No. 17-12653-DD

In the United States Court of Appeals for the Eleventh Circuit

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UNITED STATES OF AMERICA,
Appellee

v.

XIULU RUAN,
JOHN PATRICK COUCH,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
D.C. NO. 15-CR-00088-CG-B (HON. CALLIE V.S. GRANADE)

SUPPLEMENTAL BRIEF OF APPELLEE UNITED STATES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

United States v. Xiulu Ruan, John Patrick Couch, No. 17-12653-DD

Pursuant to 11th Cir. R. 26.1-1, the United States adopts the Certificates of Interested Persons submitted by Couch and Ruan.

STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully submits that the Court may benefit from oral argument on the impact of the Supreme Court's decision in this case due to the expansive record.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. This Court had jurisdiction to review the district court's final decisions under 28 U.S.C. § 1291. It now has jurisdiction to review issues that fall within the scope of the Supreme Court's remand. 28 U.S.C. § 2106.

STATEMENT OF THE SUPPLEMENTAL ISSUES

(I) Whether the district court's jury instructions adequately conveyed the necessary *mens rea* for a physician to dispense controlled substances illegally.

(II) Whether any instructional errors were harmless in the face of overwhelming evidence.

STATEMENT OF THE CASE

After it sat for 31 days and heard from around 80 witnesses, a jury found that former physicians John Patrick Couch ("Couch") and Xiulu Ruan ("Ruan") unlawfully dispensed controlled substances and committed other federal crimes. [Doc. 722-31, 10–11; Doc. 722-32, 3–13 (listing witnesses)].[1] At trial, a former employee described the clientele as "sad," "glassy eyed," and like "zombi[es]." [Doc. 722-16, 108]. Former patients recalled crowded waiting rooms, signs of drug abuse, and pain patients without apparent injuries. [Doc. 722-15, 146–47; Doc. 722-16, 143]. The case returns from the Supreme Court so this Court can assess the jury instructions and evidence on Couch's and Ruan's knowledge of the unauthorized opioid prescribing.

A. Course of Proceedings and Disposition Below

The convictions distill to three categories. First, the indictment charged Couch (Counts 5, 6, 7, 13, and 14) and Ruan (Counts 8, 9, 11, and 12) with unlawful dispensation or distribution of controlled substances. [Doc. 269, 22–27]. Second, it asserted Couch and Ruan participated in three drug conspiracies (Counts 2, 3, and 4), three fraud conspiracies (Counts 15, 17, and 19), and a conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO") (Count 1). [*Id.* at 13–22, 27–28, 31–35, 38–40]. Third, the indictment included three charges against Ruan related to money laundering (Counts 20, 21, and 22). [*Id.* at 40–42].

[1] All citations to the record and briefs reflect the pagination on the respective electronic dockets.

Couch and Ruan proposed an instruction on prescribing that addressed "good faith" and whether the defendants were "drug pusher[s]." [Doc. 462, 29–30.]. At the charge conference, Couch sought "some sort" of instruction on good faith. [Doc. 722-27, 16–17]. The district court disagreed with the proposal but chose another instruction on good faith. [*Id.* at 19–20]. In the substantive dispensing instructions, the district court explained a prescription fits within the usual course of professional practice "if the substance is prescribed by [the physician] 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." [Doc. 722-28, 26].

As for the remaining charges, the district court instructed the jury on the *mens rea* standards. [*Id.* at 15–23, 27–39]. The instructions for the drug conspiracies incorporated the substantive language but identified the conspiracy elements as an agreement to distribute or dispense drugs outside the course of practice and a determination that "the defendant knew the unlawful purpose of the plan and willfully joined in it." [*Id.* at 20–22]. The district court told the jury to view all counts separately. [*Id.* at 41].

