

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

CYNTHIA CLEMONS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

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

6th Circuit Case No. 20-6427

PETITION FOR WRIT OF CERTIORARI

RANDALL E. REAGAN
Counsel of Record
625 Market Street, Suite 900
Knoxville, Tennessee 37902
(865) 637-8505
justice@randallreagan.com

*Randall E. Reagan is Court-appointed Counsel for Petitioner
pursuant to the Criminal Justice Act of 1964*

QUESTIONS PRESENTED

On October 17, 2022, this Court vacated the opinion of the Sixth Circuit affirming Petitioner Cynthia Clemons' convictions and remanded for further proceedings in light of *Ruan v. United States*, 142 S. Ct. 2370, 213 L. Ed. 2d 706 (2022). On remand, the Sixth Circuit agreed with the parties that *Ruan* applies to 21 U.S.C. § 856(a)(l) prosecutions and also agreed that the jury instructions on the *mens rea* element required for a conviction under § 856 of a nurse practitioner authorized to prescribe controlled substances were error in light of *Ruan*. However, in conflict with other circuits' handling of this issue, the Sixth Circuit determined that Mrs. Clemons could not meet the plain error standard. Is the Sixth Circuit's ruling on the plain error standard contrary to this Court's precedents, including *Ruan* and *Henderson v. United States*, 568 U.S. 266, 133 S. Ct. 1121, 185 L. Ed. 2d 85 (2013)?

After determining that the District Court did not "spell out the 'knowingly' standard required under *Ruan*, 142 S. Ct. at 2375, for the second element" of § 856, the Sixth Circuit reasoned that by the district court's insertion of the generic term "illegally" in the instruction, the jury instruction "made clear that the jury had to find that Defendants knowingly opened the clinics for the purpose of illegally distributing Schedule II controlled substances." Did the Sixth Circuit commit error by substituting the generic term "illegally" for the language mandated in *Ruan*?

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. Sylvia Hofstetter

Sixth Circuit Case No. 20-6245 (decided August 29, 2023)

United States v. Courtney Newman

Sixth Circuit Case No. 20-6428 (decided August 29, 2023)

United States v. Holli Womack

Sixth Circuit Case No. 20-6426 (decided August 29, 2023)

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The opinion of the Court of Appeals for the Sixth Circuit on remand from this Court is reported at 80 F.4th 725 and is attached as Appendix A. This Court's order remanding this case to the Sixth Circuit for further proceedings is published at 143 S.Ct. 350 and is attached as Appendix B. The Sixth Circuit's original opinion is published at 31 F.4th 396 and is attached as Appendix C. The district court's opinion denying Petitioner's motion for judgment of acquittal and motion for new trial is unpublished and attached as Appendix D.

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals for the Sixth Circuit affirming Petitioner's convictions was entered on August 29, 2023. *United States v. Hofstetter*, 80 F. 4th (6th Cir. 2023). (App. A) This Petition for Writ of Certiorari is filed within ninety days of that date, pursuant to Supreme Court Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

21 U.S.C. § 856(a)(1) provides:

(a) Unlawful acts

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 purposes of manufacturing, distributing, or using any controlled substance

Fed. R. Crim. Procedure 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

Cynthia Clemons received her Associates of Science degree in Nursing from Lincoln Memorial University (LMU) in 1997, her Bachelor of Science degree in Nursing from Lincoln Memorial University (LMU) in 2010, and her Masters degree in Nursing/Family Practitioner from LMU in 2011.

Mrs. Clemons was licensed in Tennessee as a registered nurse and, in 2013, had over fourteen years of clinical experience as an R.N. She was licensed as an Advanced Practice Nurse in 2012 and received her certification as a Family Nurse Practitioner in 2012.

Beginning in April of 2012, Mrs. Clemons worked as a family nurse practitioner for Blount Hospitalists in Maryville, Tennessee. She was issued her DEA number at that time, authorizing her to prescribe controlled substances under the supervision of a licensed physician also authorized to prescribe controlled substances.

Mrs. Clemons began working at East Knoxville Healthcare Services (EKHS) on Lovell Road in Knoxville, Tennessee (the Lovell Road clinic) on November 4, 2013, as an independent contractor nurse practitioner for an hourly wage of \$65.00, roughly the

same hourly wage she made when working for Blount Hospitalists. On occasion, she would be called upon to work at an associated clinic in Lenoir City, Tennessee (the Lenoir City clinic). While working at the Lovell Road and Lenoir City clinics, Mrs. Clemons was supervised by a physician authorized to distribute controlled substances.

