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 SUPPLEMENTALREPLY BRIEF

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I. THE GOVERNMENT MUST PROVE THAT DR. KAHN KNEW THE CHARGED PRESCRIPTIONS TO BE UNAUTHORIZED.

There is a wide gulf between what the jury instructions in this case required the government to prove and what the Supreme Court's decision in Kahn requires the government to prove. The Supreme Court was clear that the government must prove (1) that a prescription was unauthorized, as an objective matter and (2) "that a defendant knew or intended that his or her conduct was unauthorized." *Ruan v. United States*, 142 S. Ct. 2370, 2380 (2022).

The government pointedly ignores the actual language of the jury instruction issued in this case. The jury instruction stated:

> 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). That language articulates exactly the test advocated by the attorney general and rejected by the Court in *Ruan*. *Ruan*, 142 S. Ct. at. 2381.

Instead, the government argues that under the law of the case doctrine, those instructions must be taken by this Court as meaning that the jury could not have found the defendant guilty unless it also found that he "failed to even attempt or make some honest effort to apply the appropriate standard of care." Gov. Supp. Br. at 5 (quoting *United States v. Kahn*, 989 F.3d 806, 826) (10th Cir. 2021). That is not how the law of the case doctrine works. *Musacchio v. United States*, 577 U.S. 237, 244-45 (2016) ("The doctrine 'expresses the practice of courts generally to refuse to reopen what has been decided,' but it does not 'limit courts' power.'"). But even if it were, there is a significant difference between a jury

instruction that allows the defendant to be convicted for failing to "make some honest effort to apply the *appropriate* standard of care," and what the Supreme Court deemed sufficient for conviction in *Ruan*.

First, even under a pre-*Ruan* objective test, "standard of care" is not synonymous with "usual course of professional practice." *United States v. Sabean*, 885 F.3d 27, 44 (1st Cir. 2018). Even "*intentional* malpractice" is insufficient to establish that a prescription was outside the "usual course of professional practice." *United States v. Feingold*, 454 F.3d 1001, 1010 (9th Cir. 2006). As argued in his opening brief, Dr. Kahn disagrees with the notion that either § 841 specifically, or the CSA generally, subjects all doctors who write prescriptions that fail to adhere to the standard of care, or even those who commit intentional malpractice, to a drug dealing charge.

Second, even if "usual course of professional practice" does mean the same thing as "standard of care," the instructions issued by the district court allowed the defendant to be convicted based on a misunderstanding of what the "appropriate" standard of care required. There is a difference between an instruction which requires the government to prove, for example, that the "the defendant knowingly violated the standard of care as he understood it" and one which states that the defendant "did not attempt to conform to the *appropriate* standard of care" or "in accordance with *generally recognized* and accepted standards of practice." The word "appropriate" and the phrase "*generally recognized* and accepted standards of practice" are entirely objective. According to *Ruan*, the question of a medical practitioner's guilt under §841 is entirely subjective.

The instructions issued by the district court required the defendant to attempt to act in accordance with the "appropriate" standard of care, not what he (however mistakenly) subjectively believed the standard of care to require. Under the instructions issued by the district court, a defendant could be convicted—even if he earnestly and honestly believed that he complied with the correct and objective standard of care—if he was wrong as to what standard of care he should be applying or what that standard required. That difference is antithetical to the holding of *Ruan*.

Furthermore, the language cited by the government must be read in conjunction with other language used in the same instruction. The district court instructed the jury 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 (emphasis added). The government does not defend that language or explain how it could possibly be consistent with *Ruan* when it was explicitly repudiated by *Ruan*, 142 S. Ct. at. 2381.

