defendant fits the profile. Since the jury is competent to make the comparison in this case on its own, linking the traits of a typical pill mill to the defendants' clinic carries a significant risk of unfair prejudice without adding much probative value.
>
> *Stapleton*, 2013 U.S. Dist. LEXIS 160442, at *19–21 .... Thus, as requested by Iwas, law enforcement witnesses will not be permitted to testify that Beacon Pointe Pharmacy fit the profile of a prescription drug diversion scheme. That is an issue for the jury to decide based on the evidence presented to them.

Iwas, 2023 WL 6702114, at *4. The same applies here. The proposed "red flag" testimony in this case may not include an opinion that Shakeel Kahn's medical practice fit the red-flag profile of a "pill mill" or prescription drug diversion office. The jury can be told about the relevant red flags and about the characteristics of Shakeel Kahn's medical practice, but the Government's experts must leave to the jury to decide whether Shakeel Kahn's practice met those red flags.

3. Diversion Investigator Kevin Skidmore and David Drndarski

As noted in footnote 3, *supra*, prior to the first trial, the Court precluded David Drndarski from testifying as an expert witness under Daubert/Rule 702 (ECF 675 p. 2) and precluded Investigator Kevin Skidmore from testifying due to his untimely expert designation (ECF 663). The Court issued its legal rulings on these matters, and, relying on the law of the case doctrine, the Government "requests the court continue its previous rulings to prevent 'continued re-argument of issues already decided.'" (ECF 1164 p. 3 (quoting *Gage v. General Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986)).) The Court concurs.

Accordingly, David Drndarski remains precluded from testifying as an expert witness. As he did at the first trial, he may testify as a fact witness in accordance with his personal experiences. (*See* Trial Tr. Vol. IIX.[5]) And the Government remains "prohibited from using Diversion Investigator Kevin Skidmore as an expert witness." (ECF 663.)

CONCLUSION AND ORDER

Defendants' objections to the Government's expert witness designations are untimely by several years, and their failure to raise these objections in a timely manner has resulted in their forfeiture. Despite that, expert testimony must satisfy the Daubert/Rule 702 requirements, and the Court has reviewed the merits of Defendants' objections.

IT IS THEREFORE ORDERED that Shakeel Kahn's objections to the Government's expert witness notices (ECF 1186) are **GRANTED IN PART AND DENIED IN PART.** The Government's designated expert witness testimony is not precluded by Daubert/Rule 702, subject to the limited warnings and restrictions set forth in Subsection 2, *supra*. Additionally, in conformity with the law of the case doctrine, David Drndarski and Investigator Kevin Skidmore are precluded from offering expert opinion testimony, as set forth in Subsection 3, *supra*. The

[5] ECF 914.

remainder of Shakeel Kahn's objections to the Government's expert witness notices are **DENIED.**

ORDERED: October 27, 2023.

Alan B. Johnson
United States District Judge

FILED

8:23 am, 10/17/23

Margaret Botkins
Clerk of Court

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHAKEEL A. KAHN, and
NABEEL AZIZ KHAN,

Defendants.

Case No. 17-CR-0029-ABJ

ORDER PROVIDING GUIDANCE ON JURY INSTRUCTIONS AS TO 21 U.S.C. § 841(a)(1) AND MENS REA

This matter comes before the Court on the parties' various submissions and arguments concerning the jury instructions to be used in the upcoming retrial as to 21 U.S.C. § 841 and mens rea in light of *Ruan v. United States*, 142 S. Ct. 2370 (2022), and *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023) ("*Kahn II*"). (ECF 1164, 1182, 1185, 1193, 1203, 1204, 1205, 1206, 1213, 1217.) The parties also addressed the issue at the September 22, 2023 motions hearing. (ECF 1194, 1195.) Having considered the parties' positions, reviewed the caselaw, and being otherwise fully advised, the Court issues the following guidance for the parties' trial preparations.

1. **Primary Elements of a § 841(a)(1) Violation by a Doctor**

Shakeel Kahn was a licensed medical doctor at the times of the alleged offenses. He is charged with various violations of § 841(a)(1), a section of the federal Controlled Substances Act. Additionally, Shakeel Kahn and his brother/codefendant, Nabeel Khan, are charged with conspiring with each other and others to violate § 841(a)(1). As pertinent here, that law

provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally to … distribute or dispense, or possess with intent to … distribute or dispense, a controlled substance.

21 U.S.C. § 841(a)(1). Most of the charges relate to prescriptions Shakeel Kahn issued for various controlled substances, including narcotics. The Government contends the prescriptions were illegitimate because Shakeel Kahn knew or intended the drugs would facilitate addiction or be sold on the street. Shakeel Kahn's primary defense in this case (on which his codefendant/brother also heavily leans) is that, as a licensed medical doctor, the challenged prescriptions were either authorized by law or he subjectively believed them to be authorized. "[A]uthorization plays a 'crucial' role in separating innocent conduct—and, in the case of doctors, socially beneficial conduct—from wrongful conduct." *Ruan*, 142 S. Ct. at 2377 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994)).

