APPENDIX

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APPENDIX A

23-6555
United States v. Parasmo

United States Court of Appeals
For the Second Circuit

August Term 2024

Argued: October 31, 2024
Decided: May 19, 2026

No. 23-6555

United States of America,
Appellee,
v.
Frank Parasmo,
Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of New York
No. 19-cr-001, Joan M. Azrack, *Judge*.

Before: Kearse, Sullivan, and Robinson, *Circuit Judges*

Frank Parasmo, a medical doctor licensed to prescribe opioids in New York state, appeals from a judgment of conviction in the Eastern District of New York (Azrack, *J.*) following a jury trial at which he was found guilty of thirty-two counts of unlawfully distributing a controlled substance in violation of 21 U.S.C. § 841. On appeal, Parasmo contends that (1) the district court incorrectly instructed the jury to apply an objective – rather than a subjective – standard of intent; (2) the district court improperly admitted expert testimony and evidence regarding New York State

medical standards for the prescription of opioids; and (3) he received ineffective assistance of counsel.

These challenges fail. While we agree that the district court issued a defective charge – albeit one consistent with our precedent at the time – that error was harmless because it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Ng Lap Seng,* 934 F.3d 110, 129 (2d Cir. 2019) (internal quotation marks omitted). As for Parasmo's evidentiary challenges, these too fall short because the expert testimony and evidence of New York State medical standards assisted the jury without usurping its role. Finally, we decline to address Parasmo's ineffective-assistance-of-counsel claim, which is better left for a motion pursuant to 28 U.S.C. § 2255. Accordingly, we **AFFIRM** the judgment of the district court.

Judge Robinson dissents in a separate opinion.

AFFIRMED.

MATTHEW W. BRISSENDEN, Matthew W. Brissenden, P.C., Garden City, NY, *for Defendant-Appellant.*

MICHAEL R. MAFFEI (Anthony Bagnuola, Charles P. Kelly, *on the brief*), Assistant United States Attorneys, *for* Joseph Nocella, Jr., United States Attorney for the Eastern District of New York, NY, *for Appellee*.

RICHARD J. SULLIVAN, *Circuit Judge*:

Frank Parasmo, a medical doctor licensed to prescribe opioids in New York state, appeals from a judgment of conviction following a jury trial at which he was found guilty of thirty-two counts of unlawfully distributing a controlled substance in violation of 21 U.S.C. § 841. On appeal, Parasmo contends that (1) the district court

incorrectly instructed the jury to apply an objective – rather than a subjective – standard of intent; (2) the district court improperly admitted expert testimony and evidence regarding New York State medical standards for the prescription of opioids; and (3) he received ineffective assistance of counsel.

These challenges fail. While we agree that the district court issued a defective charge – albeit one consistent with our precedent at the time – that error was harmless because it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Ng Lap Seng,* 934 F.3d 110, 129 (2d Cir. 2019) (internal quotation marks omitted). Parasmo's evidentiary challenges similarly fall short because the expert testimony and evidence of New York State medical standards assisted the jury without usurping its role. Finally, we decline to address Parasmo's ineffective-assistance-of-counsel claim, which is better left for a motion pursuant to 28 U.S.C. § 2255. Accordingly, we affirm the judgment of the district court.

I. BACKGROUND

Between 2014 and 2015, Parasmo issued prescriptions for large quantities of oxycodone and hydrocodone to at least twenty patients. Many of these patients displayed numerous red flags indicating that they should not have been prescribed either drug. Evidence introduced at trial included testimony that Parasmo continued prescribing opioids even after (1) he became aware that patients were addicted to opioids; (2) he learned that patients were diverting or selling their prescribed medications; (3) urine screens were negative for the prescribed opioids, indicating

that the patients were not using the drugs as directed but instead diverting them to third parties; (4) patients were simultaneously abusing unprescribed narcotics; and (5) insurers, pharmacies, and the New York State Medical Society repeatedly issued written warnings that he was overprescribing opioids.

On January 2, 2019, a grand jury in the Eastern District of New York indicted Parasmo on thirty-five-counts of distributing oxycodone and hydrocodone without authorization, in violation of 21 U.S.C. § 841. App'x at 35. Parasmo proceeded to trial and was convicted on thirty-two counts on October 7, 2021. Parasmo filed a motion for acquittal under Federal Rule of Criminal Procedure 29 on December 15, 2021. On July 4, 2022, following the Supreme Court's decision in *Ruan v. United States*, 597 U.S. 450 (2022), Parasmo filed a supplemental motion for acquittal, or in the alternative, for a new trial, pursuant to Federal Rule of Criminal Procedure 33. These motions were denied by the district court on January 30, 2023. Parasmo timely appealed that decision.

II. DISCUSSION

Parasmo now challenges his conviction, arguing that (1) the district court's jury instructions were erroneous in light of *Ruan*; (2) several evidentiary rulings by the district court were erroneous; and (3) his trial counsel provided ineffective assistance of counsel. For the reasons set forth below, we conclude that the first two arguments lack merit, while the ineffective-assistance claims are best left for another day.

A. The Erroneous Jury Instruction Was Harmless.

Parasmo first contends that the district court improperly instructed the jury that it should apply an objective – rather than a subjective – standard of intent for

each of the counts in the indictment. That instruction, Parasmo argues, ran afoul of the Supreme Court's holding in *Ruan*, which was decided after he was found guilty at trial.

"A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) (internal quotation marks omitted). "We review a claim of error in jury instructions *de novo*, reversing only where [the] appellant can show that, viewing the charge as a whole, there was a prejudicial error." *United States v. Moses*, 109 F.4th 107, 114 (2d Cir. 2024) (internal quotation marks omitted). "Even where charging error is identified, . . . we will not reverse a conviction if the government can show harmlessness, *i.e.*, show that it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Ng Lap Seng*, 934 F.3d at 129 (internal quotation marks omitted).

1. The Jury Instruction Was Erroneous in Light of Ruan.

Parasmo's statute of conviction, section 841(a)(1), makes it unlawful for any person to "knowingly or intentionally" "distribute[] or dispense" a controlled substance "[e]xcept as authorized." 21 U.S.C. § 841(a)(1). As provided by federal regulation, registered doctors – like Parasmo – are "authorized" to issue prescriptions for controlled substances, but only if those prescriptions are issued "for a legitimate medical purpose" and "in the usual course of . . . professional practice." 21 C.F.R. § 1306.04(a).

In *Ruan*, the Supreme Court considered the "state of mind that the [g]overnment must prove to convict . . . doctors of violating [section 841(a)(1)]." 597

U.S. at 454. The Court ultimately adopted a "subjective" standard, explaining that when a defendant produces evidence that he is "authorized to dispense controlled substances," the government must then "prove beyond a reasonable doubt that the defendant *knew* that . . . []he was acting in an unauthorized manner." *Id.* (emphasis added). In reaching that conclusion, the Court rejected the government's contention that the statute "implicitly contain[s] an 'objectively reasonable good-faith effort' or 'objective honest-effort standard,'" observing that section 841(a)(1), like other criminal statutes, omits any mention of "words such as 'good faith,' 'objectively,' 'reasonable,' or 'honest effort.'" *Id.* at 465.

At the same time, *Ruan* did not "bar all consideration of objective criteria." *United States v. Bauer*, 82 F.4th 522, 528 (6th Cir. 2023). To the contrary, the Supreme Court explained that the government can refer to "objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice'" as circumstantial evidence of a defendant's subjective intent. *Ruan*, 597 U.S. at 467 (quoting 21 C.F.R. § 1306.04(a)). "[T]he 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 [g]overnment has carried its burden of proving knowledge." *Id.* (alteration adopted and internal quotation marks omitted).

Here, the district court's jury instruction on *mens rea* – which predated the Supreme Court's decision in *Ruan* – conveyed that the government had the burden to prove that Parasmo knowingly and intentionally acted in an unauthorized manner. Specifically, the district court instructed that the government had to prove the

following elements beyond a reasonable doubt: (1) that Parasmo "knowingly and intentionally distributed the controlled substance alleged in the indictment," and (2) that he "knowingly and intentionally prescribed the controlled substances outside the bounds of professional medical practice and not for a legitimate medical purpose." App'x at 2405. As to the second element, the district court elaborated that "when [a doctor] knowingly and intentionally acts outside the bounds of professional medical practice, and without a legitimate medical purpose in prescribing controlled substances, he is doing so in an unlawful manner." *Id.* at 2406–07. And in setting out the meaning of "knowledge," the district court made clear that knowledge "[could not] be established merely by demonstrating that the defendant was negligent, careless[,] or foolish," *id.* at 2407, and that it was "not enough for the government to prove negligence, malpractice, carelessness[,] or sloppiness" on Parasmo's part, *id.* at 2410.

Parasmo primarily takes issue with the next portion of the jury instruction, which directed the jury to "determine whether the defendant acted in good faith." *Id.* at 2411. Specifically, the district court instructed the jury that:

> A doctor prescribes a drug in good faith in medically treating a patient when he prescribes the drug for a legitimate medical purpose in the usual course of practice; that is, the doctor has prescribed the drug lawfully. Good faith in this context means acting *reasonably* and with the honest exercise of best professional judgment as to a patient's needs; that is, the defendant acted in accordance with what he *reasonably* believed to be the *standard of medical practice generally recognized and accepted in the State of New York*. If you find that the defendant acted in good faith in prescribing the drugs, then you must find him not guilty. The government bears the burden of proving beyond a reasonable doubt that the defendant acted without a good faith belief that his

> distribution of the controlled substances . . . was for a legitimate medical purpose in the usual course of medical practice.[1]

Id. at 2411–12 (emphases added). According to Parasmo, this instruction is no longer good law after *Ruan* because it impermissibly transformed the subjectiveintent standard into a lesser, objective one when it defined good faith to mean "acting reasonably" and requiring "reasonabl[e] belie[f]." Considering this charge in light of the instructions as a whole, we agree. *See Moses*, 109 F.4th at 114.

Of course, as Parasmo acknowledges, the district court did not have the benefit of the Supreme Court's holding in *Ruan*, and the good-faith instruction given in his case was consistent with our precedent at the time. Indeed, in *United States v. Wexler*, we approved of a similarly formulated charge that "[g]ood faith in this context means the honest exercise of best professional judgment as to a patient's medical needs," and "that the doctor acted in accord with what he should have reasonably believed to be proper medical practice." 522 F.3d 194, 205–06 (2d Cir. 2008). But as *Ruan* made clear, the government cannot meet its burden merely by proving that the physician

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[1] Parasmo had instead requested an alternative good-faith instruction, which provided in relevant part:

> The government must prove beyond a reasonable doubt that Dr. Parasmo did not act in good faith. A medical professional's good faith is relevant to your determination of whether Dr. Parasmo knowingly and intentionally acted outside the bounds of usual professional practice and without a legitimate medical purpose. A doctor distributes a drug in [g]ood faith when he believes he is medically treating a patient for a legitimate medical purpose and in the usual course of medical practice. Good faith in this context means good intentions and the honest exercise of professional judgment as to a patient's needs.

App'x at 112–13.

lacked "objective good faith" or failed to act reasonably in issuing the prescriptions. 597 U.S. at 465.

The government, for its part, asserts that "*Ruan* is wholly consistent with the jury instructions" issued by the district court and that "[n]othing about the good-faith charge modified th[e] correct articulation of the *mens rea*" standard. Gov't Br. at 43. As support, the government points to *Ruan*'s continued approval of objective criteria, including evidence of accepted professional standards of care, to evaluate the credibility of a doctor's asserted beliefs. But that argument misses the mark. The district court's good-faith instruction did not clearly inform the jury that it could use the gap between objective standards and Parasmo's conduct as circumstantial evidence to determine whether he acted with the requisite (subjective) intent. Instead, the charge incorrectly suggested that good faith, in and of itself, required that Parasmo was (objectively) "acting reasonably." App'x at 2411.

To be sure, the instructions that the district court gave during Parasmo's trial at times hinted at the correct subjective standard of intent. As noted above, the district court's initial instructions as to the authorization element incorporated a "knowing[] and intentional[]" *mens rea* requirement and reiterated that the government had to prove more than that Parasmo was simply "negligent, careless[,] or foolish" in writing the prescriptions at issue. App'x at 2405–07, 2410; *see also Ruan*, 597 U.S. at 465–66 (explaining that having a "defendant's criminal liability [turn] on the mental state of a hypothetical 'reasonable' doctor . . . reduces culpability on the all-important element of the crime to negligence" (internal quotation marks omitted)).

And the good-faith instruction incorporated some subjective terms by referring to "good faith" as involving the "honest exercise of best professional judgment as to a patient's needs," while further emphasizing that the government "b[ore] the burden of proving . . . that [Parasmo] acted without a good faith belief," *id.* at 2411.

But other aspects of the good-faith instruction – either explicitly or implicitly – endorsed an objective standard of reasonableness. For example, the district court first explained that a doctor acts "in good faith . . . when he prescribes the drug for a legitimate medical purpose in the usual course of practice." *Id*. It also defined "good faith" to require "acting *reasonably*," and directed the jury to consider what Parasmo "*reasonably* believed to be the standard of medical practice." *Id.* (emphases added). And at times, the district court referred to the second element without any clear reference to the *mens rea* requirement. *See, e.g.*, *id.* at 2410 ("What the government must prove beyond a reasonable doubt is that . . . he was not writing those prescriptions for a legitimate medical purpose, but was instead writing them outside the usual course of professional practice.").

Ultimately, because the jury charge in Parasmo's case blended pre- and post-*Ruan* instructions, we conclude that it was legally deficient. *See United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010) (finding instructions erroneous on *de novo* review where the "charge either fails to adequately inform the jury of the law, or misleads the jury as to the correct legal standard" (internal quotation marks omitted)).

2. The Erroneous Jury Instruction Was Harmless Because Overwhelming Evidence Supported the Guilty Verdict.

Nonetheless, as noted above, "[e]ven where charging error is identified, . . . we will not reverse a conviction if the government can show harmlessness, *i.e.*, show that it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Ng Lap Seng*, 934 F.3d at 129 (internal quotation marks omitted). Based on the evidence presented at trial, we conclude that a jury would have reached the same result if properly instructed, and therefore, the instructional error was harmless.

To begin, the government's expert witness, Dr. Seth Waldman, testified regarding the generally accepted standards of medical practice in New York from 2009 through 2015. Dr. Waldman explained, among other general principles known to New York practitioners during the relevant period, that prescribing opioids like oxycodone presents risks of addiction and overdose, and that those risks increase when patients concurrently use controlled substances or illegal drugs like cocaine, heroin, and amphetamines. Due to these risks, Dr. Waldman testified that a practitioner acting in the usual course of medical practice would monitor a patient's use of prescribed medications, including by drug testing the patient. Such testing is "important," he explained, because monitoring for the presence of other substances – or the absence of the prescribed medication – can reveal misuse. App'x at 665–66. In particular, taking oxycodone in combination with other illegal substances "becomes extremely dangerous." *Id.* at 666. Dr. Waldman also testified that a negative oxycodone test could indicate a very different problem – namely, that the patient is

"diverting that medication" by "selling it or giving it to someone else." *Id.* at 667. Dr. Waldman further detailed the signs of "drug[-]seeking behavior," which could include patients "repeatedly using their prescriptions faster than [scheduled]," "[l]osing prescriptions, having prescriptions stolen on a repetitive basis," "receiving prescriptions from multiple doctors for the same condition," and exhibiting physical signs "that the patient is using drugs." *Id.* at 671–72.

Dr. Waldman's testimony is particularly compelling given the evidence the jury heard related to Parasmo's prescription of opioids to: (1) patients whose toxicology reports repeatedly reflected the use of illegal substances; (2) patients whose toxicology reports repeatedly reflected the *absence* of prescribed opioids, indicating that patients were not actually taking (and perhaps diverting) their prescribed medications; and (3) patients who had long histories of substance abuse, overdoses, and unsuccessful attempts at rehabilitation. The record also reflects that Parasmo himself recognized that he should cease prescribing opioids with respect to certain patients, and that third parties – including other physicians, pharmacists, insurance companies, and law-enforcement officers – repeatedly raised concerns to Parasmo about his prescription practices with patients who were doctor-shopping, taking other illegal substances, and/or diverting their prescriptions.

The district court's order denying Parasmo's post-trial motions for a new trial – albeit applying the pre-*Ruan* standard for intent – thoroughly documented the evidence introduced at trial**,** which included the following examples:

- Leonard Marino repeatedly reported to Parasmo, over the course of several years, that his medication had been lost, stolen, or run out early, which as Dr.

Waldman explained, was a "sign that the patient is overusing or selling the medication." *Id.* at 803. Marino's medical records also showed "multiple prescriptions from different doctors . . . overlapping in a very short period of time," indicating that he was actively engaging in "doctor shopping" – a pattern that Parasmo was alerted to in a November 28, 2011 phone call from a pain management specialist. *Id.* at 797–98, 801. In 2014 and 2015, Marino also returned multiple abnormal toxicology reports that either showed no oxycodone (indicating that he was not taking his prescribed medication) or indicated the presence of other substances (in addition to his prescribed oxycodone). Despite indicating in Marino's chart in July 2015 that he would reduce the number of pills given to Marino to "wean" him off the drug, Parasmo increased his dosage two months later and continued to prescribe him oxycodone into December 2015 – even after he continued to return abnormal toxicology reports.

- John Lettenberger had a documented history of a substance-abuse disorder. His toxicology reports in 2009 revealed positive tests for cocaine, and Parasmo's notes in 2011 reflected his attendance at Narcotics Anonymous meetings. In April 2014, Parasmo's notes indicated that Lettenberger asked for fifty additional oxycodone pills, which he claimed to "owe[]" someone. *Id.* at 790–91. Although Parasmo refused to provide the additional pills, Dr. Waldman testified that Lettenberger's statements were "concerning" because they showed "that the patient is already and has been in the process of diverting at least some of his medications." *Id.* at 791. Two months later, on June 2, 2014, Lettenberger tested positive for cocaine, but negative for oxycodone, his prescribed medication. According to Parasmo's records of an appointment the following day, Lettenberger told him he "had some coke at a party" and that after running out of oxycodone pills, he bought Vicodin "on the street." *Id.* at 792–93. Parasmo's records from that appointment also reflect that Lettenberger was "mov[ing] about quite well" and was "very animated," which, as Dr. Waldman explained, was inconsistent with Lettenberger's claim of having "more pain than oxy can handle." *Id.* at 792. Nevertheless, on June 26, 2014, Parasmo issued a prescription for 240 30-mg oxycodone pills.

