

No. _____

IN THE
Supreme Court of the United States

MELISSA RICHARDSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

Nichole M. Buckle

Bar No. 305018

CARMOUCHE, BOKENFOHR,

BUCKLE & DAY, PLLC.

6425 Youree Drive, Suite 380

Shreveport, Louisiana 71105

Phone: (318) 629-0014

Fax: (318) 404-1571

nikki@cbbd.com

QUESTIONS PRESENTED

Question Presented No. 1: Whether the 5th Circuit erred in denying Richardson's motion to suppress.

Question Presented No. 2: Whether the 5th Circuit erred in affirming that there was sufficient evidence to support Richardson's conviction.

PARTIES TO THE PROCEEDING

Petitioner and Defendant-Appellant in the courts below is Melissa Richardson. The United States of America is the Appellee.

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PETITION FOR WRIT OF CERTIORARI

Melissa Richardson respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals, Fifth Circuit, in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit is unreported. (App. 1). The Rulings of the United States District Court for the Western District of Louisiana are unreported. (App. 2-5).

JURISDICTION

On July 22, 2021, the United States Court of Appeals for the Fifth Circuit entered its judgment and opinion affirming the District Court. This petition has been timely filed within 90 days of that order. Sup. Ct. R. 13.1. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

BASIS FOR JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction pursuant to 18 U.S.C. § 3231.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved:

(1) U.S. Constitution, Amendment V provides, in relevant part:

No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

(2) U.S. Constitution, Amendment VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(3) 21 U.S.C. § 843(a)(3) provides:

It shall be unlawful for any person knowingly or intentionally –

(3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.

STATEMENT OF THE CASE

In June 2017, Defendant-Appellant, Melissa Richardson (“Mrs. Richardson”), was a pharmacist at the Overton Brooks VA Medical Center in Shreveport, Louisiana (“Overton Brooks”), where she had been employed for twelve (12) years. At the time, Mrs. Richardson was 41 years old, the wife of a fireman and mother of two teenagers. Mrs. Richardson had been raised in a rural area by parents who demanded Mrs. Richardson and her sisters respect and obey authority figures, and she was instilling that same principle to her children. Mrs. Richardson had never had any dealings with law enforcement, in any capacity. Although she is college-educated, due to the lack of personal or even familial experience with law enforcement, Mrs. Richardson had no knowledge or understanding of a person’s rights when accused of criminal activity. Mrs. Richardson had also suffered a heart attack just four (4) years earlier. She was on numerous daily medications to control her blood pressure and cholesterol levels, and she carried Nitroglycerin tablets with her at all times due to frequent angina attacks.

On June 8, 2017, Mrs. Richardson was working in the pharmacy vault where controlled substances are kept. Scott Fisher had just recently been appointed as the interim pharmacy chief and he was traveling back and forth from Baltimore as he transitioned into the new position. Mr. Fisher was not yet familiar with the practices or procedures followed by Overton Brooks or the individual staff members. On that date, Mr. Fisher and Jason Hawkins, the VISN pharmacy director, went to the vault but neither possessed an

access card. Upon their request, Mrs. Richardson used her access card and let them into the vault. Inside the vault, Mrs. Richardson engaged in conversation with both Mr. Fisher and Mr. Hawkins for nearly three (3) minutes while she attempted to count a single prescription. After counting the pills and pouring them into a prescription bottle, Mrs. Richardson placed the bottle in a mail bag, put a label on it, and then placed the mail bag in a blue bin directly below the counter in accordance with pharmacy practices. The bag was left in order for another staff member to perform the second or double count and verify the prescription. After Mrs. Richardson exited the vault, a pharmacy technician performed the second count and notified Mr. Fisher that the bottle contained only 86 instead of 90 pills as prescribed. As a result of the shortage of four (4) tablets from the single, unsealed mail order package, and without contacting Mrs. Richardson to inquire about the discrepancy, Mr. Fisher contacted the Department of Veteran Affairs Office of Inspector General (“VA OIG”) and a criminal investigation immediately followed.

The evening of June 8, 2017, VA OIG Agents John Ramsey and Jennifer Vancor received a call concerning possible diversion of narcotics at Overton Brooks. They were in Mississippi when they received the call and they proceeded to drive four and one-half hours to Shreveport, Louisiana. They arrived at Overton Brooks at approximately 9:00 or 10:00 p.m. and met with Mr. Fisher to discuss his concerns. The agents spent the night reviewing surveillance tapes from the vault, without sleep. Mr. Fisher left Overton Brooks during the early morning hours of June 9,

2017 to catch a 6:30 a.m. flight, leaving Ashley Cathcart as the point of contact for the agents.

On June 9, as pharmacy employees arrived, the agents hid in the office of Darlene Cook to watch the live feed of the surveillance camera in the pharmacy vault. The agents “wanted to have Melissa in the vault by herself ... so [they] could ... monitor what was going on.” At approximately 12:45 p.m., at the agents’ request, Mrs. Cathcart called the pharmacy technicians to a meeting outside the vault and instructed Mrs. Richardson to go the vault to verify mail-out prescriptions. Mrs. Richardson immediately proceeded to the pharmacy vault and entered with her authorized access card. Upon entering the vault, she noted an unusually high number of prescriptions were left to be completed and verified. When Mrs. Richardson went to the vault, she was also in a disagreement with her husband regarding childcare and she texted back and forth with him while in the vault.

