No. 23-5975

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

Caesar Mark Capistrano — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

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

PETITION FOR WRIT OF CERTIORARI

Caesar Mark Capistrano
(Your Name)
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FCI - Fort Dix
(Address)

Joint Base MDL , NJ 08640-0920
(City, State, Zip Code)

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QUESTION(S) PRESENTED

1. Are inferior courts, the Fifth Circuit Court of Appeals in particular, allowed unrestricted and unrestrained freedom to interpret the clear and unequivocal Holding of the Supreme Court of the United States in Ruan v United States, 149 S Ct 370, and bend it to its own will and circuit precedents , because it is unpalatable?; to admit in its own Opinion that "the district court's jury instruction erred by not including the mens rea element" and another admission that "such an error does warrant reversal" yet purposefully and deliberately ignore the error and affirm a physician's wrongful convictions?; or to grant vacatur of 21 USC §841 convictions, as it occurred in the Eleventh Circuit, and uphold the collateral charges (i.e §846 Conspiracy and §2 Aiding & Abetting) predicated only upon the just vacated substantive charges that "infected" them all?

2. Why are pro se litigants consciously ignored, routinely relegated to the background, considered lower tier sub-class of citizen-litigants, whose arguments can be dismissed or bottom-shelved, just because they are not represented by counsel who is an accepted member of the exclusive club or clique?; even whose successful, forceful, provable, and well-documented satisfaction of the circuit court's requirements on the plain error test in this particular case, irrefragable though those arguments may be, would still be treated contemptibly, as just an insignificant non-occurrence or fiction? - in contravention to well-established Supreme Court holdings?

3. How many errors of law that results in mistakes in jury instructions are acceptable, excusable, and permissible before a reviewing court will consider them prejudicial and not "harmless" or an "abuse of discretion"? - two?, three?,

maybe four?; Supreme Court precedents consistently point to a mere instance to merit reversal while the appellate court reviewed three maybe four and continued to affirm. Is this not just another species of fraud or judicial obfuscation?

4. Has the current jurisprudence changed so drastically to allow conviction in an indictment of a crime of conspiracy where there only exists a "conspiracy of one"?; can the prosecution have only a sole witness which was given a "sweetheart deal", who was documented to have repeatedly lied on rebuttal, as was shown in the evidence, and reflected in the testimony, who may not even have been allowable as a witness because of the "intracorporate conspiracy doctrine", and convict a physician who did not do anything to advance any goals of the conspiracy, as was shown in the evidence and stated in the testimony, and who lacks the scienter required for a felony conviction?

5. Can the prosecution declare a deliberate lie, a fabricated misrepresentation of fact it is aware to be untrue, in what is akin to a false testimony at closing argument to the jury, free from the constraints of the Confrontation Clause of the 6th Amendment to the Constitution that removes the opportunity for a rebuttal, to prejudicially entice the jury to convict?

6. Must circuit courts uniformly and automatically defer the resolution of the claim of Ineffective Assistance of Counsel, despite the existence of enumerated, well-documented, knowable, and provable myriad derelictions of duty by trial attorney, (before and during, and in this particular case, the rushed 4-day trial of a very complex case), to a subsequent collateral attack (i.e. §2255 Motion)?

LIST OF PARTIES

[X] 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

1. Ruan v United States, 142 S Ct 2370 (June 27, 2022)
2. United States v Henson, 2023 US App LEXIS 5025 (CA10 2023)
3. United States v Kahn, 58 F.4th 1308, 2023 US App LEXIS 2719 (CA10 2023)
4. United States v Ruan, 56 F.4th 1291 (CA11 2023)
5. United States v Henson, 2023 US Dist LEXIS 102923 (6/13/23)
6. United States v Henson, 2023 US Dist LEXIS 124475 (7/19/23)

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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

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[X] reported at 74 F.4th 756, 2023 US App LEXIS 19003; 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 _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] 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

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 25, 2023.

[ ] ~~No~~ A petition for rehearing was timely filed in my case. on August 7, 2023.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals 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. § 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

The correct interpretation of the Supreme Court of the United States' Opinion and Holding in Ruan v United States, 142 S Ct 2370, June 27, 2022 regarding Title 21 USC §841 and §846 prosecutions is involved, with varying interpretations and resulting orders coming out from several Courts of Appeals. The decision of one Court of Appeals that allow the survival of collateral charges predicated and tethered only upon the vacated 21 USC §841 statute. The decision of another Court of Appeals that vacated all §841 convictions and all associated and predicated collateral charges to the substantive §841 convictions.

Title 21 §841 and §846 and also, Title 18 USC §2 are located in Appendix B.

The violation and infringement of guaranteed and protected Rights under the Fifth and the Sixth Amendments to the Constitution of the United States are involved.

The Vth and the VIth Amendments are located in Appendix B.

