

No. 23-

IN THE
Supreme Court of the United States

WILKINSON OLOYEDE THOMAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 722-2807

QUESTION PRESENTED FOR REVIEW

Petitioner, WILKINSON OLOYEDE THOMAS, submits the Fifth Circuit Court of Appeals (“Fifth Circuit”) failed to use the standard of review for pill mill cases as established by this Court. Thus, the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and therefore a compelling reason is presented for discretionary review. Mr. Thomas requests that this Court grant this petition and allow this case to proceed further.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Wilkinson Oloyede Thomas:	Petitioner (Defendant-Appellant in the lower Courts)
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United States of America:	Respondent (Plaintiff-Appellee in the lower Courts)
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PETITION FOR WRIT OF CERTIORARI

Petitioner, WILKINSON OLOYEDE THOMAS, requests that this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit. Mr. Thomas submits the decision by the Fifth Circuit is in conflict with decisions of this Court and therefore a compelling reason is presented in support of discretionary review.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Wilkinson Oloyede Thomas*, No. 21-10620 (5th Cir. July 25, 2023), appears at Appendix A to this Petition and is reported at *United States v. Capistrano*, 74 F.4th 756 (5th Cir. 2023).

The Judgment in a Criminal Case of the United States District Court for the Northern District of Texas, Fort Worth Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

This Petition arises from a direct appeal which granted final and full judgment against Mr. Thomas following a jury trial in a pill mill case. The Fifth Circuit affirmed the decision of the District Court. A copy of the Judgment appears at Appendix B. A copy of the decision by the Fifth Circuit appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Overview

The Government identifies this matter as a “pill-mill” case. A pill-mill is made up of doctors, pharmacists, and others who work together to illegally prescribe and distribute prescription narcotics to drug addicts.

At trial, the Government outlined how it believed numerous “red flags” would be used to determine if the doctor and pharmacists are knowingly promoting a pill-mill for financial gain. Three people were accused: Dr. Cesar Mark Capistrano; and two pharmacists: Ethel Oyekunle-Bubu, and the Petitioner, Wilkinson Oloyede Thomas. The Government’s main

exhibit in this case is a list of red flags that purportedly show when a doctor or a pharmacist is knowingly involved in a pill-mill case and should be convicted.

These red flags established that Dr. Capistrano and Ms. Oyekunle-Bubu were actively participating in and becoming quite wealthy as a result of their extensive participation in the pill-mill. All of the Government's claimed red flags establish their guilt. The two were convicted and received significant prison sentences.

However, the Government's case runs into its own truthful testimony that showed these red-flags were not present with respect to Mr. Thomas. As its own witnesses testified, Mr. Thomas dispensed narcotics as required by law, had a low percentage of income from narcotics, and Mr. Thomas documented the dispensing of narcotics in compliance with the rules and regulations governing the same.

Thus, as the trial came to a close, the Government abandoned its red flag theory with respect to Mr. Thomas. The Government then claimed that actually dispensing narcotics in accordance with the law would become the new red flag. Accordingly, when it came to Mr. Thomas, the Government was left to argue that following the law was against the law.

Indeed, at closing the Government for the first time directed the jury to a recorded phone call as evidence of a "drug deal" between Mr. Thomas and Mr. Kincade, who was one of the Government's witnesses who testified that Mr. Thomas filled prescriptions in accordance with the law. However, as discussed below, it was mere speculation and conjecture by the Government that there was any drug transaction between Mr. Thomas and anyone.

Mr. Thomas was found guilty and appealed to the Fifth Circuit, which affirmed his conviction. As discussed below, Mr. Thomas contends the Fifth Circuit applied an incorrect standard of review, which is in conflict with decisions of this Court, and therefore this petition deserves encouragement to proceed further and his convictions must be vacated.

