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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RAYMOND MOYA,

Defendant - Appellant.

No. 20-2006

**Appeal from the United States District Court
for the District of New Mexico
(D.C. No. 1:15-CR-01889-JCH-1)**

J. Lance Hopkins, Tahlequah, Oklahoma, and Kimiko L. Akiya of Bartko Zankel Bunzel & Miller, San Francisco, California, (Amy Sirignano with them on the briefs) for Defendant-Appellant.

James R.W. Braun, Assistant U.S. Attorney (John C. Anderson, United States Attorney, with him on the briefs), Albuquerque, New Mexico, for Plaintiff-Appellee.

Before **PHILLIPS**, **EBEL**, and **CARSON**, Circuit Judges.

PHILLIPS, Circuit Judge.

During the late hours of a Friday night in 2011, eighteen-year-old Cameron Weiss injected himself three times with heroin. By early Saturday morning, Cameron lay dead in his bed. At issue is the conviction of the heroin seller, Raymond Moya,

for distribution of heroin resulting in death. The precise question underlying this conviction is whether the heroin was the but-for cause of Cameron's death.

A federal jury in the District of New Mexico found Moya guilty of distribution of heroin resulting in death. Moya argues that the district court misinstructed the jury about the "death results" element of the heroin-distribution crime and that the jury lacked sufficient evidence to convict on that element. According to Moya (and his expert witness), the heroin that Cameron injected Friday night couldn't have caused his death hours later.

Having reviewed the trial record, most notably the competing expert-witness testimony, we conclude that a rational jury could have found Moya guilty beyond a reasonable doubt. We thus affirm.

BACKGROUND

I. Factual Background

Cameron began struggling with drug addiction while in high school in Albuquerque, New Mexico. Sports-related injuries led to his abusing Percocet, and at about age sixteen, Cameron became addicted to heroin. Cameron's attendance and performance at school deteriorated, and he dropped out during his junior year. Cameron's parents did all they could to help him combat his addiction, including enrolling him in five or six different drug-rehabilitation programs. Cameron left each program resolved to kick the addiction. But he never overcame it.

At age eighteen, Cameron was convicted of disturbing the peace. Probation violations led to more arrests and more jail time. Cameron last served jail time in

July 2011. While there, Cameron met Joe Dyson, also a heroin addict. Before Cameron got out of jail, Dyson gave him a note with a cellphone number for a friend, Colin Riley, who could help Cameron get heroin. According to the note, Riley could "hook [Cameron] up" with Riot or Elmo, two of Dyson's heroin dealers. R. vol. 4 at 533–34. "Riot" was Moya's nickname.

On Sunday, August 7, 2011, Cameron got out of jail. He called Riley that day about buying heroin. Riley in turn texted Moya to arrange a heroin purchase later that evening near a grocery store in Albuquerque. Because Cameron had no car, he asked his friend, Cody Rondeau, to drive him there. The two young men met Riley in the grocery-store parking lot. Cameron handed a car-stereo amplifier to Riley, who then crossed the street and traded it to Moya for about two grams of heroin. After Riley returned to the car, he, Cameron, and Rondeau injected some of the heroin.

The next day, Cameron flew to California to join his family on vacation. During the trip, his mother noticed that Cameron was exhibiting signs of drug withdrawal: extreme agitation, anxiousness, anger, and volatility. On the evening of Thursday, August 11, the family returned to Albuquerque. Once back, Cameron began using drugs again. He went to his friend Cody Teeters's apartment, where he, Teeters, and Rondeau ingested an array of drugs. They started with an aerosol spray and "anything that [they] could find in [Teeters's] medicine cabinet," but soon moved on to heroin and cocaine. *Id.* at 818.

On Friday night, August 12, Cameron and Dyson (Cameron's prison acquaintance) made plans to buy heroin. Dyson had no car, so he told Cameron and

Rondeau that if they picked him up, he would give them some of the heroin he bought. After they picked him up, Dyson contacted Moya about buying heroin. At that point, Cameron and Rondeau both appeared sober, apparently no longer experiencing any effects from the drugs they had used with Teeters the previous night. The three drove around until they met up with Moya outside a fast-food restaurant at about 8 or 9 p.m.

While Cameron and Rondeau waited in Rondeau's car, Dyson got in Moya's car and paid him $100 for two grams of heroin. Moya had already divided the heroin into 1.8 grams for Dyson and .2 grams for Cameron and Rondeau. After Dyson returned to Rondeau's car, Rondeau drove across the street to a parking lot, and the three of them injected some of Dyson's 1.8 grams of heroin.[1] After getting high, Cameron and Rondeau dropped Dyson off at his house.

Cameron and Rondeau injected heroin twice more that night. At a bowling-alley parking lot, they injected some of their .2 grams of heroin. While there, Rondeau "fell out" and collapsed to the ground. *Id.* at 479. Heroin users describe "falling out" as "not only the loss of consciousness for a moment but . . . the beginning stages of passing away." *Id.* at 812 ("[Y]ou kind of just feel like the life is getting sucked out of you."). Rondeau regained consciousness after Cameron threw

[1] The record doesn't specify how much of Dyson's heroin the three consumed in the parking lot. Dyson testified that they each injected "approximately 60 units apiece," but he never clarified what that meant. R. vol. 4 at 555. Considering the trial record as a whole, it seems likely that "60 units" meant 60 milligrams.

water on his face, a well-known method for reviving heroin users. Sometime later, between 11 p.m. and midnight, Rondeau drove to a grocery-store parking lot, where he and Cameron injected what remained of the .2 grams of heroin.

Out of heroin, Cameron and Rondeau went to Cameron's house and sat outside. Cameron decided that he wanted to see some friends, so they drove to Antonio Martinez's house. While there, Martinez noticed that Cameron "wasn't right": He wasn't his usual "energetic" self and he "just looked almost dead." *Id.* at 719. Cameron and Rondeau stayed for about twenty minutes, talking and smoking marijuana in the driveway. They left Martinez's house around 1:00 or 2:00 a.m., and Rondeau dropped Cameron off at home sometime between 3:00 and 3:30 a.m.

That morning, Saturday, August 13, Cameron's father was due at work at 6:00 a.m. At about 5:20 a.m., he walked by Cameron's room and heard "a gurgling sound." *Id.* at 773. At 7:30 a.m., Cameron's mother found him lying face up on his bed, his eyes open and foam expelled from his nose and mouth. Cameron wasn't breathing and appeared dead. Cameron's mother urgently called 911 and performed CPR until paramedics arrived. But the paramedics couldn't revive him, and at 8:35 a.m. they pronounced him dead.

Cameron's body was placed in a sealed bag and taken to the Office of the Medical Investigator, where it was kept in the cold-storage room pending an autopsy. At the time, the Office's policy was to examine bodies received on the weekend on the next business day.

After Cameron's death, his mother looked through his room multiple times. During one search, she found a syringe in the pocket of a pair of his pants, though the record doesn't say where she found the pants or when Cameron had last worn them (Cameron was wearing shorts the night that he died). About a year later—when law enforcement began collecting evidence—she provided the syringe to the DEA. Laboratory testing revealed traces of cocaine inside the syringe.

II. Procedural Background

A. Indictment and Trial

In May 2015, a federal grand jury indicted Moya on two counts: (1) distribution of heroin on August 7, 2011; and (2) distribution of heroin on August 12, 2011, resulting in Cameron's death, both in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C). The first count stems from the transaction discussed above in which Moya sold Riley heroin in exchange for the car-stereo amplifier Cameron had supplied. Moya doesn't challenge his conviction of count 1.

In May 2019, after years of discovery disputes, pretrial motions, and an interlocutory appeal (discussed in more detail below), Moya stood trial for six days. Because the trial focused on the cause of Cameron's death, the parties now emphasize the trial testimony of three experts: (1) Dr. Sam Andrews, the government's primary expert witness; (2) Dr. Steven Pike, the defense's expert; and (3) Dr. Laura Labay, the government's rebuttal expert.

1. Dr. Sam Andrews's Testimony

Dr. Andrews is a forensic pathologist who worked for New Mexico's Office of the Medical Investigator when Cameron died. On August 15, 2011—two days after Cameron's death—Dr. Andrews performed Cameron's autopsy. Dr. Andrews concluded that Cameron died from "[h]eroin toxicity," R. vol. 4 at 1028, a term that he generally used to describe an overdose. He explained that "toxicity" refers to "the toxic effects of the particular drug . . . in question on the body resulting in death." *Id.* at 1022. He also testified that if Cameron hadn't used heroin in the hours before his death, he wouldn't have died, and that "there was no competing cause." *Id.* at 1044–45.

Preliminarily, Dr. Andrews testified about how heroin acts on the body. He explained that heroin is a central-nervous-system depressant—that is, it decreases a user's consciousness, heart rate, breathing rate, and blood pressure. And though he acknowledged that a heroin overdose can happen quickly (even while "the needle is still in their arm"), he testified that "most commonly in my practice[,]. . . an individual gets sleepy, they start to lose consciousness, they slip into a [coma] and then they die a slow progression." *Id.* at 1023. Based on that, Dr. Andrews explained that brain swelling suggests a heroin overdose because "when someone has central nervous system depression their blood pressure drops, their breathing rate drops, they are not oxygenating their blood as well," and "a brain that gets deprived of oxygen is going to swell." *Id.* at 1024.

