

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**UNITED STATES OF AMERICA,
Plaintiff-Appellee,**

v.

No. 19-3062

**STEVEN R. HENSON,
Defendant-Appellant.**

SUPPLEMENTAL BRIEF REGARDING *KAHN*

I. Background. On January 12, 2016, a Kansas grand jury indicted Steven R. Henson, a medical doctor, on 31 counts arising from his operation of two pain management clinics in Wichita, Kansas, which he operated between July 2014 and August 2015. (AA.28-50.)¹ Henson was charged with

- conspiracy to distribute, dispense and possess with intent to distribute controlled substances outside the usual course of professional practice without a legitimate medical purpose, in violation of 21 U.S.C. § 841 and 846 (**Counts 1 and 2**);
- illegally distributing or dispensing outside the usual course of professional practice without a legitimate medical purpose, in violation of 21 U.S.C. § 841 (**Counts 3-16**);

¹ The record on appeal comprises a single appendix filed by Henson consisting of 298 pages, and a supplemental appendix filed by the government consisting of 15 volumes and 3732 sequentially paginated pages. The jury trial exhibits are on a disk and referenced in Volume 15 of the government’s supplemental appendix at pages 3694-3732. Henson’s appendix is cited as “AA” followed by a corresponding page number. The government’s appendix is cited as “ASA” followed by the volume number and page number in that volume that appears in the lower-right corner of the page.

- distributing or dispensing controlled substances outside the course of professional practice or without a legitimate medical purpose that resulted in death, in violation of 21 U.S.C. § 841 (**Count 17**);
- possessing a firearm in furtherance of a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A) (**Count 18**);
- making false writings, in violation of 18 U.S.C. § 1001(a)(3) (**Count 19**);
- attempt to obstruct a court order, in violation of 18 U.S.C. § 1509, (**Count 20**);
- engaging in monetary transactions greater than \$10,000 involving the proceeds of drug distribution, in violation of 18 U.S.C. § 1957 (**Counts 21-25**); and
- laundering of proceeds of drug distribution, in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (**Counts 26-31**).

(AA. 34-47.) Henson was convicted on all counts except Counts 15, 18, and 21-25. (AA.204-05.)

At Henson’s trial, the district court gave the following instructions on scienter with respect to the § 841 counts. Instruction 25 told the jury that, as to all of the § 841(a)(1) counts—i.e., Counts 1, 2, 3-14, and 16-17—it could find Henson had the requisite intent

if the Government proves beyond a reasonable doubt that a prescription was knowingly written (1) not for a legitimate medical purpose, or (2) outside the usual course of professional practice, then the exception to the Controlled Substances Act does not apply.

(AA.99 (Instr. 25) (emphasis added).)

Instruction 26 told the jury that, as to Counts 3-14 and 16-17, it could find Henson had the requisite intent if he knew and intended that his actions “**were not for legitimate medical purposes or were outside the usual course of professional practice.**” (AA.101 (Instr. 26) (emphasis added).)

Finally, Instruction 35 told the jury that it could not convict Henson if he acted in good faith:

The good faith of a defendant, whether or not objectively reasonable, is a complete defense to the crimes charged, because good faith on the part of the defendant is inconsistent with specific intent, which is an essential part of the charges.

....

In the practice of medicine, good faith means the honest exercise of good professional judgment as to a patient’s medical needs. Good faith connotes an honest effort to treat patients in compliance with generally recognized and accepted standards of medical practice.

(AA.120-21 (Instr. 35) (emphasis added).)

2. ***Kahn***. In *United States v. Kahn*, No. 19-8054, slip op. (10th Cir. Feb. 3, 2023), this Court considered whether similarly worded instructions given in that case required vacatur of Dr. Kahn’s convictions in light of *Ruan v. United States*, 142 S. Ct. 2370 (2022). In *Ruan*, the Court held that, in proving that a medical practitioner violated 21 U.S.C. § 841(a) by dispensing controlled substances without authorization, “the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally

acted in an unauthorized manner.” *Id.* at 2376. In *Kahn*, this Court concluded that the jury instructions issued in that case were inconsistent with *Ruan* because they did not require the government to prove that Dr. Kahn knowingly or intentionally acted in an unauthorized manner. *Kahn*, slip op. at 10. Rather, in *Kahn* the jury was instructed that it could convict Dr. Kahn if it concluded that he acted outside the usual course of professional medical practice or without a legitimate purpose, *id.* at 11, and this Court found those instructions erroneous under *Ruan* “because they allowed the jury to convict Dr. Kahn after concluding either that Dr. Kahn subjectively knew a prescription was issued not for a legitimate medical purpose, or that he issued a prescription that was objectively not in the usual course of medical practice,” *id.* at 12.

