FILED
United States Court of Appeals
Tenth Circuit

August 19, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff - Appellee, v. STEVEN R. HENSON, Defendant - Appellant.	No. 19-3062

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:16-CR-10018-JTM-1)

Blair T. Westover (Beau B. Brindley, with her on the briefs), Chicago, Illinois, for Defendant-Appellant.

James A. Brown, Assistant United States Attorney (Duston J. Slinkard, Acting United States Attorney, with him on the brief), Office of the United States Attorney, District of Kansas, Topeka, Kansas, for Plaintiff-Appellee.

Before **HOLMES**, **SEYMOUR**, and **MORITZ**, Circuit Judges.

HOLMES, Circuit Judge.

Defendant-Appellant Steven R. Henson ("Mr. Henson") appeals his convictions and sentence related to his involvement in a drug distribution

conspiracy in and around Wichita, Kansas. He raises four issues on appeal. First, Mr. Henson argues that we should vacate his convictions and remand for a new trial because the district court violated his Sixth Amendment rights by erroneously depriving him of chosen counsel. Second, Mr. Henson claims the district court committed reversible error by instructing the jury it could find the requisite mental state for his crimes based on a "deliberate ignorance" or "willful blindness" theory of knowledge. Third, Mr. Henson seeks remand for resentencing based upon the purported procedural and substantive unreasonableness of his sentence to life in prison. Fourth and finally, Mr. Henson asks us to reconsider a prior precedent and, in doing so, hold that one of the district court's jury instructions misstated the law. For the reasons explicated *infra*, we reject Mr. Henson's challenges. Accordingly, exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we **affirm** Mr. Henson's convictions and sentence.

I

During the events at issue in this case, Mr. Henson was a licensed physician specializing in pain management who operated the Kansas Men's Clinic, along with another medical office, in the Wichita, Kansas, area. In October 2014, the Drug Enforcement Administration ("DEA") began investigating Mr. Henson after receiving calls from pharmacists complaining about his general practices and

prescribing habits. *See* Aplee.'s Resp. Br. at 2–3; *see also, e.g.*, Aplee.'s Suppl. App., Vol. II, at 324–28 (Tr. Patricia O'Malley Test., dated Oct. 4, 2018) (DEA diversion investigator describing the "types of red flags" raised by complaining pharmacists regarding Mr. Henson's medical and prescribing practices, including "the large quantit[ies] of prescriptions, the high dosage amounts prescribed, the higher strength of the medication prescribed," the "flood" of patients that would arrive once one patient filled a prescription Mr. Henson wrote, the unusual hours at which Mr. Henson would see patients, Mr. Henson's lack of medical staff, and Mr. Henson's acceptance of cash payments in lieu of insurance for "very expensive" prescriptions).

Perhaps the most critical "red flag" that complaining pharmacists identified was Mr. Henson's penchant for prescribing potent controlled substances in great quantities and in dangerous combinations. In particular, Mr. Henson was known to prescribe high doses and large quantities of opioids, such as oxycodone and methadone, and benzodiazepines, such as alprazolam, either alone or in combination. *See* Aplee.'s Suppl. App., Vol. II, at 327–28 (Ms. O'Malley describing prescriptions written by Mr. Henson for hundreds of doses of methadone, oxycodone, and alprazolam, with the quantity of some prescriptions so high that the daily dose was twenty pills); *id.*, Vol. X, at 2636 (Tr. Steven Henson Test., dated Oct. 17, 2018) (Mr. Henson testifying that he prescribed a

combination of methadone, oxycodone, and alprazolam "fairly frequently").[1] Drugs such as methadone and oxycodone generally depress an individual's respiratory system, *see* Aplee.'s Suppl. App., Vol. VIII, at 2190–91 (Tr. Timothy Rohrig Test., dated Oct. 15, 2018), whereas drugs like alprazolam "depress the central nervous system, reduce breathing, and are 'strong, hypnotic, sedative-type drugs,'" Aplee.'s Resp. Br. at 12 n.2 (quoting Aplee.'s Suppl. App., Vol. VIII, at 2194); *see* Aplee.'s Suppl. App., Vol. II, at 304 (Ms. O'Malley describing the "very common" usage by "street consumers" of Schedule II narcotic painkillers, like oxycodone, in combination with Schedule IV benzodiazepines, like alprazolam, to "experience a greater, longer high"). In combination, opioids and benzodiazepines "can decrease breathing to the point that a person dies." Aplee.'s Resp. Br. at 12 n.2; *see* Aplee.'s Suppl. App., Vol. II, at 304–05 (Ms. O'Malley: "The Schedule II narcotics [like oxycodone and methadone] . . . [are] used in combination with a product . . . call[ed] . . . benzodiazepine . . . . They

[1] Under the Controlled Substances Act, 21 U.S.C. §§ 801–904, oxycodone and methadone are both classified as Schedule II drugs—meaning they "ha[ve] a currently accepted medical use in treatment," but also "a high potential for abuse" that can "lead to severe psychological or physical dependence"—while alprazolam is classified as a Schedule IV drug—meaning it "has a currently accepted medical use in treatment" and a relatively "low potential for abuse." *See* 21 U.S.C. § 812; 21 C.F.R. § 1308.12(b)(1)(xiv) (classifying oxycodone as a Schedule II substance); 21 C.F.R. § 1308.12(c)(15) (classifying methadone as a Schedule II substance); 21 C.F.R. § 1308.14(c)(2) (classifying alprazolam as a Schedule IV substance); *see also* Aplt.'s App. at 29–30.

both reduce breathing. Especially the benzodiazepine, it's a central nervous system depressant, and the two in combination can . . . . decrease the breathing to the point that . . . . [y]ou can die.").

Over the course of its investigation, the DEA uncovered several aspects of Mr. Henson's medical practice that led the agency to conclude he "was practicing without a legitimate medical purpose outside the usual course of professional practice, and that he was acting as a source of supply for street drug dealers." Aplee.'s Resp. Br. at 3; *see* Aplee.'s Suppl. App., Vol. IX, at 2346 (Tr. Richard Morgan, M.D., Test., dated Oct. 16, 2018) (Dr. Morgan testifying that he found Mr. Henson's medical practice "to be reckless and dangerous" and "outside of the course of legitimate practice"). To start, Mr. Henson performed no physical exams and asked virtually no questions during appointments with his patients; rather, he would ask these patients their names, ages, and whether they had pain, and then proceed to write them prescriptions for large quantities of high-dose medications.

For example, DEA Special Agent Andrea Harrison, testifying at Mr. Henson's trial, said that when she visited Mr. Henson at the Kansas Men's Clinic on May 4, 2015—while working in an undercover capacity—Mr. Henson merely asked her the following: her name, date of birth, why she was visiting him, and whether she had pain. Mr. Henson was the only individual in the office during

the appointment, and he did not have Agent Harrison "fill out any new patient paperwork," examine her, "take [her] blood pressure or pulse," or ask for any medical records. Aplee.'s Suppl. App., Vol. IV, at 862–63 (Tr. Special Agent Harrison Test., dated Oct. 9, 2018). Instead, Mr. Henson asked Agent Harrison whether she was in pain generally, and after she stated that she suffered residual pain from two car accidents, he wrote her a prescription for 240, 30-milligram oxycodone pills. *See id.* at 864–67 (Agent Harrison testifying that Mr. Henson never asked her when the purported pain-causing car accidents occurred, whether she was hospitalized, or how much pain she was in, and that he only asked her the specific area where she had pain after he wrote the prescription). At a follow-up appointment on May 27, 2015, Mr. Henson wrote Agent Harrison another prescription for 240, 30-milligram oxycodone pills "[w]ithout asking [her] about the nature of her pain [or] whether the medication was helping or hurting her." Aplee.'s Resp. Br. at 4; *see* Aplee.'s Suppl. App., Vol. IV, at 872–73, 875.

Beyond Mr. Henson's cursory examinations, investigators were also troubled by the fact that many of Mr. Henson's patients were drug abusers or were diverting and selling prescriptions obtained from him. *See, e.g.*, Aplee.'s Suppl. App., Vol. II, at 388, 443–49 (Tr. Jeremy Wojak Test., dated Oct. 4, 2018) (one of Mr. Henson's ostensible patients testifying about his drug abuse and his sale of drugs obtained via Mr. Henson's prescriptions); *id.*, Vol. III, at 632–36 (Tr.

Amanda Terwilleger Test., dated Oct. 5, 2018) (another of Mr. Henson's patients testifying that she and Mr. Wojak would pay cash to Mr. Henson to obtain prescriptions for hundreds of oxycodone pills to sell or to feed their addictions); *id.*, Vol. XIII, at 3561–68 (Tr. Joel Torres Test., dated Oct. 10, 2018) (Mr. Henson's former patient testifying that Mr. Henson charged $300 cash for office visits; did not accept insurance; performed no physical examinations; and wrote Mr. Torres prescriptions for oxycodone, methadone, and alprazolam, which Mr. Torres then either sold or used to "get high" and feed his addiction); *see also id.*, Vol. II., at 563–74 (Tr. Jordan Allison Test., dated Oct. 4, 2018) (Mr. Allison testifying about his oxycodone addiction and his practice of buying drugs from Mr. Wojak and either using them or selling them).

In particular, one of Mr. Henson's patients, Nick McGovern, became a major supplier and distributor of drugs based on his relationship with Mr. Henson. *See* Aplee.'s Suppl. App., Vol. VI, at 1541–48 (Tr. Grant Lubbers Test., dated Oct. 11, 2018) (Mr. Henson's former patient testifying that he purchased pills from Mr. McGovern, who obtained them via prescriptions written by Mr. Henson, and that Mr. McGovern introduced Mr. Lubbers to Mr. Henson, who then wrote prescriptions directly for Mr. Lubbers); *id.*, Vol. VII, at 1730, 1735–43 (Tr. Keith Attebery Test., dated Oct. 12, 2018) (same); *id.*, Vol. XIII, at 3565–68 (same as to Mr. Torres). Mr. McGovern was himself a heavy drug abuser, and he eventually

succumbed to an overdose of methadone and alprazolam prescribed by Mr. Henson. *See* Aplee.'s Suppl. App., Vol. V, at 1364–65; *id.*, Vol. VI, at 1528–30 (Tr. Timothy Gorrill Test., dated Oct. 11, 2018) (coroner testifying regarding Mr. McGovern's death); *id.*, Vol. VII, at 1710–11, 1802–03; *see also* Aplee.'s Resp. Br. at 19–20.

As well, despite being notified numerous times that his patients were diverting their medications, Mr. Henson continued his prescribing habits unabated. *See, e.g.*, Aplee.'s Suppl. App., Vol. X, at 2679, 2692–94 (Mr. Henson acknowledging that he was notified by pharmacies and family members that his patients might be diverting medications he prescribed to them, but admitting he did not stop prescribing medication to them); *id.*, Vol. XV, Ex. 54jj (text messages from the father of one of Mr. Henson's patients to Mr. Henson, informing him that his son was diverting the medication prescribed by Mr. Henson in order to pay for his gambling habit); *id.*, Vol. XV, Ex. 55kk (voicemail left by Lynn Harris, a United States Probation Officer, raising concerns that medications prescribed by Mr. Henson "may be getting diverted"); *see also id.*, Vol. XV, Ex. 55dd (voicemail from pharmacists in Ponca City, Oklahoma, raising "red flags" about two of Mr. Henson's patients, who came into the pharmacy late at night and wanted to pay cash to fill high-dose and large-quantity prescriptions, despite recently filling similar prescriptions).

Based on the government's investigation, a Kansas federal grand jury indicted Mr. Henson on the following charges related to his medical practices:

> Counts 1 and 2: conspiracy to distribute, dispense, and possess with intent to distribute prescription drugs outside the usual course of professional practice and without a legitimate medical purpose, in violation of 21 U.S.C. §§ 841 and 846;
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> Counts 3 through 16: illegal drug distribution or dispensing outside the usual course of professional practice without a legitimate medical purpose, in violation of 21 U.S.C. § 841;
>
> Count 17: illegal distribution or dispensing prescription drugs outside the course of professional practice or without a legitimate medical purpose that resulted in death, in violation of 21 U.S.C. § 841;
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> Count 18: possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924;
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> Count 19: knowingly making and using a false writing or document, in violation of 18 U.S.C. § 1001;
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> Count 20: obstruction, in violation of 18 U.S.C. § 1509;
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> Counts 21 through 25: money laundering, in violation of 18 U.S.C. § 1957; and
>
> Counts 26 through 31: money laundering, in violation of 18 U.S.C. § 1956.

See Aplt.'s App., Doc. 1, at 28–50 (Indictment, filed Jan. 12, 2016); Aplee.'s Resp. Br. at 1–2.

At trial, Mr. Henson "did not challenge the government's claim that . . . [his] patients were either abusing or reselling their medications, nor that he issued

the charged prescriptions." Aplt.'s Opening Br. at 2. Rather, his defense "was that he did not intentionally or knowingly issue any of the charged prescriptions outside the course of professional practice or without a legitimate medical purpose," and that "he did not have any agreement with any of his patients to do the same." *Id.* Specifically, Mr. Henson pointed out that many of his patients admitted lying to him about their drug addictions, and that he was, consequently, unaware of their misuse of their prescriptions. He also explained that he prescribed "continually increasing amounts of pain medication without any upper boundary" based on alternative treatment theories and medical philosophies, and that "at all times he was attempting to act in good faith and treat what he believed to be his patients' legitimate pain needs." *Id.* at 5.

The jury, however, was largely unpersuaded, and it found Mr. Henson guilty on Counts 1–17, 19–20, and 26–31. *See* Case No. 6:16-cr-10018-JTM, Doc. 373 (Verdict, filed Oct. 23, 2018).[2] Mr. Henson filed a motion for a new

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[2] Mr. Henson does not include the jury verdict form from his trial in his appendix on appeal. However, we can take judicial notice of this document from the district court's docket. *See, e.g.*, *Bunn v. Perdue*, 966 F.3d 1094, 1096 n.4 (10th Cir. 2020) ("Some of the relevant . . . filings in district court . . . were not included in the record on appeal, but they are accessible from the district court docket. We may therefore take judicial notice of the filings."); *United States v. Holloway*, 939 F.3d 1088, 1104 n.10 (10th Cir. 2019) (taking judicial notice of district court filings, including the transcript of defendant's sentencing hearing, where the parties failed to include them in the record on appeal); *see also Milligan-Hitt v. Bd. of Trs. of Sheridan Cnty. Sch. Dist. No. 2*, 523 F.3d 1219,

(continued...)

trial, which the district court denied. Thereafter, the court sentenced Mr. Henson to life imprisonment for his convictions—a sentence that fell within Mr. Henson's advisory guidelines range. Mr. Henson brings this timely appeal of his convictions and sentence.