From Indictment to Trial

Relevant to this case was the Second Superseding Indictment, which charged Mr. Thomas with conspiracy to dispense and distribute Hydrocodone (Count 1), conspiracy to dispense and distribute carisoprodol (Count 2), conspiracy to dispense and distribute promethazine with codeine (Count 3), and possession with intent to distribute and dispense narcotics, to wit: Hydrocodone. ROA.131-34. Mr. Thomas pleaded not guilty to all charges and requested a jury trial. ROA.2711.

The Jury Trial Begins

In its opening statement, the Government declared that pharmacists must look for red flags to prevent themselves from being part of an illegal drug transactions and, ultimately, these are what the jury must use to determine if pharmacists are guilty of illegally dispensing controlled substances. ROA.2868-76. Mr. Thomas's attorney observed that the dispensing of controlled substances accounted for only 4.2% of revenue at Mr. Thomas's pharmacy. ROA.2883, 2885. Additionally, Mr. Thomas's attorney reminded the jury that William Kincade, who was a co-defendant and witness for the Government, would be a key witness to evaluate in determining whether Mr. Thomas was guilty. ROA.2885-86.

Over the next three days, the Government called numerous witnesses. Many of those witnesses were only relevant to Dr. Capistrano and Ms. Bubu. Thus, Mr. Thomas mainly addresses the testimony of: (1) Agent Kristy Lynn Smith, the DEA investigator in this case; (2) Johnny Sosa, a law enforcement officer; and (3) Wayne Kincade, a co-defendant who filled some of his prescriptions at Calvary Pharmacy, which was owned and managed by Mr. Thomas. ROA.2891-3253, 3332-439. Although Mr. Kincade was called to the stand by the Government, he would ultimately exonerate Mr. Thomas, which in turn would force the Government to use a new argument to which no witness had testified. ROA.3332-3439.

DEA Investigator Kristy Lynn Smith

Agent Smith defined a pill-mill as “a medical practice or a clinic that the physician actually just issues controlled substances not for a legitimate medical purpose outside the scope of professional practice and it’s usually done in a cash form.” ROA.2900 (emphasis added). She told the jury: “For a prescription for any controlled substance to be legal it has to be issued for a legitimate medical purpose and in the usual course of professional practice.” ROA.2903. Thus, if a pharmacist fails to do either “then the prescription is illegal or not valid.” ROA.2903-04.

Agent Smith opined that pharmacists must be able to identify “red flags” that show a prescription is not legally valid. ROA.2905. The Government a two page chart which lists “the red flags for both the physician or a pharmacist” that indicate pill-mill activities.

ROA.590-91, 2906-07. The Government explained, as discussed in further detail below, that this chart “aids in the comprehension of these convoluted concepts.” ROA.2907.

Essential to the determination that a pharmacist is a party to a pill-mill is the finding that the pharmacist failed to comply with the prescription monitoring program (“PMP”). ROA.2908. Pharmacists are required to put into the PMP the distribution of any controlled substances at their pharmacy. ROA.2609.

With respect to pharmacies, Agent Smith testified that the red flags included dispensing controlled substances that are highly abused in that area, having patients of known over-prescribing doctors, allowing patients to pay with cash when the patient had insurance, filling prescriptions for multiple family members or groups of people all going to the same doctors for the same drugs, having patients use an intercom or a “knock” to gain entry to the pharmacy, filling non-controlled substances for a patient with controlled substances, and that the pharmacy had been cut-off by the supplier of the controlled substances. ROA.2923. Agent Smith concluded that these red flags applied to Mr. Thomas’s pharmacy. ROA.2923.

On cross-examination, Agent Smith agreed:

- * Mr. Thomas never received a letter from the Texas State Board of Pharmacy about his dispensing of controlled substances;
- * Mr. Thomas did not have a blemish on his record as a pharmacist or with the Texas State Board of Pharmacy;

- * Mr. Thomas never received any warning from the DEA that he had violated any laws with respect to the filling of prescriptions;
- * The PMP records, that are crucial to prove guilt in this case per this witness's testimony were not seized despite the impact of such evidence in this case; and
- * A controlled buy of narcotics at Calvary Pharmacy would provide evidence that Mr. Thomas was violating the law, but this was never done.