The decisions in *Ruan* and *Kahn II* require the Government in this case to prove: (1) the prescriptions were in fact unauthorized (actus reus), and (2) Shakeel Kahn subjectively knew the prescriptions were unauthorized or intended them to be unauthorized (mens rea). *See Ruan*, 142 S. Ct. at 2376 ("the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner"); *Khan II*, 58 F.4th at 1316 ("Under § 841(a)(1), the government always has the burden of 'proving that a defendant knew or intended that his or her conduct was unauthorized.") (quoting *Ruan*, 142 S. Ct. at 2382). This effectively requires the Government to prove the "defendant's subjective intent to act in an unauthorized manner." *Kahn II*, 58 F.4th at 1316.

The parties (and the Court) largely agree on these essential elements, and the jury will be instructed accordingly.

2. "Unauthorized" Prescriptions

The parties' primary disagreement now centers on how to define an "unauthorized" prescription. As it did at the first trial, the Government relies on the Code of Federal Regulations to distinguish an authorized prescription from an unauthorized prescription. The relevant regulation states in part:

> A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.... An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the [Controlled Substances Act] (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

21 C.F.R. § 1306.04(a).

Unlike the first trial, Shakeel Kahn now objects to relying upon this regulation to define an authorized prescription. He contends Congress, in the Controlled Substances Act, never delegated its authority to define "authorization" to an agency (here, the Drug Enforcement Administration), and therefore there's a separation of powers issue by relying on this regulation. He also points out that the regulation itself does not say it defines an "authorized" prescription but instead it describes what is necessary for a controlled substances prescription "to be effective." Relying on the concurrence in *Ruan*, Shakeel Kahn suggests an "authorized" prescription should be defined as a prescription that is "a valid means of pursuing a medical purpose." (ECF 1203 p. 21 (quoting *Ruan*, 142 S. Ct. at 2389 (Alito, J., concurring)).) These arguments do not carry the day for two reasons.

First, as noted, these arguments were not raised during the first trial and are therefore defaulted. Defendants had ample opportunity to present these arguments to this Court when

determining jury instructions and to the Tenth Circuit on appeal, but Defendants did not do so. *See Ruan*, 142 S. Ct. at 2375 ("We assume, as did the courts below and the parties here, that a prescription is 'authorized' and therefore lawful if it satisfies [21 C.F.R. § 1306.04(a)]."). Moreover, the decisions in *Ruan* and *Kahn II* did not concern or address the definition of "authorization," and therefore those decisions have not cast any doubt on the Court's and the parties' prior reliance on the regulation to help define an authorized prescription. In fact, prior to the first trial, Shakeel Kahn expressly requested the use of the regulation language in the jury instructions. (ECF 694 pp. 1-3.) As properly instructing the jury is the duty of a court and jury instructions create questions of law, this Court's prior determinations on jury instructions that were not modified by *Ruan* or *Kahn II* remain controlling as the law of the case. *See United States v. Kress*, 58 F.3d 370, 373 (8th Cir. 1995) ("Where a party could have raised an issue in a prior appeal but did not, a court later hearing the same case need not consider the matter.").

Second, and more significantly, both the Tenth Circuit and Supreme Court have advanced the use of this regulation when identifying an "authorized" prescription. The majority opinion in *Ruan* stated:

> [A]s provided by regulation, 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, 142 S. Ct. at 2375 (quoting 21 C.F.R. § 1306.04(a)). And the Tenth Circuit followed suit:

> A federal regulation provides that, to be "authorized," "[a] prescription for a controlled substance ... must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."

Kahn II, 58 F.4th at 1314 (quoting 21 C.F.R. § 1306.04); *see also id.* at 1319 ("Here, the government is correct that the Supreme Court has acknowledged that 'the scope of a doctor's prescribing authority' remains tethered 'to objective criteria such as legitimate medical purpose

and usual course of professional practice.'") (some quotation marks omitted) (quoting *Ruan*, 142 S. Ct. at 2382).

Consequently, the Court will be instructed that a prescription is "authorized" if it is issued for a legitimate medical purpose in the usual course of the provider's professional practice.

3. Proving a prescription was "unauthorized" proves the actus reus; it does not itself prove the mens rea.

The final issue the Court finds it should address at this time is the parties' disagreement about what the Government actually proves if it proves a prescription was "unauthorized" (in that it was not written for a legitimate medical purpose in the usual course of the provider's professional practice). The Government asserts that if it "proves that the defendant knowingly and intentionally issued prescriptions in violation of both factors [legitimate medical purpose and within the usual course of professional practice], it has proven the *mens rea* as to the lack of authorization." (ECF 1213 p. 5.) Possibly so, but also possibly not. And the jury will not be instructed in accordance with the Government's if-then assertion.

Proving that a prescription was not issued for a legitimate medical purpose in the usual course of the provider's professional practice will prove only the actus reus—that the defendant issued a prescription not authorized by law. The Government will then have to prove the mens rea—that the defendant meant to issue an unauthorized prescription. In doing so, the Government can point to the fact that the prescription was not issued for a legitimate medical purpose in the usual course of the provider's professional practice as evidence the defendant knew or intended his conduct to be unauthorized.

