No. 22-6970

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

JEFFREY KESTEN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

COURT OF APPEALS FOR THE TENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JEFFREY KESTEN
(Your Name)

19 NEVILLE COURT
(Address)

MANCHESTER, NEW JERSEY, 08759
(City, State, Zip Code)

(609) 389-5096
(Phone Number)

QUESTION(S) PRESENTED

(1) Can a court enforce an appeal waiver from a plea agreement when the defendant was not informed of and did not plea to the proper *mens rea* element for the crime charged?

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

United States v. Kesten, No. 1:20-CR-00291-DDD-1, U.S. District Court for the District of Colorado. Judgment entered February 24, 2022.

United State v. Kesten, No. 22-1066, U.S. Court of Appeals for the Tenth Circuit. Judgment entered August 23, 2022.

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STATUTES AND RULES

OTHER

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☒ is unpublished.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☒ is unpublished.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**:

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[ ] is unpublished.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[ ] is unpublished.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

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was August 23, 2022.

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

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 20, 2022, 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 February 17, 2023 (date) on November 28, 2022 (date) in Application No. 22 A 460.

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

[ ] For cases from **state courts**:

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

18 U.S.C. § 371

21 U.S.C. § 841

42 U.S.C. § 1320a-7b(b)(1)

STATEMENT OF THE CASE

The petitioner, Dr. Jeffrey Kesten, was previously engaged with a pharmaceutical company to serve as a consultant for a particular pain medication. As part of his duties, Dr. Kesten performed paid promotional speaker programs relating to the medication. Dr. Kesten participated in the speaker programs solely intending to convey clinical knowledge that could benefit patients.

In 2020, the government charged Dr. Kesten with multiple crimes relating to his work with the pharmaceutical company. The basis of the allegations was that Dr. Kesten solicited or received kickbacks in the form of speaker fees in exchange for prescribing the company's medication. A major premise of the government's case was the correlation between Dr. Kesten's prescribing patterns of the pharmaceutical company's medication and the speaker programs. In 2022, Dr. Kesten pleaded guilty to one count of conspiracy under 18 U.S.C. § 371. However, Dr. Kesten was not informed by his public defender or the government when he entered the plea agreement that the government was required to prove that he willfully engaged in the alleged conspiracy. Additionally, the government did not contest that Dr. Keston's actions were authorized because he was prescribing medication "for a legitimate medical purpose [and] ... acting in the usual course of his professional practice." 21 C.F.R. § 1306.04(a).

While Dr. Kesten was serving his sentence, this Court decided *Xiulu Ruan v. United States*. 142 S. Ct. 2370 (2022). In *Xiulu Ruan*, this Court held that the knowingly or intentionally *mens rea* applied to the "except as authorized" clause in

21 U.S.C. § 841. *Id.* at 2371; *see also* 21 U.S.C. § 841 (making it a crime to "knowingly or intentionally" "manufacture, distribute, or dispense ... a controlled substance" "except as authorized"). Additionally, precedent from this Court emphasizes the importance of willful criminal conduct. *See Morissette v. United States*, 342 U.S. 246, 251 (1952) ("vicious will"); *Elonis v. United States*, 575 U.S. 723, 734 (2015) ("wrongdoing must be conscious to be criminal"); *see also Rehaif v. United States*, 139 S. Ct. 2191, 2195 (2019) ("In determining Congress' intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state").

Dr. Kesten's plea agreement included an appeal waiver. In light of *Xiulu Ruan* and other precedents, Dr. Kesten contends that this Court should not enforce his appeal waiver for three reasons. First, the Court of Appeals for the Tenth Circuit ("Tenth Circuit") erred by enforcing the appeal waiver under a plain-error standard of review. Second, the Tenth Circuit erred by overlooking that the intent required to commit a conspiracy offense under 18 U.S.C. § 371 depends on the underlying substantive offense. Third, the Court of Appeals for the Tenth Circuit erred by overlooking the distinction between "knowing" and "willful" states of mind.