If Dr. Shay was correct about the standard of care, but Dr. Kahn believed that Shay's view was wrong, then, definitionally, Dr. Kahn was not making any effort, honest or otherwise to apply the "appropriate" standard of care. It does not follow that he subjectively knew the prescriptions he issued were unauthorized. *Ruan*, 142 S. Ct. at 2381 ("We have rejected analogous suggestions in other criminal contexts."). Indeed, the Court in *Ruan* rejected the government's proposed standard that would merely have required the defendant to make an effort to educate himself on what the standard of care required. *Id.* 2381. The Court was clear that erroneous beliefs as to what the standard of care requires are not sufficient to establish guilt. *Id.*

To be sure, there is a great deal of ambiguity here between failing to apply the correct standard of care, failing to apply the standard of care as you understood it, and substituting your own beliefs for what you know are accepted in the medical community. There is further ambiguity as to when any of those eventualities is of sufficient severity to justify a finding that the defendant acted outside the usual course of professional practice.

That is why *Ruan* requires *more* than an intentional deviation from the standard of care or even intentionally acting outside the usual course of professional practice. *Ruan* requires the government to prove that the defendant knew the prescriptions were unauthorized under the CSA. *Ruan*, 142 S. Ct. at 2382

As argued below, the difference between allowing conviction based on a doctor's failure to conform to a standard of care he may not have properly understood and may have disagreed with, and one requiring the government to prove that the defendant issued what he knew to be unauthorized prescriptions was not harmless in this case.

II. INSTRUCTIONAL ERROR WAS NOT HARMLESS IN THIS CASE.

The government argues that "the 'harmless error' question must be whether . . . there is any reasonable possibility that a *Ruan*-compliant instruction on *mens rea* might have produced an acquittal." Gov. Supp. Br. at 7. That is absolutely not the standard. As this case is currently postured, even overwhelming evidence of guilt is not sufficient. *Carpenters v. United States,* 330 U.S. 395, 408-09 (1947). The error in this case is harmless "only if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well." *California v. Roy*, 519 U.S. 2, 7 (1996). In this case, the government must

establish that the record *compels* a guilty verdict. *Hernandez v. Rayl*, 944 F.2d 794, 796 (10th Cir. 1991) ("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." In undertaking harmless-error analysis "it is not the [reviewing] court's function . . . to speculate upon probable reconviction and decide according to how the speculation comes out." *Kotteakos v. United States*, 328 U.S. 750, 763 (1946).

The government cites *Ruan* for the statement that "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." Gov. Supp. Br. at 6 (quoting *Ruan*, 142 S. Ct. at 2382). However, the very next sentences in *Ruan* read: "But the Government must still carry this burden. And for purposes of a criminal conviction under § 841, this requires proving that a defendant knew or intended that his or her conduct was unauthorized." *Id.* at 2382.

The government is free at retrial to argue that such an inference is justified in this case. However, the fact that it is an *inference* means that it is something that a properly instructed jury would be free to either make or disregard. With all respect to this Court, an inference from objective facts to a defendant's subjective *mens rea* is the type of inference that is better left to a properly instructed jury. *United States v. Wacker*, 72 F.3d 1453, 1465 (10th Cir.1995).

Even were overwhelming evidence sufficient to meet the government's burden of establishing harmless error, the evidence cited in the government's supplemental memo falls far short of the mark. First, some of the allegations in the governments supplemental

memo are just incorrect as a matter of the record. For example, Dr. Kahn did not, as the government claims, prescribe the same combinations of controlled substances to "every patient" or even "every patient" charged in the indictment. Gov. Supp. Br. at 14; Vol. 15 Tr. 161-66 (listing medication prescribed during the course of the alleged conspiracy); Vol. 16 Tr. 249 (describing different medications).

The government argues that Dr. Kahn "Fail[ed] to obtain patient history or conduct medical exams." Gov. Supp. Br. at 13. That is not true. Dr. Kahn either obtained complete medical records for his patients or was told that they were not available because the patient's previous doctor was no longer in practice. *See, e.g.*, Vol. 4 Tr. 181; Vol. 5 Tr. 145-6; 148-9; 163, 186; Vol. 7 Tr. 13-14; 117; 215; Vol. 10 Tr. 35-36.

