IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA
(APPELLE)

V

CASE NUMBER (#) = 23-6193

DR.HOWARD ADELGLASS
(APPELANT)

APPELLANT PRO SE SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT BRIEF

COMES NOW the defendant, DR. HOWARD ADELGLASS. (hereinafter "Dr.Adelglass" or 'defendant" or "appellant") pro se and in

absentia with this APPELLANT PRO SE SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLANT BRIEF. " the court affords liberal

construction to a pro se litigants pleadings holding them to a more lenient standard than those drafted by an attorney.

(Erickson v Pardus 551 U.S 89, 127, S CT 2197 167 L.ED 2d 1081 (2007); Haines v. Kramer 404 U.S 519,520 92 S. CT. 594 30

L. ED 2d 652 (1972).

HYBRID REPRESANTATION, FOR THE PURPOSE OF A SUPPLEMENTAL BRIEF IS ALLOWED BY THE 2ND CIRCUIT

Although frowned upon, hybrid representation for the purpose of the supplemental brief is not barred by the 2nd circuit. In addition, precedent has been set in other circuits where the appellant forges a coherent, conclusive argument, and the briefing by counsel is highly prejudicial (see below). " when the defendant asks only to participate in the defense, as cabassa did when he applied to the court to deliver his own summation, there is no relinquishment of the right to counsel and no determination to represents one's own self. (people v cabassa 79 N.Y, 2d 722 730, 586 N.Y.S 2d 234, 598 N.E 2d 1 (1992); O'reilly v. new york times co, 692 F. 2d 863, 868 (2d 1982). In addition " although he is represented by counsel on appeal, walker was permitted to file a pro se supplemental appeal, which is a lengthy catalog of factual allegations that, in our view, raises no cognizable objection ... " (united states v walker 243 Fed . appx 621 ; 2007 US app lexis 14323 June 18, 2007). A defendant is " entitled to a degree of representation that is consistent with the tenets of the sixth amendment and that appointed counsels representation falls short of those tenets". (united states v. Rigoberto Soto-arrelo 486 Fed. Appx

735; 2012 U.S App lexis 1423, July 12,2012).

ORGINAL APPELANT BRIEF IS HIGHLY PREJUDICAL

the appellant will address many different prejudices herein, but first we cross the threshold of "highly prejudicial". Appellant was convicted by a jury of conspiracy to distribute and possession with intent to distribute oxycodone (21 USC 846 an d841 (b)) and subsequently sentenced to a term of 150 months. In a nearly 50 page appellant's brief, Ms. Van ness, and Ms. Colson spent merely 12 pages referencing adelglass's points on appeal. The remaining pages were spent rehashing testimony in favor of the government and postulating adelglasses guilt. For example, counsel rehashes testimony from the governments star witness, a "co-defendant" of Dr.Adelglass, Melissa Batista. This prejudice begins to manifest as early as page 2 of the appellant brief where batista says patients "just didn't seem right" and agreed they appeared intoxicated or "out of it" either from pain or from the medication. Dr.Adelglass has been treating pain patients since the late 1980's, far before the "opioid crisis." Next on page 3 counsel for adelglass rehashes testimony, again from Batista, saying that he would "fix" the files in case "the feds" came. This testimony should have been stricken under rule 403 as "highly prejudicial." In testimony Batista said that "some patients would pick up prescriptions without seeing Dr.Adelglass and sometimes the scripts would be mailed to patients, without identifying which patients". (Dr.Adelglass's attorneys rehash this testimony on page 3) A review of adelgalss's medical records would show that these were patients seen regularly on a monthly basis over a period of years and in addition in accordance with "code D" from the New York Medical Board, prescriptions can be mailed to elderly patients with disabilities that would not regularly make it to the office.

Ms. Batista, a young women with very questionable integrity who was knowingly engaged in criminal acts had all of these things to say about Dr. Adelglass after extensive coaching by the government. She was under a 5k1.1 agreement that absolved her from all prosecution. It is evident in her testimony that she feared that if she didn't answer the questions in favor of the government position she herself would go to prison. In fact, all of the governments witnesses sans the "expert witness", who testified to adelglass's prescriptions, office etiquette, and drug use, were all under "non-prosecution" agreements including Batista, John Brown, Toniann Anderson, and Aissa Roman. All of this testimony becomes highly prejudicial under rule 403 because without it, these witnesses themselves would have been facing substantial prison time. If the court were to believe this lampoon version of "Breaking Bad" or "Narcos" as Batista and others told it, Batista herself would be facing prosecution. Batista, who seems concerned with being able to recollect her version of events for the government ,yet was unable to recall nearly every answer to the defense questions (see transcripts), alleges that on multiple occasions she was told to go downstairs and "get the coke" or "marihuana" and did so without any care in the world. The next natural question should have been "did you partake" or "did Dr.adelglass offer cocaine to you" that's what would happen in a normal scenario vs this comedic drama perpetuated by the government. Ms

Van ness and Ms. Colson go on to rehash all of this for 34 of 37 pages in the appellant brief, and avoided issues Dr.Adelglass wanted to preserve for appeal, which he submits in this brief for consideration. Colson and Van ness made only three points: "appellant was denied a fair trial by the admission of prejudicial evidence that implicitly and explicitly associated his oxycodone prescribing history with other practitioners not shown to be comparable to be relevant (point 1); "appellant was denied a fair trial by the admission of irrelevant evidence detailing how he and his wife spent money he earned and demonstrating his commission of uncharged tax crimes" (point 2) : the cumulative error doctrine requires reversal of appellants conviction and a new trial" (point 3).

