
No.

in the
Supreme Court
of the
United States

Term,

HOLLI WOMACK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI FROM
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH MEDICI
Federal Public Defender Southern District of Ohio

Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
250 E. Fifth St. Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner

QUESTION PRESENTED

On October 17, 2022, this Court vacated Petitioner Womack's conviction in light of *Ruan v. United States*, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022) and remanded for further proceedings. On remand, the Sixth Circuit agreed with the parties that *Ruan* applies to 21 U.S.C. § 856(a)(1) prosecutions, and also agreed that the jury instructions given were error in light of *Ruan*. However, parting ways with other circuits handling of this issue, the Sixth Circuit determined that Womack could not meet the plain error standard. Is the Sixth Circuit's draconian view of the plain error standard contrary to this Court's precedents, including *Henderson v. United States*? 568 U.S. 266, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013).

RELATED CASES

Pursuant to Supreme Court Rule 14.1(b)(iii), Petitioner submits the following cases which are directly related to this Petition:

United States v. Cynthia Clemons
Sixth Circuit Case No. 20-6427 (decided 8.29.23)

United States v. Courtney Newman
Sixth Circuit Case No. 20-6428 (decided 8.29.23)

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The Petitioner, Holli Womack, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on August 29, 2023.

OPINION BELOW

The Sixth Circuit's opinion in this matter is published at 80 F.4th 725, and is attached hereto as Appendix 1. This Court's decision to remand for further proceedings is published at 143 S.Ct. 250, and is attached hereto as Appendix 2. The Sixth Circuit's previous opinion is published at 31 F.4th 396, and is attached as Appendix 3. The district court's opinion denying Petitioner's motion for acquittal and/or new trial is unpublished, and attached as Appendix 4.

JURISDICTION

The Sixth Circuit denied Petitioner's appeal on August 29, 2023. This petition is timely filed. The Court's jurisdiction is invoked pursuant 28 U.S.C. § 1291 and Supreme Court Rule 12.

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 856 provides in part:

Except as authorized by this subchapter, it shall be unlawful to--

- (1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;**
- (2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.**

Federal Rule of Criminal Rule 52 provides:

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

STATEMENT OF THE CASE

On October 17, 2022, this Court granted certiorari, vacated the judgment, and remanded back to the Sixth Circuit this matter for further consideration in light of this Court's recent ruling in *Ruan v. United States*. 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022). Petitioner Holli Womack had been convicted after a jury trial of one count of using or maintaining a place for the purpose of distribution of a controlled substance, in violation of 21 U.S.C. § 856(a)(1).

The facts relating to this conviction were that for an eleven month period spanning 2013 and 2014, Womack was a part-time employee at a pain clinic in Tennessee. For most of that period, she was in training to be a nurse practitioner. Shortly after she received her license and was able to write prescriptions herself, she put in her notice to leave the clinic. In all, she wrote prescriptions for two months at the clinic. The clinic itself had admittedly bad practices: the Government put forth evidence that clients were prescribed opioids by some health care professionals with little to no review of their medical history or symptoms. Patients used false MRIs and drug screens, and other false documentation. One manager of the clinic took bribes to see patients quicker. There was no evidence Womack used false MRIs or knew about them. Womack was charged with conspiracy to distribute narcotics, in violation of 21 U.S.C. § 846, and one count of aiding and abetting the maintaining of a premises for the illegal distribution of narcotics, in violation of 21 U.S.C. § 856.

Womack admitted to prescribing opioids. Her defense was that she did not knowingly act in violation of the law. As to the 21 U.S.C. § 856(a) count, the jury was instructed:

In order to prove a defendant guilty of opening, using, or maintaining a drug-involved premises, the government must prove each of the following elements beyond a reasonable doubt as to each of Counts 11, 12, and 13: First, that the defendant knowingly opened, used, or maintained a place, whether permanently or temporarily; And second, that the defendant did so for the purpose of distributing any controlled substance You are instructed that oxycodone, oxymorphone, and morphine are Schedule II controlled substances.

....
If a nurse practitioner prescribes a drug in good faith in the course of medically treating a patient, then the nurse practitioner has prescribed the drug for a legitimate medical purpose in the usual course of accepted medical practice, that is, she has prescribed the drug lawfully.