II

Mr. Henson raises four issues on appeal. First, Mr. Henson claims that he was denied his Sixth Amendment right to counsel of choice based on an allegedly erroneous, pre-trial ruling by the district court finding his original counsel labored under a conflict of interest that could only be ameliorated through written waivers. Second, Mr. Henson argues the district court erred by instructing the jury on a "deliberate ignorance" or "willful blindness" theory of knowledge, when the government failed to proffer sufficient evidence supporting such an instruction. Third, Mr. Henson contends his sentence is procedurally and substantively unreasonable. Fourth, Mr. Henson requests that we revisit and

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[2](...continued)
1231 (10th Cir. 2008) (noting, in discussing the difference between the record and a party's appendix, that "[t]he record on appeal comprises all of 'the original papers and exhibits filed in the district court,'" along with "the transcript of proceedings," and that we "retain the *authority* to go beyond the appendix if we wish, because all of the transcripts . . . and documents and exhibits filed in district court remain in the record regardless of what the parties put in the appendix" (quoting FED. R. APP. P. 10(a))).

overturn one of our prior precedents—and, in so doing, conclude that a jury instruction in his trial misstated the law.

We consider each issue in turn. In the end, we conclude that Mr. Henson's arguments on appeal are unavailing. Accordingly, we affirm his convictions and sentence.

A

In his first issue on appeal, Mr. Henson contends he is entitled to a new trial because he was denied his counsel of choice, thereby violating his Sixth Amendment rights. We begin by reviewing the procedural history relevant to this issue, after which we assess Mr. Henson's arguments in support of his counsel-of-choice claim. Ultimately, we do not reach the merits of this issue because we conclude Mr. Henson abandoned the issue in the district court by way of his attorney's voluntary withdrawal from the case. Mr. Henson has, therefore, waived appellate review of the issue.

1

Mr. Henson's counsel-of-choice claim relates to events that occurred pre-trial. Specifically, two weeks before Mr. Henson's trial was originally scheduled to commence, the government filed a motion styled "United States' Motion to Determine Conflict of Interest." *See* Aplt.'s App., Doc. 200, at 51 (Gov't's Mot. to Determine Conflict of Interest, filed July 10, 2017). The government raised the

possibility that Mr. Henson's then-counsel, Kurt Kerns, was laboring under a conflict of interest based on his past representation of two individuals involved in Mr. Henson's prosecution: (1) a government witness who Mr. Kerns had represented ten to fifteen years prior on aggravated battery charges in Kansas state court, and (2) Mr. Henson's former patient and co-defendant, Joel Torres,[3] who had been represented by Mr. Kerns in three prior cases in Kansas state court—two involving drug distribution charges, and one involving a misdemeanor concealed weapons charge. The government contended that, because it was likely Mr. Henson's defense would be "that all [his] patients were addicts," that they "all lied to [him]," and that "he had no knowledge" any of his patients were diverting drugs, it would be "reasonable to expect" that Mr. Kerns's cross-examination of his former clients would cover their drug abuse and whether such abuse "cloud[ed] their memor[ies] of the events to which they will testify." *Id.* at 54. Under Kansas Rule of Professional Conduct 1.9(c), Mr. Kerns could

[3] Mr. Torres pleaded guilty to conspiracy to distribute prescription pills and entered into a plea agreement on May 31, 2017, pursuant to which he waived his Fifth Amendment rights and testified at Mr. Henson's trial. *See* Aplee.'s Suppl. App., Vol. XIII, at 3561–65; *id.*, Vol. XV, Ex. 7-b, at 4 (Joel Torres Plea Agreement, filed May 31, 2017) (waiving any rights "which might be asserted under," *inter alia*, "the United States Constitution . . . that pertain[] to the admissibility of any statements [Mr. Torres] ma[kes] after th[e] Plea Agreement"); *see also* Aplt.'s App. at 51 (noting that Mr. Torres had been "subpoenaed to testify, and will testify on behalf of the United States" in Mr. Henson's trial).

not rely on protected information or personal facts obtained through his prior representation for the benefit of Mr. Henson.[4] Thus, in the government's eyes, Mr. Kerns's divergent ethical obligations—i.e., those owed to Mr. Henson and those owed to his former clients—would impair his ability to "adequately represent" Mr. Henson. *Id.* at 55. Considering the specter of this ethical dilemma, the government requested that the district court determine if conflicts of interest existed and, if so, whether they could be waived.

Responding to the government's motion, Mr. Kerns disputed that he labored under a conflict of interest and argued that his prior representations of the government's witnesses occurred in the "distant past" and in cases "completely

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[4] *See* Kan. R. Pro. Conduct 1.9(c) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client."). Under its Local Rule 83.6.1(a), the District of Kansas adopts the Kansas Rules of Professional Conduct "as the applicable standards of professional conduct" within the federal district court, "except as otherwise provided by a specific rule of th[e] court." Mr. Henson does not contend that any specific rule of the District of Kansas provided for the exclusion of Rule 1.9(c), and our examination of the local rule's text and other research does not support such a conclusion. *See United States v. Bo Cheng Feng*, No. 05-40095-01-JAR, 2006 WL 3747554, at *1-2 (D. Kan. Dec. 12, 2006) (noting, in ruling on a motion to determine conflict of interest filed by the government—in a situation analogous to the one here—that "[t]he standards for conduct of attorneys in [the District of Kansas] are the Kansas Rules of Professional Conduct as adopted by the Supreme Court of Kansas" and specifically discussing Kansas Rule of Professional Conduct 1.9).

unrelated to [Mr. Henson's] prosecution." *Id.*, Doc. 204, at 56 (Def.'s Resp. to Gov't's Mot. to Determine Conflicts, filed July 13, 2017). Moreover, Mr. Kerns averred he had "no recollection of" these prior representations "whatsoever" and, therefore, "[t]here [was] no conflict" and "nothing to have either client waive." *Id.* at 56–57.

The district court held a hearing on the government's motion on Tuesday, July 18, 2017. During the hearing, the court made the following remarks, which are integral to Mr. Henson's counsel-of-choice claim:

> I am not as concerned about the [government witness's prior] battery charge, I don't think that . . . create[s] an actual conflict, even if drug use may have contributed or been one of the underlying factors in the battery but your prior representation of a co-defendant on a drug distribution charge, whether you have any memory of it or not, Mr. Kerns, makes Dr. Henson's interests materially adverse to your former client on a matter that's substantially related to the prior representation.
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> While I do not know what position Dr. Henson intends to take at trial, I don't think it's too far fetched to think that he likely will claim that his patients misled him and that he did not know that they were diverting drugs and that being the case, the interests of the clients are materially—your two clients are materially adverse and effective cross examination of the co-defendant probably is going to require you asking about his drug use and history.
>
> And even if you no longer remember at all the representation, the fact that you were once privy to the witness's confidential information, and likely retained some evidence of it even if it's in storage, creates a conflict with your former client and I really believe that in order to continue representation, you're going to have to obtain a written waiver of the conflict both from Dr.

> Henson and from your former client, and it sounds as if he is not going to be willing to waive that conflict.
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> There . . . was a case out of Ohio that was cited in the Government's brief about a taint team approach, where somebody else from your firm might be in a position to do the cross-examination of the witness but I am not even sure here that that would fully address what needs to be done and *so while—and I'm happy to hear any evidence anybody would like to present here on this today, my inclination is to find that there is a conflict if you can't obtain waivers from everyone that's involved, Mr. Kerns. And if you are able to do that, I would like to know by the end of this week and would like to have those written waivers submitted so that we have them. And if I haven't heard from you by Friday at 9 o'clock that you have obtained the waivers, absent some further authority, I intend to find that there is an irreconcilable conflict of interest and Dr. Henson is going to have to obtain different counsel. Unless the parties can agree upon some other approach*.

Id., Doc. 410, at 146–48 (Tr. Hr'g on Gov't's Conflicts Mot., dated July 18, 2017) (emphasis added) (line breaks omitted). Later in the hearing, the court stated, in denying Mr. Henson's motion for a continuance, that Mr. Henson's trial would start on Monday, July 24, 2017, "unless, Mr. Kerns . . . end[ed] up either being removed by [the court] for a conflict of interest, or voluntarily withdrawing in an effort to allow Dr. Henson to find different counsel." Case No. 6:16-cr-10018-JTM, Doc. 410, at 12:4-8 (Tr. Hr'g on Gov't's Conflicts Mot., dated July 18, 2017).[5]

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[5] Mr. Henson has not included this portion of the hearing transcript in his appendix on appeal. However, we take judicial notice of these documents (continued...)

The next day, on July 19, 2017, Mr. Kerns filed his "Motion to Withdraw as Counsel Pursuant to the Court's Order to Withdraw." Aplt.'s App., Doc. 210, at 66–67 (capitalization omitted). Purporting to move the district court "pursuant to its order on July 18, 2017 determining a conflict and *ordering counsel to withdraw*," Mr. Kerns represented that he was unable to obtain waivers from his prior clients, based on statements made by their current counsel. *Id.* at 66 (emphasis added). Mr. Kerns further averred that he was filing the motion "in compliance with the Court's order, while preserving the issue for future appellate review, if necessary." *Id.* By minute order dated July 21, 2017, the district court granted Mr. Kerns's motion "for reasons stated on the record at the July 18, 2017 hearing and because defendant has new counsel as to Steven R. Henson." *See id.*, Doc. 212, at 11 (Minute Order, entered July 21, 2017).

After he was convicted, Mr. Henson raised this counsel-of-choice issue in his motion for new trial, which the district court denied.[6] The court

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[5](...continued)
from the district court's docket. *See supra* note 2.

[6] On appeal, the government contends that Mr. Henson has forfeited his counsel-of-choice claim based on purported dissimilarities between his post-trial arguments and his arguments on appeal. *See* Aplee.'s Resp. Br. at 28 ("[I]n this case plain error review is in order because [Mr.] Henson advances his denial-of-counsel-of-choice claim on a different ground than the one he raised in the district court."). Specifically, the government argues that, in the district court, Mr. Henson "claimed that the district court violated his Sixth Amendment right to counsel of choice by *ordering* [Mr.] Kerns to withdraw and *forcing* his (continued...)

acknowledged that, at the end of its July 18 hearing on the government's conflict-of-interest motion, it stated that, "absent some additional arrangement . . . a conflict of interest likely existed, and gave the parties a week to suggest solutions." *Id.*, Doc. 427, at 193 (Mem. & Order, entered Mar. 4, 2019). But "the

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[6](...continued)
dismissal from the case," whereas on appeal, Mr. Henson "[n]ow . . . asserts that '[t]he district court's decision to require a conflict waiver deprived [him] of his right to counsel of choice,' and that 'the district court's erroneous finding of a conflict requiring waiver resulted directly in the motion to withdraw and plainly deprived [Mr.] Henson of counsel of choice.'" *Id.* at 28–29 (third alteration in original) (citations omitted) (quoting Aplt.'s Opening Br. at 24, 27). In other words, "rather than claim that the district court erroneously ordered [Mr.] Kerns to withdraw—which was [Mr.] Henson's argument in the district court—[Mr.] Henson now claims that the district court['s] alleged[ly] 'erroneous finding of a conflict requiring waiver' animated [Mr.] Kerns's voluntary decision to withdraw, thereby depriving [Mr.] Henson of his Sixth Amendment right to counsel of choice." *Id.* at 29.

The government is correct that our forfeiture principles apply to a situation where "a litigant changes to a new theory on appeal that falls under the same general category as an argument presented at trial." *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (quoting *United States v. Nelson*, 868 F.3d 885, 891 n.4 (10th Cir. 2017)); *see* Aplee.'s Resp. Br. at 30; *see also United States v. Burke*, 571 F.3d 1048, 1057 (10th Cir. 2009) ("[W]hen a defendant pursues a particular theory or objection, but fails to raise another closely related argument, he has forfeited the argument and we review only for plain error."). Thus, if Mr. Henson failed to raise in the district court the counsel-of-choice arguments he now makes on appeal, we would review this claim for, at most, plain error—provided that Mr. Henson were to make a plain error argument on appeal. *See, e.g.*, *In re Rumsey Land Co., LLC*, 944 F.3d 1259, 1271–72 (10th Cir. 2019). However, we need not consider whether Mr. Henson has forfeited his counsel-of-choice claim because, as explained further *infra*, we conclude that Mr. Henson affirmatively *abandoned* this claim in the district court, thereby *waiving* appellate review of it entirely.

matter was [ultimately] taken out of the court's hands" by Mr. Kerns's motion to withdraw, filed in lieu of "obtaining waivers from his prior clients" or "providing for other possible resolutions." *Id.* As for its comments during the hearing, the district court noted that, while it indicated it was inclined to find a conflict, that inclination "was explicitly not final." *Id.* at 195. Moreover, the court suggested that any conflict might be remedied through written waiver, a "taint team approach," or another method devised by the parties themselves. *Id.* The court also solicited additional evidence and legal authority relevant to this issue. *Id.* Yet "[a]ll of these potential avenues were short-circuited by Mr. Kerns's voluntary withdrawal." *Id.* Thus, the court found that Mr. Henson's "claim . . . [was] precluded by the procedural history of the case"—i.e., that Mr. Kerns "voluntarily withdrew from representation, without objection by [Mr. Henson], prior to any actual decision by th[e] court disqualifying counsel"—and, consequently, Mr. Henson's "long-belated assertion of his constitutional choice of counsel d[id] not warrant a new trial." *Id.* at 197.

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On appeal, Mr. Henson is keen to contest what he views as the district court's erroneous finding of a conflict of interest—a finding that, in his telling, arbitrarily deprived him of his chosen counsel in violation of his constitutional rights. As a general matter, Mr. Henson is correct that the Sixth Amendment

guarantees the accused the "right to be represented by an otherwise qualified attorney whom [he] can afford to hire." *United States v. McKeighan*, 685 F.3d 956, 966 (10th Cir. 2012) (quoting *Caplin & Drysdale v. United States*, 49 U.S. 617, 624–25 (1989)); *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006) (noting that the right to counsel of choice "has been regarded as the root meaning of the [Sixth Amendment's] constitutional guarantee"); *see also United States v. Holloway*, 826 F.3d 1237, 1241 (10th Cir. 2016) ("Because 'erroneous deprivation of the right to counsel of choice [has] "consequences that are necessarily unquantifiable and indeterminate, [the deprivation] unquestionably qualifies as structural error."' Accordingly, '[i]f a defendant is wrongly denied his counsel of choice, no showing of prejudice is necessary to establish constitutional error.'" (alterations in original) (citations omitted) (first quoting *Gonzalez-Lopez*, 548 U.S. at 150, then quoting *McKeighan*, 685 F.3d at 966)). *But cf. Holloway*, 826 F.3d at 1241–42 (noting that the right to chosen counsel "is not absolute"; that district courts enjoy "wide latitude in balancing the right to counsel of choice against the needs of fairness"; and that, accordingly, "[o]nly when the trial court *unreasonably or arbitrarily interferes* with a defendant's right to counsel of choice do we agree a conviction cannot stand" (quoting first *McKeighan*, 685 F.3d at 966, quoting second *Gonzalez-Lopez*, 548 U.S. at 152,

and quoting third *United States v. Mendoza-Salgado*, 964 F.2d 993, 1016 (10th Cir. 1992))).

