ORAL ARGUMENT – NOT YET SCHEDULED
PETITIONERS' REPLY BRIEF
Case No. 23-1007

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REBECCA SNYDER, et. al.

Petitioners,

v.

MERRICK B. GARLAND, Attorney General, et. al.

Respondents.

REPLY BRIEF FOR PETITIONERS
Reviewing final decision of DEA Trial Judge – Docket No. 23-5
Before the Honorable Teresa A. Wallbaum (TAW)

PETITIONERS' REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE IN THE SEALED DEA ADMINI STRATIVE PROCEEDING

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

(a) Parties (updated)[1] The Petitioners in the above captioned case are chronic pain patients who sought to intervene in the DEA Administrative Proceeding below, after DEA summarily suspended their doctor's authority to prescribe pain medication and sought to revoke his DEA certificate of registration (COR); the patients sought to inform the DEA Administrative trial judge that their doctor's continued authority to prescribe pain medication was consistent with their personal interest and critical to their health and survival; 11 patients joined the original motion to intervene; two patients died who were not intervenors; one patient died since we filed.

The petitioners are:

(1) Rebecca Snyder, **recently deceased**, awaiting a family member's substitution,

(2) Gemi Spaulding,

(3) Wilbert Louis Ogden,

(4) Clarissa Knopf,

(5) Dustin Parker,

(6) Michelle Gubbay-Snyder,

(7) Lera Anne Fuqua,

[1] References to Exhibits, Documents, etc in this version of submission will be replaced by references to the Joint Appendix, presently deferred, when we file the Opening and Reply Brief in final.

(8) Regina Dolan,

(9) Jessica Fujimaki, - **deceased before filing w/ this court, and withdrawn as a party petitioner**,

(10) Piper McKee-Wright, and

(11) Rodney Summers.[2]

(b) Respondents. The respondents in this matter are comprised of the Attorney General of the United States, the DEA Administrator, and the Chief Counsel DEA.

(c) Intervenors. Petitioners are not aware of any other intervenors in this matter.

(d) Amici. Petitioners are not aware of any amici in this matter.

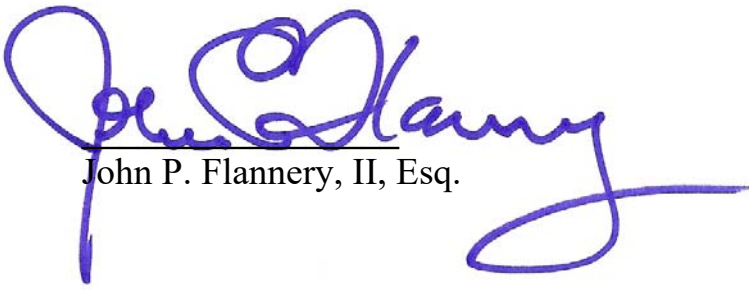
(e) Ruling under review. The petitioners sought to intervene in the proceedings below, in *In re David Bockoff, MD* v. DOJ, DEA, Docket No. 23-5; the administrative trial judge, however, denied the motion on December 22, 2022, and that decision was filed with this Court on February 15, 2023.

(f) Subsequent Ruling. The administrative trial judge's memorandum opinion followed on May 2, 2023, and there was no mention of the

[2] Each of these patients, seeking to intervene, have signed an extensive HIPPA waiver as to the disclosure of their identities, their medical records, and any privacy or discussion of this information.

patients' petition to intervene.[3] There has been no further decision and petitioners have had no access to the "hearing" before the ALJ.

(g) Related cases. The ruling that is the subject of this petition for review has not previously been before this Court or any other court.



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[3] The Memorandum was titled, *"Recommended Rulings, Findings of Fact, Conclusions of Law, and Decision of the Administrative Law Judge"* (hereinafter "The May 2023 Memorandum," stating, in relevant part, at p. 2, that: "The issue in these proceedings is whether Respondent's COR (Certificate of Registration) should be revoked because his registration is inconsistent with the public interest …": the 44-page May Memorandum makes no mention of petitioners' "interest," though their interest was substantial – involving life or death questions.

I. PRELIMINARY REMARKS

We relied on facts and argument in our opening brief, and proposed the questions on appeal that upheld the right of the chronic pain patients to intervene when the DEA summarily cut off their medical treatment and prescribed pain medication with absolutely NO evidence there was an imminent public emergency.

II. THE ADMINISTRATIVE PROCEDURE ACT – Section 555(b)

The principal code section that provides the right to intervene is found in Title 5, USC, Section 555(b) and reads in relevant part as follows:

> "So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request or controversy in a proceeding, whether interlocutory, summary or otherwise or in connection with an agency function (underscoring provided)."

This APA statutory provision is "universally understood to establish the right of an interested person to participate in an ongoing agency proceeding." See *Animal Legal Defense Fund Inc. v. Vilsack*, 237 F. Supp. 3d 15, 20 (DC District of Columbia (2017).

The statute provides a remedy for "interested" persons who are not parties in the traditional sense in an administrative proceeding.

The statute applies in a variety of ways to the "presentation, adjustment, or determination of an issue, request or controversy."

In this case the "interest" of persons who were patients of Dr. Bockoff is that the government summarily cut off their medical treatment and pain prescriptions claiming a public "emergency" that did not exist until the government summarily cut off these named patients and every other patient of Dr. Bockoff.

These persons sought to intervene, to have access, to this sealed DEA proceeding to present, adjust, even to determine the rightness of cutting off their pain meds in a ripe and real "controversy" as they are the ones, denied medical surcease, suffering the risks of illness, death and suicide because they were cut off in violation of every state statute that forbids and sanctions any physician from abandoning a patient without certain safeguards; in this case DEA usurped those protections, and endangered these patients, when summarily denying these patients both treatment and medication. See 5, USC, Section 555(b).

The APA states that this occasion for these patients to intervene may be "interlocutory, summary or otherwise or in connection with an agency function." Id.

Among its various criticisms of this petition, DEA complains in effect that our application is "interlocutory." The DEA does not therefore discuss the fact that the

statute approves, specifically, an "interlocutory" motion to intervene, and if the proceeding is itself "summary."

Nevertheless we consider the decision, the only decision, on whether petitioners may participate, denied on December 22, 2022, as final.

III. THIS IS NOT A TITLE III PROCEEDING

The most striking error that dominates this argument is that DEA repeatedly confuses the notion of "interested persons" with Title III "standing."

It is hornbook law that any notion of the standing requirement for Title III tribunals does not apply to an administrative proceeding.

We may have caused some confusion when we argued that we thought the circumstances to bring this case were so strong that the circumstances satisfied the requirements of Rule 24 (Intervention) of the Federal Rules of Civil Procedure. We admitted, however, and have never wavered from the point, that Rule 24 does not apply because it is concerned exclusively with Title III cases.

Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n, 194 F.3d 72, 74 (D.C.Cir. 1999) expressly stated, in a case involving the Nuclear Regulatory Commission that: "Agencies are not constrained by Article III of the Constitution, nor are they governed by judicially created standing doctrines restricting access to the federal courts."

DEA cites Article III cases to dispute whether "standing" may be found for the petitioning patients.

But these cases are inapposite to the material facts before this tribunal.

DEA cites *Pederson v. La. State Univ*, 213 F. 3d 858, 869 (5th Cir. 2000) (Respondent's Brief at 11) but that was a Title IX class action court suit, an Article III case, and not an administrative proceeding, subject to the APA.

While *BCCA Appeal Group v. US Environmental Prot. Agency*, 355 F. 3d 817, 825 (5th Cir. 2003) does involve an administrative proceeding, the EPA, the question of standing is focused on parties to a rule making proceeding, and the question was not about the participation of an "interested person" seeking to intervene under the APA.

Morall v. DEA, 412 F.3d 165, (DC Circuit 2005) involved the physician's registration being revoked based on evidence by a DEA Investigator, to the exclusion of other contrary evidence, ignored by the ALJ; in that case; there was no intervenor seeking to participate as an "interested person."

DEA cites a 5th Circuit case, *Bonds v. Tandy*, 457 F. 3d 409 (5th Cir. 2006), that, reduced to its holding on the material facts, found an ex con pharmacist who sought to assert employment rights, claiming he was "a person aggrieved," but who was not an employer-registrant or waiver applicant, lacked Title III standing; this is another instance of DEA citing a case that makes no reference in the Court's

12 page opinion either to intervention or to Mr. Bonds making a claim he was an "interested person."

Nor was there any reference to 5 USC Section 555(b).

We do not intend to review all those cases in the DEA Response Brief that depend on Article III proceedings and the "standing" requirements of an Article III proceeding.

There are some real outliers in the Government's discussion including the case of *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 US 464 (1982), a dispute over the transfer of government land to a church, involving a claim for declaratory and injunctive relief, and the case went back and forth over whether there was a Title III claim by Americans United for Separation of Church and State.

The case had absolutely nothing to do with intervention.

The case had nothing whatsoever to do with this case.

There are a string of cases disputing "standing" as applied in Title III cases. See DEA Brief in Response, pp 14-16.

DEA repeatedly, when this matter was before the ALJ and now when upon appeal, relies on *Nichols v. Board of Trustees of Asbestos Workers Local 24 Pension plan*, 835 F. 2d 881, 898-899 (DC Cir. 1987).

It is not understandable why DEA relies on this authority.

It was a somewhat complex IRS matter, the question was reviewed by a panel of this Court, and the question was whether Mr. Nichols had a right to intervene.

IRS flatly denied Mr. Nichols request to intervene as an "interested person." Nichols held that "the orderly conduct of public business" does not interpose a presumptive ban to Nichols' participation request and consequently does not justify denial of that request by the agency. The Court concluded that because Nichols' status as an "interested person" entitled him to intervene in the agency's proceedings to review the amendment, "neither the denial of his participation request nor the regulatory interpretation that purportedly supported that denial can stand." Id.

In this matter, our pain patients seeking to intervene in the ALJ Hearing, the presiding officer repeated the error, of banning intervention, as occurred in *Nichols,* when the ALJ stated that the CSA "creates a complex 'closed regulatory system,' a 'comprehensive regime'with the main objectives of 'conquer[ing] drug abuse and … control[ling] legitimate and illegitimate traffic in controlled substances." See ALJ Order Denying Patients' Emergency Motion to Intervene, December 22, 2022, 1st full graph, at p. 2.