> The Government, of course, can prove knowledge of a lack of authorization through circumstantial evidence. And the regulation defining the scope of a doctor's prescribing authority does so by reference to objective criteria such as

"legitimate medical purpose" and "usual course" of "professional practice." *Ruan*, 142 S. Ct. at 2382. Such evidence by itself, though, may or may not establish the knowledge or intent requirement. It is evidence of conscious wrongdoing, not conscious wrongdoing per se.

> A physician's serial disregard of accepted medical norms constitutes relevant evidence of his mental state, and "the more unreasonable a defendant's asserted beliefs or misunderstandings are, especially as measured against objective criteria, the more likely the jury ... will find that the Government has carried its burden of proving knowledge."

Kahn, 58 F.4th at 1319 (quoting *Ruan*, 142 S. Ct. at 2382).

It will be the jury's duty to determine whether the Government proves "beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so." *Ruan*, 142 S. Ct. at 2375. The Court will not instruct the jury along the lines of it must find knowledge or intent if it finds a prescription was issued without a legitimate medical purpose in the usual course of the provider's professional practice.

The Court concludes that this ruling provides sufficient information to allow the parties to adequately prepare for trial, and all remaining issues and details concerning jury instructions will be addressed at the jury instructions conference(s) during trial.

ORDERED: October 16, 2023.

Alan B. Johnson
United States District Judge

PERTINENT CONSTITUTIONAL PROVISIONS

U.S. Constitution, Article I, Section 1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Constitution, Article II, Section 1, Clause 1 (excerpt)

The executive Power shall be vested in a President of the United States of America.

U.S. Constitution, Article III, Section 1 (excerpt)

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

U.S. Constitution, Amendment V (excerpt)

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATUTORY AND REGULATORY ADDENDUM

The following are relevant excerpts. Ellipses identify omitted text. The historical scope provision is reproduced as it appeared during the charged conduct.

21 U.S.C. § 802(5)

The term "control" means to add a drug or other substance, or immediate precursor, to a schedule under part B of this subchapter, whether by transfer from another schedule or otherwise.

21 U.S.C. § 802(21)

The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research.

21 U.S.C. § 821

The Attorney General is authorized to promulgate rules and regulations and to charge reasonable fees relating to the registration and control of the manufacture, distribution, and dispensing of controlled substances and to listed chemicals.

21 U.S.C. § 822(b)

Persons registered by the Attorney General under this subchapter to manufacture, distribute, or dispense controlled substances or list I chemicals are authorized to possess, manufacture, distribute, or dispense such substances or chemicals (including any such activity in the conduct of research) to the extent authorized by their registration and in conformity with the other provisions of this subchapter.

21 U.S.C. § 829(a)

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in schedule II, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.], may be dispensed without the written prescription of a practitioner, except that in emergency situations, as prescribed by the Secretary by regulation after consultation with the Attorney General, such drug may be dispensed upon oral prescription in accordance with section 503(b) of that Act [21 U.S.C. 353(b)]. Prescriptions shall be retained in conformity with the requirements of section 827 of this title. No prescription for a controlled substance in schedule II may be refilled.

21 U.S.C. § 829(c)

No controlled substance in schedule V which is a drug may be distributed or dispensed other than for a medical purpose.

21 U.S.C. § 829(e)(1) and (2)(A)

(1) No controlled substance that is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 301 et seq.] may be delivered, distributed, or dispensed by means of the Internet without a valid prescription.

(2) As used in this subsection:

(A) The term "valid prescription" means a prescription that is issued for a legitimate medical purpose in the usual course of professional practice by . . . (i) a practitioner who has conducted at least 1 in-person medical evaluation of the patient; or (ii) a covering practitioner.

21 U.S.C. § 841(a)(1)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

21 U.S.C. § 842(a)(1) and (2)

It shall be unlawful for any person . . . (1) who is subject to the requirements of part C to distribute or dispense a controlled substance in violation of section 829 of this title; (2) who is a registrant to distribute or dispense a controlled substance not authorized by his registration to another registrant or other authorized person or to manufacture a controlled substance not authorized by his registration . . . .

21 U.S.C. § 871(b)

The Attorney General may promulgate and enforce any rules, regulations, and procedures which he may deem necessary and appropriate for the efficient execution of his functions under this subchapter.

21 U.S.C. § 903

No provision of this subchapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which that provision operates, including criminal penalties, to the exclusion of any State law on the same subject matter which would otherwise be within the authority of the State, unless there is a positive conflict between that provision of this subchapter and that State law so that the two cannot consistently stand together.

21 C.F.R. § 1306.01 (2016)

Rules governing the issuance, filling and filing of prescriptions pursuant to section 309 of the Act (21 U.S.C. 829) are set forth generally in that section and specifically by the sections of this part.

21 C.F.R. § 1306.04(a)

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

UNITED STATES DISTRICT COURT
DISTRICT OF WYOMING

UNITED STATES OF AMERICA,
Plaintiff,

v.

SHAKEEL A. KAHN,
Defendant.