During the autopsy, Dr. Andrews observed that Cameron's brain had swollen, consistent with central-nervous-system depression often seen in heroin deaths. Dr. Andrews also noted that Cameron's lungs had fluid in them (known as pulmonary edema), indicated by the white froth, or "foam cone," left on the tube that the paramedics had placed in Cameron's throat. *Id.* at 1024–25, 1029. He also saw that Cameron's lungs were heavy and wet, another indicator of "decreased oxygenation." *Id.* at 1031. And he noted that the lungs had "a lacy white appearance," which suggested aspiration pneumonia, i.e., that Cameron had inhaled vomit into his lungs. *Id.* at 1030–31. Dr. Andrews explained that when "healthy adults" "swallow something that goes down the wrong tube, the trachea, our body coughs and hacks, we try to get that out so it doesn't get in the lungs." *Id.* at 1024. But the central-nervous-system depression caused by heroin suppresses a user's gag reflex. So instead of coughing the vomit up, heroin users risk aspirating the vomit into the lungs. According to Dr. Andrews, this is what happened to Cameron. Dr. Andrews testified that the pulmonary edema and aspiration pneumonia were common signs of a death resulting from heroin.

As part of the autopsy, Dr. Andrews ordered toxicology testing on the femoral blood (blood drawn from the groin) and urine. The blood tests revealed several drug metabolites in Cameron's system at his death. "A metabolite is a product of metabolism . . . or . . . what a drug breaks down into in the body." *Burrage v. United States*, 571 U.S. 204, 207 (2014) (internal quotation marks and citations omitted). Cameron's blood contained traces of several illicit drugs: (1) THC, a metabolite of

marijuana; (2) benzoctamine, an inactive metabolite of cocaine; and (3) codeine and morphine, active metabolites of heroin. Dr. Andrews explained that active metabolites, like the codeine and morphine, have "physiological effects" on the body, but inactive metabolites do not. R. vol. 4 at 1079–80. The urine test similarly showed codeine, morphine, cocaine metabolites, cannabinoids (marijuana), and a compound called 6 monoacetylmorphine (6-MAM). The 6-MAM in Cameron's urine confirmed that the codeine and morphine were heroin byproducts.

Dr. Andrews acknowledged that the 48-hour interval between Cameron's death and the autopsy left him unable to say with certainty whether cocaine was in Cameron's blood at death (as opposed to the inactive cocaine metabolites that showed up in the toxicology report). But relying on his experience, training, and the autopsy, Dr. Andrews testified that heroin, not cocaine, had caused Cameron's death. *Id.* at 1048–49 ("[T]his is a depressant death. This is not a death that is typically associated with cocaine."). Pressed by defense counsel about why cocaine couldn't have played a role, Dr. Andrews explained that the night Cameron died, he "didn't show . . . any stimulant-type effects" that would indicate cocaine use. *Id.* at 1075–76. And Dr. Andrews rejected defense counsel's suggestion that cocaine could have caused Cameron's brain swelling, explaining that "typically cocaine causes a rapid death and we don't see swelling of the brain." *Id.* at 1065.

2. Dr. Steven Pike's Testimony

Dr. Pike was Moya's sole witness at trial. A medical toxicologist, Dr. Pike worked as an emergency-room physician at the Santa Fe Medical Center. The district court approved Dr. Pike as an expert in the field of forensic toxicology.

Dr. Pike disagreed with Dr. Andrews's opinion. Dr. Pike testified that someone who survives intravenous heroin use "for an hour has survived it entirely." *Id.* at 1122. In his opinion, the heroin that Cameron had used the night before he died was "absolutely not the cause of death." *Id.* at 1151. He even went so far as to say that "[i]t is physiologically and medically impossible" that the heroin Cameron used hours earlier could have caused his death. *Id.* at 1122–23.

Though Dr. Pike had "no question" that Cameron "died of acute respiratory failure," he couldn't pinpoint what caused the respiratory failure. *Id.* at 1150–52. Dr. Pike initially identified aspiration pneumonia as the primary culprit. *Id.* at 1151 ("So my best explanation is that [it] would be aspiration pneumonia."). But when the government asked him whether Cameron "died from aspirating" vomit, Dr. Pike equivocated: "It is not clear whether [aspiration pneumonia] was the sole cause of death. It was a contributing factor in his death." *Id.* at 1154.

Nor did Dr. Pike ever explain what caused Cameron's aspiration pneumonia.[2] And though Dr. Pike hypothesized that other drugs may have contributed to Cameron's respiratory failure, including "the effects of cocaine," *id.* at 1152, or "additional heroin[] from some other source taken closer to the time that he was at home or presumably even after he got home," *id.* at 1151, he never settled on any particular theory.

3. Dr. Laura Labay's Testimony

Dr. Labay, who worked as the director of toxicological services and as a forensic toxicologist at National Medical Services ("NMS Labs"), testified as the government's sole rebuttal witness. She holds a Ph.D. in toxicology and has over twenty years' experience as a forensic toxicologist. The district court recognized Dr. Labay as an expert in forensic toxicology.

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[2] Dr. Andrews and Dr. Pike both agreed that aspiration pneumonia at least contributed to Cameron's respiratory failure. That's common in opioid overdoses. One recent study of 234 opioid-related deaths found that almost 42% of the users had aspirated vomit, "with 13.25% showing fulminant [i.e., severe or sudden] aspiration." Johannes Nicolakis et al., *Aspiration in Lethal Drug Abuse—A Consequence of Opioid Intoxication*, 134 Int'l J. of Legal Med. 2121, 2128 (2020). But Dr. Pike did not testify that aspiration pneumonia was the sole cause of Cameron's death.

We recognize that a defendant challenging a distribution-resulting-in-death charge might try to distinguish between heroin deaths resulting from respiratory failure—what we might call the "typical" overdose scenario—and heroin deaths resulting from asphyxiation by aspiration. *See id.* ("In fulminant aspiration cases, cause of death was mostly stated as asphyxiation by aspiration, often in combination with respiratory depression, while slight aspiration and non-aspiration were classified as death by opioid-induced respiratory depression."). Though the two are different, for the reasons we explain below, we think heroin would be the but-for cause of death in each situation.

Like Dr. Andrews, Dr. Labay testified that Cameron wouldn't have died without having injected heroin:

> Q: As far as you can tell, would Cameron Weiss have died if he had not taken any heroin on August 12, of 2011?
>
> A: I think my interpretation is that it was a heroin intoxication.
>
> Q: And only heroin?
>
> A: Yes.

Id. at 1253.

She disagreed with Dr. Pike's opinion that a person who injects heroin and survives for an hour cannot overdose. She explained that even after heroin converts to morphine, its depressive effects on the central nervous system can last beyond an hour. Because morphine has a half-life of up to three hours, and the general "rule of thumb" is that a drug affects the body for five half-lives, *id.* at 1231, Dr. Labay testified that morphine could affect the body for up to fifteen hours after heroin use.

Dr. Labay also stated her opinion that cocaine didn't contribute to Cameron's death. She testified that if someone had died suddenly from cocaine use, she would expect to see cocaine, and not just its metabolites, in that person's blood. But Cameron's blood had no cocaine—only an inactive cocaine metabolite, benzoctamine. And when the government asked Dr. Labay whether the benzoctamine observed in Cameron's blood was consistent with Cameron's using cocaine at Cody Teeters's apartment the Thursday night before Cameron died, she testified that it was.

B. Jury Verdict and Sentence

The jury found Moya guilty of both counts. Because Moya already had a felony drug offense, *see* 21 U.S.C. §§ 802 (44), 841(b)(1)(C), 851, he faced the possibility of an enhanced sentence of up to 30 years' imprisonment on count 1 and a mandatory life sentence on count 2. With an offense level of 38 and a criminal history category of VI, the sentencing guidelines recommended a sentence of 360 months to life for count 1.[3] The district court sentenced Moya to concurrent terms of 360 months for count 1 and life imprisonment for count 2. This appeal followed. We have appellate jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

Moya raises five issues on appeal. First, he argues that the district court misinstructed the jury on the law governing heroin distribution resulting in death. Second, he argues that the jury's verdict fails for insufficient evidence. Third, he argues that the district court abused its discretion in allowing Dr. Pike and Dr. Labay to answer certain of the government's hypothetical questions. Fourth, he argues that the district court abused its discretion in denying several of his pretrial motions. Fifth, he argues that cumulative errors deprived him of a fair trial. We reject each argument in turn.

[3] Though applying U.S.S.G. § 2D1.1(a)(2)—and its base offense level of 38—to Moya's conviction under count 1, neither the district court nor the PSR explains how that count meets that guideline's condition that "the offense of conviction establishes that death . . . resulted from the use of the substance[.]" But Moya doesn't challenge his sentence on count 1, so we do not review it.

I. Jury Instruction on Count 2

A. Standard of Review

We review de novo the district court's instructions to the jury. *United States v. Bedford*, 536 F.3d 1148, 1152 (10th Cir. 2008). In doing so, we "consider[] the instructions as a whole in determining whether the jury was provided with sufficient understanding of the applicable standards." *United States v. Frias*, 893 F.3d 1268, 1275 (10th Cir. 2018).

B. The District Court Properly Instructed the Jury on Count 2

Moya argues that the district court erred in rejecting his proposed jury instruction for count 2, distribution of heroin resulting in death. We disagree.

Count 2 charged Moya with violating §§ 841(a)(1), (b)(1)(C). Section 841(a)(1) makes it "unlawful for any person knowingly or intentionally" to "distribute . . . a controlled substance." Though §§ 841(b)(1), (A)–(B) govern the penalties for distributing defined weights of schedule I controlled substances, § 841(b)(1)(C) sets the penalties for distribution of smaller quantities below those thresholds, like the two grams of heroin that Moya dealt here. But § 841(b)(1)(C) also defines a more serious crime if the government charges and proves an additional element—that death resulted from the use of the charged controlled substance. In that circumstance, the minimum and maximum sentences increase. *Burrage*, 571 U.S. at 210 (citations omitted).

