No. 22-6503

IN THE SUPREME COURT OF THE UNITED STATES

PATRICK EMEKA IFEDIBA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should grant certiorari, vacate the judgment of the court of appeals, and remand in light of Ruan v. United States, 142 S. Ct. 2370 (2022).

RELATED PROCEEDINGS

United States Court of Appeals (11th Cir.):

United States v. Ifediba, No. 22-11123 (May 13, 2022)

United States v. Ifediba, Nos. 20-13218 & 20-13303 (Aug. 25, 2022)

United States District Court (N.D. Ala.):

United States v. Ebio, No. 18-cr-103 (Aug. 21, 2020)

United States v. Ozuligbo, No. 18-cr-103 (Aug. 27, 2020)

United States v. Ifediba, No. 18-cr-103 (Aug. 27, 2020)

United States v. Ebio, No. 18-cr-103 (Aug. 27, 2020)

United States v. Ifediba, No. 18-cr-103 (Aug. 19, 2021)

United States v. Ifediba, No. 18-cr-103 (Mar. 24, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 46 F.4th 1225. The opinions of the district court (Pet. App. E1-E3, H1-H13) are not printed in the Federal Supplement but are available at 2019 WL 2578123 and 2019 WL 6219209.

JURISDICTION

The judgment of the court of appeals was entered on August 25, 2022. The petition for a writ of certiorari was filed on November 23, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted on one count of conspiring to commit healthcare fraud, in violation of 18 U.S.C. 1349; ten counts of healthcare fraud, in violation of 18 U.S.C. 1347; one count of conspiring to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846; 14 counts of distributing controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of maintaining premises for the distribution of controlled substances, in violation of 21 U.S.C. 856(a)(1); one count of conspiring to launder money, in violation of 18 U.S.C. 1956(h); three counts of engaging in financial transactions intended to conceal unlawful proceeds, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and four counts of financial transactions involving unlawful proceeds, in violation of 18 U.S.C. 1957. Pet. App. C1. Petitioner was sentenced to 360 months of imprisonment, to be followed by three years of supervised release. Id. at C2-C3. The court of appeals affirmed. Id. at A1-A16.

1. Petitioner, a physician, operated a clinic with his wife in Birmingham, Alabama, that "prescribed large quantities of opioids to patients who had no medical need for them." Pet. App. A1; Gov't C.A. Br. 2-3.

Petitioner and his wife were the only physicians at the clinic and, although neither specialized in pain management, they wrote large quantities of controlled-substance prescriptions -- including for oxycodone, fentanyl, and Xanax -- for patients. Pet. App. A2. Between 66% and 85% of the clinic's patients received prescriptions for opioids. Gov't C.A. Br. 5. Patients often waited over three hours in a dirty, crowded waiting room to receive prescriptions; the clinic stayed open until 10 p.m. to accommodate them. Pet. App. A2. Patients without insurance paid cash for each visit, and, if a patient did not have the full amount, petitioner would not treat that patient. Gov't C.A. Br. 4.

The clinic also "ran an allergy-testing and treatment scheme in which it required insured patients to undergo allergy testing and prescribed them medication despite their negative allergy tests" -- and then "billed Medicare and private insurers for the tests and treatments." Pet. App. A1; see id. at A2-A5, A12-A13. Some patients never received the prescribed therapy, but the clinic billed Medicare and private insurers regardless. Id. at A3. Petitioner instructed technicians to falsify records related to allergy testing and treatment. See Gov't C.A. Br. 9.

In 2014, a private insurer noticed the unusually high volume of allergy-related claims coming from petitioner's clinic and announced an audit. Pet. App. A3; Gov't C.A. Br. 10. In preparation for the audit, petitioner instructed clinic staff to

change patient records by replacing negative allergy test results with positive results. Pet. App. A3. The insurer nonetheless discovered that patients had not needed the allergy tests or treatment; it requested a refund of $220,000 in benefits paid to the clinic. Ibid.

Drug Enforcement Administration agents conducted surveillance at the clinic, and four undercover officers repeatedly posed as patients seeking treatment. Gov't C.A. Br. 5. One undercover officer saw petitioner on four separate occasions and received an opioid prescription each time. Ibid. On his second visit, that officer received a prescription for oxycodone and fentanyl -- a dangerous combination. Ibid. Petitioner also prescribed Percocet to a different undercover officer on his second visit without seeing him or asking why he had requested "stronger" medication. Id. at 6.

2. A federal grand jury in the Northern District of Alabama charged petitioner with one count of conspiring to commit healthcare fraud, in violation of 18 U.S.C. 1349; ten counts of healthcare fraud, in violation of 18 U.S.C. 1347; one count of conspiring to distribute controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C) and 846; 14 counts of distributing controlled substances, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); one count of maintaining premises for the distribution of controlled substances, in violation of 21 U.S.C. 856(a)(1); one

count of conspiring to launder money, in violation of 18 U.S.C. 1956(h); three counts of engaging in financial transactions intended to conceal unlawful proceeds, in violation of 18 U.S.C. 1956(a)(1)(B)(i); and four counts of financial transactions involving unlawful proceeds, in violation of 18 U.S.C. 1957. Indictment 12-13. The grand jury charged three other individuals with related offenses, Indictment 12-26, 29-35, 37-39, one of whom (a clinic technician) proceeded to trial with petitioner, Pet. App. A3-A4.