ROA.3037-42. Finally, Agent Smith conceded that she did not know that only 4.2% of the revenue at Calvary was based on the sale of controlled substances and that, based on a gross revenue of \$750,000 at Calvary over the past two years, only \$31,000 of that was based on the sale of controlled substances. ROA.3043-44.

Mr. Thomas's lawyer also discussed with Agent Smith the things that would be "green flags" as opposed to red flags. ROA.3046. Agent Smith testified that Mr. Thomas did not have an intercom and patients could walk-in. ROA.3046. She said that Mr. Thomas's supplier never cut-him-off. ROA.3046. Agent Smith also testified that, while inventories must be done once a year, she was not aware that Mr. Thomas took an inventory once a month. ROA.3048.

On re-cross, Agent Smith was asked if Mr. Thomas's cell phones and computers were seized and if they were analyzed to determine whether Mr. Thomas had filed the requisite PMP. ROA.3132-35. The Government's witness stated: "I don't know." ROA.3125.

Johnny Sosa: The Recordings

Johnny Sosa discussed five wire intercepts that he reviewed for the Government. ROA.3149-50. These wire tapes were recordings between Mr. Thomas and other Government witnesses. One of these wiretaps was on the cell phone of Wayne Kincade, who was speaking to Mr. Thomas at Calvary Pharmacy. ROA.3156, 3162. The Government claimed these conversations included “code” because they were made after closing-time on Mr. Thomas’s cell phone. ROA.3162-64, 3168. Officer Sosa therefore concluded that these phone calls involved “fill scripts” for narcotics. ROA.3169-72. Officer Sosa also observed that Mr. Kincade, who was a co-defendant, did not want to sign for the prescriptions when Mr. Thomas “demanded” that he do so. ROA.3171-72.

Some of these calls involved what happened when Mr. Kincade went to pick up prescriptions filled by Mr. Thomas. ROA.3172. In one of these phone calls, the word “ticket” was used by Mr. Kincade. ROA.3172-73. Officer Sosa told the jury that, based on his experience working undercover, this word refers to “money” or how much the prescription would “cost.” ROA.3173. On the recording, Mr. Thomas goes on to tell Mr. Kincade that he owes him \$1,100 for prescriptions which he had filled “on consignment” in the past. ROA.3173. Officer Sosa determined that this was a “fronting” of drugs to be paid for on a later date, rather than permitting one to make payments for the medications. ROA.3173-74. Finally, Officer Sosa concluded the “code” word “14” meant that Mr. Kincade owed \$1,400. ROA.3174.

On cross examination, Officer Sosa admitted that he did not check Mr. Thomas's phone to determine if other patients called him on that number. ROA.3189. He also admitted he did not know if independent pharmacies stayed open late and did not know if there were cameras in the Calvary Pharmacy. ROA.3190-92. When asked why a criminal pharmacist would want to have documentation that the prescription had been signed, he responded that the pharmacist would have to have a record in case there was an inspection. ROA.3193. However, there was no testimony of such an inspection or what were the results of any such inspection.

At this point, Mr. Thomas's lawyer directed his questions to the relevancy in this case about the fact that Mr. Thomas *did* enter the narcotics from the February 5, 2022, transaction into the PMP database. ROA.3194. His questions focused on why a "crooked pharmacist" would file the PMP, which leaves a record of the transaction for law enforcement to review. ROA.3194-95. Officer Sosa initially responded "I can't answer that." ROA.3195. However, he agreed the PMP leaves a record and the record can be reviewed. ROA.3195. Officer Sosa then claimed he could not help on this issue because this was not his expertise and he was not sure whether a pharmacist required a photo ID to pick-up controlled substances. ROA.3196. Officer Sosa also opined that in his experience it was "unusual" for an independent pharmacist to permit patients to owe the pharmacist money. ROA.3196-97. He did not testify that it was illegal.