REASONS FOR GRANTING THE PETITION

This Court should review Dr. Kesten's case because his case cuts to the core of this country's criminal law. Dr. Kesten's case concerns whether criminal law should punish individuals for conduct they did not willfully commit and whether the courts should enforce appeal waivers in plea agreements that do not contain the proper *mens rea*. This section contains four sections highlighting why this Court should review this case and why the Tenth Circuit erred. First, willful criminal conduct is an essential element of crimes, including 18 U.S.C. § 841. Second, the Tenth Circuit overlooks the distinction between knowing and willful states of mind. Third, the Tenth Circuit overlooked that the intent required to commit a conspiracy offense under 18 U.S.C. § 371 depends on the underlying substantive offense. Fourth, Dr. Kesten's appeal waiver should have been reviewed *de novo*, not for plain error. This court should review Dr. Kesten's case and reverse the opinion of the Tenth Circuit.

I. Willful criminal conduct is essential to this country's criminal law.

This Court, in *Xiulu Ruan*, held that the knowingly or intentionally *mens rea* applied to the "except as authorized" clause in 21 U.S.C. § 841. *Xiulu Ruan*, 142 S. Ct. at 2371; *see also* 21 U.S.C. § 841 (making it a crime to "knowingly or intentionally" "manufacture, distribute, or dispense ... a controlled substance" "except as authorized"). In *Xiulu Ruan*, this Court outlined precedents emphasizing the importance of willful criminal conduct. *See Morissette*, 342 U.S. at 251 ("vicious will"); *Elonis*, 575 U.S. at 734 ("wrongdoing must be conscious to be criminal"); *see also Rehaif*, 139 S. Ct. at 2195

("In determining Congress' intent, we start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state").

Dr. Kesten unequivocally denies willfully engaging in wrongdoing or criminal activity. When Dr. Kesten entered into the plea agreement, he was not aware that he had to have willfully committed the criminal conduct and that language as not a part of his plea agreement. At its fundamental level, and as this Court has previously opined on, this country's criminal law should not punish individuals unless those individuals have committed willful criminal conduct. Dr. Kesten is no exception. This case is of essential importance because the courts should not enforce a plea waiver in light of a clear ruling from this Court that the defendant did not plea to an essential element of the crime.

II. The Tenth Circuit opinion overlooks the distinction between "knowing" and "willful" states of mind.

The Tenth Circuit also misapprehended the law when it asserted that the phrase "knowingly and voluntarily" is "interchangeabl[e]" with "willfully." The Tenth Circuit's conflation of the two categories of intent overlooks long-established law: this Court itself has explained that the term "knowingly" "merely requires proof of knowledge of the facts that constituted the offense," whereas the term "willfully" "requires a defendant to have 'acted with knowledge that his conduct was unlawful.'" *Dixon v. United States*, 548 U.S. 1, 5 (2006) (quoting *Bryan v. United States*, 524 U.S.

184, 193 (1998)). Put another way, to act "willfully," a person must act with the "specific intent" to violate the law. *United States v. McClatchey*, 217 F.3d 823, 829 (10th Cir. 2000). No such specific intent or purpose is required to find a person acted "knowingly," which only requires that the defendant was "'aware that [a] result is practically certain to follow from his conduct,' whatever his affirmative desire." *Borden v. United States*, 141 S. Ct. 1817, 1823 (2021) (quoting *United States v. Bailey*, 444 U.S. 394, 404 (1980)); *see also United States v. Ledford*, 154 F. App'x 692, 704 (10th Cir. 2005) ("Congress may criminalize knowing acts committed without specific intent."); *United States v. Blair*, 54 F.3d 639, 641-42 (10th Cir. 1995) (holding that statute prohibiting "knowing[]" conduct was a "general intent" crime not requiring proof of "specific intent").

Because it is well-settled, clear, and obvious that the phrases "knowing and voluntary" and "willful" are not interchangeable but refer to meaningfully distinct states of mind, the panel's conclusion that any error was not plain is clearly and obviously wrong. *See United States v. Wolfname*, 835 F.3d 1214, 1221 (10th Cir. 2016) ("An error is 'plain' if it is 'clear or obvious' under 'current, well-settled law.'"). Contrary to the conclusion reached by the Tenth Circuit, Dr. Kesten's plea was not knowing and voluntary, and the appeal waiver is therefore unenforceable.

III. The Court of Appeals overlooked that the intent required to commit a conspiracy offense under 18 U.S.C. § 371 depends on the underlying substantive offense.