For the enhanced crime of distributing heroin resulting in death, the parties proposed the following competing jury instructions:

Moya's Proposed Instruction	The Government's Proposed Instruction	Tenth Circuit's Pattern Instruction
To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt: *First*: On August 12, 2011; *Second*: the defendant knowingly or intentionally distributed heroin to C.W.; and *Third*: the substance was in fact heroin; *Fourth*: *But for* C.W.'s ingesting the heroin distributed by defendant, C.W. would not have died, and *Fifth*: Use of the heroin distributed by defendant was sufficient by itself to cause C.W.'s death. As used in this instruction, an act is a "but for" cause of an event if that event would not have happened in the absence of the conduct. R. vol. 1 at 1503.	To find the defendant guilty of this crime you must be convinced that the United States has proved each of the following beyond a reasonable doubt: *First*: the defendant knowingly or intentionally distributed a controlled substance as charged; *Second*: the substance was in fact heroin; and *Third*: death resulted from use of the heroin. *** There is no requirement that the death resulting from the use of the controlled substance distributed was a reasonably foreseeable event. This standard is satisfied upon a finding by you that, *but for the victim's ingesting the [heroin] charged in Count 2* . . . , the victim would not have died. R. vol. 1 at 1962 (emphasis added).	To find the defendant guilty of this crime you must be convinced that the government has proved each of the following beyond a reasonable doubt: *First*: the defendant knowingly or intentionally distributed a controlled substance as charged; *Second*: the substance was in fact [name controlled substance]; [*Third*: the amount of the controlled substance distributed by the defendant was at least [name amount].] [*Fourth*: [serious bodily injury] [death] resulted from use of [name controlled substance].] *** Tenth Circuit's Pattern Criminal Jury Instructions (2011 ed., Feb. 2018 update) § 2.85.1 (brackets in original).

As the chart shows, the government modeled its proposed instruction on our Circuit's pattern instruction, except for also clarifying what is needed to prove that death "resulted from" use of the heroin. The district court adopted the government's proposed instruction, which we conclude complies with the Supreme Court's *Burrage* decision. 571 U.S. at 206.

In *Burrage*, the Court announced what legal standard governs in assessing convictions for distribution of controlled substances that result in death. *Id.* There, Joshua Banka died after "an extended drug binge," which included injecting heroin purchased from the defendant. *Id.* A forensic toxicologist determined that at his death, multiple drugs were in his system, including heroin metabolites, alprazolam, clonazepam metabolites, and oxycodone. *Id.* at 207. At trial, two government experts testified that the heroin Banka had bought from the defendant had *contributed to* his death, but neither could say "whether Banka would have lived had he not taken the heroin." *Id.* Instead, one expert described Banka's death as a "mixed drug intoxication" in which the combination of the drugs he had ingested caused him to stop breathing. *Id.*

The issue before the Court was whether § 841(b)(1)(C)'s "death results" element is met "when use of a covered drug supplied by the defendant contributes to, but is not a but-for cause of, the victim's death or injury." *Id.* at 206. The Court said no. In reversing the defendant's conviction, the Court explained that "a defendant

cannot be liable under . . . 21 U.S.C. § 841(b)(1)(C) unless . . . use [of the covered drug] is a but-for cause of the death or injury." *Id.* at 218–19.

Burrage forecloses Moya's challenge. Crucial for our purposes, there, the Court began by outlining the elements of a distribution-resulting-in-death crime. It explained that "the crime . . . has two principal elements: (i) knowing or intentional distribution of heroin, § 841(a)(1), and (ii) death caused by ('resulting from') the use of that drug, § 841(b)(1)(C)." *Id.* at 210 (footnote omitted).

The instructions the district court gave Moya's jury contained the two elements laid out in *Burrage*. And they further clarified that the "death results" language requires but-for causation. R. vol. 1 at 1962 ("This standard is satisfied upon a finding by you that, but for the victim's ingesting the [heroin] charged in Count 2 . . . , the victim would not have died."). So the district court correctly instructed the jury.

Further, our own precedent confirms this. We have approved an almost identical jury instruction involving a distribution-resulting-in-death crime. *See United States v. Burkholder*, 816 F.3d 607, 621 (10th Cir. 2016).[4] In *Burkholder*, the district court instructed the jury as follows:

[4] *Burkholder* involved a different penalty provision—§ 841(b)(1)(E). 816 F.3d at 609. That provision deals with schedule III drugs, whereas § 841(b)(1)(C), the penalty provision at issue here, governs schedule I and II drugs. But the two provisions are identical for our purposes: They both contain the same "death results" language. Accordingly, the majority and dissent in *Burkholder* freely relied on caselaw interpreting § 841(b)(1)(C). *See id.* at 616, 622.

> Before you may find the Defendant guilty of the offense charged in the indictment, you must find by proof beyond a reasonable doubt that Kyle Dollar's death resulted from the use of the buprenorphine distributed by the Defendant.
>
> This standard is satisfied upon a finding by you that, *but for* Kyle Dollar ingesting the buprenorphine distributed by the Defendant, Kyle Dollar would not have died.

Id. at 611 (citation omitted). The *Burkholder* court concluded that the instruction the district court gave "was a legally adequate statement of the law." *Id.* at 621. So too here.

Despite *Burrage*'s clear language and our conclusion in *Burkholder*, Moya asserts that the jury instructions misled the jury for three reasons. First, Moya faults the district court for "not mak[ing] 'but-for' causation *an element* that must be found in order to convict the defendant." Appellant's Opening Br. at 38 (emphasis added). Second, Moya argues that the district court "provided[] essentially a strict liability jury instruction," in his view contravening Supreme Court and Tenth Circuit caselaw. *Id.* at 40 (citation omitted). Third, Moya insists that the law required the district court to instruct the jury that to find him guilty, "it must find the [heroin] was sufficient in itself to cause death." *Id.* at 42 (citation omitted). Each argument fails.

First, contrary to Moya's assertion, the district court here did instruct the jury that it couldn't find Moya guilty unless it determined that the heroin was a but-for cause of Cameron's death. Moya suggests that, post-*Burrage*, federal trial courts must incorporate the words "but-for" causation as an element in any jury instruction involving distribution resulting in death. But neither *Burrage* nor our precedents have

required district courts to include those words *as an element* of the crime. Rather, the pertinent question is whether the instructions as a whole "provided [the jury] with sufficient understanding of the applicable standards." *Frias*, 893 F.3d at 1275. Here, the instructions explained that "resulted from" means that "but for" Cameron's injecting the heroin he received from Moya he wouldn't have died. R. vol. 1 at 1962. That set forth the applicable standard. Reading the instruction for count 2 as a whole, we have no doubt that the jury would have understood that to convict Moya, it was required to find that the heroin was the but-for cause of Cameron's death.

Indeed, criminal-statute elements often contain terms needing defining. For instance, the first element under § 841(a)(1) requires that the defendant "knowingly or intentionally distributed a controlled substance." The term "distribute" has a specific meaning under the statute, so courts often provide a jury instruction that explains that meaning to dispel any confusion among the jurors, as the district court did here. But a trial court needn't incorporate the definition of "distribute" as part of the element itself to explain the standard to the jury. Instead, courts commonly provide jury instructions that define an element's terms separate from the element itself. *See, e.g.*, Tenth Circuit Criminal Jury Instructions § 2.28 (defining "forge," "payee," and "intent to defraud"); § 2.52 (defining "with malice aforethought" and "premeditated"); § 2.55 (defining "kidnap," "inveigle," and "willfully"). That separation was appropriate here.

Second, Moya asserts that the adopted instruction "essentially makes §[§] 841(a)(1), (b)(1)([C]) a strict liability crime," which, he argues, contravenes our

precedent. Appellant's Opening Br. at 43 (citation omitted). We're unsure whether Moya is referring to the entire crime charged in count 2 or just its "death results" element. Either way, Moya is mistaken.

We'll start with the crime as a whole. The federal crime of distribution resulting in death isn't a strict-liability crime. As we just laid out above, *Burrage* describes the crime's two principal elements; the first element contains the mens rea requirement that the government must prove: "knowing or intentional distribution." 571 U.S. at 210. A crime containing a mens rea requirement is not a strict-liability crime. *See Strict-liability Crime*, Black's Law Dictionary (10th ed. 2014) ("An offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state . . . ."); *see also United States v. Jeffries*, 958 F.3d 517, 522–23 (6th Cir.) ("The district court's analysis is also incorrect insofar as it characterizes § 841(b)(1)(C) as a penalty enhancement of a strict-liability crime. . . . The criminal statute which Jeffries was convicted of violating [i.e., § 841(a)(1)] contains an express mens rea requirement." (citations omitted)), *cert. denied*, 141 S. Ct. 931 (2020). And though we held in *Burkholder* that the government needn't prove proximate causation when trying a distribution-resulting-in-death charge, we explained that our holding in no way "stripp[ed] away § 841's *mens rea* requirement." 816 F.3d at 612 n.5.