Inside the vault, Mrs. Richardson located two prescriptions in the return mail section. She recognized the prescriptions belonged to two of her patients who had called and advised that they had not received their medication. Mrs. Richardson had a sticky note in her pocket with the patients’ names and phone numbers so that she could call them once their medication was ready for pickup. One prescription contained 90 pills of Tylenol with Codeine, and one prescription contained 90 pills of Diazepam. Mrs. Richardson placed the return mail prescriptions in her pocket with the intent of re-routing the prescriptions for window pickup. She signed the log sheet in the vault indicating she was “checking out”

the prescriptions, and exited the vault to notify Mrs. Cathcart what she was doing. When Mrs. Richardson did not locate Mrs. Cathcart, she grabbed two amber vials from the supply shelf, placed them in her pocket, and returned to the vault. Mrs. Richardson tore the labels from the return mail bottles, which had been packaged at a separate facility, and discarded the labels in the trash. Mrs. Richardson then transferred the pills to the amber vials so that she could later run a prescription label identifying her as the filling pharmacist and also marking the prescription for window pickup.

After returning to the vault, due to the large number of mail order prescriptions needing to be verified, Mrs. Richardson turned her attention to the mail orders so they could be mailed that afternoon. Some of the mail orders were prescriptions that were "stock bottles" that came directly from the manufacturer and were sealed, and therefore did not have to be counted by a pharmacist. The other prescriptions were controlled substances that were filled from the vault inventory and placed in amber vials. Per Overton Brooks policy, each controlled substance was "double-counted," meaning it was counted by a pharmacy technician and a pharmacist. If either count was off, it was Mrs. Richardson's practice to do a third count with both the pharmacy technician and pharmacist present.

On June 9, the vault contained the largest volume of mail order prescriptions Mrs. Richardson had ever worked on at one time. As she was counting, she believed there was overages with some of the prescriptions. She knew the bottles had been filled by a pharmacy technician by using a machine rather

than being hand-counted, and she had recently complained that the calibration on the machine was off. As she counted what she believed were overages, she placed the “extra” pills in her pocket, then sealed the prescription bottle in the mail bag and set it in the bin where it could be later be retrieved and recounted with a pharmacy technician. Mrs. Richardson knew that she was not following protocol by sealing the mail bags, but she knew representatives from The Joint Commission, an accreditation board, were present at the hospital and could enter the vault at any time. Mrs. Richardson wanted the prescriptions to appear correct so that no concerns would be raised if the Joint Commission found numerous prescriptions that had been incorrectly filled. Importantly, Mrs. Richardson never left the pharmacy vault with the pills in her pocket.

At 2:07 p.m., after Agent Ramsay and Agent Vancor observed Mrs. Richardson place pills in her pocket, and after having been awake for more than thirty-six (36 hours), they decided they had “seen everything that [they] needed to see” and went into the pharmacy vault to confront Mrs. Richardson. The agents directed Mrs. Cathcart to use her access card to open the vault door and the agents entered. The agents were wearing badges and had their firearms visible, and Agent Ramsay physically placed his hands on Mrs. Richardson and kept his hands on her as she stood from her chair. Less than ten (10) second after the agents entered the vault, the agents physically escorted Mrs. Richardson out of the vault. One agent walked in front of Mrs. Richardson and the other agent walked behind her, yelling at her to “keep [her] hands up.” Mrs. Richardson “was not free to

leave" at that time. She was escorted to her supervisor's office where the door was closed behind her and the blinds were shut. Immediately upon entering the office, agents demanded that Mrs. Richardson empty her pockets and she placed the contents of her pockets on a desk. Her pockets contained a number of loose pills, jellybeans, an ink pen, amber vials with 90 pills each, a sticky note, and torn packaging labels. After Mrs. Richardson emptied her pockets, Agent Vancor searched underneath Mrs. Richardson's clothing, including inside her bra and panties, while Agent Ramsay stood in the room with his back turned toward them.

Agents Ramsey and Vancor proceeded to aggressively interrogate Mrs. Richardson for at least two (2) hours. At trial, Agent Vancor testified that Mrs. Richardson was allowed to make childcare arrangements via text message during the interrogation, but Mrs. Richardson did not feel that she was free to leave and send her husband a text message that stated: "I'm stuck in a situation at work and I cannot leave." Additionally, when Mrs. Richardson requested to retrieve her personal prescriptions from her office, Agent Ramsey told her, "no, you're not leaving." Throughout the interrogation, Agent Ramsay accused Mrs. Richardson of lying and of self-medicating to treat her chest pain. Mrs. Richardson knew, as a pharmacist, that hydrocodone is not used to treat chest pain and that it could make her symptoms worse. She attempted to explain this to agents but they continued to accuse her of lying. After two hours of aggressive interrogation, Mrs. Richardson not only felt defeated but began having chest pains. Mrs. Richardson asked

agents, “what do I need to do so I can leave?” The agents provided her with a form and told her that she needed to write a statement admitting to taking the pills for her own use. After being presented with the form, Mrs. Richardson stated that she wanted to talk to an attorney, and Agent Ramsay told her that would be her “biggest mistake.” With the agents’ encouragement, and with the understanding that it would “close the case,” Mrs. Richardson proceeded to complete a written statement in which she falsely “confessed” to taking the controlled substances for her own personal use in order to treat her chest pains, and she signed a resignation form.

Agent Ramsey, Agent Vancor, and Mrs. Cathcart escorted Mrs. Richardson to her office to collect her personal belongings. Various prescriptions were located in Mrs. Richardson’s office, including two prescriptions for morphine, which Mrs. Richardson explained were medications that had been returned to her by patients. Mrs. Richardson’s belongings were loaded onto a cart and she was escorted from the building at approximately 5:30 p.m.

After Mrs. Richardson arrived home, she received a text message from Mrs. Cathcart asking if she made it home okay. Mrs. Richardson responded:

“Yes, I’m fine. I totally disagree w/ this, but I felt like they forced me to say things & that it was my word against fed oig people & they said if I contacted an attorney it would hurt more than help me & they looked inside my bra & panties & found nothing & continued to tell me that I was stealing & that

someone was in on this with me etc & the only way they would stop was for me to resign. It sucks but it's over. Thank u for everything & for checking on me.”

