No. 19-8054

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

v.

SHAKEEL KAHN

On Appeal From The United States District Court
For The District of Wyoming
Case No. 2:17-cr-29
The Honorable Alan B. Johnson

APPELLANT'S SUPPLEMENTAL BRIEF

BEAU B. BRINDLEY
BLAIR T. WESTOVER
53 W. Jackson Blvd. #1410
Chicago, IL 60604
(312) 765-8878
ATTORNEYS FOR
APPELLANT

Ruan v. United States, 142 S. Ct. 2370 (2022) articulates a specific intent standard, requiring the government to prove "that a defendant knew or intended that his or her conduct was unauthorized." Under *Ruan* the government must prove (1) that the charged prescription was not authorized under the CSA and (2) that the defendant knew the charged prescription was not authorized under the CSA. The latter question was not in any way put to Dr. Kahn's jury. Furthermore, the instructions were doubly problematic in this case because the good faith instruction allowed Dr. Kahn to be convicted if he was acting in accordance with what he unreasonably, but honestly, believed to be proper medical practice. Appx 239-40. The instructions in this case, therefore, allowed for a conviction based on negligence rather than knowledge.

In this case, the error cannot be harmless. Dr. Kahn's intent was the central issue at trial. The evidence that Dr. Kahn knew or believed that any of the charged prescriptions were illegitimate or unauthorized was far from overwhelming.

I. *RUAN* REQUIRES THE GOVERNMENT TO PROVE A MEDICAL PRACTITIONER'S SPECIFIC INTENT TO ISSUE WHAT HE KNOWS TO BE *UNAUTHORIZED* PRESCRIPTIONS.

Section 841 of the Controlled Substances Act states that "*Except as authorized by this subchapter*, it shall be unlawful for any person knowingly or intentionally … to manufacture, distribute, or dispense, … a controlled substance." 21 U.S.C. §841 (emphasis added). In *Ruan,* the Supreme Court held that the knowledge requirement in §841 applies to the "except as authorized" language.

Under *Ruan,* the government must prove that the defendant not only issued an unauthorized prescription, but that he actually knew (or intended) that the prescription

was unauthorized. *Ruan*, 142 S. Ct. at 2375. ("[T]he Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner or intended to do so."). *Id.* 2382 ("And for purposes of a criminal conviction under §841, this requires proving *that a defendant knew or intended that his or her conduct was unauthorized.*") (emphasis added).

Therefore, as applied to medical practitioners §841 amounts to a specific intent offense. *Ruan* explicitly drew the parallel between the petitioners' case and *Liparota*:

> "In *Liparota*, we interpreted a statute penalizing anyone who 'knowingly uses [food stamps] in any manner not authorized by' statute…. We held that 'knowingly' modified both the 'use' of food stamps element and the element that the use be 'not authorized.' ... We applied 'knowingly' to the authorization language even though Congress had not 'explicitly and unambiguously' indicated that it should so apply. ... But if knowingly did not modify the fact of nonauthorization, we explained, the statute 'would ... criminalize a broad range of apparently innocent conduct.'"

Ruan, 142 S. Ct. at 2378.

Following *Ruan*, it is not sufficient for the government to prove that the defendant knowingly and intentionally "acted without a legitimate medical purpose" or outside the "usual course" of generally recognized medical practice. Rather, the government must prove that the defendant issued such a prescription knowing that doing so was outside the scope of his authorization under the CSA. *Liparota* involved the standard necessary to convict a defendant under 7 U.S.C. §2024(b)(1) for unauthorized use of food stamps. *Liparota v. United States*, 471 U.S. 419, 430 (1985). The Supreme Court held that in order to obtain a conviction under §2024(b)(1) the government must prove "that petitioner knew that his conduct was unauthorized or illegal." *Id*. 434. The defendant in

Liparota did purchase food stamps at below the market rate from an undercover government agent. *Id.* 421–22. Furthermore, the defendant *knew* he was purchasing food stamps below the market rate. *Id*. The Supreme Court found that this was not enough to establish guilt. The Supreme Court found that knowingly engaging in conduct that is, in fact, unauthorized is not sufficient. (Even if one is aware of all the factors that render it unauthorized). Instead, the government must also prove that the defendant actually knew his conduct to be unauthorized. *Id*. 433-434.