STATEMENT OF THE CASE

A grand jury indicted Dr. Caesar Mark Capistrano and two pharmacists, Wilkinson Oloyede Thomas and Ethel Oyekunle-Bubu (Bubu), for roles in an alleged "pill-mill" operation. A "pill-mill" sees hundreds of patients every day (Dr. Capistrano followed about 50 some odd total number of patients) and exists primarily for making money as the motive. The government, despite extensive, thorough, and meticulous financial investigation and autopsy, was never able to produce concrete evidence of financial benefit, or even hidden wealth on Dr. Capistrano. In short, an alleged criminal enterprise for wealth accumulation, has no ill-gotten accumulated wealth to show for its 9 years of existence. Prosecutors charged Dr. Capistrano with 3 drug-distribution conspiracies: Hydrocodone (schedule II drug), Carisoprodol (schedule IV drug), and Promethazine with Codeine (schedule V drug). Additionally, he was charged with Aiding and Abetting on Count 18 (on Hydrocodone) and 19 (on Carisoprodol).

Dr. Capistrano, a medical doctor who is a highly-trained specialist and experienced Hematologist and Medical Oncologist since 1994, did not own multiple clinics (just one). The government's theory was that he prescribed controlled substances and Bubu and Thomas filled those prescriptions, for which there was no legitimate medical purpose. The conspiracy involved recruiters coordinating with pill mills and complicit pharmacies to fill unlawful prescriptions for street-level distribution. Allegedly, "recruits" posed as patients, received prescriptions issued in their names, and paid cash for their visit. Charged with drug-distribution conspiracies with intent to distribute controlled substances, Dr. Capistrano invoked the exemption for doctors and pharmacists from criminal liability in the Controlled Substances Act §841, for distributing "authorized" controlled substances. At trial, the government offered mostly Fourth Hurn Circumstances (Definition: "In the event of

a Fourth Hurn circumstance, the accused has the right to combat the Government's selective presentation of evidence that casts the accused citizen in an inaccurate, unfavorable light or that renders entirely legitimate, normal, or acceptable facts to appear criminal or suspicious. The Hurn Court held that the accused should be allowed to introduce additional evidence to dispel the unjustified taint, even if the evidence does not directly or indirectly bear on a particular element of an offense.")(see Hurn). No direct objective evidence implicating Dr. Capistrano to the conspiracy was produced, and the "star" government witness repeatedly lied on the stand and changed her testimonies. The jury found the Defendants guilty on all counts. The district court sentenced Dr. Capistrano and Bubu to 240 months' imprisonment and Thomas to 151 months. Defendants timely appealed on February 28, 2021. The Circuit Court affirmed on July 25, 2023.

REASONS FOR GRANTING THE PETITION

I.

REVERSIBLE ERROR PER RUAN

The Panel decision of the United States Court of Appeals for the Fifth Circuit (CA5, the Fifth Circuit), conflicts and misinterprets the Ruan v United States, 142 S Ct 2370 Opinion (Ruan), that was unanimously (9-0) decided on June 27, 2022 by the Supreme Court of the United States as it specifically applies to medical doctors, with the new requisite interpretation and understanding of the mens rea necessary for conviction on Title 21 USC §841 (§841).

The Supreme Court then proceeded to order the Vacatur of thirteen (13) §841 convictions of physicians and instructed further proceedings in light of the new understanding of the law. The United States Court of Appeals for the Tenth Circuit (the Tenth Circuit), in an Opinion written by Circuit Judge Mary Beck Briscoe for Kahn and Chief Judge Jerome A. Holmes for Henson, vacated and remanded all of Dr. Kahn's twenty-one (21) and Dr. Henson's twenty-four (24) convictions (Please take Judicial Notice of United States v Kahn, 58 F 4th 1308, 2023 US App LEXIS 2719 (2/3/23) and United States v Henson, 2023 US App LEXIS 5025 (3/2/23)), that involved §841, including all other convictions associated and predicated only upon the substantive drug charges as they can not stand alone by themselves "because they were infected by §841." Chief Judge Holmes allowed only 2 of the 24 convictions in Dr. Henson's case to survive: one regarding a false statement, and another for falsifying a record. These were in turn further vacated and the entire case dismissed in toto by the District Court and Dr. Henson allowed to go home free on bond, ruling against the strongest objections of the Government and its prosecutors. (Take Judicial Notice of United States v Henson, 2023 US Dist LEXIS 102923 (6/13/2023 and 2023 US Dist LEXIS 124475 (7/19/23)).

The United States Court of Appeals for the Eleventh Circuit vacated all of

Dr. Ruan's substantive drug convictions involving §841 but affirmed the other convictions predicated and dependent only upon §841, the statute that was erroneously understood pre-Ruan. How can these associated charges remain tenable when the substantive drug charges they were tethered on and thus, required for a violation of the associated charges or indictments become invalid and non-existent? Dr. Capistrano, in quoting Chief Judge Holmes of the Tenth Circuit posits that anything predicated only upon and in association with §841 are "infected" and can not survive the infection and should be summarily vacated in toto, as the scienter requirement was dealt a fatal blow by the mens rea element necessary post-Ruan.