Case No. 17-CR-00029-ABJ

TRANSCRIPT EXCERPT: INSTRUCTION CONFERENCE

December 13, 2023

Before the Honorable Alan B. Johnson

Trial Transcript Volume XXIII, pages 188–207

Aplt. App. Volume XXI, pages 20–39

necessary.

(A recess was taken from 2:17 p.m. to 2:41 p.m.)

THE COURT: Please be seated.

We'll try to move fairly quickly for you because I know you want to do other things that are probably more important right now.

With regard to the motion under Rule 29, the Court finds that there's sufficient evidence in the record of this proceedings to submit this case on all counts, that a reasonable jury could reach a decision that is sufficient for conviction as to all counts in this matter.

Now let's go through instructions and make sure that we have everything. I think everyone has in their possession pretty much what we're going to be discussing.

First of all, we will all recall that the -- everywhere that we found it we've replaced "third superseding indictment" with the word "indictment."

It is Instruction No. 16 . . .

(Discussion held at the bench.)

THE COURT: All right. And that's No. 13 -- Instruction No. 13.

Instruction No. 16, we've added the Tenth Circuit pattern instruction by virtue of the Government's request in this matter.

And that language, which I don't think is

objectionable, "It is not up to you to decide whether anyone who is not on trial in this case should be prosecuted for any of the alleged crimes. The fact that another person also may be guilty is no defense to a criminal charge."

MR. BRINDLEY: Judge, could we take out the word "also" --

THE COURT REPORTER: Microphone, please.

(Reporter seeks clarification.)

MR. BRINDLEY: Judge, my only request would be that we take out the word "also."

I don't want to suggest that the defendant is guilty in -- in saying that someone else might not be.

MS. SPRECHER: That's fine.

THE COURT: All right. We'll take it out.

It was there in italics anyway.

THE LAW CLERK: That's directly from the pattern.

THE COURT: It's gone.

(Discussion held at the bench.)

THE COURT: Are there any other objections to No. 13?

I think reference to "superseding indictment" was the only objection that we'd received before.

MR. GRISWOLD: Not from the Government, Your Honor.

MR. BRINDLEY: No objection to that.

THE COURT: Okay.

Instruction No. 20. No. 20 will be the instruction

given by the defense in this matter.

MR. BRINDLEY: Are we referring to --

MR. THOMPSON: Which instruction are we referring to, Your Honor? We have multiple different things that say Exhibit -- Instruction 20.

THE COURT: It is the one that has the language that was suggested by Mr. McDavid.

MR. BRINDLEY: Okay.

THE COURT: And I believe the Government has made its objections to that language vehemently.

MR. BRINDLEY: They have.

MS. SPRECHER: So this is the one that takes out the words "legitimate" and "usual"?

THE COURT: Yes.

MS. SPRECHER: But that's not the law, Your Honor.

THE COURT: It's not the regulation.

MS. SPRECHER: Right.

THE COURT: It's not what the Supreme Court said was vague.

MR. GRISWOLD: We've already talked about this at length, Your Honor. But, I mean, *Kahn II* even says that "To be authorized, a prescription for a controlled substance must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of professional practice." That is also directly from *Ruan*.

And this is exactly what was briefed and ruled on by the Court before. There is no Court and no authority for this instruction proposed by the defense.

Every circuit that has analyzed *Ruan* has still held 1306.04 is the law and defines what is authorized. This -- this is not the law, your -- like it --

THE COURT: The Supreme Court's ruled?

MR. GRISWOLD: The Supreme Court has not ruled on this. The Supreme Court -- respectfully, Your Honor -- did find that 1306.04 still defined what was authorized.

Ruan said "As provided by regulation" -- I'm quoting from *Ruan* -- "a prescription is only authorized when a doctor issues it for a -- for a legitimate medical purpose acting in the usual course of his professional practice."

And as we cited in our briefing on this before the trial and when the Court agreed with us, every circuit that has looked at this post-*Ruan* -- many of the circuits go as far as saying that the instruction -- the element should be that they knowingly or intentionally issued the prescription not for a legitimate medical purpose in the usual course of professional practice.

Where *Kahn II* has refined it further, it just says that the mens rea is that he must have not acted in -- in an unauthorized manner. But it still says that the definition of "authorized" is 1306.04, and that is still the actus reus.

And *Kahn II* in the Tenth Circuit still says you look to 1306.04 for the circumstantial evidence of his intent.

That's the law, Your Honor. This is -- this is not law.

We've talked to DOJ appellate; we've talked to our appellate counsel. They've been trying to get this, but no Court has agreed.

As we cited in the *Lamartiniere* case -- they tried that in that case in another jurisdiction, and the District Court quickly shot it down. And that was post-*Ruan*. This is the law.

MR. BRINDLEY: Judge, I -- I -- we've argued this and I -- I think we're right. We've asked to adhere to the statute, which is what the Supreme Court said to do. No Court has -- has been able to fashion instructions yet based on *Kahn II*.

Kahn II is the -- the District Court in Louisiana, with whom I vehemently disagreed, acknowledged that there's a strong split between what we've done in here in the Tenth Circuit in *Kahn II* and what was going on in that -- the Fifth Circuit and their law.