II. THE INSTRUCTIONS ISSUED IN DR. KAHN'S TRIAL WERE INCONSISTENT WITH THE STANDARD ARTICULATED IN *RUAN*.

The instructions issued in this case were not consistent with the standard articulated in *Ruan*. Most obviously, they did not require the government to prove that the defendant "knew or intended that his or her conduct was unauthorized" *Ruan*, 142 S. Ct. at 2382. More than that, however, the instruction compounded this error by instructing the jury that a defendant could be found guilty of negligently issuing prescriptions that were outside the usual course of medical practice.

A. The Good Faith Instruction Issued in Dr. Kahn's Trial Allowed For Conviction Based On Negligence.

The good faith instruction in Dr. Kahn's case was written as a description of what it meant for a defendant to knowingly issue a prescription outside the usual course of professional practice.

> "The good faith of Defendant Shakeel A. Kahn is a complete defense to the charges in Count One (conspiracy to commit a federal drug crime) as well as the charges in Counts Four, Six, Seven, Eleven, Fourteen, Sixteen, Nineteen and Twenty … because good faith on the part of Defendant Shakeel Kahn would be inconsistent with knowingly and intentionally distributing

> and/or dispensing controlled substances outside the usual course of professional practice and without a legitimate medical purpose, which is an essential part of the charges.".

Appx 239-40. The instruction then goes on to define what it means for a defendant to act in good faith.

Two aspects of the good faith instruction are particularly problematic in light of *Ruan*. First, the good faith instruction stated that "'Good faith' connotes an attempt to act in accordance with what a reasonable physician should believe to be proper medical practice." Appx 239-40. The terms "reasonable physician" and "should believe" impose an objective standard. *Ruan*, 142 S.Ct. at 2381. ("The Government's standard would turn a defendant's criminal liability on the mental state of a hypothetical 'reasonable' doctor, not on the mental state of the defendant himself or herself.").

The Supreme Court held that exactly this type of language failed to articulate the correct mental state.

> "For one thing, § 841, like many criminal statutes, uses the familiar *mens rea* words 'knowingly or intentionally.' It nowhere uses words such as "good faith," 'objectively,' 'reasonable,' or 'honest effort.'
>
> For another, the Government's standard would turn a defendant's criminal liability on the mental state of a hypothetical 'reasonable' doctor, not on the mental state of the defendant himself or herself.".

Ruan, 142 S.Ct. at 2381.

As *Ruan* makes clear, the question is what a physician subjectively believes to be authorized medical practice, not whether he is acting in what he *should* believe to be proper medical practice or what a "reasonable physician" *should* believe.

In Dr. Kahn's appeal, this Court stated that, under the instructions, "Dr. Kahn need

only 'attempt' to act reasonably, and that such an attempt must be made in an 'honest effort.' … Thus, the jury could not convict Dr. Kahn for merely failing to apply the appropriate standard of care; it could only convict Dr. Kahn if it found, beyond a reasonable doubt, that Dr. Kahn failed to even attempt or make some honest effort to apply the appropriate standard of care." *Kahn*, 989 F.3d at 826.

The word "attempt" does not save the instructions in this case. The question remains attempt to do what: Attempt to act in accordance with what he subjectively believes to be authorized activity, or what he subjectively believes the prevailing medical standards require? Or attempt to act in accordance with what a "*reasonable physician*" "*should believe"* to be the correct standard? The latter standard was exactly the standard advocated by the government and explicitly rejected by *Ruan*.

