NO. 22-6653

IN THE

SUPREME COURT OF THE UNITED STATES

JAYSON MONTGOMERY,
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

REPLY BRIEF OF PETITIONER JAYSON MONTGOMERY

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Table of Authorities

I. The Lower Courts and the Government Have Improperly Aggregated Individual Instances to Infer Guilt on these Petitioners as a "Group," in conflict with Ruan v. United States, 213 L. Ed. 2d 706, 142 S. Ct. 2370 (2022)

In its Brief in Opposition, the government inaccurately frames the question presented as merely a sufficiency of evidence issue. Rather, the question for this Court presented by this record is whether the government must establish subjective intent to engage in unlawful conduct in order to convict a defendant of healthcare fraud and violation of the anti-kickback statute."

In the statement that appears in the government's response, the Petitioners are labeled as drug marketers engaged in a pyramid scheme. Most telling is the conflation by the government of individual events, involving certain Petitioners but obviously not others, with an inference that "they" did all these things as a group such that all are guilty.

For its part, the Sixth Circuit similarly infers guilt by aggregating the actions of certain persons to support a conclusion that the whole group, including even individuals whose involvement or knowledge was clearly absent, had nothing to do with the "wrongful" conduct. This is especially true with respect to Mr. Montgomery.

This excerpt from the Sixth Circuit opinion illustrates the point:

> At every turn, these defendants demonstrated their intent to defraud. They targeted family, friends, coworkers, and service members who had insurance that wouldn't scrutinize compound drug prescriptions; they paid customers to order the creams and pills by misrepresenting that they were part of a nonexistent clinical trial, paying direct commissions, or paying the customers' co-pays; they created pre-set order pads with drug formulas tailored to maximize profit rather than medical efficiency; they persuaded customers to order unneeded and unwanted creams; they ordered extra creams and refills for customers without their knowledge or consent; they paid medical providers to sign prescriptions without seeing patients and stamped the providers' signature without consent; they directed pharmacists to backdate

> prescriptions to fall within the period before insurers stopped covering compound drugs; and these drugs were excessively expensive relative to their demonstrated benefit, netting the defendants millions of dollars in just two years. A reasonable factfinder could easily conclude that these actions constitute an intentional, comprehensive scheme to defraud and establish the defendants' guilt beyond a reasonable doubt.

(Doc. 61-2, Opinion, pp. 20-21).

The problem with this conclusory language is that the record can only be read to infer, but not evidence, that *"they"* did any such things. Wilkerson, for instance, was not involved in any of the instances where the signature stamp of the nurse practitioner was used on a prescription without her knowledge (and no such prescriptions were introduced into evidence), nor was there evidence that Wilkerson was involved in telling patients about any clinical trial (which in any event, is not illegal). *See* R. 313, PageID##2803–04. Hindmon was said to "knowingly" participate in a scheme to defraud because "*they* persuaded customers to order unneeded and unwanted creams" and "*they* directed pharmacists to backdate prescriptions." What is lacking, however, is proof of his knowledge or involvement in such things, and neither should be inferred as a matter of law.

As for Mr. Montgomery specifically, the government conveniently sidesteps the fact that he was acquitted of health care fraud or of any conspiracy. The record amply demonstrates that he was not a participant in what the government labels as wrongful conduct, nor is there evidence that establishes his knowledge of such wrongfulness.

For instance, he had no involvement in paying a pharmacist to help devise compound drug formulas including expensive ingredients. He did not prepare pre-

printed prescription pads or ask providers to backdate prescription orders. He did not pay a nurse practitioner to wrongfully execute prescription scripts in blank. He was not responsible for sending prescriptions to pharmacies for unwanted or unneeded products. He did not pay any customers' co-pays. Although it is assumed that he instructed others to do such things, the testimony of Zac Rice, a government witness, confirms that he was instructed by Montgomery not to pay anyone to order the compounded creams nor to forge any signatures for orders.

Meanwhile, certain actions in which Montgomery *was* involved are inaccurately portrayed as wrongful: identifying customers who had insurance that would reimburse for compound medications and encouraging customers to order compound creams along with "wellness" tablets, for instance. Suggesting that Montgomery "recruited his own downlinks by promising them commissions" and "instructed" his downlinks to tell customers that they were being "paid as part of a clinical trial that was nonexistent" does not imply that Montgomery knew that such commissions were improper or that there was no clinical trial.