There now exists an undisputed and palpable tension and disagreement between the sister courts of appeals in the implementation of the brilliant exposition of the unanimous Ruan Opinion of the Supreme Court that requires its guidance and intervention as this liberty issue is of paramount importance not only to Dr. Capistrano, but has national implication as it affects not an insignificant group of people engaged in the delivery of health care.

In light of Ruan, the Fifth Circuit where Dr. Capistrano's Case was argued, the jury instruction was erroneous and was reviewed by the Court as plain error, as it conceded and meticulously expounded. The Panel Opinion admitted that there was indeed plain error with Judge Patrick E. Higginbotham, in writing for the Court pronounced: "The District Court's jury instructions incorrectly stated the law by omitting the mens rea element." (page 12, United States v Capistrano et al.,74 F 4th 756). Further, Judge Higginbotham continued and stated that "Accordingly, the district court erred - based on an intervening Supreme Court case it could not know about at the time - in instructing the jury, such error does warrant reversal." (page 13 Capistrano supra.)

The Ruan decision changed the understanding of the law and the Supreme Court altered substantially and substantively the mens rea requirement necessary for

conviction in §841 prosecutions. Unfortunately for Dr. Capistrano, and in a glaring testament to the dereliction of duty of his trial counsels, his issues and his corner has been and continues to be drowned out and conflated with those of the pharmacists, Bubu in particular. This, because defense counsel failed to move for severance, with his trial separated from the others, and so he now suffers the same fate on appeal - his arguments muddled, rendered indistinct, approaching insignificance, in light of the more contentious and colorful Bubu's. Extraordinary effort must be performed in order to draw closer attention to his own arguments and issues that the Court elected to consider.

The Fifth Circuit cites its recent Opinion post-Ruan in United States v Ferris, 52 F 4th 242-243 (CA5 2023) to brush off the Ruan Opinion, unpalatable as it may be to certain circuits, that it is the "knowledge" of the pharmacist that the prescriptions are unauthorized that matters, not the dispensing itself. As an aside, Dr. Capistrano was never informed that this case was decided, let alone asked by the Court, as the writing Judge professes, to "submit any supplemental Brief to address its impact in the case". In fact, he protested and objected vehemently on Motions, to the injustice and unfairness of the decision of the Court not to allow him to defend himself and his challenges at oral arguments either in person or via videoteleconference. The oral arguments occurred without his knowledge, with the Court seemingly aware and content with not hearing his claims and rebuttals, even while being the principal appellant in this case.

The Supreme Court rendered its Holding on Ruan specifically addressing medical doctor's scienter issue, and changed the understanding of the mens rea element. The Fifth Circuit applied Ruan to the pharmacist Bubu's challenge, addressed her plain error claim per Ruan, discussed extensively why her challenge failed, but totally, consciously, and summarily ignored and conflated Dr. Capistrano's own challenge in this case, that exactly mirrors the §841 prosecution of Ruan and Kahn, and where he diligently argued all four (4) prongs of the plain

error test. (This, even after the Court noted that "Bubu and Capistrano both addressed Ruan in their Briefs on footnote #40.")

Nonetheless, United States v Ferris does not apply to Dr. Capistrano's mens rea requirement as expounded by the Supreme Court in Ruan. Who decides whether his prescriptions are unauthorized? It is Dr. Capistrano and Dr. Capistrano alone who examined and followed-up each one of his patients and all his prescriptions are deemed authorized and valid by him. The patient Cynthia Cooks, who is the only clinic patient who took the witness stand as a prosecution witness for the Government, declared "he is indeed, a good doctor and his prescriptions helped me and his other patients". The Supreme Court already held that it is only the subjective intent of the defendant-doctor alone that matters, meaning, that he meant to help his patients by writing the prescription, and not the objective standard/intent of any other hypothetical more qualified doctor who later on, adjudges and pronounces as authorized by fiat. (see Ruan. supra) Thus, Dr. Capistrano knew and believed that all his prescriptions for all his patients, that he has been following for many years, were all valid and authorized, and he never knew nor intended at any time to write any unauthorized prescriptions; that he believed all his prescriptions were being consumed by his patients only, and no one was ever directed by him to sell any substances for street level distribution.

The Fifth Circuit Court, in its admission and declaration that "the district court jury instructions incorrectly stated the law by omitting the mens rea element", (see page 12 of US v Capistrano), further stated that this error does not warrant a plain error reversal in the case of pharmacist Bubu because she did not satisfy all the four (4) prongs of plain error review, only the first two (2) prongs. Bubu's appellate counsel's abject failure to argue prongs 3 and 4 of the plain error test should be of no consequence to Dr. Capistrano, who must not be made to suffer the dereliction of duty resulting in ineffective assistance to Bubu. This

is, lamentably, their fight amongst themselves and not Dr. Capistrano's.