The ALJ essentially "banned," as did the ALJ in *Nichols*, that the patients could have intervened under the CSA and its attendant regulations. Id., 2nd graph.

By the ALJ's own words in this case, the concern was "conquering drug abuse" but these patients were not abusing, nor addicted to medication, they were dependent (a distinction with a serious difference) on treatment and medication to curb their chronic pain.

The petitioning intervenors were part of the CSA's role to facilitate "legitimate" medical use of controlled substances and the petitioners had a right to insist there was no imminent danger, public or otherwise.

IV. STATUTORY AND CONSITUTIONAL RIGHT

The ALJ insisted that the patient intervenors did "not identify any statutory right or property interest that makes them entitled to a hearing; nor do they argue that they fall within the statutory zone of interest." Id., p. 3.

Of course, the APA is that statutory right and DEA's interference with the contract between doctor and patient is the unconstitutional abridgment of their collective property right.

We underscored the latter in our opening brief, namely, that the 14th amendment right to due process encompassed the right to contract within the definition of "liberty." See *Board of Regents v. Roth*, 408 U.S. 564 (1972); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). ``

V. THE RELIEF REQUESTED IS A REMAND

DEA asks what can be done when such an error occurs?

In *Nichols*, a panel of this Court held "that the agency's flat rule prohibiting intervention in Section 302(c)(8) proceedings contravened the Administrative Procedure Act, and IRS had to reconsider "upon what conditions it will permit public participation in such proceedings." Id.

The matter was remanded to the District Court. Id.

That is the appropriate relief in this case, to remand the matter to the ALJ.

VI. WHAT WE ASK IS NOT DISRUPTIVE

When we were before the ALJ, we asked for the Court to fashion a procedure, among several suggestions we made, that would permit the patients' participation without disrupting the proceedings.

We never had that discussion to give cooperation a chance.

VII. NO ONE ELSE TOOK THE PATIENTS' PART

As we've said below before the ALJ, and in our opening brief, there was no participant in Dr. Bockoff's proceedings to take on our cause before the ALJ, in essence, to argue for Dr. Bockoff's patients' "personal interests."

DEA tries to make Dr. Bockoff's unsuccessful application to the federal court binding somehow or other on petitioner patients; that was Dr. Bockoff's application, not the petitioners. See *Bockoff v. Garland*, No. 22-cv-9046 (CD Cal. December 15, 2022).

It is but one example of how Dr. Bockoff did not represent the patients.

According to the DEA, statements of the Intervenors from the Administrative Law proceeding were introduced as an exhibit in that federal action, as Exhibit I. See DEA Brief in Response, at p. 9.

On information and belief, no pain patient who seeks to intervene, participated in that federal action in any way, nor were they or their undersigned counsel aware that these materials were mentioned in the federal case.

(Not to put too fine a point on the matter but it must also be stated that Dr. Bockoff does not represent his patients in these proceedings, and we don't represent Dr. Bockoff.)

VIII. THE ALJ's FINDINGS ARE FATALLY FLAWED

While one may ordinarily defer to the ALJ's findings, they may not stand if there is insufficient evidence to support the finding *Masters Pharm., Inc. v. DEA*, 861 F. 3d 206, 215 (DC Circuit 2017).

Another way to state the matter is that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." Id.

The government says that the DEA's decision may be set aside but only if the decision is arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with the law.

But 5 USC Section 706 provides for other bases that the reviewing court "shall" take to:

"(1) compel agency action withheld …, [or]

(2) hold unlawful and set aside agency action, findings, and conclusions found to be …

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, …

(B) contrary to constitutional right, power, privilege or immunity,

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory rights,

(D) without observance of procedure required by law, unsupported by substantial evidence …

(E) reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court."

IX. THE GOVERNMENTS SAYS IT'S ALL MOOT.

The Government's Response prefers and proposes its own two-part "counterstatement" instead.

The governments first "counterstatement" is that the pain patients' issues on appeal are "moot" because the sealed DEA Administrative Hearing in this case is "completed." See Government Response, "Counterstatement of the Issues," p.3.

Ordinarily one might assume that a "completed" proceeding meant a proceeding was "final."

We mention this because the government also denied there's been a "final" decision in this matter.

The government contradicts that well worn latin phrase, "*ubi injuria, ibi remedia*," where there's a wrong, there's a remedy.

Yet DEA argues that "completed" is not "final."

Nothing remained of the agency's decision-making process as to the effort to intervene.

While wrongly done, there is no question that the ALJ determined the rights and obligations of the intervenors.

There was no reference after the ALJ's denial to petitioners' motion to intervene.

Petitioners had no official access to any document or discovery in the case before or after the Court's denial of the motion to intervene.

We relied on "the kindness of strangers" – to borrow from a famous playwright – and the ALJ's decision, mentioned above, for May 2023, was not published to the petitioners by the ALJ or the DEA.[4]

If we had to rely on any official notice of the ALJ's decision in May 2023, we would not know now if there was a decision.

Keep in mind this is a star chamber proceeding without access by anyone other than who the ALJ or government permits; and we Intervenors were not "permitted."

If we had to rely on only what the ALJ provided, for example a copy of the judge's May 2023 decision, we would not have had that decision to make any remarks before the Administrator or this Circuit Court.

Officially we were flying blind after our request to intervene was denied.

Can a proceeding be any more "final" than that?

We think not.

We also had to be wary of waiting in futility for some uncertain period and hoping someone would tell us there was an ALJ decision after our denial – and that somehow we could pursue to the Administrator who has the matter even now.

Apparently, the government is telling us that they know the Administrator has not acted.

[4]A reference to the final words of Blanche DuBois, a character in *A Streetcar Named Desire* by T ennessee Williams: "Whoever you are, I have always depended on the kindness of strangers."

How "quaint" are First Amendment presumptions when records of litigation with the government are not transparent, opaque instead, and inaccessible to those with personal interest and the public.

We could not be unaware of the fact that, had we "waited," simply "waited," for anything to cross our desk, the May 2023 decision for example, we would not have known when the order was entered and we would likely have missed our opportunity to invoke the 30-day statute to file a petition for review with this Circuit Court.

IX. THOUGH BARRED FROM ACCESS – THE ALJ'S FINDINGS

A. FIRST, There is the statistical oversight.

These facts were first brought to our attention in the ALJ's memorandum opinion, entered on December 22, 2022, denying petitioners' right to intervene.

The DEA cited as a basis for its summary suspension, Dr. Bockoff's prescriptions for the same 5 patient files that DEA was simultaneously subpoenaing, when it had no idea what was to be found in those 5 files.

These five patients, statistically, represent only 2% of the 240 patients in Dr. Bockoff's medical practice.

Petitioning Intervenors asked how the ALJ could rely on so few medical files as a sufficient sample to draw any statistical inferences as to the 235 other patients in Dr. Gooding's practice, or any larger "universe" than that.

The ALJ, in her Memorandum Order, entered December 22, 2022, at fn 10, stated that the "the [DEA] Agency gives no more than nominal weight to evidence that a practitioner has engaged in lawful dispensing to thousands of other patients."

DEA has a "through the looking glass" way of appreciating statistical inferences as evidence.

And there's no excuse for an experienced tribunal to fail to understand how to consider and measure a statistical inference.

In a recent appellate decision out of the Third Circuit, *United States v. Titus*, 2023 U.S. App. LEXIS 22009*7 (3rd Circuit 8/22/23)(Exhibit 1, attached), the Court found that evidence by way of "extrapolation is permissible, but the government must show, and the court must find, that there is an adequate basis for the extrapolation and that the quantity was determined in a manner consistent with accepted standards of reliability."

In *Titus*, the Court observed that the government failed to meet that standard and instructed as follows, that: "[T]he government would be well advised to introduce more detailed (and less conclusory) evidence to support its conclus[ion] that there was a representative sample." Id.

The same can be said in this case.

Our mathematical information confirms the sample of 5 patients does not permit of any meaningful statistical inferences.

The ALJ's rough calculation that it did was plain error and it affected those "interested persons," petitioners, who were blameless and yet denied medical treatment and chronic pain medicine.

The Administrative Trial Court, by the ALJ, admitted that there was a small sample of alleged inapt prescriptions to five patients, without any evidence of intent to issue unauthorized prescriptions to any one of these five patients.

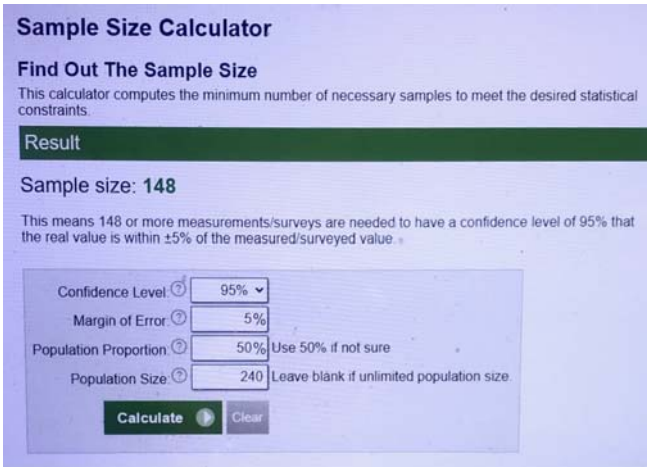
The math we have to consider is a simple small fraction: 5 out of 240 patients is 2 %.

The difficulty in making an inference from this sample size for a universe of 240 patients is quite limited.

An online app (https://www.calculator.net/sample-size-calculator.html) suggests a sample size of 148 is necessary to have a 95% confidence level when drawing inferences about a finite population as small as 240 patients.

Plainly, DEA had no such sample, and made no such calculation or showing.

It's laughable to characterize a population of 5 as having anything to say about a possible "public" emergency about addiction or diversion..



B. SECOND, there is the credibility of the expert witness.

On or about May 2, 2023, the ALJ issued a 44-page report, entitled "Recommended rulings, findings of fact, conclusions of law, and decisions of the Administrative Law Judge.

The ALJ reported that Dr. Timothy Munzing "testified as an expert."

According to this report, the Court found Dr. Munzig credible, plausible and accepted Dr. Munzing's defense against certain critical inferences, raised by the hearing counsel for Dr. Bockoff during Dr. Munzig's cross, that disfavored the expert's conduct.

What neither court nor counsel knew about Dr. Munzing was that his professional misconduct and misleading testimony in an Ohio criminal case had been uncovered.