However, we do not reach the merits of Mr. Henson's counsel-of-choice claim because we agree with the district court: Mr. Kerns's voluntary withdrawal took the matter "out of the court's hands" and "short-circuited" the court's decision-making process. Aplt.'s App. at 193, 195. That is to say, we conclude that, by voluntarily withdrawing his representation of Mr. Henson *before* the district court could issue a definitive decision on the conflict-of-interest question, Mr. Kerns effectively abandoned the basis for any argument that Mr. Henson could raise on appeal that the court erroneously or arbitrarily deprived him of his counsel of choice. And, under our precedents, the abandonment of an issue in the district court effects a waiver of appellate review of that issue. Accordingly, because Mr. Henson has not preserved—indeed, has *waived*—any argument for a new trial based on the deprivation of counsel stemming from an allegedly erroneous conflict-of-interest ruling, we affirm the district court's denial of Mr. Henson's motion for new trial on this ground.[7]

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[7] While the government does not argue that Mr. Henson has waived his counsel-of-choice claim because, in the district court, Mr. Kerns abandoned the conflict-of-interest issue that is a necessary predicate for that claim, we may enforce a party's waiver of an appellate issue on our own. *See United States v. Dahda*, 853 F.3d 1101, 1118 n.9 (10th Cir. 2017) ("The government urged forfeiture rather than waiver. But we may consider the issue of waiver sua

(continued...)

As a threshold matter, "[t]he scope of our review . . . is limited to the issues the [appellant] properly preserves in the district court and adequately presents on appeal." *Allman v. Colvin*, 813 F.3d 1326, 1329 (10th Cir. 2016) (omission in original) (quoting *Berna v. Chater*, 101 F.3d 631, 632 (10th Cir. 1996)). In this vein, we have held that where an appellant waives an issue in the district court, he fails to preserve it for appellate review. *See United States v. McGehee*, 672 F.3d 860, 873 (10th Cir. 2012) ("[A] party that has *waived* a right is not entitled to appellate relief." (alteration in original) (quoting *United States v. Teague*, 443 F.3d 1310, 1314 (10th Cir. 2006))); *cf. Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").

"[W]aiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *accord Tesone v. Empire Mktg. Strategies*, 942

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[7](...continued)
sponte."), *aff'd*, 138 S. Ct. 1491 (2018); *see also United States v. Mancera-Perez*, 505 F.3d 1054, 1057 n.3 (10th Cir. 2007) ("We may consider an issue of waiver sua sponte."). Furthermore, Mr. Henson's appellate counsel was afforded an opportunity to address the issue of waiver at oral argument and, "although we do not accord the fact great weight in our analysis, we note that the government *did* contend at oral argument that Mr. [Henson] failed to preserve the [conflict-of-interest] argument" because Mr. Kerns voluntarily withdrew after the hearing. *United States v. McGehee*, 672 F.3d 860, 873 n.5 (10th Cir. 2012); *see* Oral Arg. at 21:04–07 (government arguing that Mr. Kerns's withdrawal foreclosed the possibility of "garden-variety preservation of an appellate issue").

F.3d 979, 991 (10th Cir. 2019); *see also Vreeland v. Zupan*, 906 F.3d 866, 876 (10th Cir. 2018) ("[W]hen we say a defendant has waived a particular right, we mean that the defendant has knowingly, voluntarily, and intentionally chosen to relinquish it."). "We typically find waiver . . . in cases where a party has invited the error that it now seeks to challenge, or"—as is especially relevant here—"where a party attempts to reassert an argument that it *previously raised and abandoned below*." *McGehee*, 672 F.3d at 873 (quoting *United States v. Zubia-Torres*, 550 F.3d 1202, 1205 (10th Cir. 2008)); *see United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1183 (10th Cir. 2009) ("Waiver occurs when a party deliberately considers an issue and makes an intentional decision to forgo it.").[8]

Waiver, then, "is accomplished by intent." *United States v. Carrasco-Salazar*, 494 F.3d 1270, 1272 (10th Cir. 2007) (quoting *United States v. Staples*, 202 F.3d 992, 995 (7th Cir. 2000)). And where a litigant "intentionally relinquished or abandoned [a theory or argument] in the district court, we . . .

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[8] By contrast, forfeiture of an issue "comes about through neglect"—i.e., unintentional conduct, such as when a party simply fails to raise an issue in the district court. *McGehee*, 672 F.3d at 873 (quoting *Zubia-Torres*, 550 F.3d at 1205). "Unlike waived theories," for which a party is not entitled to appellate review, "we will entertain forfeited theories on appeal, but we will reverse a district court's judgment on the basis of a forfeited theory only if failing to do so would entrench a plainly erroneous result." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011).

deem it waived and refuse to consider it." *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011). Our decision in *United States v. Carrasco-Salazar* illustrates a typical abandonment scenario.

There, we considered a defendant's attempt "to resurrect [on appeal] his argument that the imposition of a 16-level [sentencing] enhancement was improper"; the defendant had made this argument in objections to his presentence investigation report, but during his sentencing hearing, his counsel asserted those objections had "been resolved." *Carrasco-Salazar*, 494 F.3d at 1271–72. On appeal, we concluded that this withdrawn objection had been affirmatively abandoned by the defendant and, therefore, he had waived the opportunity to raise the objection on appeal. *See id.* at 1272–73. Noting that "our sister circuits have uniformly held that an abandoned objection is waived," we held that "[t]here can be no clearer 'intentional relinquishment or abandonment of a known right' than when the court brings the defendant's prior objection to his attention, asks whether it has been resolved, and the defendant affirmatively indicates that it has." *Id.* at 1272–73 (citation omitted) (quoting *Olano*, 507 U.S. at 733).

Accordingly, we concluded that the defendant had "waived his objection to the 16-level enhancement by indicating to the district court that it had been resolved" and, therefore, he was "precluded from challenging . . . [that] enhancement on appeal." *Id.* at 1273; *see also, e.g.*, *United States v. Carter*, 941

F.3d 954, 959 (10th Cir. 2019) (finding that defendant waived a procedural challenge to his sentence where his "counsel unequivocally stated [at sentencing] that [d]efendant withdrew his objection" and, therefore, "affirmatively abandoned" the challenge in the district court); *McGehee*, 672 F.3d at 873–76 (discussing our holding in *Carrasco-Salazar* and finding a defendant had waived appellate review of a sentencing argument "he expressly declined to pursue before the district court"); *cf. Cruz-Rodriguez*, 570 F.3d at 1185 (describing our "classic waiver situation" as one "where a party 'actually identified [an] issue,' 'deliberately considered' it, and then affirmatively acted in a manner that 'abandoned any claim' on the issue" (quoting *Zubia-Torres*, 550 F.3d at 1205–06)).

The record before us makes plain that Mr. Kerns's voluntary and affirmative withdrawal of his representation of Mr. Henson abandoned—that is, waived—the conflict-of-interest issue *before* the district court could definitively rule on it. And, because a court ruling adverse to Mr. Henson on this issue is a necessary predicate for his Sixth Amendment counsel-of-choice claim, Mr. Kern's action had the effect of depriving Mr. Henson of an opportunity—i.e., waiving his opportunity—to present this claim on appeal. In other words, Mr. Henson predicates his Sixth Amendment argument on the district court's purportedly erroneous adverse determination that Mr. Kerns labored under a conflict of

interest remediable only through written waivers from Mr. Henson and the government's witnesses. But there is a fatal flaw in Mr. Henson's position—the district court never made such a determination. *Cf.* Aplee.'s Resp. Br. at 31–32 (arguing that Mr. Henson's counsel-of-choice claim fails because it "is based on [an] absent factual premise: that is, the district court did not make a finding that a conflict existed that could be remedied only by waivers from [Mr.] Kerns's former clients").

At the hearing on the government's motion, the court expressed only an "inclination" that it might potentially find an irreconcilable conflict at a future date—or, at most, that it "intend[ed] to" make such a finding in the absence of certain ameliorative measures. *See* Aplt.'s App. at 147–48. As to these measures, the court suggested that it would find any potential conflicts cured were Mr. Kerns to obtain written waivers from Mr. Henson and his former clients by 9:00 a.m. that Friday, July 21, 2017. Significantly, and contrary to what Mr. Henson argues in his opening brief, the court did not limit the galaxy of ameliorative measures solely to written waivers. Instead, the court broached the possibility of a "taint team approach," or "some other approach"—that the parties might formulate and agree to—to cure any potential conflicts under which Mr. Kerns labored; more generally, it invited the parties to present "any evidence" they had on the issue or to submit "further authority" that might move the court away from

its initial "inclination." Aplt.'s App. at 147–48; *see id.* (noting that the court "intend[ed] to find that there is an irreconcilable conflict of interest," "*absent some further authority*" or "*[u]nless the parties can agree upon some other approach*" (emphases added)).

But rather than avail himself of any of these options, Mr. Kerns instead chose to voluntarily withdraw the day after the court's hearing, thereby leaving the conflict-of-interest question unresolved. *See id.* at 195 ("The court's decision [on the conflict-of-interest issue] was explicitly not final and suggested alternatives. The court indicated that it was 'inclin[ed]' to find a conflict, and acknowledged that this could potentially be resolved in three ways—by 'written waiver,' by a . . . 'taint team approach,' or by 'some other approach' if agreed to by the government and [Mr. Henson]. The court also asked for 'any evidence' any party would like to submit, and also explicitly invited 'further authority' on the issue. *All of these potential avenues were short-circuited by Mr. Kerns's voluntary withdrawal*." (second alteration in original) (emphasis added)). In other words, what Mr. Henson characterizes as a decision or "ruling" by the district court, *see* Aplt.'s Opening Br. at 25, was far more contingent and far less definitive—and, consequently, did not constitute a decision at all. And "[a]s a general rule, we do not consider an issue not presented, considered, *and decided by* the district court." *Maestas v. Lujan*, 351 F.3d 1011, 1016 (10th Cir. 2003)

(alteration in original) (emphasis added) (quoting *United States v. Duncan*, 242 F.3d 940, 950 (10th Cir. 2001)); *accord Niemi v. Lasshofer ("Niemi II")*, 770 F.3d 1331, 1346 (10th Cir. 2014); *cf. United States v. Suggs*, 998 F.3d 1125, 1141 (10th Cir. 2021) (noting that "we are 'a court of review, not of first view'" (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

Faced with the absence of any definitive ruling from the district court on whether Mr. Kerns labored under a conflict of interest or whether any potential conflict could be cured only through written waivers—an absence that resulted from Mr. Kerns's voluntary withdrawal *before* the court could render a definitive ruling—Mr. Henson nonetheless attempts to establish that he has, in fact, preserved a counsel-of-choice challenge. This attempt is unavailing. First and foremost, Mr. Henson contends that Mr. Kerns's statements in his withdrawal motion preserved a challenge to the court's supposed conflict-of-interest determination and, thus, a challenge based on denial of his counsel of choice. *See* Aplt.'s Opening Br. at 25 ("[Mr.] Kerns was clear that he was only withdrawing due to the district court's finding of a conflict and its indication he would have to withdraw unless he obtained waivers. [Mr.] Kerns was clear that he was objecting to the district court's ruling and intended to preserve the district court's erroneous finding of conflict."); *see also* Oral Arg. at 11:01–11:13 (appellant's counsel claiming that Mr. Henson had not abandoned his conflict-of-interest issue

"because Mr. Kerns went so far out of his way to say that he was intending not to waive"). But it is entirely unclear why or how Mr. Kerns's bare statements in his withdrawal motion somehow preserved an otherwise abandoned claim of error.

Indeed, this point merits emphasis: the record before us offers no objective basis upon which to conclude either that the district court issued any appealable conflict-of-interest ruling—which could form the basis for Mr. Henson's counsel-of-choice claim—or that Mr. Kerns could preserve a challenge to such a purported conflict-of-interest ruling simply by characterizing the challenge as preserved in his motion to withdraw. In particular, as to this second point, Mr. Henson does not cite any legal authority for the proposition that a party can resurrect a waived issue merely through the *ipse dixit* of his trial counsel. *Cf. United States v. VanDam*, 493 F.3d 1194, 1201 n.4 (10th Cir. 2007) (observing that it would be "truly Panglossian" if the government could "reimpose" a higher sentencing range previously rejected by the district court through the sheer power of its arguments at resentencing), *abrogated in part on other grounds by Puckett v. United States*, 556 U.S. 129 (2009). Thus, Mr. Kerns's subjective assessment of whether the conflict-of-interest issue remained viable is of no moment to our analysis, especially in light of record evidence showing clear abandonment.

On this same score, Mr. Henson does not put forth a convincing reason for why Mr. Kerns was not required to do something beyond simply withdrawing in

order to preserve a challenge regarding the conflict-of-interest issue, upon which his counsel-of-choice claim turns. *Cf.* Oral Arg. at 30:15–30:48 (the court querying whether, even assuming the district court made a ruling on the conflict-of-interest question, "in order to fully preserve" his challenge to this ruling, Mr. Kerns needed to "make a record" that, e.g., he found no additional legal authority on the question or that he explored ameliorative measures beyond written waivers, but concluded none were feasible); *id.* at 30:49–31:11 (The court: "[What] troubles me is the line of reasoning that says that when the court makes a ruling [counsel simply disagrees with], that [counsel] can just . . . [withdraw]. Don't you have to make sure . . . that you've locked in [and preserved] your position?"). Beyond insisting that he had preserved a challenge to the court's supposed conflict-of-interest ruling by saying he had done so, Mr. Kerns, in his withdrawal motion, makes no mention of any non-waiver efforts he had taken to negate the court's conflict concerns—such as proposing a taint-team approach or some other approach agreed to by the parties or offering additional legal authorities bearing on the conflict-of-interest issue.

Moreover, the timing of Mr. Kerns's withdrawal motion—which was filed the day after the court's hearing, despite the court having given Mr. Kerns approximately three days, until that Friday, to submit further authority or to devise ameliorative measures—undercuts an inference that Mr. Kerns gave

serious consideration to alternatives beyond obtaining written waivers.[9] Contrary to the assertion by appellant's counsel that Mr. Kerns "went so far out of his way" not to waive this issue, *see* Oral Arg. at 11:01–11:13, the record reflects that Mr. Kerns did the bare minimum—if that—to comply with the district court's instructions and attempt to ameliorate any potential conflicts of interest.