Before trial, the government filed a motion in limine seeking to exclude (1) evidence about the purportedly legitimate care that the clinic provided to certain patients whose care was not the basis for any charge in the indictment and (2) evidence that some patients had positive experiences at the clinic. D. Ct. Doc. 71 (Dec. 17, 2018). The district court orally granted the motion, explaining that such evidence "doesn't negate the intent with respect to the conspiracy itself" and is "inadmissible for three reasons: One, it's not relevant; two, even if it had some limited probative value, it's outweighed by the unfair prejudice of confusing the jury; and three, it becomes character evidence." 2/5/19 Tr. 42, 45. In a follow-up written opinion, the court additionally observed that under Federal Rule of Evidence 404(a)(1) "the government generally cannot introduce evidence attempting to show that a defendant was predisposed to commit a

crime, nor can a defendant present evidence of generally good conduct in an attempt to negate the government's showing of criminal intent." Pet. App. E2 (citation omitted).

At trial, the government presented patient records, treatment logs, and billing records, along with testimony from former clinic patients, undercover officers who had posed as patients, clinic staff, insurance fraud investigators, medical experts, and a cooperating co-conspirator. See Pet. App. A4. At the close of trial, the district court instructed the jury that, in order to return a guilty verdict on the Section 841(a) counts for unlawfully dispensing a controlled substance, it was required to find that petitioner (1) "dispensed by prescription the identified * * * controlled substance or substances to the identified individual," (2) "did so knowingly and intentionally," and (3) "did not have a legitimate medical purpose to do so or did not do so in the usual course of professional practice." 7/15/19 Tr. 30-31. The court further instructed that "a controlled substance is prescribed by a physician in the usual course of professional practice and, therefore, lawfully if the substance is prescribed by him in good faith as part of his medical treatment for the patient in accordance with the standard of medical practice generally recognized and accepted in the United States." Id. at 31. Petitioner did not object to those instructions. See id. at 144; 7/11/19 Tr. 14-22.

The jury found petitioner guilty on all counts. Pet. App. C1. The district court denied petitioner's motion for new trial, id. at H1-H13, noting that the government presented "overwhelming evidence of [petitioner's] guilt" on the Section 841(a) counts, id. at H8. The court sentenced petitioner to 360 months of imprisonment, to be followed by three years of supervised release. Id. at C2-C3.

3. The court of appeals affirmed. Pet. App. A1-A16.

The court of appeals found that the district court had permissibly excluded evidence purporting to show that petitioner provided legitimate medical treatment to some patients. Pet. App. A8. The court of appeals explained that "Federal Rule of Evidence 404(a)(1) forbids such use of character evidence" and "'evidence of good conduct is not admissible to negate criminal intent.'" Ibid. (brackets and citation omitted). And it agreed with the district court that petitioner could not "portray [himself] as a person of good character by pointing to his prior good acts." Ibid.

The court of appeals also rejected petitioner's contention that the exclusion of that evidence impaired his constitutional right under the Fifth and Sixth Amendments to present a defense to the Section 841(a) charges of unlawfully distributing controlled substances. Pet. App. A8; see Pet. C.A. Br. 21-24. Observing that "the government never alleged that [petitioner] unlawfully

treated every patient who walked through [the clinic's] doors: indeed, it conceded that his treatment of some patients was legitimate," the court explained that therefore "it was no defense" to the Section 841(a) charges "that [petitioner] lawfully treated some patients. Pet. App. A8.

ARGUMENT

Petitioner asks (Pet. 22-27) this Court to grant the petition for a writ of certiorari, vacate the decision below, and remand the case for further proceedings (GVR) in light of Ruan v. United States, 142 S. Ct. 2370 (2022). That course is not warranted because petitioner failed to present any claim to the court of appeals implicating Ruan even though this Court decided Ruan before the court of appeals issued its decision in this case. And his other claims are entirely factbound and largely forfeited. The petition for a writ of certiorari should be denied.

1. The Controlled Substances Act (CSA or Act), 21 U.S.C. 801 et seq., makes it a federal crime "for any person knowingly or intentionally * * * to manufacture, distribute, or dispense * * * a controlled substance," "[e]xcept as authorized" by the Act. 21 U.S.C. 841(a)(1). A prescription is "authorized" by the Act "when a doctor issues it 'for a legitimate medical purpose . . . acting in the usual course of his professional practice.'" Ruan, 142 S. Ct. at 2375 (quoting 21 C.F.R. 1306.04(a) (2021)). In Ruan, this Court held that the CSA's "'knowingly or

intentionally' mens rea applies to authorization." Ibid. Accordingly, "[a]fter a defendant produces evidence that he or she was authorized to dispense controlled substances, 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." Ibid.