What Dr. Munzing had to say at the criminal trial contradicted what he testified at an ALJ DEA Hearing; the case is titled *United States of America v. Thomas*

Romano, Case No. 2:19-cr-202, and was tried from August 1 through August 12, 2022, attached hereto as Exhibit 2.

The Court in *Romano* granted a new trial because the 'interest of justice' required it under Rule 33 of the Federal Rules of Criminal Procedure.

This material should have been made available by DEA to the parties even though the DEA Hearing was not a criminal prosecution; in any case, it should have been available because it goes directly to Dr. Munzing's credibility.

The ALJ's findings can not be dispositive when these materials have not been made available to court and counsel.

Lest there be any confusion, we must re-state that we would be in the dark as well if we had not seen the ALJ's report.

XI. THE QUESTIONS RAISED MERIT REMAND - TO GET IT RIGHT

Given the findings by the ALJ and pleadings filed by the DEA, the government doesn't appreciate the distinction between an "interested person" and an "interested party" or an "aggrieved person." This misunderstanding has consequences.

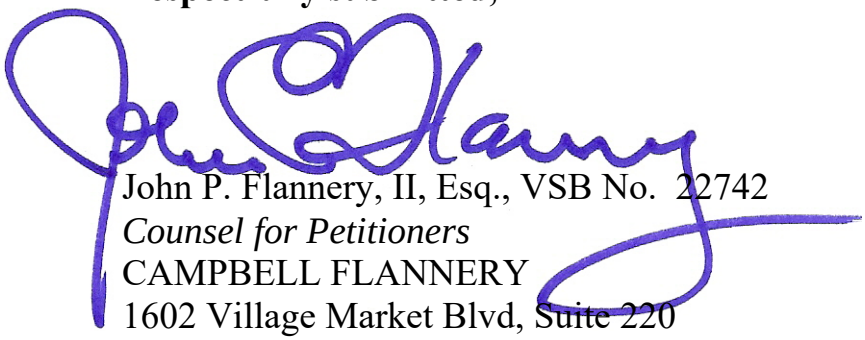
Worse, DEA appears to understand no difference between an "interested

person" in an administrative proceeding and a Title III court action.

RELIEF REQUESTED

COMES NOW, Petitioners herein, to request that this Honorable Court compel the agency action unlawfully withheld and unreasonably delayed, namely, the authority for petitioners to intervene, and to remand the matter to the DEA Administrative Tribunal, authorizing Petitioners' motion to intervene upon remand, and such other relief as this Court deems fit and just.

Respectfully submitted,



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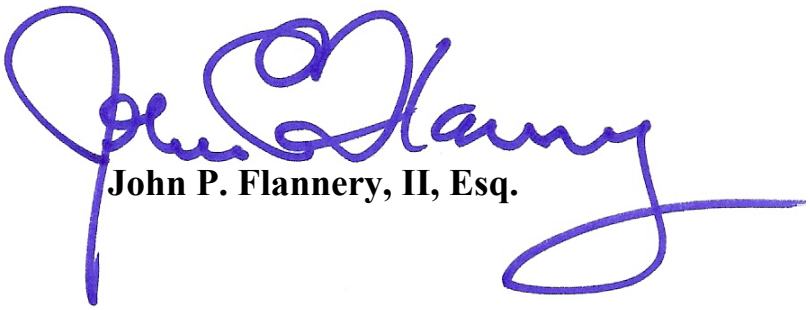
CERTIFICATE OF COMPLIANCE WITH TYPE AND VOLUME LIMITATIONS

I hereby certify that the foregoing Opening Brief was prepared in 14 point proportionally spaced Times New Roman Type in Microsoft Word 2013 and contains 4,219. The number of words for the reply brief may not exceed 6,500 words. The Reply Brief for Petitioners therefore complies with the requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(7)(B)(ii).



John P. Flannery, II, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed a copy of the foregoing with the Clerk of Court, United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on October 27, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by using the appellate CM/ECF system.

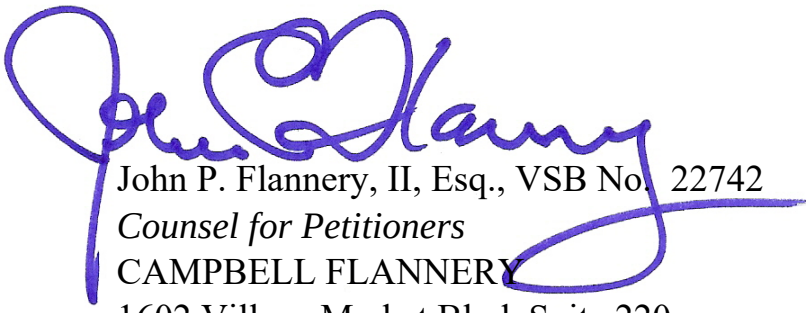


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EXHIBIT 1

United States v. Titus

United States Court of Appeals for the Third Circuit

June 20, 2023, Argued; August 22, 2023, Filed

No. 22-1516

Reporter
2023 U.S. App. LEXIS 22009 *; __ F.4th __; 2023 WL 5356241

UNITED STATES OF AMERICA v. ***PATRICK TITUS***, Appellant

Prior History: [*1] On Appeal from the United States District Court for the District of Delaware. (D.C. No. 1:18-cr-00045-001). District Judge: Honorable Richard G. Andrews.

Core Terms

prescriptions, patients, extrapolation, sentence, reliable, drugs, drug quantity, statistician, prescribing, estimation, quotation, files, marks, controlled substance, burden of proof, kilos

Case Summary

Overview
HOLDINGS: [1]-In an action for unlawfully dispensing and distributing controlled substances and maintaining drug-involved premises, there was not enough evidence to prove that defendant was responsible for at least 30,000 kilos because the review of 24 files to infer the illegality of thousands of other prescriptions was not a statistically valid sample; [2]-The trial court rightly excluded defendant's expert testimony that his thinking was rigid and inflexible because it did not support a legally acceptable theory of lack of mens rea.

Outcome
Sentence vacated and case remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > Sentencing > Imposition of Sentence > Evidence

Evidence > Burdens of Proof > Allocation

Evidence > Burdens of Proof > Preponderance of Evidence

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Sentences

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

HN1[] **Imposition of Sentence, Evidence**

An appellate court reviews a district court's factual finding for clear error. And at sentencing, the government bears the burden of proving drug quantity by a preponderance of the evidence. Extrapolation is permissible, but the government must show, and the court must find, that there is an adequate basis in fact for the extrapolation and that the quantity was determined in a manner consistent

with accepted standards of reliability.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Evidence > Admissibility > Procedural Matters > Rulings on Evidence

HN2[] **Standards of Review, Abuse of Discretion**

An appellate court reviews an evidentiary decision for abuse of discretion and a constitutional argument de novo.

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Burdens of Proof

Evidence > Burdens of Proof > Allocation

Criminal Law & Procedure > ... > Standards of Review > Plain Error > Definition of Plain Error

HN3[] **Plain Error, Burdens of Proof**

When a defendant does not object to an alleged error at trial, he bears the burden of showing a plain error that affected his substantial rights. *Fed. R. Crim. P. 52(b)*.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

Criminal Law & Procedure > ... > Standards of Review > De Novo Review > Jury Instructions

HN4[] **Standards of Review, Abuse of Discretion**

An appellate court reviews the instructions' statement of the law de novo and the court's refusal to give a specific instruction for abuse of discretion.

Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion

HN5[] **Standards of Review, Abuse of Discretion**

An appellate court reviews the court's rulings on alleged prosecutorial misconduct for abuse of discretion.

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Appellate Review

Criminal Law & Procedure > ... > Standards of Review > Clearly Erroneous Review > Findings of Fact

Criminal Law & Procedure > ... > Discovery & Inspection > Brady Materials > Brady Claims

HN6[] **Brady Materials, Appellate Review**

An appellate court reviews the court's legal conclusions as to a Brady claim de novo and its findings of fact for clear error.

Evidence > Admissibility > Expert Witnesses > Daubert Standard

HN7[] **Expert Witnesses, Daubert Standard**

At a minimum, any extrapolation must be shown to be reliable, and defendants must have a fair chance to challenge its reliability.

Counsel: Mary Kate Healy, [ARGUED], Eleni Kousoulis, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Wilmington, DE, Counsel for Appellant.

John-Alex Romano, [ARGUED], Jeremy R.

Sanders, U.S. DEPARTMENT OF JUSTICE, CRIMINAL DIVISION, Washington, DC, Counsel for Appellee.

Judges: Before: ***CHAGARES***, Chief Judge, and BIBAS and MATEY, Circuit Judges.

Opinion by: BIBAS

Opinion

OPINION OF THE COURT

BIBAS, *Circuit Judge*.

Though the prosecution bears a heavy burden of proof, we will not let it cut corners. Dr. ***Patrick Titus*** wrote thousands of prescriptions for controlled substances. The government properly proved that many of these prescriptions were unlawful, so we will affirm Titus's conviction. But many other prescriptions were lawful. And the severity of Titus's sentence depended on how many were not. Rather than review every patient's file, the government urged the court to extrapolate from a small sample. Yet the government failed to show that doing so would satisfy its burden to prove the drug quantity by a preponderance of the evidence. Because the court sentenced Titus without enough **[*2]** proof, we will vacate his sentence and remand for resentencing.

I. The Pill Mill

Titus ran a solo medical practice and had a license to prescribe controlled substances. For a time, business boomed. In its last thirteen months, Titus's practice earned almost $1.1 million by handing out more than 20,000 prescriptions for Schedule II drugs.

But many of those prescriptions were illegal. For one thing, Titus would often do only cursory physical examinations before prescribing opioids. As a former patient put it, visiting Titus was like a "revolving door, in and out." JA 560. For another, he kept prescribing drugs despite signs that his patients were diverting or abusing them. Many tested negative for prescribed drugs or tested positive for illegal drugs. Though Titus sometimes sent these patients warning letters, he kept the prescriptions flowing. And even when he kicked patients out of his practice, he often sent them off with one last prescription.

Eventually, others caught on. Several drugstores refused to fill his prescriptions. And at least two of Titus's patients overdosed, leading other doctors to file professional complaints against him. Trying to avoid the growing scrutiny, he shut **[*3]** down his practice.

