

No. _____

IN THE
Supreme Court of the United States

COURTNEY NEWMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Justice Act of 1964*

QUESTION PRESENTED

21 U.S.C. §856(a)(1), the “crack house statute”, requires the Government to prove beyond a reasonable doubt that a defendant, “except as authorized by this subchapter ... knowingly open, lease, rent, use or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance.” In *Ruan v. United States*, ___ S.Ct. ___, 2022 WL 2295024, Case No. 20-1410 (2022), this Court, interpreting 21 U.S.C. § 841, determined that where a health care professional is charged for conduct occurring within the scope of his or her practice, once a defendant proves that their conduct is “authorized” under the Controlled Substances Act, “the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so.” *Id.* at __ (slip op. at 3). The Court concluded that “for purposes of a criminal conviction under § 841, this requires proving that a defendant knew or intended that his or her conduct was unauthorized.” *Id.* at __ (slip op. at 9).

The question presented is whether an authorized physician or health care professional can be convicted under 21 U.S.C. §856(a)(1) if the sole allegation of unlawful activity is the prescribing of controlled substance and the district court instructed the jury that the lawfulness of a prescription is to be determined from an “objective and not a subjective viewpoint” in contravention of this Court’s decision in *Ruan*.

RELATED CASES

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner submits the following Cases which are directly related to this Petition:

United States v. Sylvia Hofstetter

Sixth Circuit Case No. 20-6245 (decided April 11, 2022)

United States v. Cynthia Clemons

Sixth Circuit Case No. 20-6427 (decided April 11, 2022)

United States v. Holli Womack

Sixth Circuit Case No. 20-6426 (decided April 11, 2022)

TABLE OF CONTENTS

QUESTION PRESENTED.....	i
RELATED CASES	ii
TABLE OF CONTENTS.....	iii
TABLE OF CITED AUTHORITIES.....	iv
CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS.....	1
JURISDICTIONAL STATEMENT.....	1
STATUTORY PROVISION AT ISSUE.....	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION.....	5
A. 21 U.S.C. §841 and 21 U.S.C. §856(a)(1) are intertwined in cases involving physicians prescribing controlled substances and it is incumbent upon this Court to ensure that the standards of proof for these interconnected statutes be the same to ensure that the same so that juries are not asked to judge the same set of facts under two different standards.....	6
B. The Sixth Circuit’s decision holding that the jury instruction on 21 U.S.C. 856(a)(1) adequately conveyed the illegality of the acts in distributing controlled substances when “taken as a whole” encompasses language that is contrary to this Court’s ruling in <i>Ruan</i>	8
C. 21 U.S.C. §856(a)(1) was not intended to criminalize the conduct that occurred in this case.....	9
CONCLUSION.....	20
APPENDIX A – Opinion of U.S. Court of Appeals	
APPENDIX B – Judgment of U.S. District Court	
APPENDIX C – Order on Motion for a New Trial	
APPENDIX D – Excerpt of Day 39 Trial Transcript (Jan. 28, 2020) Jury Instruction	

TABLE OF CITED AUTHORITIES

Cases

<i>Liparota v. United States</i> , 471 U. S. 419, 426 (1985)	9
<i>Rehaif v. United States</i> , 588 U. S., at ____ (2019)	9
<i>Ruan v. United States</i> , ____ S.CT. ____, 2022 WL2295024, NO. 20-1410 (2022) . <i>passim</i>	
<i>Russello v. United States</i> , 464 U.S. 16, 23 (1983)	11
<i>United States v. Hofstetter, et al.</i> , 36 F.4 th 396 (6th Cir. 2022)	1,5
<i>United States v. X-Citement Video, Inc.</i> , 513 U. S. 64, 72 (1994)	9

Statutes

21 U.S.C. § 841	2, 6, 8, 9, 10
21 U.S.C. § 856(a)(1)	1, 2, 3, 5, 6, 8, 9, 10
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1291	5

Rules

Federal Rules of Criminal Procedure 29	5
Supreme Court Rule 14.1(b)(iii)	ii

Constitutional Provisions

Article III, Section II of the United States Constitution	1
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CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS

The opinion of the United States Court of Appeals for the Sixth Circuit has been published as *United States v. Hofstetter*, 31 F.4th 396 (6th Cir. 2022). The opinion is available on electronic databases and is attached to this Petition for a Writ of Certiorari as Appendix A. The judgment of the United States District Court for the Eastern District of Tennessee is unpublished and is attached as Appendix B. The trial court's order denying Courtney Newman's Motion for a New Trial issued September 14, 2020 is unpublished and is attached as Appendix C. A partial transcript of jury instructions is attached as Appendix D.