Thus, Mr. Henson fails to show how or why Mr. Kerns's statements—made in his withdrawal motion—preserved a conflict-of-interest issue for appeal in the face of objective, countervailing evidence in the record that (1) the district court had not definitively decided whether a conflict of interest existed or whether a potential conflict was curable only by furnishing written waivers, and that (2) Mr. Kerns voluntarily "acted in a manner" that unambiguously "abandoned any [conflict-of-interest] claim." *See Cruz-Rodriguez*, 570 F.3d at 1185 (quoting *Zubia-Torres*, 550 F.3d at 1205–06). In particular, Mr. Kerns did not somehow resurrect any conflict-of-interest issue that he had abandoned by merely

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[9] Indeed, Mr. Henson's motion for new trial strongly suggests that alternatives were available and possibly could have cured potential conflicts questions raised by the district court—but that Mr. Kerns, for whatever reason, declined to make use of them. *See* Aplt.'s App., Doc. 411, at 152–53 (Mem. in Supp. of Def.'s Mot. for New Trial, filed Dec. 7, 2018) (describing a taint team approach as "a readily available measure" and faulting the district court for allegedly "fail[ing] to permit a taint team, limited cross-examination, or the retention of *additional* . . . counsel to conduct cross-examination" in lieu of written waivers, when these measures "could have adequately ameliorated the risks of the potential conflict without infringing upon Dr. Henson's right to be represented by counsel of choice"); *see also* Oral Arg. at 31:54–32:24.

inveighing against a purportedly erroneous ruling that the district court, in fact, never made.

Unaided by Mr. Kerns's statements, Mr. Henson further contends that the court confirmed both that it had found a conflict requiring written waivers and that Mr. Kerns's withdrawal was not voluntary when it granted Mr. Kerns's withdrawal motion "for reasons stated on the record at the July 18, 2017 hearing" on the government's conflicts-of-interest motion. Aplt.'s App. at 11; *see* Aplt.'s Opening Br. at 25 ("In granting [Mr.] Kerns's motion to withdraw, the district court . . . indicated that it was doing so in conformity with i[t]s rulings at the July 17, 2018, hearing."). Further, Mr. Henson also appears to suggest the court was under some obligation *not* to grant Mr. Kerns's motion if the court had not, in fact, definitively ruled on the conflict-of-interest question or hinged its conflicts ruling on the absence of waivers. *See id.* at 27 ("When the district court granted [Mr.] Kerns's motion without any disagreement with its assertions, it acknowledged that it intended to disqualify [him] in the absence of waivers he did not obtain. If that was not the case, the district court would have denied the motion as being based on an incorrect premise.").

We start with this last point—regarding the court's ostensible obligation—finding it unsupported by authority and fundamentally misguided. Irrespective of whether Mr. Kerns subjectively understood that the court had *not*

definitively ruled on the conflict-of-interest question, he expressly requested relief—i.e., permission to withdraw—by filing a motion. And Mr. Henson does not explain why—let alone offer any authority demonstrating that—the district court was obliged to affirmatively correct any misunderstanding that Mr. Kerns may have harbored about the tentative nature of the court's conflict-of-interest assessment before the court granted his requested relief. And we seriously question whether any controlling authority for such an obligation exists. *Cf. Niemi v. Lasshofer ("Niemi I")*, 728 F.3d 1252, 1259 (10th Cir. 2013) ("In our adversarial system we don't usually go looking for trouble but rely instead on the parties to identify the issues we must decide."); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998) ("[T]he district courts[] have a limited and neutral role in the adversarial process, and are wary of becoming advocates who comb the record of previously available evidence and make a party's case for it.").

More importantly, the court's minute order granting Mr. Kerns's withdrawal motion does not signify or communicate what Mr. Henson claims it does—i.e., it does not clearly indicate that Mr. Kerns actually was correct in believing that the court *had decided* he labored under a conflict of interest that could be rectified solely through written waivers. Mr. Henson places great weight on the order's language, which states that the court granted Mr. Kerns's motion

"for reasons stated" during the July 18 hearing on the government's conflict-of-interest motion. But Mr. Henson omits from his discussion of the minute order a later portion of that hearing transcript.

There, in denying Mr. Henson's separate motion for a continuance, the court stated the following: "So, I am denying the motion to continue this trial. [Mr. Henson's trial] will proceed on Monday, July 24th, unless, Mr. Kerns, you end up either being removed by me for a conflict of interest, *or voluntarily withdrawing in an effort to allow Dr. Henson to find different counsel*." Case No. 6:16-cr-10018-JTM, Doc. 410, at 12:4-8 (emphasis added). In other words, the court gave Mr. Kerns the option of withdrawing voluntarily, so that Mr. Henson could find another attorney. And from the record, it seems likely that this is precisely what Mr. Kerns did. That is, rather than wait for a definitive ruling on the conflict-of-interest question, Mr. Kerns withdrew to allow Mr. Henson time and opportunity to find another lawyer.

Thus, the court's language in its minute order granting Mr. Kerns's withdrawal motion "for reasons stated" at the July 18 hearing could well have been referencing its comments regarding Mr. Kerns's potential, voluntary withdrawal, rather than the court's assessment of a potential conflict of interest. In the end, we need not decide what the court meant by this language in its minute order. Instead, it is enough for us to conclude that Mr. Henson has not

established that the minute order—in opposition to other record evidence—clearly evinces that the court had made a definitive ruling on the conflict-of-interest question or, more specifically, had determined any potential conflict could only be cured through written waivers.

In sum, we conclude that Mr. Kerns's voluntary and affirmative withdrawal of his representation of Mr. Henson abandoned the conflict-of-interest issue before the district court could definitively rule on it. And, because a court ruling adverse to Mr. Henson on this issue is a necessary predicate for his counsel-of-choice claim, Mr. Kern's action had the effect of depriving Mr. Henson of an opportunity (i.e., waiving his opportunity) to present this counsel-of-choice claim on appeal. Stated otherwise, it was Mr. Kerns himself, of his own accord, that deprived Mr. Henson of his original counsel, *not* the district court. And it is beyond peradventure that Mr. Henson must accept the consequences of Mr. Kerns's action. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990) (noting that, "[u]nder our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent'" (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 634 (1962))); *accord Maples v. Thomas*, 565 U.S. 266, 280–81 (2012); *see also Gripe v. City of Enid*, 312 F.3d 1184, 1189 (10th Cir. 2002) ("Plaintiff argues against the harshness of penalizing him for his attorney's conduct. But there is nothing novel here. Those who act through agents are

customarily bound by their agents' mistakes. It is no different when the agent is an attorney.").[10] Accordingly, because Mr. Henson has waived his counsel-of-choice claim, he is not entitled to a new trial based upon it.

B

[10] In this connection, one point bears underscoring: by concluding that Mr. Henson has waived appellate review of his counsel-of-choice claim, we are *not* suggesting that, in the district court, Mr. Kerns waived Mr. Henson's *right* to counsel of choice or that Mr. Henson would be bound by any such waiver. Rather, what Mr. Kerns waived or abandoned by voluntarily withdrawing as counsel was any entitlement that Mr. Henson might have had to a definitive decision by the district court on the conflict-of-interest issue—a decision that was a necessary predicate for his counsel-of-choice claim. In other words, what Mr. Kerns waived by voluntarily withdrawing was *not* one of Mr. Henson's rights—whether classified as fundamental or not—but, instead, Mr. Henson's opportunity to have the district court rule on the conflict-of-interest question. And, by so waiving that opportunity, Mr. Kerns effectively failed to preserve (i.e., waived) any concomitant opportunity of Mr. Henson to challenge any judicial denial of his counsel of choice; that is because the district court never had a chance—due to Mr. Kerns's voluntary withdrawal—to make a conflict-of-interest ruling that could have effected such a denial. *See New York v. Hill*, 528 U.S. 110, 114 (2000) (noting that "[f]or certain fundamental rights, [a] defendant must personally make an informed waiver," whereas "[f]or other rights, . . . waiver may be effected by action of counsel"); *Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988) ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial." (footnote omitted)); *United States v. Aptt*, 354 F.3d 1269, 1282 (10th Cir. 2004) ("[S]ome rights are firmly in the domain of trial strategy, and can be waived by counsel even in the face of client disagreement.").

In his second issue on appeal, Mr. Henson claims he is entitled to a new trial based on the district court's purported error in giving a "deliberate ignorance" or "willful blindness" instruction to the jury. The specific instruction Mr. Henson challenges is Jury Instruction No. 41, which reads as follows:

> The term "knowingly" means that defendant realized what he was doing and was aware of the nature of his conduct and did not act through ignorance, mistake, or accident.
>
> When the word "knowingly" is used in these instructions, it means that the act was done voluntarily and intentionally, and not because of mistake or accident. Although knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, *knowledge can be inferred if the defendant deliberately blinded himself or herself to the existence of a fact*. Knowledge can be inferred if the defendant was aware of a high probability of the existence of the fact in question, unless the defendant did not actually believe the fact in question.

Aplt.'s App., Doc. 368, at 128 (Jury Instrs., filed Oct. 23, 2018) (emphasis added).

Mr. Henson does not argue that this jury instruction misstates the law. Rather, he argues that "the government failed to present sufficient evidence that [he] had a suspicion falling short of actual knowledge or that he took a substantial step to avoid confirming that suspicion"—in other words, that the government failed to proffer sufficient evidence to support instructing the jury on deliberate ignorance or willful blindness as a theory of knowledge. Aplt.'s Opening Br. at

29; *see, e.g.*, *United States v. Little*, 829 F.3d 1177, 1185 (10th Cir. 2016) ("[A] deliberate ignorance instruction is proper . . . when evidence," viewed "in the light most favorable to the government," "has been presented showing the defendant purposely contrived to avoid learning the truth." (alteration in original) (quoting *United States v. Bornfield*, 145 F.3d 1123, 1129 (10th Cir. 1998))). Mr. Henson contends that, without sufficient, supporting evidence, the instruction "could only have worked to confuse the jury and reduce the government's burden of establishing the required mental state." Aplt.'s Opening Br. at 29–30. Mr. Henson contends further that the effect of the allegedly erroneous instruction was not harmless. *See id.* at 37 ("A jury would be entirely reasonable in finding that Dr. Henson did not actually know that the prescriptions he wrote were either outside the scope of professional practice or without a legitimate medical purpose. Thus, harmlessness cannot be proved beyond a reasonable doubt."). Accordingly, Mr. Henson asserts his instructional error claim necessitates reversal.

Here, again, we do not reach the merits of this issue. As with his counsel-of-choice claim, Mr. Henson's instructional error claim suffers from a "fatal flaw." *United States v. Hillman*, 642 F.3d 929, 939 (10th Cir. 2011). Specifically, while Mr. Henson challenges the sufficiency of the evidence supporting a deliberate ignorance theory of knowledge, he does not challenge the

sufficiency of the evidence supporting a theory of *actual* knowledge, which the instruction in question also addressed. And "because he does not challenge the sufficiency of the evidence on a theory of actual knowledge, our case law precludes reversal of [Mr. Henson's] conviction[s] on the basis of insufficient evidence supporting an *alternate* theory of deliberate ignorance." *Id.* (emphasis added); *see also* Aplee.'s Resp. Br. at 40–41 (noting that Mr. Henson "is not entitled to review of [his instructional error] claim on the merits because the district court instructed the jury that it could convict [him] if he had actual knowledge that his conduct was illegal, and he fails to challenge the sufficiency of the evidence on a theory of actual knowledge, which Instruction 41 also addressed").

Two of our cases are especially on point. First, in *United States v. Ayon Corrales*, the defendant challenged a "knowledge" jury instruction quite similar to Instruction 41 in Mr. Henson's case. *See* 608 F.3d 654, 657–58 (10th Cir. 2010). That instruction "addressed both actual knowledge and deliberate ignorance" and was modeled on this court's Pattern Criminal Jury Instruction No. 1.37. *Compare id.* at 657 (defining "knowingly" as meaning, *inter alia*, "that [an] act was done voluntarily and intentionally," and that "knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact"), *with* 10th Cir., Criminal Pattern Jury Instr. No. 1.37 (Knowingly—Deliberate Ignorance) (2d ed.,

updated Feb. 2018) ("When the word 'knowingly' is used in these instructions, it means that the act was done voluntarily and intentionally, and not because of mistake or accident. Although knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact. Knowledge can be inferred if the defendant was aware of a high probability of the existence of [the fact in question], unless the defendant did not actually believe [the fact in question]." (brackets in original)).

Like Mr. Henson, the defendant in *Ayon Corrales* did not argue that the instruction "misstate[d] the law," but rather "contend[ed] that there was insufficient evidence at trial to support a jury finding of deliberate ignorance, so an instruction on that theory was improper. . . . absent supporting evidence." *Ayon Corrales*, 608 F.3d at 657. But we declined to "determine . . . whether there was sufficient evidence of deliberate ignorance" because, just like Mr. Henson, the *Ayon Corrales* defendant "d[id] not challenge the sufficiency of the evidence to support a conviction based on a finding of actual knowledge"—and "when there is sufficient evidence to support a conviction on one theory of guilt on which the jury was properly instructed, we will not reverse the conviction on the ground that there was insufficient evidence to convict on an alternative ground on which the jury was instructed." *Id.*; *see id.* at 657–58 (explaining that this

principle was "set forth by the Supreme Court" in *Griffin v. United States*, 502 U.S. 46 (1991), where the Court held that "when an offense can be committed by two or more means, a guilty verdict will be sustained when the evidence is sufficient to support one of the means, even if the evidence will not support any alternative means"); *see also United States v. Hanzlicek*, 187 F.3d 1228, 1234–36 (10th Cir. 1999) (holding in the alternative that, "[e]ven were [we] to conclude that the evidence adduced at trial was not sufficient to support the giving of [a] deliberate ignorance instruction, the error would be harmless" because, *inter alia*, "the jury was instructed on alternate theories of actual knowledge and deliberate ignorance," "the deliberate ignorance instruction given properly stated the law," and "there was sufficient . . . evidence of actual knowledge"—and, therefore, the "district court d[id] not commit reversible error whe[n] it submit[ted] a properly-defined, although factually unsupported, legal theory to the jury along with a properly supported basis of liability"). Thus, in *Ayon Corrales*, "[b]ecause there was indisputably sufficient evidence for the jury to find that [the defendant] had actual knowledge"—and, to put a finer point on it, because the defendant affirmatively failed to challenge the sufficiency of the evidence supporting a theory of actual knowledge—we rejected the defendant's instructional error claim. 608 F.3d at 658.

One year later, we again "considered the interplay between challenges to a deliberate ignorance instruction and actual knowledge for purposes of appellate review." *Hillman*, 642 F.3d at 939. Relying on and discussing *Ayon Corrales*, the *Hillman* court "decline[d] review of the sufficiency of the evidence of deliberate ignorance" because the defendant "d[id] not challenge the sufficiency of the evidence supporting the actual knowledge [jury] instruction or the language of the actual knowledge instruction itself." *Id.* at 940. As the defendant's position was "the same as the one we rejected in [*Ayon*] *Corrales*, and [as] he ha[d] failed to provide any reasonable basis on which to distinguish his case," we rejected his instructional error challenge and affirmed his conviction. *Id.*

The government cites *Hillman* and *Ayon Corrales* as barring appellate review of Mr. Henson's instructional error claim. *See* Aplee.'s Resp. Br. at 41 ("[Mr.] Henson's failure to [challenge the sufficiency of the evidence on a theory of actual knowledge] forecloses him from obtaining review on the merits of his claim that the government presented insufficient evidence of his deliberate ignorance to justify giving the instruction."). Having made no mention of these cases—or, more broadly, the sufficiency of the government's evidence supporting a theory of liability based on actual knowledge—in his opening brief, Mr. Henson strains, unsuccessfully, in his reply brief to somehow distinguish his case and evade *Hillman*'s and *Ayon Corrales*'s clear holdings. But these cases plainly

control here. Moreover, at no point does Mr. Henson level a challenge to the sufficiency of the government's evidence of actual knowledge.