But it was too late. Just weeks later, federal agents raided the homes of Titus and two of his employees. There, they found thousands of patient files, revealing Titus's illicit practices. He was indicted on fourteen counts of unlawfully dispensing and distributing controlled substances (one count for each of fourteen prescriptions) and one count of maintaining drug-involved premises, in violation of *21 U.S.C. §§ 841(a)(1), (b)(1)(C), 856(a)(1)*. The jury acquitted Titus on one dispensing-and-distributing count but convicted him on all the rest.

Yet the fourteen prescriptions in the indictment were far from the whole story. At trial, with an eye toward sentencing, the government put on evidence of many prescriptions beyond the fourteen listed in the indictment. That evidence came from two witnesses: the government's statistician and its medical expert.

The statistician began by reviewing data from the Prescription Monitoring Program. The Program records when doctors write prescriptions, when drugstores fill them, and which patient gets them. From that data, he identified 1,142 patients who had gotten a prescription for controlled drugs from Titus during his practice's last two years. From that group, the statistician **[*4]** drew a random sample of 300 patients. That sample was appropriate, he testified, because it was large enough for reliable

extrapolation.

Of the 300 patients, the government found only 282 patients' files. The statistician reviewed those files and extrapolated from them to the total universe of patients, concluding that Titus had handed out (a) 29,323 prescriptions for controlled substances to 948 patients with at least one inconsistent drug test and (b) 1,552 prescriptions for controlled drugs to 352 patients he had already discharged from his practice. Though these numbers reflected suspicious prescriptions, the statistician said nothing about how many were illegal.

But the government's medical expert did. From the 282-patient sample, the government asked him to review the first twenty-four files. He determined that Titus had written illegal prescriptions to eighteen of the twenty-four patients.

At sentencing, the government sought to hold Titus responsible not just for the thirteen illegal prescriptions for which he was indicted and convicted, but for all his relevant conduct. *U.S.S.G. § 1B1.3(a)(1)*. Under the Sentencing Guidelines, his responsibility was based on the total "converted drug weight" of all **[*5]** his illegal prescriptions. § 2D1.1.

Predictably, Titus and the government put forward vastly different weights. The government tried to include all the Schedule II prescriptions Titus had written in his practice's last thirteen months. By that count, his converted drug weight was more than 106,000 kilos, giving him a base offense level of 38. Titus said the court should look at only the thirteen patients for whom he had been convicted, plus the eighteen whom the medical expert had identified. Those thirty-one patients had a converted drug weight of only 7,500 kilos, which would mean a base offense level of 32.

The District Court steered a middle path. On the one hand, it hesitated to include all the drugs from all thirteen months, whether lawfully or unlawfully prescribed. On the other hand, it declined to limit the sentence to the drugs personally reviewed by the jury and medical expert. So the court revised the government's calculation, holding Titus responsible for at least 30,000 kilos.

To reach that weight, the court cited "general trial evidence" and the backdrop of "widespread illegal prescribing [and] ignoring of positive drug tests." JA 2335-36. But it relied mostly on the medical expert's **[*6]** testimony. The court believed that it could extrapolate from the sample of twenty-four files "careful[ly]," even though it thought that this was "not a statistically valid number." JA 2336. The court's finding of at least 30,000 kilos led to a base offense level of 36. After adding two other enhancements, Titus's Guidelines range was 292 to 365 months' imprisonment. Varying downward, the court sentenced Titus to 240 months. He now appeals.

The District Court had jurisdiction under *18 U.S.C. § 3231*. We have jurisdiction to review Titus's sentence under *18 U.S.C. § 3742(a)* and his conviction under *28 U.S.C. § 1291*.

II. The Government Failed to Prove Titus's Drug Weight

Titus says there was not enough evidence to prove that he was responsible for at least 30,000 kilos. ***HN1***[↑] We review the District Court's factual finding for clear error. *United States v. Diaz, 951 F.3d 148, 159 (3d Cir. 2020)*. And "[a]t sentencing, the government bears the burden of proving drug quantity by a preponderance of the evidence." *United States v. Douglas, 885 F.3d 145, 150 (3d Cir. 2018)* (internal quotation marks omitted and alterations adopted).

As mentioned, some of Titus's prescriptions were lawful. *See 21 U.S.C. § 841(a)*; *Ruan v. United States, 142 S. Ct. 2370, 2375, 213 L. Ed. 2d 706 (2022)*. So the drug quantity for which he may be criminally punished is the amount of *illegal* prescriptions. Extrapolation is permissible, but "the government must show, and the **[*7]** court must find, that there is an adequate basis in fact for the

extrapolation and that the quantity was determined in a manner consistent with accepted standards of reliability." *United States v. McCutchen, 992 F.2d 22, 25-26 (3d Cir. 1993)*. To meet this standard, "the government would be well advised to introduce more detailed (and less conclusory) evidence" to support its "conclus[ion] that there was a representative sample." *Id. at 26 n.8*.

Yet the evidence did not support a reliable extrapolation. The District Court used the medical expert's review of twenty-four files to infer the illegality of thousands of other prescriptions. In the court's view, that sample size was not "statistically valid." JA 2336. Yet it extrapolated anyway. And without much explanation from the District Court, Titus had no chance to "respond meaningfully, or for that matter, at all." *United States v. Nappi, 243 F.3d 758, 766 (3d Cir. 2001)*.

Plus, the government never showed that the sample was large enough to be reliably representative of the remaining thousands of prescriptions. (Though statistical evidence can help to show that a sample size is large enough to support reliable inferences, we do not hold that such evidence is always necessary.) Nor did it document proper extrapolation methods. And it never explained how extrapolating **[*8]** from this sample could prove the huge drug weight by a preponderance of the evidence. So the sentencing court failed to "ensure that the Government carrie[d] [its] burden [of proof] by presenting reliable and specific evidence." *United States v. Roman, 121 F.3d 136, 141 (3d Cir. 1997)* (internal quotation marks omitted).

If not as a reliable extrapolation, the government asks us to affirm the court's finding as a reasonable estimate. The two terms emphasize different things here: extrapolation is using a representative sample to draw inferences about a *known*, larger whole, while estimation is using evidence of particular drug conduct to infer the *unknown* total drug quantity associated with that conduct. Neither extrapolation nor estimation is a legal term of art. Rather, both are complementary ways for the government to satisfy its burden of proof: that, more likely than not, the defendant possessed, sold, or distributed at least this drug quantity.

Some cases may call for both estimation and extrapolation, but this case does not. We have allowed estimation as a way to compute an overall drug quantity that is unknown. *See, e.g., United States v. Paulino, 996 F.2d 1541, 1545 (3d Cir. 1993)*; *Diaz, 951 F.3d at 154, 159-60*. Here, by contrast, the universe of drugs is known. Thus, estimation was not needed. *Paulino, 996 F.2d at 1545*.

As a last-ditch measure, **[*9]** the government cites other evidence, but none of it suffices. The statistician noted suspicious prescriptions but declined to call them unlawful. And the other trial evidence was too general. Plus, the drug-involved-premises conviction does "not translate readily into a specific drug quantity finding, which is the ultimate issue for sentencing purposes." *United States v. Miele, 989 F.2d 659, 668 (3d Cir. 1993)*.

On remand, the government can try to put on more drug-quantity evidence. But it may not do so unless admitting the evidence is necessary for fairness. *United States v. Rowe, 919 F.3d 752, 762-63 (3d Cir. 2019)*; *United States v. Dickler, 64 F.3d 818, 832 (3d Cir. 1995)*. We leave that decision to the District Court.

III. Titus's Challenges to His Conviction Fail

Though Titus's challenge to his sentence has merit, his many challenges to his conviction do not. *First*, he says the District Court should have admitted his expert testimony that his thinking was "rigid and inflexible." Appellant's Br. 28. And he says excluding that testimony violated his constitutional right to present a defense. ***HN2***[⬆] We review the evidentiary decision for abuse of discretion and the constitutional argument de novo. *United States v.*

Watson, 260 F.3d 301, 306 (3d Cir. 2001); *United States v. Gordon, 290 F.3d 539, 546 (3d Cir. 2002)*.

The court rightly excluded the testimony because it did not "support a legally acceptable theory of lack of mens rea." *United States v. Pohlot, 827 F.2d 889, 906 (3d Cir. 1987)*. And it properly excluded a variant of the **[*10]** testimony that would have "state[d] an opinion about whether [Titus] ... ha[d] a mental state ... that constitutes an element of [*§ 841(a)(1)*]." *Fed. R. Evid. 704(b)*. Because the District Court reasonably applied "the standard rules of evidence," excluding the testimony did "not violate [Titus's] constitutional right." *United States v. Heinrich, 57 F.4th 154, 167 (3d Cir. **2023**)* (internal quotation marks omitted).

Second, Titus argues that the District Court wrongly closed the courtroom during jury selection. ***HN3***[⬆] Because he did not object at trial, he bears the burden of showing "a plain error that affect[ed] [his] substantial rights." *Fed. R. Crim. P. 52(b)*. But his only evidence of a courtroom closure is an ambiguous order to relocate. So he has not carried his burden to show that the District Court erred. *Puckett v. United States, 556 U.S. 129, 135, 129 S. Ct. 1423, 173 L. Ed. 2d 266 (2009)*; *United States v. Olano, 507 U.S. 725, 734, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993)*. And even if he had, justice would not require reversal. *United States v. Williams, 974 F.3d 320, 337, 347-48 (3d Cir. 2020)*.

Third, Titus challenges the jury instructions and the court's rejection of his proposed good-faith instruction. ***HN4***[⬆] We review the instructions' statement of the law de novo and the court's refusal to give a specific instruction for abuse of discretion. *United States v. Friedman, 658 F.3d 342, 352 (3d Cir. 2011)*. Here, the instructions required the jury to find that Titus had knowingly or intentionally distributed controlled substances outside "the usual course of professional practice and not for **[*11]** a legitimate medical purpose." JA 2168. That instruction correctly reflected *Ruan, 142 S. Ct. at 2375*. Because its instruction covered the relevant law, the District Court did not abuse its discretion by denying the proposed good-faith instruction. *United States v. Gross, 961 F.2d 1097, 1102-03 (3d Cir. 1992)*.

Finally, Titus argues that a series of prosecutorial misdeeds violated due process. ***HN5***[⬆] We review the court's rulings on alleged prosecutorial misconduct for abuse of discretion. *United States v. Lee, 612 F.3d 170, 193 (3d Cir. 2010)*. Whether taken individually or together, we see no misconduct here.