Faced with the fact that the evidence showed Mr. Thomas was following the law, Officer Sosa took a new previously unmentioned and unproven path for establishing Mr.

Thomas' guilt in this case. ROA.3197. When asked, if Mr. Thomas was breaking the law, why would he not do this in an alley late at night or at his house, Officer Sosa exclaimed: "because it's my belief [he was] attempting to appear legitimate." ROA.3197.

Officer Sosa continued to argue his new, untested theory to establish guilt in this case. Now, when asked why would a criminal leave a trail by filing the PMP, Officer Sosa said that Mr. Thomas was filing the PMP to "look legitimate" and appear as if he was not doing something illegal. ROA.3198. In the end, when Officer Sosa was asked whether it could be that a pharmacist would file the PMP because he believed the transaction was legal, he responded: "I don't know." ROA.3198. This comment implicates every pharmacist as a drug dealer despite always following the law.

Wayne Kincade Exonerates Mr. Thomas

The Government called Wayne Kincade (discussed above as the person on the cell phone recordings), who was a co-defendant who entered a plea of guilty and agreed to testify truthfully for the Government. ROA.3336. He was a "recruiter," who would take patients to the clinics to be prescribed narcotics. ROA.3337-39. He would then take the prescription to the pharmacies so that the prescriptions would be filled and he could then sell the narcotics for a profit. ROA.3337-40. Mr. Kincade normally used the pharmacy run by Ms. Bubu, but subsequently took some of his prescriptions to Mr. Thomas. ROA.3361-63.

However, toward the end of the Government's examination, Mr. Kincade provided testimony that exonerated Mr. Thomas. ROA.3373. Mr. Kincade directly stated to the jury and the prosecution that Mr. Thomas filled prescriptions "straight by the book," meaning

that he was aboveboard and honest unlike the pill-mill pharmacists. ROA.3373. Indeed, when the Judge described Mr. Kincade's testimony, he did so following fashion:

I said Oloyede, you know he worked straight by the book. He didn't—he wasn't like some of the other pharmacists.

ROA.3373. Furthermore, Mr. Kincade specifically testified that he *did not* tell Mr. Thomas that he was selling narcotics on the street. ROA.3373.

The Jury's Verdict

The jury convicted Mr. Thomas and his co-defendants, finding them guilty on all counts. ROA.427-28.

Sentencing

Sentencing was held on August 6, 2021. ROA.4058. In addition to other matters, the Court addressed Mr. Thomas's objection as to whether the 2-Level enhancement for maintaining a premises for the purpose of distributing a controlled substance applied. ROA.4063. The Court observed that 'it seemed unrebutted, that 90 percent of the business at the pharmacy was legitimate.' ROA.4063. The prosecutor responded: "We don't care about these uncontrolleds." ROA.4064. The prosecutor also observed:

So, yes, he is different than Bubu. Bubu didn't care, right? She was filling prescriptions left and right and raising prices to street level. He was more careful. He knew the red flags. So he didn't want his main pharmacy to be look at as filling for this Dr. Capristrano that had too many flags.

ROA.4064-65.

Furthermore, after the Court addressed the Government's arguments, the prosecutor said that, if the pharmacy had "80/20 ratio between noncontrolleds and controlleds, then you can fly under the radar." ROA.4066. Thus, the prosecutor explained:

So, that is also something that could potentially be at play here, where they purposefully try to make sure that the noncontrolled inventory and prescriptions are higher than the controlleds in order to avoid red flags and the TSP coming in to look at them.

ROA.4066-67.

The Judge disagreed with the Government and granted Mr. Thomas's objection to the 2-level increase for maintaining a premise for the purpose of distributing a controlled substance. ROA.4067. He specifically stated he was doing so "because I don't think that the maintaining enhancement should apply in this case." ROA.4067. Therefore, Mr. Thomas's Total Offense Level was set at 34, with an imprisonment range of 151 to 188 months. ROA.4067.