Dr. Kahn asked each and every one of his patients for their medical history in the intake form documents. The record demonstrates that Dr. Kahn reviewed those documents and discussed them with his patients. Vol. 7. Tr. 14; Vol. 10 Tr. 17. Dr. Kahn testified that he *did* examine patients on their first visit. Vol. 15 Tr. 155. This was corroborated by many of the patient witnesses. Vol. 7 Tr. 14; 74; Vol. 10 Tr. 21; 97-99. Not even Dr. Shay could possibly be conducting a physical examine on his patients at subsequent visits given that he saw 50 patients per day and sometimes allowed family members to pick up a patient's prescription. Vol. 4 Tr. 67; 96; 98-99 ("Q How long would you go -- what would be medically appropriate before assessing a patient? A There is no time. … A It is, again, art and science."). The record is also replete with testimony from patients and former employees that Dr. Kahn conducted urinalysis and checked and acted on PMPs. Vol. 5. Tr. 129; 198; 214; 140; Vol. 10. Tr. 17; Vol. 12 Tr. 129.

The government lists several requirements that, at least according to Dr. Shay, outline the standard of care in pain management. Gov. Supp Br. at 8. The government argues that the defendant knew about, or should have known about, those standards and intentionally disregarded them. Therefore, he must have known that he was acting outside the usual course of professional practice. With the exception of those relating to medical records (discussed separately below), the defendant expressly testified that he was either in conformity with those guidelines or justified in deviating from them.

The government argues that Dr. Kahn "Prescrib[ed] dangerously high drug dosages or combinations without identifying a justification." Gov. Supp. Br. at 14. The evidence at trial demonstrated that Dr. Kahn did not believe the dosages or combinations of drugs he prescribed were inappropriate or unauthorized. For example, he repeatedly brought attention to his prescription practices by reporting pharmacists who refused to fill them to the pharmacy or medical board. Vol. 15 Tr. 63-64; Vol. 3 Tr. 193-94; Vol. 13 Tr. 91. The case agent admitted this was contrary to actions that he would expect from a person who was trying to obfuscate his prescription practices. Vol. 5 Tr. 92.

While Dr. Shay did not believe that Dr. Kahn's medical records provided a sufficient explanation for the dosages he issued, the medical records were not bereft of explanation. *See, e.g.,* Vol. 5 Tr. 140 ("Finally, with his mother's eminent death, Paul was a nervous wreck. In the distant past he received Xanax to deal with his anxiety. Today his symptoms include agitation, chest pains, tremors, palpitations, et cetera.").

Many of the higher dosage prescriptions Dr. Kahn issued came after either he or previous practitioners tried other methods of treatment. Vol. 9 Tr. 126. Dr. Kahn did not

prescribe patients with whatever prescription they asked for, suggesting that he did tailor prescriptions to the individual patient. *See, e.g.,* Vol. 5 Tr. 131. For example, Dr. Kahn did not prescribe the undercover patient with Oxycodone, but rather a much lower dosage of a different narcotic. Vol. 15 Tr. 200; Vol. 15 Tr. 200 ("Q And did you believe you were following all the applicable laws that you were required to follow? A Absolutely."). He altered patients' medications in response to their feedback. For example, patient-witness Rodriquez (who came to Dr. Kahn in pain after getting a prescription she was previously issued by another doctor) told Dr. Kahn that she was running out of medication. Dr. Kahn lowered the strength of her prescription while increasing the number of physical pills to help her moderate her pain and usage. Vol. 6 Tr. 259-60.

Dr. Kahn testified at length as to why he favored certain medications and certain drug combinations and strengths. *See, e.g.*, Vol. 15 Tr. 160-65, 167-68; Vol. 16 Tr. 27. He testified that he did not believe the combination of drugs he was prescribing were particularly dangerous if the patients were monitored. Vol. 15 Tr. 136. He cited peer reviewed sources he relied on in arriving at these conclusions, Vol. 15 Tr. 43, 169, including the VA Guidelines, and other sources, which generally allow for rapid increases in dosage strength over relatively short periods of time. Vol. 16 Tr. 231-32.