So we -- we have cited the Supreme Court, we have asked to adhere to the statute, which is what the Supreme Court has said to do, and we believe this is the right instruction.

MR. GRISWOLD: Your Honor, we ask that the Court reconsider and look at your own ruling from before the trial and the law as cited in the Court's own ruling. You cited to *Ruan*, you cited to *Kahn II*, finding that 1306.04 is the definition of "authorized" and what is required for Instruction 20.

That is what the Supreme Court still holds; that's what the Tenth Circuit still holds. This is good law.

And to change it to this -- this is not the law of what is authorization.

THE COURT: I think it's at great risk if we confuse the jury.

The important lesson or teaching of -- of *Ruan* really is -- is the issue of the element in this case of knowledge and belief on the part of the defendant that has to be established. And I think reciting regulations really is inviting -- inviting serious problems.

MR. GRISWOLD: Your Honor, if the Court wants to take out the specific reference to the regulation, we'd be okay taking out 1306.04, even though I still think that would be what's appropriate, because in these types of instructions you always do cite to the statute when we look at any of the other ones.

But, either way, the legal definition of what is authorized is what -- "a legitimate medical purpose in the

usual course of professional practice." And how can we prove if he knew that or not if we can't even say what it is legally?

Because this is not the proper legal definition of what is authorized. He even acknowledged on the stand during his direct testimony that, if he did not go -- comport with 1306.04, that he would be subject to the penalties of the Controlled Substance Act.

He has -- the elements are very clear and make it clear that we have to prove that he knowingly, intentionally acted in an unauthorized manner.

They're still going to be able to freely argue that he did not know that, that he thought it was different and so he didn't have that subjective intent with the way the elements are written and with the original 20 instruction as provided.

Even the end of the original 20 instruction makes it very clear that just proving they were not authorized is not enough. The original 20 instruction says, beyond that, we must still prove that he knew what was authorized and that he intentionally or knowingly did not issue them in an authorized manner.

But just because of that raised requirement on the mens rea standard, it doesn't mean we change the definition of "authorized" contrary to what the law is.

The law is still 1306.04. That is still the actual law of what is authorized. That is still the actual law of -- for an authorized prescription. And to change that would be completely contrary to all of the case law we've cited, to the rule itself, and I don't . . . yeah. They're taking away the objective measurement, as provided by the statute.

And *Ruan* itself says that to be authorized it's "for a legitimate medical purpose, acting in the usual course of professional practice." And *Ruan* itself and *Kahn II* both say you look to the objective standard of 1306.04 as proof of what his intent was, that we are allowed to cite to violations of this as objective proof of what his intent may be.

MR. BRINDLEY: And, Judge, they can cite all the -- there is nothing in our instruction that -- that the Court has indicated it's planning to give -- that takes away their ability to argue objective evidence. They can argue that he had to know because he was so divergent from what we've been told by the expert all the standards are.

That is what *Ruan* said that it should be for. That is what *Kahn II* specified. The language about the two prongs of the regulation was only relevant because it would be circumstantial evidence about his knowledge. And they can argue that.

The language that we have used comes from the Controlled Substances Act, and we cited the specific places

where. The Supreme Court criticized the regulation and said "We're not going -- we need to go to the statute and the authorization language because of this criticism."

And so under *Kahn II*, which is the -- the strongest opinion for a defendant on this subject in the United States, it -- this is the appropriate language. We avoid confusion, we allow the jurors to hear the language from the statute, which is what the Supreme Court told us we should be talking about, and to make a decision.

And they're going to be able to argue all day long that his prices were outrageous and he didn't do all the things Dr. Shay said he should do and, because of that, you must know -- you can find beyond a reasonable doubt that he did know. And that's what Justice Alito was talking about in the concurrence. That's what *Kahn II* talks about.

This instruction is correct and should be given as the Court has indicated.

THE COURT: I'm willing to take the risk. We'll give it.

Have the parties looked at No. 23?

MR. THOMPSON: To be clear, Your Honor, is this the medical malpractice one or a different one?

THE COURT: Yes.

MR. THOMPSON: Okay.

MR. BRINDLEY: Judge, we agreed last time to put

in --

THE COURT REPORTER: Excuse me. Microphone, please.

(Reporter seeks clarification.)

MR. BRINDLEY: It's on but I'm not close enough to it.

We'd agreed last time to put in "or violated Medical Board regulations."

THE COURT: Yeah, we put that in.

MR. BRINDLEY: There's one addition we would like, based on the cross-examination of Dr. Kahn, because we had a lot of discussion of the language "standard of care."

And so we would like to add a sentence that says -- after "violated Medical Board regulations," we'd like to add a sentence that says, "Similarly, you cannot convict Defendant Shakeel Kahn if all the Government proves is that he failed to attempt to apply the appropriate standard of care."

And that is consistent with the language of *Kahn II*. And given that "standard of care" has been introduced heavily in the discussion with Dr. Kahn himself, I think that language needs to be in the instruction.

MS. SPRECHER: May we have a second, Your Honor. This is new.

THE COURT: Uh-huh.

(Discussion held at counsel table.)