- Rocco Oliveri had a history of substance abuse and abnormal toxicology test results, which indicated the presence of buprenorphine, a drug administered for the treatment of substance abuse. In December 2012, Oliveri asked Parasmo to renew his prescription one week early; Parasmo obliged and prescribed 120 30- mg oxycodone pills, even though Oliveri continuously tested negative for the prescribed medications. After noting in August 2013 that he intended to "wean [Oliveri] from oxycodone," *id.* at 869, Parasmo nevertheless continued to write prescriptions for 150 30-mg oxycodone pills. A week later, Oliveri told Parasmo that "his son's friends took his oxys from him and beat him up," and that "he ha[d] never taken any himself" because "he gives all his []oxys to his son." *Id.* at 870–71. Oliveri's addiction specialist "specifically

requested that the doctor not write any more oxycodone" for Oliveri. *Id.* at 871. And yet, on November 12, 2013, Parasmo prescribed more oxycodone for Oliveri.

- Leslie Finnegan-Andrews also had a history of abnormal toxicology test results, which indicated the presence of numerous unprescribed drugs. On January 23, 2014, Parasmo noted "oxycodone addiction – wean" on Finnegan-Andrews's medical record. *Id.* at 1690. In October 2015, Parasmo noted that Finnegan-Andrews was "continually asking for more pain meds," "her brother who needs pain meds lives with her," and "[m]aybe that is why she keeps asking me for more pain meds." *Id.* at 715–16. An October 26, 2015 drug test indicated the presence of unprescribed Dilaudid in her system, while a November 13, 2015 test returned negative for any opioids. On December 17, 2015, despite noting that Finnegan-Andrews had "r[un] out of meds less than two weeks after [he] gave her the meds," and noting that she had received a seven-day supply of Oxycodone through a walk-in clinic, *id.* at 1643, Parasmo issued her two prescriptions: one for sixty-three 20-mg oxycodone pills, and another for sixty 40-mg oxycontin pills. *Id.* at 604–05.

- Maria Scalcione had a history of substance abuse and had been discharged by a prior doctor for drug-seeking behavior. *Id.* at 896. During the time she was treated by Parasmo, Scalcione consistently returned abnormal test results, which indicated the presence of numerous unprescribed substances and the absence of her prescribed medications. Between June 2014 and December 2015, Scalcione consistently tested negative for Oxycodone. In October 2015, Scalcione's sister contacted Parasmo and reported that Scalcione was not taking the oxycodone pills and was instead "selling them." App'x at 914–18, 922–23. Notwithstanding this clear evidence, Parasmo prescribed Scalcione ninety 30-mg Oxycodone pills on December 29, 2015.

The record included additional evidence that would compel a reasonable jury to conclude that Parasmo subjectively understood that his prescription practices fell outside the usual course of professional practice. *See Ruan*, 597 U.S. at 454, 457; 21 C.F.R. § 1306.04(a). Former Drug Enforcement Administration Task Force Officer Dean Steinmann testified about an interview he conducted with Parasmo on July 1, 2015. According to Steinmann, Parasmo mentioned that he had received a letter "a couple years back" from the New York State Medical Society informing him that he was in the "top 10 percent of physicians" in New York state for "[o]xycodone writing

or prescriptions." App'x at 299–300. Parasmo told Steinmann that he "felt nervous about that letter" and that "he was getting a lot, more and more pain patients," even though he and his staff "kept trying to weed out or get rid of" them. *Id.* at 300. Parasmo also "informed" Steinmann that the physician with whom he shared an office "d[idn't] prescribe any pain management medication," as was the case with a "number of other physicians" with whom Parasmo "had spoken." *Id.* at 301. Parasmo told Steinmann that, in light of his "big influx" of pain patients, he decided to put up a sign in his office in March 2015 indicating "that he wasn't going to be writing any[]more controlled substance or opioid prescriptions." *Id.* at 302. But as the record demonstrates, Parasmo continued to issue oxycodone prescriptions well after March 2015 and through at least December 2015.

3. The Dissent Misconstrues the Evidence Introduced at Trial.

Resisting this overwhelming evidence, the dissent insists that the error is not harmless because Parasmo's office had none of the hallmarks of a traditional "pill[]mill," and because some of his patients reported genuine medical concerns. Dissent at 4–5. But nothing in section 841 or our caselaw suggests that the government is required to prove that a doctor was operating a so-called "pill mill" – a medical practice where controlled substances (typically opioids) are prescribed at a high volume, for cash payment, and with little or no genuine patient evaluation. The statute requires only proof that the defendant "knowingly or intentionally acted in an unauthorized manner." *Ruan*, 597 U.S. at 457; *see also* 21 C.F.R. § 1306.04(a). And knowingly issuing prescriptions without a "legitimate medical purpose" clearly meets that standard. 21 C.F.R. § 1306.04(a).

Furthermore, while Parasmo's office was not run like a typical "pill mill," he certainly profited financially from these prescriptions. The record reflects that patients returned to his office with striking regularity – sometimes seeing him multiple times a month. *See* App'x at 976–77. Parasmo himself noted that "he had a big influx" of "pain patients" and that he was "prescribing more and more pills," *id.* at 302, to the point where he was in the top 10% of physicians by amount of oxycodone prescriptions issued in New York, *id.* at 299. And he was compensated for each visit, either directly by the patient or through insurance reimbursements, enabling him to profit from prescriptions written without legitimate medical justification.

The dissent nonetheless contends that a jury could plausibly conclude that Parasmo acted in good faith, and that he believed that his prescriptions were appropriate to manage his patients' conditions because he ordered numerous tests for his patients, referred them to specialists to "treat their pain-inducing conditions," "tried to wean them off the controlled substances," and "looked for alternative treatments . . . including prescribing medications *other than* a controlled substance." Dissent at 5. But that portrayal reflects a highly selective view of the record. As explained above, Parasmo routinely ignored the results of drug screens and continued prescribing large quantities of opioids to patients even after they tested positive for other drugs or tested negative for their prescribed medications. He ignored requests from addiction specialists when they requested that he stop writing oxycodone prescriptions for their shared patients. *See* App'x at 871. And even after noting in

patients' files that they needed to be weaned off controlled substances, he frequently *increased* their prescriptions at their next appointments. *See id.* at 811; 1280–89.

Take, for example, Frankie Campanelli, whom the dissent offers as an example of Parasmo's good faith in prescribing opioids. Campanelli had a history of back pain and had previously had surgery for back issues. At her first visit in October 2011, Parasmo prescribed her thirty 10-mg Percocet pills. *Id.* at 975. After that, her prescriptions dramatically increased at each visit. On January 17, 2012, Parasmo increased her dose to ninety 15-mg Oxycodone pills. *Id.* By May 2012, Campanelli's drug test indicated the presence of unprescribed Alprazolam, Hydrocodone, and Oxymorphone, but *not* Oxycodone. *Id.* Nevertheless, in July 2012, Parasmo again increased her Oxycodone prescription, this time to ninety 30-mg pills. *Id.* By October 2012, Campanelli was up to 150 30-mg pills. And in November, Parasmo increased her Oxycodone prescription to 240 30-mg pills, notwithstanding Campanelli reporting that she had seen a different doctor who injected her with steroids. On May 17, 2013, Parasmo increased Campanelli's prescription yet again, this time to 240 30-mg Oxycodone pills and forty 15-mg Oxycodone pills. Eleven days later, Parasmo wrote another prescription for 240 more 30-mg Oxycodone pills, with no explanation noted in her chart. *Id.* at 976–77. On August 8, 2013, Parasmo's notes indicated that Campanelli's urine tests came back positive for heroin, that he intended to "wean the 15s," and that she would get "no more meds" if she continued to test positive. *Id* at 977. Notwithstanding that notation, Parasmo increased Campanelli's prescription the following month to 240 30-mg Oxycodone pills, 240 15-mg Oxycodone pills, and

180 Xanax pills – even after she had another abnormal toxicology screen. In November 2013, Parasmo noted that Campanelli was taking sixteen tablets of 30-mg Oxycodone a day and referred her to pain management. *Id.* at 979. A month later, he again noted in her chart the need to "wean meds." *Id.* And yet in January 2014, Parasmo wrote Campanelli a prescription for 240 30- mg Oxycodone pills, 240 15-mg Oxycodone pills, and 120 2-mg Xanax pills. *Id.* at 979–80. So much for "weaning" her from these powerful and addictive pain killers.

Consider also Summer Ferro, whom the dissent cites as evidence of Parasmo's good faith. When Ferro first consulted with Parasmo on January 6, 2011, she complained of "panic/anxiety attacks, asthma, and stomach problems," and had a history of substance abuse. *Id*. at 693–94. Another physician who shared Parasmo's office warned him that Ferro was "abusing her pain meds." *Id.* at 694. In December 2012, Parasmo communicated to Ferro that he could not treat her "gynecological, gastroenterological[,] or pain issues" because they were "not [his] area of expertise." *Id.* at 699. He also recorded in her chart that she "only comes to me for pain meds" and that her problems "will not be solved with this kind of treatment." *Id.* at 1216. Yet, this acknowledgement did not change his prescribing practices. Despite Ferro's repeated positive drug tests for cocaine and marijuana – and despite acknowledging at one point that he "[c]annot give controlled substances" to her – Parasmo continued to prescribe Ferro large quantities of opioids, including multiple prescriptions for 120 Percocet pills between 2013 and 2015 – sometimes on the very same day he documented these concerns. *Id.* at 700–04, 1222, 1224.

Parasmo's knowledge is perhaps most starkly illustrated by his treatment of Maria Scalcione. Scalcione began seeing Parasmo in 2011, complaining of "severe pain in [her] neck" and "tingling" in her "arm and hand." *Id.* at 895. There was substantial evidence that she had substance-abuse issues – among other indicators, she had been discharged from a prior doctor for drug-seeking behavior. *Id.* at 896. In December 2011, Parasmo wrote her a prescription for 120 2-mg Xanax pills and 180 5-mg Percocet pills. *See id.* at 897. On February 3, 2012 and February 29, 2012, Parasmo wrote Scalcione prescriptions for Xanax, Percocet, and Hycodan cough syrup (a cough suppressant containing hydrocodone, which is an opioid). On February 29, 2012, Scalcione tested positive for marijuana and cocaine, and negative for Xanax, Percocet, or hydrocodone. *See id.* A drug test in March 2012 yielded the same results. Nevertheless, on May 18, 2012, Parasmo wrote Scalcione a prescription for 180 5-mg Percocet pills and 120 2-mg Xanax pills. *Id.* at 898. On June 29, 2012, Scalcione tested positive for marijuana, but not for the prescribed Xanax or Oxycodone, and Parasmo noted that she had not taken Percocet in ten days. *Id.* at 899. On the same day, he received a note from the New York State Monitoring Program stating that Scalcione had received an additional sixty Oxycodone pills from another prescriber. *Id.* at 898. Despite these warning signs, he refilled her prescription that day. *Id.* at 899.

By June 2013, Scalcione's prescription had increased to 150 30-mg Oxycodone pills. In December 2013, United Healthcare alerted Parasmo that Scalcione was "on a high dose of opioids." *Id.* at 900. And yet, later that month he prescribed her an additional 150 30-mg Oxycodone pills. In June 2014, May 2015, June 2015, October

2015, November 2015, and December 2015, Scalcione consistently tested negative for Oxycodone. *Id.* at 900–01. In October 2015, Scalcione's sister contacted Parasmo and stated that she would "report" him if he continued writing her prescriptions, stating that Scalcione was "not taking" the oxycodone pills but was instead "selling them." *Id.* at 922–23. Despite unmistakable indications that Scalcione was not taking the prescribed medication – including her testing negative for the drug *over an eighteen-month period* – and was instead diverting it, Parasmo nonetheless prescribed her ninety 30-mg oxycodone pills on December 29, 2015, *id.* at 902. This behavior – continuing to prescribe opioids despite clear evidence that the patient was not taking them – made clear that the prescriptions were not for a legitimate medical purpose and that Parasmo knew it.

It is true that many of Parasmo's patients had complicated medical and personal histories. But the complexity of their medical conditions does not erase the fact that Parasmo ignored glaring red flags and blatant warnings that his patients were diverting the pills he prescribed. On this record we cannot agree with the dissent that there was a "substantial likelihood that a properly instructed jury would have concluded that the government failed to prove that Dr. Parasmo acted with a guilty intent." Dissent at 16.

4. *Pabisz* and *Tureseo* Support a Finding of Harmless Error.

Parasmo contends that our holdings in *United States v. Pabisz*, 936 F.2d 80 (2d Cir. 1991), and *United States v. Tureseo*, 566 F.3d 77 (2d Cir. 2009), compel the conclusion that the instructional error here was not harmless. We are not persuaded.

In *Pabisz*, we reversed the defendant's conviction for willfully attempting to evade his federal income taxes because, in light of the Supreme Court's intervening decision in *Cheek v. United States*, 498 U.S. 192 (1991), "the jury was erroneously instructed that they could not credit his good faith defense unless they found his beliefs reasonable," *Pabisz*, 936 F.2d at 81. But in that case, Pabisz testified at trial to the research he had conducted and actions he had taken that led him to conclude that he was not required to file individual income-tax returns – that is, evidence of his subjective beliefs. That testimony created a risk that the jury had convicted him because they found his honestly held beliefs to be objectively unreasonable. *See id.* at 83. And in *Tureseo*, we concluded that an erroneous jury instruction as to the *mens rea* requirement for aggravated identity theft was not harmless because at least some testimony presented at trial suggested that the defendant did not know "that he was using the identity of an actual person," as was required for a conviction. 566 F.3d at 86.

Here, unlike the defendant in *Pabisz*, Parasmo did not testify at trial (as was his right) and thus did not introduce any direct evidence of his subjective beliefs. And unlike in *Tureseo*, where the only evidence of the defendant's subjective intent referred to by the court was thin, the proof at Parasmo's trial overwhelmingly established that Parasmo possessed the requisite *mens rea* for the offenses charged. As discussed above, ample evidence shows that he prescribed large quantities of opioids to patients who displayed numerous red flags, even after receiving warnings from third parties that those patients were diverting their medication, doctor-

shopping, or struggling with opioid addiction. This evidence overwhelmingly established that Parasmo subjectively knew the prescriptions were issued without a legitimate medical purpose and outside the usual course of professional practice. It is therefore "clear beyond a reasonable doubt that a rational jury would have found [Parasmo] guilty absent the error." *Ng Lap Seng*, 934 F.3d at 129 (internal quotation marks omitted).[2]

Accordingly, we conclude that the district court's erroneous jury instruction constituted harmless error.[3]

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[2] The dissent also points to two out-of-circuit opinions, *United States v. Duldulao*, 87 F.4th 1239 (11th Cir. 2023), and *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023), in an attempt to demonstrate that other courts have vacated convictions in "similar cases." Dissent at 14–15. But these cases are also readily distinguishable. In *Duldulao*, the Eleventh Circuit held that a district court's omission of the subjective intent instruction was plain error because "the jury could have rested its convictions solely" on the "impermissible" objective theory of liability. Dissent at 14 (quoting *Duldulao*, 87 F.4th at 1259). Yet there, as the court noted, the government had relied mainly on circumstantial, "general" evidence of unlawful activity, which made the risk of an erroneous conviction particularly high. *Duldulao*, 87 F.4th at 1261. In Parasmo's trial, by contrast, the government relied on evidence of the defendant's *specific* interactions with patients, conversations with doctors, and medical records detailing "discrete prescriptions" – precisely the kind of evidence the Eleventh Circuit indicated would have changed its assessment in *Duldulao*. *Id.* Similarly in *Kahn*, the Tenth Circuit's vacatur was premised on the fact that this was "not a case in which the element of the crime that was impacted by the invalid jury instruction was . . . supported by overwhelming evidence." 58 F.4th at 1319 (internal quotation marks omitted). The clear implication is that in a case like Parasmo's – where the evidence truly *is* "overwhelming" – the court would agree with our conclusion regarding the harmlessness of the instruction. *See id.*

[3] For the same reasons discussed above, we also reject Parasmo's request that we dismiss the indictment based on the legal insufficiency of the evidence.

B. The District Court Did Not Err by Permitting Dr. Waldman to Opine on Medical Standards in New York.

Parasmo next contends that the district court erred by permitting Dr. Waldman to opine on generally accepted medical standards in New York at the time of Parasmo's offense conduct and on whether the prescriptions at issue were written in accordance with those standards. According to Parasmo, Dr. Waldman's testimony, coupled with the district court's good-faith instruction, improperly usurped the role of the jury by embracing the ultimate issue in the case – that is, whether Parasmo acted "as authorized" under an objective standard. We review a district court's decision to admit expert testimony for abuse of discretion, *United States v. Romano*, 794 F.3d 317, 330 (2d Cir. 2015), which we will find only where the admission of expert testimony was "manifestly erroneous," *United States v. Jones*, 965 F.3d 149, 162 (2d Cir. 2020) (internal quotation marks omitted).

Federal Rule of Evidence 704(a) provides that "[a]n opinion is not objectionable just because it embraces an ultimate issue." The Rule includes a narrow exception, prohibiting experts from testifying about whether a criminal "defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." Fed. R. Evid. 704(b). But as we have previously explained, "Rule 704(b) does not prohibit all expert testimony that gives rise to an inference concerning a defendant's mental state." *United States v. DiDomenico,* 985 F.2d 1159, 1165 (2d Cir. 1993). So long as the expert does not "expressly state the inference" and leaves it, even if obvious, "for the jury to draw," *id.* (internal quotation marks omitted), his testimony is permissible.

Dr. Waldman's testimony falls squarely within the confines of Rule 704. As *Ruan* makes clear, the scope of a practitioner's prescribing authority is defined by federal regulation with "reference to objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice,'" and evidence of such objective criteria – when considered in conjunction with the defendant's conduct – is relevant to the jury's evaluation of the defendant's subjective intent. 597 U.S. at 467 (quoting 21 C.F.R. § 1306.04(a)). Accordingly, expert testimony is appropriate to explain the usual course of professional practice and whether certain practices fall within those parameters. It bears noting that Dr. Waldman offered no opinion about Parasmo's subjective mental state when he wrote the prescriptions at issue, or whether Parasmo had the intent required by the statute. *See DiDomenico,* 985 F.2d at 1165; *see also Diaz v. United States*, 602 U.S. 526, 528 (2024) ("Because the expert witness did not state an opinion about whether [the defendant himself] had a particular mental state, we conclude that the testimony did not violate Rule 704(b)."). Based on this record, we see no abuse of discretion in the district court's admission of Dr. Waldman's testimony.

C. The District Court Properly Admitted Evidence of New York State's Medical Standards.

For similar reasons, the district court did not err in permitting the government to introduce evidence of New York regulations concerning the legitimate medical purposes for which a doctor may write prescriptions for opioids. Parasmo contends vaguely that "defining the 'usual course of professional practice' based upon state regulations invites disparate interpretations of [section 841(a)(1)]." Parasmo Br. at

61. Because Parasmo did not make this objection below, we review this challenge for plain error. *See United States v. Al Kassar*, 660 F.3d 108, 126 (2d Cir. 2011).