> "For another, the Government's standard would turn a defendant's criminal liability on the mental state of a hypothetical "reasonable" doctor, not on the mental state of the defendant himself or herself. Cf. *id.*, at 24 (Government arguing that "a physician can violate Section 841(a) when he makes no objectively reasonable attempt to conform his conduct to something *that his fellow doctors would view* as medical care" (emphasis added)).
>
> We have rejected analogous suggestions in other criminal contexts."

Ruan, 142 S.Ct. at 2381.

The difference between attempting to comply with the standards as one subjectively understands them to be and attempting to comply with the standards that a reasonable person should believe to be correct is not a minor one. Dr. Kahn testified on many occasions that, in hindsight, given what he had heard at trial, he would have or even *should have* implemented different prescription policies. R. 293 at 171 (Vol. 15) ("Q During the time period you were making the prescriptions at issue in this case, did a

patient's age impact your determination about whether or not it was appropriate to treat them for chronic pain? A No. Q You think it should have? A Perhaps. Q But at the time, did you believe you were acting appropriately with regard to each of your patients? A Yes."). R. 293 at 220 ("Q Should you have? A In hindsight, yes."); R. 293 at 233. ("As you sit here now, do you believe that there was anything you could have done that might have prevented Jessica Burch's death? A Yes. I should have been more attentive when she came in the office. I should have paid more attention and looked for signs that something was wrong."). R. 293 at 49-50 ("Q Today based on everything you know now, do you still believe that that philosophy was the appropriate one? A I believe the philosophy was appropriate, but I think I needed to look at its implementation. There has been -- obviously people have lied to me. Plain and simple, and those lies have been devastating to them and to me. Q In the future, would you apply this same philosophy to pain? A Not the way I did, no").

Under the good faith instruction issued at trial, the jury may well have thought that, at the time his prescriptions were issued, Dr. Kahn earnestly believed he was employing the correct methods, but nonetheless took these statements that he should or could have done things differently as dispositive evidence of guilt. After all, Dr. Kahn admitted that, in hindsight, he "should have" done things differently.

The phrase "should have" is yet more problematic because it at least implies that it is up to the jury to determine what the prevailing medical practice "should be." For example, Dr. Kahn testified that he understood there to be competing philosophies in the area of pain management but chose to follow the one advocating more aggressive

treatment. R. 293 at 45-46 ("Q Were you aware that many physicians were advocating a more restrictive use of opioids? A Yes, I was. … Q Did you agree with that? A No."); R. 293 at 169 ("Q And did you believe it was especially dangerous to prescribe these three medications: The oxycodone, the benzodiazepines and the Soma together? A No."). A defendant who intentionally rejected a standard of care different from the one embraced by the jury is definitionally not *attempting* to conform his prescriptions to that standard. If the defendant is wrong about what the standard requires, the good faith instructions provide him with no cover whatsoever. "Attempts" here only shields doctors who, having chosen the correct means of practice, make a mistake in application. It does not protect doctors who have an incorrect understanding of what the standard is. *Ruan* does not allow conviction on that basis while the instructions in Dr. Kahn's case did.

B. Jury Instructions Allowed Dr. Kahn To Be Convicted Even If He Believed That The Prescriptions Were Serving A Legitimate Medical Purpose.

Dr. Kahn argued that allowing for a conviction where a defendant issues a prescription that is *either* issued without a legitimate medical purpose *or* outside the usual course of professional practice was in in error because it allowed doctors to be convicted even where they honestly believed the charged prescriptions served a legitimate medical purpose. Def. Brief at 44. (Dkt. No. 010110323849). The good faith instruction issued by the trial court also defined the defendant's guilt by reference to the standard of care rather than the defendant's subjective purpose in issuing the charged prescriptions:

> "The good faith defense requires the jury to determine whether Defendant Shakeel Kahn acted in an *honest effort* to prescribe for patients' medical conditions in accordance with *generally recognized* and accepted standards of practice."

Appx 239-40 (emphasis added).