Accordingly, because Mr. Henson fails to contest the sufficiency of the government's evidence of his actual knowledge, we decline to review Mr. Henson's instructional error claim based on the purported insufficiency of the government's deliberate ignorance evidence, pursuant to our decisions in *Hillman* and *Ayon Corrales*.

C

In his third issue on appeal, Mr. Henson argues that his life sentence is unreasonable. As with our review of Mr. Henson's counsel-of-choice claim, we begin by reviewing the salient procedural background—here, Mr. Henson's sentencing hearing in the district court—and then consider his arguments challenging the reasonableness of his sentence. We ultimately conclude Mr. Henson's sentence is reasonable in all relevant respects.

1

Following his convictions, Mr. Henson was sentenced for his crimes on March 8, 2019. At Mr. Henson's sentencing hearing, the court first took up objections to his Presentence Investigation Report ("PSR"), sustaining some and

overruling others; this resulted in Mr. Henson receiving a total offense level of 42, a criminal history category of I, and an advisory guidelines range of 360 months to life for his crimes. Aplt.'s App., Doc. 465, at 261 (Tr. Sentencing Hr'g, dated Mar. 8, 2019). The district court next heard the parties' positions on what sentence Mr. Henson should receive. The government recommended a within-guidelines life sentence, primarily based on Count 17, which related to Mr. Henson's role in causing the death of Nick McGovern, one of his former patients. Mr. Henson, on the other hand, sought a below-guidelines sentence of twenty years, the statutory minimum, maintaining that a greater sentence would be "[un]necessary" given the "model life" Mr. Henson led "[o]utside of this case." *Id.* at 262–63; *see id.* at 262–65 (Mr. Henson's counsel highlighting, *inter alia*, Mr. Henson's "dedicat[ion] . . . to his career, to his faith, and to his community"; his mission trips; and his purported lack of ill intent or malice, and arguing that, in light of these factors, "[t]wenty years [in prison] is more than enough to incapacitate, to rehabilitate, to deter," and "to recognize the seriousness of [Mr. Henson's] offense[s]"). Mr. Henson also spoke briefly on his own behalf:

> Your Honor, I trained hard to become a physician. I have been recognized as a well-trained physician and I've only had one goal in life as a physician, [which] was to be able to take excellent care of patients and to increase their functionality. That's been my only goal in medicine and bringing care to the underserved, both in my local community as well as world-wide because not everybody has the opportunity to receive the care that they need. Thank you.

Id. at 266–67.

After hearing several victim statements, the district court announced its sentencing decision. The court began by acknowledging it was "required to impose a sentence . . . sufficient but not greater than necessary to comply with the purposes of sentencing that are identified by federal statute . . ., [and to] consider not only the sentencing guidelines, . . . [but] aggravating and mitigating factors [as well]." *Id.* at 284–85. The court noted it "also considered the statements of the parties, the [PSR], . . . [and] letters." *Id.* at 285. The court found Mr. Henson's guidelines range "correctly calculated," in light of his offense level and criminal history category, and "appropriate in this case." *Id.*

The court then made the following remarks, which form the key basis for Mr. Henson's challenge to the reasonableness of his sentence. Given their centrality to his challenge, we quote them at some length:

> Having considered all of the stated factors and the advisory guidelines, the nature and circumstances of the offense, Dr. Henson's history and characteristics, I am about to announce and impose a sentence. I do have a couple of observations, having dealt with this case now for a couple of years and having been present at the trial. And no case exists in a vacuum and . . . I believe every person is more than the worst thing they've ever done in their lives; that everyone is entitled to dignity and respect when they come in to this kind of situation, and that that ought to be a consideration in sentencing.
>
> And, Dr. Henson, I have made every effort to afford you at every opportunity the dignity and respect that I would any person,

whatever the charge has been, or whatever the charges have been, and as I listen, you saying that all you've ever really wanted to do is to take care of people, and to increase their functionality, and that may have been what you were attempting to do throughout your practice, but it is very difficult to reconcile those statements with your conduct throughout this case.

You know, as I have thought about people that I have seen over the years, and there are probably no more than three or four people that I thought were just absolutely filled with evil that were absolutely beyond redemption, but in your case . . . I think in some respects what I have seen from you is worse, in that you seem to not really understand. I really don't think that you get it. I think in some respects you're numb to what you were doing over time. The quantities of pills that you were prescribing, the combinations of pills that you were prescribing, and the combinations even with lesser quantities had deadly consequences, and that's why Nick McGovern ended up where he is. It was Alprazolam and Methadone, the combination is what ultimately did him in, and I just wonder whether your practices really have had any impact on you.

It seems you're still saying, Why am I here? What have I done wrong? What did I do? And that question has been answered in this case over and over, and over again by witness after witness, by the experts, and the jury, frankly, in its verdict answered that question over and over, and over again. And it is as if for as bright as you clearly are, for the good things that you have done in your life -- and I'm not overlooking those -- that you seem to be missing some kind of a piece that allows you to tap into other people's feelings and the[ir] suffering[;] . . . focus[ing] more on, Why is this happening to me, than the impact that you've had on others.

And we are now at a point where the most recent literature indicates that worldwide more than one in every five persons over the age of 14 is addicted to drugs. And that is mind boggling. More than one out of every five persons over the age of 14 is addicted to drugs. And so many of the people that you were seeing over time were addicts. And I never saw an effort

with any -- there was one patient of yours that did come in, though, and talk about all the good that you had done for him, and we recognize that, and maybe that's the way things started with you when you got into the pain medication area, and maybe over time you just lost either the ability to look at each patient individually and what they needed, and what horse they were on, maybe you had too many of them to be able to do that, or there may have been some other reason. I never fully understood it. You've indicated that you probably didn't pay as much attention to some of these folks as you should have, and there's no question about that. You didn't pay as much attention as you should have to virtually every patient over the past year, or the last year or so that you were in practice. And I take all of that into account in trying to determine what an appropriate sentence is in your case.

This is -- and I have sentenced people to life before, but they were people who took guns and shot people. They were not people who wrote out prescriptions resulting in death. It was just there was a step removed in the process. I have sentenced people to lengthy sentences short of life as well, but I have never had a case like yours. And this has been a very, very difficult case, I think for everybody who has been involved. I thought your lawyers did a tremendous job of defending you in this trial and I think that they had a very difficult job for a couple of reasons: [f]irst of all, because the evidence was just overwhelming; and [s]econd of all, I think, Dr. Henson, that you still think you're the smartest person in the room and that you would be in a position to sway a jury if they just listened to what you had to say. However, the things that you said didn't add up in a lot of respects.

[Your counsel] indicated that you didn't do this for money, but I remember your testimony that you raised your fee from $50 to $300 because you had to pay rent on your office. [Your counsel] indicated that you did not make Nick McGovern take the pills but in point of fact, you put him in a position with your prescriptions where he had to take those pills just in an effort to try and get through the day. It was creating more pain; not taking more away. And the whole approach of just giving people whatever

> they said they needed for pain, you were exacerbating a problem, you were not treating it. And that being the case, and looking at the consequences, this is the sentence that I intend to impose.

Id. at 286–91 (line breaks omitted).

Following these remarks, the court sentenced Mr. Henson to terms of life imprisonment for Count 17; 240 months' imprisonment for each of Counts 1 through 14, 16, and 26 through 31; 60 months' imprisonment on Count 19; and 12 months' imprisonment on Count 20—all to run concurrently. *Id.* at 291. Mr. Henson's life sentence fell within his advisory guidelines range. The court stated that it "believe[d] this [life] sentence is as sufficient . . . a sentence that [it] can give . . . but is not greater than necessary to reflect the seriousness of [Mr. Henson's] offenses, to promote respect for the law, and to provide just punishment for the offense," pursuant to 18 U.S.C. § 3553(a)(2)(A). *Id.* As well, the court found the sentence "should afford adequate deterrence to criminal conduct and protect the public from further crimes," in accordance with § 3553(a)(2)(B) and (C). *Id.* The court also observed that Mr. Henson's "imprisonment . . . w[ould] allow [him] the opportunity to receive correctional treatment in an effective manner, and . . . assist with community reintegration, if [he is] ever released," in accord with § 3553(a)(2)(D). *Id.* at 291–92.

After announcing its sentence, the district court also revoked Mr. Henson's bond, to which his counsel objected. *Id.* at 292–93. However, when asked by the

court in closing its hearing if he had "anything further on behalf of [Mr.] Henson here today," Mr. Henson's counsel responded, "No, Your Honor." *Id.* at 298.

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a

On appeal, we review Mr. Henson's sentence for "reasonableness under an abuse-of-discretion standard." *Peugh v. United States*, 569 U.S. 530, 537 (2013); *accord United States v. Nkome*, 987 F.3d 1262, 1268 (10th Cir. 2021); *see also United States v. Huckins*, 529 F.3d 1312, 1317 (10th Cir. 2008) ("[W]e review the reasonableness of sentencing decisions, 'whether inside, just outside, or significantly outside the Guidelines range[,] under a deferential abuse-of-discretion standard.'" (second alteration in original) (quoting *Gall v. United States*, 552 U.S. 38, 41 (2007))).

"Our appellate review for reasonableness includes both a procedural component, encompassing the method by which a sentence was calculated, as well as a substantive component, which relates to the length of the resulting sentence." *United States v. Smart*, 518 F.3d 800, 803 (10th Cir. 2008); *see United States v. Friedman*, 554 F.3d 1301, 1307 (10th Cir. 2009) ("Reasonableness review is a two-step process comprising a procedural and a substantive component." (quoting *United States v. Verdin-Garcia*, 516 F.3d 884, 895 (10th Cir. 2008))); *see also United States v. Martinez-Barragan*, 545 F.3d 894, 898 (10th Cir. 2008) (noting

that our reasonableness review "has both procedural and substantive dimensions").[11]

"First, we must 'ensure that the district court committed no significant procedural error,'" *United States v. Lente*, 647 F.3d 1021, 1030 (10th Cir. 2011) (quoting *Gall*, 552 U.S. at 51), which entails "consider[ing] 'whether the district court committed any error in calculating or explaining the sentence,'" *United States v. Cookson*, 922 F.3d 1079, 1091 (10th Cir. 2019) (quoting *Friedman*, 554 F.3d at 1307), *cert. denied*, 140 S. Ct. 276 (2019). As relevant here, "[g]enerally, a district court's use of an improper factor invokes procedural review." *United States v. Sayad*, 589 F.3d 1110, 1116 (10th Cir. 2009); *see Smart*, 518 F.3d at 803 ("[I]f a district court bases a sentence on a factor not within the categories set forth in § 3553(a), this would indeed be one form of procedural error.").

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[11] We have noted that, "[t]hough the overarching standard for our review of the procedural reasonableness of the [district] court's sentence is abuse of discretion, '[t]his standard is not monolithic.'" *Nkome*, 987 F.3d at 1268 (third alteration in original) (quoting *United States v. Arias-Mercedes*, 901 F.3d 1, 5 (1st Cir. 2018)). Rather, "[w]hen a party challenges a sentence for procedural reasonableness, our standard of review is ordinarily abuse of discretion, under which we review de novo the district court's legal conclusions regarding the guidelines and review its factual findings for clear error." *United States v. Gantt*, 679 F.3d 1240, 1246 (10th Cir. 2012); *accord United States v. Gieswein*, 887 F.3d 1054, 1058 (10th Cir. 2018); *cf. United States v. McComb*, 519 F.3d 1049, 1054 n.4 (10th Cir. 2007) (explaining that our "abuse of discretion standard consists of component parts, affording greater deference to findings of fact (clearly erroneous) than to conclusions of law (erroneous)," and that a district court's factual findings "have always been afforded great deference" based on the court's "role, position, and expertise . . . [in] mak[ing] factual determinations").

If we conclude "the district court's decision is 'procedurally sound,' we [then] move on to the second step and 'consider the substantive reasonableness of the sentence imposed,'" *Lente*, 647 F.3d at 1030 (quoting *Gall*, 552 U.S. at 51), which entails considering "whether the length of the sentence is reasonable given all the circumstances of the case in light of the factors set forth in 18 U.S.C. § 3553(a)," *Cookson*, 922 F.3d at 1091 (quoting *Friedman*, 554 F.3d at 1307).[12] Ultimately, the district court's "mandate is to impose a sentence" in line with the "parsimony principle": i.e., the court's chosen sentence must be "'sufficient, but not greater than necessary, to comply with the purposes' of criminal punishment, as expressed in § 3553(a)(2)." *Martinez-Barragan*, 545 F.3d at 904 (quoting 18 U.S.C. § 3553(a)); *see also United States v. Smith*, 756 F.3d 1179, 1183 (10th Cir. 2014) ("In what's often called its parsimony principle, § 3553(a) directs courts to 'impose a sentence sufficient, but not greater than necessary, to comply' with

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[12] The § 3553(a) factors a court must consider include: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant"; (2) "the need for the sentence imposed" to "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment for the offense," "afford adequate deterrence to criminal conduct," "protect the public from further crimes of the defendant," and "provide the defendant" with services related to rehabilitation; (3) "the kinds of sentences available"; (4) the Sentencing Guidelines; (5) "any pertinent policy statement[s]" from the Sentencing Commission; (6) "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct"; and (7) "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(1)–(7); *see also United States v. Barnes*, 890 F.3d 910, 915 (10th Cir. 2018).

several . . . policy goals[, such as] just punishment, adequate deterrence, and protection of the public.").

Mr. Henson argues that his life sentence is both procedurally and substantively unreasonable. On the procedural front, Mr. Henson faults the district court for (1) "mention[ing] the [§ 3553(a)] factors . . . only briefly"; (2) appearing to justify its sentencing decision based on improper and arbitrary factors, such as Mr. Henson's alleged indifference and perceived smugness, as well as "the number of people world-wide that are addicted to narcotics"—or, alternatively, not indicating what role, if any, these factors played in its sentencing decision; and (3) failing to "explain why [his] requested sentence (20 years) would be insufficient to satisfy the [§ 3553(a)] factors." Aplt.'s Opening Br. at 38–39. On the substantive front, Mr. Henson recycles many of these objections, in relatively generic fashion, while also arguing, in similarly generic and cursory terms, that his life sentence is "entirely unreasonable" in light of the § 3553(a) factors and his charitable acts. *Id.* at 42.[13]

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[13] Mr. Henson asserts as forms of *procedural* error, *inter alia*, the district court's failure to adequately explain its sentencing decision, its purported reliance on improper or arbitrary factors in making its sentencing decision, and its alleged disregard of the § 3553(a) factors and his requested, below-guidelines sentence. In questioning the *substantive* reasonableness of his sentence, Mr. Henson rehashes, in one form or another, these same errors, while also objecting, generally, to the necessity of a life sentence. *Procedural* reasonableness typically concerns the district court's underlying calculation and explanation supporting its (continued...)