As noted above, federal regulations provide that an "authorized" prescription is one "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a). The Controlled Substances Act defines "practitioner," in turn, by reference to "the jurisdiction in which he practices." 21 U.S.C. § 802(21) (defining "practitioner" as a physician who is "licensed, registered, or otherwise permitted, by the . . . jurisdiction in which he practices . . . to distribute [or] dispense . . . a controlled substance in the course of professional practice"). Once again, *Ruan* explicitly contemplates the use of "objective criteria such as 'legitimate medical purpose' and 'usual course' of 'professional practice'" as probative of the doctor's knowledge and subjective intent concerning the legality of his prescribing practices. 597 U.S. at 467 (quoting 21 C.F.R. § 1306.04(a)). It thus follows that, in this case, the medical standards relevant to defining a "legitimate medical purpose" and "usual course of professional practice" are those of New York – the state in which Parasmo was, at all relevant times, licensed to practice medicine. *Id.* (internal quotation marks omitted). We therefore see no error – let alone plain error – in the district court's admission of evidence regarding the New York regulations.

D. Parasmo's Ineffective-Assistance-of-Counsel Claim is Better Suited for Collateral Review.

Finally, Parasmo contends that his trial counsel provided ineffective assistance by failing to introduce evidence of New York regulations and laws that clarified when

a doctor may legally prescribe opioids to persons suffering from addiction. When an ineffective-assistance claim is raised on direct appeal, we may either (1) decline to hear the claim so that it may be raised in a habeas petition brought pursuant to 28 U.S.C. § 2255, (2) remand to the district court for further factfinding, or (3) decide the claim on the record before us. *See United States v. Adams*, 768 F.3d 219, 226 (2d Cir. 2014). Nevertheless, we are "generally disinclined to resolve ineffective assistance claims on direct review . . . because the district court is 'best suited to developing the facts necessary to determining the adequacy of representation.'" *United States v. Gaskin*, 364 F.3d 438, 467–68 (2d Cir. 2004) (quoting *Massaro v. United States*, 538 U.S. 500, 505 (2003)). We see no reason to deviate from that practice here, especially since Parasmo "did not raise these contentions in the district court, [so] there is no record that would permit them to be assessed on this appeal." *United States v. Laurent*, 33 F.4th 63, 97 (2d Cir. 2022). We therefore decline to address the merits of this claim, which Parasmo may raise in a motion to vacate his conviction or set aside his sentence pursuant to section 2255. *See United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003).

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

No. 23-6555
United States v. Parasmo

Beth Robinson, *Circuit Judge*, Dissenting:

As the "heart and lungs" of liberty, juries play a crucial role in our criminal justice system. C. Bradley Thompson, ed., *The Revolutionary Writings of John Adams* 55 (2000). In criminal cases, the jury is the "oracle of the citizenry in weighing the culpability of the accused." *United States v. Gilliam*, 994 F.2d 97, 101 (2d Cir. 1993).[1] The jury's constitutional responsibilities include determining the facts, applying the law to those facts, and drawing the ultimate conclusion of guilt or innocence. To aid the jury in fulfilling its duty, trial courts instruct jurors on the relevant principles of law necessary to reach a conclusion as to each element of the charged offense.

Here, the court's instruction misinformed the jury as to the *only* element of the charged offense that Dr. Parasmo contested—his subjective intent. *See Ruan v. United States*, 597 U.S. 450, 467 (2022) (to prove the elements necessary to support a conviction under § 841, the government must prove that a defendant "knew or intended that his or her conduct was unauthorized"). The government's theory of the case was that Dr. Parasmo didn't write the victims' prescriptions for a legitimate medical purpose, *and he knew that*. Dr. Parasmo's theory of the case was that, though he was aware of and concerned about the signs that his patients were abusing or misdirecting their medications, he subjectively believed, in good faith, that his

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[1] In quotations from caselaw and the parties' briefing, this dissent omits all internal quotation marks, footnotes, and citations, and accepts all alterations, unless otherwise noted.

prescriptions were appropriate to manage his patients' pain arising from genuinely serious medical conditions, and that he was taking reasonable steps to address the possibility that patients were abusing the controlled substances. The court's instruction invited the jury to convict *even if* it accepted Dr. Parasmo's view of the case. Like the majority, I conclude the court's instruction was error. Majority Op. at 13.

Unlike the majority, I conclude the error was not harmless. In conducting a harmless error review, I'm especially mindful of the perils of our weighing the evidence regarding Dr. Parasmo's subjective intent—the only real issue in this case, and one the jury itself never got to consider. After all, ordinarily, "[t]he question of whether criminal intent is inferable from the facts proved is a question for the jury." *United States v. Speare*, 297 F.2d 408, 410 (2d Cir. 1962).

True, an instructional error, including the omission or misdescription of a critical element of the charge, is subject to harmless-error analysis. *Neder v. United States*, 527 U.S. 1, 15 (1999). But where an element of an offense is contested, we should be extremely wary of treating the failure to require the jury to make a finding as to that element as a harmless error, lest we usurp the jury's role. *Cf. id.* at 17 (concluding that the failure to instruct on an element of the charged crime was harmless where the "element was *uncontested* and supported by overwhelming evidence" (emphasis added)); *see also United States v. Kahn*, 58 F.4th 1308, 1319 (10th Cir. 2023) ("Where an element of an offense is contested at trial, as it was here, the Constitution requires that the issue be put before a jury—not an appellate

court."). To "safeguard[] the jury guarantee" in a case like this, a court sitting in review must "conduct a thorough examination of the record." *Neder*, 527 U.S. at 19. "If, at the end of that examination, the court cannot conclude *beyond a reasonable doubt* that the jury verdict would have been the same absent the error . . . it should not find the error harmless." *Id.* (emphasis added). That's a tall order.

And the government, not Dr. Parasmo, carries the burden of demonstrating that the jury instruction error was harmless beyond a reasonable doubt. *Gutierrez v. McGinnis*, 389 F.3d 300, 303 (2d Cir. 2004) ("The burden of proving the error's harmlessness falls to someone other than the person prejudiced by it.").

With these principles in mind, I cannot conclude beyond a reasonable doubt that, if properly instructed, the jury would have reached the same conclusion. There is ample evidence from which the jury could have concluded that the government failed to prove beyond a reasonable doubt that Dr. Parasmo subjectively believed he was acting as a dealer not a doctor, and the failure to require a jury to make a finding as to Parasmo's subjective good faith undermines the fairness of this trial. My conclusion is supported by the record and caselaw in analogous cases from this Circuit and beyond.

1. The Record

As emphasized above, the question before us is not whether there was *sufficient* evidence from which a jury *could* conclude that Dr. Parasmo had a guilty state of mind. There was. The question here is whether we can conclude beyond a reasonable doubt that the jury *would* have reached that conclusion if properly

instructed. *Neder*, 527 U.S. at 19. That is, whether the evidence "all flow[s] in one direction." *United States v. Tureseo*, 566 F.3d 77, 86 (2d Cir. 2009).

It does not. For one thing, Dr. Parasmo took copious and detailed notes of his patients' symptoms and the treatments he prescribed. He generally conducted physical examinations before prescribing the controlled substances. His office also ordered drug screens for patients and meticulously recorded the results of each. This is not the conduct one would expect from a "pill mill" doctor.

Plus, the jury could no doubt consider the *absence* of evidence to support the theory that Dr. Parasmo wrote the prescriptions for purposes *other than* medical treatment. As Dr. Parasmo accurately argues, "[t]here were no allegations of cash payments to Dr. Parasmo, no 'runners,' fake patients, or systematic diversion." Appellant's Br. at 6.

The majority emphasizes that the government was not required to prove that Parasmo operated a "pill mill." Majority Op. at 19. That's true. But in assessing whether the jury necessarily would have reached the same verdict if properly instructed as to Parasmo's subjective state of mind, it's significant that Parasmo's practice did not bear the typical hallmarks of a pill mill as described by the government's own investigating detective—including prescription without examination, fake patients, cash payments, lines of people waiting to get into the mill, and cash kickbacks from a pharmacy. In the face of such evidence, a harmless error analysis might be more tenable.

And finally, in treating individual patients, Dr. Parasmo ordered numerous tests, referred his patients to a wide variety of specialists to treat their pain-inducing conditions, tried to wean them off the controlled substances, and looked for alternative treatments to control his patients' pain, including prescribing medications *other than* a controlled substance—all behaviors suggestive of a good faith effort to help his patients.

Take, for example, patient Frankie Campanelli, who suffered from bilateral carpal tunnel syndrome, scoliosis, and a prior spinal surgery that left her with two metal rods in her back. In August 2013, Dr. Parasmo recorded that he significantly reduced her dosage and noted that "she was supposed to wean" the medication and if the urine screen tested positive for heroin "no more meds from me." App'x 977. Dr. Parasmo's notes from October 2013 indicate that she was reporting severe back pain and that he was searching for a viable alternative to pain medication: "To do decompression for two weeks. If it does not work detox." App'x 1160. At her next appointment, Dr. Parasmo's notes reflect that F.C. "[had] been crying for days ever since she went through detox" and that her "[p]ain is incredible." App'x 978. Dr. Parasmo continued to prescribe her oxycodone, but he also referred F.C. to pain management in November 2013. The next month, he wrote a note saying, "wean meds." App'x 979. He continued to prescribe her pain medication; however, he noted that F.C.'s "[m]other goes to pharmacy to get meds and controls them." App'x 979. Six months after he wrote his final oxycodone prescription for F.C., he *again* referred her to pain management.

Or consider Summer Ferro, who suffered from severe stomach pain and anxiety disorder. Her anxiety was so severe that she had "palpitations and air hunger" and "turn[ed] blue." App'x 696. He referred her to a psychiatrist, gynecologist, gastroenterologist, and pain management doctor. He cut her prescription in half. And when she tested positive for cocaine, Dr. Parasmo told her that he couldn't prescribe her controlled substances and gave her a list of pain management specialists.

Evidence regarding other patients, including those identified by the majority, likewise paints a more complex picture than the majority suggests. In discussing Dr. Parasmo's prescriptions for other patients, the majority doesn't acknowledge the broader contexts—including evidence of the patients' medical histories of chronic pain. John Lettenberger suffered from traumatic brain injuries and complex fractures after a significant car accident that left him hospitalized for four months and in a coma for three weeks. Maria Scalcione suffered from a significant degenerative disk disease that was so severe a neurosurgeon concluded she needed lumbar surgery. Because of her severe chronic pain she couldn't drive, had trouble sitting or bending, and had to quit her job. Leslie Finnegan-Andrews suffered from severe migraines and pain in her right hip. And Maurice Milano, who worked in construction, suffered from chronic pain because of damage to his spine and bullet fragments in his neck due to prior motor vehicle accidents and a gunshot wound. In each case, Dr. Parasmo was confronted with a real patient suffering from severe chronic pain alongside red flags

suggesting the possibility, or even likelihood, that they were misusing their medications.

And in each instance, Dr. Parasmo tried to treat the patient's underlying condition and to find alternative ways to control their pain. He encouraged Milano to move to a warmer climate to help alleviate his constant pain and referred him to pain management multiple times.

Dr. Parasmo refused to prescribe medication to Lettenberger, despite his reports of severe pain, after he tested positive for cocaine and the results of the drug test showed that he wasn't taking his prescribed medication. Instead, he prescribed an anti-inflammatory, a mood stabilizer, and an antidepressant.

Rocco Oliveri went to pain management, a neurologist, and a psychiatrist. Dr. Parasmo attempted to wean Oliveri off oxycodone, referred him to PT, and worked closely with the psychiatrist Oliveri was seeing.

And Dr. Parasmo referred Scalcione to a neurosurgeon who concluded that she needed surgery. But the surgeon didn't take her insurance. Dr. Parasmo then referred her to pain management, and after Scalcione reported that it wasn't working, he prescribed her pain medication and tried to find her a different neurosurgeon. One of the several neurosurgeons Dr. Parasmo consulted with told him that Scalcione would require three surgeries to correct her back problem, but that she should wait until the pain became unbearable.

From this evidence, a reasonable jury could readily infer that Dr. Parasmo did not intend to illicitly prescribe controlled substances, and that he subjectively

believed he was prescribing controlled substances for the legitimate medical purpose of treating his patients' pain.

The majority asserts that I present a "highly selective" view of the record. Majority Op. at 21. But we *should* focus on the evidence that supports Parasmo's defense. The central question in our harmless error analysis is whether the evidence presented to the jury "all flow[s] in one direction." *Tureseo*, 566 F.3d at 86. The above evidence highlights that it does not.

2. The Caselaw

My view is consistent with this Court's conclusions in analogous cases, as well as that of other circuits.

Most squarely on point is *United States v. Pabisz*, 936 F.2d 80 (2d Cir. 1991). In *Pabisz*, we considered a defendant's conviction for willfully attempting to evade federal income taxes, in violation of 26 U.S.C. § 7201. Pabisz contended that he did not *willfully* attempt to evade his taxes because he believed, in good faith, that he was not required to pay them. As here, the district court's instruction regarding the defendant's good faith defense misled the jury "into believing that [the defendant's] good faith beliefs could negate the element of willfulness only if those beliefs were objectively reasonable." *Id.* at 83. We concluded that the instruction undermined "the fundamental fairness of the trial" and amounted to *plain error*. *Id.* Significantly, in reaching this conclusion, we emphasized that the potential for misleading the jury was heightened by *the government's summation* in which the prosecutor repeatedly urged the jury to consider the *reasonableness* of the defendant's beliefs. *Id.*

So it was in this case. In summation, the government repeatedly (and wrongly) emphasized "that this is an objective standard," App'x 2065, and asserted that Dr. Parasmo's belief that he was prescribing controlled substances for a legitimate medical purpose "has to be reasonable, and is *not subjective*," App'x 2372 (emphasis added). The government argued that it didn't matter whether Dr. Parasmo "thought the prescription was okay." *Id.*

Pabisz is on all fours with this case. The majority's distinction—that Dr. Parasmo didn't testify in his own defense or introduce direct evidence of his subjective beliefs—is unpersuasive. Majority Op. at 27. As noted above, there is plenty of circumstantial evidence to undermine the government's suggestion that Dr. Parasmo had the necessary guilty intent, and the good faith defense was the centerpiece of Dr. Parasmo's defense. Suggesting that the improper instruction did not undermine the fairness of Parasmo's trial because Parasmo himself did not take the stand (1) fails to recognize that it is the *government's burden* to prove Parasmo had a guilty state of mind, not Parasmo's burden to prove his good faith; and (2) burdens Parasmo's Fifth Amendment right *not* to testify.[2]

[2] *United States v. Heaton*, 59 F.4th 1226 (11th Cir. 2023) doesn't help the majority. It's true that the defendant in that case didn't testify in his own defense, *id.* at 1238, and the Eleventh Circuit found the evidence of the defendant's subjective intent "overwhelming," *id.* at 1242. But in that case the defendant prescribed medication without documenting the patient's response, taking a medical history, or conducting a full physical examination; had sexual relationships with multiple patients; and misled the relevant medical board. *Id.* at 1232, 1242–44. The evidence here is far more equivocal.

Likewise, in *Tureseo*, an aggravated identity theft case under 18 U.S.C. § 1028A, we concluded that the district court erred when it failed to instruct the jury that in order to convict it had to find that Tureseo *knew* that the identifying documents at issue belonged to an *actual person*. 566 F.3d at 85–86. And we concluded the error was not harmless. *Id.* at 86. Although Tureseo's use of another's *birth certificate* constituted substantial evidence that he knew the document belonged to an actual person, we concluded that "the evidence does not all flow in one direction." *Id.* We posited, based on the identity theft victim's testimony that he had never met Tureseo, that a jury could conclude that the defendant did *not* know of the victim's actual existence. *Id.* If anything, the inference that Dr. Parasmo acted in good faith here flows even more naturally from the record evidence than the inference we relied on in *Tureseo* in concluding the instructional error was not harmless.

And this case is readily distinguishable from one in which we have concluded that a *Ruan* error was harmless. The government in *United States v. Belfiore* had far more evidence of the defendant's guilty intent than the mere fact that the defendant continued to prescribe controlled substances to patients despite evidence of their illicit drug use and failed tests. No. 22-20, 2024 WL 2075128, at *2 (2d Cir. May 9, 2024) (summary order). The evidence in *Belfiore* included a recording of the defendant warning an undercover officer that he should not share narcotics with others because someone may turn out to be an undercover officer. *Id.* It included a different recording of the defendant telling an undercover officer that the defendant "was set up for disaster" because the undercover officer's drug tests were negative for oxycodone and

there were no pharmacy records of the officer having the prescriptions filled. *Id.* It included evidence that the defendant falsified medical records and urged a social worker to submit a false affidavit in a medical malpractice case stating that the defendant had arranged an emergency appointment on behalf of a patient who died from an overdose of a drug he had prescribed. *Id.* And there was evidence that, when the undercover officer told the defendant that he was sharing the prescribed oxycodone with his girlfriend, the defendant warned that ongoing sharing would "screw up" the pill count. *Id.*

Here, there was no evidence of Dr. Parasmo instructing patients as to how to avoid detection, nor was there evidence of him falsifying any records. In fact, Dr. Parasmo kept meticulous records—including recording each of his patients' failed drug tests. And, as noted above, there was considerable evidence that Dr. Parasmo prescribed alternative non-narcotic therapies, made referrals, and tried to wean patients off the controlled substances.

The majority's position here is also squarely at odds with considered decisions of other circuits in similar cases. I find support for my view in an Eleventh Circuit decision holding that the omission of a subjective intent instruction in a similar case affected a defendant's substantial rights. *See United States v. Duldulao*, 87 F.4th 1239 (11th Cir. 2023). In *Duldulao* the Court concluded that the instructional error was not harmless because "the jury could have rested its convictions solely on an impermissible theory of liability: that [the defendant]'s actions did not comply with objective professional norms of medicine." *Id.* at 1259. The Court reached this

conclusion even though in *Duldulao*, in contrast to here, there was evidence that clinic staff falsified medical records, patients were "shooting up" in the parking lot, the clinic barely had any medical equipment or supplies, the doctors spent very little time with patients, the defendant doctors' boss made it clear that patients expected to receive controlled substances during their visits, and untrained front desk staff wrote prescriptions for controlled substances for the doctor to sign after each patient's brief visit. *Id.* at 1247–49. The Court emphasized two factors that are also present here: at trial, the government stressed that the defendant's actions deviated from objective professional norms of medicine, and the jury issued a split verdict. *Id.* at 1259.