MR. BRINDLEY: And, Judge, to be clear, the quotes

from *Kahn II* that we are taking this from are as follows: In *Kahn II* it reads "It is not enough that the jury found that Dr. Kahn failed to attempt or make some honest effort to apply the appropriate standard of care."

And then, below, "To allow conviction where the Government proved only that Dr. Kahn failed to attempt or make some honest effort to apply the appropriate standard of care does not require any finding that he intended to act as a -- not as authorized."

So given the language from *Kahn II*, some version of that is necessary, given the standard of care language introduced by the Government in the cross-examination of Dr. Kahn.

THE COURT: Give me the language you wanted again.

And it follows "regulation"?

MR. BRINDLEY: What's that?

THE COURT: Give me that language again.

MR. BRINDLEY: Oh.

Okay. Here's how we'll do it: "You cannot convict Defendant Shakeel Kahn if all the Government proves is that he is an inferior doctor or violated Medical Board regulations."

(Discussion held at counsel table.)

MR. BRINDLEY: I'm looking -- let me read -- I'm getting shown the old version. Let me -- let's -- oh, here it is.

"It is not enough for the Government to prove" --

THE COURT REPORTER: Excuse me. Go slowly, please.

(Reporter seeks clarification.)

MR. BRINDLEY: Yes.

Okay. So after it says "It is not enough for the Government to show Defendant Shakeel Kahn violated a Medical Board regulation, you cannot convict Defendant Shakeel Kahn if all the Government proves is that he is an inferior doctor or that he failed to attempt to apply the appropriate standard of care."

MS. SPRECHER: That's fine, Your Honor.

THE COURT: Otherwise, is Instruction No. 23, as amended, satisfactory?

MR. BRINDLEY: Yes, Your Honor.

MS. SPRECHER: Yes, sir.

THE COURT: With No. 25 we inserted "without authorization" in place of "without a legitimate medical purpose" --

MR. BRINDLEY: Yes.

THE COURT: -- "in the usual course of professional conduct" and removed "by Federal law" from the blocked quote.

Any other objections?

MR. THOMPSON: One second, Your Honor. Sorry.

(Discussion held at counsel table.)

MR. BRINDLEY: Judge, we had -- we had previously

asked that this read "except as authorized by the Controlled Substances Act," and then there was -- there was some confusion because we had the regulation language up above.

The regulation language has been removed, so at this point I think it would be accurate, because we're quoting from the CSA, to indicate "except as authorized by the Controlled Substances Act."

Or "this subchapter," if you like.

(Discussion held at counsel table.)

THE LAW CLERK: In light of all that, do you want something added to the new 25?

MR. BRINDLEY: Yes.

THE LAW CLERK: What?

MR. BRINDLEY: "Except as authorized by the Controlled Substances Act, comma."

THE LAW CLERK: In the blocked quote there?

MR. BRINDLEY: Yes.

THE LAW CLERK: We did not agree to that.

MR. BRINDLEY: Okay. That's the request we made. That will be the objection we'll make. I understand.

THE LAW CLERK: The -- we did change -- it said "by Federal law" --

MR. BRINDLEY: Right.

THE LAW CLERK: -- and we all agreed that that could be removed.

MR. BRINDLEY: Okay.

(Discussion at counsel table.)

THE COURT: Does the Government have any position it wishes to take?

MS. SPRECHER: No objection, Your Honor.

Sorry to make you wait.

THE COURT: The defendant objects and submits additional language. The Court has rejected the request, and No. 25 will be given as written.

No. 29. The Court, upon request of the defense, inserted the terms "further unlawful distribution" in place of "further distributing."

MR. BRINDLEY: Yep.

THE COURT: Any further objection or --

MR. BRINDLEY: No, Your Honor.

THE COURT: -- request?

It will be received, then, as modified.

No. 34, the third paragraph. We're going to amend it to read "As noted in these instructions, Federal law authorizes a registered practitioner to issue a -- a controlled substance prescription for a medical purpose while acting in the course of professional practice."

MR. BRINDLEY: Yes, we agree.

MR. GRISWOLD: We obviously object, Your Honor.

THE COURT: Very well.

Any other objection or suggestion concerning that?

MR. THOMPSON: There's a -- the next sentence down has the same language, Your Honor, after -- after talking about Section 841(a)(1).

THE COURT: Thank you, Mr. Thompson.

MR. THOMPSON: Thank you.

THE COURT: Instruction No. 36, we added the term "undercover" in this -- Count Six -- "undercover as Christopher James (C. J.) Johnson" to "Special Agent Ryan Hieb" in the third column of Count Six.

And, secondly -- in Count Sixteen.

And added exhibit references to the third column, as provided by the Government.

MR. THOMPSON: No objection to that.

MS. SPRECHER: No objection.

THE COURT: To the first paragraph in No. 37 we added the term "without authorization."

That became a popular change.

MR. BRINDLEY: Yes.

THE COURT: Any objection to 37 as changed?

MR. BRINDLEY: No, Your Honor.

MS. SPRECHER: No, Your Honor.

THE COURT: 38, same as to the first element.

Any objection?

MS. SPRECHER: No, Your Honor.