Mr. Montgomery was not found guilty of conspiracy to commit fraud, but somehow both lower courts determined that he knew the payments he received were illegal. This result is illogical on this record and demonstrates how important is the Court's ruling in Ruan requiring a finding of specific intent as to each defendant before a court. More than a conflict regarding the sufficiency of evidence, this matter involves judicial analysis in the courts below that conflict with Ruan, 213 L. Ed. 2d 706 and create a circuit split. This Court has determined that the

government must establish subjective intent of lawful conduct to sustain criminal convictions. Id. at 2376, 2382 (requiring that government prove "a defendant knew or intended that his or her conduct was unauthorized"). The district court's invention of a failure to disclose theory and the Sixth Circuit's application of an objective test do not satisfy that standard. Further clarification by this Court is obviously needed by way of a grant of this Petition.

The First, Second, Fifth, and Eleventh circuits have determined that the government must establish that the defendant knew that his or her actions were fraudulent or unlawful to be convicted of healthcare fraud or related offenses. *See, e.g.*, United States v. Nora, 988 F.3d 823, 831 (5th Cir. 2021) (holding defendant must have understood his actions to be fraudulent or unlawful to be convicted and acted with "bad purpose"); United States v. Nerey, 877 F.3d 956, 969 (11th Cir. 2017) ("[w]illful[ly]" means "with the specific intent to do something the law forbids, that is with a bad purpose").

At all points in this matter, Montgomery has maintained this his case cannot be distinguished from Nora, except as considered by the Sixth Circuit. The record behind this Petition, then, illustrates that the Sixth Circuit does not require the government to present evidence that is obviously required in other Circuits. This case presents an example of the question presented – as noted by the other Petitioners before the Court, the question was fully preserved below, and there are no alternative grounds upon which the courts below based their rulings.

Accordingly, this Court should grant the Petition or, alternatively, grant the Petition, vacate the lower court decisions, and remand the case in light of Ruan.

II. Ruan Is Applicable to this Matter

This Court confirmed in Ruan that a defendant's subjective mental state must be established to uphold a criminal conviction. The government argues that Ruan does not apply because it "construed a different requirement in a different statute." Op. 14. This Court did not intend, however, for Ruan to be so limited.

Ruan recognized that the "knowingly and intentionally" language of the Controlled Substances Act applied to the "except as authorized" language and required the government to prove that "a defendant knew or intended that his or her conduct was unauthorized." 142 S. Ct. at 2376, 2382. This requirement was not intended to be limited to the Controlled Substances Act. Rather, the Court in Ruan sets forth that a *mens rea* standard should apply to statutes closely analogous to the Controlled Substances Act. If such an intention is not in evidence in light of the ruling of Ruan, even more cause exists to grant the relief sought in this Petition to address the reach of that decision.

This Court stated in Ruan that there is "a longstanding presumption, traceable to the common law that Congress intends to require a defendant to possess a culpable mental state." 142 S. Ct. at 2376-77 (quoting Rehaif v. United States, 204 L. Ed. 2d 594, 139 S. Ct. 2191, 2195 (2019)); *see also* United States v. X-Citement Video, Inc., 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994); Morissette v. United States, 342 U.S. 246, 256–258, 72 S. Ct. 240, 96 L. Ed. 288 (1952). This is true because, "With few exceptions, 'wrongdoing must be conscious to be criminal.'" Id. (quoting Elonis v. United States, 575 U.S. 723, 734, 135 S. Ct. 2001, 192 L. Ed. 2d 1 (2015)). Meanwhile, a strict *mens rea* requirement "helps to diminish the risk of

'overdeterrence,' i.e., punishing acceptable and beneficial conduct that lies close to, but on the permissible side of, the criminal line." Id. at 2378. Ruan, in sum, makes clear that a criminal statute requiring knowing and intentional conduct compels the government to prove that a particular individual defendant subjectively knew he was acting unlawfully.