Unlike Bubu, Dr. Capistrano intelligibly satisfied all the four (4) requirements in his Briefs and transparently argued prongs 3 and 4 missing in Bubu's challenges. Dr. Capistrano forcefully and precisely argued that the error affected his substantial rights because the error was prejudicial, because had it not for the error, he would have been acquitted and not convicted of all counts, and the outcome would have been different. This then undermined the outcome of the proceedings against him, therefore impacting negatively on the integrity and public perception of judicial proceedings if not corrected and remedied by exercising the Court's discretionary powers to correct the error.

The Court continued further, by stating that "Accordingly, although the district court erred - based on an intervening Supreme Court case it could not know at the time - in instructing the jury, such an error does warrant reversal." (see page 13 Capistrano supra)

Therefore, purely based on the Court's detailed and logical analysis of the 4 prongs of plain error review, Dr. Capistrano on the other hand successfully argued all the four prongs of the plain error test that the Court strictly demands, in rejecting Bubu's challenge. This in turn, warrants immediate vacatur, reversal, and remand of all of Dr. Capistrano's convictions, as the Court has already concluded in its Opinion.

It is not only extremely prejudicial, highly improper, but deliberately counterintuitive for the Fifth Circuit to seemingly acquiesce to the Supreme Court's holding on Ruan's new mens rea interpretation, declare that the jury instruction was indeed erroneous, find the existence of plain error and that same error warrants reversal of convictions, YET contemptibly ignore Dr. Capistrano's claims even after a successful, intelligent, and exhaustive argumentation of all the four (4) prongs of the plain error test; tacitly accepting the new interpretation of §841 per Ruan, but not delivering the deserved and rightfully anticipated remedy or relief - the

complete vacatur, reversal, and remand of the case as to Dr. Capistrano's convictions on all five (5) counts.

This is a veritable Pandoras's box that the Fifth Circuit opened, by seemingly accepting of the new understanding of the law and the scienter required for prosecution and conviction of medical doctors on §841, and then proceed to ignore the correct, forceful, and successful argumentation by Dr. Capistrano, and by the sleight of the pen by the writing Judge, discard it into nothingness, disregard the remedy or relief he is entitled to, thus actively disrespecting the Ruling that emanates from the unanimous decision of the Highest Court.

It is indeed a grievous situation that Dr. Capistrano finds himself in, when in the pursuit of his liberty that is fueled by that trust in the fairness and equity of judicial proceedings, distilled in that oft-quoted, albeit dismissive remark, and well-worn adage to "worry not for they (the prisoners) could always appeal their [erroneous] judgment of conviction", his reward for a successful challenge and accomplished display of such an error, would be judicial indifference, neglect, and obfuscation; if done deliberately, could even be misconstrued as judicial vindictiveness.

This Petition affects not only Dr. Capistrano but also many other medical doctors who have and are still undergoing prosecution on §841. Nationally, medical doctors have already refrained from prescribing narcotic medications to their patient's legitimate pain issues because this government overreach has been imprisoning very qualified doctors for doing what they subjectively thought best for their patients. This resulted in the undertreatment of pain, that has already driven these patients to obtain illicit substances on the streets, with frequently dire and often fatal consequences. These unfortunate human beings are relegated to the procurement of illegal substances to replace the properly prescribed controlled substances to alleviate their pain, lest they suffer tremendously and unnecessarily

in silence. Such is the national importance and unintended consequence of this over-policing of medical doctors; the threat of incarceration for 20 years or more, stops any good doctor, as Dr. Capistrano was one of the clearest casualty, for caring for his patients.

Evenmore, the national importance and implication of this injustice, looms large and casts a broad shadow as it affects not an insignificant number of medical doctors-litigants (and other healthcare professionals) imprisoned for §841 violation, including those currently undergoing proceedings and prosecutions nationwide.

II.

PRO SE LITIGANTS

Learned men remark and assert that laws that govern a nation's life and all its intricate functions, only work if those that have consented and thus, are subject to its rules, regulations, constraints, and stipulations continue to abide and concede to them and their settled, accepted and valid interpretation. The Constitution itself is an outstanding collection of declarations, pronouncements, and specifications that has mightily withstood the test of time and held firmly and forcefully the fabric of the nation only <u>because</u> the government and its governed chose to continue to obey and honor everything it contains. Otherwise, it "would not be worth the paper it is written on."

Dr. Capistrano declared ab initio that as a litigant proceeding pro se, that he is not a university-trained Doctor of Laws nor has extensive professional experience as a licensed attorney-at-law, nor a member of any state or national bar association. He, however, proceeds under the incontrovertibly clear auspices and stipulation of the Supreme Court's Holdings and Rulings regarding this class of litigants, appellants, and petitioners: "[ ] allegations such as those asserted by Petitioner, however inartfully pleaded are sufficient [ ]" and "[ ] under the

allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers,[ ]" Haines v Kerner, 92 S Ct 594, 30 L Ed 2D 652, 404 US 519 (1972); "[ ] and [the court] will interpret them to raise the strongest argument they suggest." Burgos v Hopkins, 14 F 3d 787, 1994 US App LEXIS 1391 (CA2 1194). The Supreme Court reminds the lower courts to afford pro se litigants/appellants liberal construction and to always accept and interpret any cognizable claim that they may put forward. (see Burgos v Hopkins, supra.)