Titus says the government improperly (1) elicited a prejudicial statement from one of its witnesses and (2) commented on his silence. But the District Court found that the government had not elicited the statement deliberately. And in context, the prosecution did not "manifestly intend[]" to comment on his silence, nor would the jury "naturally and necessarily" have taken it that way. *United States v. Brennan, 326 F.3d 176, 187-88 (3d Cir. 2003)* (internal quotation marks omitted). Plus, the District Court struck the comments and gave curative instructions, which we presume the jury followed. *See Samia v. United States, 143 S. Ct. 2004, 2013-14, 216 L. Ed. 2d 597 (**2023**)*.

Titus also challenges the government's opening statement and closing argument. But he failed to object at trial and cannot show "egregious error or a manifest miscarriage of justice." *Brennan, 326 F.3d at 182* (internal **[*12]** quotation marks omitted). And the challenged statements fell within the prosecutor's "considerable latitude" to argue the evidence. *United States v. Green, 25 F.3d 206, 210 (3d Cir. 1994)* (internal quotation marks omitted).

Titus lastly protests that the prosecution waited to disclose a failed undercover investigation until the eve of trial. ***HN6***[⬆] This is a *Brady* claim, for which we review the court's legal conclusions de novo and its findings of fact for clear error. *Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)*; *United States v. Moreno, 727 F.3d 255, 262, 59 V.I. 1131 (3d Cir. 2013)*. Titus's

argument is belied by the record: he used the investigation effectively throughout his defense, so it was disclosed in time. *United States v. Higgs, 713 F.2d 39, 44 (3d Cir. 1983)*.

* * * *

The government may not use a small sample size to justify a much larger criminal punishment without explaining how that evidence satisfies its burden of proof. And courts must tread cautiously too. ***HN7***[ ] At a minimum, any extrapolation must be shown to be reliable, and defendants must have a fair chance to challenge its reliability. Because Titus's sentencing fell short, we will vacate his sentence and remand.

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EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America,

v. **Case No. 2:19-cr-202**

Thomas J. Romano, **Judge Michael H. Watson**

Defendant.

OPINION AND ORDER

Dr. Thomas J. Romano ("Defendant") renews his motion for judgment of acquittal, ECF No. 103, and alternatively moves for a new trial or mistrial, ECF No. 104. For the following reasons, the motion for a judgment of acquittal is **DENIED**; the motion for a new trial is **GRANTED**.

I. BACKGROUND

Defendant was charged with thirty-four counts of unlawfully distributing a controlled substance. *See* Superseding Indictment, ECF No. 30. From August 1 through August 12, 2022, the Court presided over Defendant's trial. *See* ECF Nos. 72, 75, 77, 78–83, & 86. The Jury returned a verdict of acquittal as to ten of the counts and a verdict of guilty as to the other counts. *See* ECF No. 87.

While the jury was deliberating, Defendant moved to dismiss the indictment based on newly disclosed impeachment material on one of the Government's witnesses, Dr. Timothy Munzing ("Dr. Munzing"). *See* ECF Nos. 84 & 85. Specifically, during closing argument, the Government sent Defendant

a 2020 Administrative Law Judge ("ALJ") decision (the "ALJ Decision") ruling on a 2019 Drug Enforcement Administration ("DEA") hearing (the "DEA Hearing"). *See* ALJ Decision, ECF No. 115-2; Email, ECF No. 115-5. Dr. Munzing testified at the DEA Hearing, and the ALJ Decision summarized that testimony. *See* ALJ Decision, ECF No. 115-2. That summary strongly suggested that Dr. Munzing's DEA Hearing testimony undermined or contradicted some of the central points he made on the stand in this case. *See id.* at 11–17. A subsequent review of the DEA Hearing Transcript confirmed that, at the DEA Hearing, Dr. Munzing gave contradictory testimony to the testimony he offered in this trial. *See* DEA Hr'g Transcript, ECF No. 110-3. As outlined in Defendant's motion, much of the relevant conflicting testimony is as follows:

Dr. Munzing's DEA Hearing Testimony	**Dr. Munzing's *Romano* Testimony**
Applicability to Pain Specialists. Q. My question was, did you have a chance to look at the CDC guidelines after we talked, and you did. Correct? A. I did not look at the whole guidelines but I looked at where it came from. Q. And you saw when you looked yesterday that the CDC guidelines specifically were designed and for primary care settings, correct? A. Yes.	**Applicability to Pain Specialists.** Q. So let's start with the first part of that sentence. It says, recommendations for primary care clinicians. Are these guidelines provided solely for primary care clinicians? A. No. That was the primary audience. . . * * * Q. So based on your understanding, and your understanding of the use of this guideline, is this guideline

* * * Q. Do you think you knew in 2016 that these [CDC] guidelines only applied to primary care settings and not to pain specialists? A. I think at that point I knew that that specific guideline, you know, applied to primary care. * * * Q. You know that the CDC guidelines apply to primary care physicians, correct? A. Yes. DEA Hr'g Transcript 325:24–326:7, 330:6–12, 339:13–15, ECF No. 110-3.	aimed directly and only at primary care clinicians? A. The focus was to primary care. The guidelines in the document apply to a broader area than just primary care. * * * Q. So [Defendant is] most clearly not a primary care clinician, correct? A. He is not a primary care clinician. Q. Okay. So the reality is that by the very nature of this document, upon which you relied quite heavily, it does not apply to Dr. Romano or people of his specialty. Correct or incorrect? A. Incorrect. Tr. 574:2–6; 579:7–11, ECF No. 125; 845:2–9, ECF No. 126.
Legacy Patients Q. You know, don't you, that the CDC guidelines do not apply to patients who are already on high dose medications above 90? A. They said that they don't specifically apply to people who are on the, the high dosage medicines. Q. In fact you're aware the CDC itself knew that many	**Legacy Patients** Q. And so then just generally speaking, can you walk us through the bands? I'm going to get your reaction, your opinion with respect to the amount of opioids that are being prescribed at each level. So let's start with under 90. Under the CDC guideline calculation, how many of Dr. Romano's patients, how many of the

physicians were misunderstanding and misapplying the CDC guidelines and in fact were saying you should apply CDC guidelines to patients who came to a practice already above 90. You're aware of that.

A. Yes.

Q. And in fact you were one of those people who were misapplying the guidelines in that regard, weren't you?

A. That was one of many bullets is an area of concern that it was higher, putting the patient at higher risk.

Q. My question is, you were misapplying the guidelines yourself, not understanding that those guidelines don't apply to patients who already come into a practice above 90.

A. I was applying that, yeah. . .

DEA Hr'g Transcript 363:11–364:7, ECF No. 110-3

reviewed patients have prescriptions under that level?

A. Of the prescriptions, 13.4 percent.

Q. And is that a lot or a little when it comes to prescribing morphine milligram equivalents?

A. Well, that would tell me that 86.6 percent are over 90, and that's a very large number.

* * *

Q. So four out of every five prescriptions to these patients, opioid prescriptions to these patients, are over double the CDC guideline?

A. That's correct.

* * *

Q. For a number of these patients, were they receiving prescriptions prior to seeing the defendant?

A. Yes.

Q. Were they receiving, in some cases, high doses or dangerous combinations of prescriptions prior to seeing the defendant?

A. Yes.

Q. And were they receiving those prescriptions for an extended period of time, in

	some instances, prior to seeing the defendant? A. Some of them, yes. Tr. 644:12–23; 645:4–7, ECF No. 125; 781:23–782:8, ECF No. 126.
Application to Pain Specialists and Doctors with Legacy Patients Q. And what I said is correct, that in fact the CDC guidelines for two separate reasons do not apply to Dr. Rosenblum in these patients. A. Strictly the CDC guidelines, that's correct. DEA Hr'g Transcript 366:5–8, ECF No. 110-3	

Defendant's motion to dismiss—and the Court's concerns about the alleged nondisclosure of the impeachment evidence—led to additional briefing, an evidentiary hearing, the pending motions, and this Opinion and Order.

II. JUDGMENT OF ACQUITTAL

Defendant renews his motion for judgment of acquittal under Federal Rule of Criminal Procedure 29. ECF No. 103. The Court denies the motion.

A. Standard of Review

A motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29 challenges the sufficiency of the evidence. *See United States v. Donnell*, No. 21-3957, 2022 WL 10219848, at *2 (6th Cir. Oct. 18, 2022). On

such a motion, the "relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). When considering the motion, the Court does not "weigh the evidence presented, consider the credibility of witnesses, or substitute [its] judgment for that of the jury." *United States v. Essex*, No. 21-6137, 2022 WL 17078717, at *3 (6th Cir. Nov. 18, 2022) (quotation marks and citations omitted). The Rule 29 standard is "demanding" and "imposes a very heavy burden on defendants." *United States v. Martin*, No. 22-5172, 2022 WL 17456337, at *2 (6th Cir. Dec. 6, 2022) (cleaned up).

B. Analysis

During the trial, the Court denied Defendant's Rule 29 motion, citing to the following evidence:

> You've stipulated to the defendant writing prescriptions and you got the experts, the various publications, notices, letters, and other evidence from which a rational jury could infer he was knowingly or intentionally prescribing without a legitimate medical purpose outside the usual course of professional practice.

Tr. 1806:19–24, ECF No. 131. As none of the evidence has changed, the Court likewise does not change its view of the Rule 29 motion.

Further, even taking Dr. Munzing's DEA Hearing testimony into account, the Court denies the Rule 29 motion. To whatever extent Defendant may want the Court to consider the DEA Hearing testimony when considering the value of

Dr. Munzing's testimony in this trial, the Court may not make credibility determinations on a Rule 29 motion. *See Essex*, 2022 WL 17078717, at *3.

If, instead, Defendant argues that the Court should effectively strike the entirety of Dr. Munzing's testimony and consider the evidence without the same, the Court disagrees. A prior inconsistent statement is generally not a basis to exclude opinion testimony under the *Daubert* framework. *See In re: Ohio Execution Protocol Litig.*, No. 2:11-CV-1016, 2019 WL 4508920, at *2 (S.D. Ohio Sept. 19, 2019) ("[A]ny inconsistent testimony or statements [the proposed expert] has offered previously are best addressed on cross examination." (internal quotation marks and citations omitted)). Thus, even if the Court had known about the DEA testimony prior to trial, it likely would not have excluded Dr. Munzing's testimony. Instead, the DEA testimony would have merely provided fodder for cross examination.