The jury convicted Couch and Ruan on these charges. [Doc. 722-31, 10–11]. This Court affirmed those convictions but vacated another charge. *United States v. Ruan*, 966 F.3d 1101, 1177 (11th Cir. 2020).[2]

[2] This Court remanded the case for resentencing. The district court resentenced Couch and Ruan, and they appealed from that proceeding. *United States v. Couch*, No. 21-12538 (11th Cir); *United*

B. Statement of Facts

Couch and Ruan operated two clinics and a pharmacy attached to one of them. [Doc. 722-2, 116, 197, 225–26; Doc. 722-12, 187]. Former employees and patients described signs of impairment in both patients and staff. [Doc. 722-15, 146–47; Doc. 722-16, 28–29, 40–41 108, 136–37, 143; Doc. 722-17, 218–21]. Multiple employees left due to concerns on these conditions. [Doc. 722-14, 208; Doc. 722-16, 103–04].

Agents found pre-signed prescriptions and signed blank ones when they executed search warrants. [Doc. 722-2, 136–38, 142, 206–07]. Ruan admitted he signed blank prescriptions that nurse practitioners could use in "emergenc[ies]." [Doc. 722-26, 91–93]. Couch acknowledged he pre-signed prescriptions for patients before their appointments. [Doc. 722-25, 63–64]. He also knew his staff saw patients while he was out of the office. [*Id.* at 66–67]. An analysis revealed that Couch billed extensively while he was away. [Doc. 722-18, 20, 23, 28, 30]. Ruan also billed for such services but in smaller quantities. [*Id.* at 35–36].

Couch justified his approach toward patient accountability based on the doctor-patient relationship but also estimated he saw only 30% to 40% of his patients each visit. [Doc. 722-24, 217; Doc. 722-25, 74]. An undercover officer who posed as a patient received an appointment with Couch. [Doc. 722-8, 202]. Couch "only stayed 42 seconds" and formed no relationship with the officer before he issued a prescription

States v. Ruan, No. 21-12521 (11th Cir.). The Court has stayed those proceedings while this appeal remains.

for Roxicodone. [*Id.* at 208–09, 220–21]. The officer did not see Couch again but received more opioids. [*Id.* at 212, 230]. Meanwhile, the officer "was throwing red flags" at clinic staff to suggest he "was a pill seeker." [*Id.* at 215]. He received no warnings about Roxicodone. [*Id.* at 215–16]. His medical records contained errors and exaggerated his pain level. [*Id.* at 216–19, 244]. Couch admitted the officer's records contained errors and that he approved increased doses without seeing him. [Doc. 722-25, 22–24]. He claimed that he issued prescriptions appropriately. [Doc. 722-24, 229]. On cross-examination, he said as to legitimacy: "The ones that were done by me, where I saw the patient." [Doc. 722-25, 82].

Patient P.C.'s widow attended almost half the visits with her husband and never saw Couch. [Doc. 722-16, 178]. She identified inaccurate records and said that, unlike other doctors, Couch never formed a doctor-patient relationship with her husband. [*Id.* at 180–81, 188–90, 230]. An employee warned Couch that his prescribing practices could lead to the loss of his (or the clinic's) licenses. [Doc. 722-14, 8–9, 14].

Ruan was a "micromanager" who "was involved in every aspect" of the practice. [Doc. 722-16, 19, 52]. In emails, he expressed familiarity with the applicable prescribing standards, investigations into pill mills, and the attendant red flags. [Doc. 722-9, 169–73]. Ruan did not want the clinic's practices to draw the attention of state regulators. [*Id.* at 173]. He told a medical student that he seldom discharged patients for drug abuse because "[i]n private practice the more you fire, the more revenue you

lose." [*Id.* at 234]. Couch and Ruan formed a succession plan if one of them became subject to an investigation. [Doc. 722-10, 38–39].

Both Couch and Ruan were leading prescribers of two powerful fentanyl opioids: Subsys and Abstral. [Doc. 722-12, 85–91, 172–78; Doc. 722-13, 41–46]. Employees at Insys, the makers of Subsys, referred to Couch and Ruan as "[w]hales." [Doc. 722-7, 13]. Couch and Ruan formed such an essential part of the Abstral market that Galena sold its rights months after the raid at their practice. [Doc. 722-8, 84]. In addition, Couch and Ruan owned significant stock in Galena. [Doc. 722-3, 212–13; Doc. 722-7, 26–27]. Ruan prescribed Abstral and Subsys to one patient (D.G.) at the same time, even though they served the same purposes. [Doc. 722-4, 147].