POINTS NOT INCLUDED IN ORGINAL BRIEF

THE GOVERMENT MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KNOWINGLY OR INTENTIONALLY ACTED IN AN "UNAUTHORIZED MANNER"; THE COURT ERRED IN REFUSING Dr. ADELGLASS THE OPPURTUNITY TO SHOW THROUGH TESTIMONY, HISTORY, AND EVIDENCE THAT HE WAS IN FACT ACTING IN AN AUTHORIZED MANNER

" in 841 prosecution in which the defendant met this burden of production under 885, the government had to prove beyond a reasonable doubt that the defendant knowingly and intentionally acted in an unauthorized manner' " ... But as provided by regulation a prescriptions only authorized when a doctor issues it for a legitimate medical purpose ... acting in the usual course of HIS (emphasis added) professional practice" (28 CFR 1306.04 (a) 2021) The court clearly erred by refusing to allow Dr. Adelglass the ability to show through testimony, history, and evidence that he was acting in an authorized manner. that testimony and evidence would show that Dr.Adelglass was acting in an authorized manner, and acting in the usual course of "his" professional practice. It is irrefutable that Dr. Adelglass has been a distinguished professional pain doctor since the late 1980's. The court did not allow testimony to his resume or qualifications that would distinguish him apart from other doctors across the country, indeed, Dr.Adelglass began his pain practice decades before the opioid crisis, decades before the Sackler family even invented oxytocin. In fact, this very court relied upon Adelglass' testimony as a "pain expert" in the 90's on matters of social security. For that we look to Desiree watson v john J callahan, (1997 U.S dist lexis 19149, 97 civ 1398 SAS). In this case the plaintiff (watson) testifies that Dr.Adelglass saw her for about 15-20 minutes and that adelglass prescribed "trigger point injections on a weekly basis" among other things. Dr.Adelglass prescribed narcotics"to prepare for the painful injections , Plaintiff would take medications such as morphine, demoral,and Percodan" (prescribed by Dr.Adelglass) we specifically turn to watson to demonstrate that Dr.Adelglass has been a pain management doctor for decades (1997 in this particular case) and that "his" professional practice includes: short appointments and the appropriate prescription of pain medication. The court well knows that pain itself is subjective, not objective. We move on to Spain V Bamhart (2003 U.S dist lexis 8882; 87 soc rep service 650. may 29,2003) wherein this court again turned to Dr.Adelglass as a expert, directing the ALJ to "consider any new documents produced by plaintiffs from Dr. Adleglass which

bear upon the assessment of her RFC including his 2002 disability assessment submitted by plaintiff in support of this motion ... ".The government witness to Dr. Adelglass's practice all testified that he was "unorganized" and basically attempted to describe his practice as a drug binging however every single one of these witnesses were very prejudicial, as they were each subject to "non-prosecution agreements" more binding than the standard 5k1. Dr.Adelglass was not allowed to have rebuttal witnesses to his character, or practice, moreover, should the appellate court remand for a new trial, Dr.Adelglass has a pool hundreds of witnesses who have been under his care for decades, In new york this set of witnesses include many of the top stock brokers, bankers, other doctors, and most prominent citizens who will testify to their pain, his treatment, his demeanor, his manner, over the course of decades. Dr.Adelglass is not a "fly by the night doctor", nor is he a doctor that was trained in and worked in another practice changing to pain only when the opioids became lucrative, rather he has been a pain specialist and researcher throughout his entire career, including being part of the New York University chain. In a post Ruan world, a doctor convicted under 841 must be acting "as authorized" The question before us concerns the state of mind that the government must prove to convict doctors of violating the statue. We hold that the statutes "knowingly or intentionally" mens rea applies to authorization. After a defendant shows evidence that he or she was authorized to order a controlled substance, the government must prove beyond a reasonable doubt that defendant knew he was acting in an unauthorized manner, or intended to do so. Dr. Adelglass was in fact acting in an authorized manner 1) he is a licensed medical doctor 2) he has been a pain doctor throughout his entire career going back to the late 80's. 3) he is multimodal, in that he has many of the things a patient needs to streamline and he has practiced this way since the 1990's 4) the usual course of his professional practice,as evidenced by his expert testimony in the 1990's (see above) routinely includes conducting short concise 15 - 20 minute assessments followed by the lawful prescription of narcotic pain relief medication as required. Further, as shown above, any prescriptions written without an "in person" visit were for patients authorized to receive mailed prescriptions under new York's medical code D allowance. Dr. Adelglass acted "as authorized".

THE SUPREME COURT HAS SPECFICALLY LABELED THE LANGUAGE OF 21 CFR 1306.04 (a) "VAUGE AND HIGHLY GENERAL"

In the first post Ruan appellate court opinion addressing a vagueness challenge to the regulatory language described above the 11 th circuit determined that 21 U.S.C 841 is not unconstitutionally vague as applied to physicians. (see United States v Heaton, 59 F. 4th 1226, 11th circ 2023). In doing so the 11th circuit cited a 1978 case that had identified specific examples of "condemned behavior" by physicians that violate section 841(a) including

prescribing an excessive quantity of controlled substances; (2) issuing large numbers of such prescriptions; (3) failing to physically examine patients (4) prescribing controlled drugs at intervals inconsistent with legitimate medical treatment; (5) issuing prescriptions that has no logical relationship to the treatment of the patients alleged condition (United States v Rosen 582 F. 2d 1032, 1035-36 (1978)) Forgetting for a moment that each of these examples is highly subjective and subject to wildly divergent professional opinions, even assuming arguendo, that the examples do represent "condemned behavior", As the supreme court made clear in Johnson V. United states (576 U.S 591, 602 (2015); "our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that falls within the provisions grasp".

Further, in addition to citing the examples numerated above, the eleventh circuit specifically cited the statute's scienter requirement as clarified by Ruan as the second basis for rejecting the appellants vagueness challenge. (United States v. Heaton, Supra) Indeed, the court determined that because the "knowingly and intentionally" mens rea standard applies to the "except as authorized" provision of 21 USC 841 (a), thus requiring the government to prove that a defendant physician subjectively knew that his conduct fell outside the usual course of his professional conduct, the statute could not be deemed "unconstitutionally vague". However, this reasoning is not consistent with the reasoning of the supreme court, but rather a tautology grounded in nether logic or common sense. If a standard is vague, ambiguous, and written in generalities susceptible to more precise definition and open to varying constructions, a mens rea requirement regarding that standard does not magically render the statement any less vague.