Finally, to the extent Defendant argues that the Court should disregard Dr. Munzing's testimony as a sanction for the Government's failure to disclose the ALJ Decision, that argument also fails. For the reasons discussed below, the Court concludes that a new trial, not a judgment of acquittal, is the proper remedy for the Government's failure to disclose.

Accordingly, the Rule 29 motion is **DENIED**.

III. NEW TRIAL

Defendant moves for a new trial under Federal Rule of Civil Procedure 33 or, in the alternative, for the Court to declare a mistrial. Because the jury has

returned a verdict, the Court considers only the motion for a new trial. *See United States v. Koubriti*, 435 F. Supp. 2d 666, 673 (E.D. Mich. 2006), *aff'd*, 509 F.3d 746 (6th Cir. 2007) (explaining that a certain doctrine "applies only in cases of motions for mistrial, not to post-verdict motions for new trial."); *Sanders v. Ford*, No. 3:16-CV-02763, 2017 WL 3888492, at *8 (M.D. Tenn. Sept. 6, 2017) ("A mistrial is granted in a case in which the jury is discharged without a verdict; a motion for new trial is made after a judgment has been rendered" (quoting and collecting state law)).

A. Standard of Review

Federal Rule of Criminal Procedure 33 provides that, upon a defendant's timely motion, a court "may vacate any judgment and grant a new trial if the interest of justice so requires." Although Rule 33 does not define the "interests of justice," it is "widely agreed" that the standard "allows the grant of a new trial where substantial legal error has occurred." *United States v. Munoz*, 605 F.3d 359, 373 (6th Cir. 2010) (citing cases).

B. Analysis

The Court views two categories of problems that warrant a new trial: the *Brady/Giglio* violation and prosecutorial misconduct. The Court addresses each, in turn.

1. *Brady/Giglio* Violation

Defendant alleges that the Government's failure to disclose the ALJ Decision and/or the DEA Hearing testimony (collectively, "the Evidence") before

the parties rested violates Defendant's rights under *Brady v. Maryland*, 373 U.S. 83 (1963).

Under *Brady*, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. This disclosure obligation includes evidence "that could be used to impeach the credibility of a witness." *Schledwitz v. United States*, 169 F.3d 1003, 1011 (6th Cir. 1999) (citing *Giglio v. United States*, 405 U.S. 150, 154–55 (1972)). To be a *Brady/Giglio* violation, the at-issue impeachment evidence must be material, and the government must have suppressed it. *United States v. Tavera*, 719 F.3d 705, 710 (6th Cir. 2013).

a. Was the Evidence material?

"Evidence qualifies as material when there is 'any reasonable likelihood' it could have 'affected the judgment of the jury.'" *Wearry v. Cain*, 577 U.S. 385, 392 (2016) (quoting *Giglio*, 405 U.S. at 154). If the allegedly suppressed evidence is "merely cumulative to evidence presented at trial, then it is immaterial under *Brady*." *United States v. Bailey*, No. 19-2280, 2022 WL 2444930, at *11 (6th Cir. July 5, 2022) (internal quotation marks and citations omitted). However, "if the impeachment evidence would seriously undermine the testimony of a key witness on an essential issue . . . the withheld evidence has been found to be material." *Eakes v. Sexton*, 592 F. App'x 422, 428 (6th Cir. 2014) (internal quotation marks and citations omitted).

Here, the Evidence is material. First, it includes prior inconsistent testimony of a key witness for the Government who was involved in "making the case" against Defendant. *See Kyles v. Whitley*, 514 U.S. 419, 445 (1995) (concluding suppressed evidence was material in part because it could be used to impeach a witness who was "essential" to the government's investigation and, "indeed, 'made the case'" against the defendant). Further, the Evidence includes prior inconsistent statements about an essential issue: the applicability of the CDC guidelines to Defendant and his prescribing practices. Although the applicability of the CDC guidelines to Defendants may not have been the only basis for Dr. Munzing's opinions, it certainly was one of the major bases of those opinions. Thus, if Defendant had successfully impeached Dr. Munzing on his understanding of the guidelines, something that would have been significantly more probable with the Evidence, such an impeachment would have substantially undermined all of Dr. Munzing's opinions and, as a result, the Government's case. *See Eakes*, 592 F. App'x at 428.

In addition, the Evidence is not "merely cumulative." True, "if the undisclosed evidence just provides an additional basis on which to challenge a witness whose credibility has already been shown to be questionable or who is subject to extensive attack by reason of other evidence, the undisclosed evidence *may* be cumulative, and hence not material." *Bailey*, 2022 WL 2444930, at *11 (internal quotation marks and citation omitted) (emphasis added). Here, Dr. Munzing was the Government's main witness. His

testimony—and, therefore, his credibility—were essential. Defense counsel cross-examined Dr. Munzing about the CDC guidelines and what the guidelines said or did not say about their applicability to pain management specialists like Defendant or to doctors treating legacy patients. But, due to the nondisclosure, defense counsel could not cross-examine Dr. Munzing with his own prior inconsistent statements about the CDC guidelines' applicability. In other words, defense counsel could not show the jury that Dr. Munzing's *belief* as to the CDC guidelines applicability to doctors like Defendant had apparently changed from the DEA Heaing to this one. Dr. Munzing's own prior statements undermining his testimony would have had significantly more impeachment value. Thus, the Evidence is material.

b. Did the Government suppress the evidence?

The parties agree that DOJ Attorneys Barras and Jason personally did not receive the ALJ Decision until the middle of closing arguments and that they turned it over to the defense almost immediately upon receipt. *See* Hr'g Transcript 68:18–69:5, ECF No. 118. There is also no question that the DOJ and DEA at large—and particularly the Office of the Chief Counsel of the DEA—possessed the ALJ Decision by February 25, 2020. *See* ALJ Decision 162, ECF No. 115-4. Specifically, the ALJ Decision was served on the Office of Chief Counsel of the DEA via the email address dea.registration.litigation@usdoj.gov. *Id.*

The question, then, is who counts as "the Government" for purposes of *Brady/Giglio*.

i. Who is "the Government"?

The Supreme Court has explained that "the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," and that a failure to meet that obligation can be a *Brady* violation if that failure results in the non-disclosure of material favorable evidence. *Kyles*, 514 U.S. at 437–38. Following *Kyles*, the Sixth Circuit has explained that "others acting on the government's behalf" means only those specific individuals involved in the investigation or prosecution. *See Sutton v. Carpenter*, 617 F. App'x 434, 440–41 (6th Cir. 2015); *see also Goff v. Bagley*, 601 F.3d 445, 476 (6th Cir. 2010) ("*Brady* clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess." (internal quotation marks and citation omitted)).

Applying that rule here—the rule that only the *individuals* helping with the prosecution or investigation (that is, not the agencies) may be fairly considered "the Government"— such an individual *did* know of the Evidence in this case: Dr. Munzing. True, witnesses are generally not considered part of the investigation or prosecution team. *See Sutton*, 617 F. App'x at 440–41 (explaining that "evidence possessed only by a cooperating witness" is not attributable to the Government for purposes of a *Brady* analysis (citation omitted)). However, Dr. Munzing was not *just* an expert witness; Dr. Munzing also helped with the

investigation into and prosecution of Defendant because Dr. Munzing reviewed all the files to help the Government decide to and prepare to indict Defendant. Tr. 1935:7–21, ECF No. 131. Dr. Munzing certainly would have known what he said at the DEA hearing and that a transcript was made of the same. Accordingly, because Dr. Munzing knew about the Evidence from the time he testified at the DEA Hearing, "the Government" possessed the Evidence well ahead of the day the Government disclosed it to Defendant.

ii. Was the Evidence suppressed?

Having determined that the Evidence is material and that the Government possessed the same, the Government's nondisclosure of the Evidence was an impermissible suppression. *See, e.g.*, *Kyles*, 514 U.S. at 433 (citing cases). This is true even if, as here, the nondisclosure was a good faith mistake.

The Government disputes this position by arguing that the ALJ Decision was publicly available via an internet search and that, had Defendant exercised due diligence, he would have discovered the decision on his own.[1] This theory is sometimes called the "due diligence rule." *Tavera*, 719 F.3d at 711–12 (6th Cir. 2013). The Sixth Circuit has rejected that rule and so, therefore, does this Court. *See id.* ("In sum, we follow the Supreme Court in *Brady*, *Strickler*, and the recent *Banks* case, and decline to adopt the due diligence rule that the government proposes based on earlier, erroneous cases.").

[1] This argument, of course, invites the question of why the Government did not discover the ALJ Decision involving their primary medical opinion witness.

c. Conclusion

For these reasons, the Evidence is material, and the Government suppressed it. Accordingly, the Court concludes that the failure to disclose the Evidence was a *Brady/Giglio* violation. The "remedy for a *Brady* violation is a new trial." *United States v. Paulus*, No. 20-6017, 2021 WL 3620445, at *4 (6th Cir. Aug. 16, 2021) (citing cases). Thus, a new trial is required here.

2. Prosecutorial Misconduct

In the alternative, even if the Court had concluded that no *Brady/Giglio* violation had occurred, the Court would still order a new trial under the cumulative error doctrine. Under the cumulative error doctrine, when a defendant shows that the "combined effect of individually harmless errors was so prejudicial as to render his trial fundamentally unfair," he must receive a new trial. *United States v. Trujillo*, 376 F.3d 593, 614 (6th Cir. 2004) (citation omitted). Errors that "might not be so prejudicial as to amount to a deprivation of due process when considered alone . . . may cumulatively produce a trial setting that is fundamentally unfair." *United States v. Daniels*, 699 F. App'x 469, 475 (6th Cir. 2017) (internal quotation marks and citations omitted). Here, the Government repeatedly violated Court orders and engaged in improper argument throughout Defendant's trial. These actions of prosecutorial misconduct, both individually and certainly in combination, so prejudiced Defendant that a new trial is necessary.

a. Standard of Review

When considering whether conduct by the Government rises to the level of prosecutorial misconduct or requires a new trial, the Court first determines whether the conduct was improper. *United States v. Trujillo*, 376 F.3d 593, 613 (6th Cir. 2004) (internal quotation marks and citation omitted). Next, the Court considers whether the conduct was "flagrant." *Id.* (internal quotation marks and citation omitted). In determining whether the conduct was flagrant, the Court considers the following factors:

> 1) whether the statements tended to mislead the jury or prejudice the defendant; 2) whether the statements were isolated or among a series of improper statements; 3) whether the statements were deliberately or accidentally before the jury; and 4) the total strength of the evidence against the accused.