The day after he learned of a criminal investigation into another doctor, Ruan began donating speaking fees he received from Insys. [Doc. 722-10, 17–23, 130]. An employee who learned about the donations was "shocked" and called it "out of character." [Doc. 722-16, 25]. Ruan admitted at trial that he made the donations because he did not want others to question his motives. [Doc. 722-25, 155].

C. Standards of Review

This Court reviews jury instructions *de novo* in the light of the whole charge. *United States v. Cochran*, 683 F.3d 1314, 1319 (11th Cir. 2012). If an instruction omits an element, the Court will affirm if the error is harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 15 (1999).

SUMMARY OF ARGUMENT

The Supreme Court held that a physician who claims authority to prescribe drugs must know he issued prescriptions without authorization to face criminal liability for drug distribution. Couch and Ruan knew they engaged in unlawful prescribing, and the jury properly found them guilty. This Court should affirm the convictions.

As a threshold matter, the Supreme Court's decision did not impact the convictions for offenses other than violations of 21 U.S.C. § 841. The district court told the jury each charge was separate. It also gave instructions consistent with each applicable body of law. This Court should not raze a forest after the Supreme Court pruned a single tree. The other convictions stand.

As for the instructions on dispensing, the district court selected a compromise instruction on good faith. The trial evidence revealed bad faith in spades. Thus, the analysis turns in large part on this question: Would any reasonable jury that found bad faith also have found knowledge? The answer is yes, and it resolves this appeal.

An instruction remains sufficient even with small errors. The difference between bad faith and knowledge was minor here because the same bad-faith evidence readily proved knowledge. The jury was not misled. For similar reasons, any error was harmless. The trial included overwhelming knowledge evidence, and the jury rejected the generic good-doctor defense Couch and Ruan advanced and continue to rely upon erroneously. This Court should affirm the convictions.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The Jury Instructions Imparted Sufficient Guidance to the Jury.

This Court should uphold the jury instructions because they conveyed appropriate guidance to the jury. The Supreme Court held that the knowing or intentional *mens rea* in 21 U.S.C. § 841 applies to the authorization exception within that statute. *Ruan v. United States*, 142 S. Ct. 2370, 2376 (2022). The Supreme Court left it to this Court to decide what impact, if any, that holding had on the jury instructions. *Id.* at 2382. *Ruan* had no impact on the non-§ 841 convictions. The § 841 convictions withstand *Ruan* because the district court ultimately gave the functional equivalent of a knowledge instruction on this record.

Jury instructions need not be flawless. *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1283 (11th Cir. 2008) (explaining that the Court does not "nitpick" jury instructions "for minor defects"); *United States v. Brown*, 43 F.3d 618, 627 (11th Cir. 1995) ("A jury instruction cannot be dissected on appeal."). Instead, an instruction is erroneous if this Court has "a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *United States v. Cochran*, 683 F.3d 1314, 1319 (11th Cir. 2012) (internal quotation marks omitted).

A. *Ruan* Pertains only to the Violations of 21 U.S.C. § 841.

In *Ruan*, the Supreme Court spoke only of distribution or dispensing in § 841. The other offenses are unaffected. *See United States v. Gray*, 626 F.2d 494, 500–01 (5th

Cir. 1980) (concluding that an error in a conspiracy charge did not taint the substantive counts).[3]

The bulk of these other convictions were conspiracies. Conspiracies are separate crimes. *Pinkerton v. United States*, 328 U.S. 640, 643 (1946) (recognizing that "the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses"); *United States v. Tombrello*, 666 F.2d 485, 489 (11th Cir. 1982). As for *mens rea*, a conspirator must know the essential object or nature of the conspiracy. *United States v. McNair*, 605 F.3d 1152, 1195–96 (11th Cir. 2010). This *mens rea* is separate from *Ruan*, but it also is consistent with it.