Instead of receiving clarification (not assistance) from the Clerk and Deputy Clerks from both the district court and the Fifth Circuit, he was given a cold shoulder, ignored, misdirected, or outright denied whatever relief or remedy is due or within his right to request or demand, including, but not limited to the following:

1. Repeated requests for transcripts of Record for his Appeal ignored and delayed.

2. Various Motions (at least six (6)) at several different times of submission that were disposed of by the Clerk, exceeding and outside all the bounds of his authority, and even denying Motions for Reconsideration himself.

3. Repeatedly refusing to accept, file, and docket the timely-filed Petition for Rehearing, Hearing En Banc, because it was not physically received at their Office by their arbitrary deadline in violation of the "prison mailbox rule", Fed. R. App. P. 4(c)(1)(A)(i), 28 USC §1746, and Fed. R. App. P. 25(a)(2)(A)(iii) specifically addressing incarcerated filers.

4. Returning opened, and thus, purloined envelope containg legal communication, with the wrongful claim that it is undeliverable.

5. Granting 2 lengthy extensions to file a Petition for a Rehearing/Rehearing En Banc to a co-appellant's counsel in the same case, while insisting that Dr. Capistrano's time-to-file has expired because his 8/7/23 filing was physically

received on 8/21/23, (13 days "late"), when the mail transit time to and from this institution takes 14-21 days.

6. Finding deficiencies in the submission of Petition/Motion and asking to fraudulently change the date on the the certificate or proof of service to then miss an artificially set deadline.

7. Termination of the Criminal Justice Act - Appointed Appellate Attorney (CJAAAA), unbeknownst at that time to Dr. Capistrano that it was an illegal action.

8. No communication nor notice to submit supplemental brief on United States v Ferris, as assumed by the Court.

9. Dismissing all Motions pleading to allow Dr. Capistrano (as the attorney-in-fact) to argue and rebut challenges at oral arguments that occurred without his knowledge despite being the principal and primary Appellant in the Case.

10. The Clerks do not read nor pay proper attention to pro se submissions and arbitrarily act without authority on them. Every single instance that the Clerk or the Court violated any of the Rules of Procedure which resulted negatively and prejudicially upon Dr. Capistrano's appeal is a direct affront to, as well as repugnant to the Constitution's Fifth Amendment Due Process and Equal Protection clauses.

If this is the de facto practice of the Fifth Circuit to presume that any argument, challenge, submission, or claim put forward by pro se litigants are instantaneously undeserving and unworthy, deemed less meritorious to deserve equal and appropriate scrutiny and consideration, then it should proclaim ex cathedra, that it does not allow nor encourage any appellant in propria persona and force unto them a representative CJA-appointed counsel. At least in that scenario, pro se litigants shall be afforded the same treatment and accommodation as counsellors admitted in their Circuit. However, this runs afoul of the settled and long-standing Holdings of the Supreme Court that have already addressed and upheld the

guaranteed protections afforded by the Constitution, that affect and will continue to influence present and future litigants proceeding pro se, who all believe that the inferior courts will always adhere and be bound by the unambiguous Rulings and Directions from the Highest Court.(The Court peremptorily declares that following Haines v. Kerner[], pro se litigants' submissions are treated "liberally" on paper, however in practice, the diametric opposition is adopted by imposing "strict standards and rules" promulgated for professional attorneys.)

The [A]ssistance of Counsel is guaranteed by the Constitution ("Although the constitution guarantees the right to counsel on direct appeal,..." Douglas v California, 372 US 353,355 9 LED2D 811, 83 SCT 814 (1963), but the CJA-AAA was terminated and removed from the case, even after the request that he be made stand-by counsel was submitted. Dr. Capistrano has been doing everything on his own without assistance nor representation. If Pro se litigants shall not be afforded their Rights and Protections, even with the Supreme Court upholding these same rights and protections, then there should be NO litigants permitted to proceed pro se ab initio, and change the jurisprudence to reflect the desire and aim of the Fifth Circuit to only hear from its own members of the elite club. The Clerk of Court terminated the CJA-AAA Goranson immediately after granting Dr. Capistrano's motion to proceed in propria persona on March 11, 2022, despite his request to retain him as "stand-by" counsel. The Constitution guarantees the right to an effective [A]ssistance of Counsel all thoughout the proceedings, which does not terminate just because the trial culminated in the district court and changed venue to the appellate level. Even the Supreme Court appoints very qualified counsels/advocates to argue the issues brought forth by pro se litigants on certiorari. To falsely claim in the guise of "disallowing dual/hybrid representation on appeal" and stealthily coerce a pro se litigant to relinquish a CJA-AAA in an all-or-nothing fashion, disallowing any assistance in researching, preparing,

perfecting, and submitting documents to the Court, is the height of cunning deception and abject indifference to his plight, notwithstanding the consequences. (see 18 USC §3006A et seq.)