Appellant understands that a scienter requirement in a statute often "alleviates vagueness concerns" "narrows the scope of its prohibition, and limits the prosecutorial discretion." (gonzalez v carhart 550 U.S 124, 149, 150 (2007). But that is not always the case. For example, in united states v L. Cohen grocery co, 255 U.S 81, 89, 1921) the Supreme Court struck down as unconstitutionally vague a law that prohibited grocers from charging an "unjust or unreasonable rate" even though the statue had a strong scienter requirement. Similarly, the supreme court deemed void for vagueness a law prohibiting people on sidewalks from "conducting themselves in a manner annoying to persons passing by" even though that statute too had a knowing and intentional mens rea requirement. (coates v cinncinati, 401 U.s 611 (1971)), These decisions refute any suggestion that a scienter requirement will, in every case, automatically immunize a statute or regulation against a void for vagueness challenge, It will not, and it does not do so in regard to 21 CFR 1306.04 (a).

The ethos of this particular point/argument from the appellant is refenced in the prior point regarding how do we define

the usual course of his professional practice. Even with an internist or endocrinologist, practices differ. One doctor may recommend a rigorous diet and exercise program, supplemented by vitamins. Another doctor may recommend oral medication such as metformin and/or jardiance, while another may recommend insulin, both, slow and fast release. All three doctors are probably very competent doctors for diabetes patients, but differ in the usual course of their professional practice. So we must establish what is the usual course of Adelglass's professional practice. Turning to this courts very own records from decades earlier, his professional practice includes brief, concise 15-20 minute appointments, injections manipulations and the authorized prescription of narcotic pain medication.

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT PRESCRIBING OXYCODONE TO A PERSONS ADDICTED TO IT

CONSTITUTES IMPROPER PURPOSE ND THAT PHYSICAN WHO DO SO HAVE COMMITED A FEDERAL CRIME

During voir dire, the trial court instructed the jury as follows:

" a medical doctor, as you will hear, an distribute oxycodone as a pain killer when it is appropriate to do so . but if he knowingly and intentionally distributed it or agrees with others to distribute it for improper purposes to people, for example, who are addicted to it, then he commits a federal crime.

This instruction was wrong as a matter of law. However the defense counsel, in a stunning example of inadequate representation, failed to object. This error was further complicated when the court, in issuing final instruction stated:

"a doctor who acts outside the usual course of professional practice and knowingly prescribes oxycodone for no legitimate medical purpose or for an illegitimate purpose, such as facilitating addiction, may be found guilty of unlawful distribution." (TR 1212)

Under these instructions, all the government had to prove in order to secure a conviction was that any one of the appellants patients was "addicted" to oxycodone. However, this standard is not only legally erroneous, but it also reveals the courts ignorance of the medical distinction between dependency and addiction. Doctors, every day, routinely prescribe opiates for legitimate medical purposes in the usual course of their professional practices to persons who are dependent upon them, The court makes no mention or allows any mention of the difference between "dependent" and "addicted". This is both a miscarriage of judicial practice and an outrage to the entire medical profession world wide. Diabetics are "dependent" on insulin. they need it for their medical condition, They aren't going to rob their families or a liquor store to get their insulin the way someone addicted to a drug would. The courts instruction was wrong as a matter of law and wrong as a matter of professional, scientific medical practice.

Moreover, determining what constitutes a "legitimate purpose" was solely within the province of the jury, and thus the courts instruction usurped the jury's role as "finder of fact" and in the process, violated appellants sixth amendment right to

have a jury "determine all the facts essential to the crime or punishment".

CONCLUSION

In summation the trial court erred in several ways with extreme bias to the defendant/appellant. In addition, to rest on the laurels of a post ruan world of prescribing these medications one must determine who "his" refers to when acting in the usual course of his professional practice. Dr. Adelglass has clearly been an expert pain management doctor since the late 1980's working for and researching for the NYU system for years and as an expert relied upon by this very same court. He is well respected and served as an expert in SSI matters during the 1990's, Dr. Adelglass offers a multimodal practice and has been prescribing pain medication, injections, manipulation, and other pain remedies for decades. His "usual practice' is a through 15-20 minute appointment wherein he can determine the needs of the patient. ALL of the governments key witnesses were persons who themselves were engaged in a criminal enterprise, using Dr. Adelglass as their "patsy". Each was bound to "non-prosecution" agreements and a review of their government coached, "selective memory" testimony supports that fact.

Dr. Adelglass Respectfully moves that this appellate court rule in his favor, and remand to the district court for a new trial allowing character witnesses who have been his patients for years; witnesses who were not subject to "non prosecution" agreements. He also empowers the court to define "his", because within the course of his professional practice, Dr. Adelglass has clearly broken no laws.

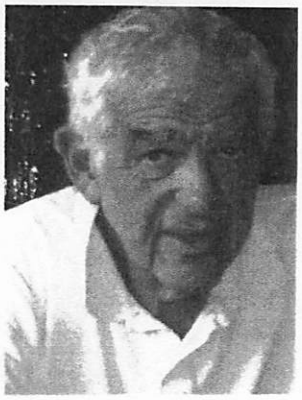
Respectfully submitted this 3/23/24 day of march 2024,

Dr. Howard Adelglass

BILL PERSKY

MY LIFE IS A SITUATION COMEDY

STARRING MARLO THOMAS CARL REINER ORSON WELLES
MY MOTHER DICK VAN DYKE MY FIRST WIFE MARY TYLER MOORE
BILL COSBY STEVE ALLEN GOLDIE HAWN PETER SELLERS JOANNA
MY SECOND WIFE SUSAN ST. JAMES & JANE CURTIN MY FATHER
TIM CONWAY FRED ASTAIRE & GENE KELLY ANDY WILLIAMS
MY SOUTHERN BELLE CARY GRANT THE SMOTHERS BROTHERS
MY THREE DAUGHTERS MY SISTER BUNNY AND MANY MORE!!!