At the outset, the fraud conspiracies were different. For example, the jury returned guilty verdicts on a kickback conspiracy regarding payments from Insys. That scheme focused on the payments for prescriptions, not the medical bases for them. *See United States v. Howard*, 28 F.4th 180, 207 (11th Cir. 2022) ("There is no medical necessity exception to the law forbidding kickbacks."). While it is outside the course of professional practice to issue prescriptions based on financial gain, that issue is a separate matter. The other fraud conspiracies (mail and wire fraud and healthcare fraud) touched to a limited extent on prescribing but did so in the context of the applicable fraud objectives. Ultimately, these conspiracies implicated an assessment of mental state tailored to those offenses, and the court told the jury each charge was

[3] Decisions from the former Fifth Circuit issued before the close of business on September 30, 1981, are binding precedent. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

separate. *Ruan* has no application to them.

As for the drug conspiracies, this Court has considered the lack of authorization as a part of the conspiracy when the distributor is a health professional. *United States v. Iriele*, 977 F.3d 1155, 1169–72 (11th Cir. 2020) (concluding that it would have been obvious to a pharmacist that prescriptions were illegitimate); *United States v. Azmat*, 805 F.3d 1018, 1035–36 (11th Cir. 2015) (analyzing a physician's awareness of a conspiracy to prescribe drugs illegally). The district court's instructions made clear that the conspiracy involved prescribing outside the course of professional practice and required the jury to find the defendants "knew the unlawful purpose of the plan and willfully joined in it." [Doc. 722-28, 22]. This instruction is consistent with the *mens rea* for conspiracies. *See McNair*, 605 F.3d at 1195–96. Hence, the jury already found that Couch and Ruan knowingly planned to prescribe drugs outside the course of professional practice for these conspiracy offenses.

In a footnote, Ruan acknowledges this language in the drug conspiracy instructions but claims the instruction was tainted by the description of the distribution offenses. [R. Supp. Br., 17–18 n.4].[4] Not so. The district court's inclusion of the language on good faith did not offset its clear and succinct directive that the jury had to find the defendants knew the nature of the plan. The nature of that plan here was prescribing outside legitimate medical bounds. The instruction offered proper

[4] Couch joins all Ruan's arguments. [C. Supp. Br., 17].

guidance. *See Cochran*, 683 F.3d at 1319.

Elsewhere, Ruan purports to challenge all his convictions because he says they were inextricably intertwined. [R. Supp. Br., 26–27]. He does not analyze these charges in any detail or explain how this sweeping claim is consistent with the district court's direction to treat the charges separately. [Doc. 722-28, 41]. In essence, Ruan invites this Court to build a framework he refused to construct himself. This Court should not do so. *See United States v. Corbett*, 921 F.3d 1032, 1043 (11th Cir. 2019) (explaining that perfunctory arguments are insufficient to preserve an issue) *and United States v. Nealy*, 232 F.3d 825, 830–31 (11th Cir. 2000) (recognizing that a supplemental brief is not the place to raise new issues). Regardless, *Ruan*'s holding on § 841 did not affect the other convictions.

In sum, *Ruan* modified this Court's prior decision with a butter knife, not a machete. *Ruan* refined the applicable *mens rea* for distribution crimes. It did not affect the other offenses, and this Court should affirm as to those convictions.

B. The District Court Gave a Sufficient Charge on 21 U.S.C. § 841.

The dispensing instructions are imperfect but sufficient after *Ruan*. The instructions properly guided the jury based on the trial record. *See Cochran*, 683 F.3d at 1319–21 (considering the trial proceedings in the evaluation of an instruction).

Ruan implanted a traditional knowledge framework onto the authorization analysis in § 841. 142 S. Ct. at 2381. It did not herald the arrival of a completely

subjective standard. *Id.* at 2382 ("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." (cleaned up)).

The traditional accoutrements of a knowledge analysis apply with equal vigor to the without-authorization facet of § 841. Direct evidence of knowledge rarely exists, so a jury often must infer it from conduct. *United States v. Duenas*, 891 F.3d 1330, 1334 (11th Cir. 2018). When drugs are involved for example, this Court has inferred knowledge from aberrant behavior during a traffic stop and divined cognition from the acts of a "prudent smuggler." *United States v. Almanzar*, 634 F.3d 1214, 1222–23 (11th Cir. 2011) (upholding an inference of knowledge based upon unusual and improper conduct during a traffic stop); *United States v. Quilca-Carpio*, 118 F.3d 719, 722 (11th Cir. 1997) (explaining and applying the prudent-smuggler principle). Ultimately, jurors do not leave common sense at the deliberation-room door.

