NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SYLVIA HOFSTETTER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

6th Circuit Case No. 20-6245

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The questions presented in this case are:

1. Whether the District Court erred by instructing the deliberate-indifference instruction based upon the facts in this case when it denied defendant's jury instruction request to charge the elements of willful-blindness instruction under *Global-Tech compliance Inc. v. SAE* .131 S.CT. 2060 (2011), and the Sixth Circuit Court of Appeals erroneously reviewed the jury charge under the standard of review of abuse of discretion as rather than de novo.

2. Whether this Court's ruling in *Ruan v. United States*, 142 S. Ct. 2370 (2022), interpreting 21 U.S.C. § 841, also applies to prosecutions in which a practice manager is charged where authorized healthcare providers in the course of their employment at a licensed pain management clinic, were relied upon to prescribe controlled substances as authorized by the DEA and all practitioners who went to trial jointly with Petitioner Hofstetter were acquitted of all substantive counts. Pursuant to *Ruan* is the United States required to prove "that a defendant knew or intended that his or her conduct was unauthorized", *Id.*, at 15, or under the facts of this case that an employee provider's conduct was unauthorized, evaluated under a subjective standard.

3. The Third question presented is whether the Court's recent ruling in *Ruan* applies to offenses charged under 21 USC §846 and §856.

LIST OF PARTIES

The caption of this case contains the names of all parties.

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. Cynthia Clemmons 20-6427
Sixth Circuit Case No. 20-6245 (decided April 11, 2022)

United States v. Courtney Newman
Sixth Circuit Case No. 20-6428 (decided April 11, 2022)

United States v. Holli Womack
Sixth Circuit Case No. 20-6426 (decided April 11, 2022)

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The opinion of the Court of Appeals for the Sixth Circuit affirming Petitioner's convictions was entered on April 11, 2022 and is reported at *United States v. Hofstetter, et al.*, 31 F.4th 396 (6th Cir. 2022). A copy of the 6th Cir. opinion is attached to this petition as Appendix A. The judgment of the district court is unpublished and attached as Appendix B. The order of the district court denying Motion for New Trial was filed on September 14, 2020, and is attached as Appendix C. An excerpt from the transcript of the district court's jury instructions is attached as Appendix D.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit affirming Petitioner's convictions was entered on April 11, 2022. This Petition for Writ of Certiorari is filed within the authorized extension of time to file a Petition for Writ of *Certiorari* until August 11, 2022 as previously granted by the Court. The Court is has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

21 U.S.C. § 856(a)(1) provides:

(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)(1) provides:

(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.

21 CFR § 1306.04(a) provides:

Purpose of issue of prescription.

(a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829) and the person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

STATEMENT OF THE CASE

Sylvia Hofstetter came to Tennessee as a business manager to oversee the opening of a pain management clinic "USCC/CHCS" or "Gallagher View" in Knoxville, Tennessee owned by Chris Tipton, Benjamin Rodriguez, Luca Sartini, and Jimmy Palma. Ms. Hofstetter remained in Knoxville, ultimately, opening another clinic "Comprehensive Health Care" or the "Lenoir City clinic", owned by the same parties, and finally the "Lovell Road Clinic" which she owned with Christopher Tipton. These clinics employed medical directors to oversee nurse practitioners in the treatment of chronic pain including the prescription of opiates.

On March 10, 2015, the Government executed a search warrant at a pain clinic on Lovell Road in Knoxville, Tennessee ("EKHC" or "Lovell Road Clinic") and an associated clinic located in Lenoir City, Tennessee, Comprehensive Healthcare Systems ("CHCS" or "Lenoir City") and an indictment was issued for Ms. Hofstetter. On October 16, 2016 a First Superseding Indictment adding others as defendants. A Second Superseding Indictment was issued on July 17, 2017 adding additional defendants and additional counts. The Third Superseding Indictment issued on January 4, 2018, also added additional defendants and counts. The Fourth Superseding Indictment on May 1, 2018 included additional allegations and is the Indictment upon which the Defendants proceeded to trial.

On October 21, 2019, jury selection began and the jury was seated on October 22, 2019. The first witness was called on October 28, 2019. On February 13, 2020, after four months of trial, Ms. Hofstetter was convicted on Counts 1-7 and

11-14 and found not guilty on Counts 16 and 18 of the Fourth Superseding Indictment.

Following the verdict, Ms. Hofstetter moved the Court to renew her motion for judgement of acquittal and for a new trial. The district court denied this motion without a hearing on September 14, 2020. Appendix C.