On March 15, 2015, federal law enforcement agents executed search warrants at the Lovell Road and Lenoir City clinics. Mrs. Clemons was charged in the first superseding indictment in this cause on October 4, 2016. On May 1, 2018, a fourth superseding indictment was filed charging Mrs. Clemons in Counts Two and Four with conspiracy to distribute oxycodone, oxymorphone, and morphine, with enhanced penalty allegations for deaths resulting from the use of controlled substances distributed or dispensed by Mrs. Clemons; in Counts Eleven and Thirteen with opening, using, and maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1); and in Counts Sixteen and Eighteen of distributing a controlled substance outside the usual course of professional practice and not for a legitimate medical purpose in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 18 U.S.C. § 2.

The trial began on October 21, 2021. On February 13, 2020, the jury returned a verdict finding Mrs. Clemons not guilty of all counts except for Counts Eleven and Thirteen charging using or maintaining a drug-involved premises.

At trial, the government presented a number of former patients of the clinics, some of whom had been treated by Mrs. Clemons.

Each of the patients treated by Mrs. Clemons stated that they told her they had legitimate need for pain medication. Mrs. Clemons gave the patients she treated

examinations to determine their range of motion. She examined patients regularly for track marks or other signs of drug abuse. She required patients to come in for pill counts to make sure they were taking the medications as prescribed.

Patients would be discharged by Mrs. Clemons for track marks and dirty drug screens. Monthly drug screens, mandated by Tennessee law, were administered to make sure the patients were not taking drugs they were not supposed to and were taking only the drugs they were prescribed.

The government presented two expert witnesses, one a nurse practitioner and one a medical doctor with no formal training or expertise in pain management. Each of these witnesses reviewed patient files selected by the government from the clinics. Each of these witnesses opined that none of the prescriptions they saw in these selected files were written for a legitimate medical purpose and in the usual course of professional practice.

The defense presented two expert witnesses, one a nurse practitioner and a medical doctor, each of whom had extensive experience in pain management. Each of these experts reviewed a random sampling of patient charts from the clinics and each opined that the prescriptions written by Mrs. Clemons and the other co-defendant providers were written for a legitimate medical purpose and in the usual course of professional practice.

At the conclusion of the government's proof, and again at the conclusion of all the proof, Mrs. Clemons, along with the other co-defendants, orally moved for an

Fed.R.Crim.P. Rule 29 motion for judgment of acquittal, a ruling on which the district court reserved until a later date.

During closing argument, the government told the jury that a violation of 21 U.S.C. § 856(a)(1) only had two essential elements:

The good news is, with Counts 11, 12, and 13, it has two elements, those are maintaining a drug premises. First, the defendant knowingly opened or used or maintained a place, where permanently or temporarily. Second, the defendant did so for the purpose of distributing any controlled substance.

What this boils down to is, if you believe these places are pill mills and they're trafficking narcotics, then they are drug premises. And the defendants charged in each of those counts are guilty.

The district court judge, reinforcing the government's argument, instructed the jury that these were the only two essential elements of a violation of 21 U.S.C. 856(a)(1):

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.

The district court did not instruct the jury in the specific instructions in regard to the § 856 offenses that the controlled substances prescribed by Mrs. Clemons had

to have been prescribed without a legitimate medical purpose and outside the usual course of professional practice for Mrs. Clemons to be convicted on those counts.

The district court instructed the jury with regard to the conspiracy counts and the substantive counts related to prescribing controlled substances that “[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.” However, the jury was further instructed that “whether a prescription is made in the usual course of professional practice is to be determined from an objective and not a subjective viewpoint.”

The district judge’s instructions were in direct contravention of this Court’s ruling in *Ruan, supra*.

Mrs. Clemons was acquitted of all counts involving illegal prescribing of controlled substances in which the judge instructed the jury that Mrs. Clemons, to be found guilty, must have prescribed the controlled substances without a legitimate medical purpose and not in the usual course of professional practice. She was convicted of the two counts in which the instructions did not contain that language.

After the jury returned its verdict, Mrs. Clemons renewed her motion for a judgment of acquittal based, *inter alia*, on errors in the jury instructions for the § 856 counts. The district court denied the motion.

Following sentencing, Mrs. Clemons timely filed an appeal to the United States Court of Appeals for the Sixth Circuit.

On April 11, 2022, the Sixth Circuit affirmed Mrs. Clemons' convictions. *United States v. Hofstetter, et al.*, 31 F.4th 396 (6th Cir. 2022) (App. C). As to Mrs. Clemons' challenge to the jury instruction, the Sixth Circuit held that the district court did not err in instructing the jury that they only needed to find that the defendants had 1) opened, used or maintained a place; and 2) that they did so for the purpose of distributing any controlled substance, without any explanation of the specific conduct that made their actions unlawful, *Id.* at 416, ruling that due to the "proximity of the illegality element" and the instructions taken as a whole, particularly relying on the instructions relating to the illegal distribution counts under 21 U.S.C. § 841, that the district court did not plainly err in giving the instruction. *Id.*, at 416.