Contrary to what the government claims, cases in which this Court has granted certiorari, vacated lower court decisions, and remanded in light of Ruan demonstrate that the Court should follow suit here. In Hofstetter v. United States, 214 L. Ed. 2d 168, 143 S. Ct. 351 (2022) (No. 22-5346), not addressed by the government, a business manager allegedly wrote unnecessary prescriptions for compound pain creams. *See* United States v. Hofstetter, 31 F.4th 396, 421 (6th Cir.), cert. granted, judgment vacated sub nom. Newman v. United States, 214 L. Ed. 2d 167, 143 S. Ct. 350 (2022), and cert. granted, judgment vacated sub nom. Womack v. United States, 214 L. Ed. 2d 167, 143 S. Ct. 350 (2022), and cert. granted, judgment vacated sub nom. Clemons v. United States, 214 L. Ed. 2d 168, 143 S. Ct. 350 (2022), and cert. granted, judgment vacated, 214 L. Ed. 2d 168, 143 S. Ct. 351 (2022). In that case, the district court had instructed the jury that the requisite intent could be inferred if the defendant had deliberately blinded herself to the existence of criminal conduct. That issue, arising from the same Circuit as this case, is analogous to the question in this case of whether and when criminal intent can be properly *inferred*.

The fact that the government maintains that Ruan is but an illustration of the fact that the granting of certiorari is needed here to clarify the extent of the government's burden in criminal healthcare cases. The principal of that case is not limited to the Controlled Substances Act, and this case provides a suitable vehicle for the Court to establish that point.

III. The Sixth Circuit Failed to Apply the Proper Standard of Intent

Already discussed above are decisions from the First, Second, and Eleventh Circuits which hold the government must establish in anti-kickback cases that subjective knowledge by a defendant that his or her actions were fraudulent or unlawful. *See, e.g.*, Nora, 988 F.3d at 831 (holding defendant must have "acted with 'bad purpose'" in carrying out his responsibilities; he must have understood his actions to be fraudulent or unlawful to be convicted); Nerey, 877 F.3d at 969 ("[w]illful[ly]" under the anti-kickback statute means "with the specific intent to do something the law forbids, that is with a bad purpose"); United States v. Troisi, 849 F.3d 490, 494 n.8 (1st Cir. 2017) ("'willfulness' is normally understood to encompass 'specific intent,' and both terms require a finding that the defendant acted with a purpose to disobey or disregard the law, rather than by ignorance, accident, or mistake"); *see also* Pfizer, Inc v. United States Dep't of Health & Hum. Servs., 42 F.4th 67, 77 (2d Cir. 2022), cert. denied sub nom. Pfizer Inc. v. Dep't of Health & Hum. Servs., 214 L. Ed. 2d 370, 143 S. Ct. 626 (2023) ("willfully" as used in the anti-kickback statute means "a voluntary, intentional violation of a known legal duty").

Predictably, the government asserts that the Sixth Circuit does not apply a different standard in this case. The government, however, fails to address the argument that the Sixth Circuit erred by considering the Petitioners' conduct in the aggregate and then found intent to defraud on all their parts. Decisions from the other Circuits demonstrate that the analysis should have determined whether each Petitioner could be found to have acted with the required subjective intent. Aggregating defendants' actions and inferring intent does not satisfy the standard set forth in Ruan that requires the government to establish the requisite

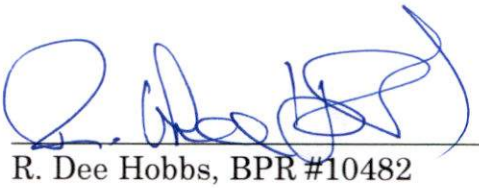
specific intent for each defendant individually. Review is necessary by this Court to make this holding clear and meaningful in cases such as this one.

IV. Conclusion

The Court should grant the petition or, alternatively, grant the Petition, vacate the lower court decisions, and remand the case in light of Ruan.

This 15th day of May, 2023.

Respectfully Submitted,



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PROOF OF SERVICE AND WORD COUNT

I, R. DEE HOBBS, do swear or declare that on this date, May 14, 2023, as required by Supreme Court Rule 29, I have served the enclosed REPLY BRIEF on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

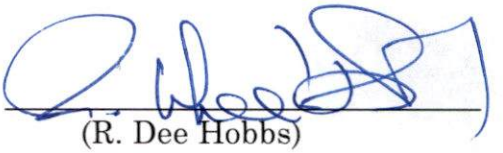
Elizabeth Barchas Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530-0001

With a courtesy copy also e-mailed this same date to the Solicitor General at:
SUPREMECTBRIEFS@USDOJ.GOV

I further declare that this Reply Brief complies with the word limitations set by rule of this Court as it contains 2476 words in its entirety.

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

Executed May 15, 2023



(R. Dee Hobbs)