III.

MISTAKES OF LAW IN JURY INSTRUCTIONS

A mistake in jury instruction is extremely prejudicial and considered plain error that warrants reversal. Supreme Court holdings indelibly point out to a single error, the occurrence of which is sufficient. The Fifth Circuit reviewed three (3), maybe four (4), piled upon one after the other, and still excused the errors.

First, the Ruan error that was discussed extensively on the previous section.

Second, the substitution of the most important qualifier "subjective" intent with the "objective" intent.

The Fifth Circuit has recognized the problematic nature of inconsistent jury instruction because "it is impossible after the verdict to know which instruction the jury followed" (see Aero Int'l Inc. v Fire Ins. Co.). Dr. Capistrano submits that the jury follows the last spoken instruction of the trial judge and more likely ignored the written instructions as being "revised". That is human nature and likely natural human behavior to listen to figures of authority. (see Valencia-Aguirre). This is more than "slip of the tongue" that results in harmless error because it is prejudicial, resulting in imprisonment and loss of liberty, that is fundamentally injurious to Dr. Capistrano's chance of acquittal at trial. Again, the Supreme Court holds that it is the subjective intent of the doctor-defendant and not any arbitrary objective standard that matters in §841 prosecutions. (see Ruan supra.)

Third, the replacement of the conjunctive "and" with "or" citing Fifth

Circuit precedents, substituting its own interpretation of the expressed will and intent of Congress in the enactment of the law.

The district court used "or" rather than "and" in instructing the jury when a prescription is authorized. The law is clear, that there are two (2) prongs of the authorization that must be satisfied. The En Banc Court Decision of the Eleventh Circuit on a different case (see United States v Garçon) addressed the issue of the conjunctive "and" and declared that "Beginning with the plain text of the statute, the majority held "and" means "and" and it does not mean "or". This issue will be addressed again in a final opinion by the Supreme Court.

Fourth, the Fifth Circuit declares that "good faith" issue is not even an element of the offense; however, it is a constructive defense against conviction. Other Sister Courts of Appeals have held that "any sincere belief (whether reasonable or not) that a prescription was within the bounds of professional practice is grounds for acquittal because a physician holding such a belief lacks the scienter required for a felony conviction." (see United States v Feingold).

In the charge to the jury, the District Court used the following instruction:

"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, medically treating a patient in accordance with a standard of medical practice, recognized and accepted in the United States. Good faith in this context, means an honest effort to prescribe for a patient's condition in accordance with the standards of medical practice generally recognized and accepted in this country." (ROA 362). Thus, "good faith" is the best example of "subjective" intent/standard.

IV.

INSUFFICIENCY OF EVIDENCE

There is no evidence of conspiracy. The only justification of the Fifth Circuit in upholding the conviction on 21 USC §846 as it pertains to Dr. Capistrano is that "all members of the conspiracy are not required to know every other member for a conspiracy to exist". (see United States v Bolts). Dr. Capistrano knew NONE of the participants. "[T]he government cannot rely solely on co-conspirators' statements, and must produce some independent evidence to establish requisite connection between accused and conspiracy." United States v Castaneda, 16 F 3d 1504 (CA9 1994).

A verdict can be supported by reasonable inference from the evidence but "may not rest on pure suspicion, speculations, and conjecture, or an overly attenuated piling of inferences on inferences." (see Rojas-Alvarez). Lamentably, this is the totality of the case against Dr. Capistrano; only circumstantial evidences, mainly Fourth Hurn circumstances, mere suspicions, speculations, and conjectures, including the assumption of Bubu's alleged "knowledge" of the clinic's practices as "evidence".

Dr. Capistrano can not be convicted of conspiracy because 'he had no contact of any type whatsoever with any pharmacists, the recruiter Kinkaid, or any other participant in the conspiracy.' His only interaction was with his patients, whom he never concluded or imagined as "recruits" or "recruiters". He rejects this term, the meaning of which he did not learn about until the first day of trial. Moreover, he rejects this description of his patients as a government/opposition construct in the effort to criminalize his legitimate medical practice. The "abundant evidence" of the Government i.e. "instructing an individual to issue prescription when he is unavailable" is standard practice and sanctioned by controlling legal authorities especially during the time of the pandemic of 2020. He prescribed both controlled and uncontrolled substances and not 99.7% as per Texas Medical Board's own calculations. Therefore, the putative "evidence" of Dr.

Capistrano's "other actions" now all fall on accusations that are mere conjectures.

