IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. **19-10676-JJ**

United States of America,

Appellee,

- versus -

Arman Abovyan,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

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United States v. Arman Abovyan, Case No. 19-10676-JJ

Certificate of Interested Persons

In compliance with Fed. R. App. P. 26.1 and 11th Circuit Rules 26.1 and 28-1, the undersigned certifies that the list set forth below is a complete list of the persons and entities previously included in the CIP included in the appellant's initial brief, and also includes additional persons and entities (designated in bold face) who have an interest in the outcome of this case and were omitted from the appellant's CIP.

1199SEIU National Benefit Fund

Aetna (AET)

Ansara, Richard

AmeriHealth

Arman, Aboyvan

Barbuto, Tina Marie

Beacon Health-Options Inc.

BCBS Hcclaimpmt (ANTM)

BCBS of Florida (ANTM)

Blue Cross/Blue Shield (ANTM)

Brannon, Hon. Dave Lee

Caruso, Michael

Certificate of Interested Persons (Continued)

Chatman, Kenneth

Cigna Behavioral Health (CI)

Cigna Hcclaimpmt (CI)

Cigna Health & Life Insurance Company (CI)

Chase, Alexandra

Community Health Options (CYM)

Descalzo, Marissel

DiRosa, Phillip

Fajardo Orshan, Ariana

Eliani, Robin Kaplan

Entin, Michael James

Fajardo Orshan, Ariana

Friedman, Jonathan S.

GEHA –Government Employee Health Association

Greenberg, Benjamin G.

Gregory, Barry

Group Health Inc.

HCA Healthcare (HCA)

Health Care Service Corp (HCSC)

Health Net (HNT)

Certificate of Interested Persons (Continued)

HealthSpan Integrated Care

HOIC Hclaimpmt

Humana (HUM)

Insurance Administrator of America, Inc.

J.F.

Joffe, David

John Hopkins Medicine

Katz, Randall D.

Lopez, Omar Antonio

Lyle Hughart Welfare Fund

Magellan Behavioral Health System Fund (MGLN)

Magnacare

Markus, David Oscar

Maryland Electrical Industry Health Fund

Matzkin, Daniel

Medical Mutual

Megellan Behavioral Health Systems

Mendez, Joaquin

M.H.

Middlebrooks, Hon. Donald M.

Certificate of Interested Persons (Continued)

National Automatic Sprinkler Industry Welfare Fund

Nucci, Edward C.

Operating Engineers Local 99 & 99A Health & Welfare Fund

Optima Health

Patient #1

Patient #2

Patient #3

Patient #4

Patient #5

PMCS

Reflections Treatment Center

Schumacher, Howard J.

Smachetti, Emily M.

Smart Lab, LLC

Tufts Associated Hclaimpmt

UMR

United Behavioral Health (UNH)

United Health Group (UNH)

United Healthcare Inc. (UNH)

United Healthcare Oxford (UNH)

Certificate of Interested Persons (Continued)

United Healthcare Service, Inc. (UNH)

UPMC Benefit Management Services, Inc.

Value Options Inc.

ValueOptions Hcclaimpmt

Villafana, Ann Marie

Warehouse Employees Union Local No. 730 Health & Welfare Trust Fund

Willems, Donald

s/ Randall D. Katz
Randall D. Katz
Assistant United States Attorney

Statement Regarding Oral Argument

The United States of America respectfully suggests that the facts and legal arguments are adequately presented in the briefs and record before this Court and that the decisional process would not be significantly aided by oral argument.

Table of Contents

Page:

Table of Contents

(continued)

Page:

Table of Contents

(continued)

Page:

Table of Citations

Cases: **Page:**

Table of Citations (Continued)

Cases: **Page:**

Table of Citations (Continued)

Cases: **Page:**

Table of Citations (Continued)

Cases: **Page:**

Table of Citations (Continued)

Cases: **Page:**

Table of Citations (Continued)

Cases: **Page:**

Statutes & Other Authorities: **Page:**

Table of Citations (Continued)

Statement of Jurisdiction

This is an appeal from a final judgment of the United States District Court for the Southern District of Florida in a criminal case. The district court entered judgment against Abovyan on February 14, 2019 (DE:267). The district court had jurisdiction to enter the judgment pursuant to 18 U.S.C. § 3231. Abovyan filed a timely notice of appeal on February 21, 2019 (DE:271); *see* Fed. R. App. P. 4(b). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and authority to examine Abovyan's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of the Issues

I. Whether the evidence was sufficient to support Abovyan's convictions.

II. Whether this Court should refuse to consider Abovyan's challenge to health care fraud jury instructions because of invited error and whether the district court erred when it excluded Abovyan's legally incorrect jury instruction.

III. Whether the district court reversibly abused its discretion in admitting 404(b) evidence of Abovyan's lawful gambling as evidence of intent, motive or lack of mistake and whether it properly exercised its discretion by limiting cross-examination of hearsay and speculative testimony.

IV. Whether the district court reversibly abused its discretion when it relied on an intended and foreseeable loss amount and properly sentenced Abovyan on the count-two drug conspiracy.

Statement of the Case

1. Course of Proceedings and Disposition in the Court Below

A Southern District of Florida grand jury returned a superseding indictment charging Dr. Arman Abovyan with ten counts: conspiracy to commit health care fraud, in violation of 18 U.S.C. § 1349 (Count One); conspiracy to possess with intent to distribute and dispense controlled substances, including buprenorphine (Count Two), in violation of 21 U.S.C. § 846; unlawful dispensing of a controlled substance, buprenorphine, to specific patients one through six (Counts Three through

Nine), in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; and possession with intent to distribute various controlled substances, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Count Ten) (DE:45). A co-defendant, Tina Barbuto, was charged with these counts and obstruction of justice, but pled guilty prior to trial (DE:161).

Abovyan proceeded to trial. He moved for a Rule 29 judgment of acquittal at the close of the prosecution's case and all evidence (DE:282:227;DE:284:88). The district court denied the motions as to Counts One through Nine, but reserved ruling on Count Ten (DE:282:238). After an eight-day jury trial, the jury returned guilty verdicts on Counts One through Nine and acquitted Abovyan on Count Ten (DE:190). He was sentenced at the low end of the advisory guideline range to a term of 135 months' imprisonment -- concurrent terms of 120 months as to Counts One through Eight, followed by a consecutive 15-month term as to Count Nine -- a three-year supervised release term and $1,058,097.88 in restitution (DE:267;DE:286:92). Abovyan's motion for judgement notwithstanding the verdict or for a new trial was denied (DE:222;225). Abovyan filed a timely appeal (DE:271).

2. Statement of the Facts

a. The Government's Case at Trial

Abovyan became the medical director of Reflections Treatment Center ("Reflections"), in Margate, Florida, on July 8, 2016, and later, Journey to Recovery ("Journey"), in Lake Worth, Florida, in October 2016 (DE:278:197;DE:282:186) (collectively, "the facilities"). Reflections and Journey offered various levels of substance abuse treatment for individuals suffering from drug addiction (DE:278:151). Reflections opened in March 2015 and Journey in October 2016 (DE:281:84,181). Both closed on December 21, 2016, when federal search warrants were executed (DE:278:153;DE:282:181). Abovyan, an experienced internist, maintained a separate private practice in Delray Beach and Pompano Beach in addition to serving as medical director for multiple assisted living facilities and rounding at hospitals (DE:281:14,16,31).

Abovyan was recruited to run the facilities by Kenneth Chatman, a convicted felon with no medical training (DE:278:151). Chatman, and later Abovyan, defrauded insurance companies by billing for expensive and medically unnecessary urine and other screenings costing thousands of dollars, multiple times per week per patient (DE:279:44,47;DE:280:72-83,275). Chatman paid and received kickbacks to individuals, including the CEO of SmartLab (DE:279:46).

Immediately before Abovyan started as Reflections' medical director, Dr. Aaron Tendler served as medical director for a month, June 15, 2016, to July 15, 2016 (DE:282:44,85-86). Tendler signed standing orders for laboratories to test multiple times per week, but soon realized the testing was not medically necessary (DE:282:186-88). On July 11, 2016, Tendler sent SmartLab an e-mail drastically curtailing Reflections' testing regime (*id.*). SmartLab executive Justin Wayne, later convicted, forwarded Tendler's e-mail to Chatman (DE:282:188). Within days, Chatman fired Tendler (DE:282:188-89). Tendler subsequently e-mailed regulators, blowing the whistle on Reflections' fraudulent billing practices (DE:282:44-48;Gx19).

Stefan Gatt, a lab representative later convicted, introduced Abovyan to Chatman at a dinner, where Abovyan agreed to become the medical director (DE:281:93-94). Chatman told Abovyan his responsibilities included ordering laboratory testing and obtaining authorization to prescribe buprenorphine (DE:281:93-94,98-100). Abovyan affirmed Reflections' previous level of laboratory testing in a July 19, 2016 standing order, and did the same for Journey on October 10, 2016 (DE:282:189-91). These standing orders required "medically necessary" drug testing for patients two to three times per week for a hundred substances, including confirmatory testing (DE:278:189-192;DE:281:11-12;Gx2174;Gx2206). Abovyan also signed letters agreeing with Tendler's

previous testing decisions, orders that Tendler later disavowed, authorizing laboratories to complete testing already ordered (DE:282:186-88,218-20).

Although Abovyan ordered and approved the enormous amount of testing, he never shared or discussed test results with patients, even results revealing serious drug abuse, relapse, and tampering (DE:280:70-71,174,280). Furthermore, only patients with insurance were subjected to this rigorous testing; individuals on "scholarship" (i.e., without insurance) were tested once monthly using a $3.50 urine cup (DE:278:208;DE:281:257).[1]

Abovyan was oftentimes absent from the facilities and used newly minted registered nurse practitioners ("RNPs") in his place (DE:281:16,21-23,162). Abovyan provided them pre-signed blank prescription pads to write prescriptions for controlled substances, including buprenorphine (DE:281:18-19,162-65). Witnesses also saw Chatman and Tina Barbuto, co-defendant and clinical director, with Abovyan's pre-signed blank prescription pads (DE:281:235,264).

Buprenorphine, also known by its brand name, Suboxone, is a highly addictive opioid that can effectively treat addicts (DE:280:14).[2] Opioids cannot be used for addiction treatment, but Congress made a special exception for

[1] This test consists of a urine dipstick placed into a cup to determine the presence of drugs (DE:278:208;DE:292:91).

[2] Throughout this brief, buprenorphine and Suboxone are used interchangeably.

buprenorphine in the Drug Addiction Treatment Act of 2000 ("DATA 2000"), codified at 21 U.S.C. § 823(g) (DE:280:19). Buprenorphine must be administered very carefully because addicts may mix it with other substances, resulting in overdose and death (DE:280:29). Due to buprenorphine's highly addictive nature, the law curtailed the ability of physicians to prescribe buprenorphine for addiction and required practitioners to obtain a separate license, known as a DEA "X" number, and take a specialized training course before prescribing buprenorphine for addiction (DE:280:21-23,197). "X" number providers are limited to thirty patients for the first year and subjected to DEA scrutiny and audits (DE:279:5).