First, "honest effort" is exactly the language that the Supreme Court rejected. *Ruan*, 142 S.Ct. at. 2381. More fundamentally, "generally recognized and accepted standards of practice" is not the correct standard for determining whether a defendant has deviated from the requirements of the CSA. *Id.* 2389 (J. Alito, concurring). ("But acting 'as a physician' does not invariably mean acting as a *good* physician, as an objective understanding of the 'in the course of professional practice' standard would suggest"). Both the majority and the concurrence agree that even intentional deviation from the standard of care is not sufficient to establish a medical practitioner's criminal guilt under §841, unless the government also proves that the defendant knew that doing so would render the prescription unauthorized. As the Court noted in *Ruan*, "the regulatory language defining an authorized prescription is, we have said, 'ambiguous,' written in 'generalit[ies], susceptible to more precise definition and open to varying constructions.'" *Id.* 2377–78. "The conduct prohibited by such language (issuing invalid prescriptions) is thus 'often difficult to distinguish from the gray zone of socially acceptable ... conduct' (issuing valid prescriptions)." *Id*.

It is unclear from whence the "generally accepted" language found its way into the case law. As the concurrence points out, there is no explicit definition of professional practice in the CSA itself. *Id.* 2388 (J. Alito, Concurring). The term "usual course of

professional practice is ambiguous and difficult to apply. Historically, the exception for prescriptions issued by medical practitioners did not require conformity with 'generally accepted' standards of practice. Instead, it was limited only by the defendant's subjective belief (or lack thereof) that he had a legitimate medical purpose in issuing the prescription. *Id.* 2389.

Neither the concurrence nor the majority in *Ruan* found any justification for splitting "usual course of professional practice" from "legitimate medical purpose" or defining "usual course" more expansively than would have been permissible at the time the CSA was drafted. As the Supreme Court has recognized, 21 C.F.R. §1306.04(a) is a "parroting regulation." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). At most, it can only make explicit requirements that are already imposed by the statute itself. At oral argument in *Ruan*, the assistant solicitor general all but conceded that, in light of *Gonzales,* the administration could not have issued a regulation that limited a practitioner's authorization beyond historical exception. Transcript of Oral Arg, *Ruan v. United States* at 67-86[1]; *See* H.R.Rep.No. 91-1444, 14-15 (expressing "[c]oncern[s] about the appropriateness of having federal officials determine the appropriate *method* of the practice of medicine.") (emphasis added); 21 U.S.C. §823(g)(2)(H)(i) ("Nothing in such regulations or practice guidelines may authorize any Federal official or employee to exercise supervision or control over the practice of medicine or the manner in which medical services are provided.").

[1] https://www.supremecourt.gov/oralarguments/argumenttranscripts/2021/20-1410nmjp.pdf.

The instructions in this case were clearly in error and directed the jury to consider the wrong question(s). The instructions "as a whole" "mislead" the jury into concluding that guilt was dependent upon the reasonableness of Dr. Kahn's medical practice, rather than whether he subjectively believed that the prescriptions he issued were outside the scope of his authorization to issue them under the CSA. The government was not required to prove that the defendant knew the charged prescriptions were unauthorized. Indeed, the good faith instruction did not even require the government to prove that the defendant knew his prescriptions had the characteristics that would render them unauthorized.

III. THE ERROR IS NOT HARMLESS.

The jury instructions in this case allowed for a conviction based on negligence. The Supreme Court articulated a specific intent requirement. This error is not harmless. Dr. Kahn did not contest the fact that he issued the charged prescription. The only question at issue in the trial was Dr. Kahn's intent in issuing the prescriptions. The defendant's mental state was the central question at issue. The evidence was not overwhelming. To the contrary all the evidence seems to prove that the defendant earnestly believed that he was acting in conformity with the law.

A. Harmless Error In This Case Requires The Government To Establish Not Only That The Evidence Was Overwhelming But That The Jury Could Not Have Returned A Guilty Verdict Without First Determining That The Defendant Had The Specific Intent To Issue Unauthorized Prescriptions.