To sustain Dr. Capistrano's claim that he was never a part of any conspiracy, he consistently warned that his patients will face dismissal if caught sharing or selling prescriptions that he wrote, and in fact, the evidence showed patients were dismissed from his clinic. How did this promote the objectives of a "pill-mill" operation when patients were dismissed from his clinic for non-compliance and bad actions, and therefore lose revenue? Dr. Capistrano did not know nor did he interact with a single member of the conspiracy. If Shirley Williams is the only "co-conspirator" that the Government had presented to testify on the rushed 4-day trial of 3 individuals, then her testimony needed to be discarded: First, the intracorporate conspiracy doctrine dictates: "A corporation can not conspire with its employees, and its employees, acting in the scope of their employment, conspire among themselves." McAndrew v Lockheed Martin Corp., 206 F.3d 1031,1035 (CA11 2000); second, her repeated lies and perjuries were exposed at trial and were rebutted at cross-examination; third, she was the clinic manager, who always maintained she was a "nurse", and handled the day-to-day functions of the clinic, but Dr. Capistrano was never aware of her other activities nor discussed any of these other activities with her.

Any other probable co-conspirator that the government may or may not have but did not testify, must be discarded because it is a glaring violation of the Confrontation Clause of the 6th Amendment that guarantees the right to confront any witness against his person.

Thus, the weight of the conspiracy violation collapses on its own unsupported and infirm foundation.

V.

FRAUD

The prosecution's deliberate and perfectly-timed, and pre-meditated lies akin to a false testimony at closing argument, where the fabricated assertions can not be rebutted on cross examination, was highly prejudicial that affected negatively, the outcome of the proceedings. Nearly a century ago the Supreme Court instructed prosecutors "to refrain from improper methods calculated to produce a wrongful conviction..." Berger v United States, 295 US 78,88, 55 S Ct 629 (1935). The Government had access to all the documents and patient files of the medical clinic and lying to the jury, what is equivalent to "he is not a cancer doctor, it is all a lie, he is a fake, and that alone justifies handing out a guilty verdict", raises to the level of Fraud and not only prosecutorial misconduct nor abuse of discretion. The prosecutor's repeated false declarations at closing, akin to false testimony, was not subjected to rebuttal and the Confrontation Clause of the 6th Amendment was again violated. This affected the substantial rights of Dr. Capistrano because the prosecutor convinced the jurors that he was not a real Cancer Specialist. He indeed had cancer patients, not all were actively being treated for their specific cancers, but yet, pain control is an integral part of cancer care, post-procedurally, during and after chemo, radio, or surgical therapy. Thus, the prosecution's numerous circumstantial evidence based on speculation, inferences, and conjectures, and Fourth Hurn circumstances, and fraudulent Lie, resulted in a prejudicial conclusion by the jurors. The trial judge sustained the lie, thereby insinuating that they are supported by the "evidence". These were never "strong", as claimed.

The transcript of the fraudulent misrepresentation does not capture the actual, vile expression of contempt, derision, ridicule, and disgust by opposition litigator Sean Smith. The transcript does not reflect the vivid, studied, and in an accusatory tone, a well-prepared dramatization by prosecutor Smith, in order to convince the jury to convict Dr. Capistrano for "lying" about himself by treating "zero" cancer patients. It is much different from reading a transcript which makes

the prejudicial error sound unfairly benign, which was auspiciously objected to, and therefore, preserved, during trial. The Supreme Court does not quantify how many lies are permissible but consistently opined that "A lie is a lie", meaning once, or one time. (see Napue v Illinois). And that a "lie is a Fraud." And "Fraud vitiates all, including judgments." (see United States v Throckmorton).

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. ..."Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v United States, 295 US 78,88, 79 L Ed 1314, 55 S Ct 629 (1935).

In United States v. Young, 84 L Ed 2D 1, 105 S Ct 1038, 470 US 1, the Tenth Circuit expressly concluded and held that "the prosecutor's statements at closing arguments constituted misconduct and were sufficiently egregious to constitute plain error". In a per curiam opinion, it reversed the conviction and remanded for retrial. That Court of Appeals overlooked the failure of the defense counsel to preserve the point by timely objection; such is NOT the case here in Capistrano, where the fraudulent statements were objected to at trial.

In a separate opinion by Associate Justice Stevens regarding the same case, he cited Namet v United States, 373 US 179, 10 L Ed 2D 278, 83 S Ct 1151 (1963), where the Court recognized that even in the absence of an objection, trial error may require a reversal of a criminal conviction on either of two theories: (1) that it reflected prosecutorial misconduct, or (2) that it was obviously prejudicial to the accused. Both theories are present here. The error, which is plain and clear, is undisputed professional and prosecutorial misconduct of the

most poisonous variety. It was obviously prejudicial to Dr. Capistrano because, had it not for the fraudulent misrepresentation (the plain error), at least one juror would not have voted to convict him, and he would not have been imprisoned. Evenmore, this then reflects negatively on the fairness, integrity, and public reputation of judicial proceedings. It now rests upon the Court to exercise its vast and unlimited power to apply corrective and remedial measures by reversing Dr. Capistrano's wrongful convictions.