Petitioner asks this Court to GVR in light of Ruan because the district court precluded his presentation of "evidence supporting his lawful 'intent'" and did not instruct the jury that "lawful 'subjective intent' was a complete defense." Pet. 23; see Pet. 26-27. A GVR is not warranted in this case. This Court's "traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'" United States v. Williams, 504 U.S. 36, 41 (1992) (citation omitted); see, e.g., Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Adickes v. S. H. Kress & Co., 398 U.S. 144, 147 n.2 (1970). Applying that rule here would preclude a grant of certiorari because petitioner did not challenge his conviction in the court of appeals on the ground that excluded evidence was necessary to show his mens rea or that the jury instructions omitted the requisite mens rea. See Pet. App. A1-A16; see also generally Pet. C.A. Br.

This Court has sometimes entered a GVR order to allow a lower court to consider a previously unraised claim that acquired new

vitality as a result of an "intervening" event. See Lawrence v. Chater, 516 U.S. 163, 167-168 (1996) (per curiam) (describing this Court's "intervening development" GVR practice); see also id. at 180-181 (Scalia, J., dissenting) (explaining that the Court's "intervening event" GVR practice involves "a postjudgment decision of this Court" or, occasionally, a decision of this Court that "preceded the judgment in question, but by so little time that the lower court might have been unaware of it") (emphasis omitted). Here, however, this Court decided Ruan on July 29, 2022, while petitioner's direct appeal was pending, and petitioner -- who was represented by counsel in the court of appeals, see Pet. C.A. Br. 32 -- had nearly four weeks to raise any Ruan-based contentions before that court rendered its decision on August 25, 2022, see Pet. App. A1. He failed to do so, and he then failed to seek panel rehearing or rehearing en banc in order to raise a belated Ruan-based claim before the mandate issued on September 23, 2022 -- eight weeks after Ruan was decided. See C.A. Doc. 61-1.

In these circumstances, nothing warrants a departure from this Court's ordinary practice of granting certiorari with regard only to claims that were pressed or passed upon below. The Court has repeatedly denied certiorari in cases with an analogous procedural history. See Mohr v. United States, 140 S. Ct. 961 (2020) (No. 19-6289) (denying petition for writ of certiorari invoking, inter alia, a recent statutory-interpretation decision

of this Court that was available but not brought to the attention of the court of appeals while petitioner's direct appeal remained pending); see also Reed v. United States, 141 S. Ct. 2765 (2021) (No. 20-7355) (same); James v. United States, 141 S. Ct. 1520 (2021) (No. 20-6492) (same); Stitt v. United States, 140 S. Ct. 2573 (2020) (No. 19-7074) (same); Golden v. United States, 140 S. Ct. 2521 (2020) (No. 19-7011) (same); Brown v. United States, 140 S. Ct. 1136 (2020) (No. 19-6517) (same); Leach v. United States, 140 S. Ct. 964 (2020) (No. 19-6722) (same); Mathis v. United States, 140 S. Ct. 962 (2020) (No. 19-6655) (same); Leon v. United States, 139 S. Ct. 56 (2018) (No. 17-8008) (same). The Court should follow the same course here.*

2. Petitioner also summarily asserts (Pet. 27-28) that his convictions and sentence violate the First, Fourth, Fifth, Sixth, and Eighth Amendments; that insufficient evidence supports his convictions; that the district court admitted inappropriate expert

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* Were the Court to GVR this case, the government would maintain that petitioner failed to preserve any Ruan claim and that plain-error relief is not warranted. He did not object to the jury instructions. 7/11/19 Tr. 14-22; 7/15/19 Tr. 144. And while he challenged the exclusion of the contemplated evidence in the court of appeals, he did not do so on the ground that the excluded evidence addressed his mental state at the time he issued the relevant controlled-substance prescriptions to the patients referenced in the indictment. See, e.g., Pet. C.A. Br. 22-23 (arguing only that petitioner "would have put on witnesses to show dismissals for violating the clinic's rules as well as other instances of good care and practice" in order "[t]o combat * * * allegations" that the clinic was a "'pill mill'" and "present a complete defense") (citations omitted).

testimony, impaired his right to allocution, and imposed a substantively unreasonable sentence; and that the government engaged in misconduct. Petitioner appears (Pet. 28) to "submit[]" those claims "to preserve [his] right to raise them in a motion pursuant to 28 U.S.C. § 2255." But to the extent that he is requesting certiorari as to any of them, that request is unsound.

First, the additional claims are factbound assertions of error that do not warrant this Court's review. See Sup. Ct. R. 10. Second, other than a sufficiency challenge to his convictions for healthcare fraud, see Pet. App. A4 n.4, A12-A13, petitioner failed to advance them in the court of appeals. "'Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.'" Zobrest, 509 U.S. at 8 (quoting Adickes, 398 U.S. at 147 n.2). Third, petitioner discusses those claims only in a cursory fashion without developed argument or record citations, and federal courts generally "refuse to take cognizance of arguments that are made in passing without proper development." Johnson v. Williams, 568 U.S. 289, 299 (2013).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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