MR. BRINDLEY: No.
THE COURT: We did the same in Instruction 41, first paragraph.
Any objection?
MS. SPRECHER: No objection.
THE COURT: And 42 --
MR. BRINDLEY: No objection.
THE COURT: -- added it -- "without authorization" -- to every entry in Column No. 2.
It's actually the third column.
I assume no objection.
MS. SPRECHER: No objection.
MR. BRINDLEY: No objection.
THE COURT: Also added references in the fourth column, which have been provided here by the Government.
MR. BRINDLEY: No objection to those. We agree.
THE COURT: Instruction 43, we removed "by Federal law" from the third paragraph.
MR. BRINDLEY: Yes.
THE COURT: Any further objection?
MR. BRINDLEY: No further objection.
MS. SPRECHER: No, Your Honor.
THE COURT: And, No. 45, inserted the term "intended to" in place of the term "would" in the second sentence.
Any objection?

MR. BRINDLEY: No objection.

MS. SPRECHER: No objection.

THE COURT: And also added exhibit references to Column No. 3, as provided by the Government.

Any objection to those?

MS. SPRECHER: No objection.

MR. BRINDLEY: No objection.

THE COURT: Very well.

And, No. 64, we removed Special Agent Ryan Hieb from the list and removed the highlighting.

MS. SPRECHER: No objection, Your Honor.

MR. BRINDLEY: No objection.

THE COURT: Anything further we need to discuss concerning the instructions?

MS. SPRECHER: Not from the Government, Your Honor.

MR. BRINDLEY: Judge, we have one final request.

And that is in Instruction No. 33, after No. 2 -- so in the paragraph after No. 2 that starts "Defendant, as part of criminal conspiracy" -- oh, no, that's still part of 2. I'm reading wrong.

"This standard is satisfied if you find the Government has proven, beyond a reasonable doubt, that but for Jessica Burch ingesting one or more of the" -- we would like to insert the word "unauthorized" before "controlled substances."

MS. SPRECHER: No objection.
THE COURT: Agreed.
MR. BRINDLEY: Okay.
We have no further issues with the instructions.
THE COURT: Have the parties given consideration to the verdict form?
MR. BRINDLEY: We agree with the verdict form.
MS. SPRECHER: We have the same objections, Your Honor.
(Discussion held at the bench.)
THE COURT: Anything further by way of instructions?
MR. BRINDLEY: Not from the defense.
MS. SPRECHER: No, Your Honor.
THE COURT: Two hours apiece for closings.
We'll put you on the timer. When all time runs out, all hell will break loose.
MR. THOMPSON: Willie will get the hook.
MR. BRINDLEY: Judge, you -- you instruct first? You give most of the instructions first, before we begin argument; correct?
THE COURT: The substantive instructions. I have no objection to you referring, in your closing, to any instruction that may not have been given.
MR. BRINDLEY: Okay.
THE COURT: And so the last instruction that I'll

give by way of opening is going to be . . . 56 -- I mean 55. And the verdict form.

The only reason I do that is to make sure the voice holds out.

Now, tomorrow morning, anything you want by way of special arrangements or . . .

MS. SPRECHER: Not for me, Your Honor. Thank you.

MR. THOMPSON: Nothing for us, Your Honor.

MR. BRINDLEY: No, Your Honor.

THE COURT: Slow down. Give the reporter a fair chance to be able to report what's going on.

MR. GRISWOLD: One additional thing, Your Honor, if I may.

The Court had said -- or I don't know if I remember exactly what the Court had said, but we had the pending objections on the exhibits that were the law, whether it be regulations or statutes.

We are going to ask that none of those go back to the jury, whether they are from the Government or the defense. It's the Court's job to instruct on the law.

I do have Ninth Circuit precedent in a similar tax case where the Court did find that, while they could -- the defense could show the statutes to say that's what he relied on, it's not proper and could be potentially confusing to send those back to the jury. The law is as the Court gives it, and

we shouldn't be having exhibits back there with the law.

THE COURT: Yeah. Both sides offered and discussed at length particular provisions of the law in this matter.

I agree with you, Mr. Griswold. I think in your closings you can refer to them; you can show them up on screen or do whatever you want in that regard. They will not go back to the jury. You might double-check that and not just leave it to Becky.

MR. GRISWOLD: Will do, Your Honor.

MR. BRINDLEY: Thank you, Your Honor.

THE COURT: All right.

THE COURTROOM DEPUTY: All rise.

(Proceedings adjourned at 3:28 p.m., December 13, 2023.)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

UNITED STATES OF AMERICA, Plaintiff, vs. SHAKEEL A. KAHN, Defendant.	DOCKET NO. 17-CR-00029-ABJ VOLUME XXIV of XXV (Pages 1 through 225) Casper, Wyoming Thursday, December 14, 2023 8:39 a.m.

TRANSCRIPT OF TRIAL PROCEEDINGS

BEFORE THE HONORABLE ALAN B. JOHNSON
UNITED STATES DISTRICT JUDGE
and a jury of twelve and three alternates

MELANIE HUMPHREY-SONNTAG, RDR, CRR, CRC
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Proceedings reported with realtime stenography;
transcript produced with computer-aided transcription.