$14.99

If you've watched TV in the last 50 years, you already know Bill Persky. He discovered Goldie Hawn, gave Kelsey Grammer his first television job, created the ground breaking TV series, 'That Girl' and won 5 Emmy Awards. Concurrently, he was raising his three daughters as a single parent. Bill Persky's life has been its own never ending situation comedy. You've loved and laughed at the shows he's written and/or directed: 'The Dick Van Dyke Show', 'Welcome Back Kotter', 'Who's The Boss', 'Kate & Allie', 'Bill Cosby' and 'Sid Caesar' – this book is the sitcom he's lived. It's filled with behind-the-scenes stories of his relationships with everyone from Farrah Fawcett and Mary Tyler Moore to Orson Welles.

It's a revealing inside look at television and life in the chaotic past 50 years. Times weren't always easy, but on screen and off, Bill found that laughter was the best road to survival. Not only will you enjoy reliving the great days of television, but you'll recognize yourself through Bill's honest portrayal of his successes and failures as a writer, a father, a son and a husband – the roles he plays in 'My Life Is A Situation Comedy'.

"Bill Persky's writing is exactly what you would expect from one of the most accomplished comedy writers in show business. BRILLIANT! From his auspicious start producing infomercials to the sitcoms we all love which earned him FIVE EMMYS, Billy takes a hilarious look at success, failure, triumph, divorce, children, marriage, and even death with heart, soul and humor. Billy is such a descriptive storyteller, I feel like I was there. You will too! Instructions for a good time: READ Bill Persky's book. LAUGH and REPEAT."
Kelly Ripa

"Bill Persky is a great American storyteller. This beautifully written memoir is a treasure chest of memories and observations by a writer/director/producer who worked in the golden age of television through the seismic changes of the women's movement, chronicling our lives with honesty and hilarity. All the while, he raised three amazing daughters and encouraged the rest of us to aim high and never settle. When he finds true love with Joanna, you will rejoice. To know Bill is to love him, to read him is to savor every word."
Adriana Trigiani

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FOREWORD

By the Author

Don't get the wrong idea. I have had my fair share of *situations* involving loss, pain, failure, disappointment, illness, and disaster. The *comedy* comes from watching myself, in disbelief, as I attempt to make things right and maintain a semblance of dignity while constantly slipping on the banana peels of life.

Many of my slips ended up as episodes of *The Dick Van Dyke Show, That Girl, Kate and Allie,* and over 300 other TV shows and films. What follows is my personal Situation Comedy, which played out while you were watching them.

The stories that follow are all true, but some of the names have been changed to protect the privacy of those who might not wish to be identified. Others are too close, important or famous to be called anything but who they are.

ALTERNATIVE MEDICINE RUN AMOK

With one click of the mouse, I went from being a respected 79-year-old tenant of my co-op to receiving disapproving looks in the elevator and hearing stifled laughter as I passed. The cause? A deluge of porn and sex toy catalogues started to arrive in my mail from Foxy.com.

It started innocently with the onset of neuropathy, a mild but annoying numbness caused by lack of stimulation to the nerves—in my case, those of the right foot. There is little research and no known cure, which is why I turned to my personal miracle man, Dr. Howard Abeloff, a physiatrist (as little known a word as neuropathy) but a lifesaver for everything from bad backs and insomnia to hair loss.

Abeloff came into my life after I was scheduled for major back surgery. He was recommended by a trainer at my gym whom he had healed after an accident that had left her unable to walk. As I watched her leaping joyously in her aerobics class, I thought of Estelle Reiner's famous line in *When Harry Met Sally* and decided, "I'll have what she's having."

My first appointment with Abeloff almost ended when I opened the door to his office which was reminiscent of the bar scene in *Star Wars*, filled with a bizarre assortment of patients reading old magazines, including an ancient copy of *Look* with Grace Kelly on the cover. As I turned to leave, his associate, an

Indian woman in a sari, said, "I know it looks weird, but he will help you." And he did.

In the past three years, he has saved me, and friends, from countless operations and untold pain through methods you are more likely to find in books on witchcraft than modern medicine.

His cure for the neuropathy expanded even his boundaries when he prescribed a Trojan mini-vibrator to be inserted in…I held my breath for what might come next, and exhaled with relief when he said my sock, a location I'm sure the Trojan company had never considered. Abeloff had discovered that vibrating recharged the nerves and, in time, corrected the condition.

I nervously entered Duane Reade looking for a male cashier and felt reduced to my teenage self when I had bought my first condom, the one guys carried in wallets for so long it created an embossed circle in the leather. Walter, without a trace of judgment, directed me to the personal hygiene section where I found the mini in a finger-shaped device along with a selection of circles, rings, loops, and bullets. On checking out, I told Wilma, the only cashier available, that my doctor had prescribed it for my neuropathy, which judging from her expression, she thought was a venereal disease or a part of the male anatomy that shows up after 70.

I immediately slipped the mini into my sock and it actually helped as I chalked up another miracle to Abeloff. The only problem was that the batteries lasted just 50 minutes, probably ample time for its primary purpose but not for mine, which required continuous vibration. Obviously, I needed a rechargeable version, and turned to Google, which opened a new world of vibratory possibilities in amazing shapes, sizes, colors, materials, promises, and testimonials available from hundreds of colorful sites: pocket-rocket, smittenkitten, discreet-romance, lovehoney, Igor the Octopuss (the Godzilla of vibrators), Fantasiaparty,

Dearlady, Adam&Eve, Too-Timid, Goodvibes, Rapidrabbit, and Dr. Approved where I was relieved not to find any reference to Abeloff.

An exhaustive search from site to site left me with a feeling of sadness for all the lonely and unfulfilled people there are out there, but a new respect for the creativity and depravity of the human mind. After trying to imagine "where and how" and "what went into what," I was about to give up when I found it: The Lelo Egg, a harmless looking but effective item "available in a soft-to-the-touch finish with a floral design in pink, black, or white, with discreet carrying case and AC/DC re-charger. Due to the intimate nature of the product, there is a no return policy," this last of which I found reassuring.