Abovyan conceded that he signed or pre-signed the buprenorphine prescriptions before obtaining the "X" number license (DE:284:130). Abovyan eventually received an "X" number license to prescribe buprenorphine for addiction on September 20, 2016 (DE:280:69-70). Prior to this date, Abovyan signed and/or pre-signed buprenorphine prescriptions for patients, stating they were for pain, not addiction -- illegally bypassing the DEA "X" number license requirements (DE:280:69,85-87,104-06,116,143,147-48;DE:292:22). These prescriptions are part of the Count Two conspiracy and represent the substantive charges in Counts Three though Nine:

Indictment Count	Patient Number/Initials	Date Prescribed & Controlled Substance Prescribed/Dispensed by Abovyan
3	Patient #1/E.L.	Buprenorphine/July 20, 2016
4	Patient #2/H.F.	Buprenorphine/July 25, 2016
5	Patient #3/A.C.	Buprenorphine/July 25, 2016
6	Patient #4/D.W.	Buprenorphine/July 27, 2016
7	Patient #5/C.D.	Buprenorphine/August 3, 2016
8	Patient #2/H.F.	Buprenorphine/August 29, 2016
9	Patient #6/A.B.	Buprenorphine/August 31, 2016

FBI Special Agent Joshua Hawkins and others executed search warrants at the facilities and various locations on December 21, 2016 (DE:278:159). Agents discovered Abovyan's signature on stacks of laboratory request forms throughout Reflections with no patient information, but pre-filled with diagnosis codes requiring full test panels and confirmation testing (DE:278:159,179-83,189).

Abovyan's personnel file was recovered, including a July 15, 2016 letter he signed approving of Tendler's previous medical testing (DE:278:194;Gx2001); documents Abovyan signed stating he was responsible for addiction treatment, diagnosis, ordering and interpreting laboratory testing, monitoring therapists and pharmacists, and following all laws and regulations (DE:278:195-97;Gx2001); and his signed July 7, 2016 employment contract for $11,000 per month, detailing his responsibilities for ordering and interpreting laboratory results and medications (DE:278:197-98;Gx2001). Correspondence directed to Abovyan at his private practice was found, including a November 2016 United Insurance letter, stating all Reflections authorizations were suspended due to fraud (DE:278:190-91,200-202).

Barbuto provided agents consent to search her storage unit where patient documents, test results, and Abovyan-prescribed controlled substances to Reflections patients were found, including thirteen bottles of buprenorphine, clonazepam, lorazepam, phenobarbital, amphetamines, and other prescriptions, along with Abovyan's DEA "X" number certificate (DE:278:211,217-24,230;Gx7). A June 2016 document stating "*scholarships, 12 panel, one time a month*," was recovered, meaning individuals without insurance received one in-house drug test monthly (DE:278:228;DE:280:154).

Patricia LaFrance took urine samples for $13 an hour at the facilities (DE:292:90). LaFrance testified she did a dipstick urine test for every patient, but whatever it showed, she sent for laboratory confirmation (DE:292:91-92,104). Chatman instructed LaFrance to use her own urine if a patient was not present (DE:292:97). LaFrance was trained by a previous employee to fill out Abovyan's pre-signed laboratory requisition forms (DE:292:94-95,100). LaFrance sometimes photocopied the forms, but never saw Chatman forge Abovyan's signature (DE:292:115-16).

Dr. Kelly Clark, a board-certified doctor in addiction medicine and psychiatry and President of the American Society of Addiction Management ("ASAM"), testified that the DATA 2000 Act requires physicians to obtain specialized course training and apply for an "X" number to prescribe buprenorphine for addiction

(DE:280:5,28-30).[3] She explained that once ingested, Suboxone cuts the overdose risk in half for patients in treatment by blocking brain receptors so the individual cannot get high off other opioids, including heroin (DE:280:21-23,197).

Dr. Clark stated that the role of a medical director is to ensure appropriate medical and clinical care (DE:280:42,154). In 2016, a supervising physician was required to write prescriptions for RNPs in Florida and, furthermore, RNPs could not write controlled substance prescriptions on a pre-signed pad (DE:280:33). She also told jurors that Abovyan could not prescribe buprenorphine for addiction until he received his "X" number license (DE:280:34-38).

Dr. Clark spent over one hundred hours reviewing the facilities' patient files and procedures (DE:280:65). In Florida, a licensed addiction treatment center must have a physician medical director (DE:282:135;DE:284:81). She described the different levels of care for addicts and stated that the physician must conduct a level of care assessment at each interaction (DE:280:40-42).

Dr. Clark testified that drug testing is the primary tool for choosing, modifying and monitoring a treatment plan and must be tailored to the individual patient (DE:280-56,60). She explained the different urine tests, ranging from an inexpensive dipstick/cup test, costing a few dollars, to $1,000-$6,000 laboratory

[3] Dr. Clark helped craft the DATA 2000 Act (DE:280:157). She also served as medical director of many addiction treatment facilities and holds medical licenses in ten states (DE:280:7,189).

tests physicians must order and approve (DE:280:57-59,72-83,275). Dr. Clark determined that it was "outside of reason" for a doctor to utilize a standing order for a hundred expensive drug tests, across-the-board, multiple times a week for every patient (DE:280:61-62,275-76). The physician must review test results, discuss them as soon as possible with the patient and alter the treatment plan accordingly (DE:280:63,230,234-35).

Dr. Clark told jurors that when Abovyan was medical director, there was no real patient treatment at Reflections and no medical necessity for Abovyan's buprenorphine prescriptions (DE:280:67-68,242-49,281). Abovyan did not examine patients,[4] conduct assessments, or make treatment plans before prescribing buprenorphine (DE:280:68). Abovyan wrote buprenorphine prescriptions for pain/withdrawal when there was no indication that patients suffered from pain/withdrawal; the real purpose was to treat ongoing opioid addiction (DE:280:69). Dr. Clark testified that withdrawal typically takes two to ten days and those prescriptions were not medically necessary for withdrawal (DE:280:68-69). Abovyan was required to have a DEA "X" number to legally prescribe buprenorphine for addiction before September 20, 2016 (DE:280:69-70).

[4] The ASAM standards require the physician to conduct a physical examination. (DE:280:238,242-45).

Abovyan's monitoring of patients taking buprenorphine and the frequency of drug testing did not meet basic care standards and were medically unnecessary (DE:280:69-70,70-73,266,274). Dr. Clark reviewed sixteen patient charts; fifteen patients failed drug tests, and Abovyan never addressed results with these patients (*id.*). Because Abovyan ordered the testing, he was responsible to discuss the results with patients (DE:280:70-71,174). The remaining patient was a "scholarship" patient who did not receive laboratory testing (*id.*). Dr. Clark observed that scholarship patients without insurance never received laboratory testing (DE:280:70).

Dr. Clark determined that the sheer number of substances tested under Abovyan's standing order was "outrageous," requiring a hundred tests on a single specimen, including substances not typically tested in addiction medicine (DE:280:72-83,275). The amount billed for these tests was $1,000-$6,000 per urine specimen, two to three times a week, with no patient follow-up of results (*id.*).

Abovyan electronically signed many of these test results with the same notation -- "*reviewed, will discuss at next patient encounter*" -- but never discussed results with patients (DE:280:280). Abovyan ignored these results, although they required immediate discussion and altered treatment plans (DE:280:73,188,266). Abovyan also prescribed patients high dose medications with abuse potential without medical necessity (DE:280:76,274-75).

Dr. Clark explained the prescriptions charged in Counts Three through Nine:

Patient #1 ("P1"). P1 entered Reflections with opioid and cocaine addiction and overdosed a month before, but had no pain symptoms (DE:280:84-85). Without an examination, assessment, diagnosis or care plan, Abovyan prescribed P1 Suboxone for pain and withdrawal on July 20, 2016 (Count Three) without an "X" number (DE:280:85-86;DE:282:172-73). Dr. Clark concluded this was a false prescription and diagnosis because there was no pain or withdrawal (DE:280:86-87).

On July 12, P1 submitted a urine sample for an "extraordinarily high" one hundred tests, generating hefty insurance proceeds for Reflections (DE:280:90,92). The next day, July 13, additional urine testing was performed; this was not medically necessary because the July 12 results were not returned, and no medical need existed to test (DE:280:93). On July 14, P1 provided an oral swab for drug testing, and there was no need to test again because the July 12 and 13 test results were not returned (DE:280:93-96). The next day, before any other tests were returned, P1 was extensively tested again (DE:280:96).

Abovyan electronically signed the results from the July 12 test seventeen days later stating "*reviewed and will discuss at next patient encounter*," but there was no patient discussion (DE:280:92). The July 13 results indicated test tampering and alcohol consumption, while the July 15 test showed cocaine use (DE:280:94,96). Abovyan signed the results weeks later without any patient discussion (*id.*).

Patient #2 ("P2"). P2 entered Reflections with opioid and cocaine addiction disorders (DE:280:101). Abovyan prescribed P2 Suboxone on July 25, 2016 (Count Four) with a pain/withdrawal diagnosis (DE:280:102;DE:282:173-74). On August 29, 2016 (Count Eight), Abovyan again prescribed P2 Suboxone for pain/withdrawal, two weeks after the first prescription (DE:280:104). P2's diagnosis was drug dependence for both prescriptions and Abovyan needed an "X" number license (DE:280:104-06).

P2's urine was extensively tested (DE:280:108). P2 provided urine test specimens on July 7, 8, 9, 11, 13, 15, 22, and 24 (DE:280:108-09). Although many of these tests revealed substantial drug abuse, Abovyan electronically signed them stating "*reviewed and will discuss at next patient encounter*," but there was no assessment or discussion (DE:280:109-112).

Patient #3 ("P3"). P3 was admitted to Reflections for opioid and cocaine addiction (DE:280:114-16). Abovyan prescribed P3 Suboxone on July 25, 2016 (Count Five) with a pain/withdrawal diagnosis (DE:280:116;DE:282:174). P3's diagnosis was for drug dependence, requiring an "X" number (*id.*). Just a week later, Abovyan prescribed P3 additional Suboxone for pain/withdrawal (DE:280:117). Dr. Clark testified that both prescriptions were "false" because they were for addiction, necessitating an "X" number:

> [T]his medication was not being used as it says it is…[t]hat's a false prescription…It can kill you if you are not taking it correctly. This was just

> prescribing, okay, this was not treatment…treatment is using the information that's available, assessing the information, working with the patient, coming up with a treatment plan...None of that occurred…not monitoring the clinical condition at all, not bothering to follow-up on any of the tests that were signed off on that were ordered by Abovyan, not bothering to look over the charts where the staff noted repeatedly patients failing their drug tests, but they never talked about it with the patient.
>
> If they talk about it with patients, what happens? If you look on their initial documents…they might be discharged to a higher level of care…they no longer get to bill these thousands of dollars multiple times for these drug tests…this is a life-saving medication, let's be clear, when used in treatment. There was no treatment…by virtue of not confronting the patient is colluding with the patient...It harms the patient if they think that the doctor and their counselors, their therapists don't care if they are using enough even to confront them on it… (DE:280:118-20).