But while distribution resulting in death isn't a strict-liability *crime*, it does contain a strict-liability *element*. As we noted in *Burkholder*, "the Supreme Court did not indicate [in *Burrage*] that a separate *mens rea* attaches to the second element of

[a distribution-resulting-in-death] crime." *Id.* (citation omitted); *cf. United States v. Lowell*, --- F.4th ---, 2021 WL 2640548, at *2, *5 (10th Cir. June 28, 2021) (relying on *Burkholder* and holding that a defendant who struck a motorcycle with his car and killed the driver was subject to a federal-carjacking statute's "death results" enhancement "irrespective of the defendant's intent in causing that death" even though the statute's prefatory paragraph contained a specific-intent requirement). And every circuit to consider § 841(b)(1)(C)'s "death results" element has concluded that it imposes strict liability. *See United States v. Hatfield*, 591 F.3d 945, 950 (7th Cir. 2010) ("[T]he cases are unanimous and emphatic that section 841(b)(1)(C) imposes strict liability." (collecting cases)); *Jeffries*, 958 F.3d at 531 (Donald, J., dissenting) ("[T]he majority is correct that the statute contains a mens rea requirement, but the 'death results' enhancement does not." (citing *United States v. Rebmann*, 226 F.3d 521, 525 (6th Cir. 2000))). As multiple courts have recognized, "Where serious bodily injury or death results from the distribution of certain drugs, Congress has elected to enhance a defendant's sentence regardless of whether the defendant knew or should have known that death would result." *Jeffries*, 958 F.3d at 522 (quoting *United States v. Robinson*, 167 F.3d 824, 830 (3d Cir. 1999)).

In sum, Moya is wrong that the district court's jury instruction rendered count 2 a strict-liability crime. On the other hand, the "death results" element doesn't contain a separate mens rea requirement. In that sense, it imposes strict liability. So the district court properly instructed the jury despite not having incorporated a separate mens rea requirement into the "death results" element.

Third, Moya argues that the district court should have instructed the jury that the heroin "was sufficient in itself to cause death." Appellant's Opening Br. at 42 (citation omitted). In other words, Moya asserts that if other drugs—say, cocaine—had contributed to Cameron's death, the government would fail in proving that the heroin was the but-for cause of death.[5] *See* Appellant's Reply Br. at 3 ("Further, the government never [proved] . . . that heroin was the independent cause of death *such that other drugs, such as cocaine, were not contributing factors.*" (emphasis added)).

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[5] At times, Moya appears to invoke *Burrage*'s discussion of the concept of "independently sufficient cause," a concept arising "when multiple sufficient causes independently, but concurrently, produce a result." 571 U.S. at 214. The classic illustration recounted by the Court goes like this:

> [I]f A stabs B, inflicting a fatal wound; while at the same moment X, acting independently, shoots B in the head also inflicting a fatal wound; and B dies from the combined effects of the two wounds, A will generally be liable for homicide even though his conduct was not a but-for cause of B's death (since B would have died from X's actions in any event).

Id. at 215 (internal quotation marks, alterations and citations omitted).

But the concept of independently sufficient cause doesn't help Moya for at least three reasons. First, the Court declined to adopt this rule, instead leaving the question open for another day. *See id.* ("We need not accept or reject the special rule developed for these cases, since there was no evidence here that Banka's heroin use was an independently sufficient cause of his death. No expert was prepared to say that Banka would have died from the heroin use alone."). Second, even if the Court had adopted this rule, it wouldn't have provided a defense for criminal defendants. To the contrary, it would merely have presented an alternative theory under which defendants could be found guilty *even if their drugs weren't the but-for cause of a user's death*. Third, both of the government's expert witnesses testified that the heroin was independently sufficient to cause Cameron's death. R. vol. 4 at 1044–45 (Dr. Andrews's testimony that there was no "competing cause"); *id.* at 1253 (Dr. Labay's testimony that "only heroin" caused Cameron's death).

Again, Moya fundamentally misunderstands *Burrage*. Moya derives his argument from the *Burrage* Court's rejection of the government's proposed "contributing-cause" test. *Burrage*, 571 U.S. at 214–16. And it's true that the government here couldn't prevail if the evidence demonstrated only that Moya's heroin had contributed to Cameron's death. *See id.* But Moya stretches *Burrage* much further, suggesting that if there were *any other* contributing causes, heroin couldn't be the but-for cause. That's not how it works. *Burrage* explained that the government can prove but-for cause amid use of multiple drugs so long as the charged drug "was the straw that broke the camel's back." *Id*. at 211. That is, "if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." *Id.* (citation omitted). Applied here, even if the evidence had shown that other drugs had weakened Cameron's body, the government still would have met its burden by proving that Cameron would have lived if he hadn't injected the heroin. Accordingly, the district court correctly rejected Moya's

proposed addition of an element that the heroin "was sufficient by itself" to cause Cameron's death.[6] R. vol. 1 at 1503.

II. Sufficiency of the Evidence

A. Standard of Review

We "review a sufficiency of the evidence challenge de novo, viewing the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the government."[7] *United States v. Rodebaugh*, 798 F.3d 1281, 1296 (10th Cir. 2015) (citation omitted). "We will reverse only if no rational trier of fact could have found the essential elements of the crime . . . ." *Id.* (quoting *United States v. Hale*, 762 F.3d 1214, 1222–23 (10th Cir. 2014)). "In other words, we ask whether 'a reasonable jury could find the defendant guilty.'" *Id.* (quoting *United States v. King*, 632 F.3d 646, 650 (10th Cir. 2011)). "In conducting this review we may neither weigh conflicting evidence nor consider the credibility of witnesses. It is for

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[6] Moya also throws a rule-of-lenity argument into the mix, asserting that we must "not give the text a meaning that is different than the ordinary meaning, and 'that disfavors the defendant.'" Appellant's Opening Br. at 39 (emphasis omitted) (quoting *Burrage*, 571 U.S. at 216). But *Burrage* tells us the meaning of "results from," the contested language in § 841(b)(1)(C), while interpreting the statute favorably to the defendant. Given that the phrase is unambiguous, the rule of lenity doesn't apply. *See Jeffries*, 958 F.3d at 521 ("Because the phrase 'results from' is not ambiguous, it is unnecessary to look to traditional background principles of criminal liability to resolve the interpretive inquiry before us.").

[7] The same standard of review applies when reviewing Moya's challenge to the district court's denial of his motion for acquittal under Federal Rule of Criminal Procedure 29. *United States v. Irvin*, 682 F.3d 1254, 1266 (10th Cir. 2012) (citing *United States v. Wood*, 207 F.3d 1222, 1228 (10th Cir. 2000)).

the . . . fact finder[] to resolve conflicting testimony, weigh the evidence, and draw inferences from the facts presented." *Id.* (quoting *United States v. McKissick*, 204 F.3d 1282, 1289–90 (10th Cir. 2000)).

B. Sufficient Evidence Supported the Jury's Verdict

Moya maintains that the government failed to present sufficient evidence for a jury to convict him of count 2, heroin distribution resulting in death. Specifically, he argues that the government never adequately proved how the heroin that Cameron had ingested sometime between 11 p.m. and midnight could have killed him hours later.[8] But after our review of the record, we conclude that a reasonable jury could have convicted him based on the evidence at trial.

For the jury to return a guilty verdict on count 2, the government needed to prove two elements beyond a reasonable doubt: (1) that Moya had knowingly or intentionally distributed heroin; and (2) that death had resulted from Cameron's using that heroin. *Burrage*, 571 U.S. at 210. Because Moya challenges the sufficiency of the evidence on only the second element, we needn't revisit the jury's finding regarding the first element.

[8] Moya also argues that the government failed to prove that other drugs didn't contribute to Cameron's death. But as we explained above, the government could prove that Moya's heroin was the but-for cause of Cameron's death even if other drugs were contributing causes, i.e., that the heroin was the "straw that broke the camel's back." *See Burrage*, 571 U.S. at 211. In any event, the jury heard testimony from both of the government's experts that no other drugs contributed to Cameron's death.

Ample evidence supported the jury's verdict on the "death results" element. At the top of the list, two experts—Dr. Andrews (a forensic pathologist) and Dr. Labay (a forensic toxicologist)—both testified that but-for Cameron's injecting the heroin that Moya distributed, Cameron wouldn't have died. The government asked Dr. Andrews point-blank: "Based on what you know, do you have an opinion about whether Cameron Weiss would have died if he hadn't used heroin in the hours before his death?" R. vol. 4 at 1045. He responded, "[i]f [Cameron] hadn't used heroin I don't think he would have died." *Id.* He went further, testifying that "there was no competing cause." *Id.* at 1044. Dr. Labay reached the same conclusion. When the government asked her if it was "only heroin" that had killed Cameron, she answered "[y]es." *Id.* at 1253.

And neither Dr. Andrews nor Dr. Labay provided bare opinions without explanation; rather, both of them based their opinions on the autopsy findings, the circumstances surrounding the death, and the toxicology report. Consider Dr. Andrews's testimony. His autopsy findings strongly pointed to death by heroin: Cameron's swollen brain, the so-called "foam cone" around his mouth, the aspirated gastric content (vomit), the fluid in his lungs—all of which are telltale signs of central-nervous-system depression associated with a heroin death. R. vol. 4 at 1024.

It's true that Dr. Andrews acknowledged that fluid in the lungs and foam around the mouth sometimes occur in cocaine overdoses. But Dr. Andrews remained adamant that cocaine didn't play a role in Cameron's death, explaining that Cameron displayed no stimulant-type effects the night before he died. To the contrary,

Cameron "was somnolent, appearing drunk, [and] falling asleep." *Id.* at 1076. And the gurgling that Cameron's father heard suggested to Dr. Andrews that Cameron had "slipped into a coma and a comatose state" before he died, indicative of "a prolonged depressant death." *Id.* Further, Dr. Labay's testimony supported Dr. Andrews's conclusions. She testified that Cameron would have had cocaine in his blood if he had died from cocaine toxicity—not just inactive metabolites of cocaine. Even if the government provided no other evidence on this element, these two experts' testimony alone would support the jury's verdict.