VI.

INEFFECTIVE ASSISTANCE OF COUNSEL

The resolution of a valid, provable, and knowable claim that the trial counsel, certainly after carefully perusing the trial transcripts and the chronology of events transparently validates such claim, was derelict in the performance of his fiduciary and deontological duties, resulting in an Ineffective [A]ssistance of Counsel (which the Constitution guarantees under the 6th Amendment), should not be uniformly nor automatically deferred back to the trial court on a different Motion (i.e. 28 USC §2255). When the aggrieved individual seeking relief from the appellate court shows the myriad but supportable evidence of derelictions of duty of his trial attorney, and the Record credibly supports the claims, should there be no allowance, no movement from that congealed position that always favor the easiest way out, and defer to the trial court further development of the Record, in order to re-state the obvious and already well-established and documented facts?

The Fifth Circuit declined to consider the claims of Ineffective Assistance on Direct Appeal, insisting that the Record is not sufficiently developed with respect to the claim. The dereliction of duty by trial counsel was legion and well-documented in the Briefs, with confirmation in the trial Record.

Dr. Capistrano enumerated these instances and urged the Court to invoke the exception to the general rule because the Record provided substantial details about the trial attorney's derelictions and perspicuously inefficient assistance. "[ ], similar cases which show that there has never been a real contest in the hearing of the case as reason for which a new trial may be sustained to set aside and annul the former judgement or decision and open the case for a new trial and a fair hearing." (see Throckmorton). The argued claims of the appellant do not require examination of the attorney's conduct or motivation. "The usual need for developing the Record regarding the attorney's version of the events do not exist here." (see Martinez-Perez).

"An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v Alabama 571 US 263,274, 134 S Ct 1081, 188 L Ed 2d 1 (2014).

As was asserted in the Briefs by Dr. Capistrano, defense counsel's derelictions of duty resulting in ineffective assistance, were legion and were enumerated, compiled and specific. In addition, an emergency motion to file a supplement filed on April 25, 2023, was denied by the clerk of court even after noticing the Court of its crucial value to the appeal. Recently discovered factual evidence, after overcoming interminable hindrances as an incarcerated petitioner, revealed fatal errors in the Indictment numbers 2,3,18,19. Extensive and careful review of 21 USC §841, the criminal statute for which the district court tried, convicted, and meted out the corresponding punishments to Dr. Capistrano, further exposes the glaringly incorrect crime that was prosecuted. This now obvious error resulted in a fraudulent indictment from the government prosecutors, which the defense counsel did not challenge, and the trial court failed to verify. This fraud upon the district court, by issuing these erroneous indictments that convicted Dr. Capistrano for unlawfully prescribing a class of drugs that he did not dispense,

requires de novo review for plain error. Mistakes of law may be presented and invoked at any time during judicial review.

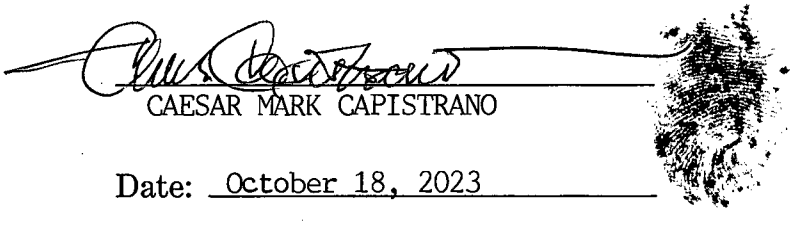
Count number 2 of the Indictment declares the violation of 21 USC §846 [§841(a)(1). §841(b)(1)(E)(2)]. Count number 3 declares violation of 21 USC §846 [§841(a)(1), §841(b)(1)(E)(3)]. Count number 18 violates 21 USC §841(a)(1) and (b)(1)(C),(E)(2) and 18 USC §2. Count number 19 alleges violation of 21 USC §841(a)(1) and (b)(1)(C),(E)(3) and 18 USC §2. The Law does not define nor enumerate any sub-paragraphs (E)(2) nor (E)(3). What is infinitely more relevant and consequential is the fact that sub-paragraph (E) refers to Schedule III drugs. Hydrocodone is Schedule II, Carisoprodol is Schedule IV, and Promethazine with Codeine is Schedule V.

The inescapable and undeniable truth, therefore, reposes within these invalid and fraudulent counts of the pretended indictments for the non-existent crimes that are in fact, not cognizable by the United States and its courts, that eventually resulted in the punishment of incarceration and loss of liberty. These are errors, plain and clear, [and thus, it is a legal impossibility, and therefore, Dr. Capistrano is **actually innocent**], that prejudicially affected the outcome resulting in wrongful conviction for which the trial should not even have been allowed to commence; especially when coupled by the "quintessential example of unreasonable performance of counsel under Strickland", which is in itself another plain error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



CAESAR MARK CAPISTRANO

Date: October 18, 2023