

No. _____

21-6621

IN THE

SUPREME COURT OF THE UNITED STATES

VALENTINE OKONKWO

— PETITIONER

(Your Name)

Supreme Court, U.S.
FILED

NOV 06 2021

OFFICE OF THE CLERK

UNITED STATES OF AMERICA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

VALENTINE OKONKWO-60104-018

(Your Name)

FEDERAL CORRECTIONAL COMPLEX, COLEMAN LOW, UNIT B-3, P.O.BOX 1031

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COLEMAN, FLORIDA 33521-1031

(City, State, Zip Code)

NONE

(Phone Number)

RECEIVED

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. Did the lower court err for ruling that an administrative search without a warrant, ostensibly conducted by a DEA Diversionary inspector was lawful to be utilized for a criminal prosecution?
2. Did the lower court erroneously apply the law by using a total amount of 563,000 Oxycodone pills dispensed for legitimate and illegitimate purposes to determine Petitioner's years of imprisonment instead of 120,829 of Oxycodone pills which a DEA inspector testified were filled with fraudulent prescriptions?
3. Did the lower court err for not making the writ of audita querela available to Petitioner to challenge a forfeiture monetary judgment when his counsel did not contest it at trial and direct appeal?
4. Did the lower court misapply the law for permitting Petitioner's innocent and untainted personally legitimately earned money to be seized by the United States' Government in partial fulfillment of a forfeiture monetary judgment?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

N/A

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STATUTES AND RULES

21 U.S.C. § 841(a)(1) and 841(b)(1)(C)
21 U.S.C. § 846(a)(1)
21 U.S.C. § 853 (c)
28 U.S.C. § 1254(1)
28 U.S.C. § 1291
28 U.S.C. § 1746
28 U.S.C. § 2255

OTHER N N/A

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**: N/A

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

[X] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was August 24, 2021.

[] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: October 15, 2021, and a copy of the order denying rehearing appears at Appendix C.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[] For cases from state courts: N/A

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourth Amendment

Conducting an administrative inspection ostensibly with a "primary purpose" to gather evidence in support of a criminal prosecution violates the Fourth Amendment.

Sixth Amendment

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense".

The Supreme Court ruled that freezing all of a defendant's innocent assets violates the Sixth Amendment.

21 U.S.C. §853(c)

The Supreme Court held that 21 U.S.C. §853(c) applies to tainted property only.

STATEMENT OF THE CASE

1. Petitioner was a licensed pharmacist in three states, California, Florida and Nevada and an owner of two pharmacies in Orlando, Florida before his engulfment in a statutory harm.

Petitioner was convicted that he dispensed a controlled substance, Oxycodone outside the usual course of professional practice and for other than a legitimate medical purpose, in violation of 21 U.S.C. 841(a)(1) and 841 (b)(1)(C) and conspiracy to commit this offense in violation of 21 U.S.C. 846 (a)(1). Petitioner was sentenced to 292 months which can be considered a life sentence in view of the fact that he is 60 years old. Petitioner asserts that he did not knowingly process fraudulent prescriptions. Petitioner states that he fell a victim to prescription forgery and scam committed by fraudsters who presented fraudulent prescriptions to his pharmacy. These swindlers scammed Petitioner when he phoned each doctor's number on the prescription to verify legitimacy.

1. Petitioner contends the constitutionality and legal standing of a DEA diversionary inspector who ostensibly conducted an administrative search without a warrant with a "primary purpose" of gathering evidence to advance a potential criminal prosecution. Petitioner had previously raised this issue in a 28 U.S.C. §2255 post-conviction motion but his claim was denied.

Petitioner's claim centered around the fact that the administrative inspection performed by the DEA diversionary inspector was in reality, a search for an evidence as part of an ongoing criminal investigation. Particularly relevant is the fact that the diversionary inspector James Graumlich was specifically and strategically assigned to the same "Tactical Diversionary Squad" which was conducting the criminal investigation of Petitioner and his pharmacy.

DI Graumlich testified that part of his "role" within the Tactical Diversionary Squad was to carry out the so called "administrative" inspection of

Petitioner's pharmacy, during which he seized over 2000 prescriptions without a warrant and took them to the Tactical Diversionary Squad, where TFA Dipaola and other task force agents who were involved in the criminal investigation could review them. DI Graumlich returned to the Petitioner's pharmacy a second time without a warrant and seized more prescriptions to bring in for inspection.