United States v. Francis, 170 F.3d 546, 549–50 (6th Cir. 1999) (citing cases). If conduct is both improper and flagrant, a new trial is warranted. *See Trujillo*, 376 F. 3d at 613 (citation omitted). In rare cases, conduct that is improper but not flagrant may also warrant a new trial. *Id.* (citation omitted).

When a defendant fails to object to the Government's conduct at trial, the conduct is subject to a more rigorous review than when a defendant does object. *See United States v. Henry*, 545 F.3d 367, 376 (6th Cir. 2008); *see also United States v. Washam*, No. 1:03CR-43-M, 2007 WL 2253161, at *12 (W.D. Ky. Aug. 1, 2007) (explaining, when considering whether alleged prosecutorial misconduct warrants a new trial that because "defense counsel did not object to the statement, the Court reviews this claim for plain error." (citation omitted)). In the

absence of a defense objection, the Court must not only determine whether the prosecutor's conduct was improper and flagrant but also consider whether an obvious or clear error occurred, whether such error affected the defendant's substantial rights, and whether the "adverse impact seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* at 376–77 (internal quotation marks and citations omitted).

With these standards in mind, the Court first analyzes whether the Government's conduct during different phases of the trial was improper. If it was, the Court next analyzes whether the improper conduct was flagrant.

b. Violation of Court Orders

To begin, the Court addresses the Government's repeated violation of the Court's evidentiary rulings. Relevant to this Order are the Court's rulings on so-called "death evidence," uncharged prescription data, and opinion testimony. Defendant objected to the violations of the Court's Orders. *E.g.*, Tr. 456:8–23, ECF No. 124 (Death Evidence); 287:22–288:9, ECF No. 123 (Uncharged Prescription Data);1168:9–25 (Opinion Testimony), ECF No. 128.

i. Death Evidence

Before trial, the Government moved *in limine* for permission to admit two types of evidence. ECF Nos. 48 & 54.[2] First, the Government sought to admit evidence of the overdose deaths of two of the patients listed in the Superseding

[2] On the Court's order, the Government filed an amended motion in limine. *See* ECF Nos. 52 & 54. For readability, the Court will cite to only the amended motion.

Indictment, J.P. and E.W. ("Death Evidence"). Mot. 1–10, ECF No. 54. The Court denied the request based on Federal Rule of Evidence 403. Order 1–4, ECF No. 69. Specifically, the Court determined there was minimal, if any, probative value to the Death Evidence and that the risk of unfair prejudice was high. *Id.*

This Order was not followed. The Death Evidence as to E.W. came out through E.W.'s widow: during her re-direct examination, she testified in passing that E.W. had "passed away." Tr. 456:9–11, ECF No. 124. Defendant objected. *Id.* 456:12–18. The Court immediately ended questioning of the witness and adjourned for lunch. *Id.* at 456:19–21. When the jury returned after lunch, the Court gave a limiting instruction about the Death Evidence. *Id.* at 469:1–4.

The reference to the Death Evidence was improper because the Court had excluded the evidence. *See Trujillo*, 376 F.3d at 613–14 (explaining, under the rubric for prosecutorial misconduct, that a witness's reference to marijuana was improper because it violated the district court's order). Thus, the statement about the Death Evidence was improper.

Turning to flagrancy, the mention of the Death Evidence was prejudicial for the reasons outlined in the Order on the motion in limine; however, the statement was isolated and an accidental "slip of the tongue" from the witness. Finally, although the Government's evidence was sufficient, *see* Part II, *supra*, it was little more than that. Especially as to Defendant's knowledge or intent, the

Government's evidence was weak, highly circumstantial, and required the jury to make substantial inferences.

On the whole, then, the mention of the Death Evidence was not flagrant, nor was it the type of non-flagrant conduct that could require new trial because the Court immediately admonished the jury not to consider that evidence. As such, a new trial is not warranted solely because of the reference to the Death Evidence. Nonetheless, the improper reference to the Death Evidence adds to the reason why Defendant's trial was fundamentally unfair.

ii. Uncharged Prescription Data

In the motion *in limine*, the Government also sought to admit data on Defendant's prescribing practices across all patients, including patients whose prescriptions were not listed in the Superseding Indictment ("Uncharged Prescription Data"). Mot. 10–17, ECF No. 54. The Court reserved ruling on whether that evidence was admissible until it saw what other evidence was presented at trial. Order 4–8, ECF No. 69. When the Court revisited the issue during trial, it ruled that the Government could present prescription data on only the indicted *prescriptions*. Tr. 293:6–9, ECF No. 123. In other words, the Court excluded prescription data for any patients not included in the indictment, *and* it excluded prescription data for patients in the indictment beyond those prescriptions that formed the basis of an indicted charge.

The Government nonetheless presented the Uncharged Prescription Data. Although the Court expressly ordered that the Government could present

evidence of *only* the indicted prescriptions, the Government proceeded to question one of its witnesses, Paul Short, about all the prescriptions Defendant wrote for the indicted patients. *See, e.g.*, Tr. 301:20–302:1; 314:20–315:13, ECF No. 123; Gov't Ex. 301. Even more troubling, the Government presented documentary evidence of Defendant's prescribing history for patients not listed in the superseding indictment, totaling over 7,000 different prescriptions. *See* Gov't Ex. 301.

The Government's presentation of the Uncharged Prescription Data was improper. Again, the presentation was improper because it was in violation of a Court Order. *See Trujillo*, 376 F.3d at 613–14.

Further, the violation was flagrant. First, the evidence was prejudicial and had a risk of misleading the jury. True, such evidence may be admissible in some circumstances, for example as res gestae evidence. *See* Order 6–8, ECF No. 69 (explaining the res gestae doctrine) (citing cases). However, on the facts of *this* case, unindicted prescriptions too far removed from those in the indictment or written to patients not mentioned in the Superseding Indictment have a low probative value of a defendant's guilt or innocence as to the indicted prescriptions, and the presentation of so many prescriptions unfairly prejudices the defendant by implying that he is a significant supplier of unlawful drugs. *See* Fed. R. Evid. 403. Underscoring that prejudice is that Paul Short testified that substantial percentages of *all* of Defendant's prescriptions for the patients listed in the Superseding Indictment—including those prescriptions not included in the

Superseding Indictment—were well outside the guidelines established by the CDC or other organizations. *See, e.g.*, Tr. 314:20–315:23, ECF No. 123. Taken together, the Uncharged Prescription Data was prejudicial and had a risk of misleading the jury by implying that Defendant engaged in significant, uncharged, criminal activity.

The other factors also weigh in favor of flagrancy. For the second factor, the Government repeatedly brought up large portions of Defendant's prescribing history for patients in the Superseding Indictment.

The conduct was not accidental because the Court gave the Order excluding the evidence minutes before the Government presented the Uncharged Prescription Data. *See id.* 293:6–9. Moreover, any argument that the Government misunderstood the Court's order as limiting the Uncharged Prescription Data to prescriptions written to indicted *patients* (rather than indicted *prescriptions*) is unavailing because the Government presented evidence of both unindicted prescriptions *and* unindicted patients. *See, e.g.*, Gov't Ex. 301.

Finally, the Government's case was weak.

Accordingly, the presentation of the Uncharged Prescription Data was improper and flagrant and, therefore, warrants a new trial.

iii. Opinion Testimony

The Government introduced opinion testimony through several witnesses billed as fact witnesses, including Drs. Le and Belcik. Of these witnesses, Dr. Le testified first; her testimony was "almost entirely expert testimony," even though

the Government represented her as a fact witness. Tr. 222:8–9, ECF No. 123. Following Dr. Le's testimony, the Court ordered that the Government could elicit opinion testimony from Dr. Belcik only as it specifically related to Dr. Belcik's treatment of A.B., a patient listed in the Superseding Indictment. *See* Order, ECF No. 76.

The Government failed to follow this Order and repeatedly elicited opinion testimony from Dr. Belcik regarding other matters. For example, Dr. Belcik offered opinion testimony about, *inter alia*, the comparative effects and risks of different medications, Tr. 1168:9–14, ECF No. 128; "red flags" in the prescribing of opioids, *id.* at 1180:3–18; and at least some of the potential dangers of combining different controlled substances, *id.* at 1213:24–1214:6.

The eliciting of these opinions from Dr. Belcik was improper because they were offered in violation of the Court's Order. *See Trujillo*, 376 F.3d at 613–14.

The Government's eliciting of these opinions was also flagrant. Dr. Belcik's opinion testimony was prejudicial because "jurors are likely to give special weight to expert testimony." *United States v. Deuman*, 892 F. Supp. 2d 881, 885 (W.D. Mich. 2012) (citation omitted). Thus, when the Government calls multiple medical professionals to opine on the "dangers" of Defendant's prescribing practices, there is a substantial risk that the jury will place too much importance on those opinions.[3] Indeed, it was this concern that underlay the

[3] That is not to say, of course, that there is any *per se* rule against presenting opinion testimony from multiple witnesses in one case, or even for multiple witnesses to opine

Court's decision to limit Dr. Belcik's opinion testimony. *See* Order 10–13, ECF No. 76.

The Government repeatedly elicited expert testimony and, therefore, this conduct was not isolated.

The conduct was not accidental because the Court gave multiple Orders on the topic, and the Government persisted in asking these questions.

Finally, as stated above, the overall strength of the case against the Defendant was weak.

Therefore, the Government's repeated use of opinion testimony from purported fact witnesses was improper and flagrant and warrants a new trial.

c. Improper argument

The Government's closing argument was far from a paradigm of proper argument. Throughout closing, the Government made comments that, although not strictly improper, came close to constituting improper vouching, *see* Tr. 1823:9–12; 1828:20–1829:2; 1898:16–21, ECF No. 131; or invoking the "community protection" argument, *see id.* 1827:24–1828:6; 1859:1–7; 1896:11–17.

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on the same topic. In some circumstances, such a line-up of opinion witnesses might be appropriate. Here, however, the risks of unfair prejudice, undue delay, and needlessly presenting cumulative evidence substantially outweighed the probative value of the duplicative testimony. *See* Fed. R. Evid. 403.

However, the Government also repeatedly referenced other bad acts evidence and uncharged, allegedly criminal conduct (the "Statements"). For the following reasons, the Statements were both improper and flagrant.