I searched for a phone number because the last thing I wanted was to order online and have my information circulated in such a bizarre world, but was unable to find one or an address other than Foxy.com. After much soul-searching, I finally filled in all the required forms, made the fatal mouse click, and within minutes received dozens of lascivious emails with offers for things I didn't know were possible for the human body to do.

Finally, The Lelo Egg arrived and is doing wonders for my neuropathy, but the daily assortment of the catalogues, not in plain brown wrappers but in all their perverted, naked glory, has destroyed my reputation. I'm just hoping someone in my building will read this disclaimer and spread the word.

(1) (3) RECEIVED (3/20/24) (4pm) CKT CT. DECISION

FILED: March 15, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4478
(4:17-cr-00005-FL-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SANJAY KUMAR

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed in part and vacated in part. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

CKT CT. DECISION

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-4478

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

SANJAY KUMAR,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Greenville. Louise W. Flanagan, District Judge. (4:17-cr-00005-FL-1)

Submitted: February 27, 2024

Decided: March 15, 2024

Before WILKINSON, WYNN, and THACKER, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

Sanjay Kumar, Appellant Pro Se. David A. Bragdon, Assistant United States Attorney, Lucy Partain Brown, Assistant United States Attorney, Andrew Kasper, Assistant United States Attorney, Adam Frederick Hulbig, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

Kumar sought dismissal under the Fifth and Sixth Amendments in the district court, he did not move for dismissal under the Speedy Trial Act. "Failure of the defendant to move for dismissal prior to trial . . . shall constitute a waiver of the right to dismissal" under the Speedy Trial Act. 18 U.S.C. § 3162(a)(2); *see also United States v. Mosteller*, 741 F.3d 503, 507-08 (4th Cir. 2014). Accordingly, we reject this challenge.

Next, in his reply brief, Kumar relies on the Supreme Court's decision in *Ruan v. United States*, 597 U.S. 450 (2022), to argue that the district court's jury instructions were erroneous. The Government argues that we should not reach this challenge because it was not raised in Kumar's informal opening brief and that, in any event, Kumar invited any error. We disagree. Although we seldom consider arguments raised for the first time in a reply brief, one exception is for an intervening change in the law between the filing of the initial brief and the reply brief. *United States v. Caldwell*, 7 F.4th 191, 212 n.16 (4th Cir. 2021). Because *Ruan* issued after Kumar filed his opening brief, he has properly raised this claim.

We generally "review a district court's rulings on jury instructions for abuse of discretion." *United States v. Ravenell*, 66 F.4th 472, 480 (4th Cir. 2023), *petition for cert. filed*, No. 23-368 (U.S. Dec. 13, 2023). A jury instruction is not erroneous if, "in light of the whole record, [it] adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *United States v. Miltier*, 882 F.3d 81, 89 (4th Cir. 2018) (internal quotation marks omitted). In reviewing a challenge to jury instructions, "we do not view a single instruction in isolation," but "consider whether taken as a whole and in the context of the entire charge,

the instructions accurately and fairly state the controlling law." *United States v. Blankenship*, 846 F.3d 663, 670-71 (4th Cir. 2017) (internal quotation marks omitted).

Under the invited error doctrine, "a court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request." *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994) (internal quotation marks omitted). We have applied the doctrine in the context of jury instructions. *Id.* at 76. While we have recognized "a potential exception to the invited error doctrine when it is necessary to preserve the integrity of the judicial process or to prevent a miscarriage of justice," this exception does not apply to circumstances in which a defendant asks a court to take a step in a case based on sound trial strategy. *United States v. Lespier*, 725 F.3d 437, 450 (4th Cir. 2013) (internal quotation marks omitted).

The Government is correct that Kumar requested some of the jury instructions that he now challenges on appeal. But we find the Eleventh Circuit's analysis in an analogous case persuasive, and we will nevertheless consider Kumar's challenge on the merits because his requested instructions "relied on settled law that changed while the case was on appeal." *United States v. Duldulao*, 87 F.4th 1239, 1255 (11th Cir. 2023) (internal quotation marks omitted).

Alternatively, the Government asks that we employ plain-error review. Our review of the record reflects that Kumar objected to some, but not all, of the jury instructions. However, even under the more stringent plain-error standard, we conclude that Kumar is entitled to relief.

To succeed on plain-error review, Kumar "has the burden to show that: (1) there was error; (2) the error was plain; and (3) the error affected his substantial rights." *United States v. Cowden*, 882 F.3d 464, 475 (4th Cir. 2018). If Kumar makes this showing, "we may exercise our discretion to correct the error only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (cleaned up). The Government concedes that some instructions were incorrect, and we agree with that concession. And in light of *Ruan* and our subsequent decision in *United States v. Smithers*, 92 F.4th 237 (4th Cir. 2024), the error is plain. *See United States v. Ramirez-Castillo*, 748 F.3d 205, 215 (4th Cir. 2014) (recognizing error is plain when it is "clear or obvious at the time of appellate consideration" (cleaned up)).

To establish the error affected his substantial rights, Kumar has the "burden of showing that the error actually affected the outcome of the proceedings." *United States v. Nicolaou*, 180 F.3d 565, 570 (4th Cir. 1999) (internal quotation marks omitted). In other words, Kumar must "show that the proper instruction, on the same evidence, would have resulted in acquittal, or at the very least a hung jury." *Id.*

It is illegal to distribute or dispense a controlled substance "[e]xcept as authorized" by law. 21 U.S.C. § 841(a)(1). In *Ruan*, the Supreme Court held that § 841's "knowingly and intentionally" mens rea applies to the "[e]xcept as authorized" clause of the statute. 597 U.S. at 454, 468. Thus, when a defendant shows that he is authorized to issue prescriptions for controlled substances, "the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Id.* This is a subjective, rather than objective, inquiry. *United States v. Kim*, 71 F.4th 155, 160,

the defendant "only sometimes crossed the criminal line drawn by § 841," and the erroneous instructions "allowed [the jury] to draw that line short." *Id.* Thus, the "instructional error undermine[d] [the Eleventh Circuit's] confidence in the outcome of the trial." *Id.* (internal quotation marks omitted).