On October 21, 2020, the district court sentenced Ms. Hofstetter to a term a total term of 400 months imprisonment, consisting of 240 months as to Counts 1-5 and 11-13 concurrent, 160 months as to Court 14 to run consecutively, and 120 months on Counts 6 and 7 to be served concurrently to all other counts. Appendix B. Judgment was entered on October 23, 2020. *Id.* A Notice of Appeal was timely filed on October 30, 2020. On April 11, 2022, the Sixth Circuit affirmed Ms. Hofstetter's convictions. *United States v. Hofstetter, et al.*, 36 F.4th 396 (6th Cir. 2022) Appendix A.

REASONS FOR GRANTING THE PETITION

Conflict among the Circuits exists as to the proper jury instruction on deliberate indifference and willful blindness and Ms. Hofstetter's jury was erroneously instructed.

The District Court erred when it denied defendant's jury instruction request to charge the elements of willful-blindness instruction under *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060 (2011). Given the conflict in the jury charges from various Circuits regarding deliberate indifference and willful blindness, the Court should adopt one standard to achieve uniformity among the Circuits. The Supreme Court should consider the willful blindness as set out in under *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060 (2011).

A district court's decision to give a particular jury instruction is reviewed for abuse of discretion and the substance of the instruction reviewed *de novo. United States v. Heredia*, 483 F.3d 913, 921 (9th Cir. 2007) (en banc). An instruction is appropriate if it is "supported by law and has foundation in the evidence." Id. at 922. As such, the district court must view the evidence in the light most favorable the party requesting." *Id.* If a party requests alternative instructions, the district court considers them separately to "determine if the evidence could for a verdict on either ground." *See United States v Charles YI* 704 F.3d. 800 (9th Cir. 2013).

In *United States v. Valburn,* 877 3rd 440, 445 (1st Cir. 2017) noted older cases have reviewed jury instructions for abuse of discretion, citing *United States v.*

Coviello, 225 F.3d 54, 73 (1st Cir. 2000), while more recent cases have undertaken *de novo* review citing *United States v. Parker*, 872 F.3d 1,14 (1st Cir. 2017). The Sixth Circuit Court in the instant case acknowledged that Hofstetter challenged the district court's deliberate-indifference instruction with respect to her distribution charge and reviewed for abuse of discretion. *United States v Hofstetter* 31 F.4th 396,418 (6th Cir. 2022).

The proof in this case was that Sylvia Hofstetter was a non-medical person, not a medical provider, who was in an administrator of three Tennessee pain clinics and part owner of one of the pain clinics with Chris Tipton. The original two Tennessee pain clinics were owned by Luca Sartini, Luigi Palma, Benjamin Rodriguez and Christopher Tipton These three pain clinics were the alleged basis for Ms. Hofstetter's charges and convictions.

There was no proof presented that Sylvia Hofstetter ever instructed the healthcare providers what medical tests to provide, what examinations to perform and what medication to prescribe to the patients. Each of the clinics had site managers. Stephanie Puckett was one of the site managers. It was described by many of the witnesses that Sylvia Hofstetter would come by the clinics mainly to look at the schedules of patients and to collect the money to be deposited in the bank. Unknowing to Hofstetter, Stephanie Puckett,

Shannon Hill and Patty Newman created a criminal scheme inside these clinics that involves such things as taking bribes from drug sponsors to get their clients in the clinic; changing prescriptions after the healthcare provider wrote the prescription in

order to increase the number of pills; change and fake MRIs; Shannon Hill would manipulate urine screens before they went back to the healthcare providers in order to create an appearance that the patient had the correct medications in their urine. In addition, these three individuals would counsel with patients in order to advise them what to say or not to say in order to look legitimate. Stephanie Puckett even became a drug dealer wherein she would sponsor patients and split the pills, keeping half for herself.

In the summer of 2014, Stephanie Puckett and Shannon Hill left the clinics to go start a pain clinic of their own. During phone conversations that were subject to FBI wiretaps, Stephanie Puckett admitted that Shannon Hill had advised her that Sylvia Hofstetter was investigating the clinic files to determine what if anything had been going on with the clinic records. Stephanie Puckett admitted that Sylvia Hofstetter was actively trying to get a handle on what was going on in the clinic. Stephanie Puckett admitted that her criminal scheme with Shannon Hill and Patty Newman as described herein was concealed from Mrs. Hofstetter.