Mrs. Richardson also received a text from another pharmacy technician, to which she responded:

“All I can say is that I am sorry u had to deal w/ all of this. I totally disagree with everything that happened but they are lookin for something. They kept putting words in my mouth, they looked inside my panties & bra, they said I was moving my arm funny while I was filling rxs.. so I showed them where me & B were arguing on my phone but they think there's more to this... they told me it would be a mistake to involve an attorney. They told me my best bet was to resign & move forward so I said I should not have to be put in this position or be[].”

In August 2017, after receiving a letter from the Board of Pharmacy and at the advice of her counsel, Mrs. Richardson voluntarily checked herself into the Palmetto Addiction Recovery Center. She was evaluated twice; the first time was a one-day evaluation and the second was a three-day evaluation. All drug tests were negative and, after a thorough and detailed evaluation, there was no indication that Mrs. Richardson suffered from an opioid-use disorder.

On April 10, 2019, a Grand Jury seated in the Western District of Louisiana, Shreveport Division,

returned an indictment against Mrs. Richardson charging her with twenty (20) counts of Acquiring Controlled Substances by Fraud in violation of 21 U.S.C. § 843(a)(3). Specifically, Mrs. Richardson was charged with knowingly and intentionally obtaining and acquiring possession of a controlled substances by misrepresentation, fraud, forgery, deception, and subterfuge, to wit: diverting controlled substances prescribed to another and placing them in her possession. Of the twenty counts against Mrs. Richardson, they were broken down as follows:

Counts 1-16: Loose hydrocodone tablets which Mrs. Richardson was accused of removing from prescription mail orders and placing in her pocket for purposes of diverting them for her own use, which actions were alleged to have occurred on June 9, 2017 between approximately 12:45 p.m. and 2:08 p.m.;

Counts 17-18: Tylenol 3 and Diazepam – prescription bottles of 90 pills each which Mrs. Richardson located in the return mail section of the pharmacy vault on June 9, 2017 and was accused of placing them in her pocket for the purpose of diverting them for her own use;

Counts 19-20: Morphine tablets located in prescription bottles found in Mrs. Richardson's desk drawer on June 9, 2017.

Mrs. Richardson entered a plea of not guilty as to all counts.

On September 6, 2019, a Motion to Suppress Verbal and Written Statements was filed. It was

argued that the written and verbal statements made on June 9, 2017, or the so called “confession,” was not knowingly and voluntarily made because Mrs. Richardson was subjected to a custodial interrogation without being advised of her *Miranda* rights and was denied the right to counsel, thus any and all statements made on June 9, 2017 should be suppressed. Mrs. Richardson also argued that her written statement was not voluntary because it was the product of intimidation and coercion by the agents.

On October 15, 2019, an evidentiary hearing on Mrs. Richardson’s Motion to Suppress was conducted by the Magistrate Judge. Agents Ramsey and Vancor testified that Mrs. Richardson was not “in custody” or under arrest when she voluntarily provided verbal and written statements “confessing” to her diversion of narcotics from the pharmacy vault. However, the agents admitted that Mrs. Richardson was the subject of a criminal investigation, that their sole purpose at Overton Brooks was to conduct a criminal investigation, and that they believed Mrs. Richardson had committed a criminal offense when they entered the pharmacy vault. The agents acknowledged that they entered the vault wearing badges and had their firearms visible, and Agent Ramsay admitted that he physically placed his hands on Mrs. Richardson to escort her from the vault. Agent Vancor also admitted that Mrs. Richardson “was not free to leave” as she was physically escorted to the supervisor’s office. Mrs. Richardson testified that agents were “hollering at [her] to keep [her] hands up, don’t do anything stupid,” during the walk to her supervisor’s office. Inside the office, after she placed the contents of her

pockets on the desk, Agent Vancor sorted through the contents of her pockets, separating the pills by like kinds, then asked “where’s the rest of it?” Agent Vancor believed Mrs. Richardson had placed a package in her scrub pants and proceeded to perform a search underneath Mrs. Richardson’s clothing, including inside her bra and panties, but confirmed that Mrs. Richardson was not hiding anything. Agent Ramsay remained inside the room during the search with his back turned towards them.

After the search, Agents Ramsay and Vancor claimed the interaction between them and Mrs. Richardson suddenly changed to a voluntary interview. The agents testified that Mrs. Richardson was advised of her rights immediately after the search and prior to beginning the interview, and that she signed a *Garrity* form. Yet, Agent Ramsay admitted he did not have a specific memory of advising Mrs. Richardson of her rights or that she was free to leave, and testified only that he “would have” said those words to Mrs. Richardson. The interview was not recorded even though it is the policy of OIG to record “custodial interrogations.”

In contrast to the testimony of the agents and their lack of recollection as to the specific statements made by them, Mrs. Richardson testified clearly that she was never told that she was being interviewed voluntarily, that she could leave at any time, that she had the right to remain silent, that she had the right to an attorney, or that she was the subject of a criminal investigation. Despite informing Agents Ramsey and Vancor that she did not know what they were talking about, the agents continued to forcefully question her, repeatedly asking who she was

conspiring with and accusing her of lying. Mrs. Richardson testified that she was having chest pains during the interrogation and was nervous because she did not have her nitroglycerin with her. Agents Ramsey and Vancor were aware of her heart condition and accused her of taking the prescription medications for her chest pains.