Here, the Government introduced evidence that could have sustained a conspiracy conviction, but the jury acquitted Kumar of that charge. Then, on the substantive counts, the jury rejected some—but not all—of the Government's evidence and convicted Kumar only of the § 841(a)(1) offenses related to two of six patients. In addition, the jury wrote several notes to the district court seeking clarification on the legal standards and indicating it was deadlocked. This demonstrates that it viewed this case as remarkably close. We therefore conclude that "the proper instruction, on the same evidence, would have . . . at the very least [resulted in] a hung jury." *Nicolaou*, 180 F.3d at 570.

As for the fourth prong of plain-error review, we again agree with the Eleventh Circuit's analysis in *Duldulao*. The district court used language from our prior cases in crafting the instructions. We thus bear responsibility for the error. *See Duldulao*, 87 F.4th at 1262; *see also, e.g.*, *United States v. McIver*, 470 F.3d 550, 558-60 (4th Cir. 2006); *United States v. Hurwitz*, 459 F.3d 463, 468-69 (4th Cir. 2006). And the Supreme Court in *Ruan* "emphasized that scienter requirements are fundamental to our criminal law as the element that generally separates merely negligent conduct from conduct worthy of criminal punishment." *Duldulao*, 87 F.4th at 1262. Accordingly, we exercise our discretion to correct the plain error and vacate Kumar's § 841(a)(1) convictions.

Because the district court's instructions referenced § 841(a)(1) as a predicate unlawful activity, we also conclude that the instructional error casts doubt on Kumar's money laundering convictions under § 1956(a)(1)(B)(i), (ii). *See United States v. Kahn*, 58 F.4th 1308, 1322 (10th Cir. 2023) (vacating money laundering convictions when those convictions related to the § 841(a)(1) convictions the court vacated in light of *Ruan*). But we find no such prejudicial effect on Kumar's tax evasion convictions. The relevant instructions for those instructions did not reference § 841(a)(1), and Kumar admitted that he stopped paying his taxes.

Therefore, we affirm Kumar's convictions on Counts 43, 44, and 45, vacate his remaining convictions, and remand for further proceedings. In light of this disposition, we decline to consider Kumar's other challenges to the district court proceedings.* *See Smithers*, 92 F.4th at 240. We deny Kumar's pending motions. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

* While Kumar raises claims of judicial bias and prosecutorial misconduct, our review of the record does not reveal any bias or misconduct.

2019 SENATOR CASSIDY'S LTR. TO DEA ADMINISTRATOR RE DEA'S MISINTERPRETED / MISAPPLIED POLICIES APROPOS TREATMENT OF CH. PAIN WITH NARCOTICS

1-3

BILL CASSIDY, M.D.
LOUISIANA

WASHINGTON, DC OFFICE:
SUITE SH-520
HART SENATE OFFICE BUILDING
WASHINGTON, DC 20510
(202) 224-5824

United States Senate

COMMITTEES:
FINANCE
HEALTH, EDUCATION, LABOR, AND PENSIONS
ENERGY AND NATURAL RESOURCES
VETERANS' AFFAIRS
JOINT ECONOMIC COMMITTEE

August 28, 2019

Uttam Dhillon
Acting Administrator
United States Drug Enforcement Administration
U.S. Department of Justice
8701 Morrissette Drive
Springfield, VA 22152

Dear Acting Administrator Dhillon,

Over the last 20 years, the scourge of the opioid crisis has escalated. Opioid deaths have increased dramatically, accounting for over 47,000 deaths in the United States in 2017.[1] The total economic burden of prescription opioid misuse alone in the United States is $78.5 billion a year, including the costs of healthcare, lost productivity, addiction treatment, and criminal justice involvement.[2]

I commend the Drug Enforcement Administration (DEA) Diversion Control division in actively engaging the 1.6 million DEA registrants involved in all aspects of the opioid crisis including the manufacturing, wholesale production, prescribing, and dispensing of Controlled Prescription Drugs (CPDs), addiction and overdose deaths. The DEA's Diversion Control efforts are geared towards preventing the non-medical abuse of CPDs by providing education and training within the pharmaceutical and medical community and to pursue those practitioners who are operating outside of reasonable medical standards.[3] NO, FOCUSED ON IDENTIFYING DOCS WITH ASSETS THAT CAN FORFEITED WITH ALGORITHM

As a physician, I know that when the DEA speaks, doctors listen. On April 24, 2019, the Centers for Disease Control and Prevention (CDC) emphasized in a commentary published in the *New England Journal of Medicine* that the 2016 Guidelines for Prescribing Opioids for Chronic Pain have been misinterpreted or misapplied, presenting a challenge to patients with chronic pain and those who treat them.[4,5] There are anecdotes of patients on stable doses of opioids for years,

NEJM 2019 STATES THAT 2016 OPIOID Rx GUIDELINES MISAPPLIED (CDC) GUIDELINES AS PHYSICIANS TAPER OR STOP OPIOIDS IN GENUINE PAIN PATIENTS FORCING THEM TO TURN TO ILLEGAL NARCOTICS

[1] National Institutes of Health, National Institute on Drug Abuse. Opioid Overdose Crisis. https://www.drugabuse.gov/drugs-abuse/opioids/opioid-overdose-crisis
[2] Florence CS, Zhou C, Luo F, Xu L. The Economic Burden of Prescription Opioid Overdose, Abuse, and Dependence in the United States, 2013. *Med Care*. 2016;54(10):901-906. doi:10.1097/MLR.0000000000000625.
[3] U.S. Drug Enforcement Administration. 360 Strategy – Diversion Control. https://admin.dea.gov/360-strategy-diversion-control
[4] CDC Newsroom. CDC Advises Against Misapplication of the Guideline for Prescribing Opioids for Chronic Pain. https://www.cdc.gov/media/releases/2019/s0424-advises-misapplication-guideline-prescribing-opioids.html
[5] National Academies of Sciences, Engineering, and Medicine. 2017. Pain management and the opioid epidemic: Balancing societal and individual benefits and risks of prescription opioid use. Washington, DC: The National Academies Press. doi: https://doi.org/10.17226/24781.