A defendant has the absolute right to a *jury* verdict on each and every element of the offense charged. *United States v. Gaudin,* 515 U.S. 506, 522-523 (1995). Where the

district court misdescribes or omits an essential element from the jury instructions, the question before the Court "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). Otherwise, the harmless error doctrine would amount to a directed verdict. *Id.*.

"The Government bears the burden to demonstrate that the error was harmless beyond a reasonable doubt." *United States v. Montelongo*, 420 F.3d 1169, 1176 (10th Cir. 2005). Where the error at issue is of constitutional magnitude the government's burden is "substantial." *Id.*

"If the 'record accommodates a construction of events that supports a guilty verdict, but it does not *compel* such a construction,' then reversal is necessary.'" *Hernandez v. Rayl,* 944 F.2d 794, 796 (10th Cir. 1991). If the government cannot establish that the verdict *actually* rendered by the jury necessarily entailed a finding of the missing or misdescribed element, then the error cannot be harmless "no matter how inescapable the findings to support that verdict might be." *Sullivan,* 508 U.S. at 279; *Connecticut v. Johnson*, 460 U.S. 73, 85 (1983) ("An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence.").

In *United States v. Holly*, 488 F.3d 1298, 1310 (10th Cir. 2007), this Court found that an erroneous instruction was harmless as to counts where "there is no way a rational jury could have concluded [the victim] was placed in fear of some bodily harm, as this

jury necessarily did, without also concluding she was placed in fear of death or serious bodily injury." *Id*. The error was harmful as to those counts where the question of the victim's fear was in dispute. *Id*.; *See, also, United States v. Little*, 829 F.3d 1177, 1183 (10th Cir. 2016) ("[W]e conclude there is no reasonable possibility that the jury would have found that Little had knowledge of the weapons at issue but lacked intent to exercise control over them."); *United States v. Dago*, 441 F.3d 1238, 1246–47 (10th Cir. 2006) (finding that error in refusing to issue unanimity instruction on CCE count to be harmless where "[t]he jury's unanimous guilty verdicts on eleven or more counts that can be considered as predicate offenses 'necessarily reflect the jury's unanimous finding that [the defendant] committed those ... crimes.'"

In addition, the erroneous jury instruction in this case went right to the issue of *mens rea*. Courts are especially reticent to find harmless error in cases where the missing or erroneously defined element involves the defendant's *mens rea*.

> "If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made."

Johnson, 460 U.S. at 85–87.

Appellate judges are poorly equipped "to evaluate states of mind based on a cold record." *United States v. Houston*, 792 F.3d 663, 669 (6th Cir. 2015); *United States v. Wacker,* 72 F.3d 1453, 1465 (10th Cir.1995). "Subjective intent is one 'best left to the

determination of a properly instructed jury.'" *United States v. Twitty,* 641 F. App'x 801, 805 (10th Cir. 2016) (unpublished).

The instructions in this case did not require the government to establish that the defendant knew he was issuing a prescription outside of what the CSA had authorized him to do. The jury's determination that the defendant did not follow what he "should have" known "generally recognized practice" to be, did not require that they first determine that the defendant *actually knew* he was issuing prescriptions outside "generally recognized" practice. Even then, a finding that the defendant actually knew he was issuing prescriptions outside "generally recognized" practice did not require the jury to determine that the defendant actually knew that doing so would render his prescriptions unauthorized. Hence, the jury's finding does not necessarily entail a finding that Dr. Kahn knew his prescriptions unauthorized by the CSA.

B. The Evidence Presented At Trial Was Not Overwhelming As To Mental State.

Dr. Kahn did not contest the fact that he wrote the charged prescriptions, or that the testifying patients were abusing or selling their medication. The only question at issue in Dr. Kahn's trial was his purpose in issuing the charged prescriptions. *See*, *e.g.,* R. 925 at 61, 128 (Vol. 18). This is not a case where "a defendant did not, and apparently could not, bring forth facts contesting the omitted element," making the error harmless. *See United States v. Benvie*, 18 F.4th 665, 670 (10th Cir. 2021).