The Court sentenced Mr. Thomas to serve 151 months in the custody of the Bureau of Prisons. ROA.4093. The Court also forfeited \$7,539 which had been seized from Mr. Thomas's home. ROA.4093.

Appeal

The Judgment was entered on August 6, 2021. ROA.2756-61. A notice of appeal was timely filed on August 9, 2021. ROA.2765. Mr. Thomas's sole argument on appeal was that the evidence was insufficient to establish guilty. The Fifth circuit disagreed, affirmed the District Court, and this petition now follows.

**ARGUMENT AMPLIFYING REASONS RELIED ON FOR
ALLOWANCE OF THE WRIT**

I. Introduction

Physicians and pharmacists are increasingly leaning away from treating patients out of genuine fear of prosecution. For example, a recent study found 40.7% of clinics contacted “were not willing to schedule an appointment for a new patient who was currently taking opioids for chronic pain.” Pooja A. Lagisetty et al., *Access to Primary Care Clinics for Patients with Chronic Pain Receiving Opioids* 4, JAMA Network Open (2019) (<https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2737896>).

However, this Court can act to mitigate this concern under 21 U.S.C. § 841(a)(1) of the Controlled Substances Act . That section of the Act provides that: “except as authorized by this subchapter, it shall be unlawful for any person, knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. 21 U.S.C. § 841(a)(1). Thus, physicians can prescribe controlled substances and pharmacists can fill those prescriptions for legitimate medical purposes. *See id*; 21 U.S.C. § 822(b); *see also* 21 C.F.R. § 1306.04(a). These rules make clear that physicians and pharmacists do not violate the above statute if they act in good faith when dispensing controlled substances.

However, the Circuit Courts have not readily followed this standard. For instance, the Eleventh Circuit held that a physician’s (as well as a pharmacist’s) “*good faith belief* that he dispensed a controlled substance in the usual course of his professional practice is

irrelevant.” United States v. Enmon, 686 F. App’x 769, 773 (11th Cir. 2017) (emphasis added).

In this case, with respect to Mr. Thomas, his attempt to provide controlled substances to his customers based on a valid prescription from a physician was a good faith attempt to provide needed medications in the normal course of his business and pursuant to the Oath of Service he took as a pharmacist. For the reasons discussed below, the Fifth Circuit failed to provide such a review of the evidence in this case. Instead, under an improper legal analysis, the Fifth Circuit determined that following the rules for filling prescriptions was merely a “cover” for the illegal distribution of controlled substances. *United States v. Capistrano*, 74 F.4th 756, 768 (5th Cir. 2023). However, this conclusion by the Fifth Circuit was a failure to review all of the evidence and affirm the conviction without due consideration of whether the substances were filled based on a good faith application of the laws providing for the legal distribution of controlled substances for medical purposes.

II. Standard of Review

In the recent case of *Ruan v. United States*, 142 S. Ct. 2370 (2022), this Court evaluated and clarified the applicable standard of review in pill mill cases. This Court observed and explained:

As we have said, [21 U.S.C.] § 841 makes it unlawful, “[e]xcept as authorized[,] . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance.” We now hold that § 841(a)’s “knowingly or intentionally” *mens rea* applies to the “except as authorized” clause. This means that once a defendant meets the burden of producing evidence that his or her conduct was “authorized,” the Government

must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. Our conclusion rests upon several considerations.

Id. at 2376.