Although agents testified that Mrs. Richardson voluntarily “confessed” and voluntarily provided a written statement, Mrs. Richardson testified that she was instructed by Agent Ramsey to “write down everything that they had told [her] was going on,” that he provided instruction as to the contents of her statement, and that he provided a completed resignation form for her to sign. Mrs. Richardson further testified that she informed Agent Ramsey that she believed that she should speak with an attorney prior to making a statement, but that Agent Ramsey informed her, “that would be your biggest mistake.” Mrs. Richardson stated that she was not sworn in prior to writing her statement, and Agent Ramsey could not specifically recall administering the oath.

On December 18, 2019, U.S. Magistrate Judge Mark L. Hornsby issued a report recommending that Mrs. Richardson’s Motion to Suppress be denied (App. 2), and the District Court adopted the Report and Recommendation on December 20, 2019. (App. 3).

A jury trial commenced on January 14, 2020. During the trial, and prior to the admission of the written statement, Mrs. Richardson, through counsel, again objected to its admission for the reasons set

forth in Mrs. Richardson's Motion to Suppress, but the objection was overruled.

Following the presentation of the Government's case in chief, on January 16, 2020, Mrs. Richardson, through counsel, filed a Motion for Judgment of Acquittal. She argued the Government had failed to prove beyond a reasonable doubt that she obtained or acquired any controlled substance by material "misrepresentation, fraud, forgery, deception, and subterfuge," a required element of the charge against her. She asserted that the Government failed to show that she induced anyone or engaged in any type of "trickery" or "deception" to obtain the controlled substances at issue, as was necessary to satisfy the element of "misrepresentation, fraud, forgery, deception, and subterfuge." Mrs. Richardson's Motion for Judgment of Acquittal was denied as to Counts 1 through 18, but granted as to Counts 19 and 20. Mrs. Richardson then proceeded to present her case.

After approximately five (5) hours of deliberation, the jury returned a verdict of Not Guilty as to Count 1 and Guilty as to Counts 2 through 16. The district court declared a mistrial as to Counts 17 and 18, and those Counts were later dismissed.

On February 13, 2020, Mrs. Richardson, through counsel, filed a Motion for Judgment of Acquittal and/or New Trial and argued the evidence was insufficient to support the jury's verdict of guilty as to Counts 2 through 16, but the motion was denied. (App. 4). On July 13, 2015, the District Court sentenced Mrs. Richardson to twelve (12) months and one (1) day imprisonment as to each count, to be served concurrently.

On July 15, 2020, based on comments made by the District Court during the sentencing hearing, Mrs. Richardson filed a Motion to Reconsider the denial of her Motion for New Trial. The District Court denied the motion on July 24, 2020. (App. 5).

Mrs. Richardson timely appealed to the United States Court of Appeal for the Fifth Circuit. She argued that the District Court erred in admitting her verbal and written statements and that the evidence was insufficient to support a finding of guilty as to Counts 2-16. On July 22, 2021, in only a 3-paragraph unpublished opinion, the Fifth Circuit affirmed Mrs. Richardson's conviction. (App. 1).

REASONS FOR GRANTING THE PETITION

The lower courts' failure to suppress verbal and written statements made by Mrs. Richardson on June 9, 2017 was erroneous because the evidence clearly demonstrated that Mrs. Richardson was "in custody" at the time she was subjected to interrogation by federal agents and that no reasonable person would have felt that he or she was free to leave. Agents Ramsay and Vancor failed to properly advise Mrs. Richardson of her *Miranda* rights and failed to provide her the right to counsel despite her request, thus any statements of Mrs. Richardson were obtained in violation of *Miranda* and should have been excluded. Additionally, the evidence demonstrated that Mrs. Richardson was under duress and that she was coerced into making the statement, thereby rendering the statement involuntary and inadmissible. The lower courts' finding that Mrs. Richardson was not in custody during the

interrogation, and that the statements were admissible, is directly contrary to well-established jurisprudence. An exercise of this Court’s supervisory power is necessary to correct the manifest error of the lower court’s and to reverse the conviction of Mrs. Richardson.

Secondly, the evidence presented at trial was insufficient to support the jury’s verdict of guilty as to Counts 2 through 16 of the indictment. Specifically, the evidence failed to show that Mrs. Richardson obtained or acquired any controlled substance by a material “misrepresentation, fraud, forgery, deception, and subterfuge,” as required by 21 U.S.C. § 843(a)(3). Mrs. Richardson also respectfully submits that, although the Fifth Circuit did not engage in a discussion concerning the elements of § 843(a)(3), the decision is in conflict with the decision of the Eighth Circuit Court of Appeal. Specifically, in *United States v. Wilbur*, 58 F.3d 1291 (8th Cir. 1995), the Eighth Circuit considered the actions of a physician who acquired morphine by withdrawing the solution from a patient’s IV bag. In evaluating the elements of § 843(a)(3), the Eighth Circuit found that while the physician “did a reprehensible thing,” there was “no evidence of trickery” that satisfied the element of “misrepresentation, fraud, forgery, deception, and subterfuge.” Mrs. Richardson respectfully submits the Fifth Circuit’s decision is in conflict with the Eighth Circuit’s decision in *Hill* and this Court’s supervisory power is necessary to interpret this important element of § 843(a)(3) and clarify the conduct that gives rise to an actionable offense under this statute.