[13](...continued)
sentencing decision, encompassing questions including whether the court explained its decision in sufficient detail, erroneously treated the guidelines as mandatory, or impermissibly ignored the statutory sentencing factors; whereas, *substantive* reasonableness typically concerns the district court's justification for its sentencing decision, encompassing related questions such as whether the chosen sentence's length is reasonable in light of the totality of the circumstances or whether the court abused its discretion in how it weighed and balanced the § 3553(a) factors. *See, e.g.*, *Nkome*, 987 F.3d at 1268 ("The procedural component [of our reasonableness review] concerns how the district court calculated and explained the sentence, whereas the substantive component concerns whether the length of the sentence is reasonable in light of the statutory factors under 18 U.S.C. § 3553(a)." (quoting *United States v. Adams*, 751 F.3d 1175, 1181 (10th Cir. 2014))); *accord Friedman*, 554 F.3d at 1307; *United States v. Conlan*, 500 F.3d 1167, 1169 (10th Cir. 2007); *see also Smart*, 518 F.3d at 803–04 (identifying, as forms of procedural error, "failing to consider the § 3553(a) factors," "failing to adequately explain the chosen sentence," and "consideration by the district court of legally erroneous factors," and contrasting these with "[a] challenge to the sufficiency of the § 3553(a) justifications relied on by the district court," which "implicates the substantive reasonableness of the resulting sentence" (quoting *Gall*, 552 U.S. at 51)).

That said, we have acknowledged that, while courts and parties alike "should avoid unduly blurring the line between substantive and procedural reasonableness," there is "some unavoidable overlap." *Barnes*, 890 F.3d at 917; *see also United States v. Liou*, 491 F.3d 334, 337 (6th Cir. 2007) (describing "the border between factors properly considered 'substantive' and those properly considered 'procedural'" as "blurry, if not porous"). Indeed, the "distinction between procedural and substantive reasonableness is a significant but not necessarily sharp one, especially as it concerns a sentencing court's explanation for the sentence," which "serves both procedural and substantive functions." *Barnes*, 890 F.3d at at 916–17; *see also Cookson*, 922 F.3d at 1091 (observing that the distinction between procedural and substantive reasonableness "turns murky" when considering the district court's explanation for its sentencing decision because "we rely on the . . . court's procedurally-required explanation in order to conduct 'meaningful appellate review' of a sentence's substantive reasonableness" (quoting *Gall*, 552 U.S. at 50)). For example, "just as a court's
(continued...)

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Before delving into Mr. Henson's arguments, we stress the significant hurdles he faces in establishing that his sentence is unreasonable. At a baseline level, our review of a district court's sentencing decisions is deferential. *See, e.g.*, *Smart*, 518 F.3d at 805–06 (noting that "it has been well settled that we review a district court's sentencing decisions solely for abuse of discretion," which demands "substantial deference to district courts"); *see also United States v. Angel-Guzman*, 506 F.3d 1007, 1015 (10th Cir. 2007) (noting, in the context of

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[13](...continued)
consideration of the § 3553(a) factors is a procedural requirement, so," too, "is its explanation of how those factors apply"; similarly, "the content of the district court's explanation is relevant to whether the length of the sentence is substantively reasonable," as the court's chosen sentence "is more likely to be within the bounds of reasonable choice when the court has provided a cogent and reasonable explanation for it." *Barnes*, 890 F.3d at 917; *see also Cookson*, 922 F.3d at 1091–92.

While Mr. Henson has characterized the bulk of his arguments as challenging the *procedural* reasonableness of his life sentence, some of these arguments "blur the line between procedural and substantive reasonableness." *United States v. Sanchez-Leon*, 764 F.3d 1248, 1268 n.15 (10th Cir. 2014) (noting that "procedural error is the 'fail[ure] . . . to consider all the relevant factors,' whereas substantive error is when the district court 'impos[es] a sentence that does not fairly reflect those factors'" (alterations and omission in original) (quoting *United States v. Lopez-Macias*, 661 F.3d 485, 489 n.3 (10th Cir. 2011))). Thus, although we follow Mr. Henson's lead in structuring our consideration of his challenge to his sentence, we recognize that certain of his arguments could implicate either the procedural or substantive component of our overarching reasonableness inquiry, irrespective of Mr. Henson's characterizations.

a substantive reasonableness inquiry, that "[w]e have always regarded appellate review of sentencing decisions as 'deferential'" (quoting *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) (per curiam))); *cf. McComb*, 519 F.3d at 1053 (discussing the "congruence between the 'abuse of discretion' standard of review and our longstanding 'reasonableness' test").

This deferential posture makes sense, as "there are perhaps few arenas where the range of rationally permissible choices is as large as it is in sentencing, 'a task calling on a district court's unique familiarity with the facts and circumstances of a case and its judgment in balancing a host of incommensurate and disparate considerations, ranging from the degree of the defendant's cooperation and remorse to the need for deterring potential future offenders.'" *McComb*, 519 F.3d at 1053–54 (quoting *United States v. Ruiz-Terrazas*, 477 F.3d 1196, 1201 (10th Cir. 2007)); *see Gall*, 552 U.S. at 51 (highlighting the "[p]ractical considerations" warranting abuse-of-discretion review for sentencing decisions); *cf. United States v. Booker*, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.").

But Mr. Henson faces further, formidable barriers to success beyond our baseline standard of review. As noted above, Mr. Henson's life sentence falls within the advisory guidelines range for his crimes—and, importantly, Mr.

Henson does not claim on appeal that the district court incorrectly calculated those guidelines. Consequently, our review of Mr. Henson's sentencing challenge is "circumscribed" in two, related respects. *See McComb*, 519 F.3d at 1053. First, as to Mr. Henson's arguments that his sentence is *procedurally* unreasonable, "[w]e have emphasized repeatedly . . . that, when imposing a sentence within the properly calculated Guidelines range," (1) a district court need provide "only 'a general statement noting the appropriate guideline range and how it was calculated'"; (2) such statement "need involve no 'ritualistic incantation to establish consideration of a legal issue'" or "'recit[ation of] any magic words' to prove that [the court] considered the various factors Congress instructed it to consider"; and, more broadly, (3) we will only "step in and find error when the record gives us reason to think that our ordinary . . . presumption that the district court knew and applied the law is misplaced." *Ruiz-Terrazas*, 477 F.3d at 1202 (quoting *United States v. Lopez-Flores*, 444 F.3d 1218, 1222 (10th Cir. 2006)); *accord United States v. Chavez*, 723 F.3d 1226, 1232 (10th Cir. 2013); *United States v. Cereceres-Zavala*, 499 F.3d 1211, 1217 (10th Cir. 2007); *see also Rita v. United States*, 551 U.S. 338, 356–57 (2007) ("[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the [Sentencing] Commission's own reasoning

that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a) . . . the judge normally need say no more.").

Second, as to Mr. Henson's arguments that his sentence is *substantively* unreasonable, we will reverse a district court's sentencing decision under our traditional, abuse-of-discretion standard only where the sentence "exceeded the bounds of permissible choice" or was "arbitrary, capricious, whimsical, or manifestly unreasonable." *United States v. Barnes*, 890 F.3d 910, 915 (10th Cir. 2018) (first quoting *McComb*, 519 F.3d at 1053, then quoting *United States v. DeRusse*, 859 F.3d 1232, 1236 (10th Cir. 2017)); *see United States v. Sanchez-Leon*, 764 F.3d 1248, 1267 (10th Cir. 2014) ("We find an abuse of discretion [with regard to a district court's sentencing decision] only if the district court was 'arbitrary, capricious, whimsical, or manifestly unreasonable' when it weighed 'the permissible § 3553(a) factors in light of the totality of the circumstances.'" (quoting *Sayad*, 589 F.3d at 1116, 1118)); *see also United States v. Reyes-Alfonso*, 653 F.3d 1137, 1145 (10th Cir. 2011) ("[I]n many cases there will be a range of possible outcomes the facts and law at issue can fairly support; rather than pick and choose among them ourselves, we will defer to the district court's

judgment so long as it falls within the realm of these rationally available choices." (alteration in original) (quoting *McComb*, 519 F.3d at 1053)).

But for defendants like Mr. Henson, who received a *within-guidelines* sentence, showing substantive unreasonableness is harder still: "[w]e '*presume* a [within-guidelines] sentence is reasonable,'" and Mr. Henson "bears the burden of rebutting the presumption." *United States v. Miller*, 978 F.3d 746, 754 (10th Cir. 2020) (emphasis added) (quoting *Chavez*, 723 F.3d at 1233)); *see Sanchez-Leon*, 764 F.3d at 1267 (stating that, when a defendant challenges his within-guidelines sentence, "we must reject his claim of substantive unreasonableness unless he can overcome the presumption that the sentence was reasonable"); *see also McComb*, 519 F.3d at 1053 (explaining that a "presumption on appeal is permissible because, among other things, in adopting a Guidelines-based sentence the district court necessarily will have come to the same conclusion as the Sentencing Commission about the proper sentence for the case at hand," and this "concurrence between the Sentencing Commission's 'wholesale' judgment and the district court's independent 'retail' judgment . . . is strong evidence of the reasonableness of the ultimate sentence imposed" (quoting *Rita*, 551 U.S. at 348)); *cf. Angel-Guzman*, 506 F.3d at 1013 ("A sentencing formula produced by a deliberative, quasi-legislative body [i.e., the Sentencing Commission], applied to

the specific facts of each case by a competent arbiter [i.e., the district court], will seldom require correcting.").

Thus, we review the reasonableness of Mr. Henson's sentence with these principles in mind: most significantly, that we defer to district court sentencing decisions, as a general matter; that the district court was not obligated to say much in justifying its application of the guidelines to Mr. Henson, as a procedural matter; and that we *presume* Mr. Henson's sentence is reasonable, as a substantive matter, unless he rebuts that presumption. Having clarified our analytical backdrop, we proceed below by first considering Mr. Henson's procedural arguments, finding no error on this front. We then assess whether Mr. Henson rebuts the presumption that his sentence is substantively reasonable, determining that he has not. Therefore, we ultimately conclude Mr. Henson's within-guidelines life sentence is procedurally and substantively reasonable and, accordingly, affirm the district court's sentencing decision.

3

a

We begin by considering Mr. Henson's challenge to the procedural reasonableness of his sentence. In assessing whether the district court committed "significant procedural error" in calculating and imposing a sentence of imprisonment, we consider whether the court, *inter alia*, "fail[ed] to calculate (or

improperly calculat[ed]) the Guidelines range, treat[ed] the Guidelines as mandatory, fail[ed] to consider the § 3553(a) factors, select[ed] a sentence based on clearly erroneous facts, or fail[ed] to adequately explain the chosen sentence." *Gall*, 552 U.S. at 51; *accord Lente*, 647 F.3d at 1030. Recall, as well, that "[g]enerally" the question of whether a district court employed "an improper factor invokes procedural review." *Sayad*, 589 F.3d at 1116. As discussed above, the district court "must provide only a general statement of its reasons" for imposing a within-guidelines sentence, and it "need not explicitly refer to either the § 3553(a) factors or respond to 'every argument for leniency that it rejects in arriving at a reasonable sentence'" to avoid committing procedural error. *Martinez-Barragan*, 545 F.3d at 903 (quoting *United States v. Jarrillo-Luna*, 478 F.3d 1226, 1229 (10th Cir. 2007), *overruled on other grounds by United States v. Lopez-Macias*, 661 F.3d 485 (10th Cir. 2011)).

Mr. Henson's procedural reasonableness challenge—already facing long odds—"suffers the distinct [and additional] disadvantage of starting at least a few paces back from the block." *Richison*, 634 F.3d at 1127. That is, because Mr. Henson failed to contemporaneously object to the district court's explanation of its sentencing decision, he has *forfeited* any challenge to the procedural reasonableness of his sentence—and, as the government rightly points out, we will therefore review such a challenge for, at most, plain error. *See* Aplee.'s

Resp. Br. at 55 (arguing that, "[b]ecause [Mr.] Henson did not contemporaneously object to the adequacy of the district court's explanation for the sentence . . ., [our] review is for plain error").

Our caselaw amply supports the imposition of plain-error review where a defendant fails to lodge an objection to the court's explanation at the time of sentencing. *See, e.g.*, *United States v. Wireman*, 849 F.3d 956, 961–62 (10th Cir. 2017) (reviewing a defendant's challenge to the procedural reasonableness of his sentence for plain error because he failed to "object to the district court's alleged lack of explanation even though the district court explicitly asked him if he had 'anything further,'" and under our precedents, a defendant "must . . . contemporaneously object in the district court to 'the *method* by which the . . . court arrived at a sentence, including arguments that the sentencing court failed to explain adequately the sentence imposed,' if he . . . hopes to avoid plain error review on appeal of any alleged procedural flaw" (quoting *United States v. Romero*, 491 F.3d 1173, 1176–77 (10th Cir. 2007))); *United States v. Marquez*, 833 F.3d 1217, 1220 (10th Cir. 2016) ("Because [the defendant's] counsel did not raise a procedural objection at the sentencing hearing, his procedural challenge is reviewed for plain error."); *Ruiz-Terrazas*, 477 F.3d at 1199 ("Because [the defendant] did not object to the procedure by which his sentence was determined and explained, we may reverse the district court's judgment only in the presence

of plain error."); *see also United States v. Uscanga-Mora*, 562 F.3d 1289, 1293 (10th Cir. 2009) (noting "we have consistently held plain error review obtains when counsel fails to render a contemporaneous objection to the procedural adequacy of a district court's statement of reasons at sentencing" and explaining why such review "is compelled both by our precedent and sound reason").

Mr. Henson contends that plain-error review does not apply here because he was never given an opportunity to lodge an objection to the district court's explanation for his sentence, but this claim is belied by the record. Notably, the court closed the sentencing hearing—after it had announced Mr. Henson's sentence—by asking defense counsel whether he had "anything further on behalf of [Mr.] Henson," to which counsel replied, "No, Your Honor." Aplt.'s App. at 298. Tellingly, counsel felt no compunctions about lodging an objection, unprompted, to the court's revocation of Mr. Henson's bond mere moments earlier. *See id.* at 293 (The district court: "I am revoking [Mr. Henson's] bond. . . ." Defense counsel: "And, Your Honor, we would object to that and ask you to reconsider . . . ."). Thus, after displaying in this way as to a different matter that he was not hampered or deterred from lodging an objection—and after being expressly afforded an opportunity to do so by the district court regarding its sentence—Mr. Hanson failed to challenge in any respect the court's sentencing explanation.