The Tenth Circuit has likewise concluded that instructions allowing for a conviction under § 841 without a jury determining whether the defendant knowingly or intentionally acted without authorization wasn't harmless. *Kahn*, 58 F.4th at 1317. Central to the Court's reasoning was that the defendant's "intent was in dispute throughout his trial and was the centerpiece of his defense." *Id.* at 1319. The Court did not wade through the evidence to determine whether it might nevertheless support a conviction. Recognizing that the instructional error regarding the defendant's intent "went directly to the heart of the trial," the Court concluded: "The jury did not make the required mens rea finding, and 'to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support

that verdict might be—would violate the jurytrial guarantee.'" *Id.* at 1320 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).[3]

As in the above cases, Dr. Parasmo's intent was fiercely contested and was his sole defense. *Cf. Neder*, 527 U.S. at 17 (concluding that the failure to instruct on an element of the charged crime was harmless where the "element was *uncontested* and supported by overwhelming evidence" (emphasis added)). The government relied heavily upon the error in its closing. *See Pabisz*, 936 F.2d at 83. And the evidence

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[3] The majority attempts to distinguish *Kahn* and *Duldulao* on the basis that the government's evidence in *those* cases was weaker. Majority Op. at 28 n.2. But that's wrong. In contrast to this case, *Duldulao* involved a classic pill mill. 87 F.4th at 1247. There was no evidence that the doctors pursued the kinds of alternate treatments Parasmo recommended for some patients here, nor that they endeavored to wean patients off the drugs. In addition to evidence that the defendant doctors prescribed controlled substances notwithstanding red flags, the government established the following: the practice operated on cash or credit only, "liberally dispensed controlled substances," had little to no medical equipment or supplies, and falsified drug test records; untrained administrative staff "wrote prescriptions for controlled substances for the doctor to sign after each patient's brief visit"; people were "nodding out" in the waiting room and "shooting up" in the parking lot, where patients left behind baggies, blunt wrappers, and syringes; and one defendant admitted to his girlfriend that he worked at a "pain mill." *Id.* at 1247–48. Nevertheless, on *plain error* review, the Eleventh Circuit vacated the convictions, rejecting the argument that the defendants' guilt was so clear that they were not prejudiced. *Id.* at 1261.

The court in *Kahn* relied very little on the evidence presented to the jury; its focus was on the fact that, as here, the instructional error "went directly to the heart of the trial: Dr. Kahn's intent." 58 F.4th at 1320. It concluded that the instructional error was not harmless because "the element of the crime that was impacted by the invalid jury instruction"—the defendant's intent—was not "*uncontested* and supported by overwhelming evidence"—a touchstone repeated at least five times in the Tenth Circuit's harmless error analysis. *Id.* at 1318, 1319, 1320 (emphasis added). The majority's abridged version of this formulation garbles the Tenth Circuit's reasoning by omitting the court's reference to the fact that the defendant's intent was not "uncontested."

doesn't "all flow in one direction," *Tureseo*, 566 F.3d at 86, such that we can conclude nothing in the record would lead a rational juror to acquit, *Neder*, 567 U.S. at 19.

* * *

This was not a "slam dunk" case. In fact, even with the erroneous instruction, the jury acquitted Dr. Parasmo on several counts. Based on the evidence at trial, there is a substantial likelihood that a properly instructed jury would have concluded that the government failed to prove that Dr. Parasmo acted with a guilty intent. I certainly cannot conclude otherwise beyond a reasonable doubt. And the erroneous jury instruction that took the central contested factual issue in this case away from the jury undermined the fundamental fairness of his trial. For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-against-

FRANK PARASMO,

Defendant.

MEMORANDUM & ORDER
19-CR-1 (JMA)

AZRACK, United States District Judge:

At the conclusion of a 13-day trial, a jury convicted Dr. Frank Parasmo ("Parasmo") on 32 counts of unlawfully distributing oxycodone and hydrocodone in violation of the Controlled Substances Act, 21 U.S.C. § 841(a). Now before the Court are Parasmo's motions for a judgment of acquittal or, alternatively, for a new trial, pursuant to Federal Rules of Criminal Procedure 29 and 33, respectively. (ECF Nos. 144, 151.) For the following reasons, the motions are DENIED.

I. BACKGROUND

A. The Indictment

On January 2, 2019, Parasmo was charged with violating 21 U.S.C. § 841(a) in a 35-count Indictment. (ECF No. 17.) The Indictment alleged that from 2014 to 2015, Parasmo issued prescriptions to 20 of his patients for oxycodone and/or hydrocodone,

both Schedule II controlled substances, in varying amounts and dosages. (Id. ¶ 1.) The Indictment alleged that he issued these prescriptions "without authorization," in other words, without "acting in the usual course of his professional practice . . . for a legitimate medical purpose[.]" (Id.)

B. The Evidence at Trial[1]

1. Standards of Medical Practice in New York

The Government's expert medical witness, Seth Waldman, M.D. ("Dr. Waldman"), testified regarding the generally accepted standards of medical practice in New York from 2009 through 2015, specifically with respect to prescribing controlled substances such as oxycodone and hydrocodone. (Tr.[2] 460, 462–63.)

Dr. Waldman testified that oxycodone and hydrocodone are short-acting opioid pain medications. (Tr. 471–72.) Both are Schedule II controlled substances. (Tr. 463, 473–74; GX 100.) Accordingly, they may only be prescribed by a doctor acting in the usual course of medical practice for a legitimate medical purpose. (Tr. 463–64.)

Although both drugs may relieve chronic pain, Dr. Waldman testified that prescribing oxycodone and hydrocodone presents risks, including that the patients will experience addiction and overdose. (Tr. 475–76.) The risk of overdose and death increases when patients use these drugs in conjunction with illicit substances like cocaine, heroin, and amphetamines. (Tr. 476.) Dr. Waldman testified that these risks

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[1] Unless otherwise noted, the Court recounts only the evidence specific to the 32 counts on which Parasmo was convicted.

[2] Citations to "Tr." refer to the corresponding pages of the trial transcript. Citations to "GX" refer to the corresponding exhibits offered by the Government and admitted into evidence at trial.

were commonly known among doctors in New York from 2009 to 2015. (Tr. 477–78.) Because of these risks, Dr. Waldman testified, it is important that doctors monitor patients prescribed oxycodone and hydrocodone by conducting toxicology screens for other substances. (Tr. 495–96.) Dr. Waldman explained, as an example, that drug testing is important because "if we prescribe oxycodone to someone and we find that they're taking something which is illegal, like cocaine or heroin at the same time, it becomes extremely dangerous. Those are exactly the people who die of drug overdose[.]" (Tr. 496.) As a result, under generally accepted standards of medical practice, a test that returned positive for illegal drugs would be cause for concern. (Tr. 498–99.)

Conversely, the absence of a prescribed opioid in a drug test may indicate that the patient does not need the prescription, or that the patient is "diverting" the medication by providing it to someone else. (Tr. 497.) Indeed, Dr. Waldman testified that it was commonly known among New York doctors engaged in the usual course of professional practice from 2009 to 2015 that the absence of prescribed oxycodone in a drug test indicated that the patient was not using it for a legitimate medical need. (Tr. 479.) He explained that for these reasons, under generally accepted standards of medical practice, a doctor should not prescribe oxycodone to a patient following a drug test that is negative for oxycodone, "without a very clear explanation for how that happened." (Tr. 498.)

2. Frankie Campanelli (Count 1)

The jury convicted Parasmo of unlawfully prescribing 240 30-milligram ("mg") oxycodone pills and 240 15-mg oxycodone pills to Frankie Campanelli on January 7, 2014. (ECF No. 139 at 1.)

Campanelli, who had previously worked in Parasmo's office during an externship, was Parasmo's patient from October 2011 to approximately June 2014. (Tr. 1605, 1611; GX 1.) She sought treatment for lower back pain. (Tr. 1608; GX 1.) Despite Campanelli's complaints of pain, Parasmo did not conduct a medical examination of her or send her for an MRI, scan, or other study of her back. (Tr. 1610–11.) Instead, he prescribed her 30 10-mg oxycodone pills. (Tr. 806, 1622.) Her subsequent visits to Parasmo followed a similar pattern. Campanelli testified that she would wait four or five hours in Parasmo's waiting room, along with "a lot of drug addicts coming to get their pills." (Tr. 1612–13.) These individuals had "needle marks on their arms," and she overheard them discuss "how they [were] going to sell their pills." (Tr. 1615.) After proceeding to the examination room, where she would wait for another 30 minutes, Parasmo would spend approximately 15 minutes with Campanelli. (Tr. 1612.)

Campanelli had a history of drug use that worsened while she was under Parasmo's care. Campanelli testified that, in addition to her unprescribed use of Xanax, she also "dabbl[ed]" with marijuana and cocaine. (Tr. 1609–10.) Over time, Campanelli became addicted to the oxycodone prescribed by Parasmo. (Tr. 1615–16.) Yet when she told Parasmo that she was taking her oxycodone pills like "Tic Tacs," (Tr. 1616), Parasmo failed to refer her to an addiction specialist. Instead, at her

request, Parasmo repeatedly increased her opioid prescription. (Tr. 1615–18, 1623–24, 1634–35.) At an appointment with Parasmo on October 2, 2013, Campanelli discussed participating in a detox program to address her oxycodone addiction. (Tr. 1634.) At the same appointment, Parasmo issued a prescription for 240 30-mg oxycodone pills and 240 15-mg oxycodone pills. (Tr. 1634–35.)

Soon after, Campanelli checked into a five-day detox program at Nassau University Medical Center. (Tr. 1618–19, 1636.) She testified that she left the program before its conclusion "to get home and get high," and immediately began using heroin intravenously. (Tr. 1619–21.) By October 16, 2013, Campanelli had consumed all of the 480 oxycodone pills that Parasmo had prescribed just two weeks previously. (Tr. 1635.) She lied to Parasmo that her mother had thrown out her oxycodone while she was in the detox program, and that she was crying in pain. (Tr. 993–94, 1635–36; GX 1.) Although Parasmo knew that Campanelli had just exited a detox program, and that she had tested positive for methadone, he nevertheless issued a prescription for 240 15-mg oxycodone pills. (Tr. 1635–37.) On October 22, 2013, Parasmo prescribed Campanelli an additional 240 30-mg oxycodone pills. (Tr. 1637.) Dr. Waldman testified that these prescriptions—which replaced the medicine that Campanelli had gone to detox to remove—were "exactly counter to what they were intending to do with the detox," and risked Campanelli's health. (Tr. 827–30.) Dr. Waldman further testified that Parasmo's prescriptions "just maintain[ed] her in this state of being addicted to oxycodone and Xanax." (Tr. 831.)

In November 2013, Parasmo referred Campanelli to a pain management specialist, but he did not follow up regarding the referral. (Tr. 810, 1638–40; GX 1.) In December 2013, Parasmo noted that he planned to reduce Campanelli's prescription. (Tr. 810; GX 1.) On January 7, 2014, however, instead of weaning Campanelli off oxycodone, Parasmo wrote the prescriptions underlying Count 1, for 240 30-mg oxycodone pills and 240 15-mg oxycodone pills. (Tr. 810–11; GX 21–22.) Dr. Waldman testified that these prescriptions were not issued in the normal course of professional practice and were not for a legitimate medical purpose. (Tr. 805–06, 832.)

3. William Lott (Counts 2 Through 5)

The jury convicted Parasmo of unlawfully prescribing 150 30-mg oxycodone pills to William Lott on May 8, 2014 (Count 2); July 10, 2014 (Count 3); February 2, 2015 (Count 4); and December 1, 2014 (Count 5). (ECF No. 139 at 1–2.)

Lott, a 59-year-old retiree, first sought treatment from Parasmo in 2009. (Tr. 576; GX 2.) At the start of his treatment, Lott suffered from lumbar stenosis, scoliosis, and chronic lower back pain. (Tr. 1358–59.) Lott had a history of alcoholism and multiple drug overdoses, and he had participated in a detox program. (Tr. 578–79; GX 2.) He was simultaneously being treated for bipolar disorder and schizophrenia, and he was taking three 20-mg doses of methadone daily. (Tr. 578; GX 2.)

In January 2012, Lott was hospitalized for approximately two months following a drug overdose at home. (Tr. 578–79, 583; GX 2.) During this time, he developed anterior compartment syndrome, which required surgery to save his leg. (Tr. 579; GX 2.) When Lott was released from the hospital, Parasmo, despite knowing

of Lott's overdose, prescribed him hydromorphone and oxycodone. (Tr. 582–84; GX 2.) Later that year, Lott was hospitalized again for 16 days following another overdose. (Tr. 582; GX 2.) Drug tests from 2014 showed marijuana, but no oxycodone, in Lott's system. (Tr. 1374–75; GX 2.)

Parasmo nevertheless continued to issue prescriptions to Lott through 2014 and 2015. Dr. Waldman testified that these prescriptions were not issued for a legitimate medical purpose and were not in the normal course of professional practice. (Tr. 577.) Dr. Waldman further testified that Lott's survival was "fortunate and remarkable," and that Parasmo's prescriptions "contributed to the overdose." (Tr. 584–85.)

4. Summer Ferro (Count 7)

The jury convicted Parasmo of unlawfully prescribing 120 5-mg oxycodone pills to Summer Ferro on July 7, 2015. (ECF No. 139 at 2.)

Ferro, a 30-year-old woman, became Parasmo's patient in 2011. (Tr. 523; GX 3.) Her chief complaints at that time were panic/anxiety attacks, asthma, and stomach problems. (Tr. 523; GX 3.) Ferro's records reflect a history of positive drug tests for cocaine and marijuana, as well as signs of psychiatric disorder. (Tr. 526–29; GX 3.) In December 2012, Parasmo sought to discharge Ferro from his care for noncompliance and to refer her to a pain management specialist. (Tr. 527, 1048–50; GX 3.) Ultimately, however, he kept her as a patient and continued to prescribe opioids to her. (Tr. 530.) Ferro again tested positive for cocaine and marijuana, in addition to oxycodone, in June 2014 and May 2015. (Tr. 531–34; GX 3.) Parasmo apparently recognized Ferro's substance abuse issues, and at an appointment on May

22, 2015, he noted "cannot give controlled substances." (Tr. 533; GX 3.) Yet at the very same appointment, he issued a prescription for 60 5-mg oxycodone pills. (Tr. 533; GX 3.) And on July 7, 2015, Parasmo prescribed 120 5-mg oxycodone pills. (Tr. 523; GX 28.)

Dr. Waldman testified that the July 7, 2015 prescription was not issued in the normal course of professional practice and was not for a legitimate medical purpose. (Tr. 523–24.) Ferro's medical records were replete with information "that points to behavioral problems and points to substance abuse problems, but not which point to any need to be using an opioid pain medication." (Tr. 524–25.) Indeed, Dr. Waldman testified that, given Ferro's repeated complaints of constipation, prescribing more oxycodone—itself a "well-known" cause of constipation—was "just making the situation much worse for her." (Tr. 531–32.) In light of her well-documented substance abuse issues, Parasmo's opioid prescriptions increased her risk of fatal overdose "dramatically." (Tr. 532.)

5. Brian Horace (Counts 8 Through 10)

The jury convicted Parasmo of unlawfully prescribing 500 30-mg oxycodone pills and 80 15-mg oxycodone pills to Brian Horace on November 14, 2014 (Count 8); December 12, 2014 (Count 9); and April 21, 2015 (Count 10). (ECF No. 139 at 2–3.)

Horace became Parasmo's patient in 2006. Horace was 44 years old at the time and complained of back and neck pain. (Tr. 771; GX 4.) Parasmo prescribed him oxycodone for his pain. (Tr. 777; GX 4.) However, warning signs soon emerged. In May 2008, Horace's pain management specialist, Dr. Paticoff, recommended that Horace reduce his then-current doses of methadone and Soma, a muscle relaxant,

because Horace "was on too much medication." (Tr. 776–77.) Beginning in 2011, Parasmo received multiple toxicology screens indicating that Horace was suffering from substance abuse disorder. For example, in July 2011, Parasmo received an abnormal toxicology report reflecting buprenorphine, a drug used to treat substance abuse disorder, and cocaine, but not the oxycodone that Parasmo had prescribed to him. (Tr. 779–80; GX 4.) Parasmo noted, "no meds with potential of abuse under any circumstances." (Tr. 779; GX 4.) Again, however, he continued to prescribe oxycodone to Horace. (Tr. 778.) In April 2012, a new toxicology report showed the presence of cocaine. (Tr. 781.) Tellingly, this report was adulterated—Horace's urine had been diluted with water—presumably by Horace himself in an attempt to avoid detection of a substance that may have been in his urine when the sample was taken. (Tr. 781–82.) Despite these red flags, Parasmo prescribed to Horace 100 30-mg oxycodone pills, and he continued to increase Horace's prescription dosage over the summer of 2012. (Tr. 782–85.)

Dr. Waldman testified that after March 2012, Parasmo had crossed a red line by continuing to issue prescriptions to Horace. Dr. Waldman explained that "with the multiple abnormal toxicology screens by that point, there was adequate reason to be suspicious of a substance abuse disorder and it would be inappropriate, except in very limited circumstances and very limited amounts, to give the patient any opioid prescriptions." (Tr. 774.) Despite ample signs of substance abuse, Parasmo continued prescribing oxycodone to Horace—and even increased his prescription over time. (Tr. 779–89.)

Craig Shalmi, M.D. ("Dr. Shalmi"), a pain management specialist, testified that when he saw Horace for appointments in January and February 2015, on referral from Parasmo, he told Horace that he would not continue to prescribe oxycodone and would seek to wean Horace off oxycodone entirely. (Tr. 266–67, 271–72.) Based on his review of Horace's medical records, Dr. Shalmi testified that he believed Horace "had more of a dependency issue, a medication dependency issue than a pain issue." (Tr. 273.) However, Horace was not willing to be weaned off oxycodone, (Tr. 271), and so he returned to Parasmo for additional oxycodone prescriptions. (Tr. 788–89.) Notwithstanding Dr. Shalmi's assessment that Horace should be weaned off oxycodone, on April 21, 2015, Parasmo prescribed Horace 500 30-mg oxycodone pills and 80 15-mg oxycodone pills. (GX 33–34.)

Based on the evidence in the record, Dr. Waldman testified that the prescriptions issued on November 14, 2014, December 12, 2014, and April 12, 2015, were not issued in the normal course of professional practice and for a legitimate medical purpose. (Tr. 771–72, 788–89.)

6. Leslie Finnegan-Andrews (Counts 11 and 12)

The jury convicted Parasmo of unlawfully prescribing 105 30-mg oxycodone pills to Leslie Finnegan-Andrews on June 25, 2015 (Count 11), as well as 63 20-mg oxycodone pills and 60 40-mg oxycodone pills on December 17, 2015 (Count 12). (ECF No. 139 at 3.)