Hydromorphone (an opioid whose brand names include Dilaudid) is a Schedule II controlled substance.

Alprazolam (a benzodiazepine or antianxiety medication whose brand names include Xanax) is a Schedule IV controlled substance.

And carisoprodol (a muscle relaxant whose brand names include Soma) is a Schedule IV controlled substance.

The following definitions apply throughout all jury instructions in this case:

The term "dispense" means to deliver a controlled substance to an ultimate user by or pursuant to the order of a practitioner. It includes prescribing or issuing a prescription for a controlled substance.

The term "distribute" means to deliver (other than by dispensing) a controlled substance to another. It includes selling a controlled substance to another. It is not necessary, however, for the Government to prove that any transfer of money or other thing of value occurred at the same time as or because of the distribution.

"Practitioner" includes a physician licensed, registered, or otherwise permitted by the United States to distribute or dispense a controlled substance in the course of professional practice.

A "registered practitioner" is a practitioner who has a valid DEA -- Drug Enforcement Administration -- registration

number.

A significant dispute in this case concerns the lawfulness of certain prescriptions for controlled substances issued by Defendant Shakeel Kahn, who was a registered practitioner at all times relevant to the charges here.

Title 21 of the United States Code, Section 841(a)(1), which is part of the Federal Controlled Substances Act, makes it unlawful for a person to knowingly or intentionally distribute or dispense a controlled substance "except as authorized."

To be authorized under the law, a controlled substance prescription must be issued by an individual practitioner acting in the course of professional practice. For purposes of a registered practitioner, to act in the course of professional practice means to practice medicine. For a practitioner to practice medicine, he or she must act for a medical purpose -- which means aiming to prevent, cure, or alleviate the symptoms of a disease or injury -- and must believe that the treatment is a medically legitimate means of treating the relevant disease or injury.

Conversely, a prescription is not authorized when it is issued for a purpose foreign to medicine, such as facilitating addiction, recreational abuse, or unlawful distribution.

However, issuing an unauthorized prescription (that

is, a prescription not issued for a medical purpose while acting in the course of professional practice) is not, by itself, a crime. A registered practitioner only violates Title 21, United States Code, Section 841(a)(1) if he or she knowingly or intentionally issues an unauthorized prescription and, at the time, knew the prescription was unauthorized or intended it to be unauthorized.

Therefore, for the Government to prove the defendant guilty of a Federal drug crime in this case based on a controlled substances prescription, the Government must prove, beyond a reasonable doubt, that Defendant Shakeel Kahn knowingly or intentionally issued the unauthorized prescription and, at the time, knew the prescription was unauthorized or intended it to be unauthorized.

In determining whether the defendant knew or intended a prescription to be unauthorized at the time it was issued, you should consider the defendant's actions, the surrounding circumstances, and all other evidence in the case.

An act is done "intentionally" if it is done purposefully and not by accident or mistake. An act is done "knowingly" if it is done voluntarily while the actor is aware of his actions, realized what he was doing or what was happening around him, and did not act because of mistake or accident. Knowledge on the part of the defendant cannot be established merely by demonstrating the defendant was

negligent, careless, or foolish.

The intent of a person or the knowledge that a person possesses at any given time may not ordinarily be proved directly because there is no way of directly scrutinizing the workings of the human mind.

In determining the issue of what a person knew or what a person intended at a particular time, you may consider any statements made or acts done by that person and all other facts and circumstances received in evidence which may aid in your determination of that person's knowledge or intent.

You may infer, but you're certainly not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts to find from the evidence received during the trial.

You must remember that it is not a medical malpractice case or a Medical Board licensing issue.

Let me read that again.

This -- you must remember this is not a medical malpractice case or a Medical Board licensing issue. It is not enough for the Government to prove any degree of negligence, malpractice, carelessness, or sloppiness on Defendant Shakeel Kahn's part, and it is not enough for the Government to show Defendant Shakeel Kahn violated a Medical Board regulation. You cannot convict Defendant Shakeel Kahn

if all the Government proves is that he is an inferior doctor or that he failed to attempt to apply the appropriate medical -- standard of medical care.

This is a criminal case, and you must apply the instructions I am giving to you to determine whether Defendant Shakeel Kahn is guilty of any of the crimes with which he is charged beyond a reasonable doubt.

A separate crime is charged in each count of the indictment. You must separately consider the evidence as to each count. Your verdict as to any one count, whether it is guilty or not guilty, should not influence your verdict as to any other count.

The following nine jury instructions are specific to Count One, which charges Defendant Shakeel Kahn with conspiracy to commit a Federal drug crime.

Not every count or charge in this case is alleged against Defendant Shakeel Kahn. For example, Count Three is not alleged against Defendant Kahn. Therefore, you will not be instructed nor asked to render a decision on every count. Please do not consider -- concern yourself with any counts or charges not discussed in these instructions.

Count One of the indictment alleges that from January of 2011 through and including on or about November 30, 2016, in the District of Wyoming and elsewhere, Defendant Shakeel A. Kahn, then a physician licensed to practice