P3's urine was laboratory tested many times, including on June 15, 17, 20, 22, 27, 29 and July 1, 4, 6, 11, 13, 15, 2016.[5] Abovyan signed results over a month later as "*normal*," although tests showed tampering and substantial drug abuse (DE:280:124-130). Abovyan wrote an August 4, 2016 progress note stating P3 was "*clean for awhile*," which contradicted the positive test results he approved days earlier (DE:280:132).

Patient #4 ("P4"). P4 entered Reflections for addiction on February 12, 2016, and did not complain of ongoing pain (DE:280:134-35). Abovyan prescribed P4 Suboxone on July 27, 2016 (Count Six) with a diagnosis of pain/withdrawal

[5] Abovyan approved all Tendler's testing and treatment (DE:280:133).

(DE:280:134-35;DE:282:175). P4's drug dependence diagnosis required an "X" number to prescribe Suboxone (*id.*).

P4's urine was laboratory tested on July 15, 2016, and indicated tampering with Suboxone (DE:280:136). Abovyan signed off on this result on July 27, 2016 as "*normal*" (*id.*). Abovyan noted P4 was "*doing well*," which was inconsistent with his positive drug tests (DE:280:137-38). Abovyan signed other positive drug tests indicating he will discuss with patient, but never did (DE:280:138-140).

Patient #5 ("P5"). P5 entered Reflections for addiction and did not complain of ongoing pain (DE:280:142,175-76). Abovyan prescribed P5 Suboxone on August 3, 2016 (Count Seven), with a pain/withdrawal diagnosis (DE:280:142-43;DE:282:175-76). P5's diagnosis was for drug dependence, requiring an "X" number (DE:280:143).

P5 provided specimens for extensive laboratory testing (DE:280:143). Dr. Clark testified that the frequency of this testing was not necessary and that the money billed was "amazing," especially considering results were never discussed with the patient (DE:280:146). Dr. Clark likened this to doing a body scan and finding a bunch of broken bones, but doing nothing (*id.*).

Patient #6 ("P6"). P6 was admitted to Reflections for addiction with no ongoing pain complaints, but Abovyan prescribed P6 Suboxone on August 31, 2016

(Count Nine), for pain/withdrawal (DE:280:147-48;DE:282:176-77). P6's diagnosis was for drug dependence and an "X" number was required (*id.*).

Other Patients. Dr. Clark testified that another patient, A.F., under Abovyan's care, died of a heroin overdose (DE:280:149). On October 4, A.F. was tested and had controlled substances in her urine; the very next day, A.F. tested negative (DE:280:150). Dr. Clark concluded this was unusual and indicated A.F.'s urine was likely swapped (*id.*). Abovyan signed that he would discuss these results with the patient. During an October 12 encounter with A.F., there was no discussion or treatment (DE:280:151-52). A.F. overdosed and died on October 14, 2016.

Dr. Clark reviewed records of J.H., a Reflections "scholarship" patient under Abovyan's care (DE:280:153). Unlike patients with insurance, J.H. did not have a single laboratory test, only a dipstick/cup test on her first day (*id.*). These dipstick/cup tests cost $3.50 while the laboratory tests cost $1,000-$6,000 (DE:278:208;DE:280:154). Notably, Abovyan prescribed Suboxone on October 13, 2016, for J.H.'s "drug dependence and withdrawal," after receiving his "X" number (DE:280:277).

Abovyan's two RNPs, Andrea Buehler and Lindsey Callaghan, testified they did not have DEA prescription licenses, but prescribed controlled substances anyway when Abovyan was not present, including buprenorphine with a pain/withdrawal diagnosis on blank, pre-signed prescription pads (DE:281:13,15-

18,26,157-65,172-74,193). Both testified that Abovyan shared his electronic medical record ("EMR") login information; they never reviewed tests with patients; and Abovyan worked less than his scheduled hours (*id.*;DE:281:20-23,79,162,167,169). [6] Callaghan testified Abovyan told her the Suboxone prescriptions were for patient maintenance (DE:281:159), while Buehler testified Abovyan told her to write "drug dependence pain and withdrawal" on the Suboxone prescriptions (DE:281:26).

Conversely, Alejandra Torek, Abovyan's private practice manager, testified that Abovyan routinely reviewed and signed patient tests that were scanned into the EMRs (DE:281:199). Abovyan spent time with patients, had "excellent" patient relationships and never pre-signed prescriptions (DE:281:215,222-23).

Insured, drug-addicted patients from the facilities testified. A.B. (P6, Count Nine) testified that many patients were high and using drugs at Reflections (DE-292:161). A.B. overdosed while at Reflections and Abovyan prescribed her Suboxone on August 31, 2016 (DE-292:162,165). She saw Abovyan once, but he never did an examination and she observed the RNPs with pre-signed prescription pads (DE-292:166,180). A.B. was urine-tested five days a week and tested positive for heroin, but was not moved to a higher level of care until she overdosed (DE-

[6] Callaghan reviewed one dipstick/cup test (DE:281:167).

292:164,169). Neither Abovyan nor the RNPs discussed her test results (*id.*;199,202).

J.B. testified that she saw Abovyan once for a short time (DE:281:233-34). Abovyan's signature was on her prescriptions and she observed multiple pre-signed prescription pads with Abovyan's signature on Chatman's desk (DE:281:235). H.F. (P2, Counts Four and Eight) entered Reflections for heroin abuse and told jurors it was "unnecessary" to test her four times a week for urine; she was also tested for blood, saliva and allergies, but never received any results (DE:282:53-57). She received results at other treatment centers (DE:282:68).

Stefan Gatt testified he paid laboratory testing kickbacks to Chatman, and Tendler was fired because he would not approve the testing (DE:281:87-92). Abovyan, Gatt and Chatman met for dinner where Chatman told Abovyan that Abovyan would be responsible for patient care, signing off on testing, and prescribing Suboxone (DE:281:94,136). Chatman told Abovyan that Barbuto would complete the additional Suboxone training (DE:281:99). Later, Barbuto told Gatt that she nearly finished Abovyan's certification (DE:281:100,141). Gatt witnessed Abovyan sign the toxicology laboratory test forms, ordering full testing panels, and Abovyan approved photocopying them with his original signature (DE:281:95,98,151).

Anthony Jackson, a convicted co-conspirator and counselor at the facilities, testified that "scholarship" patients were tested only once monthly with a dipstick/cup (DE:281:257). Patients were visibly high and laboratory test results were inconsistently put into their EMRs, sometimes taking a month, even though Abovyan required patient testing three times per week (DE:281:260-61,306,320,327). Jackson observed Barbuto and a nurse with pre-signed blank prescription pads bearing Abovyan's signature (DE:281:264). Convicted co-conspirator Bosco Vega, a SmartLab sales representative, testified that Chatman received kickbacks from SmartLab based on the volume of tests (DE:282:78-79,94).

Mayda Soto, a United Healthcare investigator, interviewed Abovyan in April 2017 (DE:282:101-04). Abovyan told her that working at Reflections was the biggest mistake of his life and, in his exact words, was "easy money" (DE:282:101-04,114). Abovyan admitted ordering laboratory testing two to three times per week (DE:282:102-03).

Text messages sent from October to December 2016 between Abovyan and Chatman, recovered from Chatman's cellular telephone, revealed Abovyan's repeated demands for money: "*Detox 8 daysx350,2800; Reflections 9,000; Journey 5,500…$17,300*" (DE:292:217); "*…give her the check, Bro, 15,300*." (DE:292:218); "*…Detox 9,450; treatment 10,5000…*", and "*…it's 950 short, Bro*" (DE:282:129;DE:292:221;Gx5043). Checks from Chatman/Reflections to

Abovyan corroborated these messages, including an October 24, 2016 check for $19,000, $950 short of Abovyan's request; a November 14, 2016 check for $15,300; and a December 15, 2016 check for $17,300 (DE:281:341;DE:282:128-131).

Abovyan was interviewed by FBI agents in June 2017 (DE:282:114). Abovyan admitted he knew a special license was required to prescribe Suboxone (DE:282:119). Abovyan conceded he signed the standing laboratory orders and ordered whatever lab tests Chatman wanted three times per week per patient (DE:282:121-22;134;164). Abovyan told agents he reviewed the laboratory test results and signed the EMRs, in addition to providing RNPs with pre-signed blank prescription pads only for "basic stuff," including Suboxone (DE:282:122-23). Abovyan initially stated he was paid only $5,000 per month, but when confronted with the text messages, he admitted additional payments for "detox," with the $5,000 solely for Chatman to use his medical license to bill insurance (DE:282:126-27,132). Abovyan stated the amount of testing was directed by Chatman and whatever Chatman wanted, Abovyan ordered (DE:282:133,150-51,155).

IRS Special Agent JoAnn Wright testified that Abovyan's business account casino gambling withdrawals totaled $663,053.84 from 2015 to 2018 (DE:282:15,43).

b. Defense Case

The defense claimed that Abovyan was "the unwitting patsy" duped into participating in a sophisticated billing scheme (DE:284:149). Thomas Pullen, a computer expert, testified that Abovyan's EMR account was accessed by eight different internet protocol addresses and ten different devices (DE:283:54,56-57,59). Pullen had no EMR system knowledge and conceded Abovyan's sharing of login information could explain the multiple logins (DE:283:70,75).

Lauren Roscoe, an RNP employed at Reflections on Thursday evenings, testified that Abovyan was always with her and did a "very short" five-minute assessment for established patients (DE:283:103-06). Abovyan signed all prescriptions in her presence, but she agreed it would be improper to pre-sign a controlled substance prescription (DE:283:108,111,115-20). Roscoe stated there were no test results in the EMRs (DE:238:111,115,122).

Phillip Shechter, a CPA and forensic accountant, examined Abovyan's finances and concluded that twenty percent of his business checking account proceeds were withdrawn for gambling, totaling $700,000 of $3.5 million (DE:283:148). Shechter testified that Abovyan's income from the facilities was not material (DE:283:150-51). On cross-examination, Shechter agreed that Abovyan took a $200,000 loan in 2017 and another loan in 2018 (DE:283:155-56). Schechter conceded there was less 2016 IRS income reported than deposited into Abovyan's

account and that his business account should not be used for personal expenses (DE:283:158-60).