I. The lower courts erred in failing to suppress the verbal and written statements made by Melissa Richardson.

a. Agents Failed to Advise Mrs. Richardson of her *Miranda* Rights

The Fifth Amendment to the United States Constitution guarantees that “[n]o person...shall be compelled in any criminal case to be a witness against himself.” U.S. Const. Amend. V. The Fifth Amendment privilege extends beyond the courtroom and “serves to protect persons in all settings in which their freedom of action is curtailed in any significant way.” *Miranda v. Arizona*, 384 U.S. 436, 467 (1966). As the Supreme Court has recognized, “the very fact of custodial interrogation exacts a heavy toll on individual liberty and trades on the weaknesses of individuals.” *Id.* at 455. “[W]ithout proper safeguards the process of in-custody interrogation ... contains inherently compelling pressures which work to undermine the individual’s will to resist and to compel him to speak where he would otherwise do so freely.” *Id.* at 467. In order to combat these pressures and permit an individual a full opportunity to exercise his privilege against self-incrimination, “the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.” *Id.*

Since *Miranda*, when a suspect is taken into custody or otherwise deprived of his freedom in any significant way, law enforcement officers are required, at a minimum, to warn the suspect “prior to

any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.” *Id.* at 479 (emphasis added). The opportunity to exercise these rights must be afforded to the suspect throughout the interrogation. *Id.*

The determination of whether a person is “in custody” depends on “how a reasonable person in the suspect’s situation would perceive his circumstances.” *Yarborough v. Alvarado*, 541 U.S. 652, 662 (2004). This requires two distinct inquiries: “first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave.” *United States v. Cavazos*, 668 F.3d 190, 193 (5th Cir. 2012), quoting *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2402 (2011). The first inquiry is an objective one that “depends on the totality of the circumstances.” *United States v. Wright*, 777 F.3d 769, 774 (5th Cir. 2015) (internal quotation omitted). Factors to be considered when making this determination include 1) the length of the questioning; 2) the location of the questioning; 3) the accusatory, or non-accusatory, nature of the questioning; 4) the amount of restraint on the individual’s physical movement; and 5) statements made by the officers regarding the individual’s freedom to move or leave. *Id.* at 775.

In this case, when viewing the totality of the circumstances and the relevant factors, it cannot, or should not, reasonably be disputed that Mrs.

Richardson was “in custody” and subjected to a custodial interrogation. Agents Ramsay and Vancor were at Overton Brooks for the sole purpose of conducting a criminal investigation, with the specific purpose of observing Mrs. Richardson. They watched Mrs. Richardson perform her duties inside the vault and observed her place loose pills in her pocket. After observing for approximately one and one-half hours, the agents decided they had “seen everything that [they] needed to see” and believed Mrs. Richardson had committed a criminal offense. Agents Ramsay and Vancor admitted they did not have authority to conduct an administrative investigation for Overton Brooks, and their interrogation was strictly to inquire about the criminal activity they believed they had observed.

In order to further investigate what they believed was a criminal offense, Agents Ramsay and Vancor entered the pharmacy vault. They flashed their badges, had their weapons visible, placed their hands on Mrs. Richardson, and brought her to her feet. Within ten (10) seconds of the agents entering the vault, Mrs. Richardson was escorted to her supervisor’s office, a private location where she was isolated from her co-workers. Mrs. Richardson’s co-worker testified at trial that the door to the office was closed, the blinds were shut, and no one was allowed to speak to her or even call her husband. The agents demanded that she empty her pockets and searched her bra and panties, leaving her feeling both violated and humiliated.

At the hearing on the Motion to Suppress, Agent Vancor's own admission demonstrates that Mrs. Richardson was not free to leave:

Q. So you walked into the vault and told Mrs. Richardson that she was going with you?

A. We asked her to accompany us to the office, yes. We told her to come with us.

Q. So at this moment, was Ms. Richardson free to leave?

A. She was not free to leave at that moment.

Q. Okay. And I believe your testimony was that she was escorted down the hallway with Agent Ramsey walking in front of her and you were behind her; is that correct?

A. That is correct.

Q. Was she free to leave at that time?

A. She was *not*.

Mrs. Richardson was “in custody” on June 9, 2017 and the agents were required to advise her of her *Miranda* rights prior to any questioning. *Miranda*, 384 U.S. at 479. There was no dispute before the lower courts that the agents failed to fully and completely advise Mrs. Richardson of her *Miranda* rights prior to questioning because Agent Ramsay

admitted that he did not tell her she had the right to an attorney. Instead, Agent Ramsay claimed he “wasn’t required to afford her an attorney” because he had not placed her under arrest. Agent Vancor also admitted at trial that Mrs. Richardson was not told she had the right to an attorney. Thus, a correct determination that Mrs. Richardson was “in custody” necessarily reflects a violation of *Miranda*. See *Oregon v. Elstad*, 470 U.S. 298, 317, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) (“When police ask questions of a suspect in custody without administering the required warnings, *Miranda* dictates that the answers received be presumed compelled and that they be excluded from evidence at trial in the [Government]’s case in chief.”).

The Government argued to the lower courts that *Miranda* warnings were not required because, after Agent Vancor searched Mrs. Richardson, the agents told her she was present for a voluntary interview and that she was free to leave. However, based on the evidence, the length of time from the initial encounter in the pharmacy vault to the agents’ presentation of the *Garrity* form was less than thirteen (13) minutes. Regardless, the fact that the agents may have explained to Mrs. Richardson that it was a “voluntary” interview would not have been sufficient to reassure a reasonable person that he or she was free to leave, particularly in light of the actions that had just occurred. Mrs. Richardson repeatedly and consistently testified that she did not feel that she was free to leave during the interrogation and that she did not understand her rights.