In *Kahn*, this Court also found “problematic” the district court’s good-faith instruction, which defined “good faith” in terms of “what a reasonable physician should believe to be proper medical practice” and asked the jury to determine whether Dr. Kahn “acted in an honest effort to prescribe for patients’ medical conditions in accordance with generally recognized and accepted standards of practice.” *Id.* at 13 (internal quotations omitted). This Court found this language impermissibly “impose[d] an objective standard” to determine Dr. Kahn’s intent, counter to *Ruan*. *Id.* at 13-14.

In *Kahn*, this Court found, *id.* at 17-18, 21, that because Dr. Kahn contested his intent at trial, the erroneous instructions were not harmless under the harmless-error test of *Neder v. United States*, which asks, with respect to an instruction that omits an *uncontested* element, whether the jury verdict would have been the same absent the error. 527 U.S. 1, 11 (1999). This Court said that “Where an element of an offense is contested at trial . . . the Constitution requires that the issue be put before a jury—not an appellate court.” *Kahn*, slip op. at 18.

This Court also found, *id.* at 19-21, that the instructions were not harmless under the more relaxed harmless-error test of *Sullivan v. Louisiana*, which asks “whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” 508 U.S. 275, 279 (1993). This Court declined to affirm Dr. Kahn’s convictions under this test because the instructions given did not require the jury to find that Dr. Kahn intended to act not as authorized and it did not want to hypothesize a guilty verdict that was never rendered. *Kahn*, slip op. at 20-21.

Accordingly, this Court vacated all of Dr. Kahn’s counts of conviction that were predicated on the erroneous instructions. *Id.* at 22-24.

3. Impact of *Kahn* On This Case. The district court’s instructions in the instant case bear the same deficiencies as those this Court found deficient

in *Kahn*. Instructions 25 and 26, were erroneous “because they allowed the jury to convict [Henson] after concluding either that [Henson] subjectively knew a prescription was issued not for a legitimate medical purpose, or that he issued a prescription that was objectively not in the usual course of medical practice.” *Id.* at 12. Instruction 35 was counter to *Ruan*: in referencing “the honest exercise of good professional judgment as to a patient’s medical needs” and “an honest effort to treat patients in compliance with generally recognized and accepted standards of medical practice” (AA.120-21 (Instr. 35)), it impermissibly imposed objective standards to determine Henson’s intent.

Moreover, even though the circumstantial evidence of Dr. Henson’s intent to act not as authorized was overwhelming, *see* Document: 010110739686, Supp. Br. of Appellee, at 13-20, the government is constrained to concede that it cannot prevail under *Neder*’s harmless-error test because Dr. Henson contested his intent at trial. Nor can the government prevail under *Sullivan*’s harmless-error test, as this Court applied it in *Kahn*, where this Court declined to “hypothesize a guilty verdict that was never rendered,” *Kahn*, slip op. at 21 (quotation marks omitted), notwithstanding the circumstantial evidence of Dr. Kahn’s intent, because doing so would violate the jury trial guarantee, *see id.* at 20-21.

Accordingly, the counts of conviction that were affected by the erroneous instructions must be vacated, including non-§ 841 counts that were predicated, at least in part on one or more of the erroneous instructions. *See Kahn*, slip op. at 23-24. Consistent with *Kahn*'s rationale, *see id.*, the government is constrained to concede that all of Dr. Henson's counts of conviction, *except* **Count 19** (making false writings) and **Count 20** (attempt to obstruct a court order) must be vacated and remanded.

Count 19 charged that, in response to a federal grand jury subpoena, Henson submitted false patient records knowing that the records contained false information regarding his patients and prescriptions. (AA.45.) Henson admitted he created the patient records after he received the subpoena (ASA.10.2792); he admitted he created the files seen in court at his defense attorney's office in Ft. Lauderdale (ASA.10.2793); and he said the inaccuracies were result of cutting and pasting (ASA.10.2795-96). (*See also* ASA.12.3372-75 (government summarizing evidence for charge).)

Count 20 charged that Henson obstructed DEA Agents who were lawfully executing a search warrant at his residence by calling 911 to report that his home was being burglarized or robbed, even though he knew the agents were with the DEA. (AA.45.) The government's evidence was undisputed on this count. (ASA.5.1332; ASA.7.1887-91; ASA.12-3375-76.)

Respectfully submitted:

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CERTIFICATIONS

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s/ James A. Brown
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