Dr. Kahn's intent was the central, and only, question at issue during the trial. The defendant "deserves the opportunity to face a jury that has been properly instructed on a

crucial element of the crime—indeed the most crucial element of this crime." *Houston*, 792 F.3d at 668–69.

The harmless error standard does not permit an appellate court to "become in effect a second jury." *Neder,* 527 U.S. at 19. Even where the government presents "substantial" evidence of a defendant's guilt, that is not sufficient by itself to establish harmless error. *United States v. Begay*, 937 F.2d 515, 525 (10th Cir. 1991).

The evidence presented at trial fell far short of proving that Dr. Kahn actually knew his patients were diverting medication. Each patient witness called by the government presented Petitioner with evidence of a medical condition capable of causing real and significant pain. R. 911 at 145 (herniated disc); R. 912 at 200 (multiple sclerosis and optic neuritis); R. 912 at 230 (endometriosis); R. 912 at 254-56 (real pain helped by medication); R. 913 at 12-13 (neurological records regarding back injury and migraines); R. 913 at 199-200 (thyroid condition and degenerative disc disease); R. 914 at 23 (significant back pain); R. 915 at 74-75 (lengthy medical history including back pain); R. 918 at 47 (testifying she wouldn't refer any patient to Petitioner if they could not prove an underlying medical condition). In many cases, similar medications were prescribed by previous or subsequent doctors. R. 912 at 148-49, 254; R. 913 at 141, 198; R. 914 at 26; R. 915 at 126.

In order to obtain the charged prescriptions, each of the patient-witnesses who testified admitted that they lied to Dr. Kahn either about the degree of pain they experienced or whether they suffered an underlying medical condition. R. 911 at 144; R. 912 at 190- 92, 219-20, 240; R. 913 at 12, 32-33, 266; R. 914 at 104-05, 197, 238; R. 915

at 135-36; R. 921 at 9; R. 918 at 48. This often involved more than a simple exaggeration of pain levels or denial of bad intent in seeking the medication. For example, in order to circumvent the routine urinalysis tests and prevent Petitioner from learning that she was not taking, but rather selling, her medication, patient Antelope would save a pill to take the day of her visit. R. 918 at 48. Another patient covered his track marks with make-up in order to hide detection of his heroin use when his blood pressure was taken. R. 912 at 122. A third patient sought the advice of a nurse practitioner regarding how to answer questions in order to optimize his chances of securing a prescription for opioids. R. 920 at 195. In order to explain a lack of complete medical records, patient Vargas, as well as the undercover agent acting as a patient, indicated that they were previously treated by a local doctor whose practice had closed. R. 913 at 119. With one exception, each of the witnesses testified that they did not have an agreement with Dr. Kahn to abuse or divert their medication and/or believed that, if Dr. Kahn learned they were abusing or diverting medication, they would be discharged as a patient. R. 912 at 141-43, 257; R. 913 at 100, 126, 197, 290-91, 297- 98; R. 914 at 65, 112, 256; R. 921 at 15-16.

In terms of evidence that Dr. Kahn actually knew he was issuing unauthorized prescriptions, the evidence was even worse. Dr. Kahn went so far as to call the DEA when he started his practice to have them review his procedures to make sure he didn't "run afoul of the law." R. 923 at 50. Dr. Kahn testified that he believed the pain contracts and informed consent documents he required patients to sign rendered the prescriptions legal. R. 923 at 55 ("A Well, it protects me because I have asked those questions that were printed from a legal perspective"). R. 923 at 55-56. ("Q So after you informed

patients of the risks and ensured that they signed these various contracts, did you believe that you were following all of procedures that you were required to follow under the law? A Yes. Q And did you intend to act within the boundaries of the law governing your profession when you used these contracts? A At all times.").