Doctors and other professionals receive no exemption from these general rules. In the conspiracy context, this Court found that a physician knowingly joined a conspiracy to unlawfully dispense drugs based on multiple circumstantial factors, including "an abundance of red flags that should have tipped off any doctor that his patients were seeking pills" and patients who "looked like addicts or 'zombies.'" *Azmat*, 805 F.3d at 1036. The Court also upheld a jury's verdict on a pharmacist's

knowledge based on a "mountain of evidence" that he was part of a pill mill, including the "enormous number of prescriptions for large quantities" of drugs and other irregularities. *Iriele*, 977 F.3d at 1170–72. Hence, a jury does not have to accept the professional's word that an action is legitimate in the face of contrary proof.

Pivoting to jury instructions, this Court has connected good faith and knowledge. On multiple occasions, this Court has found that a district court did not err by omitting a good-faith instruction because a knowledge instruction covered it. *United States v. Jordan*, 582 F.3d 1239, 1247–48 (11th Cir. 2009) (determining that concepts of good faith "were substantially included in the instruction that the criminal act must be done 'knowingly' or 'willfully'"); *United States v. Martinelli*, 454 F.3d 1300, 1315–17 (11th Cir. 2006) ("[B]ased on the instructions the district judge gave, if the jury concluded that [the defendant] had a good-faith belief in the legitimacy of the business, it could not have found that he *knew* the funds were the proceeds of mail fraud." (emphasis in the original)). These cases do not mean that good faith and knowledge are the same, but they illustrate the concepts play within the same ballpark.

This Court distinguished *Martinelli* in the context of a fraud scheme, but this case does not turn on the fine distinctions at issue there. *Cf. United States v. Takhalov*, 827 F.3d 1307, 1317–19 (11th Cir. 2016). The instructions did not mislead the jury here because the evidence on bad faith clearly established knowledge.

Turning to this case, the jury performed the functional equivalent of an

assessment for knowledge. Fairly read as a complete instruction, the jury had to find that Couch and Ruan knowingly or intentionally dispensed controlled substances and that they dispensed them outside legitimate medical bounds. On this latter point, the court instructed that a prescription is in-bounds if it "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." [Doc. 722-28, 26]. Broken down, this meant in practical terms: (1) an objective *actus reus* of a prescription outside accepted limits; and (2) a *mens rea* of a lack of good faith. To prove a lack of good faith, the United States relied on bad-faith actions that also established knowledge, such as visibly impaired staff and patients, decisions that fell far outside any appropriate boundary, and consciousness of guilt. *See, e.g.*, *Azmat*, 805 F.3d at 1036 (discussing patients who looked like "addicts or 'zombies'"), *and Almanzar*, 634 F.3d at 1222 (allowing an inference of knowledge from consciousness of guilt).

Couch and Ruan have not shown that any differences between knowledge and bad faith mattered here. Put simply, they have not shown they acted in bad faith but did so unknowingly. Instead, they lean on the generic defense that they were good doctors, a theory the jury already rejected. When the jury rejected that theory, it necessarily found knowledge on this record. *See Martinelli*, 454 F.3d at 1316.

Ruan offers emphasis-laden points that miss on substance. He claims that "the Supreme Court required that juries must find that the physician *subjectively intended* to

exceed his authorization." [R. Supp. Br., 13] (emphasis in the original). This formulation leaves the delusive impression that only intent matters when knowledge also qualifies, and it further implies erroneously that a jury must take a defendant's assertions of naivety at face value when conventional knowledge standards apply. *Ruan*, 142 S. Ct. at 2376, 2381–82; *see also Duenas*, 891 F.3d at 1334 (recognizing that knowledge often must be inferred). In addition, Ruan contends that the instruction allowed a conviction "*without regard*" to Ruan's mental state and argues that "the jury was wrongly instructed that such subjective beliefs were *irrelevant as a matter of law*." [R. Supp. Br., 26] (emphases in the original). These statements misconstrue the instructions and overstate any error. Although grounded in good faith instead of knowledge, the instruction allowed for a knowledge analysis on this record.