....
whether a practitioner -- finally, whether a prescription is made in the usual course of professional practice is to be determined from an objective and not a subjective viewpoint.

After deliberation, the jury acquitted Womack on the conspiracy count, but convicted her of maintaining or use a place for the distribution of a controlled substance.

On initial appeal to the Sixth Circuit, Petitioner Womack raised two issues:

1. Womack's 21 U.S.C. § 856 conviction for maintaining a premises for the illegal distribution of controlled substances must be

vacated, as she did not maintain the pain management clinic, or aid and abet with others to do so for the purpose of illegally dispensing controlled substances.

2. The district court's jury instruction as to the elements of 21 U.S.C. § 856, which omitted the requirement that the controlled substances be distributed illegally, was fundamental error resulting in an unreliable jury verdict.

In a published decision dated April 11, 2022, the Sixth Circuit denied Womack's appeal. The Sixth Circuit determined, as to the faulty jury instruction, that while it was an inaccurate statement of the law, other instructions given by the court let the jury render a reliable verdict. (Appendix 3, p.11)

After the certiorari grant and remand, the Sixth Circuit ordered additional briefing on the faulty instruction and held additional oral arguments. On August 29, 2023, the court again upheld the faulty instruction as not meeting the plain error standard for reversal. The Sixth Circuit determined:

The district court's drug-involved premises instruction did not spell out the "knowingly" mens rea standard required under Ruan, 142 S. Ct. at 2375, for the second element. But plain error review requires the court to review jury instructions "as a whole," within context. Dimora v. United States, 973 F.3d 496, 502 (6th Cir. 2020) (per curiam); Stewart, 729 F.3d at 530. Taken as a whole, the jury instructions made clear that the jury had to find that Defendants knowingly opened the clinics for the purpose of illegally distributing Schedule II controlled substances. Before giving the instructions regarding the two elements required for the jury to convict under § 856(a)(1), the district court provided an overview of the charge. "Count 13 of the superseding indictment charges that . . . Hofstetter, Newman, Clemons, and Womack, aided and

abetted by one another and others, did knowingly and intentionally, open, use, and maintain a business . . . for the purpose of illegally distributing Schedule II controlled substances[.]” In addition, the district court summarized Count 13 of the indictment for the jury as “charg[ing] defendants with maintaining drug-involved premises, that is, knowingly and intentionally opening, using, and maintaining businesses for the purpose of illegally distributing controlled substances outside the usual course of professional practice and not for a legitimate medical purpose[.]” In context, the instructions make clear that to find Defendants guilty, the jury was tasked with making a subjective inquiry into whether the Defendants purposefully, with knowledge or intent, illegally distributed controlled substances.

(Appendix 1, p.5)

REASON FOR GRANTING THE WRIT

1. A jury instruction which required the jury to use an objective standard to determine whether Womack distributed narcotics, and did not indicate that the distribution needed to be “illegal”, is plain error requiring reversal of the conviction

Petitioner Womack’s one count of conviction was for a violation of 21 U.S.C. § 856(a), based upon her employment as a nurse practitioner at a pain clinic. Because the district court informed the jury that an objective, not subjective standard should determine whether Womack’s distribution practices were within professional standards, this Court’s pronouncement in *Ruan v. United States* requires vacation of the conviction. The Sixth Circuit’s determination that Womack failed to meet the plain error standard is contrary to this Court’s pronouncement in *Henderson v. United States*, 568 U.S. 266, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013), and thus must be reversed.

In *Ruan v. United States*, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022), this Court, interpreting 21 U.S.C. § 841, determined that where a health care professional is charged for conduct within the scope of his or her practice, “the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so.” 142 S.Ct. at 2375. In doing so, the Court vitiated lower court rulings which had allowed the Government to prove that the health care professional did not act in “good faith” or

in an “objectively reasonable” manner. The Court concluded that “for purposes of a criminal conviction under § 841, this requires proving that a defendant knew or intended that his or her conduct was unauthorized.” *Id.* at 2382.

The jury in Petitioner Womack’s case was instructed “[i]f a nurse practitioner prescribes a drug in good faith in the course of medically treating a patient, then the nurse practitioner has prescribed the drug for a legitimate medical purpose in the usual course of accepted medical practice, that is, she has prescribed the drug lawfully.” The jury was further informed “whether a practitioner -- finally, whether a prescription is made in the usual course of professional practice is to be determined from an objective and not a subjective viewpoint.” While the Sixth Circuit correctly found this instruction was error under *Ruan*, the court ultimately determined that it was not reversible error under a plain error review. In doing so, the court misapplied the plain error standard.