This Court went on to observe that “defendants who produce evidence that they are ‘authorized’ to dispense controlled substances are often doctors [and consequently, pharmacists] dispensing drugs via prescription.” *Id.* at 2377. This Court further noted it is *unauthorized* prescriptions that render the dispensation itself illegal. *Id.* On the other hand, this Court explained, a good faith authorization would negate the *mens rea* which would in turn make the delivery of a controlled substance legal. *Id.* Thus, a prescription that is issued for a legitimate purpose is legal. *Ruan*, 142 S. Ct. at 2378. Furthermore, there are “grey zones” where the “legitimacy” of the prescription may not be clearly established. *Id.* Therefore, this court concluded that “a strong scienter requirement” is needed to diminish the possibility of any punishment for “acceptable” and beneficial conduct. *Id.*

Finally, the ultimate burden of persuasion on this issue rests with the Government. *Id.* at 2380. Thus, once the defendant presents the evidence of the prescription, it becomes the Government’s burden of persuasion that the prescription was not valid. *Id.* at 2381.

III. The Government’s Evidence

A. Introduction

As discussed above, the Government relied on evidence of red flags to support a finding of guilt for Mr. Thomas. However, all of the evidence shows the Government had to

abandon its own red flag arguments and rely on speculation and innuendo to obtain a conviction in this case.

The Government's argument with respect to red flags was simply the Government modifying or manipulating the red flag list. As an initial observation, the distance from a pharmacy to the prescribing doctor's office is not on its own critical red flag list. ROA.590-91. It is mere ad hoc conjecture by the Government as it introduces its evidence. Moreover, as discussed below, it shows the Government was able to disregard its list when the evidence shows the chosen red flags were not applicable to Mr. Thomas. In fact, in some instances, the Government decided evidence of no red flag became a red flag in order to convict Mr. Thomas.

B. Green Flags Turned Red

An example of the manipulation of its own red flag list is apparent when the Government and its witness introduced evidence that the actions of Mr. Thomas were the opposite of what the Government contended would be necessary for a conviction under its list of red flags. The most obvious example of the Government's shaming of its own red flag list was the assertion that Mr. Thomas should not have filed the PMP with the State as required by law. ROA.3193-95.

The testimony of Officer Sosa establishes this manipulation of facts to theories of guilt was an attempt by the Government to create a win/win situation regardless of the real red flags that show criminal participation in a pill-mill case. Officer Sosa was a witness called by the Government to review and evaluate specific incidents at Calgary Pharmacy

that involved Mr. Thomas and Mr. Kincade. ROA.3146-94. The witness had described how a specific incident where Mr. Thomas filled a prescription for Mr. Kincade was evidence of a crime. ROA.3194. It was established that Mr. Thomas had placed this alleged illegal transaction in his PMP. ROA.3194. When Officer Sosa was asked why would a pharmacist put an illegal transaction into the PMP, the Officer initially stated: "I can't answer that question." ROA.3194. Officer Sosa finally confessed that filing the PMP creates a record that a controlled substance drug transaction in fact happened. ROA.3195-96.

However, when this witness finally admitted that Mr. Thomas was providing evidence to the Government that would show there was a legal sale of narcotics, Officer Sosa changed his mind and presented a new theory. ROA.3198. When asked why a criminal who was breaking the law would leave a record (in the PMP) of the illegal transaction, the witness decided this was a "new" red flag. ROA.3198. This is because the Officer testified Mr. Thomas was "wanting it to appear it to be a legitimate business, so you're wanting to not appear as though you were doing something illegal." ROA.3198. In other words, while not putting such a transaction into the PMP was always a red flag, the putting of that transaction in the PMP would now be used as a red flag to convict Mr. Thomas. The forever changing by the Government of flags, be they red, or green into red, shows that the convictions against Mr. Thomas were based on mere speculation and are not supported by sufficiently reliable evidence.

C. Mr. Kincade

The Government relied almost exclusively, and certainly heavily, on the testimony of Wayne Kincade. Mr. Kincade was designated as a “recruiter” for the purported pill-mill conspiracy. ROA.593. The Government described a recruiter as one who:

participated in this conspiracy by recruiting individuals, bringing multiple individuals to these clinics to pose as patients. They would pay them cash and then these patients would receive these illegal prescriptions for a combination of controlled substances including Hydrocodone, carisoprodol, and promethazine with codeine.