Finally, this Court should review the trial record. Couch and Ruan sought an overbroad instruction on good faith with incendiary language on drug pushers that was improper before *Ruan* and that remains wrong today. The district court's compromise was imperfect but fair. This Court should affirm the § 841 convictions.

II. Any Error was Harmless due to the Overwhelming Evidence of Guilt.

This Court also should affirm because any error was harmless. An omission of an element from jury instructions is harmless if it did not affect the verdict beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 15 (1999). This analysis often turns on the strength of the evidence. *United States v. Roy*, 855 F.3d 1133, 1188 (11th

Cir. 2017) (*en banc*) (concluding that a defense attorney's temporary absence was harmless in the face of overwhelming evidence). It also considers the magnitude of any error and whether any additional finding had a necessary connection to the findings the jury already made. *Id.* (explaining that questions were repeated with counsel present); *Nealy*, 232 F.3d at 830 (concluding that a jury necessarily found an undisputed quantity of a substance when it found the defendant possessed the substance).

Evidence may be overwhelming in numerous ways. The Supreme Court found that a failure to report "over $5 million in income" from loans "incontrovertibly" was a material fact on the defendant's taxes due to the vast amount and the absence of contrary arguments to the jury. *Neder*, 527 U.S. at 16. This Court has found overwhelming evidence of knowledge when a trial left the jury with no "middle ground" between knowledge and the lack of knowledge. *United States v. Rivera*, 944 F.2d 1563, 1572 (11th Cir. 1991). It found overwhelming evidence that a conspiratorial act was foreseeable based on the circumstantial evidence and parties' knowledge. *United States v. Broadwell*, 870 F.2d 594, 604 (11th Cir. 1989). There was overwhelming evidence Couch and Ruan knowingly prescribed opioids without authority.

A. Couch Knowingly Prescribed Substances Without Authorization.

The trial evidence was overwhelming that Couch knew about the circumstances at the clinic. Witnesses described patients and staff with obvious signs of drug addiction. *See Azmat*, 805 F.3d at 1036 (allowing an inference of knowledge from

presence at a health center). The "unusual circumstances" at the clinic established Couch's knowledge. *Rivera*, 944 F.2d at 1573. In addition, Couch's defense relied on his knowledge of the applicable standards. He testified definitively that he rendered appropriate care; he did not profess a lack of awareness. [Doc. 722-24, 229]. The jury had no "middle ground" to find that Couch prescribed illegitimately and did so in bad faith while still lacking knowledge. *Rivera*, 944 F.2d at 1572. Couch met the *mens rea*.

In addition, Couch frequently failed to form any doctor-patient relationship with many patients before he prescribed opioids, and he knew this was wrong. He knew that relationship was fundamental to the practice of medicine; he told the jury he did not carefully monitor patient compliance to preserve this relationship. [Doc. 722-24, 217]. Thus, Couch had actual knowledge of its primacy. *See Broadwell*, 870 F.2d at 604 (citing "actual knowledge" and participation in an act), *and United States v. Staller*, 616 F.2d 1284, 1292 (5th Cir. 1980) (finding overwhelming evidence of knowledge based on a defendant's admissions along with other facts).

Nonetheless, he failed to form that relationship with many patients, including the undercover officer in Counts 5, 6, and 7, and patient P.C. in Count 14. Couch saw the undercover officer for a matter of seconds, yet the officer received and continued to obtain opioids. Patient P.C.'s widow never saw Couch and testified that Couch did not form a legitimate relationship with her husband. This evidence leapt off the page like the underreported income in *Neder*. 527 U.S. at 16.