“To establish eligibility for plain-error relief, a defendant must satisfy three threshold requirements. [] First, there must be an error. Second, the error must be plain. Third, the error must affect ‘substantial rights,’ which generally means that there must be ‘a reasonable probability that, but for the error, the outcome of the proceeding would have been different.’” *Greer v. United States*, 141 S. Ct. 2090, 2096, 210 L. Ed. 2d 121 (2021). In *Henderson*, this Court made clear that the “time of error” rule does not apply to a plain error review – that the error is in fact an error at the time of appellate review satisfies the standard, even when the district court

was not “in error” at the time of trial. *Henderson v. United States*, 568 U.S. 266, 275, 133 S. Ct. 1121, 1128, 185 L. Ed. 2d 85 (2013). Thus, the Court instructed that “plain-error review is not a grading system for trial judges. It has broader purposes, including in part allowing courts of appeals better to identify those instances in which the application of a new rule of law to cases on appeal will meet the demands of fairness and judicial integrity.” 568 U.S. at 277.

At issue is the Sixth Circuit’s interpretation of the third requirement. The Sixth Circuit determined that the district court’s “overview of the charges” at the beginning of the jury instructions, which allegedly gave a conflicting answer as to whether the jury should use an objective or subjective standard, was adequate to show that, absent the error, the jury would have come to the same conclusion. However, there are two problems with relying on this overview. First, the district court informed the jury, as to the overview, that the “brunt” of the instructions were the elements, and that, as to those instructions, they would be placed on the screens as the court read them. Further, the district court’s summary was not a recitation of the elements of the offenses. For example, as to count 13 (the only count of conviction), the district court noted “Count 13 charges Defendants Hofstetter, Newman, Clemons, and Womack with opening, using, and maintaining a drug-involved premise -- or premises at East Knoxville Healthcare Services on Lovell Road in Knoxville, Tennessee.” Clearly, this summary was not intended to provide

the jury with the elements of the offense, but was what the district court said it was, a short summary.

Moreover, the Sixth Circuit, in reviewing the damage of the faulty instruction, failed to weigh the fact that the jury had acquitted Womack of the conspiracy count. Other defendants were convicted (by the same jury) of the conspiracy, so there was ample evidence that the conspiracy existed. The jury must therefore have determined that Womack did not knowingly join the drug conspiracy. The error in the 21 U.S.C. § 856 instruction must have substantially swayed the jury's determination, given this.

Likewise, the Sixth Circuit's admission that the instructions were contradictory in places should have triggered it to find that the error could not be harmless. This Court has held that “[L]anguage that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict.” *Francis v. Franklin*, 471 U.S. 307, 322, 105 S. Ct. 1965, 1975, 85 L. Ed. 2d 344 (1985). Thus, that the instructions contradicted each other as to this critical issue – the only real contested issue in the trial, required a finding of plain error.

The Sixth Circuit also determined that the above reference to an “objective viewpoint” was not legal error because “[w]hether a prescription was unauthorized is an objective question because ‘the regulation defining the scope of a doctor’s

prescribing authority does so by reference to objective criteria[.]’ *Ruan*, 142 S. Ct. at 2382. In contrast, as *Ruan* makes clear, the subjective question is whether Defendants knowingly or with intent issued unauthorized prescriptions.” (Appendix 1, p.6) This is a misreading of *Ruan*. Although the regulation itself is an objective standard, the Government’s burden is clear: “for purposes of a criminal conviction under § 841, this requires proving that a defendant knew or intended that his or her conduct was unauthorized.” *Ruan* at 2382. It is the lack of any subjective evidence as to Womack in the record, coupled with the faulty instruction, which makes the instruction reversible error.

The Sixth Circuit’s decision ultimately reflects a misunderstanding of the plain error standard. As this Court held in *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 201 L. Ed. 2d 376 (2018), even unintended or inadvertent errors can rise to the level of plain error. The Court, in rejecting the Fifth Circuit’s “shock the conscience” standard of plain error review, found that “[b]y focusing instead on principles of fairness, integrity, and public reputation, the Court recognize[s] a broader category of errors that warrant correction on plain-error review.” 138 S.Ct. at 1906. Moreover, “[t]he risk of unnecessary deprivation of liberty particularly undermines the fairness, integrity, or public reputation of judicial proceedings . . .” *Id.* at 1908.