JURISDICTIONAL STATEMENT

Courtney Newman, the Petitioner, respectfully seeks this Court's review of the Sixth Circuit's decision in this case, which was entered on April 11, 2022. *United States v. Newman*, No. 20-6428 (6th Cir. April 11, 2022) (App. A). This Court has appellate jurisdiction pursuant to Article III, Section II of the United States Constitution and 28 U.S.C. § 1254(1). This criminal matter arises under the federal "crack house" statute, 21 U.S.C. § 856(a)(1).

STATUTORY PROVISIONS AT ISSUE

21 U.S.C. § 856(a) (1)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful to—

- (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purposes of manufacturing, distributing, or using any controlled substance

.....

21 U.S.C. § 841

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

STATEMENT OF THE CASE

The federal “crack house” statute, 21 U.S.C. §856(a)(1), criminalizes persons who knowingly open, lease, rent, use, or maintain any place for the purpose manufacturing, distributing or using any controlled substance unless they are authorized to do so as set forth in Title 21, Section 13, Subchapter I.

At the time of the events described herein, Courtney Newman was a nurse practitioner licensed by the State of Tennessee who also possessed a valid registration with the Drug Enforcement Agency to prescribe controlled substances. Beginning on October 16, 2013, Courtney Newman began work as an independent contractor nurse practitioner for East Knoxville Healthcare Services (“EKHS”) on Lovell Road¹ in Knoxville, Tennessee. EKHS was licensed to operate as a pain management clinic by the State of Tennessee and was regularly inspected by the Tennessee Department of Health. While working at the clinic, Ms. Newman prescribed certain controlled substances for the purpose which they had been approved for use by the Food and Drug Administration (“FDA”) to patients that had come to the clinic complaining of chronic pain and who had provided radiological evidence of the source of that chronic pain, usually in the form of an MRI. Prescriptions were only issued after the patient

¹ There were two other clinics involved in this case, one in Lenoir City, Tennessee, and another clinic located on Ebenezer Road in Knoxville, Tennessee which had shut down prior to the opening of the clinic located on Lovell Road. These clinics were owned by Sylvia Hofstetter and other partners. From the testimony at trial, Ms. Newman appears to have worked for one day at the clinic in Lenoir City and never worked at the Ebenezer Road clinic.

had undergone a urine drug screen and an in-person examination. Each of Ms. Newman's patient exam charts was reviewed and approved by her supervising physician. Patients who exhibited drug seeking behavior, failed drug screens, had track marks or other indications of illegitimate use of the medications were discharged from the clinic by Ms. Newman and no adverse action was taken against her for discharging a patient. Ms. Newman's pay was based solely on the number of hours she worked at the clinic and was not impacted by the number of patients she examined, nor was there any financial incentive to write prescriptions. Ms. Newman worked at EKHS until March 27, 2014, a total of 86 days, until she left for a job with benefits..

Unbeknownst to Ms. Newman, an undercover investigation of that clinic was being conducted by local and federal law enforcement officials. Ms. Newman was not a subject of the investigation and never provided medical services to any of the undercover agents who visited the clinics. On March 15, 2015, approximately one year after Ms. Newman ceased working at the clinic, federal law enforcement raided EKHS and the Lenoir City clinic along with the residence of one of the owners of the clinic, Sylvia Hofstetter, two former employees of EKHS, and multiple patients and former patients of the clinics were arrested and indicted. On October 16, 2016, a First Superseding Indictment was issued charging Ms. Newman and several other medical providers who had worked at EKHS with conspiracy to distribute controlled substances, distributing controlled substances and maintaining a drug related premises. There were three subsequent superseding indictments issued with

additional allegations against Ms. Newman and others, but with the same substantive charges.

After the Government's Fourth Superseding Indictment, a jury trial was held beginning in October, 2020 and continuing until late January, 2021. At the conclusion of the Government's proof, and again at the end of conclusion of all proof, Ms. Newman and the other co-defendants orally moved for an F.R.Cr.P 29 motion for judgment of acquittal, a ruling on which the district court reserved until a later date. On February 13, 2021, the jury returned a verdict finding Ms. Newman not guilty of the conspiracy to distribute controlled substances counts; not guilty of the substantive counts of distributing controlled substances; not guilty of maintaining a drug related premises relating to the Lenoir City clinic; but guilty of a single count of 21 U.S.C. §856(a)(1) - maintaining a drug related premises related to the EKHS clinic. After the jury returned its verdict, Ms. Newman renewed her motion for a judgment of acquittal based on errors in the jury instruction for the maintaining a drug related premises count; and also alleging an inconsistent jury verdict – acquitting Ms. Newman of conspiring to distribute controlled substances and actually distributing controlled substances, while convicting her of maintaining a premises to distribute those same controlled substances. The district court denied the motion. Following the district court's sentencing and final judgment, Ms. Newman timely filed an appeal to the United States Court of Appeals for the Sixth Circuit, which had appellate jurisdiction based on 28 U.S.C. § 1291 and Federal Rules of Appellate Procedure 3 and 4(b).