The lower court ruled that the administrative search without a warrant that was a pretext to gather evidence in support of a criminal prosecution was legitimate and this issue is ripe for Supreme Court review.

2. Petitioner challenges the legality of using a total amount of 563,000 Oxycodone pills dispensed at his pharmacy for legitimate and illegal purposes to determine his base offense level and term of imprisonment instead of an amount of 120,829 which evidence at trial showed to be illegally dispensed with fraudulent prescriptions as testified by a DEA supervisor Paul Short. Apparently, the lower court generalized Petitioner's offense and punishment.

The United States District Court denied this Petitioner's claim in his post-conviction motion but the Eleventh Circuit granted Certificate of Appealability to Petitioner. Eventually, a panel of judges affirmed the denial of Petitioner's appeal regarding this matter.

3. The lower court declined to grant writ of audita querela to Petitioner to challenge a forfeiture monetary judgment despite his counsel's deliberate indifference and deficient performance for choosing not to contest the forfeiture at trial and direct appeal. Petitioner's due process of law and Sixth Amendment right to counsel were violated by his counsel and Petitioner has no available legal avenue to challenge his forfeiture

4. The lower court authorized United States' Government to seize Petitioner's innocent and untainted personally legitimately earned money in the sum of \$151,153.00 in his personal savings and checking accounts in partial fulfillment of a forfeiture monetary judgment of \$555,500.00 despite that federal statute 21

U.S.C. 853(c) applies to tainted property only. Petitioner's pharmacy was an S-Corporation but the U.S. Government also seized \$240,000.00 of his pharmacy business money in partial fulfillment of the forfeiture.

Eleventh Circuit consolidated the forfeiture appeal with the criminal case post-conviction appeal and denied them.

REASONS FOR GRANTING THE PETITION

The following compelling reasons exist for this Court to exercise its discretionary jurisdiction and grant certiorari to Petitioner:

1. There was ample evidence during suppression hearing and trial to infer that the administrative search without a warrant was merely a pretext for the ongoing criminal investigation of Petitioner's pharmacy.

Diversionary inspector Graumlich testified he advised the Petitioner he was at his existing pharmacy for administrative purposes to make a determination whether the granting of a second DEA registration to Petitioner's second pharmacy is in the public interest and he did not tell Petitioner he was a subject of criminal investigation. Petitioner was not advised that any incriminating evidence found would be used in criminal prosecution as equivocally testified by the diversionary inspector.

Ample evidence exists for the Eleventh Circuit to conclude that DI Graumlich was conducting a criminal search (as opposed to an administrative inspection), thus rendering Petitioner's consent to an "administrative" inspection involuntary. "The administrative search exception does not confer authority on law enforcement to ignore the requirement for a warrant where 'the primary purpose [of the search or seizure] was to detect evidence of ordinary criminal wrongdoing'" Bruce v. Beary, 498F. 3d 1232, 1239 (11th Cir.2007). See also, United States v. Johnson, 994 F.2d 740, 742 (10th Cir. 1993) (an administrative inspection is a "sham" where it is a pretext solely to gather evidence of criminal activity).

The administrative inspection was a product of subterfuge and a violation of Petitioner's Fourth Amendment of the United States' Constitution. The lower court's decision is erroneous and it is of national importance to have the Supreme Court decide the question involved. It is of paramount importance to know that the decision of the Eleventh Circuit is in conflict with another appellate court which is the Ninth Circuit. This case is not only important to Petitioner but to others similarly situated.

See United States v. Grey, No. 18-50328 (9th Cir. May 27, 2020). Affirming the district court's order granting a criminal defendant's motion to suppress evidence seized by Los Angeles County Sheriff's Department deputies, the panel held that where, as here, law enforcement officers were asked to assist in the execution of an administrative warrant authorizing the inspection of a private residence, they violated the Fourth Amendment when their "primary purpose" in executing the warrant was to gather evidence in support of a criminal investigation rather than to assist the inspectors.

Citing also, United States v. Garcia, No. 19-10073 (9th Cir. September 10, 2020). The panel vacated a conviction and sentence for possession with intent to distribute methamphetamine and remanded with instruction to suppress evidence found in defendant's home and on his person, as well as statements he made at the police station following his arrest. In a prior appeal, this court held that officers violated his Fourth Amendment when they entered the defendant's home without a warrant, ostensibly to determine whether someone inside posed a threat to their safety or required emergency assistance.