Dr. Kahn was audited by the state medical boards on several occasions, which led him to believe that his practices were within acceptable medical norms. R. 923 at 56. He drew attention to prescriptions he had written by referring pharmacists who refused to prescribe them to the pharmacy board. R. 923 at 93-95. None of these facts are consistent with a person who knows that they are acting illegally, or outside their authorization. At the very least Dr. Kahn has "plenty to work with in contesting the mental-state determination." *Houston,* 792 F.3d at 669 (finding plain-error in failing to issue instruction on mental state consistent with *Elonis*).

The government's own expert established how very difficult it would be for a doctor to identify the exact line between aggressive medical treatment and criminal medical treatment. Dr. Shay analyzed Dr. Kahn's medical records under an amalgamation of a number of different sources: the Federation of State Medical Boards model guidelines for pain treatment, the CDC guidelines, the Wyoming chronic pain management tool kit, and the guidelines imposed by various insurance companies. R. 910 at 22, 70. Dr. Shay acknowledged that none of these guidelines are mandatory and, indeed, that the fact that they are sometimes thought of as mandatory has caused problems in the pain management field. R. 910 at 255. Dr. Shay could not say that Dr. Kahn knew of these guidelines, but did say that he "should have known." R. 913 at 175.

None of the guidelines referenced in Dr. Shay's testimony provide specific or detailed procedures that a doctor must follow before issuing a prescription. The Federation of State Medical Board Model Guidelines direct medical boards evaluating the sufficiency of a doctor's pain practice to analyze whether there was (1) "inadequate monitoring," (2) "inadequate attention" to informed consent, (3) "unjustified dosage increases," (4) "excessive" reliance on opioids and (5) failure to make use of available tools for risk mitigation. R. 910 at 20-22.

Under the guidelines, there is no specific requirement on how long a physical examination must take. (Dr. Shay himself sees 50 patients per day, the majority of whom are on opioids). *Id*. 67-68. Physical examinations are unable to detect a patient's pain level. *Id*. 40. There is no specific time period for how long a patient may receive a prescription without having an appointment. *Id*. 98. Nor is there any mandatory timeframe as to how often a patient must see a doctor. *Id*. 232. There is no specific upper limit on opioid prescriptions. *Id.* 98. Serious disagreement exists in the medical community about the efficacy of high dosage opioid treatments. *Id*. 254. There is no mandatory prohibition on the prescription of certain drug combinations. Prescribing even potentially dangerous combinations of drugs may be appropriate. *Id*. 65, 229. There are no mandatory rules requiring the use of drug screening or urinalysis and, in fact, there is disagreement in the medical community as to the efficacy of urinalysis. *Id*. 226. Finally, even where a patient violates a pain contract, cutting off a patient's medication is outside the scope of professional practice because it subjects them to withdrawal. *Id*. 76-77.

Many of the forms used by Dr. Kahn were similar to those used by Dr. Shay and were, "on paper," sufficient to establish informed consent. *Id*. 107, 174. Nevertheless, Dr. Shay determined that failure to document in his medical records that he had verbally gone over the drug addiction statement and the informed consent with his patients rendered the prescriptions outside the usual course of professional practice. *Id*. 65-66, 107. This is true, in Dr. Shay's assessment, even if there were good and legitimate reasons to issue the charged prescriptions. *Id*. 114, 206.

Similarly, Dr. Shay testified that in order to be within the usual course of professional practice a doctor must not only determine a treatment plan, but document that plan in his medical records, and that failure to document that plan, by itself, rendered any prescription to that patient outside the scope of professional practice. *Id*. 119, 218. Even if there was a plan, even if the doctor was following that plan, and even if that plan was a medically sound one. *Id*. 89, 181-82.

Dr. Shay outlined what might be a very good set of rules that doctors "should" follow. But plainly a doctor might deviate from Dr. Shay's extrapolations of the requirements of entirely advisory guidelines without realizing that doing so renders him outside of his DEA authorization.