Following the Sixth Circuit's ruling affirming her convictions, Mrs. Clemons filed a petition for writ of certiorari with this Court. This Court granted Mrs. Clemons petition on October 17, 2022, vacated the Sixth Circuit's ruling, and remanded the case to the Sixth Circuit for reconsideration in light of this Court's ruling in *Ruan v. United States*, 142 S.Ct. 2370, 213 L.Ed.2d 706 (2022).

On remand, the Sixth Circuit ordered supplemental briefing and additional oral argument on the issue regarding the faulty jury instructions relating to 21 U.S.C. § 856(a)(1).

The Sixth Circuit agreed with the parties that *Ruan* applies to prosecutions of 21 U.S.C. § 856(a)(1) violations and held that the district court should "have instructed the jury that knowledge of illegal distribution is an element of offenses under § 856(a)." 7

United States v. Hofstetter, 80 F.4th 725, 729-30 (6th Cir. 2023). The Sixth Circuit affirmed Mrs. Clemons' § 856 convictions, ruling that, while the jury instruction was an inaccurate statement of law, the jury instructions "taken as a whole" were proper and did not meet the plain error standard for reversal:

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); [*United States v. J. Stewart*, 729 F.3d [517] at 530 [(6th Cir. 2013)]. 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.

(80 F. 4th 725, at 730; Appendix A, p.6)

The Sixth Circuit's ruling on remand is contrary to *Ruan* and Mrs. Clemons respectfully files this timely petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

A. *Ruan* applies to 21 U.S.C. § 856 and once the Sixth Circuit acknowledged that *Ruan* applied to Mrs. Clemons' case, it was obligated to follow binding Supreme Court precedent in how it applied the law announced in *Ruan*.

On remand from this Court, the Sixth Circuit acknowledged that *Ruan* applies to charges brought under 21 U.S.C. § 856(a)(1). *United States v. Hofstetter*, 80 F.4th 725, 729. (6th Cir. 2023) (“The parties agree that the holding in *Ruan* applies to convictions under §856(a)(1)”)) The Sixth Circuit then proceeded with its’ analysis on the basis that *Ruan* was applicable to § 856(a)(1) cases. The Sixth Circuit reasoned that “under *Ruan*, the district court must have instructed the jury that knowledge of illegal distribution is an element of offenses under § 856(a).” However, the Sixth Circuit then began to conflate the generic term “illegal” with the actual standard that is required that is set forth in *Ruan* and other physician prescribing cases, *i.e.*, the government must prove the defendant subjectively knew or intended that the prescription was unauthorized.

The term “illegal” as noted above, is a generic term and is subject to different interpretations by different persons – what one person may view as illegal, another might view as completely lawful. Thus, a jury of twelve may have twelve different interpretations of “illegal” subjecting a criminal defendant to twelve different interpretations of guilt and a jury could conceivably convict a defendant without the

defendant or the other jurors knowing what conduct they believed was worthy of conviction.

Post-*Ruan*, in order to convict an authorized medical provider of an offense such as 21 U.S.C. § 856(a)(1), which has an element of distribution of a controlled substance, a jury must find that the provider subjectively believed they were prescribing medications in an unauthorized manner, but that did not happen here. Taken as a whole, the jury instruction did not convey the *Ruan* standard to the jury. The jury instruction was erroneous.

This Court must grant certiorari, vacate the decision of the Sixth Circuit, and remand with instruction to follow the decision in *Ruan*.

B. A jury instruction which required the jury to use an objective standard to determine whether Mrs. Clemons knowingly and intentionally distributed controlled substances outside her authorization constitutes plain error requiring reversal of the convictions.

Mrs. Clemons' two counts of conviction were for violations of 21 U.S.C. § 856(a)(1), based upon her prescribing pain medications as a nurse practitioner at two licensed pain clinics. The district court instructed the jury that whether Mrs. Clemons intentionally or knowingly wrote prescriptions at these clinics outside the scope of her DEA authorization was to be determined by an objective standard, not a subjective standard, in contravention of this Court's ruling in *Ruan*, requires vacation of the conviction. The Sixth Circuit's determination that the erroneous instructions failed to

meet the plain error standard is contrary to this Court's pronouncement in *Henderson v. United States*, 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, this 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. This 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. As discussed previously, the Government and the Sixth Circuit on remand agreed that § 856(a)(1) has the same *mens rea* requirements as § 841 and thus courts are required to follow *Ruan* when instructing a jury as to the elements necessary for an § 856 offense.

In Mrs. Clemons' case, the district court instructed the jury that "[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." However, the district court further instructed the jury that "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 to be error under *Ruan*, the court ultimately determined that it was plainly erroneous. In doing so, the court misapplied the plain error standard.

"To establish eligibility for plain-error relief, a defendant must satisfy three threshold requirements. [Citation omitted]. *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) (Cleaned up).