Defendant Hofstetter initially objected to the court charging the jury with the deliberate indifference instruction. With respect to the knowledge element, the district court instructed the jury that Hofstetter could be found liable under the doctrine of deliberate indifference:

> "Although knowledge of the defendant cannot be established merely by demonstrating that she was careless, knowledge may be inferred if the defendant deliberately blinded herself to the existence of a fact. No one can avoid responsibility for a crime by deliberately ignoring the obvious. If you are convinced that the defendant deliberately ignored a high probability that the controlled substances, as alleged in these counts, were

> distributed outside the usual course of professional practice and not for a legitimate medical purpose, then you may find that the defendant knew that this was the case.
>
> But you must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed outside the usual course of professional practice and not for a legitimate medical purpose, and that the defendant deliberately closed her eyes to what was obvious.
>
> Carelessness or negligence or foolishness on her part are not the same as knowledge, and are not enough to find her guilty of any offense charged under this law" Appendix A, Page 13.

This charge was applied to Counts fourteen, sixteen, and eighteen of the fourth superseding indictment, the substantive distribution counts. Hofstetter was convicted on count fourteen and acquitted on counts sixteen and eighteen. The conviction is significant in that Hofstetter received a sentence of 160 months consecutive to the 240 months imposed on all other convictions.

Based upon the evidence at trial, defendant Hofstetter filed a proposed to a jury instruction stating in part that if the court charged the doctrine of willful blindness or deliberate ignorance the proper charge to the jury should be willful blindness as set out in *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060 (2011), and include elements that 1) the defendant must subjectively believe that there is a high probability that a fact exists and; 2) the defendant must take deliberate actions to avoid learning of that fact.

Several of the circuits use a variation of the suggested deliberate ignorance instruction. In *United States v. Hiland*, 909 F. 2d 1114, 1130 (8th Cir. 1990) the willful blindness instruction "allows the jury to you to impute knowledge to the defendant of

what should be obvious to him, if it found, beyond a reasonable doubt, a conscious purpose to avoid enlightenment." In *United States v. Barnhart*, 979 F.2d 647, 651 (8th Cir. 1992) citing *Hiland* noted the "instruction should not be given out in all cases because, despite the instruction's cautionary disclaimer there is a possibility that the jury will be held to employ a negligence standard and convict defendant on the impermissible ground that he should have known[an illegal act] was taking place.... Consequently, if the evidence in the case demonstrates only that the defendant either possessed or lacked actual knowledge of the facts in question-- and did not also demonstrate some deliberate efforts on his part to avoid obtaining actual knowledge-- a willful blindness instruction should not be given."

In *United States v. Macias* 786 F.3d 1060, 1062 (7th Cir. 2015) referred to the charge as the "ostrich instruction" stating "an ostrich instruction should not be given unless there is evidence that the defendant engaged in behavior that could reasonably be interpreted having been intended to shield him from confirmation of his suspicion that he was involved in criminal activity." As this Court stated in *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 131 S. Ct. 2060 (2011) a defendant must not only believe that there is a high probability a fact exists but also must take deliberate actions to avoid learning of the fact. The Court reversed in *Global-Tech* based upon the poorly worded charge. *Id.*

The Court's recent decision in *Ruan v. United States* should be applied to deliberate indifference and willful blindness instructions.

The first element in willful blindness instruction pronounced in *Global-Tech* addresses the defendant's *subjective* belief. *Id* at 2070. *It* is a higher standard than the deliberate-indifference instruction given to Ms. Hofstetter's jury. It is also consistent with the Court's recent analysis in *Xiulu Ruan v United States* and *Shakeel Kahn v United States* 142 S. Ct. 2370 (2022). In *Ruan* the Court reviewed the convictions of two medical doctors that were charged and convicted under 21 U.S.C. § 841(a)(1) for providing prescriptions without a legitimate medical purpose and acting outside the usual course of professional practice. *Id. Ruan* had asked for a jury instruction that would require the government to prove that he subjectively knew that his prescriptions fell outside the scope of his prescribing authority. *Id.* The district court had rejected a request for a subjective belief standard and charged an *objective* standard. On review, this Court stated "we have referred to this culpable mental state as "scienter" which means the degree of knowledge necessary to make a person criminally responsible for his or her acts." *Id.* at 2377 *citing* Black's Law Dictionary 1613 (11th Ed. 2019); *Morrissett v. U.S.* 342 U.S. at 250-252.

While Sylvia Hofstetter was not authorized to nor did she prescribe prescriptions of a controlled substance, co-defendant Courtney Newman was a nurse practitioner authorized to prescribe control substances and employed by a clinic Ms. Hofstetter managed. At trial the testimony before the jury regarding count fourteen showed that Courtney Newman saw patient A.V.K. on November 14, 2013 and after consulting with

her, provided her with a prescription for oxycodone, a schedule II controlled substance. The only proof before the jury regarding Count 14 was regarding that prescription written by Ms. Newman to A.V.K. on that date. There was no proof of an unlawful prescription by Courtney Newman on that date, in fact Ms. Newman was acquitted on Count fourteen, nor was their any proof of any other health care provider prescribing schedule II controlled substance to A.V.K. on or about November 14, 2013 at these clinics.