At the time of the interrogation, Mrs. Richardson's workspace had been suddenly and unexpectedly dominated by law enforcement agents. Her movements were restrained and she was confronted in an accusatory manner. Considering the totality of the circumstances as described more fully hereinabove, a reasonable person simply would not have believed that he or she was free to terminate the interrogation and leave, regardless of any statements made by the agents at the commencement of the interrogation. *See e.g., Missouri v. Seibert*, 542 U.S. 600, 124 S.Ct. 2601, 159 L.Ed.2d 643 (2004) (*Miranda* warnings given mid-interrogation did not "adequately and effectively" advise defendant of his Constitutional rights, therefore defendant's subsequent confession was inadmissible); *United States v. Craighead*, 539 F. 3d 1073 (9th Cir. 2008).

b. Mrs. Richardson's Statements Were Not Voluntary

Following the evidentiary hearing on the Motion to Suppress, the District Court erroneously made a credibility determination in favor of Agents Ramsey and Vancor. The agents did not have specific recollection of all events, as Agent Ramsey admitted that he did not have a specific memory of advising Mrs. Richardson that she was free to leave, testifying only that he "would have" said those words. Agent Vancor's testimony was also questionable, as she testified at the hearing that she was in the room throughout the entire interview but then recanted her testimony when presented with the video of her in the vault only seven (7) minutes after Mrs. Richardson was escorted to the vault. At trial, Agent Vancor's

testimony was even more inconsistent, as she was forced to acknowledge that the video from the vault confirmed she left the room on at least two (2) occasions, and she also admitted that she went in and out of the room and was not present for the entire interview.

In contrast to the agents' testimony, Mrs. Richardson testified confidently and consistently at both the motion to suppress hearing and at trial that she was not told the interview was voluntary, that the *Garrity* form was not read to her, and that the *Garrity* form was not presented to her until the conclusion of the interrogation when she was also presented with the resignation form completed by Agent Ramsey.

Although electronic recording is not a constitutional requirement,¹ *Miranda* places a “heavy burden” on the government to demonstrate that a

¹ Both the Department of Justice and courts have recognized electronic recording of interrogations is necessary in order to avoid the exact type of dispute at issue in this case. See e.g., Dept. of Justice Manual, Title 9, § 13.001 (policy creating a presumption that custodial interrogations shall be electronically recorded and encouraging electronic recording in all other investigative circumstances), effective 7/1/2014; B. Boetig, et al., *Revealing Incommunicado: Electronic Recording of Police Interrogations*, pp.1-8, FBI Law Enforcement Bulletin (Dec. 2006) (recognizing electronic recording is “the most accurate and efficient method of collecting and preserving a confession,” and that courts have found the failure to record a “shabby and unjustified practice”).

suspect's waiver of rights was knowing and intelligent, and likewise places a heavy burden on the government to show that any statements were voluntarily given. *Miranda*, 384 U.S. at 475. As this Court explained in *Miranda*:

Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders. *Id.*

As explained hereinabove, Agents Ramsey and Vancor were at Overton Brooks for the sole purpose of conducting a criminal investigation, and they confronted Mrs. Richardson only after forming a belief that she had committed a criminal offense. They had the means to record the interview but chose not to arrest Mrs. Richardson at that time, knowing the VA OIG policy would have required the interview to be recorded. Agent Ramsey considered arresting Mrs. Richardson because he admitted that he "reached out to the U.S. Attorney's Office," but "it was decided ... that [they] would not arrest her on the spot, that [they] would stop the act and ask her if she was willing to be interviewed, and then [they] would go from there." In the absence of an electronic recording, and considering the inconsistencies in the testimony of Agents Ramsey and Vancor, the District Court erred in making any credibility determinations in favor of the Government. Further, when considering the totality of the circumstances, Mrs. Richardson's statement "cannot be said to be the voluntary product

of a free and unconstrained will.” *Haynes v. State of Washington*, 373 U.S. 503, 514 (1963); *see also, Lynumn v. Illinois*, 372 U.S. 528, 534 (1963) (“the question in each case is whether the defendant’s will was overborne at the time he confessed”)

c. Mrs. Richardson Was Denied the Right to Counsel

If an accused chooses to exercise his right to counsel at any time during a custodial interrogation, his exercise of that right must be “scrupulously honored.” *Miranda*, 384 U.S. at 479. This Court has consistently held that when an accused invokes his right to counsel, all interrogation must cease. *See Edwards v. Arizona*, 451 U.S. 477, 484 (1981) (“when an accused has invoked his right to have counsel..., a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation”); *see also, Davis v. United States*, 512 U.S. 452, 458 (1994) (“if a suspect requests counsel at any time during the interview, he is not subject to further questioning”); *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991) (“[o]nce a suspect asserts the right [to counsel], ...the current interrogation [must] cease”); *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990) (“when counsel is requested, interrogation must cease”); *Arizona v. Roberson*, 486 U.S. 675, 680 (1988) (“after a person in custody has expressed his desire to deal with the police only through counsel, he ‘is not subject to further interrogation’”). “In the absence of such a bright-line prohibition, the authorities through ‘badger[ing]’ or ‘overreaching’—explicit or subtle, deliberate or unintentional—might otherwise wear down the

accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." *Smith v. Illinois*, 469 U.S. 91, 98 (1984).

Even in cases where an accused indicates a desire to speak with an attorney but does not make an unequivocal request, law enforcement officers must cease the interrogation. *United States v. Cherry*, 733 F.2d 1124, 1130 (5th Cir. 1984). In such cases, law enforcement officials may only question the accused "to clarify whether [he] wants to consult with an attorney before continuing the interrogation...and cannot be used as a means of eliciting any incriminating statements from the suspect relating to the subject matter of the interrogation." *Id.*

In this case, when told she needed to write a statement, Mrs. Richardson testified that she responded: "I don't understand. I don't think I need to write anything without an attorney here." Rather than cease the interrogation, Agent Ramsay told her that would be her "biggest mistake," and proceeded to have her write a statement. The failure to cease interrogation and failure to provide Mrs. Richardson the opportunity to have counsel present was a clear violation of her constitutional right to counsel.

d. Mrs. Richardson's "Confession" Was Not Voluntary

Even where a suspect is properly advised of his *Miranda* rights, waiver of the privilege against self-incrimination must be voluntary and not the product of intimidation, coercion, or deception. *Moran v. Burbine*, 475 U.S. 412, 421 (1986). The waiver must be made with full awareness of the nature of the right

being waived. *Id.* In determining whether such waiver is voluntary, the court must consider the “totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