Finnegan-Andrews first sought treatment from Parasmo in July 2013, complaining of severe migraines and hip pain. (Tr. 535–36; GX 5.) Parasmo initially prescribed 15-mg oxycodone pills. (Tr. 537; GX 5.) Over subsequent appointments,

however, Parasmo prescribed increasingly higher amounts of oxycodone, to 20-mg and then 30-mg pills. (Tr. 537; GX 5.) Dr. Waldman testified that Parasmo did so "without any specific escalation." (Tr. 537, 539–40.) In June 2014, Parasmo referred Finnegan-Andrews to pain management specialists, took her off codeine, and noted that she should be weaned off oxycodone. (Tr. 540–41; GX 5.)

Finnegan-Andrews' records also reflect a history of abnormal toxicology test results. For example, a urine toxicology screen on September 4, 2015 was positive for unprescribed drugs, including codeine, morphine, and hydromorphone. (Tr. 537–38; GX 5.) At a subsequent appointment in October 2015, Finnegan-Andrews continued to report chronic headaches and lower back pain. (Tr. 1490–91; GX 5.) Parasmo noted that she was "continually asking for more pain meds," and "her brother who needs pain meds lives with her." (Tr. 545–46; GX 5.) He even speculated, "[m]aybe that is why she keeps asking me for more pain meds." (GX 5.) Dr. Waldman characterized this exchange, and Parasmo's note, as "suspicious for diversion, that there is someone in the household who might be using her medications." (Tr. 546.) Notably, later test results from November 13, 2015 showed that Finnegan-Andrews had no opioids in her system, despite the fact that Parasmo had continued to prescribe oxycodone. (Tr. 547–48; GX 5.) Dr. Waldman testified that the absence of oxycodone in her test results indicates that Finnegan-Andrews "doesn't have pain or the same amount of pain as you thought[,] or she's using them out early and therefore has none[,] or is being taken by somebody else for whatever reason and therefore, she's not consuming it." (Tr. 548.) Under any of these scenarios, according to Dr. Waldman, the results

demonstrate that Finnegan-Andrews "doesn't need [oxycodone] to treat her pain because she's able to exist without it." (Tr. 548.)

At a subsequent appointment on December 17, 2015, Parasmo informed Finnegan-Andrews that he was "no longer treating chronic pain." (GX 5.) Although she reported that she "ran out of meds less than 2 weeks after [Parasmo] gave her [a] refill," (Tr. 1493; GX 5), Parasmo nonetheless issued prescriptions for 63 20-mg oxycodone pills, (GX 28), and 60 40-mg oxycodone pills (GX 37). Dr. Waldman testified that these prescriptions, as well as the prescription issued on June 15, 2015, (GX 35), were not issued in the normal course of professional practice and for a legitimate medical purpose. (Tr. 536–38.)

7. John Lettenberger (Counts 13 and 14)

The jury convicted Parasmo of unlawfully prescribing 240 30-mg oxycodone pills to John Lettenberger on June 26, 2014 (Count 13) and January 15, 2015 (Count 14). (ECF No. 139 at 3–4.)

Lettenberger began seeing Parasmo in 2009 following a car accident in which he had been seriously injured. (Tr. 611–12; GX 6.) At that time, Lettenberger was already on a "high dose" of fentanyl—100 micrograms—and 7.5 mg of oxycodone. (Tr. 616; GX 6.) Toxicology reports from that time also indicated that Lettenberger had an active substance abuse disorder. For example, a report from October 2, 2009 detected cocaine. (Tr. 618; GX 6.) Later, in 2011, Parasmo's records reflect that Lettenberger was attending Narcotics Anonymous ("NA") meetings. (Tr. 618–19; GX 6.) Even while Lettenberger was attending NA meetings to treat his substance abuse disorder, however, Parasmo continued to prescribe him opioids. (Tr. 619.)

By the spring of 2014, Lettenberger was prescribed 240 30-mg oxycodone pills per month. (Tr. 620.) Parasmo's notes from this time reflect that Lettenberger told Parasmo that he "owes fifty oxys" to someone, and therefore needed increase his prescription from 240 pills. (Tr. 613, 620–21; GX 6.) Although Parasmo's notes suggest that he refused to provide the additional pills, (Tr. 1337), Dr. Waldman testified that Lettenberger's statement shows that Lettenberger "is already and has been in the process of diverting at least some of his medications." (Tr. 621.) Indeed, contemporaneous toxicology reports confirmed that Lettenberger was not taking his oxycodone as prescribed. On June 2, 2014, Lettenberger tested positive for cocaine but negative for oxycodone, his prescribed medication. (Tr. 621; GX 6.) At an appointment the following day, Parasmo noted that Lettenberger told him he "had some coke at a party," and that after running out of oxycodone pills, he bought Vicodin "on the street." (Tr. 622–23; GX 6.) Parasmo also noted that Lettenberger was moving well and was animated, which was inconsistent with previous reports of severe back pain. (Tr. 622; GX 6.) Dr. Waldman testified that, taken together, these records indicate "a severe substance abuse disorder." (Tr. 623.) Nevertheless, on June 26, 2014, Parasmo issued a prescription for 240 30-mg oxycodone pills. (Tr. 622; GX 6, 38.)

In August 2014, Lettenberger attempted suicide. (Tr. 614, 1338; GX 6.) When Parasmo subsequently issued a new oxycodone prescription, the pharmacist contacted Parasmo's office to notify him that they were uncomfortable filling Lettenberger's because they were concerned about the number of pills being

prescribed. (Tr. 614, 623.) Dr. Waldman testified that this "would at least warrant a discussion with the pharmacist or a reconsideration of what [Parasmo was] doing." (Tr. 624.) Still, Parasmo prescribed 240 30-mg oxycodone pills to Lettenberger on January 15, 2015. (Tr. 614; GX 39.) Dr. Waldman testified that this prescription, as well as the prescription issued on June 24, 2014, was not issued in the normal course of professional practice for a legitimate medical purpose. (Tr. 612–14.)

8. Maurice Milano (Count 15)

The jury convicted Parasmo of unlawfully prescribing 180 30-mg oxycodone pills and 60 15-mg oxycodone pills to Maurice Milano on May 6, 2015. (ECF No. 139 at 4.)

Milano began seeing Parasmo in 2008, reporting lower back pain stemming from a motorcycle accident and prior gunshot wound. (Tr. 586–87; GX 7.) Parasmo prescribed him Vicodin. (GX 7.) Soon after, Milano told Parasmo that he was buying drugs on the street, as well as using his mother's Vicodin and his aunt's hydromorphone. (Tr. 587, 1387; GX 7.) Milano also had multiple abnormal toxicology screens from 2010 to 2011. These reports repeatedly showed, among other substances, cocaine, methadone, morphine, and codeine; they did not detect the oxycodone that Parasmo had prescribed. (Tr. 587–90; GX 7.) Dr. Waldman testified that these reports represent "a marker of a serious substance abuse disorder and it's important not to contribute to that by adding additional controlled substances including opiates." (Tr. 590.) Yet Parasmo continued to prescribe Milano oxycodone. (Tr. 590–91.)

Meeru Sathi-Welsch, M.D. ("Dr. Sathi-Welsch"), a pain management specialist, testified that Milano should not have been prescribed opioids at this time. Dr. Sathi-Welsch examined Milano in February 2010. (Tr. 368, 382.) Dr. Sathi-Welsch testified that Milano's toxicology reports returned positive for cocaine and marijuana. (Tr. 382–83.) In fact, Milano even told her that he had recently used cocaine and was "buying drugs off the street." (Tr. 383.) As a result, Dr. Sathi-Welsch refused to prescribe opioids to Milano; instead, she offered non-opioid treatments, such as injections and acupuncture. (Tr. 383.) Dr. Sathi-Welsch testified that she provided a summary of Milano's appointment to Parasmo, including a description of her decision to not prescribe opioids to him. (Tr. 384–87.) Parasmo continued to prescribe opioids. (GX 7.)

Further warning signs of Milano's substance abuse issues went unheeded by Parasmo in 2014 and 2015. In June 2014, a toxicology screening again reflected a positive result for cocaine and a possible, but unconfirmed, result for a heroin metabolite. (Tr. 592–93; GX 7.) Moreover, in October 2014 and March 2015, Suffolk County Probation Officers informed Parasmo that Milano had failed drug tests. Specifically, Probation Officer Martha Argyros ("Officer Argyros") testified that she told Parasmo that Milano was on probation and had six positive test results for cocaine, one for morphine, and one for heroin. (Tr. 95.) Parasmo acknowledged to Officer Argyros that Milano "could be selling" his prescribed oxycodone, and he told

her that he would attempt to wean Milano off oxycodone.[3] (Tr. 55–56.) Probation Officer Valeri Verdi, now retired, testified that on March 13, 2015, she told Parasmo of her concern that Milano was continuing to take oxycodone and Xanax given his history of substance abuse. (Tr. 240–41.)

Despite the above information, on May 6, 2015, Parasmo prescribed to Milano 180 30-mg oxycodone pills and 60 15-mg oxycodone pills. (GX 40–41.) Dr. Waldman testified that these prescriptions were not issued in the normal course of professional practice and treatment and for legitimate medical purpose. (Tr. 585–86, 594–96.)

9. Leonard Marino (Counts 16 and 17)

Parasmo was convicted of unlawfully prescribing 120 30-mg oxycodone pills to Leonard Marino on June 18, 2015 (Count 16), and December 28, 2015 (Count 17). (ECF No. 139 at 4.)

Marino first sought treatment from Parasmo in 2008; he was 20 years old at the time. (Tr. 624; GX 8.) Warning signs of substance abuse appeared early. Marino was receiving opioid prescriptions from multiple doctors simultaneously in 2010, which Dr. Waldman referred to as "doctor shopping." (Tr. 627–28.) Notably, Marino also repeatedly reported losing his medications or running out of them early. (Tr. 628–34.) Several of these episodes involved Marino's mother. For example, in July

[3] Following her October 17, 2014 conversation with Parasmo, Officer Argyros contacted investigators at the United States Drug Enforcement Administration ("DEA") to "further investigate what is going on with the prescription medication that's being prescribed to [Milano]." (Tr. 59–60.) In a subsequent interview with DEA investigators, Parasmo denied that Officer Argyros had told him that Milano had tested positive for illicit substances. (Tr. 119.)

2012, Marino told Parasmo that his mother was "getting scripts in his name because she has no insurance." (Tr. 633; GX 8.) Dr. Waldman testified that this "repeated pattern of being out early and of losing your medications by whatever mechanism is a sign that the patient is overusing or selling the medication." (Tr. 632–33.) Parasmo declined to prescribe oxycodone at that time, but later that same month, he issued another oxycodone prescription to Marino. (Tr. 634–35; GX 8.) Despite Marino's continued reports of lost or stolen medications, (Tr. 637–38, 640), Parasmo continued to prescribe him oxycodone, after briefly exploring surgery as an alternative form of pain management. (Tr. 638–42, 1201; GX 8.) In 2014 and 2015, Parasmo received multiple abnormal toxicology reports for Marino; these included reports that reflected positive tests for MDMA, cocaine, morphine, and marijuana, as well as at least one report in 2015 that was negative for Marino's prescribed medications. (Tr. 638–43.)

Nevertheless, Parasmo issued to Marino his standard oxycodone prescription on June 18, 2015. (GX 8, 43.) On July 14, 2015, Parasmo noted that he planned to wean Marino off oxycodone by reducing his prescription. (Tr. 640; GX 8.) Instead, he increased Marino's prescription throughout the fall of 2015, until Marino's final prescription for oxycodone on December 28, 2015. (Tr. 640–42; GX 8, 42.) Dr. Waldman testified that, based on these facts, the prescriptions underlying Counts 16 and 17 were not issued in the normal course of professional practice and for a legitimate medical purpose. (Tr. 625–26).

10. Christina Pepe (Count 18)

Parasmo was convicted of unlawfully prescribing 240 15-mg oxycodone pills to Christina Pepe on December 4, 2014. (ECF No. 139 at 4.)

Pepe first saw Parasmo in 2012, complaining of broken ribs and herniated discs in her back. (Tr. 796; GX 9.) There were soon clear signs of substance abuse. At her next visit in April 2013, Pepe appeared to have multiple track marks from intravenous drug abuse. (Tr. 800; GX 9.) At a September 5, 2013 appointment, a test detected cocaine in her urine; she also stated that she had taken "Molly," or MDMA. Pepe also reported that she "does not know what she takes." (Tr. 800; GX 9.) At her next appointment, Parasmo prescribed Pepe 180 15-mg oxycodone pills. (Tr. 800–01; GX 9.) Dr. Waldman testified that in light of her drug use, this prescription was "dangerous" and "put[] her at substantial risk for overdose." (Tr. 800–01.)

In November 2013, after Pepe had recently tested positive for unprescribed morphine, cocaine, and marijuana, Parasmo informed her by letter that he would no longer prescribe her controlled substances. (Tr. 801–03; GX 9.) By the spring of 2014, however, Parasmo had relented. In fact, he continued to prescribe oxycodone to Pepe even after a June 2014 toxicology screen returned positive for heroin metabolite, as well as unprescribed codeine and hydromorphone. (Tr. 802–03; GX 9.) Dr. Waldman testified that this report indicated that Pepe was "an extreme risk for overdose." (Tr. 803.) Pepe reported extreme pain in July 2014. (GX 8.) Parasmo issued his final oxycodone prescription to Pepe on December 4, 2014, for 240 15-mg pills. (GX 44.) In light of Pepe's well-documented substance abuse issues, Dr. Waldman concluded that the December 4, 2014 prescription was not issued in the normal course of professional practice and was not for a legitimate medical purpose. (Tr. 796–99, 803–04.)

11. Rocco Oliveri (Counts 19 and 20)

Parasmo was convicted of unlawfully prescribing 150 30-mg oxycodone pills to Rocco Oliveri on February 6, 2015 (Count 19), and 120 30-mg oxycodone pills on June 26, 2015 (Count 20). (ECF No. 139 at 5.)

Oliveri was 49 years old when he first sought treatment from Parasmo in 2009. (Tr. 684; GX 10.) His records reflect a history of substance abuse, which Dr. Waldman testified was "active" at the same time he was receiving opioid prescriptions from Parasmo. (Tr. 685.) Oliveri repeatedly tested positive for buprenorphine and was prescribed Suboxone, both of which are drugs administered to treat substance abuse. (Tr. 687, 699; GX 10.) Yet even when an addiction specialist specifically requested that Parasmo no longer prescribe oxycodone to Oliveri, Parasmo continued prescribing oxycodone to him anyway. (Tr. 702.)

Oliveri had many abnormal toxicology reports. Some reports, such as those from April, June, and July 2009, returned negative for drugs that he had been prescribed, including oxycodone and Percocet. (Tr. 685; GX 10.) Another returned positive for cocaine, although Oliveri claimed this was a "mistake." (Tr. 691; GX 10.) Dr. Waldman testified that Oliveri's abnormal toxicology results were significant because "[i]f a patient's in pain and requires the medication on a continuous basis, then he should have the medication in his system all the time and not the presence of other medications." (Tr. 690.)

There was also substantial evidence that Parasmo was aware that the medication he prescribed to Oliveri was being diverted elsewhere. In February 2012, for example, Oliveri reported that he had been attacked at home, and that someone

"[s]tole all his meds." (Tr. 693; GX 10.) Notes from Oliveri's medical file, dated August 17, 2012, suggest that there was drug dealing activity at his home, as Oliveri's neighbors had complained of "much car traffic at his house," where individuals were "handed a bag by his son and they drive off." (Tr. 694; GX 10.) Dr. Waldman testified that this note "suggests that the doctor's aware that there's a high risk that these medicines are not being taken by the patient, but instead are being sold," which "creates a risk for all the people who are potentially taking that medication." (Tr. 694.) Just over a month later, Oliveri again reported that his medication had been stolen from his home. (Tr. 695.) Dr. Waldman testified that this could be "aberrant behavior, meaning that the patient, it might be fabricated because the patient wants an additional prescription." (Tr. 695.) Dr. Waldman further explained that if, however, Oliveri's pills were in fact stolen from his home, that "means you're putting controlled substances into a very unsecured environment and they're likely to be taken by other people and used by others, which could cause overdose and harm to them." (Tr. 695.)

This pattern continued in October 2013, when Oliveri informed Parasmo that his son's friends had stolen his oxycodone and "beat him up." (Tr. 702; GX 10.) Contemporaneous toxicology reports confirmed that Oliveri—who was being treated for substance abuse at the time—was not taking the oxycodone Parasmo prescribed. (Tr. 702–03.) In fact, Oliveri's addiction psychiatrist specifically requested that Parasmo cease writing oxycodone prescriptions for him. (Tr. 702; GX 10.) Dr.

Waldman testified that Parasmo's decision to continue prescribing oxycodone to Oliveri was "a terrible mistake." (Tr. 703.) He further explained that

> There's very good documentation in the chart that this patient doesn't take oxycodone and there's good documentation in the chart that this patient says that his oxycodone is being stolen and sold by his son, and to continue to give the patient prescriptions for oxycodone to allow that to go on is just perpetuating the diver[t]ing of the medication and has nothing to do with the patient's pain condition or with his health.

(Tr. 705.)

However, Parasmo did not stop prescribing oxycodone to Oliveri. Although Parasmo occasionally noted plans to wean oxycodone, he instead increased Oliveri's prescription over time—despite previously receiving letters from United Healthcare in 2012 and 2014 warning that he was prescribing to Oliveri a high daily dose of oxycodone. (Tr. 687, 690, 703, 706–10; GX 10.)

Based on this evidence, Dr. Waldman testified that the prescription for 150 30-mg oxycodone pills filled on February 6, 2015, (GX 45), and the prescription for 120 30-mg oxycodone pills issued on June 26, 2015, (GX 46), were not issued for a legitimate medical purpose and were not in the normal course of professional practice. (Tr. 684.)

12. Paul Peskett (Count 21)

Parasmo was convicted of unlawfully prescribing 120 10-mg hydrocodone pills to Paul Peskett on April 2, 2015. (ECF No. 139 at 5.)

Peskett, then 29 years old, first sought treatment from Parasmo in 2002 for asthma, osteoarthritis, and panic attacks. (Tr. 710–11, 714–15; GX 11.) Soon after, he was prescribed "a very high dose" of methadone, and later, Suboxone. Dr.

Waldman testified that both prescriptions suggested that Peskett was undergoing substance abuse treatment for opioid addiction. (Tr. 711–12, 715–16; GX 11.) In 2004, Parasmo received a letter from Caremark Pharmacy expressing concern that Peskett's prescriptions—for hydrocodone, Ambien, and Xanax—put him at increased risk for overdose. (Tr. 716–17; GX 11.)