Dr. Kenneth Starr, a board-certified physician in emergency and addiction medicine from California, testified as an expert (DE:284:9). Dr. Starr spent "maybe six" hours reviewing materials and never reviewed patient files (DE:284:61). Dr. Starr stated that Suboxone is a "game changer" (DE:284:17-22,29,37,51) in addiction medicine, but he would not prescribe Suboxone for pain (DE:284:35-38). He testified that the quantity of buprenorphine Abovyan prescribed was reasonable if it was working (DE:284:43). Dr. Starr said a typical visit in his practice lasts twenty to thirty minutes and care is personalized to each individual patient (DE:284:52,58). He admitted he did not know the Florida addiction treatment facility regulations nor how to determine if a patient is abusing Suboxone (DE:284:59-60,65).

Dr. Starr reviewed Dr. Clark's testimony and agreed with several points: (1) Suboxone prescriptions require a separate "X" number license for use in maintenance, addiction or detoxification (DE:284:70); (2) if a patient repeatedly failed urine tests, the treatment plan must be altered and the point of urine testing is to guide treatment (DE:284:60-61); (3) it was not "a common practice" to pre-sign prescriptions and leave them blank (DE:284:73); (4) patients are not stable if they continue to show positive drug test results and must be placed into a higher level of

care (DE:284:60); (5) P3's (Count Five) testing revealed repeated heroin and cocaine use, contradicting Abovyan's notes stating P3 was "clean for a while..." (DE:284:67-69); and (6) P4's (Count Six) testing showed drug abuse, contradictory to Abovyan's note P4 was "doing well" (DE:284:64-65).

c. The Presentence Investigation Report ("PSI")

The Probation Office determined that Abovyan's intended loss was $11,345,741.55 and he was responsible for a converted marijuana drug weight equivalency of 100kg-400kg[7] (PSI:¶¶49-51). His health care fraud conspiracy conviction (Count One) was grouped together with the distribution offenses (Counts Two through Nine). Based on these calculations and a multiple count adjustment, Abovyan's offense level was 33 with an applicable guideline range of 135 to 168 months' imprisonment (PSI:¶¶65-68).

Abovyan filed PSI objections, including to loss amount and the buprenorphine quantity (DE:252:6-11,253). The government responded that the guidelines instruct the greater of actual or intended loss applies (DE:259:9-10). The government conceded the Count Two conspiracy statutory maximum of twenty years was incorrect because the jury did not render a special verdict for distribution of a Schedule II substance (DE:259:17-18). The jury did find, however, that

[7] The buprenorphine was converted to its marijuana equivalent pursuant to U.S.S.G §2D1.1(a)(5),(c)(8).

Abovyan unlawfully dispensed a Schedule III controlled substance, buprenorphine, in Counts Three through Nine (*id.*). The Count Two statutory maximum was therefore limited to ten years' imprisonment for buprenorphine, the Schedule III controlled substance. *See* 21 U.S.C. § 841(b)(1)(E);(DE:259:18).

d. Sentencing Hearing

At the sentencing hearing, the district court overruled Abovyan's objections and found that Abovyan was "misapprehending or misrepresenting" trial testimony (DE:286:11-13,14,36). Abovyan conceded the loss issue is not specific numbers, but whether the loss was intended and foreseeable (DE:286:15-18,20). The government introduced sentencing exhibits 1-5, through IRS Special Agent Wright, detailing the "conservative" intended loss amount, consisting only of testing at Reflections submitted to SmartLab when Abovyan was medical director (DE:286:22-23,29-33;Gx1-5).

In concluding the intended loss was appropriate, the district court acknowledged that the greater of actual or intended loss applies and determined the amount was "conservative," applying only to Abovyan's time at Reflections and for specific insurance companies (DE:286:19,34).

J.F., mother of twenty-four-year-old A.F., who overdosed and died under Abovyan's care, addressed the court and stated the numbers mean nothing and her "actual loss" is her daughter's life (DE:286:47). M.H., mother of J.H., who died of

a drug overdose under Abovyan's care, wrote that Abovyan deliberately made money, but never made sure her daughter received medications he prescribed (DE:286:51-53).

The court adopted the PSI's offense level of 33, guideline range of 135 to 168 months' imprisonment and examined the 18 U.S.C. § 3553(a) factors, finding this was a serious crime with "devastating consequences," financial losses, significant human losses, and that Abovyan sold his medical license for money (DE:286:91). Abovyan did not spend the necessary time at these facilities and never reviewed testing he ordered (DE:286:86,92). Abovyan turned a "a blind eye to those at Reflections," but cared for his patients in his private practice, necessitating general deterrence (*id.*).

Abovyan was sentenced to the low end of the guideline range, 135 months' imprisonment, consisting of 120 months on Counts One through Eight concurrently, and fifteen months on Court Nine consecutively, a three-year supervised release term, and ordered to pay $1,058,097.88 restitution (DE:286:100).

3. Standards of Review

I. This Court reviews *de novo* challenges to the sufficiency of the evidence. *See United States v. Isnadin*, 742 F.3d 1278, 1303 (11th Cir. 2014). In assessing sufficiency, this Court must consider the evidence in the light most favorable to the government, drawing all reasonable inferences and credibility evaluations in favor

of the verdict. *See United States v. Capers*, 708 F.3d 1286, 1296-97 (11th Cir. 2013). The standard is the same whether the evidence is direct or circumstantial. *See United States v. Utter*, 97 F.3d 509, 512 (11th Cir. 1996). A jury's verdict cannot be overturned if any reasonable construction of the evidence allowed the jury to find the defendant guilty. *See Capers*, 708 F.3d at 1297.

II. Jury instructions challenged for the first time on appeal are reviewed for plain error. *See United States v. Felts*, 579 F.3d 1341, 1343 (11th Cir. 2009). Where a party expressly accepts a jury instruction, such action constitutes invited error and the party waives the right to challenge the accepted instruction on appeal. *See United States v. Gibson*, 708 F.3d 1256, 1275 (11th Cir. 2013). If Abovyan did not invite the error, it is reviewable only for plain error. *See* Fed. R. Crim. P. 30(d). Under plain error review, an error is corrected only if Abovyan demonstrates: (1) an error occurred; (2) that error was plain; (3) that error affected substantial rights; and (4) that error "seriously affect[ed] the fairness, integrity, or public reputation of the judicial proceedings." *United States v. Olano*, 507 U.S. 725, 732 (1993). The court reviews the charge itself as part of the whole trial. *See United States v. Park*, 421 U.S. 658, 674-75 (1975).

Refusal to give a requested jury instruction is reviewed for an abuse of discretion. *See United States v. Tokars*, 95 F.3d 1520, 1531 (11th Cir. 1996). Reversible error exists if the requested instruction: (1) was a correct statement of the

law; (2) was not adequately covered in other jury instructions; (3) concerned an issue so important that its omission impaired the accused's defense; and (4) dealt with an issue properly before the jury. *United States v. Votrobek*, 847 F.3d 1335, 1344 (11th Cir. 2017).

III. This Court reviews the district court's evidentiary rulings for a clear abuse of discretion. *See United States v. Shabazz*, 887 F.3d 1204, 1216 (11th Cir. 2018). A district court's evidentiary ruling warrants reversal only if there is a reasonable likelihood the resulting error affected the defendant's substantial rights. *See United States v. Hands*, 184 F.3d 1322, 1329 (11th Cir. 1999). If the error "had no substantial influence on the outcome and sufficient evidence uninfected by error supports the verdict," reversal is not necessary. *Id.*

IV. This Court reviews the district court's findings of fact under the sentencing guidelines for clear error. *See United States v. Jordi*, 418 F.3d 1212, 1214 (11th Cir. 2005). In order to be clearly erroneous, the district court's finding must leave this Court with a "definite and firm conviction that a mistake had been committed." *United States v. Rothenberg*, 610 F.3d 621, 624 (11th Cir. 2010). This court applies a *de novo* standard of review in determining whether a defendant's sentenced violated *Apprendi* by exceeding the statutory maximum. *See United States v. Calendario*, 240 F.3d 1300, 1306 (11th Cir. 2001).

Summary of the Argument

Abovyan was tried fairly by an experienced district judge, and despite a lengthy brief raising various issues, shows no error in his conviction or sentence.

First, the evidence was sufficient to support Abovyan's convictions. Abovyan's own admissions contradict his claim that he was a mere presence at the facilities. Abovyan admitted that he was working for "easy money" at Reflections, that he received $5,000 a month from Chatman to use his medical license for billing, that he let Chatman bill for whatever tests he wanted, and that he signed the standing laboratory orders. Abovyan ordered medically unnecessary laboratory tests, multiple times a week per patient and never reviewed results with patients, costing $1,000-$6,000 per test. This grueling testing regime was only conducted for insurance patients; those without received a monthly in-house test costing $3.50.

Abovyan conceded he wrote buprenorphine prescriptions without the required DEA "X" number license. He pre-signed blank prescriptions and fraudulently prescribed buprenorphine for "pain" outside the scope of professional practice for a non-legitimate medical purpose for months before receiving an "X" number license, violating Counts Two through Nine. The purpose of these prescriptions was to maintain the fraud scheme, because prescribing buprenorphine retained patients and allowed the facilities to continually bill insurance companies. Abovyan providing actual treatment or discussing test results of continued drug abuse and relapses

would require different levels of treatment causing patients to leave, shrinking insurance reimbursements. Abovyan knew about the scheme because he ordered this medically unnecessary testing and never discussed results with patients or altered treatment plans, rendering the claims fraudulent and violating Count One.

Next, the district court did not err regarding Count One's conspiracy to commit health care fraud instruction. While the jury instructions could have been clearer, they explicitly referred the jury to the substantive health care fraud elements "as charged in the indictment," and the scheme was sufficiently detailed in the superseding indictment. Jurors had the indictment during deliberations, containing the essential elements of the underlying offense. The district court did not reversibly abuse its discretion by denying Abovyan's civil liability jury instruction because the proposed instruction was legally incorrect, Abovyan's concerns were substantially covered in other instructions, and it did not impair Abovyan's defense.

Third, the court did not abuse its discretion by admitting Rule 404(b) evidence of Abovyan's gambling, as Abovyan opened the door to this evidence in opening statement by questioning his intent and motive to defraud. In any event, this evidence was highly probative of intent, motive, and lack of mistake, outweighing any unfair prejudice, which was diminished because the jury knew gambling was lawful and received limiting instructions. Furthermore, the court did not abuse its

discretion by sustaining objections during Abovyan's cross-examination because defense counsel attempted to elicit inadmissible hearsay and speculative testimony.

Finally, Abovyan's sentencing objections are unpersuasive. He does not show, as he must, that the court committed a clear error in deciding loss by properly relying on a foreseeable intended loss amount, and Abovyan cannot show that he was sentenced incorrectly on the Count Two conspiracy because the jury found him guilty of dispensing buprenorphine prescriptions in substantive counts.