We have applied plain-error review to procedural reasonableness claims in circumstances similar to Mr. Henson's. *See, e.g.*, *United States v. Gehrmann*, 966 F.3d 1074, 1081 (10th Cir. 2020) ("A district court explains its reasons for a sentence at the sentencing hearing, so a defendant must object at the hearing to preserve an objection to the adequacy of the court's findings. If a defendant fails to preserve an objection, 'any review would be confined to the plain-error standard.' Here, . . . the district court gave [the defendant's] counsel multiple opportunities to speak and to object at several junctures of the sentencing hearing. Though . . . counsel availed herself of the opportunities to speak, she never objected to the adequacy of the court's findings. Accordingly, we will review [the defendant's] claim [that the district court did not adequately explain its sentencing decision] for plain error." (citations omitted) (quoting *United States v. Yurek*, 925 F.3d 423, 445 (10th Cir. 2019))); *Marquez*, 833 F.3d at 1220 n.1 ("[The defendant] contends plain error review is inapplicable because his counsel was not given an opportunity to raise a procedural objection. The district court, however, specifically inquired before adjourning the hearing whether counsel had '[a]nything else this morning' to address. That inquiry provided [defense] counsel a sufficient opportunity to register an objection. Furthermore, . . . the fact that the district court's inquiry came after [the defendant's] sentence had been pronounced did not render it any less of an opportunity to object; after all,

the district court still could have remedied any procedural defect identified at that time." (second alteration in original) (citations omitted) (quoting Suppl. R., Vol. VIII, at 25)).

To prevail on his procedural reasonableness claim, then, Mr. Henson must "successfully run the gauntlet created by our rigorous plain-error standard of review." *McGehee*, 672 F.3d at 876. This "demanding," multi-pronged standard requires Mr. Henson to show "(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights"—and, "[i]f he satisfies these criteria," we may, in our discretion, "correct the error if [4] it seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (second alteration in original) (quoting *United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011)).[14]

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[14] While Mr. Henson does not make a plain-error argument until his reply brief, the government concedes that we may exercise our discretion and consider such an argument. *See* Aplee.'s Resp. Br. at 30 (recognizing that we "may exercise [our] discretion to grant review [of Mr. Henson's procedural reasonableness challenge] if [he] argues for plain error in [his] reply brief"); *see also United States v. Fagatele*, 944 F.3d 1230, 1239 (10th Cir. 2019) ("[T]his court has suggested that a defendant in a criminal case may raise a plain-error argument for the first time in a reply brief. And [the defendant's] reply brief contains such a plain-error argument. We exercise our discretion to address that argument here." (citations omitted)), *cert. denied*, 141 S. Ct. 274 (2020); *Yurek*, 925 F.3d at 445 ("[T]he government argues that [the defendant] lost her opportunity to urge plain error by waiting until her reply brief to do so. We disagree. . . . After the government challenged preservation, [the defendant] argued in her reply brief that the error would be considered plain even if she had

(continued...)

b

Mr. Henson's time in our plain-error gauntlet, however, is brief; indeed, because he fails to show the district court committed *any* procedural error, he falters at the first prong. Recall that Mr. Henson attacks the sufficiency and propriety of the district court's explanation and justification for his life sentence. More particularly, Mr. Henson asserts the district court did not adequately explain how or why a life sentence—rather than the below-guidelines, twenty-year sentence he requested—comported with the § 3553(a) sentencing factors. As well, Mr. Henson faults the district court for commenting on his perceived indifference and smugness, along with the global drug-addiction problem—seeming to suggest that such commentary amounted to impermissible consideration of extraneous, arbitrary matters beyond the § 3553(a) factors.

Mr. Henson's various procedural arguments are unavailing. To start, the district court's explanation for imposing a life sentence within Mr. Henson's advisory guidelines range was more than adequate under our caselaw. Among other things, the district court (1) stated that it was "impos[ing] a sentence . . . sufficient but not greater than necessary to comply with the purposes of

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[14](...continued)
forfeited the issue. This approach was a permissible way to invoke plain-error review. We thus apply the standard for plain error." (citations omitted)). Accordingly, we exercise our discretion and review Mr. Henson's procedural reasonableness challenge for plain error.

sentencing," Aplt.'s App. at 284–85; (2) acknowledged that it had considered the guidelines, "the statements of the parties," and the PSR, *id.* at 285; (3) announced that it would stay within the properly-calculated guidelines range for sentencing, *id.* at 285, 291; and (4) affirmed that it "considered all of the stated factors and the advisory guidelines, the nature and circumstances of the offense, [and Mr.] Henson's history and characteristics," *id.* at 286.

This explanation went well beyond the minimum level of detail required to establish the procedural reasonableness of Mr. Henson's within-guidelines sentence. *See, e.g.*, *Martinez-Barragan*, 545 F.3d at 902–03; *United States v. Tindall*, 519 F.3d 1057, 1065 (10th Cir. 2008) ("In sentencing [the defendant] within the advisory guidelines range, the district court explained, 'the sentence I am about to impose is the most reasonable sentence upon consideration of all factors enumerated in 18 United States Code 3553.' [This] one-sentence explanation accompanying a within-guidelines sentence—in the absence of the need to address specific § 3553(a) arguments brought to the district court's attention—satisfies the district court's duty to impose a procedurally reasonable sentence." (citation omitted) (quoting R., Vol. 3, at 25)); *see also United States v. Geiner*, 498 F.3d 1104, 1113 (10th Cir. 2007) (explaining that a "general discussion" is "all that procedural reasonableness requires when a court imposes a sentence within the applicable Guidelines range").

Furthermore, the record reflects that the district court expressly examined several, specific § 3553(a) sentencing factors in deciding a life sentence was warranted, including "the seriousness of [Mr. Henson's] offenses," "promot[ing] respect for the law," "provid[ing] just punishment," "afford[ing] adequate deterrence," and "protect[ing] the public from further crimes." Aplt.'s App. at 291. Likewise, the court acknowledged Mr. Henson's argument for a below-guidelines sentence and referenced his charitable acts and accomplishments in explaining why it nevertheless concluded that a life-imprisonment sentence was sufficient but not greater than necessary. *See id.* at 262–65 (hearing Mr. Henson's argument for a twenty-year sentence); *id.* at 266 (inviting Mr. Henson to speak on his own behalf); *see also id.* at 288 (acknowledging that the court was "not overlooking" the "good things that [Mr. Henson] ha[d] done in [his] life" in imposing sentence); *id.* at 289 (referencing testimony from a former patient of Mr. Henson's, who "talk[ed] about all the good that [Mr. Henson] had done for him").

Contrary to Mr. Henson's arguments, then, the court expressly considered the § 3553(a) factors and his request for a below-guidelines sentence—and such consideration more than adequately explained the court's sentencing rationale. *See, e.g.*, *Wireman*, 849 F.3d at 958–59 (noting that we "have held time and time again" that a district court imposing a within-guidelines sentence "may satisfy its

obligation to explain its reasons for rejecting the defendant's arguments for" a more lenient sentence simply "by '*entertain*[*ing*] [the defendant's] . . . arguments' and then 'somehow indicat[ing] that [it] did not rest on the guidelines alone, but considered whether the guideline sentence actually conforms, in the circumstances, to the [18 U.S.C. § 3553(a)] statutory factors" (alterations and omission in original) (citations omitted) (first quoting *Ruiz-Terrazas*, 477 F.3d at 1202–03 & n.4, then quoting *Martinez-Barragan*, 545 F.3d at 903)); *Martinez-Barragan*, 545 F.3d at 903 n.3 (noting that our caselaw "teach[es] that a district court is not required to run through § 3553(a) like a checklist"); *United States v. Sells*, 541 F.3d 1227, 1236 (10th Cir. 2008) (observing that, "in a run-of-the-mill case involving a sentence within the advisory guidelines range, it is unnecessary for the district court to specifically address on the record, by reference to the factors set out in 18 U.S.C. § 3553(a), a request for a sentence outside the Guidelines range," and that, instead, "it is sufficient for the district court to state how it . . . arrived at the advisory Guidelines range and generally note it . . . considered in gross the factors set out in § 3553(a)" (citing *Cereceres-Zavala*, 499 F.3d at 1216–18)). Thus, we discern no procedural error in the district court's explanation of its decision to impose a life sentence for Mr. Henson's crimes.

Mr. Henson also takes issue with certain remarks made by the district court regarding his purported smugness and indifferent demeanor and regarding the

global problem of drug addiction. He asserts that the court erred either by referencing these topics without explaining how they impacted its sentencing calculus (if they impacted it at all) or by improperly relying on them to justify his life sentence. Importantly, we observe at the outset—as Mr. Henson himself does—that it is not readily apparent from the sentencing transcript whether or not these remarks played *any* role in the district court's sentencing decision. The court expressly characterized these remarks as "observations" reflecting the court's involvement "with th[e] case . . . for a couple of years," not as critical factors, if factors at all, in its decision making. Aplt.'s App. at 286 (declaring that the court was "about to announce and impose a sentence" after "consider[ing] all of the [§ 3553] factors and the advisory guidelines, the nature and circumstances of the offense, [and Mr.] Henson's history and characteristics," and then briefly pivoting to a separate discussion of "observations" made during the course of the case).

Nonetheless, even if we assume that the foregoing observations by the district court regarding Mr. Henson's personal affect and the global problem of drug addiction had more than a de minimis impact on the court's sentencing calculus, we conclude that the court did not procedurally err by considering these matters. Broadly speaking, there are few limits on the factors a judge may consider in crafting a defendant's sentence. *See* 18 U.S.C. § 3661 ("*No limitation*

shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." (emphasis added)); U.S.S.G. § 1B1.4 ("In determining the sentence to impose within the guideline range . . . the court may consider, *without limitation*, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law."); *see also, e.g.*, *United States v. Pinson*, 542 F.3d 822, 836 (10th Cir. 2008) (acknowledging that there "are likely some boundaries on what factors sentencing courts can permissibly consider at sentencing," but emphasizing that the exceptions to § 3661's expansive principle are "few" in number); *United States v. Collins*, 828 F.3d 386, 389 (6th Cir. 2016) ("Federal law provides nearly unfettered scope as to the sources from which a district judge may draw in determining a sentence.").

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Pepper v. United States*, 562 U.S. 476, 487 (2011) (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)). To this end, both the Supreme Court and this court have emphasized that sentencing courts "exercise a wide discretion in the sources and types of evidence

used to assist [them] in determining the kind and extent of punishment to be imposed." *Id.* at 488 (quoting *Williams v. New York*, 337 U.S. 241, 246 (1949)); *accord Smith*, 756 F.3d at 1181–83.

Thus, under "longstanding American tradition[s] embodied in § 3661 and § 3553(a), federal courts seeking a just sentence may look to the whole of the defendant's person, character, and crimes." *Smith*, 756 F.3d at 1184. And, insofar as the district court here took into account in its sentencing decision its observations regarding Mr. Henson's personal demeanor or affect and his role in exacerbating the already extant global drug-addiction problem, the court was adhering to that tradition. *See, e.g.*, Aplt.'s App. at 287–88 (the court observing as to Mr. Henson, "I really don't think that you get it. I think in some respects you're numb to what you were doing over time. . . . [Y]ou seem to be missing some kind of a piece that allows you to tap into other people's feelings and the[ir] suffering[;] . . . focus[ing] more on, Why is this happening to me, than the impact that you've had on others."); *id.* at 288 (the court stating, "More than one out of every five persons over the age of 14 is addicted to drugs. And *so many of the people that you were seeing over time were addicts*." (emphasis added)). Moreover, the district court's remarks bear directly on several sentencing factors in § 3553(a), and thus were expressly relevant to the court's sentencing decision. *Cf. Smith*, 756 F.3d at 1183 (clarifying that "§ 3661 explains what a district court

may consider at sentencing," while "§ 3553(a) describes what a district court *must* consider" in effectuating the section's overarching "parsimony principle"—i.e., that a district court must "'impose a sentence sufficient, but not greater than necessary, to comply' with . . . policy goals [embodied in the statutory factors]"). In short, at least as employed by the district court on these facts, these observations were not improper sentencing considerations.

More specifically, let us examine the court's observations regarding Mr. Henson's demeanor or affect. The court made various references to Mr. Henson's apparent lack of contrition and failure to acknowledge the harm he caused to both individuals and the community with his reckless medical practices (i.e., his indifferent demeanor). *See, e.g.*, Aplt.'s App. at 287 (noting that the court found it "very difficult to reconcile" Mr. Henson's statements regarding his good works "with [his] conduct throughout th[e] case"); *id.* (telling Mr. Henson that, "in some respects," what the court saw from him was worse than certain criminals "absolutely filled with evil . . . [and] beyond redemption" because he "really . . . [did not] get it" and was "numb to what [he] w[as] doing over time"); *id.* at 288 (observing that Mr. Henson seems to be "missing some kind of a piece that allows [him] to tap into other people's feelings and the[ir] suffering[;] . . . focus[ing] more on, Why is this happening to me, than the impact that you've had on others"); *see id.* at 290 (commenting that Mr. Henson appeared to "still think [he

was] the smartest person in the room"). These kinds of observations unquestionably fall within the ambit of several statutory sentencing factors, including Mr. Henson's "history and characteristics," and the need for Mr. Henson's sentence to "promote respect for the law" and "afford adequate deterrence to criminal conduct"—all factors specifically cited by the district court in justifying its sentencing decision. 18 U.S.C. § 3553(a)(1)–(2); *see* Aplt.'s App. at 286–91.

More to the point, we have recognized that a defendant's hubris and associated lack of remorse—which the district court detected in Mr. Henson's perceived smugness and indifferent demeanor—are relevant factors that a sentencing court may appropriately consider when fashioning a sufficient, but not greater than necessary, sentence. *See Verdin-Garcia*, 516 F.3d at 898–99 (finding no abuse of discretion where a district court explained its decision to impose a life sentence based on, *inter alia*, the fact that the defendant "displayed a 'lack of remorse'" and a lack of "any respect for the law" (quoting R., Vol. X, at 2308)); *see also United States v. Harris*, 418 F. App'x 767, 772–73 (10th Cir. 2011) (unpublished) (holding, under plain-error review, that a defendant's sentence was procedurally reasonable where the district court explained and justified the sentence based on, *inter alia*, the defendant's "arrogance and abusive demeanor" and "his lack of remorse and failure to acknowledge responsibility"); *United*

States v. Mojica-Fabian, 264 F. App'x 712, 715 (10th Cir. 2008) (unpublished) (concluding a defendant failed to rebut the presumptive reasonableness of his within-guidelines sentence where the district court relied on, *inter alia*, his "lack of contrition or acceptance of responsibility" in reaching its decision).[15]

And so have our sister circuits. *See, e.g.*, *United States v. Isaac*, 987 F.3d 980, 995–96 (11th Cir. 2021) (finding the district court "appropriately considered" the defendant's "apparent lack of remorse" and failure to "underst[an]d the true severity and 'enormity' of his crimes" in fashioning a sentence); *United States v. Olson*, 867 F.3d 224, 229 (1st Cir. 2017) (finding that the district court did not "rely on improper factors in reaching its decision" by "remark[ing] on [the defendant's] . . . . failure to show concrete remorse," as such remarks "properly relate[d] to . . . 'the history and characteristics of the defendant'" (quoting 18 U.S.C. § 3553(a)(1))); *United States v. Keskes*, 703 F.3d 1078, 1090–91 (7th Cir. 2013) ("A lack of remorse is a proper sentencing consideration 'because it speaks to traditional penological interests such as rehabilitation (an indifferent criminal isn't ready to reform) and deterrence (a remorseful criminal is less likely to return to his old ways).'" (quoting *Burr v. Pollard*, 546 F.3d 828, 832 (7th Cir. 2008))); *United States v. Douglas*, 569 F.3d

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[15] "Although not precedential, we find the reasoning of the unpublished decisions cited in this opinion instructive." *United States v. Oldman*, 979 F.3d 1234, 1244 n.6 (10th Cir. 2020).