Parasmo also received other warning signs regarding Peskett's overdose risk. In April 2009, for example, Parasmo noted that in connection with a urine toxicology screen, Peskett gave him a "cup of water for urine, very cold." (Tr. 719; GX 11.) Dr. Waldman testified that Parasmo "was aware that the patient was trying to evade the urine toxicology screening." (Tr. 719.) Multiple toxicology screens reflected non-prescribed narcotics, including morphine and cocaine, which put Peskett at risk when taken with his prescribed opioids. (Tr. 719, 721, 724; GX 11.) Notably, in December 2009, Parasmo prescribed Vicodin to Peskett, and, in an apparent reference to Peskett's wife, "Percocet for her." (Tr. 721; GX 11.) Dr. Waldman testified that it would be "very dangerous, obviously" for Parasmo to prescribe an opioid for an individual who was not his patient. Dr. Waldman testified further that he "never heard of a situation where somebody would write a prescription to somebody else unless they're intending for it to be diverted." (Tr. 722.) In fact, Parasmo's records from January 2012 and June 2012 show that he knew that Peskett was sharing his prescriptions with his wife. (Tr. 723–24; GX 11.) Parasmo nevertheless continued to prescribe opioids to Peskett, including 120 10-mg hydrocodone pills April 2, 2015. (GX 57.) Dr. Waldman testified that, given Peskett's substance abuse issues and the

evident signs of diversion, this prescription was not issued in the normal course of professional practice and was not for a legitimate medical purpose. (Tr. 711–14.)

13. Maria Scalcione (Counts 22 and 23)

Parasmo was convicted of unlawfully prescribing 150 30-mg oxycodone pills to Maria Scalcione on January 13, 2015 (Count 22), and 90 30-mg oxycodone pills on December 29, 2015 (Count 23). (ECF No. 139 at 5.)

Scalcione began seeing Parasmo in 2011. Her records reflect that she had been in a car accident in 2008; she sought treatment for severe pain in her neck and tingling in her arm and hand. (Tr. 726, 733–34; GX 12.) There was also substantial evidence that Scalcione was struggling with substance abuse, and that she was diverting the medication prescribed to her by Parasmo. Scalcione's medical records also showed that in 2012, she was "doctor shopping" by seeing multiple doctors and receiving multiple, overlapping prescriptions at the same time. (Tr. 741–42; GX 12.) Scalcione had many abnormal toxicology reports that were positive for illicit substances like cocaine, and negative for the opioids prescribed by Parasmo. (Tr. 736–41; GX 12.) Dr. Waldman testified that her repeated abnormal toxicology results were significant because

> If a patient comes to your office complaining of pain, and they have toxicology screens which document that you've been giving them opioids and they have not been taking them, it indicates that the patient is not actually having enough pain to take the opioids and you should not continue to give them opioids because those medicines are going somewhere else.

(Tr. 742.)

In 2013 and 2014, Scalcione reported extreme back pain, but a surgeon advised that she wait for corrective surgery. (Tr. 1106–09; GX 12.) Parasmo continued

prescribing opioids to Scalcione, even after he received letters from insurance companies alerting him to her chronic opioid use, substance abuse, and prior doctor shopping. (Tr. 745–46, 748–49; GX 12.)

By the summer of 2015, following continued abnormal toxicology results, Parasmo noted that he would not prescribe Scalcione pain medication and would instead refer her to a pain management specialist. (Tr. 732; GX 12.) In October 2015, Scalcione was "begging" Parasmo to give her pain medication. Around the same time, her sister contacted Parasmo and said that she would "report" him if he continued to prescribe opioids to Scalcione because "she's not taking them, she's selling them." (Tr. 753–54; GX 12.) Throughout the fall of 2015, Scalcione had repeated abnormal toxicology screens that were negative for opioids. (Tr. 754–55; GX 12.)

Parasmo's notes from December 29, 2015, reflect that Scalcione's pain management specialist had "left town," that she had "one pill left," and "coke in her urine 2x." (Tr. 1118; GX 12.) He noted that she "went into withdrawal last time I cut her off." (GX 12.) He then issued the prescription underlying Count 23, for 90 30-mg oxycodone pills. (GX 49.) Dr. Waldman testified that he was "concerned" by this prescription "because there are multiple documents that show the patient has a substance abuse issue. There's are multiple points where it's clear that the patient is not always using her Oxycodone and mostly not using it. And there are points in the chart where the doctor was notified by the patient's family that she's in fact selling her medication." (Tr. 756.)

Dr. Waldman testified that, based on the facts outlined above, the prescriptions underlying Counts 22 and 23 were not issued in the normal course of professional medical practice and were not for a legitimate medical purpose. (Tr. 727.)

14. Michael Morrow (Counts 24 and 25)

Parasmo was convicted of unlawfully prescribing 150 30-mg oxycodone pills to Michael Morrow ("Michael") on January 14, 2015 (Count 24), and 90 20-mg oxycodone pills on August 20, 2015 (Count 25). (ECF No. 139 at 6.)

Michael became Parasmo's patient in August 2011. (Tr. 653; GX 13.) He complained of back pain, and later, muscular pain; he also had suffered a spinal injury as a child that had, for a time, left him paralyzed. (Tr. 653–54; GX 13.) Michael had repeated abnormal toxicology results. Many of these results showed the presence of drugs Parasmo had not prescribed to him, such as morphine, benzodiazepines, and Suboxone, the drug used to treat opioid addiction. (Tr. 655–60, 662–63; GX 13.) In fact, a pharmacist informed Parasmo's office in August or September 2013 that Michael had been prescribed Suboxone by another doctor. (Tr. 657–58; GX 13.) Even though Michael was evidently under treatment for opioid addiction, at a subsequent appointment in September 2013, Parasmo issued a prescription for oxycodone. (Tr. 658–59; GX 13.) Parasmo's notes from November 2013 reflect that Michael reported chronic back pain, but also that Parasmo was aware that Michael had a substance abuse problem and was "doctor shopping" for opioids. (Tr. 664–65; GX 13.) Later records from October and December 2014 contain abnormal toxicology showing continued use of medications not prescribed by Parasmo, including morphine and Suboxone, as well as alcohol use. (Tr. 652, 662–63; GX 13.)

Michael had abnormal toxicology results throughout the summer of 2015. Tests in June and July 2015 reflected alcohol use, Klonopin, Suboxone, and naloxone, a drug used to treat opioid overdose. (Tr. 652; GX 13.) Neither test showed the oxycodone that Parasmo had prescribed to Michael. (Tr. 652; GX 13.) Nevertheless, Parasmo continued to prescribe oxycodone. (GX 13.)

On August 20, 2015, toxicology results showed Suboxone, but no oxycodone, in Michael's urine. (Tr. 665–66; GX 13.) Michael reported to Parasmo that he was taking his son's Suboxone, and that his son was a recovering heroin addict. (GX 13.) Parasmo noted that he would wean Michael off oxycodone and refer him to pain management. He also issued a reduced prescription for oxycodone, as well as 60 30-mg pills of time-released morphine. (Tr. 668; GX 13, 51.) Dr. Waldman testified that given Michael's history of substance abuse and abnormal toxicology results, "was not in his best interest because it risks overdose." (Tr. 668–69.)

Dr. Waldman testified that, based on these facts, the prescriptions underlying Counts 24 and 25 were issued outside the usual course of professional medical practice and without a legitimate medical purpose. (Tr. 650–51.)

15. Steven Morrow (Counts 26 and 27)

Parasmo was convicted of unlawfully prescribing 240 30-mg oxycodone pills to Steven Morrow ("Steven") on January 14, 2015 (Count 26), and 150 30-mg oxycodone pills on August 20, 2015 (Count 27). (ECF No. 139 at 6.)

Steven first sought treatment from Parasmo in 2011 after he severely injured his ankle; he was 51 years old at the time. (Tr. 669; GX 14.) Steven's records reflect serious substance abuse issues that were ongoing while he was under Parasmo's care.

Indeed, Dr. Waldman testified that Parasmo appeared to recognize this issue, following multiple abnormal toxicology reports and a diagnosis of hypogonadism, a condition often associated with chronic opioid use in men. (Tr. 671–72; GX 14.) On November 25, 2013, Parasmo noted that he would no longer prescribe oxycodone to Steven. (Tr. 672; GX 14.) By January 2014, however, following Steven's repeated complaints of pain, Parasmo relented. Instead of tapering Steven's oxycodone prescription, Parasmo increased it from 180 30-mg pills to 240 30-mg pills. (Tr. 676–77; GX 14.)

Third parties also repeatedly alerted Parasmo to Steven's ongoing substance abuse issues. For example, a letter from Optum Prescription Solutions notified Parasmo that between September and November 2012, Steven had filled controlled substance prescriptions at four different pharmacies. (Tr. 671; GX 14.) A later letter from Optum warned Parasmo that Steven had been prescribed high amounts of opioids. (Tr. 672; GX 14.) Most notably, in February 2015 the Town of Babylon Department of Human Services, Division of Drug and Alcohol Services warned Parasmo that an addiction treatment facility had Steven diagnosed with "severe" opioid use disorder. (Tr. 673, 681; GX 14.) Dr. Waldman testified that Steven should have been "treated for substance abuse disorder" at this time, and that Parasmo's decision to continue prescribing opioids to him was "very dangerous." (Tr. 681.)

Notes from an appointment on August 20, 2015, show yet another abnormal toxicology report, with Steven testing positive for codeine, morphine, and hydromorphone, but negative for the oxycodone that Parasmo had prescribed to him.

(Tr. 682–83; GX 14.) Parasmo reduced, but did not eliminate, Steven's oxycodone prescription. (GX 14.) Dr. Waldman testified that this prescription, (GX 53), in addition to the January 14, 2015 prescription, (GX 52), was not issued within the usual course of professional medical practice and was not for a legitimate medical purpose. (Tr. 683.) He explained that, "[b]y this point in the patient's care, there are many, many episodes in which the patient demonstrated that he has a severe substance use disorder, [which] was documented by other professionals who also thought he had a severe substance use disorder." (Tr. 683.) Dr. Waldman also testified that Steven's continued use of multiple, unprescribed drugs "means it's very dangerous for him to take additional medication on top of that because the likelihood is that this process will continue and, in fact, will probably get worse, leading to an overdose." (Tr. 683–84.)

16. Mary Fusco Roland (Counts 28 Through 30)

Parasmo was convicted of unlawfully prescribing 180 30-mg oxycodone pills to Mary Fusco Roland ("Mary") on January 16, 2015 (Count 28), 120 30-mg oxycodone pills on March 30, 2015 (Count 29), and 90 30-mg oxycodone pills on April 23, 2015 (Count 30). (ECF No. 139 at 6–7.)

Mary began receiving treatment from Parasmo in 2003, and at that time she was suffering from fibromyalgia and spinal problems. (GX 15.) She also, like other patients of Parasmo, had longstanding and active substance abuse issues while she was under Parasmo's care. (Tr. 565; GX 15.) Dr. Waldman testified that while under Parasmo's care, Mary "had frequent episodes of aberrant behavior, she had evidence of doctor shopping, evidence that prescriptions were written even when the patient

had abnormal toxicology screens documenting that she had presence of other substances." (Tr. 565; GX 15.) Records from 2009 indicated that Mary had recently relapsed from heroin and cocaine use, which Dr. Waldman testified showed "an uncontrolled substance abuse problem." (Tr. 568; GX 15.) Nevertheless, Parasmo prescribed her "very, very large doses" of oxycodone, fentanyl, Xanax, and methadone. (Tr. 570–71; GX 15.) Dr. Waldman singled out the "astronomically high" dose of methadone, which, when combined with her other prescribed medications, put Mary at "an extremely high risk for overdose." (Tr. 571.) In March 2015, Parasmo noted that Mary "talks in half sentences," and that he had "no idea what she was talking about." (GX 15.) Dr. Waldman testified that "confusion just like this" is an expected side effect given the doses of narcotics that Parasmo had prescribed. (Tr. 573.)

Dr. Waldman explained that, by the time Parasmo wrote the prescriptions underlying Counts 28, (GX 54), 29, (GX 55), and 30, (GX 56), "there were numerous pieces of evidence here that made it very clear that this patient has a substance abuse disorder and was not being treated and it was not in her best interest to receive oxycodone rather than treatment for substance abuse disorder." (Tr. 566–67.) Accordingly, he testified that they had not been issued in the usual course of professional medical practice for a legitimate medical purpose. (Tr. 565–66.)

17. Andrew Roland (Count 31)

Parasmo was convicted of unlawfully prescribing 180 30-mg oxycodone pills to Andrew Roland ("Andrew") on June 12, 2015. (ECF No. 139 at 7.)

Andrew was 20 years old when he began seeing Parasmo in 2005. (Tr. 596; GX 16.) He developed back pain the following year. Parasmo prescribed hydrocodone and

referred him to physical therapy and to obtain steroid injections. (Tr. 597; GX 16.) Andrew underwent an MRI in March 2012. Dr. Waldman characterized the results as "very common," showing "minimal changes" in Andrew's back condition, which may or may not have caused him pain. (Tr. 601; GX 16.) Parasmo prescribed oxycodone to Andrew for the first time. (Tr. 598–98; GX 16.)

From November 2013 to January 2014, Parasmo increased Andrew's prescription for oxycodone by 50% without explaining his basis for doing so. (Tr. 602; GX 16.) Abnormal toxicology screens followed. In 2014, two toxicology screens returned positive for methadone, morphine, fentanyl, and amphetamines—none of which had been prescribed. (Tr. 599; GX 16.) Later in 2014, Andrew asked Parasmo to take him off oxycodone. (Tr. 603; GX 16.) In December 2014, he tested positive for morphine and fentanyl, neither of which had been prescribed. (Tr. 603; GX 16.)

In February 2015, Parasmo referred Andrew to a pain management specialist, Dr. Shalmi. (Tr. 274, 599; GX 16.) Dr. Shalmi examined Andrew on February 27, 2015 and March 11, 2015. (Tr. 274–75; GX 16.) Andrew complained of chronic pain in his lower back and lower extremities, and he stated that he wanted to come off the pain medication that Parasmo had prescribed to him. (Tr. 275.) An MRI showed "only modest findings and degenerative changes, which is common," according to Dr. Waldman. (Tr. 599–600; GX 16.) At these appointments, Dr. Shalmi advised Andrew that he could participate in a Suboxone treatment program or wean off the oxycodone prescribed by Parasmo. (Tr. 275–79.) Andrew did not return to Dr. Shalmi after his March 11 appointment. (Tr. 282–83.)

On June 12, 2015, Parasmo issued the oxycodone prescription underlying Count 31. (GX 57.) Dr. Waldman testified that "to continue to give [Andrew] the same prescriptions perpetuates the tolerance and the dependence on oxycodone," and that "he should have been referred for addiction treatment and weaned off opioids, rather than continue to get prescriptions of opioids." (Tr. 605–06.) Dr. Waldman testified that, considering Andrew's abnormal toxicology reports and the recommendations of Dr. Shalmi, the June 12, 2015 prescription was written outside the usual course of professional medical practice and without a legitimate medical purpose. (Tr. 597, 605–06.)

18. Robert Wilson (Count 34)

Parasmo was convicted of unlawfully prescribing 180 30-mg oxycodone pills to Robert Wilson on December 12, 2014. (ECF No. 139 at 8.)

Wilson first saw Parasmo in 2003; he was 42 years old at the time. (Tr. 757; GX 19.) He complained of severe swelling in his right knee, "unbearable pain," and piriformis muscle problems. (Tr. 757; GX 19.) By 2011, Wilson had spent a year in rehab for alcohol and painkiller abuse, which Dr. Waldman testified indicated "a predisposition to relapsing for substance abuse." (Tr. 760–61; GX 19.) Subsequently, Wilson had multiple abnormal toxicology screens in December 2011, March 2012, September 2013, January 2014, and June 2014. These reports reflected, at various points, the presence of drugs not prescribed—such as morphine, methadone, and heroin—as well as the absence of drugs that Parasmo had prescribed. (Tr. 759–60; GX 19.) In addition, Wilson also informed Parasmo in 2013 that he had purchased 240 oxycodone pills on the street in Florida. (Tr. 760, 765; GX 19.) Dr. Waldman

testified that Wilson's mixing of narcotics, as reflected in the toxicology reports, was "another marker for a substance abuse disorder." (Tr. 766.) Moreover, by prescribing oxycodone to Wilson, Parasmo increased what was already a "significant" overdose risk "even higher." (Tr. 767.). Dr. Waldman concluded, based on this evidence, that Parasmo's December 12, 2014 prescription, (GX 60), was not issued in the normal course of professional practice and was not for a legitimate medical purpose. (Tr. 758.)

19. Debra Wreckter (Count 35)

Parasmo was convicted of unlawfully prescribing 180 5-mg oxycodone pills to Debra Wreckter on February 27, 2015. (ECF No. 139 at 8.)

Parasmo began treating Wreckter in 1999. (GX 20.) In 2006, she suffered a herniated disc following a bad fall. (GX 20.) Parasmo prescribed her Vicodin, and later increased her medication to include a fentanyl patch, time-released morphine, Xanax, and hydrocodone. (Tr. 552–553; GX 20.) By 2011, Parasmo noted that Wreckter's cocaine addiction, which he had diagnosed in 2009, had caused her nasal septum and hard palate to disappear. (Tr. 553–54, 557; GX 20.) Dr. Waldman testified that this indicates "very heavy or long cocaine abuse," and that "if somebody has an active uncontrolled substance abuse disorder, they should not continue to get prescriptions of opioids except in very specific circumstances." (Tr. 558.) Parasmo nevertheless continued prescribing hydrocodone, and in December 2011, he began prescribing oxycodone to her instead. (Tr. 554; GX 20.)

Multiple toxicology screens reflected that Wreckter continued to use cocaine—as well as morphine, methadone, and other drugs not prescribed by Parasmo—into 2015, years after Parasmo diagnosed her addiction. (Tr. 554–55; GX 20.) In addition

to these signs of her substance abuse, notes from December 2012 show that a pharmacy contacted Parasmo's office out of concern that he was overprescribing opioids to Wreckter. (Tr. 554, 559–60; GX 20.) There were also signs that Wreckter was diverting her oxycodone, including notes from May 2013 reflecting that Wreckter gave oxycodone to her husband. (Tr. 560; GX 20.) However, Parasmo continued to prescribe her oxycodone until March 2015. (Tr. 560–63; GX 20.) Dr. Waldman concluded that, particularly in light of Parasmo's awareness of Wreckter's substance abuse issues, the February 27, 2015 prescription, (GX 61), was not issued in the normal course of professional practice and was not for a legitimate medical purpose. (Tr. 552.)

20. The DEA Investigation

The jury also heard from Dean Steinmann ("Detective Steinmann"), a retired detective who previously worked at the Port Washington Police Department and as a Task Force Officer with the United States Drug Enforcement Administration ("DEA"). (Tr. 104–06.) Beginning in 2013, Detective Steinmann was assigned to the DEA's Long Island Tactical Diversion Squad, which investigates physicians and pharmacists who dispense controlled substances. (Tr. 106–07.)