Argument

I. The Evidence Against Abovyan Was Substantial.

Abovyan challenges the sufficiency of the evidence supporting his convictions for conspiracy to commit health care fraud, conspiracy to dispense controlled substances, and dispensing controlled substances (Br.:31-49). Abovyan's challenge lacks merit and fails to grapple with key evidence against him.

A. Conspiracy to Commit Health Care Fraud

To prove health care fraud conspiracy, charged in Count One of the superseding indictment, the government was required to show: (1) a conspiracy existed to commit health care fraud under 18 U.S.C. § 1347; (2) the defendant knew of it; and (3) the defendant knowingly and voluntarily joined it. 18 U.S.C. § 1349; *United States v. Moran*, 778 F.3d 942, 960 (11th Cir. 2015). In a health care fraud case, the defendant must be shown to have known that the claims submitted were

false. *United States v. Medina*, 485 F.3d 1291, 1297 (11th Cir. 2007). A person makes a false claim if the billed treatments were "not medically necessary…or were not delivered to the patients." *See id.* at 1304; *U.S. v. Gonzalez*, 834 F.3d 1206, 1214 (11th Cir. 2016).

Conspiracy can be proven by circumstantial evidence because it predominantly is a mental crime. *See United States v. Mateos*, 623 F.3d 1350, 1362 (11th Cir. 2010) (affirming Medicare fraud convictions based on circumstantial evidence of knowledge). The existence of a conspiracy may be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme. *See United States v. Molina*, 443 F.3d 824, 828 (11th Cir. 2006). The government is not required to prove that the defendant knew all the conspiracy details, only the essential nature, and the government can establish a defendant voluntarily joined the conspiracy "through proof of surrounding circumstances such as acts committed by the defendant which furthered the purpose of the conspiracy." *Moran*, 778 F.3d at 961.

Abovyan colorfully contends that neither a "shred" nor "a scintilla of evidence" exists to show he knew about the conspiracy and his actions amounted to "nothing more than mere presence" (Br.:31-35). However, this argument conveniently ignores much of the evidence,[8] including Abovyan's own statements

[8] For example, Abovyan's brief entirely omits FBI Agent Garrity's testimony about

that support his knowing and voluntary involvement, as well as conspiracy law and the jury instructions. Abovyan knew he was an integral part of the scheme's operation because buprenorphine was essential to attracting, treating, and retaining patients, and urine testing can only be ordered with a medical practitioner's prescription.

The jury was properly instructed that the government can prove conspiracy equally by direct or circumstantial evidence (DE:284:170). A conspiracy may be proved by inferences from the participants' conduct or through acts committed by the defendant which furthered the conspiracy's purpose. *See Molina*, 443 F.3d at 828; *Moran*, 778 F.3d at 960-61; *see also United States v. Duenas*, 891 F.3d 1330, 1334 (11th Cir. 2018) (explaining "guilty knowledge can rarely be established directly, and…a jury may infer knowledge and criminal intent from circumstantial evidence alone.").

Abovyan's actions -- including billing for exorbitant testing (DE:279:44,47;DE:280:72-83,275); not reviewing these tests with patients, especially when they revealed substantial drug abuse, relapse or tampering (DE:280:70-71,174,280); refusing to laboratory test scholarship patients

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Abovyan's damaging statements to the FBI, including lying about his salary; pre-signing blank prescriptions; signing standing orders; billing for whatever tests Chatman wanted; and receiving $5,000 monthly to use his medical license for billing (DE:282:114-165).

(DE:278:208;DE:280:70;DE:281:257); signing standard orders for outrageous amounts of laboratory testing not used in treatment (DE:282:189-91); maintaining thoroughly different private practice standards (DE:281:199,215,222-23); providing pre-signed, blank prescription pads (DE:281:18,162-65,235,265); knowing insurance billing issues existed (DE:278:190-91,200-02); constantly demanding "easy money" payments from Chatman (DE:292:217-18); lying to the FBI about his salary (DE:282:126-27,132); admitting he gave Chatman carte blanche to bill for laboratory tests (DE:282:121-22,133-34,150-55,164); conceding that he received $5,000 per month for Chatman to use his medical license to bill (DE:282:126-27,132); and prescribing Suboxone without the DEA "X" number license for addiction (DE:280:67-68,242-49,281) -- all contain potent proof of circumstances evincing Abovyan's guilty knowledge and voluntary participation in the conspiracy. *See Mateos*, 623 F.3d at 1362; *Molina*, 443 F.3d at 828.

Abovyan agreed to bill for expensive laboratory testing and prescribe Suboxone, knowing it required additional licensing (DE:281:94,99,136). Gatt witnessed Abovyan sign the toxicology laboratory test forms, ordering a hundred test panels per patient multiple times weekly and Abovyan approved photocopying these forms (DE:281:95,98,151). Abovyan ordered hundreds of tests per patient on a weekly basis as "medically necessary," but never bothered to review results with patients, making the claims false. *See Medina*, 485 F.3d at 1304; *Gonzalez*, 834

F.3d at 1214. These tests were also fraudulent because they were not medically necessary; the purpose of testing is to obtain results to guide treatment, which never took place. If it did, patients would have been moved to different treatment levels, preventing Reflections' outrageous billing scheme.

The jury could infer -- using their common sense as instructed -- that testing addicts three times a week, not reviewing the results with them, nor changing their treatment plans, had a singular purpose: to bilk insurance companies out of millions of dollars (DE:280:61,118-20;DE:284:170). In fact, as Dr. Clark observed, it makes no sense to test the same patient three times a week, because none of the results would be back in time to make use of them (DE:280:108). Abovyan never discussed test results, rendering them useless and fraudulent (DE:280:73,188,266).

Dr. Clark testified these expensive hundred-panel tests included substances not normally tested for in addiction medicine (DE:280:62-63,71-72). Abovyan had to know about the scheme because he knew the specimens of "scholarship" patients' were not laboratory-tested (DE:278:208,228;DE:280:153-54). If this extraordinary lab testing was "medically necessary," it logically follows that the "scholarship" patients would receive the same amount and frequency of testing; these patients, however, received only a $3.50 in-house monthly test (*id.*).

Abovyan's RNPs testified that they never discussed test results with patients and that Abovyan worked less than his scheduled hours

(DE:281:20,23,79,162,167,169). Patients testified they did not receive their test results. Patient A.B. stated that she only saw Abovyan once, that he never did an examination, and never provided tests results (DE:292:164,199,202). She was urine-tested five days a week and tested positive for heroin, but not moved to a higher level of care until she overdosed (DE:292:169). Patient H.F., a heroin abuser, told jurors it was "unnecessary" to test her urine four times a week and that she never received test results, but did at other treatment centers (DE:282:53-57,68).

Abovyan's double standards running his private practice further reveal his knowledge and participation because his private practice was run vastly different, as he signed off on all laboratory testing, sent testing to ordinary labs, did not pre-sign prescription pads, spent time with patients, and provided excellent patient care (DE:282:102-03).

Dr. Clark testified that Abovyan's level of laboratory testing was "outrageous" in its frequency, confirmatory testing, and for the sheer number and types of substances tested (DE:280:72,275). Dr. Clark opined that ordering over one hundred expensive drug tests per patient multiple times per week was "outside of reason," leading to three-hundred tests per patient per week (DE:280:61-62,72-73,275-76). All of these tests were not medically necessary**,** but were necessary to maximize the conspiracy's profitability (DE:280:67-68,118-120,242-49,281).

Dr. Clark testified that the physician must review test results, immediately discuss them with the patient, and alter the treatment plan (DE:280:63,230-35). Dr. Clark reviewed sixteen patient charts (DE:280:70). Of these, fifteen patients failed drug tests and the positive results were never addressed (DE:280:70,266,274); one "scholarship" patient was not laboratory tested (*id.*). Both experts agreed the entire point of urine testing is to guide treatment and positive drug tests required, at minimum, an altered treatment plan (DE:284:60-61,73), which never happened under Abovyan's care.

Abovyan's own words additionally provided substantial evidence of guilt. Abovyan said he worked at Reflections for "easy money" (DE:282:114). Abovyan's text messages to Chapman revealed that money was his driving motivation, demanding $15,300, $17,300, and $19,950 (DE:292:217-221). He conceded to the FBI that he reviewed laboratory results, signed the standing laboratory orders and EMRs, provided blank pre-signed prescription pads, and ordered whatever tests Chatman wanted (DE:282:121-23,134,164). Abovyan lied to the FBI about his salary, initially stating he was paid $5,000 per month (DE:282:126-27). When confronted with text messages, Abovyan confessed there were additional payments and the $5,000 was exclusively for Chatman to use his medical license to bill insurance (DE:282:126-27,132). Abovyan admitted he

acquiesced to ordering whatever laboratory tests Chatman wanted (DE:282:133,150-55).

Accordingly, the government proved the extreme amount of laboratory testing generated substantial profits for the conspiracy and Abovyan's salary depended on its continued success. The jury knew Abovyan let Chatman, an individual with no medical training, make patient decisions to maximize profit (DE:282:121-22). The jury heard that Abovyan benefited directly and substantially, making a hefty monthly salary and spending twenty percent of his salary gambling (DE:282:32). The jury could readily conclude that Abovyan knowingly, voluntarily, and fraudulently sold his medical license to bill insurance companies for unnecessary testing.

Abovyan argues he had no involvement in billing and the fraud was not "obvious" (Br:23,35-36). The jury heard evidence of Abovyan signing approval letters of Tendler's disavowed testing to ensure reimbursements (DE:278:194). Abovyan received letters questioning laboratory testing and a letter from United Healthcare suspending reimbursements for fraud (DE:278:200-02). It strains credulity to argue the fraud was not obvious when Abovyan ordered the extensive testing at an alarming frequency, but failed to review test results with patients. Moreover, an experienced physician like Abovyan knew the laboratory was not testing specimens for charity and that he was obligated to review test results with

patients, but he never did, which begs the question--why test in the first place? The jury properly concluded, based upon the evidence, that the only answer was money.

Abovyan would have this Court rewrite conspiracy law by requiring the government to prove he directly knew of all the conspiracy's illicit activities (Br.:25-26). However, the government need not prove Abovyan knew all the conspiracy's details, only its essential nature. *Moran*, 778 F.3d at 960–61; *Molina*, 443 F.3d at 828.

Abovyan's contention that *United States v. Willner*, 795 F.3d 1297 (11th Cir. 2015) and *United States v. Ganji*, 880 F.3d 760 (5th Cir. 2018) require reversal of his conviction is misplaced (Br.:40-43). In *Willner*, this Court reversed a physician's health care fraud conspiracy conviction where there was only circumstantial evidence of changed patient charts, forged signatures, and witnessing health care fraud. 795 F.3d at 1306-10. In *Ganji*, the Fifth Circuit reversed a doctor's health care fraud conviction that was based on three pieces of circumstantial evidence: another doctor's fraudulent behavior, Ganji's $1,000 monthly salary, and patient referral increases. 880 F.3d at 768. Abovyan summons these cases in an attempt to demonstrate the evidence against him amounted to "alleged lapses in supervision or documentation…far less incriminating than…*Willner* and *Ganji*" (Br.:42).