On April 11, 2022, the Sixth Circuit issued its opinion affirming Ms. Newman’s conviction. *United States v. Hofstetter, et al.*, 36 F.4th 396 (6th Cir. 2022) (App. A). As to Ms. Newman’s challenge on the jury instruction, the Sixth Circuit held that the district court did not err when it instructed the jury that they only needed to find that the defendants had 1) knowingly opened, used or maintained a place; and 2) that they did so for the purpose of distributing any controlled substance, without any explanation of the specific conduct that made their actions unlawful. *Id.* at 11. The court opined due to the “proximity of the illegality element” and the instructions taken as a whole, particularly relying on the instructions relating to the illegal distribution counts under 21 U.S.C. 841, that the district court did not plainly err when it gave the instruction. *Id.*

The Sixth Circuit’s ruling is contrary to recent decisions of this Court and Ms. Newman respectfully files this timely petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

A. 21 U.S.C. §841 and 21 U.S.C. §856(a)(1) are intertwined in cases involving physicians prescribing controlled substances and it is incumbent upon this Court to ensure that the standards of proof for these interconnected statutes be the same to ensure that the same so that juries are not asked to judge the same set of facts under two different standards.

21 U.S.C. §841 and 21 U.S.C. §856(a)(1) share many similarities in their language. Both contain an “as authorized” clause. Both have a “knowingly” *mens rea*

element. Both involve the distribution of controlled substances. Each year, dozens, if not hundreds of physicians and other medical professionals are charged under these statutes and at trial, like in this case, the proof presented by the Government is based on the exact same conduct for both statutes.² In its recent decision in *Ruan v. United States*, ____ S.Ct. ____, 2022 WL2295024, Case No. 20-1410 (2022), this Court held that once a physician demonstrated that he or she was authorized to prescribe controlled substances, the burden was on the Government to show that the physician “knowingly and intentionally” prescribed these controlled substances illegally and that the standard of proof was a subjective one.

Both the district court and the Sixth Circuit recognized that Ms. Newman’s and the other nurse practitioners ability to be convicted under 21 U.S.C. §856(a)(1) rested solely on their prescriptions for controlled substances.

Furthermore, the indictment and the jury verdict form underscore the completeness of the jury instruction when taken as a whole because language in both also made clear that the defendants were being charged for and convicted of unlawful opioid distribution.

Hofstetter at 11,

The court’s charge also included a “general statement of the law regarding distribution of a controlled substance,” which included a section on the “manner and issuance of prescriptions” outlining “how controlled substances must be prescribed under federal law in order for such prescriptions to be legal” and how the jury must determine whether a defendant prescribed controlled substances

² A person convicted under either of these statutes faces almost the exact same penalty. The United States Sentencing Commission Guidelines dictate that in both instances the drug quantity as set forth in §2D1.1 control the guidelines range of the offense.

illegally, that is “without a legitimate medical purpose, and outside the usual course of professional practice.

District Court Order Denying Motion for New Trial, Appendix C, pg. 22

However, as part of the “general statement of the law regarding the distribution of a controlled substance” the district court instructed the jurors:

Finally, whether a practitioner -- finally, whether a prescription is made in the usual course of professional practice is to be determined from an objective and not a subjective viewpoint.

Jury Charge, Trial Transcript Vol. XXXIX, pg. 207

If this Court were to let the ruling of the Sixth Circuit stand, physicians and other medical would be subject to two different standards of proof for the very same conduct. The jury could be instructed that a physician charged under 21 U.S.C. §841 must be held to a subjective standard for her prescribing of controlled substances, while also being instructed that under 21 U.S.C. §856(a)(1) she is held to an objective standard for the exact same conduct. This is an untenable situation for medical professionals and this Court must take action to remedy this inconsistency.

B. The Sixth Circuit’s decision holding that the jury instruction on 21U.S.C. 856(a)(1) adequately conveyed the illegality of the acts in distributing controlled substances when “taken as a whole” is in error as it encompasses language that is contrary to this Court’s ruling in *Ruan*.