6500 Jackson Street
Suite 116A
Alexandria, LA 71301
(318) 448-7176

5555 Hilton Avenue
Suite 100
Baton Rouge, LA 70808
(225) 929-7711

101 La Rue France
Suite 505
Lafayette, LA 70508
(337) 261-1400

1 Lakeshore Drive
Suite 1155
Lake Charles, LA 70629
(337) 261-1400

3421 N. Causeway Boulevard
Suite 204
Metairie, LA 70002
(504) 838-0130

1651 Louisville Avenue
Suite 123
Monroe, LA 70201
(318) 324-2111

6425 Youree Drive
Suite 415
Shreveport, LA 71105
(318) 798-3215

being cut off from prescriptions (forced tapered or abandoned) due to physician misinterpretation of the CDC guidelines. Unfortunately, these reports share that some of these patients have thereby turned to illegal opioids. For many Americans who suffer from chronic pain, these misapplications lead to them not receiving pain treatments that might otherwise be a part of a healthy pain management regimen that result in measurable improvements to life functions, including a return to work, quality of life, and improvement in activities of daily living. Providing the medical community with proper education and training is essential to providing adequate care to patients who suffer from acute and chronic pain.

2019, CARA REPORT BY HHS, DOD, VA & ONDCP ON BEST PRACTICES FOR OPIOID RX DISTINGUISHES GENUINE PAIN PATIENTS ON MAINTAINED DOSES OF STABLE NARCOTICS UNDER PHYSICIAN CARE VS. THOSE WITH DRUG SEEKING BEHAVIOR

On May 9, 2019, the U.S. Department of Health and Human Services (HHS), in conjunction with the U.S. Department of Defense (DOD), the U.S. Department of Veterans Affairs (VA), and the Office of National Drug Control Policy (ONDCP), released its Comprehensive Addiction and Recovery Act of 2016 (CARA) legislated final report, *Pain Management Best Practices Inter-Agency Task Force Report: Updates, Gaps, Inconsistencies, and Recommendations.*[6] This report, made by 29 members with backgrounds in pain, addiction, mental health, state medical boards, primary care physicians, nurses, pharmacists, veterans, and professional medical organizations, was released for key stakeholders to assist the public at large, private stakeholders and government agencies in their attempts to improve the quality of pain care given to patients in the context of the current opioid crisis, as well as aiding in the proper interpretation of CDC guidelines.

Among other things including education, risk assessment, non-opioid treatments, the Best Practices Final Report emphasizes a key distinction between patients – there is the patient with chronic pain, on stable doses of opioids, in which the dose does not escalate (and does not have any indications of opioid misuse, has met the requirements of their treatment agreement, and are generally compliant patients with clear benefits of opioid treatment) while the patient remains under a physician's care.

LONG TERM ←

This is in contrast to another group of patients (with opioid use disorder, at risk for overdose and death) who exhibit drug seeking behavior such as escalating doses, doctor shopping, purchasing illegal drugs, and resorting to criminal activity to support their lifestyle who would clearly require a different approach to treatment than the previously mentioned group.

✓

Anecdotally, patients whom I know to have been on long term stable doses of pain medicine are complaining of no longer being able to obtain proper pain treatment and their doctors pointing to pressure from the DEA and/or citing the CDC guidelines. I have included an example of such a patient letter as an attachment to this letter. I am concerned about the unintended consequences of clinically appropriate patients no longer receiving or having access to the appropriate treatment due to ongoing misunderstandings between the physician and regulatory agencies such as the DEA.

✓→

To this end, I would appreciate your response to the following questions:

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[6] U.S. Department of Health and Human Services (2019, May). Pain Management Best Practices Inter-Agency Task Force Report: Updates, Gaps, Inconsistencies, and Recommendations. Retrieved from U. S. Department of Health and Human Services website: https://www.hhs.gov/ash/advisory-committees/pain/reports/index.html

"RED FLAG" LIST TO IDENTIFY "OFFENDING" DOCS

3-3 → NONE TO THE DOCS JUST PUT THEM UNDER SURVEILLANCE

1. What instructions does the DEA give to pharmacists and physicians as they treat chronic pain patients?

DEA CANNOT COMPREHEND HOW THEY ARE NOT TRAINED MED PROFESSIONALS

2. Do these instructions differentiate between the two types of patients described above? Those on stable, chronic doses and those exhibiting drug seeking behavior?

3. If a patient has been on a chronic, stable dose of opioids, is there any reason that a doctor would feel pressured by the DEA to alter their practice of medicine by changing or force tapering the patients from opioid medications? → YES. IF NOT FACE PRISON

4. How has the DEA incorporated the recommendations laid out in the HHS Pain Management Best Practices Inter-Agency Task Force Report in its interactions with pharmacists, physicians, and other CDP registrants?

THEY HAVE NOT. NEITHER ARE THEY REQUIRED

5. What other instructions or guidelines does DEA use in its efforts to properly educate and train pharmacists, physicians, and other CDP registrants? → NONE. THEY JUST TERRORIZE & SEIZE ASSETS

6. What, if any, empirical trends have you seen from any production quota adjustments made by the DEA in its effort to reduce the amount of drugs available for illicit diversion and abuse while ensuring that patients will continue to have access to proper medicine in the medically supervised arena?

NONE. THAT IS NOT A PRIORITY ON THEIR ~~AGENDA~~ / THEIR FAKE WAR ON DRUGS"

Tools like the *Pain Management Best Practices Inter-Agency Task Force Report* should be seen as a resource to better equip the DEA and other key stakeholders while seeking to combat the opioid crisis. Empowering the registrant community with instruction in best practices will serve those in need of medication who are combating pain in the acute and chronic period. This should prove to be a help as we all seek improvement of the patient's well-being and overall improved function. I look forward to your response. → THERE WILL BE NONE!

Sincerely,

Bill Cassidy, M.D.