Even so, Moya insists that the government failed to meet its burden to prove that *Moya's* heroin was the but-for cause of Cameron's death. The nub of Moya's argument is that Moya's heroin that Cameron injected sometime between 11 p.m. and midnight Friday night couldn't have killed Cameron several hours later. According to Moya, what he calculates as a roughly nine-and-a-half hour gap between Cameron's final injection and the 8:30 a.m. pronounced time of death shows that there must have been some other intervening drug use—either cocaine or heroin he bought from someone else. In support, Moya relies heavily on Dr. Pike's testimony that "[d]eaths from heroin occur immediately after use," *id.* at 1123, and that "someone who survives . . . intravenous use of heroin . . . for an hour has survived it entirely," *id.* at 1122. In other words, if Moya's heroin was going to kill Cameron, it would have happened within an hour after he injected it. But the jury was free to reject this testimony.

To begin, the evidence presented to the jury—evidence we must consider in the light most favorable to the government—calls into question the timeline undergirding Moya's argument. Start with Cameron's time of death. Even though Cameron was pronounced dead at 8:30 a.m., Cameron's mother testified that the moment she saw him at 7:30 a.m. "it was obvious to [her] . . . that he was gone." *Id.* at 267. Drawing reasonable inferences in the government's favor, it's likely that Cameron had died by 6 or 6:30 a.m. After all, Cameron's father heard a gurgling sound before he left for work at 5:30 a.m. And Dr. Andrews testified that the gurgling sound indicated that Cameron had slipped into a coma at that point.

In a similar vein, the evidence the jury heard suggests that Cameron's last heroin use may have been later than 11 p.m. Martinez testified that Cameron and Rondeau left his house at 2 a.m. Given Rondeau's testimony that they were there for only twenty minutes, and had injected the last of the heroin not long before going to Martinez's house, Cameron's last injection may have been closer to 1 a.m. So, viewing the evidence in the light most favorable to the government, the gap between Cameron's final injection and his death was closer to five hours (from 1 a.m. to 6 a.m.)—cutting Moya's timeline nearly in half.

But we would uphold the jury's verdict even if we accepted Moya's premise that more than nine hours passed between Cameron's third injection and his death. First, Cody Teeters testified that in his experience, adverse heroin effects sometimes occur within thirty seconds of injection; other times they're delayed. Specifically, he described an instance when he "fell out" a day after using heroin. *Id.* at 813, 822. He

explained that he fell unconscious and stopped breathing but that friends revived him before his condition worsened. *See* R. vol. 4 at 821 (agreeing with Moya's counsel that falling out is like "being on death's door"). Having heard evidence that a user can fall out a day after using heroin, a reasonable jury could conclude that Cameron suffered a similarly delayed episode.

Second, the jury could have relied on Dr. Labay's testimony that heroin can continue to act on a user's body for several hours after injection. She refuted Dr. Pike's testimony that a heroin user is safe from overdose once an hour has passed after injection.

Yet Moya argues that the government couldn't meet its burden unless one of its experts testified that heroin remains lethal nine hours after injection. Though neither Dr. Andrews nor Dr. Labay specified an outer limit establishing when the risk of heroin overdose has passed, Moya ignores key testimony on this issue. Dr. Labay testified that once heroin converts to morphine, the morphine's depressive effects on the central nervous system can last well beyond an hour. Indeed, because morphine has a half-life of up to three hours, and the general "rule of thumb" is that a drug has no effect on the body after five half-lives, *id.* at 1231, Dr. Labay testified that morphine could affect the body for up to fifteen hours. So even if our standard of review permitted us to credit Moya's premise that nine hours had passed between Cameron's final injection and his death, we would still rule that Dr. Labay's and Teeters's testimony provided the jury sufficient evidence to conclude beyond a reasonable doubt that Moya's heroin caused Cameron's death.

Taking a different tack, Moya argues that Cameron's death might have been caused by drugs ingested after he got home about 3 a.m. on Saturday morning:[9] "[W]e have . . . this critical piece of evidence, this syringe that has got the cocaine residue in it. We don't know when he did that. It is very possible he could have been chasing another high with that . . . goes to bed, lays down, and then, he dies." *Id.* at 1347. But the jury was presented with this theory and rejected it—for good reason.

First, the autopsy findings all pointed to a heroin overdose. Besides the lack of evidence that Cameron exhibited stimulant-drug-like behavior the hours before he died, cocaine overdoses don't typically cause the kind of brain swelling Cameron displayed. Nor were there any active cocaine metabolites in his blood at death. True, the medical examiner failed to collect the blood and urine samples until about 48 hours after Cameron died. And that delay precluded Dr. Andrews from conclusively ruling out the presence of cocaine in Cameron's blood when he died. But even acknowledging the delay, Dr. Andrews testified that "this [was] a depressant death"; "[t]his [was] not a death that is typically associated with cocaine." *Id.* at 1049. As did Dr. Labay.

Second, Moya provided no details about the cocaine-tainted syringe that Cameron's mother found in a pair of Cameron's pants. The jury wouldn't have

[9] If Cameron used any other drugs (other than Moya's heroin), he would have done so after returning home at about 3:00 a.m.: Rondeau, who was with Cameron the entire night before he died, testified that the only heroin used that night came from Moya. On cross-examination, Rondeau also testified that he and Cameron didn't use any "speedballs [a mixture of heroin and cocaine] the night before Cameron died" and that Rondeau had no other drugs that night. R. vol. 4 at 508–09.

known whether the pants were lying at the bottom of a pile of dirty laundry in a closet corner. Nor would it have known when he last wore the pants. And the government introduced evidence that Cameron had been wearing shorts the night that he died, not the pants containing a syringe. In any event, Moya's closing argument reveals the inherent weakness of his theory: He couldn't point to any evidence that Cameron had used cocaine after returning home.

On the other hand, the government introduced compelling evidence that refuted Moya's theory. Cody Teeters testified that Cameron and their friends never saved drugs for later: "We were users. We didn't believe that you had to save any[;] you wanted to get as high as you could. The point of who we were and what we were doing at that time was to get high." *Id.* at 815. Even Dr. Pike agreed that "heroin users are . . . not going to save heroin for a rainy day." *Id.* at 1134. Moreover, Cameron's family thoroughly searched his room and the entire home before they sold it about a year after he died: They found no drugs or drug paraphernalia. This further suggested that Cameron didn't store drugs in the home. On this evidence, a rational jury could have concluded that Cameron didn't ingest any more drugs after getting home at about 3 in the morning.

Finally, Moya highlights two cases that he argues support a reversal here: *Burrage* and *Krieger v. United States*, 842 F.3d 490 (7th Cir. 2016). Neither does.

We have already discussed *Burrage* in some detail. As mentioned, neither of the experts in that case could say whether the decedent would have lived had he not injected the heroin the defendant sold him. *See* 571 U.S. at 207. Instead, the expert

witnesses opined that it was the combination of the cocktail of drugs the decedent had ingested in the hours before his death that stopped his breathing. *Id.* In contrast, here, Drs. Andrews and Labay both concluded that heroin killed Cameron, even ruling out other drugs as contributing causes.

And their conclusions were consistent with the other testimony at trial. Though Cameron used multiple drugs Thursday night, those drugs had worn off by the following afternoon: Multiple witnesses who saw Cameron at that time described him as sober, including his sister, who knew how to recognize when he was on drugs. As for Friday night, aside from smoking marijuana, Rondeau testified that he and Cameron had used only the heroin they received from Moya.

In *Krieger*, the defendant gave her friend, Curry, a prescription fentanyl skin patch commonly abused by addicts, which Curry chewed up later that night. 842 F.3d at 492. Curry's mother found her dead the next afternoon. *Id.* At the scene, investigators found "a hypothermic needle, a small pipe with burnt residue on it, and two red capsules." *Id.* at 493. The autopsy revealed "traces" of several drugs in Curry's system—including cocaine, benzodiazepines, cannabinoids, and Oxycodone—but the medical examiner determined that Curry had died from fentanyl toxicity. *Id.* The defendant pleaded guilty to distributing fentanyl under §§ 841(a)(1), (b)(1)(C). *Id.* at 493. The government then sought a twenty-year mandatory-minimum sentence, arguing that the "death results" penalty enhancement applied because the fentanyl caused Curry's death. *Id.* After a sentencing hearing in which both sides offered competing expert testimony about what had caused Curry's death, the district

court concluded that the government had proved by a preponderance of the evidence that the fentanyl the defendant supplied "resulted in the death of Curry."[10] *Id.* at 495.

Five years after the defendant was sentenced in 2009, the Supreme Court decided *Burrage*. The defendant then collaterally attacked her sentence, arguing that the government had never proved that the fentanyl patch was the but-for cause of Curry's death. *Id.* at 492, 497. The Seventh Circuit agreed. After ruling that *Burrage* applied retroactively, *id.* at 499–500, the court emphasized that the district court had not concluded that but for Curry's ingesting the fentanyl she would have lived, *id.* at 501 ("[T]he district court did not use the term 'but for' anywhere in the order."). Indeed, before *Burrage,* "no district court had any reason to know that it should be focusing on 'but-for' causation when sentencing for 'death resulting.'" *Id.* So the Seventh Circuit considered whether the evidence at the sentencing hearing satisfied *Burrage*'s standard. *See id.* at 504–05. Though the court acknowledged the expert testimony that fentanyl toxicity had caused Curry's death, it noted that law enforcement and the medical examiners had failed to adequately assess the impact of the other drugs found in her system. *Id.* As a result, the court concluded that the

[10] The defendant in *Krieger* was indicted, sentenced, and lost her direct appeal to the Seventh Circuit before the Supreme Court decided *Alleyne v. United States*, 570 U.S. 99 (2013). *Krieger*, 842 F.3d at 496. *Alleyne* held that facts that increase a mandatory minimum sentence (like the defendant's in *Krieger*) must be submitted to a jury and proved beyond a reasonable doubt. 570 U.S. at 111–16. But because the defendant's sentence preceded *Alleyne*, the government had to prove only by a preponderance of the evidence that the fentanyl resulted in Curry's death. *Krieger*, 842 F.3d at 493–94.

government had failed to prove but-for causation and remanded for resentencing. *Id.* at 505.