On July 1, 2015, following Officer Argyros' tip regarding Maurice Milano, (see supra, n.3), Detective Steinmann interviewed Parasmo at his office in Deer Park, New York, along with DEA Special Agent Anton Kohut. (Tr. 111–14.) Detective Steinmann, Special Agent Kohut, and Parasmo discussed Parasmo's opioid prescribing practices. (Tr. 123.) Parasmo told them that he had received a letter from the New York State Medical Society, "a couple years back," informing him that the

amount of oxycodone prescriptions he had issued placed him in the top 10% of physicians in New York. (Tr. 123–24.) Detective Steinmann testified that Parasmo said he "felt nervous about that letter," and that "he was getting a lot, more and more pain patients," but he and his staff "kept trying to weed out or get rid of" the pain patients. (Tr. 124.) Special Agent Kohut told Parasmo that, according to records from the New York Bureau of Narcotics Enforcement ("BNE"), in the previous five years Parasmo had prescribed more than 1.5 million opioid pills. (Tr. 129.)

Detective Steinmann also testified that Parasmo told them that the physician with whom he shared his office, Dr. Rachel Celebenski, did not prescribe pain medication, nor did several other physicians with whom Parasmo had spoken. (Tr. 125.) Detective Steinmann testified that Parasmo told them that "his staff approached him to inform him, 'Hey, we got to start cutting down on the pills[.]'" (Tr. 129–30.) Parasmo explained to Detective Steinmann and Special Agent Kohut that because he had received "a big influx" of pain patients seeking opioids, in March 2015, he had hung a sign in his office stating that "he wasn't going to be writing any more controlled substance or opioid prescriptions." (Tr. 126.) In practice, however, Parasmo continued writing oxycodone and/or hydrocodone prescriptions through at least December 2015.[4]

[4] Parasmo wrote oxycodone or hydrocodone prescriptions for the following patients after March 2015: Summer Ferro (Count 7), Brian Horace (Count 10), Leslie Finnegan-Andrews (Counts 11 and 12), Maurice Milano (Count 15), Leonard Marino (Counts 16 and 17), Rocco Oliveri (Counts 19 and 20), Paul Peskett (Count 21), Maria Scalcione (Count 23), Michael Morrow (Count 25), Steven Morrow (Count 27), Mary Fusco Roland (Count 30), and Andrew Roland (Count 31).

DEA Intelligence Research Specialist Adrian Castro ("Specialist Castro") also testified regarding Parasmo's opioid prescribing practices. (Tr. 1724–44.) Relying on BNE data, Specialist Castro testified that between 2010 and 2013, the number of oxycodone prescriptions written by Parasmo doubled, and the number of actual pills prescribed more than doubled. (Tr. 1740–41; GX 75–76.) Although Parasmo wrote fewer oxycodone prescriptions in 2014, the number of oxycodone pills prescribed continued to increase year-over-year. (Tr. 1741; GX 75–76.) Specialist Castro testified that this trend changed in July 2015—the month Detective Steinmann and Special Agent Kohut interviewed Parasmo—when both the number of oxycodone prescriptions and actual pills prescribed began decreasing. (Tr. 1742–43; GX 77, 98.)

C. Procedural History

Trial commenced on September 14, 2021. (ECF No. 115.) On October 7, 2021, the jury convicted Parasmo on Counts 1–5, 7–31, and 34–35. (ECF No. 139.) The jury acquitted him on Counts 6, 32, and 33. (Id.)

Parasmo timely filed a motion for acquittal under Rule 29, (ECF No. 144), which the Government opposed (ECF No. 147). Following the United States Supreme Court's decision in Ruan v. United States, 142 S. Ct. 2370 (2022), Parasmo filed a supplemental motion for acquittal, or in the alternative, for a new trial, pursuant to Rule 33. (ECF No. 151.) The Government opposed Parasmo's supplemental motion (ECF No. 154), and Parasmo filed a reply in further support of his supplemental motion (ECF No. 155).

II. MOTION FOR A NEW TRIAL

The Court begins its analysis with Parasmo's motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. Parasmo challenges the Court's jury instructions in the wake of Ruan and contends that the Court should grant a new trial due to instructional error.[5] (Def.'s Rule 33 Mem. at 9, ECF No. 151-1; Def.'s Rule 33 Reply, ECF No. 155.) The Government opposes Parasmo's motion. (Gov't Rule 33 Opp'n, ECF No. 154.)

A. Legal Standard

Under Rule 33, "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). However, a district court must exercise this discretion "sparingly and in the most extraordinary circumstances, . . . and only in order to avert a perceived miscarriage of justice." United States v. Gramins, 939 F.3d 429, 444 (2d Cir. 2019) (quotation marks and citations omitted). The "ultimate test" for granting a new trial

[5] Rule 33 provides that "[a]ny motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). However, the Court may extend the 14-day deadline for filing post-trial motions, even after the deadline has expired, upon a finding of "excusable neglect." Fed. R. Crim. P. 45(b)(1)(B). Although Parasmo filed his Rule 33 motion approximately nine months after he was convicted at trial, the Court will consider the motion because it was filed shortly after the Supreme Court's decision in Ruan. See United States v. Mangano, No. 16-CR-540 (JMA), 2022 WL 65775, at *23 (E.D.N.Y. Jan. 6, 2022) ("A significant intervening change in law constitutes a valid basis to extend time under Rule 45(b)(1)(B).") (quoting United States v. Kirsch, 151 F. Supp. 3d 311, 315 (W.D.N.Y. 2015), aff'd, 903 F.3d 213 (2d Cir. 2018)).

pursuant to Rule 33 is "whether letting a guilty verdict stand would be a manifest injustice." Id. (quotation marks and citation omitted).

B. The Jury Instructions

On September 7, 2021, Parasmo and the Government submitted their proposed jury instructions to the Court. (ECF No. 106-1.) They disagreed regarding elements of the § 841 charge. Parasmo requested that, in line with authority from the First Circuit,[6] the Court instruct the jury that in order to find him guilty under § 841, "the government must prove beyond a reasonable doubt that Dr. Parasmo believed he was acting illegally under a criminal drug law by writing the prescription." (Scaring Aff., Ex. A at 5, ECF No. 151-3.) He also asked the Court to instruct the jury that "[a] doctor distributes a drug in good faith when he believes he is medically treating a patient for a legitimate medical purpose and in the usual course of medical practice. Good faith in this context means good intentions and the honest exercise of professional judgment as to the patient's needs." (Id. at 7.)

In contrast to Parasmo's proposed instructions, the Government requested that the Court instruct the jury that the Government must prove beyond a reasonable doubt that Parasmo "knowingly and intentionally prescribed the controlled substances outside the bounds of professional medical practice and not for a legitimate medical purpose."7 (ECF No. 106-1 at 34.) With respect to Parasmo's good faith, the Government asked the Court to instruct the jury that "[g]ood faith in this

[6] Parasmo's proposed § 841 instruction was derived in relevant part from the jury instructions in United States v. Zolot, No. 11-CR-10070 (D. Mass.), ECF No. 636. (See Scaring Aff., Ex. A at 4 n.4, 6 n.9, ECF No. 151-3.)

context means acting reasonably and with the honest exercise of best professional judgment as to a patient's needs; that is, that the defendant acted in accordance with what he reasonably believed to be the standard of medical practice generally recognized and accepted in the State of New York." (Id. at 37.)

Ultimately, the Court instructed the jury that in order to prove that Parasmo violated § 841, the Government must establish beyond a reasonable doubt the following elements: "First, that the defendant knowingly and intentionally distributed the controlled substance alleged in the indictment. And, second, that the defendant knowingly and intentionally prescribed the controlled substances outside the bounds of professional medical practice and not for a legitimate medical purpose." (Tr. 2247.) With respect to the second element, the Court instructed the jury as follows:

> As to the second essential element, implicit in the registration of a physician with the Drug Enforcement Administration, to be allowed to prescribe controlled substances, is the understanding that he is authorized only to act as a physician, and when he knowingly and intentionally acts outside the bounds of professional medical practice, and without a legitimate medical purpose in prescribing controlled substances, he is doing so in an unlawful manner.

(Tr. 2248–49.) The Court instructed the jury that a person acts "knowingly" if "he acts purposely and voluntarily and not because of a mistake, accident or other innocent reason." (Tr. 2249.) The Court explained that a person acts "intentionally" if "he acts willfully and with specific intent to do whatever it is the law forbids." (Tr. 2249.) The Court continued by providing the following instructions, again regarding the second element:

> Because many controlled substances have an accepted medical use, federal law authorizes registered practitioners, including doctors and pharmacies, to

distribute controlled substances pursuant to lawful prescriptions. The defendant is a registered practitioner. To be lawful, a prescription must meet certain requirements. Section 1306.04(A) of Title 21 of the Code of Federal Regulations provides in relevant 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. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner.
>
> An order purporting to be a prescription issued not in the usual course of professional treatment is not a prescription within the meaning and intent of [Section 841], and, the person issuing it shall be subject to penalties provided for violations of these provisions of the law relating to controlled substances.

The terms usual course of his professional practice, and usual course of professional treatment, refer to generally accepted medical practice. If you find that the defendant prescribed the Schedule II controlled substance, then you should consider whether the government has proven beyond a reasonable doubt that the defendant did so knowingly and intentionally, outside of the usual course of his professional practice and for no legitimate medical purpose.

In making a medical judgment concerning the right treatment for an individual patient, physicians have discretion to choose among a wide range of available options. Therefore, in determining whether the defendant acted without a legitimate medical purpose, you should examine all of the defendant's actions and the circumstances surrounding them. In determining whether or not the defendant's actions conformed with generally accepted medical practice, you should determine whether the defendant's action conformed with what is objectively considered generally accepted medical practice.

A practitioner is not permitted to substitute his or her view of what is good medical practice for standards generally recognized and accepted in the State of New York. The usual course of professional medical practice refers to the standard of medical practice and treatment generally recognized and accepted in the State of New York.

However, you must remember this is not a medical malpractice case. It is not enough for the government to prove negligence, malpractice, carelessness or sloppiness on Dr. Parasmo's part. You cannot convict the defendant if all the government proves is that he is an inferior doctor.

> What the government must prove beyond a reasonable doubt is that when the doctor wrote the prescriptions that are the subject of the indictment he was not writing those prescriptions for a legitimate medical purpose, but was instead writing them outside the usual course of professional practice. In determining the usual course of professional medical practice, you should consider the totality of the defendant's actions and circumstances surrounding them, including evidence of accepted professional standards of care in effect at the time. You should also consider the extent if at all of any deviation from and of the severity of any such deviation from professional standards.

(Tr. 2250–53.) Finally, the Court provided the following instruction regarding the effect of Parasmo's good faith:

> In connection with this element, you must also determine whether the defendant acted in good faith. A doctor prescribes a drug in good faith in medically treating a patient when he prescribes the drug for a legitimate medical purpose in the usual course of practice; that is, the doctor has prescribed the drug lawfully. Good faith in this context means acting reasonably and with the honest exercise of best professional judgment as to a patient's needs; that is, the defendant acted in accordance with what he reasonably believed to be the standard of medical practice generally recognized and accepted in the State of New York.
>
> If you find that the defendant acted in good faith in prescribing the drugs, then you must find him not guilty. The government bears the burden of proving beyond a reasonable doubt that the defendant acted without a good faith belief that his distribution of the controlled substances, oxycodone and hydrocodone, was for a legitimate medical purpose in the usual course of medical practice.

(Tr. 2253–54.)

C. The Supreme Court's Decision in Ruan

The statute underlying Parasmo's convictions, 21 U.S.C. § 841(a), provides that it is unlawful for any person, "except as authorized," to "knowingly or intentionally" "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Under applicable regulations, a prescription for a controlled substance is only authorized, and thus

does not violate § 841, when a doctor issues it "for a legitimate medical purpose . . . acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a).

In June 2022, the Supreme Court held in Ruan, for the first time, "that § 841's 'knowingly or intentionally' mens rea applies to the 'except as authorized' clause," in addition to the statute's actus reus ("manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"). 142 S. Ct. at 2376. Therefore, "once a defendant meets the burden of producing evidence that his or her conduct was 'authorized,' the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." Id. at 2376. The Court explained that "[a] strong scienter requirement helps to diminish the risk of 'overdeterrence,' i.e., punishing acceptable and beneficial conduct that lies close to, but on the permissible side of, the criminal line." Id. at 2378 (citation omitted). However, the Court emphasized, citing 21 C.F.R. § 1306.04(a), that "[t]he Government, of course, can prove knowledge of a lack of authorization through circumstantial evidence. . . . As we have said before, '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.'" Id. at 2382 (quoting Cheek v. United States, 498 U.S. 192, 203–04 (1991)).

D. Analysis of the Jury Instructions Under Ruan

Parasmo asserts that the Court's jury instructions regarding § 841 were erroneous under Ruan. Specifically, he contends that the Court erred by instructing the jury that his "conduct in dispensing controlled substances was criminal to the

extent that it did not comport with 'generally accepted medical practice,'" and by "emphasiz[ing] that any belief on the part of the Defendant needed to be 'reasonable.'" (Def.'s Rule 33 Mem. at 11–12.) He argues that the jury should have been charged that "the government must prove beyond a reasonable doubt that [he] believed he was acting illegally under a criminal drug law by writing the prescription." (Id. at 12.) The Government, on the other hand, argues that the jury instructions were not erroneous, even under Ruan. (Gov't Rule 33 Opp'n at 4–5.)

"A jury charge is erroneous if it 'either fails to adequately inform the jury of the law, or misleads the jury as to a correct legal standard.'" United States v. Mangano, No. 16-CR-540 (JMA), 2022 WL 65775, at *32 (E.D.N.Y. Jan. 6, 2022) (quoting United States v. Silver, 948 F.3d 538, 547 (2d Cir. 2020)). As explained below, the Court finds no error in the jury charge.

First, the Court's instructions clearly stated that the Government must prove beyond a reasonable doubt that Parasmo (1) "knowingly and intentionally distributed the controlled substance alleged in the indictment," and, as required under Ruan, that Parasmo (2) "knowingly and intentionally prescribed the controlled substances outside the bounds of professional medical practice and not for a legitimate medical purpose." (Tr. 2247.) The Court instructed the jury that this second element is "essential," as a doctor prescribing a controlled substance acts unlawfully under § 841 only "when he knowingly and intentionally acts outside the bounds of professional medical practice, and without a legitimate medical purpose in prescribing controlled substances[.]" (Tr. 2248–49.) This is precisely what Ruan commands—i.e., that "the

Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." 142 S. Ct. at 2376.

Second, the Court's instructions emphasized that "this is not a medical malpractice case." (Tr. 2252.) The Court explained that, as such, "[i]t is not enough for the government to prove negligence, malpractice, carelessness or sloppiness on Dr. Parasmo's part. You cannot convict the defendant if all the government proves is that he is an inferior doctor." (Tr. 2252.) Thus, the Court's instruction was designed to avoid the risk of "overdeterrence" and "reduc[ing] culpability on the all-important element of the crime to negligence." Ruan, 142 S. Ct. at 2378, 2381.

Third, the Court instructed the jury that, in evaluating whether Parasmo had knowingly or intentionally acted without "a legitimate medical purpose, . . . outside the usual course of professional practice," i.e., without authorization, the jury was entitled to consider "the totality of the defendant's actions and circumstances surrounding them, including evidence of accepted professional standards of care in effect at the time," as well as "the extent if at all of any deviation from and of the severity of any such deviation from professional standards." (Tr. 2252–53.) Although Parasmo argues that this was error, (Def.'s Rule 33 Mem. at 11–12), the Supreme Court held in Ruan that "[t]he Government, of course, can prove knowledge of a lack of authorization through circumstantial evidence. . . . [a]nd 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.'" 142 S. Ct. at 2382 (citing 21 C.F.R. § 1306.04(a)); see also id. (citing Gonzales v. Oregon,

546 U.S. 243, 285 (2006) (Scalia, J., dissenting) ("The use of the word 'legitimate' connotes an objective standard of 'medicine'") and United States v. Moore, 423 U.S. 122, 141–42 (describing Congress' intent "to confine authorized medical practice within accepted limits" (emphasis added))). Accordingly, the Court finds no error here.

Fourth, and finally, Parasmo contends that the Court erred by instructing the jury that a doctor prescribes a controlled substance "lawfully" when the doctor does so "in good faith," which "means acting reasonably and with the honest exercise of best professional judgment as to a patient's needs; that is, the defendant acted in accordance with what he reasonably believed to be the standard of medical practice generally recognized and accepted in the State of New York." (Def.'s Rule 33 Mem. at 12 (citing Tr. 2253).) Specifically, Parasmo objects to the Court's reference to his "reasonabl[e]" belief, to the extent that this implied that the jury could convict him for violating § 841 based on an objective, rather than subjective, standard. (Id.)

Parasmo is correct that § 841 "nowhere uses words such as 'good faith,' 'objectively,' 'reasonable,' or 'honest effort.'" Ruan, 142 S. Ct. at 2381. He is likewise correct that following Ruan, for purposes of a criminal conviction under § 841, the Government must prove that a defendant "knew or intended that his or her conduct was unauthorized." Id. at 2382. However, Parasmo appears to ignore the Supreme Court's additional guidance that, "[a]s we have said before, '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.'" Id. at 2382 (quoting Cheek, 498 U.S. at 203–04); see also United States v. Sabean, 885 F.3d 27, 45 (1st Cir. 2018) (explaining in appeal of § 841 conviction that "the further that a defendant strays from accepted legal duties, the more likely that a factfinder will find him to be in knowing disregard of those duties"). Here, as the Government notes, (Gov't Rule 33 Opp'n at 4), the Court's instructions emphasized that the jury must evaluate "what he reasonably believed[.]" (Tr. 2253 (emphasis added).) The instructions also stressed that the Government had to prove that the defendant acted without a "good faith belief," which necessarily required the jury to evaluate Parasmo's subjective "belief." (Tr. 2253 54 (emphasis added).)

The jury charge thus focused on whether Parasmo himself believed that he was acting in good faith, while also recognizing that, in line with Ruan, that the jury may consider the reasonableness of a defendant's "asserted beliefs or misunderstandings . . . as measured against objective criteria." 142 S. Ct. at 2382. The Government still bore the burden to prove that Parasmo had knowingly or intentionally acted outside the bounds of professional medical practice and not for a legitimate medical purpose. And the jury was explicitly informed of this critical requirement. (Tr. 2247 (stating that the government must prove that "the defendant knowingly and intentionally prescribed the controlled substances outside the bounds of professional medical practice and not for a legitimate medical purpose").