Unlike *Willner* and *Ganji*, the government presented a mountain of direct and circumstantial evidence against Abovyan. Indeed, *Ganji* itself holds that agreement to commit health care fraud need not be formal or spoken and the government can use evidence of the conspirators' concerted actions to prove an agreement existed. 880 F.3d at 767. There is substantial evidence of Abovyan's *own* fraudulent behavior as medical director, including ordering expensive testing with an "outrageous" frequency only for insurance patients (DE:280:56-76); *failing* to review test results with patients (DE:280:70-81,174,280); *never* using these results to alter patient treatment (DE:280:94,96,109-12,130-32,137-40,146,151-52;DE:292:164,169); *pre-signing* blank prescription pads (DE:281:18-19,162,65,235,264); *knowing* he needed a DEA "X" number to prescribe buprenorphine for addiction, but fraudulently prescribing it without one (DE:280:67-70;DE:281:99); *demanding* tens of thousands of dollars from Chatman (DE:282:129;DE:292:217-18,221); *signing* letters approving of Tendler's testing for reimbursement (DE:278:194,204-05); *stating* that Reflections was "easy money," lying to the FBI about salary, and admitting allowing Chatman to bill for anything he wanted (DE:282:114,121-22); and *entering* EMR notes stating patients were "normal" and "doing well" when testing showed drug abuse, relapses, and tampering (DE:280:122-152).

Furthermore, expert testimony demonstrated that Abovyan's testing, patient care and buprenorphine prescriptions were outrageous, medically unnecessary, and outside the scope of professional practice (DE:280:59-63,68-75,99,118-20). The evidence showed that Abovyan's lack of care and need for "easy money" led to relapses, overdoses, and deaths.

Additional circumstantial evidence revealed that Abovyan knew about the conspiracy and voluntarily joined it, including his responsibility for patient treatment, prescription drugs, and laboratory results (DE:278:194-198); his disparate treatment of patients at Reflections (DE:281:199,215,222-23); correspondence he received from insurance companies questioning laboratory testing (DE:278:202); the fact that "scholarship" patients were not laboratory tested, thwarting Abovyan's claim of medical necessity (DE:280:277); and patient testimony that Abovyan rarely saw them, never provided test results and only kept refilling prescriptions (DE:281:233-35;DE:282:53-57,68;DE:292:164-69,180,199,202).

Contrary to Abovyan's contention that he was "the unwitting patsy," Abovyan was the key to allow a steady stream of "easy money" to flow to Chatman and himself. The trial record firmly established that not only did Abovyan test with an "outrageous" frequency, but these expensive tests had no value because Abovyan and his RNPs never discussed them with patients (DE:280:70-71,118-20;DE:281:20-23,79,162,167,169). To make matters worse, Abovyan

electronically signed patient test results, showing evidence of tampering, relapse or drug use, that he "*reviewed and will discuss at next patient encounter*," oftentimes a month later, but never did (DE:280:92,124-32,136-38,143-46,151-52;DE:282:53-57;DE:292:199). The government was entitled to prove the conspiracy by concerted actions, common sense and inferences. All of which, combined with ample direct and circumstantial evidence, were more than sufficient to support Abovyan's health care fraud conspiracy conviction.

B. Conspiracy to Dispense Controlled Substances & Substantive Offenses

Abovyan also contends the evidence was insufficient to convict him of the controlled substance offenses (Br.:43-49). His arguments remain equally unavailing.

To prove a drug conspiracy, as charged in Count Two of the superseding indictment, the government must prove that: (1) there was an agreement between two or more people to commit a crime (unlawfully dispensing controlled substances in violation of § 841(a)(1)); (2) the defendant knew about the agreement; and (3) the defendant voluntarily joined the agreement. 21 U.S.C. § 846; *United States v. Monroe*, 866 F.2d 1357, 1365 (11th Cir. 1989). The existence of an agreement may "be proved by inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme." *Mateos*, 623 F.3d 1350, 1362 (11th Cir. 2010). A jury may find that a doctor violated the Controlled Substances Act ("CSA") from

evidence received from lay witnesses surrounding the facts and circumstances of the prescriptions. *See United States v. Joseph*, 709 F.3d 1082, 1100 (11th Cir. 2013).

Under the CSA, it is unlawful for "any person" to knowingly or intentionally distribute or dispense a controlled substance. Physicians and pharmacists can be criminally liable under the CSA "when their activities fall outside the usual course of professional practice." *United States v. Moore*, 423 U.S. 122, 124 (1975). To prove unlawful dispensation, as charged in Counts Three through Nine of the superseding indictment, Abovyan must have "dispensed controlled substances for other than legitimate medical purposes in the usual course of professional practice, and did so knowingly and intentionally." 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2; *United States v. Ignasiak*, 667 F.3d 217, 227 (11th Cir. 2012).

For Counts Two through Nine, Abovyan concedes that he signed or pre-signed the Suboxone prescriptions without having the "X" number license (DE:284:130). Abovyan knew he needed an "X" number license and his own expert agreed it was improper to pre-sign prescriptions and to prescribe Suboxone for addiction without a DEA "X" number (DE:281:98-100;284:70,73).

Abovyan started as medical director on July 15, 2016, and did not receive his DEA "X" number license until September 20, 2016 (DE:280:34-35). Over two months, he knowingly prescribed Suboxone for addiction (DE:280:34-38,68-71,84-153). Moreover, Abovyan provided pre-signed, blank prescription pads to his

RNPs, Chatman and Barbuto, to prescribe this and other controlled substances (DE:281:18-19,162-63). Dr. Clark testified that the DATA 2000 Act required physicians to obtain a DEA "X" number and specialized course training to prescribe buprenorphine for addiction (DE:280:5,28-30). The buprenorphine specialized training course was not insignificant and Dr. Clark testified that buprenorphine is deadly if not closely monitored (DE:280:28-29,48). Abovyan also fraudulently procured his "X" number license through Barbuto (DE:278:100-103).

Dr. Clark testified Abovyan's buprenorphine prescriptions before September 20, 2016, were outside the scope of professional practice and without a legitimate medical purpose (DE:280:38,68-75,86-87,99,104-06,116,134-35,143,147-48). Abovyan disguised these Suboxone prescriptions with a "pain" diagnosis to shroud them in a legitimate medical purpose, but medical records proved otherwise (*id.*).

Count Three. Although P1 was diagnosed with drug addiction, on July 20, 2016, Abovyan prescribed P1 Suboxone for pain/withdrawal without an "X" number (DE:280:85;DE:282:172-73). This was a false diagnosis and prescription because P1 did not suffer from pain/withdrawal and Abovyan did not have a DEA "X" number (DE:280:86-87). There is no record of an assessment, diagnosis, or care plan, but there are records of P1's urine testing, showing continued drug abuse and tampering, with no accompanying discussion of test results (DE:280:86,90-96).

Counts Four and Eight. On July 25, 2016, Abovyan prescribed P2 Suboxone (Count Four) with a diagnosis of pain/withdrawal (DE:280:102;DE:282:173-74), but P2's diagnosis was for drug addiction (DE:280:104). On August 29 (Count Eight), Abovyan again prescribed P2 Suboxone for pain/withdrawal (DE:280:104). Both prescriptions were false and required a DEA "X" number (DE:280:105-06). Buehler wrote the August 29 prescription (GE:281:25), and testified that Abovyan pre-signed prescriptions (DE:281:19). P2's urine was tested twenty different times, oftentimes showing drug abuse, and Abovyan signed the results, never discussing them with P2 (DE:280:107-112). P2 stated it was "unnecessary" to be urine tested four times a week (DE:282:54).

Count Five. On July 25, 2016, Abovyan prescribed P3 Suboxone with a diagnosis of pain/withdrawal (DE:280:116;DE:282:174). P3's diagnosis was for drug dependence, and this was a "false" prescription requiring an "X" number (*id.*). Abovyan prescribed P3 additional Suboxone for pain/withdrawal a week later (DE:280:117). There was no review of P3's charts, patient assessment, or a treatment plan (DE:280:118-20). Abovyan noted P3 was "normal" and "clean for awhile," while results showed continued drug abuse (DE:280:124-130).

Count Six. On July 27, 2016 Abovyan prescribed P4 Suboxone with a pain/withdrawal diagnosis (DE:280:116,134-35;DE:282:175), but P4 never complained of pain. P4's drug dependence diagnosis required an "X" number to

prescribe Suboxone (*id.*). P4's laboratory testing revealed he tampered with Suboxone, but Abovyan wrote this was "normal" and prescribed more Suboxone (DE:280:136). Despite this, Abovyan noted P4 was "doing well" (DE:280:137-38).

Count Seven. P5 did not complain of ongoing pain, but Abovyan prescribed Suboxone anyway on August 3, 2016, with a pain/withdrawal diagnosis (DE:280:142-43;DE:282:175-76). P5's actual diagnosis was for drug dependence, requiring an "X" number (DE:280:143). Abovyan never reviewed test results with P5 (DE:280:143-46).

Count Nine. P6 did not complain of ongoing pain, but Abovyan nonetheless prescribed P6 Suboxone on August 31, 2016, with a pain/withdrawal diagnosis (DE:280:147-48;DE:282:176-77). P6's diagnosis was for drug dependence and Abovyan needed an "X" number (*id.*). P6 testified that Abovyan prescribed her Suboxone, that she was urine-tested five days a week and tested positive for heroin, but it took an overdose to move her to a higher level of care (DE:292:164,169). Abovyan never discussed her test results (DE:292:199,202).

Abovyan's two RNPs testified they did not have prescription licenses, but with Abovyan's approval, they prescribed controlled substances, including buprenorphine, with the specific pain/withdrawal diagnosis on pre-signed prescription pads (DE:281:13,15-18,26,158-65,172-74,193). They never reviewed tests with patients (*id.*;DE:281:20-23,79,162,167,169).

The record established that in a very real way, Abovyan acted like a "pill mill" doctor, dispensing opioids to patients and testing patients without providing results or follow-up, even when tests revealed serious drug abuse, relapse and tampering (DE:280:70-71,94-96,109-112,124-32,137-40,174,280;DE:292:164,169). He also prescribed patients high dose, multiple-refill abuseable medications without medical need (DE:280:76,274-75).

The evidence of a conspiracy is buttressed by the fact that at his private practice, Abovyan reviewed patient test results daily and never pre-signed prescriptions (DE:281:215,222-23). In contrast, Reflections patients testified that other patients were high; they saw Abovyan once or not at all; they observed RNPs, Chatman and Barbuto with pre-signed, blank prescription pads; and they never discussed drug test results with Abovyan nor his RNPs (DE:283:53-57;DE:292:161-2,164-69,180,199,202,234-35).