Despite some parallels, *Krieger* differs markedly from our case. Most notably, the *Krieger* court reviewed the evidence de novo to assess whether the government had proved but-for causation under *Burrage*. *Id.* at 504–05. No jury verdict was in play. Our review is more limited. Unlike the court in *Krieger*, we're not independently assessing the expert testimony to probe its quality or credibility. We decide only whether, viewing the evidence in a light most favorable to the government, a rational jury could have found the essential elements beyond a reasonable doubt. *Rodebaugh*, 798 F.3d at 1296. Given the differing standards of review, *Krieger* has little value for our purposes.

What's more, the Seventh Circuit faced the tricky task of reviewing a district court's sentencing decision that was issued pre-*Burrage*. Though the district court occasionally referred to a causal standard that resembled but-for causation, the *Krieger* court "[could not] say with any certainty that the district court made a finding that but for the fentanyl . . . Curry would not have died." 842 F.3d at 501. Not so here. The district court, the parties, and the jury all understood that the government had the burden of proving that the heroin was the but-for cause of Cameron's death. The trial centered on that very issue. Thus, we know that the jury was convinced that heroin was the but-for cause of Cameron's death.

At bottom, viewing the evidence in the light most favorable to the government, Moya falls short of demonstrating that only an irrational jury could have convicted

him on the evidence presented at trial. No matter how much more impressive Dr. Pike's testimony might seem to Moya, we may not reweigh the evidence. *See Rodebaugh*, 798 F.3d at 1296. "It is the province of the jury, rather than of the appellate court, to weigh the credibility of witnesses and to judge conflicting testimony." *United States v. Brinklow*, 560 F.2d 1008, 1010 (10th Cir. 1977); *see also United States v. Golb*, 69 F.3d 1417, 1428 (9th Cir. 1995) ("[I]t was within the jury's province to resolve these competing opinions and determine what weight to accord the government's evidence."). Between Dr. Pike on the one hand and Dr. Andrews and Dr. Labay on the other, the jury found the government's witnesses more credible. On this trial record, we must not disturb the jury's verdict.[11]

III. The Government's Hypothetical Questions

A. Standard of Review

The parties argue this issue under competing standards of review. Moya asserts that we should review the district court's admission of the experts' answers to the government's hypothetical questions for abuse of discretion. But the government

[11] Even if Moya prevailed on his sufficiency-of-the-evidence argument related to the "death results" element, he would remain properly convicted of the lesser included offense of distributing heroin under count two (just as he is under count 1). *See Burrage*, 571 U.S. at 210 n.3 ("Violation of § 841(a)(1) is thus a lesser included offense of the crime [of distribution resulting in death]."). So while he no longer would be subject to mandatory life imprisonment, he still would be sentenced under count 2 for distributing heroin. *See United States v. Ellis*, 868 F.3d 1155, 1168 (10th Cir. 2017) (concluding that the defendant stood "properly convicted under 21 U.S.C. § 841(a)(1), (b)(1)(C)" regardless of whether sufficient evidence supported the jury's finding regarding the specific weight of the drugs).

counters that when, as here, "the defendant did not make a contemporaneous objection to the admission of testimony, . . . then the district court's decision is reviewed for plain error."[12] *United States v. Brooks*, 736 F.3d 921, 929–30 (10th Cir. 2013).

The government has the better argument here. Moya filed a motion in limine seeking to limit any hypothetical questions the government intended to ask the expert witnesses. And just before the government began cross-examining Dr. Pike, Moya reminded the court that the government's hypothetical questions must "exclude any irrelevant evidence" and "be directed specifically as to form and length, considering the facts that we have on the record today." R. vol. 4 at 1163. But Moya never objected to the substance of any of the government's hypothetical questions that he now challenges on appeal. So the district court never had an opportunity to rule on whether the challenged questions breached the rules of evidence.

Plain-error review generally applies in such cases notwithstanding Moya's general musings about the potential for improper hypothetical questions. *See United States v. Archuleta*, 737 F.3d 1287, 1287 (10th Cir. 2013) ("Because [Defendant] failed to object at trial regarding any alleged violation of Rule 704(b), we review this issue for plain error."); *United States v. Norman T.*, 129 F.3d 1099, 1106 (10th Cir.

[12] The government further maintains that because Moya failed to argue that his challenge can survive plain-error review, he has waived the issue. *See, e.g.*, *United States v. Barrera-Landa*, 964 F.3d 912, 918 (10th Cir. 2020). We needn't take up that argument because, regardless, we conclude that Moya's hypothetical-questions challenge is meritless.

1997) ("A timely objection, accompanied by a statement of the specific ground of the objection, must be made when evidence is offered at trial to preserve the question for appeal . . . ."). Hence we will reverse only if "(1) the district court committed error; (2) the error was plain—that is, it was obvious under current well-settled law; (3) the error affected the Defendant's substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Perrault*, 995 F.3d 748, 759 (10th Cir. 2021) (citation and footnote omitted). Because we conclude that the district court didn't err, we don't reach the other three prongs.

B. The District Court Didn't Err in Allowing Dr. Pike and Dr. Labay to Answer the Government's Hypothetical Questions

Moya advances various theories—none convincing—for why the district court shouldn't have allowed Dr. Pike and Dr. Labay to answer several of the government's hypothetical questions. But despite Moya's general objection at trial, in reality he faults the district court for not sua sponte disallowing the government's hypothetical questions. In the end, Moya fails to persuade us that the district court erred.

1. Dr. Pike

On appeal, Moya raises two objections to the hypothetical questions that the government posed to Dr. Pike. First, he argues that the questions improperly elicited answers that "went to the ultimate issues in the case." Appellant's Opening Br. at 51. Second, he argues that the questions "were confusing to the jury." *Id.* at 53. Neither argument withstands scrutiny.

The Federal Rules of Evidence "specifically allow[] testimony in the form of an opinion that embraces an ultimate issue to be decided by the trier of fact." *United States v. Goodman*, 633 F.3d 963, 968 (10th Cir. 2011) (internal quotation marks and citations omitted); Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue."). Rule 704(b) creates an exception "expressly forbid[ding] experts from offering opinions as to the state of mind of a criminal defendant if that mental state is an element of the crime of which they are accused[.]" *Goodman*, 633 F.3d at 968 (emphasis omitted). But none of the experts testified about Moya's mental state. Rather, their opinions focused on the cause of Cameron's death. Though that was undoubtedly an "ultimate issue" and an element the government needed to prove, nothing in the federal rules forbids an expert from offering an opinion on that kind of factual determination.

We have recognized other limits on experts testifying about ultimate issues, but none of those apply here. For instance, we have cautioned that even though "Federal Rule of Evidence 704 allows an expert witness to testify about an ultimate question of fact," "the rule does not permit an expert to instruct the jury how it should rule, if the expert does not provide any basis for that opinion." *United States v. Richter*, 796 F.3d 1173, 1195 (10th Cir. 2015). Instead, "[p]ermissible testimony provides the jury with the tools to evaluate an expert's ultimate conclusion and focuses on questions of fact that are amenable to the scientific, technical, or other specialized knowledge within the expert's field." *Id.*; *see also United States v. Dazey*, 403 F.3d 1147, 1171–72 (10th Cir. 2005) ("Even if [an expert's] testimony arguably

embraced the ultimate issue, such testimony is permissible as long as the expert's testimony assists, rather than supplants, the jury's judgment.").

Here, Dr. Pike's answers to the government's hypothetical questions didn't supplant the jury's judgment. He merely offered his opinion about the possibility that sources other than heroin caused Cameron's death. And it's no wonder that Moya didn't object to this line of questioning at trial—Dr. Pike's answers helped his case. That is, Dr. Pike repeatedly and forcefully refuted the government's attempts to suggest that heroin toxicity primarily caused Cameron's death. For these reasons, the district court didn't err by not sua sponte prohibiting Dr. Pike from answering questions that implicated one of the ultimate issues at trial.

Moya next challenges the government's hypothetical questions on the ground that they "were . . . only tangentially related to the facts in evidence" and thus confused the jury. Appellant's Opening Br. at 53. Moya fails to identify any particular offending question, choosing instead to cite generally to nearly 50 pages of trial transcript (i.e., most of the government's questions directed to Dr. Pike). In any event, our caselaw affords advocates wide latitude in formulating hypothetical questions put to experts on cross examination:

> We have said that a hypothetical question should incorporate facts supported by evidence, but need not include all the facts in evidence nor facts or theories advanced by the adversary. If the adversary desires the opinion of the expert upon the facts as he asserts them to be, he can obtain it on cross-examination.

Taylor v. Reo Motors, Inc., 275 F.2d 699, 703 (10th Cir. 1960) (internal quotation marks and citation omitted); *cf. Goodman*, 633 F.3d at 969–70 (holding that the

prosecutor didn't violate the rules of evidence by asking an expert a series of hypothetical questions because the jury still had to draw the ultimate conclusion regarding the defendant's sanity). The key inquiry is whether the questions "were . . . so completely ill[-]founded as to distort the true facts and mislead the jury." *Taylor*, 275 F.2d at 703.