The Court's conclusion is bolstered by the Eleventh Circuit's recent decision, applying the Supreme Court's decision in Ruan, that the jury instructions at issue in

that case were erroneous. 56 F.4th 1291 (11th Cir. 2023) ("Ruan II"). In Ruan, the district court instructed the jury that

> For a controlled substance to be lawfully dispensed by a prescription, the prescription must have been issued by a practitioner both within the usual course of professional practice and for a legitimate medical purpose. If the prescription was issued either, one, not for a legitimate medical purpose or, two, outside the usual course of professional practice, then the prescription was not lawfully issued.
>
> A controlled substance is prescribed by a physician in the usual course of professional practice and, therefore, lawfully if the substance is prescribed by him in good faith as part of his medical treatment of a patient in accordance with the standard of medical practice generally recognized and accepted in the United States. The appellants in this case maintain at all times they acted in good faith and in accordance with standard of medical practice generally recognized and accepted in the United States in treating patients.
>
> Thus a medical doctor has violated section 841 when the government has proved beyond a reasonable doubt that the doctor's actions were either not for a legitimate medical purpose or were outside the usual course of professional medical practice.

United States v. Ruan, 966 F.3d 1101, 1166 (11th Cir. 2020).

In holding that this instruction "inadequately conveyed the required mens rea," the Eleventh Circuit explained that "it is the defendant's subjective intent that matters," and this instruction "did not help convey that a subjective analysis was required for the 'except as authorized' exception." Ruan II, 56 F.4th at 1297. The instruction was also inadequate because it "essentially repeated the language from 21 C.F.R. § 1306.04(a) without linking it to any requirement that the jury find a lack of good faith or scienter for this exception." Id. at 1298. By contrast, in this case, as discussed above, the Court instructed the jury that to convict Parasmo for violating § 841, the Government must prove that he "knowingly and intentionally prescribed the controlled substances outside the bounds of professional medical practice and not

for a legitimate medical purpose." (Tr. 2247.) This instruction—unlike the instruction in Ruan—clearly conveyed "that a subjective analysis was required for the 'except as authorized' exception." Ruan II, 56 F.4th at 1297.

Ruan is also notable for another reason. In Ruan, the Eleventh Circuit found that the instruction for the substantive § 841(a) charges—which lacked critical language that was included in Parasmo's instructions—was erroneous. Despite finding error in the instruction for the substantive charges, the Eleventh Circuit, however, still upheld the defendants' convictions for conspiring to violate § 841(a) because the conspiracy instructions required the jury to find that the defendants knew the illegal object of the conspiracy. Ruan II, 56 F.4th at 1299. The Eleventh Circuit reasoned that "[f]or a defendant to know that the aim of their agreement was illegal in this context means that they would need to know both that (1) they were dispensing a controlled substance and (2) that they were doing so in an unauthorized manner." Id. Similarly, at Parasmo's trial, the jury was explicitly instructed that the Government had to prove that the "the defendant knowingly and intentionally prescribed the controlled substances outside the bounds of professional medical practice and not for a legitimate medical purpose." (Tr. 2247.) Given this instruction, the jury at Parasmo's trial was informed that the defendant had to know that he was dispensing a controlled substance in an unauthorized manner.

Accordingly, viewing the jury instructions regarding § 841 as a whole, the Court finds no error under Ruan.

E. Even if the Instructions Were Erroneous Under Ruan, Any Error Was Harmless

Parasmo contends that he suffered prejudice as a result of the Court's purported instructional error. He argues that the Court's instructions regarding § 841 "eviscerated [his] one and only defense," namely, that he "never intended to violate the law, but was responding—even if ineptly—to patients who presented as suffering from real and significant medical issues resulting in chronic pain." (Def.'s Rule 33 Mem. at 13.) The Government contends that, to the extent that the jury instructions were erroneous under Ruan, any error was harmless because the evidence at trial "showed beyond a reasonable doubt, that [Parasmo] would have been convicted under the Ruan standard." (Gov't Rule 33 Opp'n at 5.)

"'Where a defendant has preserved his claim of error by a timely objection calling the district court's attention to the problem when the court would have the opportunity to fix the error, [the Second Circuit will] review a district court's jury charge de novo, and will vacate a conviction for an erroneous charge unless the error was harmless.'" Mangano, 2022 WL 65775, at *32 (quoting United States v. Nouri, 711 F.3d 129, 138 (2d Cir. 2013)). "For erroneous instructions to be harmless, it must be 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" Id. (quoting Silver, 948 F.3d at 547); see also United States v. Martoma, 894 F.3d 64, 72 (2d Cir. 2017) ("[W]e will not overturn a conviction if we find that the jury would have returned the same verdict beyond a reasonable doubt, and thus that the error did not affect the defendant's substantial rights.") (internal quotation marks and citation omitted). "The burden lies with the

government to establish that [the] error is harmless." United States v. Skelos, 988 F.3d 645, 656 (2d Cir. 2021) (citing Silver, 948 F.3d at 569).

Based on the evidence presented at trial, the Court is convinced beyond a reasonable doubt that even if Parasmo had received the § 841 instruction that he requested, a rational jury would have found him guilty on Counts 1–5, 7–31, and 34–35. Indeed, there was overwhelming evidence at trial that Parasmo knowingly or intentionally prescribed oxycodone and/or hydrocodone outside the bounds of professional medical practice and without a legitimate medical purpose.

Parasmo continued to prescribe oxycodone and/or hydrocodone to his patients even when:

> (i) the patient had suffered multiple drug overdoses, in the case of William Lott;
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> (ii) the patient had recently left a drug rehabilitation treatment program, in the case of Frankie Campanelli and Rocco Oliveri;
>
> (iii) the patient had repeated abnormal toxicology screens reflecting the use of illicit drugs, in the case of Lott, Campanelli, Oliveri, Summer Ferro, Paul Peskett, Debra Wreckter, Mary Fusco Roland, Maurice Milano, Leonard Marino, Michael Morrow, Steven Morrow, John Lettenberger, Maria Scalcione, Robert Wilson, and Christina Pepe;
>
> (iv) the patient had repeated abnormal toxicology screens reflecting the absence of prescribed opioids, suggesting that their pills were being diverted for non-medical purposes, in the case of Milano, Marino, Oliveri, Scalcione, Wilson, Steven Morrow, Michael Morrow, and Leslie Finnegan-Andrews;
>
> (v) the patient had a long and well-documented history of substance abuse issues, in the case of Lott, Milano, Wreckter, Lettenberger, Oliveri, Peskett, Scalcione, Wilson, Pepe, Mary Fusco Roland, Michael Morrow, Steven Morrow, and Brian Horace;
>
> (vi) Parasmo himself had recognized that he should cease prescribing opioids to the patient, in the case of Ferro, Milano, Oliveri, Scalcione, Horace, Pepe, Marino, and Steven Morrow; and

> (vii) third parties—including other physicians, pharmacists, and law enforcement officers—objected to Parasmo's decision to prescribe opioids to patients, in the case of Lettenberger, Milano, Oliveri, Scalcione, Wreckter, Steven Morrow, and Andrew Roland.

(See Gov't Rule 33 Opp'n at 7.) Additionally, Dr. Waldman testified that none of these prescriptions was issued in the usual course of professional medical practice and for a legitimate medical purpose. See supra, Section I.B.

Parasmo contends that the evidence at trial "bore no resemblance to the prototypical pill mill case; there were no runners, no 'fake' patients, and no cash payments." (Def.'s Rule 33 Mem. at 13.) However, the evidence at trial showed that, on multiple occasions with different patients, Parasmo was aware that the oxycodone and/or hydrocodone he prescribed was not being used for a legitimate medical purpose and was instead being diverted for secondary dealing. When confronted with this evidence, however, Parasmo continued to prescribe opioids to these patients. For example, Rocco Oliveri repeatedly informed Parasmo that his medication had been stolen from him in his home, including at least once by his son's friends. Oliveri's medical records also evidence possible drug dealing activity taking place in his home. Contemporaneous toxicology reports confirmed that Oliveri was not taking the opioids that Parasmo had prescribed to him. Despite this evidence that Oliveri's oxycodone was being diverted, Parasmo continued issuing prescriptions to him. Dr. Waldman characterized this as "a terrible mistake," (Tr. 703), as "to continue to give the patient prescriptions for oxycodone to allow that to go on is just perpetuating the diver[t]ing of the medication and has nothing to do with the patient's pain condition or with his health." (Tr. 705.) Like Oliveri, Maria Scalcione's toxicology screens

repeatedly returned negative for prescribed opioids. Even after her sister contacted Parasmo and told him that Scalcione was selling her pills, however, he continued prescribing oxycodone. And as another example, Parasmo's records show that he knew that Paul Peskett was sharing his opioid prescriptions with his wife. Dr. Waldman testified that it would be "very dangerous, obviously" for Parasmo to prescribe an opioid for an individual who was not his patient, and that he "never heard of a situation where somebody would write a prescription to somebody else unless they're intending for it to be diverted." (Tr. 722.) There was even evidence that Parasmo was aware that Leslie Finnegan-Andrews and John Lettenberger were selling their oxycodone pills, and that Parasmo still did not stop issuing prescriptions to them. This was damning evidence that Parasmo knew that he was prescribing opioids outside of the bounds of professional medical practice and without a legitimate medical purpose.

Parasmo also argues that the evidence shows that he "repeatedly made efforts to wean various patients off their medications or to refer them out to pain specialists—hardly the actions of a doctor who subjectively intends to act as a 'drug pusher.'" (Def.'s Rule 33 Mem. at 13.) However, as the Government points out, "even when [Parasmo] made entries in patient records stating 'no more pain meds' or 'no more controlled substances'—[he] kept on prescribing addictive controlled substances." (Gov't Rule 33 Opp'n at 7.) If anything, these records reflect Parasmo's knowledge that his continued prescriptions to these patients were not "authorized" within the meaning of § 841 because, as Dr. Waldman testified, they were issued

outside the usual course of professional medical practice did not serve a legitimate medical purpose. Indeed, by 2015 Parasmo had been on notice for at least "a couple years," (Tr. 123), based on a letter he received from the New York State Medical Society, that the amount of oxycodone prescriptions he was issuing placed him in the top 10% of physicians in the entire state. Similarly, Detective Steinmann testified that Parasmo told him and Special Agent Kohut that he had decided in March 2015—after his staff urged him to "start cutting down on the pills," (Tr. 129)—to cease prescribing pain medication to his patients. However, BNE records reflect that he continued to prescribe oxycodone to his patients beyond March 2015. (See supra, n.4.) It was only after Detective Steinmann and Special Agent Kohut interviewed Parasmo on July 1, 2015 that his prescribing activity rapidly declined. The jury was entitled to consider this evidence as probative of Parasmo's knowledge that these opioid prescriptions were not "authorized" within the meaning of § 841.

The evidence adduced at trial is precisely the type of "circumstantial evidence," measured against "objective criteria," which Ruan permits the Government to rely on in proving knowledge of a lack of authorization under § 841. See 142 S. Ct. at 2382.

Parasmo argues, citing United States v. Pabisz, 936 F.2d 80 (2d Cir. 1991), that the purported charging error was not harmless. (Def.'s Rule 33 Reply at 6–7, ECF No. 155.) In Pabisz, the defendant was convicted at trial of federal income tax evasion. 936 F.2d at 82. On appeal, he argued that the district court erred in instructing the jury that they could not credit his good faith defense unless they found that his beliefs were reasonable. Id. at 83. The Second Circuit determined that the

instructions were erroneous because they did not, as required by an intervening Supreme Court decision, inform the jury "that [the] defendant's beliefs need not be objectively reasonable if they were actually held in good faith." Id. The court granted the defendant's request for a new trial and explained that because "the jury was erroneously instructed about the principal issue at trial, we are compelled to find that the fundamental fairness of the trial . . . was undermined." Id. (internal citations and quotation marks omitted).

Relying on Pabisz, Parasmo contends that the purported instructional error here was not harmless because it "does not go to some corollary issue, but to the issue which was at the very heart of this case: whether Dr. Parasmo was acting with subjective good faith." (Def.'s Rule 33 Reply at 6–7.) Parasmo also argues that "as in Pabisz, the Government continuously harped upon the objective standard and the unreasonableness of [his] conduct throughout its summation." (Id. at 8; see also id. at 6; Def.'s Rule 33 Mem. at 14.) Thus, he claims that, as in Pabisz, "the fundamental fairness of the trial . . . was undermined" by the purported instructional error. (Def.'s Rule 33 Reply at 8 (quoting Pabisz, 936 F.2d at 83).) The Court is unconvinced, as Pabisz is distinguishable.

First, it is not clear in Pabisz that the Government even argued that the instructional error was harmless in light of the strength of the evidence at trial. See Pabisz, 936 F.2d at 83 (identifying the three arguments advanced by the Government). Second, in Pabisz, the defendant—unlike Parasmo—took the stand. The defendant testified regarding his subjective good faith belief that he was not

required to pay taxes. 936 F.2d at 81–82. He explained during his testimony that, "after reading a flier that analyzed a 1916 Supreme Court case, Brushaber v. Union Pacific Railroad Co., 240 U.S. 1, 36 S.Ct. 236, 60 L.Ed. 493 (1916), he went to a law library and read several Supreme Court cases concerning the obligation to pay taxes. In addition, he studied the Internal Revenue Code, wrote letters to three Congressmen and contacted the IRS." Id. He also testified that, "based upon his research, he concluded that he was not required to file individual income tax returns or pay taxes. Therefore, after 1981, he did not file any income tax returns and also claimed to be exempt from withholding in his W–4 forms." Id. Thus, in Pabisz, there was direct evidence of the defendant's subjective beliefs presented to the jury. Here, by contrast, Parasmo did not testify that he subjectively believed that the prescriptions at issue were "authorized" within the meaning of § 841. And as discussed above, there was overwhelming evidence to the contrary at trial.

The Court also finds distinguishable Ruan II, which, after holding that the substantive § 841 instructions were erroneous, concluded that this error was not harmless beyond a reasonable doubt. Ruan II, 56 F.4th at 1298. At trial, both defendants, as well as the Government, presented expert evidence regarding the appropriate standard of care. Id. Crucially, both defendants testified that they believed that they had acted in accordance with the applicable standard of care. Id. The Eleventh Circuit concluded that "[t]he jury could have weighed all of this evidence and concluded that [the defendants] subjectively believed their conduct was in accord with the appropriate standard of care." Id. In other words, "a properly

instructed jury may not have convicted the defendants had it known that [the defendants'] subjective beliefs that they were acting properly was a defense to these charges." Id. Under these circumstances, the Eleventh Circuit could not conclude that the erroneous instruction was harmless beyond a reasonable doubt. Id.

The present case is strikingly different from Ruan II. First, Parasmo did not present expert testimony regarding the standard of care. The only expert testimony on this issue came from the Government's expert, Dr. Waldman, recounted above. Second, and most importantly, Parasmo did not testify that he subjectively believed that he had acted in accordance with the standard of care. In the absence of this evidence, there is no indication that here—in contrast to Ruan II, as well as Pabisz—a properly instructed jury may not have convicted Parasmo had it known that his subjective belief was a defense to charges under § 841.[7]

[7] Parasmo also contends that this case is "closely analogous" to United States v. Tureseo, 566 F.3d 77 (2d Cir. 2009), in which the Second Circuit reversed a defendant's conviction for aggravated identity theft based on the trial court's erroneous mens rea instruction. (Def.'s Rule 33 Mem. at 14–15.) There, the trial court had entirely omitted the required mens rea instruction, which had been announced in an intervening Supreme Court decision, that the Government must "show that the defendant knew that the means of identification at issue belonged to another person." Tureseo, 566 F.3d at 86 (emphasis added). This instruction was erroneous because it "omit[ted] an essential element of the offense[.]" Id. And because evidence at trial did not "all flow in one direction," the Second Circuit could not conclude that the error was harmless beyond a reasonable doubt. Id. Parasmo argues that "[t]he same result is mandated here, where the Court's instructions failed to convey the correct scienter requirement—i.e., that a prescribing doctor must knowingly act in an unauthorized matter." (Def.'s Rule 33 Mem. at 15.) The Court disagrees. Parasmo's premise is incorrect. As discussed above, the Court correctly instructed the jury that Parasmo must knowingly or intentionally act in an unauthorized manner; it did not "omit[] an essential element of the offense." Tureseo, 566 F.3d at 86. Therefore, the Court agrees with the Government, (Gov't Rule 33 Opp'n at 6), that Tureseo is inapposite.

Viewing the evidence at trial as a whole, the Court concludes that even if the § 841 jury instruction was erroneous, it is clear beyond a reasonable doubt that a rational jury would have found Parasmo guilty absent the error. Accordingly, his Rule 33 motion is denied.

III. MOTION FOR ACQUITTAL

Parasmo also moves for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29. He argues that while the evidence at trial "may have established that [he] failed to adhere to best medical practices," it is insufficient to establish that he was acting without a legitimate medical purpose, in violation of § 841. (Def.'s Rule 29 Mem. at 1, ECF No. 144-1). The Government opposes his motion. (Gov't Rule 29 Opp'n, ECF No. 147.)

A. Legal Standard

Rule 29 provides that "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). "The test for sufficiency . . . is whether a rational jury could conclude beyond a reasonable doubt that a defendant is guilty of the crime charged." United States v. Napout, 332 F. Supp. 3d 533, 548 (E.D.N.Y. 2018), aff'd, 963 F.3d 163 (2d Cir. 2020) (quoting United States v. Eppolito, 543 F.3d 25, 45 (2d Cir. 2008)). "The Court must make this determination with the evidence against a particular defendant . . . viewed in a light that is most favorable to the government

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Additionally, even if the Court's instructions were erroneous, the evidence of Parasmo's guilt "flows in one direction," as discussed above.

. . . and with all reasonable inferences . . . resolved in favor of the government." Id. In doing so, the court must "defer[] to the jury's assessment of witness credibility and its assessment of the weight of the evidence." United States v. White, 7 F.4th 90, 98 (2d Cir. 2021) (internal quotation marks and citations omitted). "A judgment of acquittal is warranted only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." Martoma, 894 F.3d at 72 (internal quotation marks and citation omitted). Accordingly, a defendant challenging a jury's guilty verdict "'bears a heavy burden[.]'" Mangano, 2022 WL 65775, at *58 (quoting United States v. Aguilar, 585 F.3d 652, 656 (2d Cir. 2009)).

B. Analysis

The Court has already concluded with respect to Parasmo's motion for a new trial that the evidence is sufficient—even following Ruan—to support his § 841 convictions for knowingly or intentionally prescribing controlled substances without authorization. Accordingly, Parasmo's sufficiency arguments under Rule 29, which requires the Court to view the evidence in the light most favorable to the Government, necessarily fail as well. See Mangano, 2022 WL 65775, at *59. Thus, his Rule 29 motion is denied.

IV. CONCLUSION

For the reasons stated above, Parasmo's motions for a judgment of acquittal, or in the alternative, for a new trial, are DENIED.

SO ORDERED.

Dated: January 30, 2023
Central Islip, New York

/s/ (JMA)
JOAN M. AZRACK
UNITED STATES DISTRICT JUDGE