In the following discussion, the Court is mindful that prosecutors are afforded "wide latitude" during closing arguments. *Henry*, 545 F.3d at 377 (citing cases). Any potentially improper comments must be considered in the "context of the trial as a whole" because "inappropriate comments alone do not justify reversal where the proceedings were otherwise fair." *Id.* at 377 (internal quotation marks and citations omitted). However, prosecuting attorneys have as much a duty "to refrain from improper methods calculated to produce a wrongful conviction" as they do "to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S. 78, 88–89 (1935). When the Government makes improper statements in closing arguments (as opposed to elsewhere in the trial), there is even greater concern because "the jury heard the [improper] comments shortly before deliberations." *Simpson v. Warren*, 475 F. App'x 51, 63 (6th Cir. 2012).

As a general rule, it is improper for a prosecutor to discuss uncharged conduct or "other bad acts" during closing argument. *See, e.g., Cristini v. McKee*, 526 F.3d 888, 899–900 (6th Cir. 2008) ("When a prosecutor dwells on a defendant's bad character to prove that he or she committed the crime charged, we may find prosecutorial misconduct."); *United States v. Foreman*, 199 F. App'x 515, 517 (6th Cir. 2006) (discussing favorably another circuit's rule that "the

prosecutor's engaging in a discussion of uncharged crimes [is] wholly inappropriate" (internal quotation marks and citation omitted)). Said another way, "the government may not rely on prejudicial facts not in evidence when making its closing arguments." *United States v. Roach*, 502 F.3d 425, 434 (6th Cir. 2007) (citation omitted). The risk of prejudice to a defendant from discussions of uncharged conduct is highest when the charged and uncharged conduct are "of the same nature." *United States v. Snyder*, 789 F. App'x 501, 508 (6th Cir. 2019).

Here, the Government made the following statements during closing argument (collectively, "the Statements"):

> You heard from Dr. Munzing that, in fact, these prescriptions are indicative, that is important to keep in mind the number of prescriptions and the quantity of these prescriptions as that's just one indication, one very basic outline of the scope of how many pills and what kind of prescribing this defendant was conducting over the course of, in some instances, five or more years with these patients.

Tr. 1818:8–14, ECF No. 131.

> You've seen this chart. We've explained this chart. Just to give you a quick summary of it. 80 percent of every opioid prescription to this patient group was over double. And 30 percent was over five times the daily amount or six times even. As we discussed, I'm not great at math. But, most importantly, what we know, six times the daily MME suggestion of the CDC that, again, is not a hard-and-fast rule but is a guideline for patient safety. Yet the defendant blew straight past it.

Id. at 1820:19–1821:2.

> And this is the slide specifically what we're talking about when we're talking about the concurrent prescribing or the polypharmacy or multimodal prescribing the defendant was conducting with 11 of the 13 patients that are the subject of the Indictment.

> He not only personally prescribed high daily MME, as much as over 450 at a time to these patients. He then also prescribed benzodiazepines often for extended periods of time. And then to five of these patients he even prescribed the trinity including, as we heard, unfortunately, was the situation with [E.W.] where he had over almost 1,000 daily MME and benzodiazepines and carisoprodol. All the while having all the other issues that we'll discuss in a moment.
>
> One example of this. So as I just discussed in a summary form, we have 11 of the 13 patients who were prescribed opioids and benzos, 5 of the 13 were prescribed trinity, and 7 of those were prescribed at least 450 daily MME at one point with the defendant.

Id. at 1822:9–1823:1.

> Remember, the defendant was concerned with making sure that the patients knew how many drugs they were taking. That's why he gave them Narcan. You heard from Dr. Munzing, methadone is the type of drug that it's really easy to forget or to lose track of the kind of dosing you're on because it's slow acting. You're not going to immediately feel it. And yet [T.M.] was on an exceptionally high daily MME and the trinity throughout the course of prescribing by the defendant.

Id. at 1836:25–1837:7.

> But what you heard is that [D.N.] had almost 1,000 daily MME and that he had it continually over seven to eight or even nine or ten times the CDC guideline of MME consistently over the period of five years. He also had benzodiazepines and he also traveled a fairly significant distance, about the same as [M.M.]. A couple of hours each way every single month each direction just to get the drugs.

Id. at 1837:18–24.

> So [J.T.], Counts 15, and 16. A lot of scripts over two, three PowerPoint slides. We've heard about [J.T.]. I don't need to belabor this.
>
> These are versions of the trinity prescribing that the defendant issued to [J.T.] over the course of many years. These are two of the many examples of that.

Id. at 1840:19–24.

> So now we've heard of [P.T.], counts 17, 18, 19 and 20. [P.T.] we've already spoke about as well. These are examples of the trinity prescriptions from 2016 through 2019 that [P.T.] was on over the course of many years.

Id. at 1841:24–1842:2.

> And yet the defendant, without any consideration, placed [M.R.] back on them and then within two months he put him back on the holy -- or put him back on the trinity of drugs. Again eschewing the danger, again eschewing the risks. Because that's what he decided was the best thing.
>
> Then this is an example of the trinity prescribing that continued over the course of years to [M.R.]. The type of prescribing that, as you heard, [M.R.] cannot get from any other doctor. That's not an accident, ladies and gentlemen.

Id. at 1847:12–21.

> So Count 33 relates to a prescription prior to that date that's exemplifying the type of prescribing he was issuing to [A.B.]. And Count 34 is the opioid and two benzodiazepines that he issued the month after without -- despite what the defendant tells you he completely ignored the red flag of Dr. Belcik's note that was provided to him the month prior.

Id. at 1853:14–19.

> Ladies and gentlemen, as an overview, none of these patients are on nearly what, if anything, what they were previously prescribed because no doctors will do it. Some of the patients as you heard from are happier now. And that while all the patients had legitimate medical issues, none of them had the legitimate medical need for the types, dosages, combinations of drugs the defendant prescribed to them, oftentimes for many years.

Id. at 1853:20–1854:2.

The Statements were certainly improper. Each one expressly or impliedly argues that Defendant was prescribing controlled substances without a legitimate medical purpose outside the usual course of professional practice for "years."

This reference to Defendant's prescribing practices for "years" invites the jury to consider not only the prescriptions in the Superseding Indictment but also the overall course of (uncharged) prescribing practices. It thus uses Defendant's alleged guilt on *uncharged* conduct as an argument to find Defendant guilty for the *charged* conduct. Although many of the comments are vague—*e.g.*, that Defendant "continued" to prescribe certain drugs—they impart a message that the Government views large portions of Defendant's prescribing history as unlawful. Further, this is not a case where a prosecutor's closing argument references to other bad acts are firmly grounded in properly admitted evidence. *United States v. Davidson*, 452 F. App'x 659, 666 (6th Cir. 2011) (explaining that the prosecutor's reference to the defendant's other bad acts "was not improper in that the prosecutor was simply referring to evidence that was properly admitted during trial"). To the contrary, this is the same type of other bad acts evidence the Court expressly excluded earlier in the trial. *See* Part III.2.b.ii, *supra*. Accordingly, the Statements were improper.

In addition, the Statements were flagrant. The Statements were unquestionably prejudicial to Defendant, especially because the uncharged conduct discussed was exactly the same conduct for which Defendant was on trial: unlawfully prescribing controlled substances. *See Snyder*, 789 F. App'x at 508.

Next, the Statements were far from isolated: as demonstrated above, the Government repeatedly argued propensity evidence to the jury throughout its closing.

Third, the statements were deliberate, not accidental. Indeed, because the Court had already excluded this type of other acts evidence, it is "hard to believe that the prosecution was unaware" that referencing "character evidence during closing argument was inappropriate."[4] *United States v. Silvestri*, 968 F.2d 1217 (Table), 968 F.2d 1217, at *6 (6th Cir. 1992) (Keith, J., concurring).

Finally, the overall strength of the evidence against Defendant was weak.

Although Defendant did not object to the Statements, they are nonetheless grounds for a new trial. First, for the reasons explained above, the Statements were an obvious error. Second, the Statements are so prejudicial that they affected Defendant's substantial rights and "seriously affected the fairness, integrity, or public reputation of the judicial proceedings," especially considering the non-overwhelming evidence against Defendant. *Henry*, 545 F.3d at 376–77. As the Sixth Circuit has said, when reviewing for plain error, "even one unfairly prejudicial remark may warrant reversal where the evidence of guilt is not very

[4] Again, the Court notes that there are likely some permissible uses of other acts evidence in these sorts of cases. However, even assuming there was such a permissible use for this evidence in this case, the Government went far beyond that permitted use with its comments in closing. *See Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000) ("[W]hile the evidence as to [the defendant's] character was admissible for certain limited purposes, the prosecutor went far beyond the bounds of permitted conduct when presenting that evidence to the jury.").

strong . . ." *United States v. Acosta*, 924 F.3d 288, 308 (6th Cir. 2019). Here, we have not one, but numerous prejudicial remarks from the Government in the face of properly admitted evidence that was, at best, highly circumstantial and weak as to Defendant's knowledge of wrongdoing.

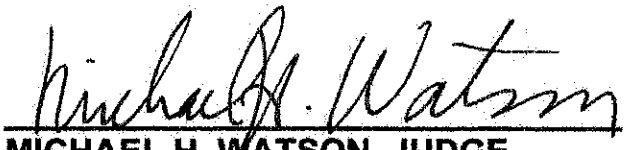
Accordingly, the Statements were improper and flagrant, and they are grounds for a new trial under the plain error standard.

IV. CONCLUSION

In sum, the Court concludes that the Government violated its *Brady/Giglio* obligations, and, therefore, a new trial is required. In the alternative, the Government's conduct throughout trial was both improper and flagrant. This misconduct so permeated the trial that it rendered the trial fundamentally unfair. As such, a new trial is also warranted based on that misconduct.

For these reasons, the motion for a judgment of acquittal is **DENIED**; the motion for a new trial is **GRANTED**. The new trial will be on only the counts on which the jury found Defendant guilty, as Double Jeopardy bars retrial on the acquitted counts. *See Benton v. Maryland*, 395 U.S. 784, 796 (1969) (holding that the Double Jeopardy Clause barred retrial on acquitted count after the jury returned a split guilty/not guilty verdict); *cf. Tibbs v. Florida*, 457 U.S. 31, 41 (1982) ("A verdict of not guilty, whether rendered by the jury or directed by the trial judge, absolutely shields the defendant from retrial.").

IT IS SO ORDERED.



MICHAEL H. WATSON, JUDGE
UNITED STATES DISTRICT COURT