Moya can't meet this standard without directing us to any particular question. He vaguely references "the government's hypothetical about atropine-contaminated cocaine." Appellant's Opening Br. at 53. But that hypothetical was related to the defense's theory that cocaine—not heroin—caused Cameron's death. *See, e.g.*, R. vol. 4 at 1341 (describing "the syringe with cocaine residue" as "one of the most critical and key parts of evidence in this whole case"). And none of the government's other hypothetical questions distorted the true facts or misled the jury. Hearing no objection from Moya, the district court expressed no sua sponte reservations about the government's hypothetical questions. Nor do we see any reason it should have.

2. Dr. Labay

On appeal, Moya sets out more concrete objections to hypothetical questions asked of Dr. Labay. His arguments fail nonetheless.

Moya first objects to this question and part of Dr. Labay's answer:

> The government: Is that part of the reason that you disagree with my hypothetical statement that a heroin user is totally safe if they survive for one hour after using heroin?
>
> Dr. Labay: Yes. So I disagree with that statement, especially as a blanket statement because after somebody uses heroin, yes, that heroin is rapidly converted to the heroin metabolite and that . . . gets conver[ted] to morphine. The morphine is a pharmacologically active substance. And if that is present at sufficient concentration after the hour mark, then an individual can have the adverse effects associated with the use of the drug.

Id. at 1232–33. Moya argues that Dr. Labay's response (1) "was . . . outside the scope [of] her permissible expert testimony" and (2) misled the jury into equating "adverse effects [with] death." Appellant's Opening Br. at 54. Neither of Moya's hindsight objections to this question and answer relate to the hypothetical nature of the question, nor do they persuade us that the district court erred.

Moya's first argument is puzzling. The court accepted Dr. Labay as a forensic-toxicology expert. The scope of her testimony necessarily encompassed the effect of heroin in the body over time—including whether a user could experience adverse effects beyond one hour after use. So nothing in her answer went outside her area of expertise.

His second argument fares no better. To start, Moya doesn't explain why the jury would equate Dr. Labay's statement about "adverse effects" with death. But even spotting Moya that the jury did understand it that way, nothing about the question and answer was misleading. The government introduced Dr. Labay as a rebuttal expert to refute Dr. Pike's testimony that heroin users face no risk of overdose if they survive beyond the first hour after injection. Dr. Labay's opinion

that heroin overdose can and does occur even beyond an hour after injection didn't mislead the jury—it simply presented a contrary view. The district court rightly permitted the testimony.

Finally, Moya challenges the following question and answer:

> The government: If hypothetically Cody Teeters testified that he and Cameron both injected cocaine Thursday, August 11, the day or two before his death, would that be consistent with what you see on this tox screen?
>
> Dr. Labay: Yes. So the benzoctamine at 150 nanogram per milliliter to me represents cocaine use maybe within the day at some point, like within the 24-hour time period.

R. vol. 4 at 1247–48. Moya argues that the exchange misled the jury by suggesting that Cameron and Teeters had injected *only* cocaine, despite Teeters's testimony that they had also used heroin, air dusters, and prescription pills. But the government posed the question to probe whether Cameron's cocaine use two days before he died would explain the benzoctamine in Cameron's blood. Whether he and Teeters also ingested other drugs didn't bear on that inquiry. Hence the government's excluding extraneous information to focus the question helped, rather than misled, the jury.

In brief, we conclude that the district court properly allowed Dr. Pike and Dr. Labay to answer the unobjected-to hypothetical questions that the government posed.

IV. Denial of Moya's Pre-Trial Motions

A. Background

At Moya's arraignment, the district court entered its standard discovery order. The court set the motions deadline for July 2015, but it extended that deadline

numerous times, eventually to June 2016. The court set a separate deadline of October 11, 2016, for *Daubert* motions.

In January 2017, the court granted the parties' joint request to continue the trial date by three months. The trial was further delayed after the government filed an interlocutory appeal of two orders excluding the testimony of government witnesses Dr. Dawn Sherwood and Dr. Laura Labay. On September 21, 2018, we affirmed the exclusion of Dr. Sherwood's testimony as a discovery sanction, but we reversed the district court's exclusion of Dr. Labay's testimony. *See generally United States v. Moya*, 748 F. App'x 819 (10th Cir. 2018) (unpublished). The district court then reset the trial date for May 6, 2019.

In February 2019, Moya moved to extend the deadlines for *Daubert* and Rule 12(b) motions. The government opposed the motion, and the court denied it, concluding that Moya had failed to "persuade the Court that there [was] a need for more pretrial motions." R. vol. 1 at 1351.

Moya filed three pretrial motions anyway. First, on April 3, 2019, Moya filed a Third Amended Notice of Expert Witness Testimony, identifying Dr. Satish Chundru as a defense expert. The government moved to exclude Dr. Chundru's testimony as a discovery sanction under Rule 16. Evaluating the government's motion under *United States v. Wicker*, 848 F.2d 1059 (10th Cir. 1988), the district court granted the government's motion after concluding that all three *Wicker* factors favored exclusion.

Second, on April 26, 2019, Moya moved to exclude the testimony of Dr. Sam Andrews based on what Moya characterized as recently obtained impeachment

information. Opposing the motion, the government argued that the impeachment material might go to the weight of Dr. Andrews's testimony but wouldn't make it inadmissible. The district court agreed. But in denying Moya's motion, the court ruled that Moya could cross-examine Dr. Andrews about the impeachment material if he could first show that the material was "admissible under Rule 608 [i.e., witness's character for truthfulness] or another Rule of Evidence." R. vol. 1 at 1937 (emphasis deleted).

Third, on April 28, 2019—just a week before trial—Moya moved to exclude the toxicology reports related to the blood and urine samples taken during Cameron's autopsy. Moya argued that "[t]he blood and urine taken from [Cameron] nearly 49 hours post-mortem is not representative of the blood and urine in his system at the time he was pronounced dead." Supp. R. vol. 2 at 7 (citation omitted). The government moved to strike the motion as untimely. The district court granted the government's motion to strike, concluding that despite having "all the necessary information to file his motion" since at least February 2016, Moya had filed "his current motion without acknowledging that it [was] late or showing any good cause for the delay." R. vol. 1 at 1938.

B. The District Court Correctly Denied Each of Moya's Pretrial Motions

In a single section, Moya asserts that the district court abused its discretion in denying four pre-trial motions: (1) his motion to compel scientific evidence; (2) his motion to exclude Cameron's blood and urine samples; (3) his motion to allow Dr.

Chundru to testify at trial; and (4) his motion to extend the *Daubert* deadline and to exclude Dr. Andrews. We affirm as to each.

Emphasizing Moya's paltry briefing, the government urges us to consider these arguments waived. And there are good reasons why we should. Litigants may waive arguments not only when they omit them from their opening brief, but also when they are "inadequately presented." *United States v. Walker*, 918 F.3d 1134, 1151 (10th Cir. 2019) (citation omitted). Thus, we generally deem a party's argument waived if it's "nominally raised" or "advanced in an opening brief only in a perfunctory manner." *Id.* (internal quotation marks and citations omitted). And if we refuse to "fill the void by crafting arguments and performing the necessary legal research" for pro se litigants, that holds with even greater force for counseled litigants. *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (citation omitted).

So we hesitate to overlook Moya's briefing deficiencies here. Of the four arguments Moya raises, he devotes only a page each to three of them and just over a page to the fourth. *See Walker*, 918 F.3d at 1152 ("[W]hether a legal argument has been adequately presented cannot be determined solely by looking at the number of words devoted to it, but it would be illogical to say that this metric is meaningless."). And while litigants often improve their arguments by getting to the point, that's unfortunately not so here: "the few words that [Moya] expended on this topic consist of little more than generalized and conclusory statements." *Id.*

Still, "whether issues should be deemed waived is a matter of discretion." *Id.* at 1153 (citing *Abernathy v. Wandes*, 713 F.3d 538, 552 (10th Cir. 2013)). Considering the severity of the sentence Moya faces, we will briefly consider the motion denials he challenges here.

1. Motion to Compel Scientific Evidence

We generally review for an abuse of discretion the district court's denial of a discovery request for documentary evidence. *See United States v. Gonzalez-Acosta*, 989 F.2d 384, 388–89 (10th Cir. 1993). Though we have applied a different standard of review when considering particular discovery motions, *see, e.g.*, *United States v. James*, 257 F.3d 1173, 1177–78 (10th Cir. 2001) (reviewing de novo a "selective prosecution discovery order"), neither party urges us to depart from our usual standard for discovery motions, and we see no reason to do so here. "Therefore, we will not disturb the district court's ruling unless we have a definite and firm conviction that the court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Gonzalez-Acosta*, 989 F.2d at 389 (internal quotation marks and citation omitted).

Citing *Brady*, *Giglio*, and Federal Rule of Criminal Procedure 16, Moya sought discovery of voluminous records from NMS Labs, including specific toxicology reports and Cameron's medical records. The district court denied the motion, ruling that Moya failed to show that the requested documents "[were] exculpatory, as required by *Brady*, or that their disclosure is otherwise required by *Giglio* or Rule 16." R. vol. 2 at 133.