ROA.2869.

Due to his role in this conspiracy, Mr. Kincade pleaded guilty and agreed to assist the Government in the prosecution of its case. ROA.3332-338. He signed a plea agreement, which included a “proffer” agreement. ROA.3333-334. Therein, Mr. Kincade agreed to tell the truth on the stand. ROA.3336.

Mr. Kincade testified that, when he would pick up prescriptions for patients, he made sure that Mr. Thomas received the proper identification information on the patient. ROA.3370. In fact, at one point, the Court even clarified that Mr. Kincade’s testimony was that Mr. Thomas “worked straight by the book. He didn’t–wasn’t like some of the other pharmacists.” ROA.3373. Indeed, the witness was adamant that Dr. Capistrano was in the black book and therefore Mr. Thomas would not fill prescriptions written by him. ROA.3375.

On cross-examination, Mr. Kincade admitted he was a drug addict. ROA.3379-80. He again reemphasized that Mr. Thomas “ran his pharmacy by the book, unlike other pharmacies.” ROA.3383.

Mr. Kincade also explained that he did not tell Mr. Thomas that he was a drug addict. ROA.3383. Mr. Kincade further testified that he never indicated to Mr. Thomas that Mr. Kincade was breaking the law. ROA.3438. In response to the Government's one question on re-direct as to whether he ever told anyone he was breaking the law, Mr. Kincade responded "No" and that "everybody knew what they were doing." ROA.3438-39. The Government did not ask Mr. Kincade any more questions. ROA.3439.

D. The Government's Closing Argument

By the time the evidence had been presented to the jury and closing arguments were almost complete, the Government abandoned its red flag theory and could only claim Mr. Thomas's guilt had been proven by one phone call. ROA.3991. By then, the jury had heard from the Government's own witness that Mr. Thomas had followed the rules and the law, and thus there were no red flags flying over Mr. Thomas which would indicate, much less prove, that he knew he was filling prescriptions for a pill-mill. *See* ROA.3991-92.

The Government directed the jury's attention to Exhibit No. 27, Session 3711, which was now described by the prosecutor as "a drug deal." ROA.3991. Before the prosecutor argued, he played an audio recording for the jury. ROA.3991. [The prosecutor described this phone call between Mr. Kincade was talking to Mr. Thomas and they were both using personal cell phones. ROA.3991.

At this stage, it is important to go back and examine this recording and the testimony of law enforcement investigator Sosa, who was testifying when the recording was introduced to the jury. ROA.758-64, 3172-74. During that testimony, when the recording was paused,

the prosecutor asked Officer Sosa what the word “ticket” means as it was used by Mr. Kincade on the tape. ROA.3172. He responded that in this instance a ticket is a “code” that is used in drug deals and “it’s usually used to refer to money so when you ask someone what the ticket is, that’s asking how much does it cost, how much do I owe you.” ROA.3172-73. Importantly, the word “ticket” was used by Mr. Kincade, but not Mr. Thomas. ROA.758-64.

Then, at the next stop of the recording, Officer Sosa noted that the two discussed how much Mr. Thomas was owed for prescriptions that were filled a week earlier. ROA.3173. The witness testified that this was called “fronting” because the pharmacist had previously filled the prescription for the patient, but had not yet been paid ROA.3174.

The Government then played and paused the recording for the third and final time. ROA.3174. Officer Sosa testified that, when Mr. Thomas said “altogether fourteen,” he was using “code” to tell Mr. Kincade that he owed \$1,400 for prescriptions filled previously and one prescription filled that day. ROA.3174. As noted above, the prosecutor concluded at rebuttal closing argument that the above discussion was evidence which showed a drug deal between Mr. Kincade and Mr. Thomas, and made no mention of red flags with respect to Mr. Thomas. ROA.758-64. Clearly, at the end of closing, the Government believed this is what could save its case against Mr. Thomas.