The Sixth Circuit’s plain error analysis wholly ignores this plain error standard, and instead replaces it with a new one: if in the context of a jury

instruction error, the jury was given both incorrect and partially correct instructions, it should be assumed that the jury followed the correct ones, and therefore, no plain error exists. This Court's precedents in *Rosales-Mireles* and elsewhere require otherwise.

Finally, the Sixth Circuit's analysis misses the plain error mark because it does not show what evidence would have supported a jury finding on subjective intent. The only evidence presented by the Government related to their experts, and whether Petitioner Womack's conduct met an objective standard within the healthcare professional community. The Government provided no evidence as to Womack's state of mind or actual criminal intent. As *Ruan* clarifies, this is not enough.

2. The Sixth Circuit's reading of *Ruan* is contrary to other circuits

The Sixth Circuit's reading of the effect of *Ruan* is also contrary to other circuits that have decided this very issue, creating a conflict among the circuits which must be resolved by this Court.

The Tenth Circuit's decision in *United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023) is directly on point. There, the defendant received certiorari relief based upon *Ruan*. Upon remand to the Tenth Circuit, the Government argued that the error in the instructions was harmless. The Tenth Circuit disagreed. The court noted that the defendant did not contest he distributed the substances in his role as a physician, nor did he contest that some of his patients abused the drugs. The only

issue at trial was his intent. The Government cited voluminous evidence in the record to support their argument that, under a subjective standard, there was “overwhelming” evidence to convict under the new *Ruan* standard. The Tenth Circuit disagreed with this analysis, finding “[w]here an element of an offense is contested at trial, as it was here, the Constitution requires that the issue be put before a jury—not an appellate court. . . . In this case, Dr. Kahn's intent was in dispute throughout his trial and was the centerpiece of his defense. A jury, properly instructed, must address whether the government carried its burden to establish Dr. Kahn's intent beyond a reasonable doubt.” *Id.* at 1319.

A similar result occurred in *Ruan* itself. *United States v. Ruan*, 56 F.4th 1291 (11th Cir. 2023). After remand from this Court, the Eleventh Circuit determined that, even though a “good faith” instruction was given to the jury, vacation of the 21 U.S.C. § 841 convictions was necessary. “[T]he district court did not adequately instruct the jury that the defendants must have ‘knowingly or intentionally’ prescribed outside the usual course of their professional practices. At a minimum, as discussed above, without the limiting qualification that only subjective good faith was sufficient for conviction, the jury was authorized to convict under the sort of objective good faith or honest effort standard rejected by the Supreme Court.” *Id.* at 1298. As such, “a properly instructed jury may not have convicted the defendants had it known that Dr. Ruan's and Dr. Couch's subjective beliefs that they were acting properly was a defense to these charges. Similar to *McDonnell*, under the

erroneous instruction in this case the jury was authorized to convict the defendants for conduct that was lawful. Thus, we cannot conclude that these errors were harmless.” *Id.*

The Sixth Circuit’s treatment of *Ruan* is fundamentally different from that of the Tenth and Eleventh Circuits. This creates a conflict among the circuits which must be addressed by this Court. There is no question but that Womack was involved in the dispensing of controlled substances; she was a nurse practitioner who gave out prescriptions. The issue before the jury as to this element was whether she did so illegally. This required the jury to determine her subjective intent – a finding the jury never made in this case. The Sixth Circuit’s finding this did not constitute plain error is a misinterpretation of not only *Ruan*, but this Court’s plain errors precedents. This Court should grant certiorari review, and remand for a new trial.

CONCLUSION

Womack requests this Court grant certiorari, reverse the Sixth Circuit's decision, and remand for dismissal of the conviction.

Respectfully submitted,

JOSEPH MEDICI
Federal Public Defender



Kevin M. Schad
Appellate Director
Office of the Federal Public Defender
Southern District of Ohio
Appellate Director
250 E. Fifth St.
Suite 350
Cincinnati OH 45202
(513) 929-4834
Kevin_schad@fd.org
Counsel for Petitioner