The government did not present proof of the *mens rea* of Ms. Hofstetter as to Count fourteen. They did not prove her subjective belief (scienter) as to that prescription or whether she subjectively knew whether Courtney Newman was authorized to prescribe that medication, or did so with a legitimate medical purpose in the usual course of professional practice. There is no proof that defendant Hofstetter was even aware of this patient and her chart. Over the objections of the defendant, the government spent a great deal of time talking about allegations of theft, gambling and other nefarious alleged conduct against Sylvia Hofstetter in order to create an objective belief that Mrs. Hofstetter should've known that the prescriptions were being unlawfully prescribed. Given the severity of the penalty 160 months consecutive to 240 months, "such severe penalties counsel is in favor of a strong scienter requirement". And this Court should require it in the instant case. See *Ruan v. United States*, 142 S. Ct. 2370 (2022).

The trial court also erred inf ailing to instruct the second element of the willful blindness instruction that Ms. Hofstetter must have taken deliberate action to avoid

learning of the facts. The proof at trial showed defendant Hofstetter took deliberate steps to investigate questionable activities in the clinics. She did not deliberately take actions to avoid learning what was going on with the clinics but to the contrary took an affirmative action and launched an investigation in the clinics to determine what had been going on in the clinics and its medical records.

While the District Court's jury charge tracked the Sixth Circuit jury pattern instruction 2.09 "deliberate ignorance" it is a much weaker instruction than that of willful blindness as stated in Global-Tech. The defendant disagrees with the Court of Appeals conclusion that the jury charge given was "functionally equivalent" to the *Global-Tech* instruction. Finally, the language in the Court's deliberate indifference instruction "carelessness or negligence or foolishness on her part are not the same as knowledge and are not enough to find her guilty of any offense charge under this law" implies that anything more than carelessness, negligence or foolishness is sufficient to prove knowledge, thus setting the standard of proof lower than scienter.

United States v. Parker 872 F.3d 1, 15(1st Cir. 2017) noted "recent cases have brought clarity to this area, explaining, for example, that the standard of review depends on the nature and circumstances of the particular claim of error. *See United States v. De La Cruz*, 835 F.3d 1, 12 (1st Cir. 2016). Here, as we said a 2nd bill, Parker's claims turn on whether the trial evidence supported a willful-blindness instruction and over whether the issued instruction relieved of the government of its burden to prove his knowledge. And given our current case law, these claims demand de novo review. *See Id,*: see also, United States v George 841 F.3d 55, 65 (1st Cir. 2016)."

It is the defendant's position that the Sixth Circuit Court of Appeals in this case was in error in its determination that the standard of review is abuse of discretion and in upholding the District Court judge's decision not to charge willful blindness as pronounced in *Global-Tech*.

It is Defendant's position that if the jury had been instructed to look at the subjective belief of Ms. Hofstetter as to whether there was a high probability that a fact existed as to an unlawful prescription in count fourteen and that Ms. Hofstetter must have taken deliberate action to avoid learning the facts she would not have been convicted. In light of that error and in light of this Court' illuminating language in *Ruan* concerning the subjective mindset of the defendant, the poorly worded instruction given in the instant case should be grounds for a reversal of Ms. Hofstetter's convictions.

Given the conflict among Circuits regarding the Ostrich instruction, deliberate indifference and willful blindness, the Supreme Court should adopt one uniform standard across the Circuits. This Court should also consider the willful blindness instruction in the context of its recent decision in *Ruan*.

The scienter requirement stated in *Ruan* should also be applied to Ms. Hofstetter's convictions for violations of 21 U.S.C. §846 and §856.

Ruan held that, in cases of authorized healthcare professionals prescribing controlled substances, the government must prove that the authorized healthcare professional 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. Physicians and medical professionals authorized to prescribe

controlled substances charged with violations of §846 and 856 will be subject to a different standard of proof for the same conduct as in § 841 cases, unable to determine whether their lawful conduct in prescribing medications for their patients will be deemed unlawful for the purpose of operating their business unless this Court rules that the holding in *Ruan* applies to prosecutions under § 856 . This dichotomy is an issue that needs to be addressed under the reasoning of *Ruan*.

Ms. Hofstetter specifically adopts and incorporates by reference the Petitions for Writ of Certiorari filed by Co-Defendants Cynthia Clemons, Courtney Newman, and Holli Womack as to this issue as if fully set forth herein.

CONCLUSION

For the foregoing reasons, Sylvia Hofstetter requests this Court 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 this the 10th day of August , 2022.

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