In this case, the written statement obtained from Mrs. Richardson was the product of intimidation and coercion and was not a voluntary and knowing confession by Mrs. Richardson. Mrs. Richardson had no prior experience with law enforcement and had no knowledge or understanding as to the rights that should have been afforded to her. Dr. Jennifer Russell, a clinical and forensic psychologist, testified at trial that she conducted an evaluation of Mrs. Richardson in April and May of 2019 which revealed personality traits that made her particularly susceptible to police coercion. Dr. Russell explained that Mrs. Richardson’s lack of experience with law enforcement made her vulnerable, that her specific personality traits put her at an increased risk of being susceptible to police interrogation techniques, that Mrs. Richardson is overly generous about other’s motives and assume they have her best interests at heart, that she is likely to avoid conflict and confrontation, and that she has a tendency to comply with requests and obey instructions from persons in positions of authority.

Mrs. Richardson also suffers from a serious heart condition. She had a heart attack due to a 100% blockage in her “widow maker” and had to undergo bypass surgery. At her young age, she is on the verge of congestive heart failure and she frequently suffers

from headaches and chest pains. During the interrogation, Mrs. Richardson testified that she was experiencing chest pains, that she did not have her medication with her, and that she was ready to leave and get home.

Mrs. Richardson was intimidated and under duress when she provided the written statement to agents. Additionally, she was coerced into providing the statement. When she requested an attorney, Agent Ramsay told her that would be her “biggest mistake” and would result in her being in court “for years.” Agent Ramsey represented to her that if she completed the statement and signed the resignation form that it would “make this a closed case” and that he would notify the Pharmacy Board of her cooperation. Mrs. Richardson was not advised of her rights, and she had no knowledge or understanding as to the manner in which the statement could later be used against her.

II. The lower courts erred in affirming that there was sufficient evidence to support Richardson’s conviction

Mrs. Richardson was convicted of fifteen (15) counts of acquiring a controlled substance by fraud in violation of 21 U.S.C. § 843(a)(3) based on her action of placing the loose hydrocodone pills in her pocket. Under 21 U.S.C. § 843(a)(3), it is unlawful “to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.” The statute requires more than the mere fact of concealment. The defendant must have made “a material misrepresentation, [or committed] fraud,

deception, or subterfuge which [was] a cause in fact of the acquisition" of the controlled substance. *United States v. Bass*, 490 F.2d 846, 857 (5th Cir. 1974), *overruled on other grounds by United States v. Lyons*, 731 F. 2d 243 (5th Cir. 1984). "The statute does not proscribe the mere making of a false statement or representation, or the making of a false statement or representation with an intent to influence another's action but without out actual influence." *Id.* at fn 11.

At the conclusion of the trial, the jury was instructed that in order to find Mrs. Richardson guilty of any count, the Government must have proved beyond a reasonable doubt each of the following elements of the offense:

First: That the defendant knowingly or intentionally acquired or obtained possession of a controlled substance;

Second: That the defendant utilized misrepresentation, fraud, forgery, deception, or subterfuge to acquire or obtain possession of the controlled substance; and

Third: That the misrepresentation, fraud, forgery, deception, or subterfuge was material.

The evidence presented in this case was insufficient to satisfy the elements of the offense charged. With respect to counts 1 through 16, the evidence showed only that Mrs. Richardson entered the pharmacy vault and was in the process of counting and completing mail order prescriptions, a task that

she was authorized to do as part of her job duties. While performing this task, Mrs. Richardson placed some of the hydrocodone pills into the pocket of her scrub top. Importantly, it is undisputed that Mrs. Richardson never left the vault with any of the loose hydrocodone tablets in her possession.

At all times relevant to this case, Mrs. Richardson was authorized to possess the controlled substances at issue. Mrs. Richardson had been employed at Overton Brooks as a pharmacist for 12 years, where she was the Red Team clinical pharmacist and was chosen to be a member of the VA Pain Management Team. She one of the few employees with a badge that provided access to the controlled substances vault, and she went to the vault on June 9, 2017 at the request of her supervisor. The government failed to show that Mrs. Richardson's actions with respect to any controlled substances at any time involved any misrepresentation, fraud, forgery, deception, or subterfuge, or that any such alleged misrepresentation, fraud, forgery, deception, or subterfuge was material.

Video evidence also demonstrated that Mrs. Richardson actions in the vault on June 9, 2017 were clearly visible to any passerby, as the vault door was only made of iron bars. She was not attempting to hide her actions and was aware that her actions were being recorded by a camera that was located in the vault. The evidence presented also confirmed that it would have been easy for any supervisor to identify the pharmacist who filled a particular prescription by checking the Vista or ScriptPro prescription management systems. Mrs. Richardson made no

attempts to conceal her actions or to leave the vault while in possession of any controlled substance.

In *United States v. Wilbur*, 58 F. 3d 1291, 1292 (8th Cir. 1995), the defendant physician was convicted of acquiring morphine in violation of 21 U.S.C. § 843(a)(3). The evidence showed that the defendant prescribed morphine to a patient then entered the patient's room alone, closed the door, and withdrew morphine solution from the patient's IV bag with a syringe. *Id.* at 1292-1293. On appeal, the Eighth Circuit found the evidence was insufficient to sustain the defendant's conviction, recognizing that the focus of 21 U.S.C. § 843(a)(3) is on "how [the] defendant obtained the drugs." *Id.* at 1292, quoting *United States v. Hill*, 589 F.2d 1344, 1351 (8th Cir.1979), *cert. denied*, 442 U.S. 919, 99 S.Ct. 2843, 61 L.Ed.2d 287 (1979). The court found that the defendant had "acquired the morphine ... without having attempted to induce anyone to leave him alone in the patient's room—i.e., without having resorted to any trickery in order to obtain the drug." *Id.* at 1293. In reversing the conviction and remanding the matter for the entry of a judgment of acquittal, the court went on to explain:

Dr. Wilbur did a reprehensible thing, from both a legal and a moral standpoint-let there be no doubt about that. The government charged him, however, not with theft, conversion, or embezzlement, but with acquiring drugs by misrepresentation, fraud, deception, or subterfuge. There is simply no evidence of trickery that allowed his

acquisition of morphine during the period specified in the indictment.