Indeed, Dr. Kahn testified that he intentionally disregarded some of those recommendations but believed that doing so did not render any prescription he issued illegitimate or unauthorized. R. 923 at 46-7. ("Q Did you agree with those guidelines? A No. Q Did you believe that you had to follow them in order to be practicing medicine legitimately? A No, they are just guidelines."); R. 923 at 48 ("Q And did you believe

there was an upper limit on how much opioids could be prescribed to a patient? A There is no upper limit on opioids. You can go as high as you can, or as high as you want, as long as you are not having side effects."). Similarly, Dr. Kahn admitted to sloppy record keeping but did not believe that sloppy record keeping renders his prescriptions illegitimate. R. 923 at 73 ("A My prescribing habits and my recordkeeping habits are two different matters. I was within the law when I prescribed those medications to those patients."). R. 923 at 148 ("Q Did you believe that your practices in regard to your recordkeeping meant that your patients were being put at greater risk? A No. Q Did you believe that you were doing enough with your recordkeeping to comply with your obligations as a doctor? A Yes."). Based on the instruction they received, there is no sense in which the jury hearing this evidence can be said to have necessarily determined that Dr. Kahn believed his prescriptions unauthorized under the law.

In closing, the government relied on the good faith instruction to argue that deviation from the standard articulated by Dr. Shay rendered the defendant guilty:

> "And despite knowing the guidelines and citing the guidelines of appropriate opioid therapy for the ones that he touted that he was in compliance with to the reviewing boards that he was writing to, he told you instead that he really didn't believe all that. He followed some other philosophy, and the articles that he read, he couldn't cite to you, but that was his philosophy.
>
> The law doesn't allow that. It is true that if a physician, in good faith, relies on appropriate practices that are accepted in the medical field in good faith that would be an exception to the law, an excuse for why he did what he did.
>
> But in this case, in order to achieve – understand what good faith is it requires that you determine that Shakeel Kahn acted in an honest effort to prescribe for patients' medical conditions in accordance with generally recognized accepted standards of practice, not some obscure standard of practice. The practice that is generally recognized and accepted."

R. 927 at 73-4.

> "There is little, if any, evidence other than the defendant's testimony that his philosophy is generally recognized and accepted. It means that you would have to take his word for it over Dr. Shay or any of the guidelines or policies. I invite you to look at those guidelines and policies. We chose to show you things that supported our position. Look at the guidelines and policies and see if you think his prescribing practice was within those guidelines."

Id. 74.

Under *Ruan,* Dr. Kahn's subjective beliefs about the authorization of his prescriptions are dispositive. The instructions and government argument in this case explicitly said otherwise. In light of the testimony, evidence, and government arguments, the instructional error as to *mens rea* cannot possibly be harmless.

CONCLUSION

Dr. Kahn's conviction must be vacated and his case remanded for a new trial.

Respectfully submitted,

By: /s/ Beau B. Brindley
/s/ Blair T. Westover
Attorneys for Defendant-appellant

The Law Offices of Beau B. Brindley
53 W Jackson Blvd. #1410
Chicago, Illinois 60604
(312) 765-8878

CERTIFICATIONS

Privacy Redactions

I certify that all required privacy redactions, if any, have been made.

Virus Scan

I further certify that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and, according to the program, is free of viruses.

Respectfully submitted,

By: /s/ Beau B. Brindley
Attorney for Defendant-appellant

CERTIFICATE OF SERVICE

I, Beau B. Brindley, hereby certify that I caused a true and accurate copy of the attached Reply Brief of Defendant-Appellant Steven Henson to be served upon the government by electronically serving it through the CM/ECF system September 6, 2022.

Respectfully submitted,

By: /s/ Beau B. Brindley
Attorney for Defendant-appellant

The Law Offices of Beau B. Brindley
53 W Jackson Blvd. #1410
Chicago, Illinois 60604
(312) 765-8878