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, this 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 counts 11 and 13 (the only counts of conviction for Mrs. Clemons), the district court instructed the jury that these counts charged Mrs. Clemons, and other defendants, "with opening, using, and maintaining a drug-involved premise -- or premises. . ." 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 summary of the indictment.

Moreover, the Sixth Circuit, in reviewing the damage from the faulty instruction, failed to weigh the fact that the jury had acquitted Mrs. Clemons and the other nurse practitioners of the conspiracy counts and the distribution counts. When given other, more specific instructions such as those given on the conspiracy counts and the distribution counts, the jury acquitted Mrs. Clemons of those counts and it can reasonably be assumed that the jury determined that Mrs. Clemons did not intentionally and knowingly prescribe controlled substances outside her authorization.

It was only where the jury was given the open-ended "illegal" instruction in the 21 U.S.C. § 856 count which allowed them to substitute their own judgment about

"illegality" in place of the actual elements of the offense that they found Ms. Clemons guilty despite determining that she had neither conspired to or distributed controlled substances. The error in the 21 U.S.C. § 856 instruction must have substantially swayed the jury's determination, given this.

It was plain error for the district court not to give an instruction which did not meet the *Ruan* standard. The Sixth Circuit further compounded that error by finding that the undefined term "illegally" was an adequate replacement for the *Ruan* language.

Likewise, the Sixth Circuit's admission that the instructions were contradictory in places should have led to a finding 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, establishes a finding of plain error.

The Sixth Circuit determined that the above reference to an "objective viewpoint" was not 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 Mrs. Clemons' knowledge or intent 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. This 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 partially 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 Mrs. Clemons' conduct met an objective standard within the healthcare professional community. The Government provided no evidence as to Mrs. Clemons' state of mind or actual criminal intent and, as *Ruan* holds, this is not enough.

C. The Sixth Circuit's reading of *Ruan* is in conflict with other circuits.

The Sixth Circuit has attempted to interpret *Ruan* in the most narrow ways possible. In addition to the decision in Mrs. Clemons' case, in *United States v. Anderson*, 67 F.4th 755 (6th Cir. 2023) the Sixth Circuit held that the jury instructions in that case "substantially covered" the *mens rea* requirement as set forth in *Ruan*, even though it used language that had been specifically rejected in *Ruan*.¹ In *United States v. Sakkal*, 2023 U.S. App. LEXIS 13489; 2023 Fed. App. 0242N; 2023 WL 3736778 (6th Cir., May 31, 2023), the Sixth Circuit again found that the inclusion of language that had been rejected in *Ruan* was sufficient because, although Dr. Sakkal had requested a subjective good faith instruction, he had failed to object to the language in the final instruction.

¹But cf. *United States v. Hofstetter*, 80 F.4th 725, 732 (6th Cir. 2023) Cole, CJ concurrence ("...I write separately to highlight how *Anderson* conflicts with *Ruan*... Judge White penned a forceful dissent explaining why the instruction does not meet the Court's mens rea standard for unauthorized prescription distribution...I agree with her dissent...")

The Sixth Circuit's narrow and erroneous interpretation 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* [v. *United States*, 579 U.S. 550, 136 S.Ct. 2355, 195 L.Ed.2d 639 (2016)], 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.*, at 1298.

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 Mrs. Clemons was involved in the dispensing of controlled substances; she was a nurse practitioner who wrote prescriptions for patients she had examined. The issue before the jury as to this element was whether she did so outside the scope of professional practice and without medical necessity and outside of her authorization. *Ruan* requires the jury to determine her subjective intent – a finding the jury never made in this case. The Sixth Circuit's finding that this did not constitute plain error is a misinterpretation of

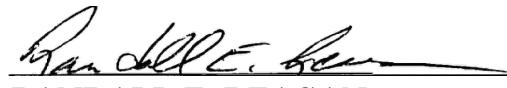
not only *Ruan*, but this Court's plain errors precedents. This Court should grant certiorari review, and remand for a new trial.

Finally, because the facts in this Petition are substantially similar for all the petitioners in this case and the related cases of Courtney Newman and Holli Womack, in the interests judicial economy, Mrs. Clemons would adopt by reference the arguments of petitioners Newman and Womack in their petitions for writ of certiorari and respectfully requests this Court allow adoption of such arguments as if fully set forth herein.

CONCLUSION

For the foregoing reasons, Cynthia Clemons respectfully requests this Court grant her Petition for a Writ of Certiorari, vacate the decision of the United States Court of Appeals for the Sixth Circuit, and remand for retrial.

Respectfully submitted,



RANDALL E. REAGAN
Counsel of Record
Criminal Justice Act counsel
for Cynthia Clemons
625 Market Street, Suite 900
Knoxville, Tennessee 37902
(865) 637-8505
justice@randallreagan.com