Couch makes no arguments of his own. [C. Supp. Br., 17]. Instead, he leans on Ruan's contentions, which turn primarily on differences in expert testimony. That argument should not prevail for at least three reasons. First, it confuses the *actus reus* with the *mens rea*. The experts opined on the legitimacy of the prescribing practices, not Couch's mental state. *See* Fed. R. Evid. 704(b) (providing that experts cannot opine on a defendant's mental state). Second, the jury necessarily considered and rejected Couch's expert because it found he satisfied the *actus reus*. *See Nealy*, 232 F.3d at 830 (finding that a jury's finding necessarily included an undisputed quantity based on other determinations). Third, Couch's argument is incompatible with his trial defense. Couch never asserted that he failed to understand the standards but instead claimed he knowingly followed them. When the jury rejected that answer, it had no choice but to find knowledge.

B. Ruan Knowingly Prescribed Substances Without Authorization.

Ruan leaned even more heavily into the defense that he was a diligent doctor, not an unwitting stooge. He was a "micromanager" over his practice. [Doc. 722-16, 19, 52]. His emails evinced a deep familiarity with pill mills, red flags, and illegitimate prescribing. Given this evidence, Ruan's defense was and remains that he was a conscientious doctor, not that he obliviously was a bad one. This left the jury with a natural choice: it could believe this theory and acquit because he prescribed legitimately, or it could reject it. When the jury rejected this defense, it necessarily found Ruan

acted knowingly. *Nealy*, 232 F.3d at 830; *Rivera*, 944 F.2d at 1572–73.

In addition, there was strong evidence of Ruan's consciousness of guilt. He described his patient decisions to a medical student in financial terms. [Doc. 722-9, 234]. He made succession plans if he or Couch were investigated. [Doc. 722-10, 38–39]. This, too, provides overwhelming evidence of knowledge. *See Broadwell*, 870 F.2d at 604 (finding that an action was foreseeable based on the evidence).

Ruan's conviction in Count 8 also stands out for additional reasons. Ruan prescribed this patient both Abstral and Subsys on the same occasion. An expert testified there was no reason for such a prescription because the two drugs are the same. [Doc. 722-4, 147]. Other witnesses corroborated this similarity. The trial evidence revealed that Ruan made prescribing decisions based on financial motives, and Ruan illustrated his consciousness of guilt by donating his Insys speaker proceeds promptly after he learned of his indirect mention in a criminal complaint. Ruan admitted he made these donations so that others would not question his motives, and a former employee was "shocked" by donations because philanthropy "was a little bit out of character" for Ruan. [Doc. 722-16, 25; Doc. 722-25, 155]. The evidence on this count particularly was overwhelming. *See Neder*, 572 U.S. at 16.

As explained above, Ruan's arguments miss the mark. Ruan never purported to be an uninformed doctor, and the United States did not rely on unknowing acts. These facts distinguish his case from *McDonnell v. United States*, on which he relies. 579 U.S.

550, 578–79 (2016). They also set his case apart from *Takhalov*, where the jury could have convicted on an improper theory. 827 F.3d at 1321–23. At bottom, Ruan's evidence did not support an alternate universe in which he prescribed without authorization, did so in bad faith, yet acted unknowingly. His convictions stand.

C. There is Overwhelming Evidence for the Other Offenses.

Finally, the other convictions also stand if this Court finds any error in the jury instructions on those remaining offenses. *United States v. McClain*, 593 F.2d 658, 671–72 (5th Cir. 1979) (concluding that a defect in a substantive instruction did not require reversal of the conspiracy offenses). Overwhelming evidence supports each of the drug conspiracies, particularly the fentanyl conspiracy. The general evidence discussed above carries even greater weight in the conspiracy context. *See United States v. Green*, 818 F.3d 1258, 1278 (11th Cir. 2016) (finding it was enough for a conspiracy that the defendants knew they were providing drugs to illicit users). The fraud conspiracies also functioned differently, but any connection was harmless in the face of the overwhelming evidence on the unlawful opioid prescribing.

CONCLUSION

In sum, Couch and Ruan knew they prescribed controlled substances without authorization, and the jury found as such. This Court should affirm their convictions.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the page limitation set forth in this Court's order, excluding those portions exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4. This brief contains 20 pages.

/s/ Scott A. Gray
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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2022, I have submitted this document on the CM/ECF filing system, which has served all counsel of record. In addition, a true and correct copy of the foregoing pleading has been served upon the appellants by placing same in the United States Mail, postage prepaid and properly addressed, to:

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