The district court's denying the motion doesn't constitute a clear error of judgment. Moya challenges the court's ruling in conclusory fashion, baldly stating that "[t]he scientific discovery Moya requ[ested] was favorable *Brady* evidence." Appellant's Opening Br. at 64 (citations omitted). But to establish a *Brady* violation Moya must explain at a bare minimum *why* the requested evidence was favorable to him and demonstrate that it was material, i.e., that the result of the proceeding would have been different if the evidence had been given to the defense. *United States v. Erickson*, 561 F.3d 1150, 1163 (10th Cir. 2009). Because Moya doesn't even attempt to establish those necessary criteria, his challenge fails.

2. Motion to Exclude Cameron's Blood and Urine Samples

"We review the district court's decision to decline to hear untimely pretrial motions for an abuse of discretion." *United States v. Gonzalez*, 229 F. App'x 721, 725 (10th Cir. 2007) (unpublished) (citing *United States v. Booker*, 952 F.2d 247, 249 (9th Cir. 1991)).

The week before trial, Moya moved to exclude the blood and urine samples collected by the Office of the Medical Investigator because they were taken about 48 hours after Cameron had died. He argued that the two-day delay produced unreliable samples that didn't accurately reflect the actual amounts of cocaine in Cameron's body at the time he died. In response, the government urged the district court to strike the motion as untimely because the government had provided Moya the contested toxicology report over three years earlier. After noting that Moya had "all the necessary information to file his motion" before the April 2017 deadline, the district

court sided with the government. R. vol. 1 at 1938. The court faulted Moya for failing to acknowledge that his motion was filed years late or demonstrating "any good cause for the delay," so the court struck the motion as untimely. *Id.* But the court allowed Moya to cross-examine both Dr. Andrews and Dr. Labay about the 48-hour delay and how it affected the accuracy and relevance of the blood and urine samples.

On appeal, Moya mostly ignores the procedural posture of the case and argues as if the district court denied his motion on the merits. That is, he argues under *Arizona v. Youngblood*, 488 U.S. 51 (1988) and *California v. Trombetta*, 467 U.S. 479 (1984), that "the government essentially destroyed exculpatory evidence by delaying the collection of decedent's blood and urine." Appellant's Opening Br. at 65 (citation omitted). But because the district court never considered the merits of the motion, Moya must appeal the district court's striking his motion as untimely. On that score, Moya asserts without explanation that the district court "erroneously deemed it was late." *Id.* at 66 (citation omitted). That one-sentence aside fails to persuade us that the district court abused its discretion in enforcing the motions deadline when Moya offered no reason for his tardy submission.

But even if we reached the merits, Moya wouldn't succeed. For starters, Moya's theory hinges on the assumption that if the blood and urine samples were taken immediately after Cameron died, they would have yielded different findings concerning cocaine concentration. Dr. Labay conceded that possibility, but stressed that it was no sure thing. *See* R. vol. 4 at 1269 ("[B]ecause this is a nondetected

finding of cocaine, you have two options. One is that [parent cocaine] was there at the time of death and by the time the sample was collected it was no longer there, *or it was never there to begin with at the time of death*." (emphasis added)). Stated differently, we can't know whether the allegedly "destroyed" evidence—a blood and urine sample taken immediately after Cameron died—would have been helpful to the defense. Thus, it's exculpatory value is indeterminate.

That's a problem for Moya. Under *Youngblood* and *Trombetta*, "if the exculpatory value of the evidence is indeterminate and all that can be confirmed is that the evidence was 'potentially useful' for the defense, then a defendant must show that the government acted in bad faith in destroying the evidence." *United States v. Bohl*, 25 F.3d 904, 910 (10th Cir. 1994) (quoting *Youngblood*, 488 U.S. at 58). Putting aside the question whether the government could be considered to have destroyed the evidence here, Moya never argues that the government acted in bad faith here. Nor could he. And that's fatal to Moya's challenge.

3. Motion to Allow Dr. Chundru to Testify at Trial

"We review the exclusion of expert testimony for abuse of discretion." *United States v. Paup*, 933 F.3d 1226, 1230 (10th Cir. 2019) (citing *United States v. Adams*, 271 F.3d 1236, 1243 (10th Cir. 2001)).

About a month before trial, Moya sought to add Dr. Satish Chundru as a defense expert. Citing *Wicker*, the government objected to Dr. Chundru's testimony and asked the district court to exclude it. Because the district court found that Moya's late disclosure violated Rule 16, it considered the appropriate sanction under the

three *Wicker* factors. Under *Wicker*, courts must consider "(1) the reasons the government delayed producing the requested materials . . . ; (2) the extent of prejudice to the defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance." 848 F.2d at 1061. The district court concluded that all three factors weighed in favor of excluding Dr. Chundru and granted the government's request.

On appeal, Moya ignores the *Wicker* factors entirely, instead focusing his two-paragraph argument on his constitutional right to put on witnesses. But Moya's right "to present a defense is cabined by the Federal Rules of Evidence and Criminal Procedure." *United States v. Bishop*, 926 F.3d 621, 626–27 (10th Cir. 2019) (excluding defendant's expert testimony for Rule 16 violation). Thus, the pertinent inquiry here is whether the district court abused its discretion in excluding Dr. Chundru as a Rule 16 discovery sanction. To prevail, Moya must demonstrate how the district court wrongly applied *Wicker*. *See Paup*, 933 F.3d at 1230–32. He didn't. We can't. So we must affirm.

4. Motions to Extend the *Daubert* Deadline and to Exclude Dr. Andrews

As best we can tell, Moya challenges two of the district court's orders under this heading: (1) its refusal to extend the deadline to file *Daubert* motions; and (2) its refusal to exclude Dr. Andrews. Neither argument has merit.

a. The District Court Didn't Abuse Its Discretion in Declining to Extend the *Daubert* Motions Deadline

Rule 12(c)(1) of the Federal Rules of Criminal Procedure allows district courts to "set a deadline for the parties to make pretrial motions." The rules further state that "the court *may* extend or reset the deadline for pretrial motions" "[a]t any time before trial." Fed. R. Crim. P. 12(c)(2) (emphasis added). Moya sought an extension to file, among other things, *Daubert* motions challenging Dr. Andrews's testimony. In support, Moya vaguely cited "issues" that had arisen with the government's witnesses "since this case was appealed to the Tenth Circuit" in 2017. R. vol. 1 at 1343. Unpersuaded by Moya's "broad, generic statement" for the need for additional pretrial motions, the district court denied Moya's request. *Id.* at 1351.

The parties assume we review for an abuse of discretion the district court's refusal to extend its deadline for pretrial motions. That's the standard of review we apply in the civil context. *See, e.g.*, *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 988 (10th Cir. 2019) ("We review a court's refusal to enter a new scheduling order for abuse of discretion." (quoting *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1254 (10th Cir. 2011))). But neither party cites any of our caselaw addressing the standard of review in the criminal context, nor has our search unearthed a decision from our Circuit on point. Fortunately, several of our sibling circuits have considered this issue, and they uniformly review for an abuse of discretion. *See United States v. Blanks*, 985 F.3d 1070, 1072 (8th Cir. 2021); *United States v. Santana-Dones*, 920 F.3d 70, 80 (1st Cir. 2019); *United States v. Atkins*, 702 F. App'x 890, 894 (11th Cir.

2017). Because abuse-of-discretion review comports with Rule 12(c)(2)'s permissive "may" language, we adopt that standard.

Here, Moya never explains how the district court abused its discretion by refusing to extend the deadline. Nor do we discern any error. As the district court explained, "the parties . . . had . . . ample opportunities for filing as evidenced by the number of such motions that they have filed." R. vol. 1 at 1351. Given Moya's inability to articulate specific reasons why he needed additional time to file pretrial motions, the district court properly denied his request.

b. The District Court Didn't Abuse Its Discretion in Denying Moya's Motion to Exclude Dr. Andrews

Moya filed his eleventh-hour motion to exclude Dr. Andrews just over a week before trial. Moya argued under Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), that Dr. Andrews's testimony was unreliable, largely because the blood and urine samples were drawn 48 hours after Cameron died. In opposing the motion, the government noted that Moya didn't challenge Dr. Andrews's qualifications and asserted that his proffered testimony met all the requirements under Rule 702.

Given its refusal to extend the deadline for *Daubert* motions, the district court could have denied as untimely Moya's motion to exclude Dr. Andrews. *See supra* Section IV.B. But it didn't. Instead, it summarily denied Moya's motion but ruled that Moya could "cross examine Andrews about the extrinsic matters raised in these motions." R. vol. 1 at 1937. Though the district court's ruling was brief, it's evident

that the court agreed with the government's contention that "[Moya's] arguments go to the weight that the jury might choose to give Andrews'[s] opinion, but are insufficient to preclude him from testifying altogether." *Id.* at 1936.

On appeal, Moya tells us that the district court improperly performed its gatekeeping role in allowing Dr. Andrews to testify, but that's the extent of his argument—he never explains *how* the district court erred. Because he falls far short of demonstrating that the district court abused its discretion, we affirm the district court's ruling.

V. Cumulative Error

A cumulative error analysis "is an extension of the harmless-error rule." *United States v. Rivera*, 900 F.2d 1462, 1469 (10th Cir. 1990) (en banc). This doctrine recognizes that "[t]he cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error." *Id.* To assess that possibility, we "aggregate[] all errors found to be harmless and analyze[] whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Grant v. Royal*, 886 F.3d 874, 954 (10th Cir. 2018) (quoting *Hooks v. Workman*, 689 F.3d 1148, 1194 (10th Cir. 2012)). Unless the court identifies at least two harmless errors, we will decline to undertake a cumulative error analysis. *Hooks*, 689 F.3d at 1195.

As discussed above, Moya has failed to identify any errors, harmless or otherwise. So we needn't conduct a cumulative error analysis.

CONCLUSION

For the foregoing reasons, we affirm.