The Sixth Circuit found that the jury instruction for the single count of conviction under 21 U.S.C. 856(a)(1) adequately conveyed to the jury all of the elements that it needed to find Ms. Newman guilty when taken as a whole with the other instructions in the case. However, the jury instructions contained the phrase

“whether a prescription is made in the usual course of professional practice is to be determined from an objective and not a subjective viewpoint” which the Court in *Ruan* has ruled is the incorrect standard of proof. Although *Ruan* was addressing a different statute, as pointed out elsewhere herein, in physician related cases, the proof put on by the Government for violations of 21 U.S.C. 856(a)(1) will almost always be the exact same proof used to prove violations of 21 U.S.C. 841. Both statutes contain a “knowingly” *mens rea* provision

And when a statute is not silent as to *mens rea* but instead “includes a general *scienter* provision,” “the presumption applies with equal or greater force” to the scope of that provision. *Rehaif*, 588 U. S., at ____ (slip op., at 3) (emphasis added). We have accordingly held that a word such as “knowingly” modifies not only the words directly following it, but also those other statutory terms that “separate wrongful from innocent acts.” *Id.*, at ____ (slip op., at 6); see, e.g., *ibid.*; *United States v. X-Citement Video, Inc.*, 513 U. S. 64, 72 (1994); *Liparota v. United States*, 471 U. S. 419, 426 (1985).

Ruan at ____ (slip op., at 6)

Like 21 U.S.C. 841, 21 U.S.C. 856(a)(1) contains an “except as authorized” clause³. As noted in *Ruan*,

Nor is the “except as authorized” clause a jurisdictional provision, to which the presumption of *scienter* would not apply. Cf. *Rehaif*, 588 U. S., at ____ (slip op., at 4); *United States v. Yermian*, 468 U. S. 63, 68–69 (1984). To the contrary, and as we have explained, a lack of authorization is often the critical thing distinguishing wrongful from proper conduct.

³ The jury instruction omitted the introductory clause “Except as authorized by this subchapter, it shall be unlawful to –“

Ruan at ____ (slip op. at 7,8)

Ruan held that in cases of drug distribution, the Government must prove that physicians knowingly and intentionally acted in an unauthorized manner and that the standard for that proof is a subjective one and not an objective one as the jury was instructed here. Without intervention by this Court, physicians and medical professionals will be subject to two different standards of proof for the exact same conduct, left to wonder if their lawful conduct in prescribing medications for their patients will be deemed unlawful for the purpose of operating their medical practice. This Court must address the dichotomy that has now been created by the decision in *Ruan*.

C. 21 U.S.C. §856(a)(1) was not intended to criminalize the conduct that occurred in this case.

21 U.S.C. §856(a)(1), more commonly known as the “crack house statute” makes it unlawful for a person to “knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purposes of manufacturing, distributing, or using any controlled substance.” Compare that language to 21 U.S.C. §841 which makes it a crime to “manufacture, distribute, or ***dispense***, or possess with intent to manufacture, distribute or ***dispense***, a controlled substance” (***Emphasis added***) Clearly Congress did not intend that “dispense” be an unlawful activity under 21 U.S.C. §856(a)(1) or it would have said so like it did in 21 U.S.C. §841. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress

acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) Congress very clearly intended that dispensing and distribution were not interchangeable terms, nor the same activity. In 21 U.S.C. §802, Congress set forth the definitions it intended to be applied to the subchapter containing both 21 U.S.C. §841 and 21 U.S.C. §856(a)(1). In Paragraph 10 of §802, the term “dispense” is defined as follows:

The term “dispense” means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling or compounding necessary to prepare the substance for such delivery. The term “dispenser” means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

In the next paragraph of §802, Paragraph 11, the term “distribute” is defined as follows:

The term “distribute” means to deliver (other than by administering or dispensing) a controlled substance or a listed chemical. The term “distributor” means a person who so delivers a controlled substance or a listed chemical.

It does not appear that Congress intended for dispensing or prescribing by a physician to be unlawful conduct under this statute. If Congress had intended dispensing to be unlawful conduct, they would have said so as they did in 21 U.S.C. §841. The Government, the district court and the Sixth Circuit appear to conflate “distribute” and “dispense” even though Congress has explicitly defined these as

separate, distinguishable activities. It appears that Congress acted intentionally and with purpose by excluding dispensing as unlawful conduct in §856(a)(1) and as such, this Court must find that prosecution under this statute and this set of facts is improper.

Finally, because the facts in this Petition are substantially similar for all the petitioners in the related cases listed above, Cynthia Clemons, and Holli Womack, petitioner Courtney Newman would adopt by reference the arguments of the petitioners in the related cases and respectfully request this Court allow such an adoption of arguments as if fully formed here for the sake of judicial economy.

CONCLUSION

For the foregoing reasons, Courtney Newman respectfully requests this Court to grant her Petition for a Writ of Certiorari, vacate the decision of the United States Court of Appeals for the Sixth Circuit, and remand for proceedings consistent with this Court's ruling.

Respectfully submitted,

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