Dr. Kahn testified as to why he issued specific prescriptions to specific individuals. Vol. 15 Tr. 201. He believed that each prescription he issued was appropriate. *Id.* 169. He provided intelligible reasons as to why he disagrees with some of the government's expert's conclusions. *Id.*44-46. He testified that he believed that some doctors agreed with Dr. Shay and others agreed with him [Dr. Kahn]. *Id.* Tr. 45-46.

The government argues that Dr. Kahn did not have proper monitoring of his patients. Gov. Supp. Br. at 14. It may be that Dr. Kahn did not do as much monitoring as he should have. However, he did have methods for monitoring in place. The record is replete with testimony from patients and former employees that Dr. Kahn conducted urinalysis. Vol. 5. Tr. 140, 198, 214; Vol. 10. Tr. 17; Vol. 12 Tr. 129. Dr. Kahn regularly checked the PMP and questioned and even discharged patients from his practice when they found them to be "doctor shopping". Vol. 15 Tr. 61, 123. Dr. Kahn testified that he questioned patients to for evidence of diversion. Vol. 15 Tr. 207.

The government argues that Dr. Kahn's charging practices were inconsistent with accepted medical billing practices. *See* Gov. Supp. Br. at 15-17. Dr Kahn testified that his pricing was based on an assessment of the risk of abuse or other complications (as determined by COMM and SOAP scores[1]) that the patient presented and, therefore, the amount of effort he had to expend in their treatment. Vol. 15 Tr. 53; 112-17). While dosage amount is certainly a significant factor in determining a patient's risk of abuse or addition, not every patient on the same dosage amount was charged the same fee. Vol. 15 Tr. 173; Vol. 4 Tr. 230 (Dr. Shay agreeing that there is "no mandatory rule about what a doctor can charge for his service" and that "Higher dose opiate patients may be more demanding than others.").

The government argues that the defendant ignored evidence of diversion and that the defendant knew that his patients were selling their medication. *See* Gov. Supp. Br. at

[1] These are diagnostic rubrics common in pain management practice used to assess a patient's potential susceptibility to abuse or addiction. Vol. 4 Tr. 106.

15. Dr. Kahn testified that he did not believe he could terminate a patient based on a mere allegation of abuse. Dr. Kahn testified that discharging a patient without sufficient corroboration for any such allegation would constitute abandonment of care. Vol. 15 Tr. 151, 246. When a patient was alleged to be diverting their medication, Dr. Kahn would try to corroborate that by searching the internet for arrest reports and checking with the patient. Vol. 15 Tr. 246-47. Dr. Kahn did discharge some patients from his practice and, in fact, referred some to the DEA. Vol. 10 Tr. 150-51; Vol. 11 Tr. 151.

The "wanted his 'cut'" language cited in the government's brief, (*see* Gov. Supp. Br. at 15), comes, not from a recording, but the from the testimony of Paul Beland. Vol. 5 Tr. 219. Mr. Beland suffers from significant credibility problems including a somewhat lengthy criminal record that includes a forgery conviction and drug abuse. Vol. 6. Tr. 52; Vol. 6. Tr. 96. Dr. Kahn testified that he never made this "cut" statement to Mr. Beland, and that he never believed any of his patients were selling their prescription medication. Vol. 15 Tr. 27. Even if one accepts Mr. Beland's statement at face value, Mr. Beland admitted that, after Dr. Kahn made that statement, he denied to Dr. Kahn that he was selling his pills. Vol. 6 Tr. 120. Mr. Beland testified that he used make-up to hide his track marks. Vol. 6 Tr. 121. Mr. Beland testified that he did not want Dr. Kahn to know he was selling his pills and had no agreement with him regarding the sale of his prescription medication. Vo; 6 Tr. 141-43. The same is true for Mr. Muelhausen. Vol. 7 Tr. 108-09 (testifying that he denied selling his pills to Dr. Kahn); Vol. 7 Tr. 115 (Informing Mr. Muelhausen that selling medication was illegal).