The Court of Appeals asserts that a conspiracy conviction under 18 U.S.C. § 371 only requires proof that the defendant acted "knowingly and voluntarily," citing the language of Tenth Circuit Pattern Jury Instruction § 2.19 (2021) and multiple cases from this Court. The Tenth Circuit overlooks the well-settled legal principle—long recognized by both the Tenth Circuit and this Court—that "a conspiracy conviction requires at least the degree of criminal intent necessary for the substantive offense itself." *United States v. Dazey*, 403 F.3d 1147, 1159-60 (10th Cir. 2005); *see also Ingram v. United States*, 360 U.S. 672, 678 (1959) ("[C]onspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."). Tenth Circuit Pattern Jury Instruction § 2.19 recognizes as much, stating in its Use Note: "Conspiracy to commit a particular substantive offense requires at least the degree of criminal intent necessary to commit the underlying offense," and "[i]f the underlying offense requires a special criminal intent . . . further instruction on that intent is necessary" (citing *United States v. Feola*, 420 U.S. 671, 686 (1975); *United States v. Bedford*, 536 F.3d 1148, 1155 (10th Cir. 2008)).[1]

Because the underlying offense required proof that he "knowingly and *willfully*" solicited or received kickbacks, in violation of the Medicare Antikickback

[1] https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20Version.pdf

Act, 42 U.S.C. § 1320a-7b(b)(1) (emphasis added), Dr. Kesten's conviction for conspiracy to commit that offense likewise required proof that he "knowingly and *willfully* joined a conspiracy *with the specific intent to violate the [Medicare Antikickback] Act.*" *McClatchey*, 217 F.3d at 829 (emphases added). And given that the level of intent required to commit conspiracy necessarily depends on the object of the conspiracy charged, it is immaterial that other cases involving conspiracies to commit different crimes contain different statements of the intent element required. Contrary to the conclusion reached by the Tenth Circuit, the cases identified by the government neither contradict nor overrule *United States v. Nall*, 949 F.2d 301 (10th Cir. 1991), nor do they otherwise refute or undermine Dr. Kesten's argument that *his* conspiracy conviction required proof that he acted willfully. Regardless of what degree of intent may be required to prove a conspiracy to commit other offenses, conspiracy to violate the Medicare Antikickback Act requires that the defendant entered the conspiracy "willfully" "with the specific intent to violate the Act." *McClatchey*, 217 F.3d at 829. The district court therefore erred—and clearly and obviously so—when it told Dr. Kesten that his conspiracy conviction required proof of only knowing and voluntary conduct.

IV. Plain-error standard of review does not apply to the assessment of the enforceability of the appeal waiver.

In applying the plain-error standard of review, the Tenth Circuit decision overlooks Tenth Circuit precedent stating: "Whether a defendant's appeal waiver outlined in a plea agreement is enforceable is a question of law we review *de novo*." *United States v. Ibarra-Coronel*, 517 F.3d 1218, 1221 (10th Cir. 2008).

The Tenth Circuit relied on *United States v. Rollings*, 751 F.3d 1183 (10th Cir. 2014). Plain-error standard is a standard of review that applies to the merits of an appeal. And unlike this case, *Rollings* concerned not only the enforceability of the appeal waiver but the validity of the plea agreement as a whole: The defendant in that case was not only seeking to avoid enforcement of the appeal waiver but also arguing that the court should vacate his conviction because his guilty plea was invalid, so that "the merits of the appeal concern[ed] the voluntary nature of the plea." *Id.* at 1189 n.3. The court emphasized that it was only under these particular circumstances—where the "*merits* of the appeal concern the voluntary nature of the plea"—that the ordinary directive "not [to] consider the merits of an appeal in determining whether to enforce an appellate waiver" does not apply. *Id.* (emphasis added). Where, as here, "only the appellate waiver provision is challenged," this Court does not consider "whether the plea in the plea agreement is valid." *Id.* at 1190 n.5.

It makes sense to apply a different standard to determine the enforceability of an appeal waiver than to the validity of a guilty plea as a whole. These are different legal questions: even if an appeal waiver is unenforceable, a defendant's conviction

obtained through a guilty plea may remain in place. Moreover, whether an appeal waiver provision is enforceable is a question that is, by its nature, determined in the first instance by the Court of Appeals—a district court, after all, does not hear appeals—and so it is appropriate for the Court of Appeals to decide that legal question *de novo*, there being no district court decision to review. By contrast, the district court does decide whether to accept a guilty plea in the first instance, so it makes good sense for a Court of Appeals to apply an appellate standard of review, like the plain-error standard, when reviewing that decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Tiffany Kesler MD

Date: February 17, 2023