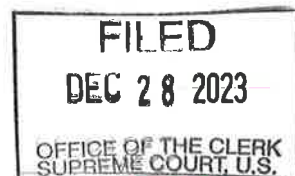


ORIGINAL

IN THE UNITED STATES SUPREME COURT

Caesar Mark Capistrano
Petitioner



v.

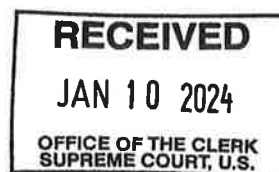
No. 23-5975

UNITED STATES OF AMERICA
Respondent

PETITION FOR REHEARING
OF DENIAL OF PETITION FOR WRIT OF CERTIORARI

Now comes Doctor Caesar Mark Capistrano, (Dr. Capistrano), Petitioner/Appellant in propria persona, who begs this most Honorable Court's indulgence by hearing his argument for requesting a reconsideration of the denial of the Petition for Writ of Certiorari on December 11, 2023. Dr. Capistrano continues to remind the Court that as a Pro se Petitioner: "[a]llegations 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 SCT 594, 404 US 519 (1972); this submission is to be afforded less scrutiny as filings drafted by professional attorneys and allowed liberal construction. Moreso, "[] and [the Court] will interpret them to raise the strongest argument they suggest." Burgos v. Hopkins, 14 F.3d 787 (CA2 1994).

The Court should grant the petition for writ of certiorari because upon examination, the case is exactly what the Ruan v United States, 142 S Ct 2370 Decision is all about and why it was addressed by



this Court in June 2022. Dr. Capistrano could not have been found guilty by the jury, <therefore, his actual innocence of of all the charges in the indictment is claimed>, because of the plain error in the final jury instruction that omitted the mens rea element and requirement of Title 21 USC §841, §846 prosecutions. The United States Court of Appeals for the Fifth Circuit (the Fifth Circuit) admitted and acknowledged in its published Opinion that declared: "The district court's jury instructions incorrectly stated the law by omitting the mens rea element." United States v. Capistrano, 74 F.4th 756, 2023 US App LEXIS 19003 at *13 (7/25/23); and further added: "Accordingly, although 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. <Id. at *14>. However, for whatever mysterious reason, the Fifth Circuit failed, deliberately or inadvertently, to exercise its duty to remedy the error, that resulted in Dr. Capistrano's continued wrongful incarceration.

In the intervening period since the filing of the petition for writ of certiorari on October 18, 2023, it has been reported by a reputable publication that the Supreme Court has granted the vacatur and remand of at least two(2) other medical doctors' petitions affected by the Ruan v. United States Opinion that was decided on June 27, 2022. It is further reported that as a result, the Court of Appeals have remanded for a new trial. There are at least fourteen(14) medical doctors and related professionals' cases that were vacated and remanded to the various Courts of Appeals upon the grant of each of their petitions for writ of certiorari:

1. Cynthia Clemons v. United States, 143 SCT 350 (10/17/22).
2. Sylvia Hostetter v. United States, 143 SCT 351 (10/17/22).
3. Courtney Newman v. United States, 143 SCT 350 (10/17/22).
4. Medardo Queg Santos v. United States, 1433 SCT 350 (10/17/22).
5. Holli Womack v. United States, 143 SCT 350 (10/17/22).
6. Saad Sakkal v. United States, 143 SCT 298 (10/11/22).
7. Frank H. Bynes, Jr. v. United States, 143 SCT 71 (10/3/22).
8. George P. Naum III v. United States, 142 SCT 2893 (6/30/22).
9. Andres Mencia v. United States, 142 SCT 2897 (6/30/22).
10. Steven R. Henson v. United States, 142 SCT 2902 (6/30/22).
11. John Patrick Couch v. United States, 142 SCT 2895 (6/30/22).
12. Shakeel Kahn v. United States, 142 SCT 2370 (6/27/22).
13. Xiulu Ruan v. United States, 142 SCT 2370 (6/27/22).
14. Kendrick Eugene Duldulao v. United States, 143 SCT 350 (10/17/22).

Where else can a citizen of the United States turn to at this critical junction of an appeal? Appellate attorneys agree and declare that "there are so many things wrong in this particular case". But they hasten to add, "unfortunately, they are not the wrong things that superior courts want to consider". But if it is pellucid and transparent that the unanimous (9-0) Ruan Opinion of the Highest Court

is being ignored by the Fifth Circuit, by appearing in agreement with the new interpretation of the law, and yet refuses to grant the vacatur, reversal, and remand of the wrongfully arrived at conclusion at trial, could this Court not be persuaded to review and remand the case for further proceedings?

This case is a pure Title 21 USC §841/§846 prosecution, and it mirrors the salient features and arguments in all the previously enumerated medical doctors and practitioners' vacated and remanded cases when their petitions for writ of certiorari were granted. Is this doctor's liberty interest and his life, less valuable? Are they less worthy of the same consideration and attention?

Petitioner claims that the panel decision of the Fifth Circuit conflicts and misinterprets the Ruan Decision 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. As the scienter requirement was dealt a fatal blow by the mens rea element necessary post-Ruan, several courts of appeals that have addressed the issue disagreed and has issued varying opinions that requires the guidance and intervention of this Court, as this liberty issue has national implication as it affects not an insignificant number of people engaged in the delivery of health care.