The government argues that "The Defendant and his brother were overheard discussing patients re-selling pills and the street value of the drugs the Defendant prescribed." Gov. Supp. Brief at 16. The government citation actually refers to a conversation between Mr. Drndarski and the defendant's brother. Vol. 8 Tr. 61 ("A I have heard Sonny say that he saw a thing on 20/20, and they were selling -- patients were selling pills for $30 a -- $10 a milligram or something like that. That's all. That's it."); Vol. 8 Tr. 64 ("Q So when Sonny said that he had seen it on TV what the TV thought the value of the pills were, you didn't correct him? A I didn't correct him, no. I said, 'That sounds crazy. I don't think you could get that,' something like that. Yeah."). During that conversation Mr. Drndarski denied that he sold pills. Vol. 8 Tr. 65 ("A Absolutely not. . . . A Because I knew better than to tell him. . . . He will cut me off for a fact."). Dr. Kahn testified that at times he would "test" his patients to see if they were selling their medication by accusing them of doing so. Vol. 15 Tr. 207. Dr. Kahn testified that, on each occasion, the referenced the patient denied selling their medication. *Id*. 214.

Dr. Kahn had an answer to each of the allegations in the government's supplemental response brief. A properly instructed jury would be free to disregard Dr. Kahn's explanations. But the government makes no argument to suggest that the jury in this case necessarily did so or that, going forward, a jury would be *compelled* to do so.

Dr. Kahn did issue prescriptions to Mr. Vargas while he was in custody. Dr. Kahn put Vargas's signature on the intake forms provided to him by Ms. Burch when Dr. Kahn testified that he knew Vargas to be in custody. Vol. 15 Tr. 219. Here, again, there are two ways the jury could interpret that testimony. The jury could interpret it to mean that Dr.

Kahn knew Burch would be using or selling that medication, or they could credit Dr. Kahn's testimony that he believed Burch would be providing that medication to the jail where Vargas was being held. *Id*. 217. Dr. Kahn testified to spoke to Mr. Vargas on the phone while in custody. *Id*. 220. Dr. Kahn testified that Vargas gave him permission to sign the forms for him. *Id*. 217. Dr. Kahn testified that, at all times, he believed the medication he prescribed was going to treat Mr. Vargas for legitimate pain. *Id*. 222.

Dr. Kahn testified that he did not believe that his patients were selling or abusing their medication and would not have issued prescriptions to people whom he did believe were doing so. Vol. 15 at 19-20. The witnesses in this case testified that they believed Dr. Kahn would discharge them as patients if he discovered them to be diverting or abusing their medication. Vol. 6 Tr. 141-43, 257; Vol 7 Tr. 100, 126, 197, 290-91, 297-98; R. Vol. 8 Tr. 65, 112, 256; Vol. 14 Tr. 15-16. A properly instructed jury is free to believe or disbelieve Dr. Kahn on this point. However, the instructions in this case allowed Dr. Kahn to be convicted without making any such finding. At this stage, contested testimony is not enough to establish that the jury was compelled to accept the government's version of events. *Rayl*, 944 F.2d at 796. This is not a case where the omitted element was either uncontested or uncontestable. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 17 (1999). It was directly and explicitly contested.

The medical records make for both the government's best and worst arguments. On the one hand, Dr. Kahn knew his record keeping was sloppy and insufficient to meet medical board guidelines. Vol. 15 Tr. 73. He testified as much. *Id*. Dr. Kahn used cut and paste, which resulted in many of the errors the government identifies. For example, he

repeatedly stated, using the same language, that he examined Ms. Burch when he had not. Vol. 15 Tr. 229. Similarly, he indicated that Mr. Moody was not present at the office when, in fact, he was. *Id.* 149-50. Dr. Kahn did not keep track of the tests he conducted, or the exams he did. *Id.* 147-48. He did, however, do them. Multiple witnesses testified to taking urinalysis tests that were not recorded in the medical records.