523, 526–28 (5th Cir. 2009) (concluding the district court did not "commit procedural error" by imposing an above-guidelines sentence based on "its finding that the defendant lacked remorse for his crime"); *cf. United States v. Ochoa-Fabian*, 935 F.2d 1139, 1143 (10th Cir. 1991) (noting that a district court "is in a better position than the appellate court to weigh the defendant's sincerity of remorse and contrition").[16]

Similarly, the district court's observations concerning the global drug-addiction problem had a clear nexus to Mr. Henson's conduct and implicated § 3553(a)'s sentencing factors. More specifically, these observations (assuming that they had an impact on sentencing at all) were part and parcel of the court's effort to impose a just and sufficient punishment on Mr. Henson for exacerbating an extant global drug-addiction problem, by preying on the weaknesses of, in the court's words, "many" individuals that "were addicts." Aplt.'s App. at 288. In

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[16] Moreover, the district court's commentary regarding Mr. Henson's indifferent demeanor and apparent lack of remorse did not emerge out of thin air. Quite the contrary: the jury was instructed that it could find the requisite knowledge for Mr. Henson's crimes based on a theory of *deliberate indifference*, which the district court concluded was supported by the government's evidence. In other words, the court's references to Mr. Henson's indifferent demeanor and apparent lack of remorse were not simply observations regarding Mr. Henson's affect at his sentencing hearing; rather, they related to aspects of his offense conduct, on full display during the trial testimony. Thus, while Mr. Henson implies at various points in his appellate briefing that he is perplexed and bewildered as to why the district court would refer to his smugness and indifferent demeanor, such bewilderment is implausible and unconvincing in light of the circumstances of this case.

particular, the record shows Mr. Henson cavalierly distributed incredibly potent, controlled substances—in dangerous quantities and in dangerous combinations—with callous disregard for the consequences. Those consequences, of course, were dire, including the death of Nick McGovern. By way of contrast, these observations do *not* reflect a misguided shift in the court's focus from sentencing Mr. Henson based on his particular circumstances to a more abstract effort to combat the global ill of drug addiction. *Cf. Smart*, 518 F.3d at 803 ("[I]f a district court bases a sentence on a factor not within the categories set forth in § 3553(a), this would indeed be one form of procedural error.").

In this regard, the court's observations directly implicated a host of sentencing factors, including "the nature and circumstances of [Mr. Henson's] offense and [his] history and characteristics," and the need for his sentence to, *inter alia*, "reflect the seriousness" of his crimes, "promote respect for the law," "provide just punishment for the offense," and "afford adequate deterrence to criminal conduct." 18 U.S.C. § 3353(a)(1)–(2); *see United States v. Robinson*, 892 F.3d 209, 215–217 (6th Cir. 2018) (finding the district court "did not abuse its discretion" by considering "the harm caused by the opioid epidemic in Ohio"; stating at sentencing that "communities ha[d] been ripped apart by opioids and fentanyl and other related drugs"; and "admonish[ing]" the defendant "for the seriousness of his specific conduct in contributing to the opioid problem" by

"dealing 'death drugs' and placing everyone at risk by 'put[ting] these poisons into the hands of addicts'" (first and third alterations in original)); *see also United States v. Pippins*, 761 F. App'x 154, 158–59 (4th Cir. 2019) (per curiam) (unpublished) (rejecting a defendant's argument that the district court "improperly focused on the heroin epidemic in West Virginia" during sentencing because that focus demonstrated that the court "based its decision on the statutory factors," including "the need for the sentence to reflect the seriousness of" the defendant's offenses, which related to his "leader[ship] of a lengthy heroin-trafficking conspiracy," and "to deter [him] and others from continuing to contribute to the growing epidemic").

In sum, the transcript from Mr. Henson's sentencing hearing plainly shows that the district court expressly relied upon the § 3553(a) factors in imposing a within-guidelines sentence for Mr. Henson's crimes, and that it explained its rationale for this sentence in ample and adequate detail. Under our precedents, it was neither obligated to do more, nor erred in not doing more. *See, e.g.*, *Chavez*, 723 F.3d at 1232. Mr. Henson, then, fails to demonstrate procedural error—let alone error that was plain and affecting his substantial rights. Accordingly, we find Mr. Henson's procedural reasonableness challenge meritless.

4

Having found Mr. Henson's sentence procedurally sound, we next consider Mr. Henson's challenge to the substantive reasonableness of his sentence. Recall "[a] substantive reasonableness sentencing challenge asks us to address 'whether the length of the sentence is reasonable given all the circumstances of the case in light of the [§ 3553(a)] factors.'" *United States v. Durham*, 902 F.3d 1180, 1238 (10th Cir. 2018) (quoting *Verdin-Garcia*, 516 F.3d at 895). As noted *supra*, we review this claim for abuse of discretion, meaning we "will reverse only if the sentence imposed was 'arbitrary, capricious, whimsical, or manifestly unreasonable,'" or the district court "exceeded the bounds of permissible choice, given the facts and the applicable law in the case at hand." *DeRusse*, 859 F.3d at 1236 (first quoting *United States v. Gantt*, 679 F.3d 1240, 1249 (10th Cir. 2012), then quoting *McComb*, 519 F.3d at 1053)); *see also Sayad*, 589 F.3d at 1118 (noting that our "substantive reasonableness review broadly looks to whether the district court abused its discretion in weighing permissible § 3553(a) factors" and is "highly deferential").[17]

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[17] While Mr. Henson did not contemporaneously object to the length of his sentence at the district court's hearing, unlike his procedural reasonableness challenge, he was not required to do so in order to preserve a substantive reasonableness challenge. *See, e.g.*, *United States v. Kaspereit*, 994 F.3d 1202, 1214 (10th Cir. 2021) ("To preserve a substantive reasonableness challenge, we only require that a defendant advocate for a shorter sentence than the one imposed. Here, Defendant thoroughly litigated for a sentence less than he received. And therefore we apply the ordinary standard of review—abuse of

(continued...)

"We do not reweigh the sentencing factors but instead ask whether the sentence fell within the range of 'rationally available choices that facts and the law at issue can fairly support.'" *United States v. Blair*, 933 F.3d 1271, 1274 (10th Cir. 2019) (quoting *United States v. Martinez*, 610 F.3d 1216, 1227 (10th Cir. 2010)); *see also Barnes*, 890 F.3d at 915–16 (explaining that we "give substantial deference to the district court's weighing of [the § 3553(a)] factors" because that court "sees and hears the evidence, makes credibility determinations, has full knowledge of the facts[,] and gains insights not conveyed by the record," and is therefore "in a superior position to find facts and judge their import under § 3553(a) in [an] individual case" (quoting *Gall*, 552 U.S. at 51)). Most importantly, we presume Mr. Henson's within-guidelines life sentence is substantively reasonable, unless Mr. Henson carries his burden of rebutting that presumption. *See Verdin-Garcia*, 516 F.3d at 898 (noting that the defendant-appellant's burden to rebut the presumption of reasonableness "is a hefty one,

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[17](...continued)
discretion—rather than the plain error standard Defendant invokes." (citation omitted)); *United States v. Garcia*, 946 F.3d 1191, 1211 n.12 (10th Cir. 2020) ("A defendant need not object in district court to mount a substantive-reasonableness challenge on appeal."); *United States v. Vasquez-Alcarez*, 647 F.3d 973, 976 (10th Cir. 2011) ("We have held that 'when the claim is merely that the sentence is unreasonably long, we do not require the defendant to object in order to preserve the issue.'" (quoting *United States v. Torres-Duenas*, 461 F.3d 1178, 1183 (10th Cir. 2006))). Accordingly, as Mr. Henson argued for a below-guidelines sentence in the district court and challenges the length of his life sentence on appeal, we review his substantive reasonableness claim for abuse of discretion.

because abuse-of-discretion is a deferential standard of review"); *see also* *Martinez-Barragan*, 545 F.3d at 905.

Mr. Henson does not come close to carrying his burden. While he crafted several, specific arguments challenging the procedural reasonableness of his sentence, Mr. Henson dedicates only a little over two pages in his opening brief to challenging the substantive reasonableness of that sentence, *see* Aplt.'s Opening Br. at 41–43—and in those pages, he offers scarcely more than his own, subjective incredulity at the district court's sentencing decision.[18] That is, Mr. Henson simply cannot believe that a life sentence was appropriate in this case. But Mr. Henson does not meaningfully engage with the fact that his sentence falls within the advisory guidelines range for his crimes—the calculation of which he did not challenge in the district court and does not challenge on appeal—and, therefore, we presume it to be substantively reasonable. Thus, while Mr. Henson may disagree with the district court's sentencing decision, bare disagreement is not enough to establish the district court abused its discretion in imposing a life sentence—especially when we presume that the sentence at issue is reasonable. *See, e.g.*, *McComb*, 519 F.3d at 1053 (explaining that the district court's decision

[18] To the extent that Mr. Henson effectively relies on the substance of his procedural-reasonableness arguments to *also* challenge the substantive reasonableness of his sentence, we reject them for the reasons explicated in Section II(C)(3) above. *See supra* note 13.

to impose a sentence within the properly-calculated guidelines range "is strong evidence of the reasonableness of the . . . sentence imposed" and acknowledging the "congruence between [our] 'abuse of discretion' standard of review" and the presumption of substantive reasonableness enjoyed by within-guidelines sentences); *Sells*, 541 F.3d at 1239 ("[I]t is not [our] job . . . to review de novo the balance struck by a district court among the factors set out in § 3553(a). Thus, as long as th[is] balance . . . is not arbitrary, capricious, or manifestly unreasonable, we must defer to that decision . . . ." (citations omitted)).

Moreover, we cannot conclude that the district court exceeded the bounds of reasonableness in determining that a life sentence for Mr. Henson was justified by the circumstances of this case. The evidence presented at Mr. Henson's trial demonstrated that his conduct left a trail of devastation and despair in communities inside and outside of Kansas. Numerous former patients and customers of Mr. Henson testified about the harm he caused and the lives he negatively impacted by his irresponsible prescribing habits and reckless indifference to those who entrusted their care to him, as a physician. Though Mr. Henson insists he only wanted to alleviate the pain of those around him, the district court could reasonably have concluded that his insistence beggared belief. As evidenced by the jury's verdict, it was Mr. Henson himself who caused much pain—and even death—to those around him. On this record, then, the district

court acted well within its considerable discretion in imposing a within-guidelines life sentence—and Mr. Henson does nothing to cast doubt on the presumption of reasonableness that sentence enjoys.

* * *

Accordingly, because Mr. Henson establishes no procedural or substantive error in the district court's sentencing decision, we conclude that his life sentence is reasonable in all respects and affirm the district court's decision.

D

In his fourth and final issue on appeal, Mr. Henson claims that another of the district court's jury instructions—Instruction 25—inaccurately states the law. Instruction 25 reads, in pertinent part, as follows:

> Under 21 U.S.C. § 841(a)(1), federal law provides that "it shall be unlawful for any person knowingly or intentionally . . . to . . . distribute, or dispense or possess with the intent to distribute . . . a controlled substance." . . . Federal regulations allow for controlled substance prescriptions that are issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. To be lawful and effective, a prescription must meet the requirements of Section 1306.04 of Title 21 of the Code of Federal Regulations. . . . Under this regulation, a registered medical practi[t]oner may prescribe a controlled substance if she acts both for a legitimate medical purpose and while acting in the usual course of her profession. Without both, a practi[t]oner is subject to prosecution. *In other words, if the Government proves beyond a reasonable doubt that a prescription was knowingly written (1) not for a legitimate medical purpose, or (2) outside the usual course of professional practice, then the exception to the Controlled Substances Act does not apply.* . . .

Aplt.'s App. at 98–99 (first, second, and third omissions in original) (emphasis added) (line and paragraph breaks omitted).

Mr. Henson argues that, to convict a physician for violating 21 U.S.C. § 841, the government "should be required to establish" instead that a doctor *both* "issued a prescription outside the scope of professional practice" *and* that he issued it "for no legitimate medical purpose." Aplt.'s Opening Br. at 44. In other words, Mr Henson argues that the relevant, regulatory language should be read *conjunctively*, not *disjunctively*.

However, Mr. Henson readily "concedes that his argument is contrary to this court's precedent." *Id.* Indeed, in *United States v. Nelson*, we held that an individual can be convicted under 21 U.S.C. § 841 if the government proves beyond a reasonable doubt that he prescribed a controlled substance *either* "outside the scope of professional practice" *or* "for no legitimate medical purpose." *See* 383 F.3d 1227, 1231–32 (10th Cir. 2004). We recently discussed and reaffirmed this holding in another published decision:

> Defendants ask us to revisit our prior holding that a licensed physician may be convicted under 21 U.S.C. § 841 for either prescribing "outside the scope of professional practice" *or* "for no legitimate medical purpose." *See United States v. Nelson*, 383 F.3d 1227 (10th Cir. 2004). Because one panel may not overturn a decision by a prior panel, we must reject Defendants' challenge. *United States v. Caiba-Antele*, 705 F.3d 1162, 1165 (10th Cir. 2012) ("[W]e are bound by the precedent of prior panels absent en banc reconsideration or a superceding contrary decision by the Supreme Court." (quoting *In re Smith*, 10 F.3d

> 723, 724 (10th Cir. 1993))). In any event, our prior holding in *Nelson* is sound. . . . Other circuits have reached the same conclusion.

United States v. Khan, 989 F.3d 806, 822 (10th Cir. 2021) (alteration in original) (additional citations and paragraph breaks omitted), *petition for cert. filed*, No. 21-5261 (U.S. Jul. 29, 2021).

Mr. Henson requests that we "revisit [our] holding" in *Nelson*, Aplt.'s Opening Br. at 11, but we are not at liberty to do so. *See, e.g.*, *United States v. De Vaughn*, 694 F.3d 1141, 1149 n.4 (10th Cir. 2012) ("We cannot, of course, 'overturn the decision of another panel of this court barring en banc reconsideration, a superseding contrary Supreme Court decision, or authorization of all currently active judges on the court.'" (quoting *United States v. Edward J.*, 224 F.3d 1216, 1220 (10th Cir. 2000))); *see also Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015). Thus, because Mr. Henson concedes that the jury instruction in question correctly stated the law under *Nelson*, and because we are bound by this precedent, Mr. Henson is not entitled to relief on this issue.

III

For the foregoing reasons, we conclude that Mr. Henson's challenges on appeal are unavailing. Accordingly, we **AFFIRM** his convictions and sentence.