The Fifth Circuit, in its published opinion declared that the final jury instruction was erroneous and then reviewed and conceded that it was plain error. Judge Patrick E. Higginbotham, in writing the opinion concedes and pronounces that the mens rea element of the law was

omitted, and thus a plain error occurred, and that even if the trial court could not have known or foreseen the Supreme Court decision in June 27, 2022, when this case was tried on January 25, 2021 and was concluded in January 28, 2021, that such error does warrant reversal. United States v. Capistrano supra at *13 & *14.

The Fifth Circuit applied Ruan only to the pharmacist Bubu's challenge while the Supreme Court rendered its Holding on Ruan specifically addressing medical doctors' scienter issue, and changed the understanding of the mens rea element necessary for conviction in §841 prosecutions. It addressed Bubu's plain error claim, discussed extensively why her challenge failed, but totally ignored and conflated Dr. Capistrano's own challenge in this case, that exactly mirrors the §841 prosecution of Drs. Ruan and Kahn. Unlike pharmacist Bubu's challenge, Dr. Capistrano was able to diligently argue all four (4) prongs of the plain error test. The Fifth Circuit on footnote #40 even noted that "Bubu and Capistrano both addressed Ruan in their briefs", but was silent on Dr. Capistrano's challenge.

Dr. Capistrano successfully addressed all the four (4) requirements of the plain error test in his Briefs, even the prongs 3 and 4 missing in the pharmacist's challenge. He submitted that the plain error affected his substantial rights because the error was prejudicial, that had it not for the error, he would have been acquitted and not convicted on any count, and the outcome would have been different. That this undermined the outcome of the proceedings against him, rendering the verdict not trustworthy, thus impacting negatively the integrity and public reputation of judicial proceedings, especially if not corrected and remedied by exercising the Court's unlimited discretionary power to correct the error.

Evenmore, the Fifth Circuit appeared to have acquiesced to the Supreme Court's new holding on Ruan's new mens rea interpretation, declared that the jury instruction was indeed erroneous, found the existence of plain error and declared that that same error warrants reversal of convictions, BUT proceeded to ignore Dr. Capistrano's challenge while addressing the incomplete arguments of the co-appellant pharmacist Bubu, tacitly accepting the new interpretation of §841 per Ruan, but not delivering the deserved and anticipated remedy or relief - the vacatur and remand of the case.

The nationwide importance and implication of this case can not be overstated, as it looms large and casts a broad shadow because it affects not an insignificant number of doctors-litigants, including ancillary medical personnel, imprisoned for 21 USC §841 violation, including those currently undergoing proceedings and prosecutions all around the country. Nationally, medical doctors have already refrained from prescribing narcotic medications to their patient's legitimate health issues because the government's overreach has resulted in imprisonment of 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 same patients to obtain illicit substances on the streets, with frequently dire and often fatal consequences e.g. overdose and death. These unfortunates are relegated to the procurement of illegal substances as substitute for the properly prescribed controlled substances to alleviate their pain, or otherwise be forced to suffer acutely and unnecessarily in silence. This is the national importance and unintended consequence of the over-policing of


medical doctors treating pain. The threat of lengthy incarceration of 20 years or even more, stops any qualified and authorized doctor, like Dr. Capistrano, from caring for his patients and treating them as best as he possibly could.

The case as it pertains to Dr. Capistrano merits a review because he has shown the grave injustice by demonstrating that the Fifth Circuit conceded to the existence of plain error when the trial court erred by omitting the mens rea element as required by the new understanding of the law post-Ruan, as well as the further concession by the panel that "Accordingly,...[]], such error does warrant reversal". United States v. Capistrano, supra. at *13 & *14. The Fifth Circuit however, did not follow through on its recommendation, and failed to order the intended relief.

WHEREFORE, Premises considered, Petitioner-Appellant in propria persona Dr. Caesar Mark Capistrano, begs this most Honorable Court to GRANT this Petition for Rehearing of the Denial of Petition for Writ of Certiorari. And further, may the Court GRANT the Petition for Writ of Certiorari because of the reasons recited above.

Dated: December 23, 2023

Respectfully submitted:


CAESAR MARK CAPISTRANO
PRO SE PETITIONER/APPELLANT
5756 HARTFORD & POINTVILLE
JOINT BASE MDL, NJ 08640

CERTIFICATION BY PRO SE PETITIONER

To comply with the stipulations of Rule 44.2, Petitioner/Appellant in propria persona Doctor Caesar Mark Capistrano do hereby attests that, to the best of his knowledge, this Petition for Rehearing of the Denial of the Petition for a Writ of Certiorari has grounds limited to intervening circumstances of a substantial effect or not previously presented. Moreso, that the Petition is presented in good faith and not for delay.



(Signature)

No. 23-5975

IN THE
SUPREME COURT OF THE UNITED STATES

Caesar Mark Capistrano
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PROOF OF SERVICE

I, Caesar Mark Capistrano, do swear or declare that on this date, the 28th of December, 2023, as required by Supreme Court Rule 29 I have served the enclosed PETITION FOR REHEARING OF DENIAL OF THE PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail utilizing this prison's institutional mailbox system, properly addressed to each of them with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery.

The names and addresses of those served are as follows:

1. Scott S. Harris, Clerk
Office of the Clerk
Supreme Court of the United States
One First Street, NE
Washington, DC 20543-0001
2. Solicitor General of the United States, Room 5614
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

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

Executed on December 28, 2023.


(Signature)