This is ultimately the government's worst argument because Dr. Kahn expressly testified that he believed the completeness of his medical records did not affect the legitimacy of his prescriptions. Vol. 15 Tr. 148. ("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"). Dr. Kahn testified that he believed he was doing enough with record keeping to comply with the requirements of being a doctor. *Id.* 148.

Dr. Kahn also testified that he did not believe that keeping sloppy medical records rendered the prescriptions themselves unauthorized. Vol. 15 Tr. 73, 75, 88, 90. The *Ruan* concurrence agrees. *Ruan*, 142 S. Ct. at 2389 (Alito, J., concurring) ("Under the correct understanding of that defense, a doctor acts 'in the course of professional practice' in issuing a prescription under the CSA if—but only if—he or she believes in good faith that the prescription is a valid means of pursuing a medical purpose.").

In Dr. Shay's opinion, failure to document a prophylactic measure itself renders a prescription outside the scope of professional practice regardless of whether that prophylactic measure was actually taken. Vol. 4 Tr. 79, 114 ("A Because you have to document it. "Usual course" means that you visited with the patient …and it was documented."). Based on the jury instructions issued in this case, the jury could have

convicted Dr. Kahn based *only* on the fact that his medical records were admittedly insufficient. The government has no way to prove this is not precisely what happened.

Ruan requires more. *Ruan* requires the government to prove that Dr. Kahn believed that sloppy or inaccurate medical records rendered the prescriptions themselves *unauthorized*. He testified that he did not believe that. Dr. Kahn's position would be on worse footing had the jury been instructed that the government had to prove Dr. Kahn knew the charged prescriptions were issued without a legitimate medical purpose. It is harder to believe that a doctor would think a non-medical prescription was authorized by the CSA than it is to imagine that a doctor believes that an otherwise legitimate prescription would be rendered criminal just because of a failure in record keeping.

The government's argument ignores the abundant exculpatory evidence in the record that suggests Dr. Kahn believed the prescriptions he issued were legitimate and authorized by the CSA. Before setting up his pain management clinic, Dr. Kahn contacted the DEA to evaluate his practices. Vol. 15 Tr. 50. ("A Actually, I did. I contacted the -- before I started practicing in pain management, I contacted the Drug Enforcement Administration. Q Why them? A Because I wanted to make sure that when I went into pain management, I wouldn't run afoul of the law.").

Dr. Kahn has contacted the DEA regarding patients he believed were diverting their medication Vol. 15 Tr. 50. On appeal from the Arizona medical board, an administrative judge found that "The board failed to establish by a preponderance of the evidence that the respondent deviated from the standard of care by prescribing high dose short-accounting opioids on a PRN basis." Vol. 16 Tr. 253.

Dr. Kahn repeatedly testified that he would not issue prescriptions to patients that he knew to be diverting or abusing their medication and that he did not believe that any patient he was treating was diverting or abusing their prescriptions. He explained why he believed he had the authority—and indeed, the obligation—to deviate from the guidelines cited by the government and yet was in conformity with other guidelines and general practice. Vol. 16 Tr. 230. Dr. Kahn testified that he believed that his "general prescribing practices were lawful and proper for a physician[.]" Vol. 15 Tr. 56.

In the face of that testimony from Dr. Kahn, there is no way to contend that the evidence regarding the question of whether he subjectively knew his prescriptions to be unauthorized was uncontested. It was explicitly contested. Since the element omitted from the jury instructions was a *mens rea* element, in the absence of uncontested evidence that Dr. Kahn knew his prescriptions to be unauthorized, a new trial must be ordered. *Neder v. United States*, 527 U.S. 1, 17 (1999).

CONCLUSION

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

Respectfully submitted,

By: /s/ Beau B. Brindley
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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 Supplemental Reply Brief of Defendant-Appellant to be served upon the government by electronically serving it through the CM/ECF system November 4, 2022.

Respectfully submitted,

By: /s/ Beau B. Brindley
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