Furthermore, it must be determined if the above discussion constitutes an illegal “drug deal” in the context of the evidence as a whole. Mr. Thomas submits that it was not. Mr. Kincade testified that Mr. Thomas operated his pharmacy by the book. Mr. Kincade admitted that he was a drug addict and that he worked for the doctors to make sure chosen

pharmacies filled prescriptions. He made it clear that Mr. Thomas did not know he was an addict or drug dealer. Furthermore, as the Government's recording demonstrates, Mr. Kincade is the only one who uses the word "ticket" in the recorded conversation. As noted above, that term becomes important to the Government's case when the Government's witness states that the word means "money." But again, Mr. Thomas never used that word and there is not indication he knew that a "ticket" was a term used by drug dealers.

IV. The Opinion of the Fifth Circuit

The Fifth Circuit concluded the evidence was sufficient to support Mr. Thomas' convictions in this case. However, the Appellate Court only evaluated the testimony of Mr. Kincade in making its decision. The Fifth Circuit's critical observation was as follows:

Thomas argues that Kincade's statement that Thomas 'wasn't like some of the other pharmacists' and was "by the book" means "it was clear to Mr. Kincade that Mr. Thomas was not a party to a pill mill case." But this view is not the only one fairly drawn from Kincade's testimony that Thomas "knew what [he] was doing." While Thomas imposed some requirements on filling other prescriptions, a reasonable jury could infer that Thomas was trying to cover himself, as the Government argued.

Capistrano, 74 F.4th at 768.

V. The Fifth Circuit Failed to Follow the Proper Standard of Review

As noted above, the Government claimed red flags were the key to determining Mr. Thomas' guilt in this case. But, it soon became apparent that the red flags established Mr. Thomas was not guilty. Furthermore, the Government's own witness, Mr. Kincade, said Mr. Thomas dispensed controlled substances in accordance with the law. Thus, the Government

decided that Mr. Thomas' actions of following the law was just a cover for actually breaking the law.

In its opinion, the Fifth Circuit failed to follow the standard of review for evaluating pill mill cases. *See Ruan v. United States*, 142 S. Ct. 2370 (2022). The Circuit Court simply followed the Government's constant changing of theories of guilty and assisted the Government in creating a standard of review that ultimately ignores the evidence. There is no established standard of review which provides that the Government can instruct the courts to find that certain evidence of innocence can be converted into evidence of guilt simply because the Government deems it is critical to its case.

As this Court noted in *Ruan*, once the defendant introduces evidence that his conduct is authorized—*i.e.*, filling a prescription for a controlled substance—the burden shifts to the Government to prove the *mens rea* in this case. 142 S. Ct. at 2376. The Government's only attempt to prove *mens rea* was its theory that following the law was a mere cover for not following the law.

The Fifth Circuit never provided authority that this Court has ever endorsed such a standard of review. Indeed, the Government merely switched at the end of trial to a new theory for a conviction because none of its theories of guilt (for example, the red flag theory) had been proven. Thus, Mr. Thomas submits this Court should grant this petition, allow this case to proceed to further review and order a judgment of acquittal.

CONCLUSION

For the reasons set forth above, Mr. Thomas submits the Fifth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court and thus a compelling reason is presented for discretionary review.

WHEREFORE, PREMISES CONSIDERED, Petitioner, WILKINSON OLOYEDE THOMAS, respectfully requests that this Court grant this petition and issue a Writ of Certiorari. Mr. Thomas also requests any further relief to which he may be entitled under the law and in equity.

Respectfully Submitted,

James Scott Sullivan
JAMES SCOTT SULLIVAN
LAW OFFICES OF J. SCOTT SULLIVAN
22211 I.H. 10 WEST, SUITE 1206
SAN ANTONIO, TEXAS 78257
(210) 722-2807