Bill Cassidy, M.D.
United States Senate

Audrey J. Griffin
100 West 144st Street #62 N.Y. N.Y. 10030
212 283 1526 & Joyrose1917@aol.com

To Whom It May Concern,

I am amazed at what has happened to Dr. Howard Adelglass' (Dr. HA) practice. I have been a patient of Dr. HA for over the past 20+ years.

I met Dr. HA when I was hospitalized for pain management at the Hospital for Joint Diseases, NYC (HJD). Originally, I was going to be hospitalized in a local psychiatric inpatient unit for suicidal ideations. I am grateful to God that my admitting psychiatrist recognized that I needed pain management instead of psychiatric care. Therefore, he sought for an inpatient pain management program. The one he found was at the HJD.

The goal of this inpatient program was to expose us to other forms of pain management treatments other than medication, which did not involve any medication, e.g., occupational and physical therapy, meditation, cognitive therapy, and trigger point treatment. Dr. HA was the doctor who introduced us to trigger point treatment.

I appreciated the effects of this modality during the pain management program. Therefore, as I continued to have physical therapy as an outpatient, I also added this modality, trigger point treatments to help me cope with chronic pain.

I would like to share with the readers why I needed pain management; why my pain was pushing me to end my life

I was born with both legs and my left hand deformed, mild case of scoliosis, and mild case of spinal bifida. In order to be an independent functional person I ended up needing an offloading boot on my left leg and foot. My right leg underwent an amputation necessitating usage of a

Audrey J. Griffin
100 West 141st Street #62 N.Y. N.Y. 10030
212 283 1526 & Joyrose1917@aol.com

full-length prosthesis. My left hand had webbed fingers; surgery was performed to allow me to have four digits vs three.

At the age of 12 was the first time I experienced sciatic pain; which lasted for 45 years. In 2015, my sciatic nerve was decompressed but the results would be my femoral nerve being inflamed for 5 years.

As I aged my orthopedic conditions and the unnatural use of my body caused the development of osteoarthritic pain. To manage my pain, my orthopedist provided me with various muscle relaxers, opiates, and anti-inflammatories, but not Dr. AH. After every treatment he would ask me if I had pain medication and my response, was, always, "Yes." The treatment would always end with him providing me with ice, to ice the treatment site. The trigger point treatment site was painful for a few days. He never provided any pharmacological treatment to manage my pain. I would always see Dr. HA if my other pain modalities were not working. I saw him for a series of treatments maybe every 2-3 years.

While waiting to see him in his waiting room, I never saw any questionable behavior. I never saw patients who resemble patients who were using their medication as if their medication were recreational drugs, e.g., drooling, inability to stay awake, unsteady gait etc. Due to my professional back ground, as a psychiatric occupational therapist, who in 1984, worked with drug addicts who had acquired AIDS. The hospital I was employed at was located in the epicenter of the outbreak in the Bronx, NY.

What I did see were patients who were actors, lawyers, mothers, teenagers with sport injuries etc. Often, he engaged his patients in research projects, always with the goal to help his patients control their

Audrey J. Griffin
100 West 116th Street #62 N.Y. N.Y. 10030
212 283 1526 & Jogriff1977@aol.com

pain. The last time I saw him, he provided me with a trigger point treatment at a reduced cost. He told me he no longer took Medicare cases. He did not explain why but now I know. I was unable to pay his prices so I could no longer see him.

I am honored that Dr. AH asked me to write a testimonial. The government should be ashamed of how they are treating such a competent physician. I have met some doctors and healthcare professionals over my 62 years of life, who have mismanaged their privilege to prescribe pain medication. The competent doctors are not the only victims of this "witch hunt"; we the patients are suffering as well. It is very difficult to find doctors to manage pain medication. Beside all of the issues that come along with chronic pain, we now have to go here and there seeking help with our painful bodies to only hear, "I am sorry; we do not provide prescriptions for pain medication". There was a time in my life that I was saying to myself, "If this is going to be my life… I can't live like this. I am better off dead."

I heard someone say, "No one wants to die, they just want the pain to stop."

The chronic pain person needs competent healthcare professionals who will help us, "Stop the Pain". If they longer exist, more and more chronic pain individuals are going to "STOP their PAIN!" indefinitely; and that would be a shame; especially since there are competent healthcare professionals, like Dr. HA.

Sincerely,

September 15, 2022

---------- Forwarded message ---------
From: **Troy Gladstone** <tgladst1@gmail.com>
Date: Thu, Dec 3, 2020 at 5:35 PM
Subject: My letter
To: Jodi Gladstone <jodi.gladstone@gmail.com>

Dr. Adelglass is a moral ethical pain management physician. The allegations written in the New York Post could not be further from the truth. He has always exercised utmost appropriate care given my injuries.

My monthly in-person appointments were extremely thorough. He adjusted my body, asked me questions about the status of my pain levels, and examined the areas that hurt me the most. He regularly had me get x-rays and MRI images where he would evaluate them on his own and with me as well. He was always excellent at explaining the nature of my injuries and the options I could take to get better.

We worked together to develop a plan. I was prescribed an opiate medication which I took as prescribed that helped along with being given a pilferer of different exercises to try out that he thought could potentially help me as well. Dr. Adelglass strongly encouraged me to get injections – an option I was definitely considering but not ready to take action on for personal reasons.

I NEVER abused my medication. I took regular urine screens and Dr. Adelglass would even have me meet with a psychiatrist specialized to ensure my opiate medication was being taken properly and was effective.

Dr. Adelglass ran a tight shift when it came to following medical protocol. He did not accept any new patients and would kick out existing patients if they broke any of the policies outlined in our patient contracts. He had a zero-tolerance policy. I myself first hand witnessed him kick out patients that would break anything in that contract, and also turn them away if they ever tried to return.

As a patient of Dr. Adelglass for almost 5-years now, I have waited in his office for hours on and out and know for a fact that there was no greed, deceit or unethical medical care practiced. Dr. Howard Adelglass is innocent and has ALWAYS done right by his patients. By shutting down an innocent pain management doctor's 'operation' as it was referred to in the New York Post will leave his innocent patients (including myself) in chronic torturous pain with nowhere to turn.