2. The lower court misapplied the law by utilizing a total amount of 563,000 Oxycodone pills dispensed at Petitioner's pharmacy to determine his base offense level, irrespective of whether they are for legitimate or illegitimate purpose rather than 120,829 Oxycodone pills which a DEA inspector testified were illegally filled with fraudulent prescriptions.

Obviously, the Government held Petitioner accountable for every single Oxycodone pill dispensed during the relevant time period irrespective of whether any of the transactions were for a legitimate medical purpose. Petitioner dispensed Oxycodone pills to some cancer patients and patients that were involved in car accidents with chronic excruciating pain and those individuals had legitimate prescriptions. A look at the total quantity dispensed that was used to calculate Petitioner's term of imprisonment and the quantity which is

proven from evidence in trial to be illegally dispensed from fraudulent prescriptions draws inference of great disproportionality.

The Government had the lower court generalize the Petitioner's culpability as to quantity and ignore any of the legitimate prescriptions filled by Petitioner. This was not a case where Petitioner was dealing on illicit street drugs with unclear number of people on an unknown number of occasions rather the amount of Oxycodone unlawfully dispensed by Petitioner in this case was quantifiable and the Government relied on concrete data to determine that amount.

In determining the quantity of drugs attributable to a particular defendant, a district court must make proper findings of fact. See United States v. Ismond, 993 F.2d 1498, 1499 (11th Cir. 1993). Petitioner was highly prejudiced by defense counsel's failure to object to the quantity of Oxycodone alleged by the government. It is imperative to have the Supreme Court decide this case because there are others that are similarly situated.

Extraordinary and compelling circumstances warrant the issuance of writ of audita querela to Petitioner for him to be able to attack the enforcement of a judgment of forfeiture after it was rendered. Petitioner's counsel showed deficient performance and ineffective assistance for deliberately choosing not to tell Petitioner about the forfeiture hearing proceeding and not to contest it at trial and direct appeal. Petitioner's due process and Sixth Amendment right to counsel were violated.

The Eleventh and Seventh Circuits have ruled that the essential requirements of due process are the right of notice and the opportunity to respond.

The Sixth Amendment affords a criminal defendant the right to "the Assistance of Counsel for his defense". U.S. Const. amend VI. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" Strickland v. Washington, 466 U.S. 668, 686 (1984).

Audita querela, latin for "the complaint having been heard" is an ancient writ used to attack the enforcement of a judgment after it was rendered. U.S. v. Holt, 417 F. 3d 1172, 1174(11th Cir. 2005). Petitioner's counsel made him lose the legal opportunity to challenge his forfeiture on direct appeal.

Audita querela like coram nobis is an "extraordinary remedy" that is available "only under circumstances compelling such action to achieve justice. United States v. Salgado, 692 F. Supp. at 1267(E.D.Wash.1988). The district court granted Salgado's petition for a writ of audita querela to vacate his conviction which was unopposed by the government while recognizing the extraordinary circumstances that the case presented. This case is important not only to Petitioner but to others that are similarly situated.

4. The lower court erred for allowing Petitioner's innocent and untainted personally legitimately earned money in his savings and checking bank accounts to be seized by the United States' Government as a substitute asset in partial fulfillment of forfeiture monetary judgment.

Petitioner had these savings from profit made for selling his residential home in Rancho Cordova, California in 2005 and for working as a licensed pharmacist for more than twenty years. The pharmacy in controversy was established in 2009.

The seizure of these monetary savings predisposes Petitioner and his four children to economic strangulation and abject poverty.

The Supreme Court had previously acknowledged that a federal statute 21 U.S.C. §853(c) applies to tainted property only. Citing Luis v. United States, 578 U.S. --136S.Ct.1083, 194 L.Ed.2d 256(2016). The Supreme Court ruled that freezing all of a defendant's innocent assets violates the Sixth Amendment. Based on Luis the Fourth Circuit ruled that criminal forfeiture statutes could not reach untainted assets, even if they might be substituted for forfeitable assets if the defendant is convicted.

The decision of the lower court is in conflict with the decisions of the Supreme Court and the Fourth Circuit. Compelling reasons exist to have the Supreme Court decide this case of national importance and it is important not only to Petitioner but to other people similarly situated.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Valentine Okonkwo

Date: November 3, 2021