Id.

Similarly, Mrs. Richardson did not induce or coerce anyone into allowing her access to the vault or access to the controlled substances. Like Dr. Wilbur, she did not engage in any type of trickery or deception. The evidence shows only that she obtained the controlled substances in the course and scope of her employment duties. Simply acquiring or obtaining the controlled substances is insufficient to satisfy the essential elements of the offense. *See e.g., United States v. Dumas*, 688 F. 2d 84 (10th Cir. 1982) (conviction overturned where the evidence demonstrated the defendant was intentionally seeking to acquire Dilaudid, but there was no evidence that he agreed to obtain Dilaudid “by misrepresentation, fraud, forgery, deception, or subterfuge”); and compare, *United States v. Callahan*, 801 F.3d 606 (6th Cir. 2015) (defendants intentionally injured a minor and coached her on the lies to tell medical personnel in order to be prescribed painkillers, then took the minor’s prescription medications for themselves); *United States v. Duffy*, 23 Fed. Appx. 617 (8th Cir. 2001) (defendant pharmacist had her manager sign blank order forms then ordered cocaine, authorized payment for the cocaine, and receive the cocaine when it was shipped); *United States v. Neighbors*, 23 F.3d 306 (10th Cir. 1994) (pharmacist ordered various drugs from manufacturer claiming the drugs were to be placed in the pharmacy inventory but diverted them for his own use and failed to stock the drugs at the pharmacy);

United States v. Madden, 2012 U.S. Dist. LEXIS 171391 (N.D. Cal. 11/30/2012) (defendant shifted her work hours so she was working alone, failed to report overtime in order to work late nights and have unsupervised access to the evidence locker, and entered the evidence locker without permission then lied about doing so).

Mrs. Richardson has at all times acknowledged that she did not follow proper procedure when she placed the loose hydrocodone pills in her front pockets, but her failure to follow procedure due to the pressure of wanting to complete the filling of mail-out prescriptions in a matter of hours and wanting to ensure everything looked secure if the Joint Commission representatives entered the vault, while distracted by a disagreement with her husband, does not equate to “misrepresentation, fraud, forgery, deception, or subterfuge.”

At trial, Mrs. Richardson specifically denied that she had diverted any controlled substance for her personal use, and as an experienced pharmacist she knew hydrocodone would exacerbate her symptoms rather than alleviate them. This testimony was corroborated by her primary care physician, Dr. Melanie Smith, who testified that Mrs. Richardson had always been hesitant to take any narcotic medication, even when such a medication was warranted by her condition. Dr. Jay Weiss, medical director at the Palmetto Addiction Recovery Center, also testified that a drug screen conducted on Mrs. Richardson’s hair did not show the presence of any narcotic drugs within the three months prior to the

test, and that he was unable to diagnosis Mrs. Richardson with an opioid-use disorder.

Viewing the evidence in the light most favorable to the government, a rational trier of fact could not have found that Mrs. Richardson acquired the hydrocodone pills by a material misrepresentation, fraud, forgery, deception, or subterfuge. As such, the elements of the offense were clearly not met beyond a reasonable doubt, and the lower courts' failure to reverse her conviction and enter a judgment of acquittal was manifest error.

CONCLUSION

The lower courts erred in failing to suppress the verbal and written statements made by Mrs. Richardson and finding that there was sufficient evidence to support Mrs. Richardson's conviction. For the reasons stated herein above, Mrs. Richardson's petition for writ of certiorari should be granted, as intervention by this Honorable Court is necessary to correct the lower courts' manifest errors and to address the conflict that now exists between circuits as to the actions sufficient to establish "a material misrepresentation, fraud, forgery, deception, or subterfuge," a necessary element of 21 U.S.C. § 843(a)(3).

Respectfully submitted,

Nichole M. Buckle
Bar No. 305018
CARMOUCHE, BOKENFOHR,
BUCKLE & DAY, PLLC
6425 Youree Drive, Suite 380
Shreveport, Louisiana 71105
Phone: (318) 629-0014
Fax: (318) 404-1571
nikki@cbbd.com

CERTIFICATE OF COMPLIANCE

No. _____

MELISSA RICHARDSON,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondents.

As required by Supreme Court Rule 33.1(h), I certify that the Petition for Writ of Certiorari contains 8,606 words, excluding the parts of the petition that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Signed on this 18th day of October, 2021.

s/ Nichole M. Buckle, Bar No. 305018

CERTIFICATE OF SERVICE

No. _____

MELISSA RICHARDSON,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

I HEREBY CERTIFY that a copy of the above and foregoing Petition for a Writ of Certiorari was filed electronically with the U.S. Supreme Clerk of Court. Notice of this filing has been sent to the following through the United States Postal Service:

Allison Duncan and Brian Flanagan
Assistant United States Attorneys
300 Fannin Street, Suite 3201
Shreveport, LA 71101

Solicitor General of the United States
Department of Justice
950 Pennsylvania Avenue, N.W., Room 5614
Washington, DC 20530-0001

Melissa Richardson
5296 Quad J Road
Shreveport, LA 71107

Signed in Shreveport, Louisiana, on this 18th day of October, 2021.

/s/ Nichole M. Buckle
OF COUNSEL