The evidence further revealed Abovyan's integral involvement in the drug scheme to treat patients with buprenorphine and subject them to expensive testing to continue receiving the opioid. In reality, there was no real treatment, and Abovyan did not bother to look over charts, discuss positive drug and relapse test results with patients, conduct assessments or change treatment plans (DE:280:61-64,73,118-20). Dr. Clark concluded that Abovyan's care amounted to only prescribing, ignoring the

test results, and that he caused "severe harm" by colluding with patients not to confront them on their continued drug abuse (DE:280:73,118-20).

Abovyan argues that the buprenorphine prescriptions were medically necessary and the government confuses DEA licensing requirements with medical treatment standards (Br.:44-46). The government proved that these prescriptions were medically unnecessary because the patients did not complain of pain and Abovyan wrote prescriptions to skirt the "X" number requirement (DE:280:38,68-75,86-87,99,104-06,116,134-35,143,147-48). Furthermore, Abovyan's argument conveniently ignores the evidence that: (1) he was responsible for patient medications, but knowingly prescribed buprenorphine for addiction without an "X" number (DE:280:67-68,242-49,281); (2) Dr. Clark testified the Suboxone prescriptions were not medically necessary and outside the scope of professional practice (*id.*); (3) Abovyan allowed other individuals to possess blank, pre-signed prescription pads to prescribe controlled substances (DE:281:18-19,162-65,235,264); (4) Abovyan kept prescribing buprenorphine, without examinations, assessments or reviewing patient drug tests that revealed tampering, relapse and continued drug abuse (DE:280:92,109-112,118-20,124-132,136-40,143-46,150-54;DE:281:20-32,79,162-69); and (5) significantly, Abovyan's expert, Dr. Starr, refused to prescribe Suboxone for pain (DE:282:35-38). Abovyan cannot seriously argue that his buprenorphine prescriptions, prior to receiving his "X" number

license, were medically necessary when his own expert refused to prescribe buprenorphine for pain (*id.*).

The evidence showed that Abovyan knowingly and intentionally prescribed these substances with no legitimate medical purpose and outside the course of professional practice. The jury was also entitled, for Counts Two through Nine, to discern Abovyan's deliberate ignorance, as the jury was instructed (DE:184:23;DE:284:183-84). Furthermore, the jury's verdicts for Counts Three through Nine could have alternatively rested on their determination that Abovyan knowing and intentionally aided and abetted Chatman by joining with him to dispense buprenorphine (DE:284:184-85).

Abovyan again relies on *Ganji* and *Willner*, as well as *United States v. Feingold*, 454 F.3d 1001, 1010 (9th Cir. 2006), to claim the evidence was not sufficient (Br:46-48). *Ganji* and *Willner* remain equally unavailing because the paltry evidence in those cases relied on the misconduct of *other* physicians and a few pieces of circumstantial evidence, unlike the substantial evidence here. Abovyan argues *Feingold* holds that medical malpractice cannot be the basis for a distribution conviction (Br:48), but conveniently omits the entirety of *Feingold*'s holding: that a criminal conviction based upon medical malpractice is properly excluded by jury instructions that require intent, state the prescriptions had no legitimate medical purpose and were outside the usual course of professional

practice, and that provide for a good faith defense. 454 F.3d at 1010-1013. Abovyan's jury instructions exceeded these Ninth Circuit benchmarks – the § 841(a)(1) elements provided for the former three and a good faith instruction was included (DE:284:180,183). Substantial evidence exists to affirm Abovyan's conspiracy and drug convictions.

II. Abovyan's Jury Instruction Claims Are Not Reversible Error.

Abovyan argues plain error occurred because that the jury was not properly instructed on the Count One health care fraud conspiracy and that the district court abused its discretion by denying his defense theory instruction (Br.:49-53). These contentions are without merit.

A. Health Care Fraud Conspiracy Jury Instructions (Count One)

Abovyan argues that his Count One conviction requires reversal because the jury was not instructed on the underlying elements of health care fraud, 18 U.S.C. § 1347. Abovyan did not object to the instruction and argues plain error review applies (Br.:50). Abovyan, however, invited the error, rendering the jury instruction unreviewable. Abovyan's counsel responded to the district court's question during a jury charge conference "[d]oes that identify all the issues, at least that we need to deal with?" with: "On behalf of the Defense, yes" (DE:283:192). Abovyan had ample opportunities to raise this issue, as the government filed jury instructions before trial; during two charge conferences, where he once affirmatively

stated there were no remaining issues; during and after the jury charge and closing arguments; and in his new trial motion. When a party invites or induces error, a subsequent claim of error has been waived and this Court is precluded from reviewing that error on appeal. *United States v. Brannan*, 562 F.3d 1300, 1306 (11th Cir. 2009). An error is invited or induced when a party expressly proposes a course of action or affirmatively acquiesces in a ruling or approach proposed by the district court. *See United States v. Silvestri*, 409 F.3d 1311, 1337 (11th Cir. 2005) (defendant invited error when he stated that the proposed jury instructions "covered the bases"); *United States v. Frank*, 599 F.3d 1221, 1240 (11th Cir. 2010) ("[W]hen a party agrees with a court's proposed instructions, the doctrine of invited error applies, meaning that review is waived even if plain error would result.").

In any event, while the instructions could have been clearer, there was no plain error because the jury actively considered the substantive health care fraud elements because the conspiracy instructions referred to the "*common and unlawful plan to commit health care fraud, as charged in the superseding indictment*." (DE:184:14;DE:284:176).[9] The jury received a redacted copy of the superseding

[9] The Count One elements were: (1) two or more persons, in some way or manner, agreed to try to accomplish a common and unlawful plan to commit health care fraud, as charged in the superseding indictment and (2) the defendant knew of the unlawful purpose of the plan and willfully joined in it (DE:284:176).

indictment for deliberations (DE:284:192) and are presumed to follow the court's instructions. *See United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir. 1996).

The health care fraud scheme was detailed in the indictment, meeting all the underlying health care fraud elements.[10] The superseding indictment (DE:45) describes the scheme's elements in great detail: (1) billing insurance companies for medically unnecessary testing, receiving kickbacks, illegally prescribing buprenorphine, providing blank, pre-signed prescriptions, and fraudulently obtaining money from insurance companies by materially false and fraudulent representations; (2) the insurance companies billed were "health care benefit programs;" (3) Reflections and Journey used a laboratory, among others, for testing in Texas, pharmacies that filled Abovyan's prescriptions were national chains, and federal health care plans were included; and (4) the superseding indictment charged and detailed Abovyan's intent to defraud.

Additionally, Abovyan approved attaching the "Florida Patient Brokering Act" ("FPBA") after the Count One instructions (DE:180:16). The FPBA, charged

[10] Section 1347 provides a penalty for those who: "knowingly and willfully executes, or attempts to execute, a scheme or artifice (1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items or services. *Moran*, 778 F.3d at 960.

in the superseding indictment, alleged that the defendants committed health care fraud by violating the FPBA, which was read in the jury charge and provided health care fraud elements (DE:284:176-77).

Under plain error review, Abovyan cannot show that any error affected his substantial rights or the fairness of the judicial proceeding. Omitting an element from a jury instruction is not plainly erroneous where there is overwhelming evidence on that element. *See United States v. Johnson*, 520 U.S. 461, 469-70 (1997) (affirming conviction under plain error when judge, instead of jury, decided materiality in perjury proceeding); *see also United States v. Gonzalez*, 834 F.3d 1206, 1225-26 (11th Cir. 2016) (upholding conviction where jury was not instructed on elements of a conspiracy object, the anti-kickback statute, and the indictment included the relevant portion of the statute). As set forth in the sufficiency portion of this brief, there was ample evidence of Abovyan's involvement in a conspiracy to commit health care fraud.

Finally, even if there was plain error, under the concurrent sentence doctrine, Abovyan is foreclosed from relief. *See United States v. Bradley*, 644 F.3d 1213, 1293 (11th Cir. 2011) (declining appellate review of other convictions if a defendant has concurrent sentences on several counts and the conviction on one count is valid).

B. The District Court Did Not Abuse Its Discretion Denying Abovyan's Confusing & Incorrect Proposed Malpractice Instruction.

Abovyan argues that the court used a "strict liability" standard for Counts Two

through Nine and denied a defense jury instruction detailing the difference between civil malpractice and criminal conduct, creating a "perfect storm" resulting in conviction (Br. at 50-53).

The district court correctly determined that Abovyan's proposed instruction was confusing (DE:284:89-90). A district court abuses its discretion by refusing to give a theory-of-defense jury instruction if the requested instruction: (1) states the law correctly; (2) was not substantially covered by the jury charge; and (3) the subject deals with an issue so important that failure to give it seriously impaired the defense. *See United States v. Woodward*, 531 F.3d 1352, 1364 (11th Cir. 2008). Abovyan fails all three prongs.

First, the instruction incorrectly states the law because it would be legal error that the jury must find Abovyan was "not acting as a doctor but as a drug dealer," "drug pusher," and "not practicing medicine…but instead knowingly selling drugs to a patient who was not really sick but wanted drugs for recreational purposes." (DE:182:3-4). Moreover, rather than clarify the liability distinction, Abovyan's instruction blurs with additional confusing language (DE:182:3).

This instruction also omits a critical element when reciting the § 841(a)(1) elements -- that the controlled substance be prescribed "outside the usual course of professional practice," instead adding "not in good faith." The actual offense instructions require that Abovyan knowingly and intentionally dispensed controlled

substances for other than legitimate medical purposes outside the usual course of professional practice (DE:284:180). Abovyan subtracts and adds elements and defenses like a math problem in an attempt to confuse the jury.

Second, any concern was substantially covered by other jury instructions, including the offense and good faith instructions (DE:184:16-22;DE:284:175-183), detailing how controlled substances are lawfully prescribed, the standard of care, and that bad results may not render treatment below the standard of care (*id.*). These instructions required Abovyan's actions to be outside the course of professional practice, provided for good faith and required intent.[11] *See United States v. Feingold*, 454 F.3d 1001, 1012 (9th Cir. 2006).

Lastly, Abovyan's defense was not impaired by the district court's refusal to give this instruction because Abovyan nonetheless pressed his defense vigorously before the jury, arguing throughout trial,[12] that reasonable minds may disagree regarding the criminality of Abovyan's actions (DE:284:142-44,156,158). Therefore, the district court properly refused to give Abovyan's instruction.

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[11] Although the court casually discussed "strict liability," the elements do not require it, only knowingly and intentionally dispensing controlled substances not for legitimate medical purposes outside the usual course of professional practice (DE:284:180).

[12] Abovyan argued in closing that he: "…may have been careless, he may have been negligent, he may even have been reckless, but it doesn't rise to the level of criminality, clearly" (DE:284:158).

III. There was No 404(b) Violation or Cross-Examination Limitation Justifying A New Trial.

Abovyan challenges the district court's admission of gambling funds under Rule 404(b) (Br.:53-55). He further asserts that the district court abused its discretion by sustaining objections to a series of eight hearsay questions during an agent's cross-examination (Br.:56-57). Abovyan's alleged evidentiary errors have no merit.

A. There Was No Reversible 404(b) Error Admitting Gambling Evidence

Rule 404(b) provides that evidence of other crimes, wrongs, or acts is not admissible to prove a person's character, but may be admissible to show proof of motive, intent, or absence of mistake. *See United States v. Eckhardt*, 466 F.3d 938, 946 (11th Cir. 2006). Rule 404(b) is a rule of inclusion and evidence should not be lightly excluded. *See United States v. Jernigan*, 341 F.3d 1273, 1280 (11th Cir. 2003). Rule 404(b) evidence is admissible if: (1) relevant to an issue other than the defendant's character; (2) the prior act is sufficiently proved to allow a jury determination the defendant committed the act; and (3) the evidence's probative value is substantially outweighed by undue prejudice, satisfying Rule 403. *See Eckhardt*, 466 F.3d at 946; *Jernigan*, 341 F.3d at 1285.

Here, the 404(b) evidence[13] was admissible because: (1) it was relevant to

[13] The evidence was also inextricably intertwined because Abovyan's gambling was relevant to his motive and need for "easy money." Subsequently, this Court may affirm on any ground supported in the record. *See Lucas v. W.W. Grainger Inc.*, 257 F.3d 1249, 1256 (11th Cir. 2001).

show Abovyan's motive, intent and lack of mistake; (2) there was no dispute Abovyan gambled; and (3) the probative value was substantial and outweighed any undue prejudice, especially when Abovyan opened the door to motive, and any prejudice was thwarted by the district court's three limiting instructions.

The district court determined that Abovyan's opened the door to the 404(b) evidence and found minimal prejudice because gambling is legal (DE:281:332-34).[14] The agent affirmed that gambling is legal and represented 21% of Abovyan's income (DE:282:25-26;32).

Abovyan's opening statement query begged for the government to show Abovyan's motive and intent. The government introduced this evidence to prove motive, intent, and lack of mistake -- the evidence revealed that twenty percent of Abovyan's income was gambled and that Abovyan needed a steady stream of "easy money" (DE:281:335;DE:282:14-15).

There is no dispute about proof of gambling, introduced through agent testimony

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[14] Defense counsel declared in opening statement that "*no evidence will be introduced to suggest why Dr. Abovyan would throw his medical license away for $72,000 when he is making close to $800,000 for 2016. That's what the evidence is, ladies and gentlemen, or I should say what it is not…*" (DE:278:144). Furthermore, the oft-cited defense figure of Abovyan receiving $72,000-$73,000 for five months is misleading. Save for their shutdown in December 2016, Abovyan would have made much more money; the $73,000 amount annualized is $175,200 per year.

and bank records (DE:282:13-15). The probative value outweighed any prejudice, as Abovyan's opening statement thrust motive and intent into the trial (DE:278:144). Any prejudice was mitigated by the fact that gambling is legal, which jurors heard five separate times (DE:281,332-34;DE:282:25-26). The district court read the cautionary instruction three times (DE:281:336;DE:282:9;DE:284:173-84). The prosecutor, in closing statement, emphasized gambling's legality (DE:284:119).

Abovyan cites *United States v. Jones*, 28 F.3d 1574 (11th Cir. 1994) (rev'd on other grounds), and *United States v. St. Michael's Credit Union*, 880 F.2d 579 (1st Cir. 1989), to buttress his contention of error (Br. at 54-55). Both cases are readily distinguishable. In *Jones*, evidence of an illegal gambling ring was used to prove identity, but 404(b)'s standard is stringent when extrinsic crimes are offered to prove identity. 28 F.3d at 1581-82. Here, Abovyan's gambling was legal and not used to prove identity. *St. Michael's* similarly offers no relief because the gambling evidence was not introduced under Rule 404(b) and excluded on relevancy grounds. 880 F.2d at 601-02. This Court has held that 404(b) gambling evidence is admissible to prove fraudulent motive or intent. *See United States v. Thanh Quoc Hoang*, 560 Fed.Appx. 849, 852-53 (11th Cir. 2014) (unpublished) (holding that 404(b) gambling evidence was relevant to show motive to commit bank fraud). Any evidentiary error was harmless because Abovyan opened the door to its admission, the fact that gambling is legal, the court's limiting instructions, and the

overwhelming evidence against Abovyan.

B. The District Court Did Not Reversibly Abuse Its Discretion by Sustaining Hearsay Objections.

Abovyan contends that the court abused its discretion by improperly sustaining the prosecutor's hearsay objections during the defense cross-examination of FBI Special Agent Joshua Hawkins (Br.:55-58). The court's rulings were proper. In the event that any error occurred, it was harmless.

In the eight series of examples cited in his brief, Abovyan was attempting to elicit improper hearsay and speculation. The case agent, for example, could not testify as to what Dr. Abovyan said at Reflections about testing because the case agent was not present (DE:279:44). This is self-serving hearsay admitting Abovyan's own statements. Likewise, the agent could not testify as to why Barbuto "was acting in that manner?" (DE:279:57-58) or to Chatman's state of mind by answering "Kenny Chapman made sure that what he was doing was known by him and his wife only?" (DE:279:86). Finally, the case agent could not testify as to what Abovyan signed, because he was not at Reflections, and any individual who told the agent what he or she signed would require the agent to testify to hearsay (DE:279:77-79).

Abovyan submits that *United States v. Smith*, 521 F.2d 957, 965 (D.C. Cir. 1975), allows law enforcement investigative reports into evidence and that the government's objections should have been overruled; however, Abovyan never attempted to offer any such reports into evidence and *Smith* covers only reports, not

impermissible questions that call for speculation and hearsay.

Nonetheless, any error in limiting cross-examination was harmless. In evaluating whether the limitation of cross-examination was harmless, the importance of the witness testimony, whether the testimony was cumulative, the presence or absence of corroborating or contradicting testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the government's case, is considered. *See United States v. Ross*, 33 F.3d 1507, 1518 (11th Cir. 1994). Abovyan was afforded wide latitude to cross-examine the agent, the purported testimony regarding Abovyan's signature was cumulative (and Abovyan admitted to signing most of the documents anyway, including laboratory forms, orders, and prescriptions), and the substantial strength of the government's case rendered any error harmless.

IV. Abovyan's Sentence Was Proper.

Finally, Abovyan contends two sentencing deficiencies warrant reversal: (1) a six-sentence argument that his Count Two sentence exceeded the statutory maximum (Br.:58-59); and (2) the court abused its discretion by relying on an unforeseeable intended loss.[15] Both contentions lack merit.

[15] Abovyan contends that he was penalized in sentencing for going to trial (Br.:59-60). However, Dr. Willems, a similarly situated defendant who was less culpable, involved longer and received less money, received a sentence of 120 months' imprisonment after pleading guilty (DE:268:78-80,92).

A. Abovyan's Count Two Sentence Was Legally Correct

Abovyan contends his sentence on the Count Two distribution conspiracy exceeded the statutory maximum (Br.:58-59). Abovyan's sentence was proper because he was subjected to a statutory maximum of ten years, the maximum sentence for Schedule III drugs, like buprenorphine, under 21 U.S.C. §§ 846, 841(b)(1)(E). Although there was no Count Two special verdict form, the jury found that the defendant unlawfully dispensed buprenorphine, a Schedule III controlled substance on seven separate instances in Counts Three through Nine. The jury, therefore, found that a Schedule III substance was part of the Count Two distribution conspiracy. The government complied with *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and prior to sentencing, informed the district court that the statutory maximum should be ten years, the maximum penalty for buprenorphine (Schedule III) distribution in accordance with 21 U.S.C. § 841(b)(1)(E) (DE:259:18). Therefore, the sentence is correct.

B. The District Court Did Not Abuse Its Discretion in Determining Loss.

Abovyan claims the district court merely made a "nebulous pronouncement," failing to make an individualized loss determination (Br.:62). Abovyan ignores the district court's clear factual findings (DE:286:19,34).

Abovyan conceded he agreed with the specific numbers, but not the intended loss or foreseeability (DE:286:21).The district court pointed out the absurdity of

defense counsel's argument that the intended loss was not reasonably foreseeable: "*So [Abovyan]…would say that I have reviewed all of this work, and it is all medically necessary, but somehow he didn't think it was getting billed for, is that your argument?*" (DE:286:28). Abovyan specifically authorized these laboratory tests and knew billing was taking place because he admitted being paid $5,000 per month to use his license for billing and he ordered whatever testing Chatman wanted (DE:282:121-22,133,150-51,155). Moreover, the government's evidence at the sentencing hearing -- including Exhibits 1-3 detailing loss and the IRS Agent's testimony -- established that the intended loss amount was limited to Abovyan's time at Reflections (not Journey), specific insurance companies and one laboratory (DE:286:22-26;29-33). The district court concluded:

> Well, as a guideline issue, I think the guidelines are pretty clear it is the greater of actual or intended. The loss amount presented by the Government relate only to the time when Dr. Abovyan was there are and are actually conservative in terms of total billing…I'm denying your objection…paragraph [53]… accurately reflects the loss amount in this case, which is the 11,000,000 figure.

(DE:296:34).

The district court's finding was not "nebulous." Rather, the finding was specific and individualized. Abovyan asserts that his sentencing requires remand because the loss determination was akin to *United States v. Hunter*, 323 F.3d 1314 (11th Cir. 2003), where the district court held multiple defendants responsible for an entire conspiracy loss, not making individualized loss determinations. Abovyan

misapplies *Hunter* because a particularized determination was made here for Abovyan's "conservative" intended loss amount, which was limited to only SmartLab's billing for Abovyan-approved testing at Reflections (DE:296:34). The district court did not abuse its discretion.

Conclusion

For all the foregoing reasons,[16] the district court's judgment should be affirmed.

Respectfully submitted,

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[16] Abovyan notes cumulative error in passing, failing to brief the issue (Br:28,30). Failure to make arguments in support of an issue waives it. *See Hamilton v. Southland Christian Sch. Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012). In addition, where there is no error, like here, or a single error, cumulative error does not exist. *See United States v. Waldon*, 363 F.3d 1103, 1110 (11th Cir. 2004).

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements for Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-based typeface using Microsoft Word 2016, 14-point Times New Roman.

Certificate of Service

I hereby certify that seven copies of the foregoing Brief for the United States were mailed to the Court of Appeals via Federal Express this 28th day of October, 2019, and that, on the same day, the foregoing brief was filed using CM/ECF and served via CM/ECF on David O. Markus.

s/ Randall D. Katz
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