No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LILLIAN AKWUBA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Ruan v. United States*, 597 U.S. 450, 454 (2022), this Court held that to convict an authorized person of distributing a controlled substance under 21 U.S.C. § 841 the Government must prove, beyond a reasonable doubt, that they knowingly and intentionally acted in an unauthorized manner. The Eleventh Circuit applied *Ruan* to Ms. Akwuba's case holding that the jury never heard the proper mens rea requirement. But it concluded the *Ruan*-based error was harmless considering the strength of the Government's case. Its harmless error analysis did not consider this Court's instruction from *United States v. Neder*, 527 U.S. 1, 17 (1999), that "the omitted element [be] uncontested **and** supported by overwhelming evidence**."** (emphasis added.) In fact, Ms. Akwuba contested the omitted intent element by presenting evidence that she provided proper medical care and by showing that the Government's standard of care witnesses based their opinions on incomplete patient records.

The question presented here is whether the stringent harmless error language from *Neder* applies to *Ruan*-based jury instruction error?

PARTIES TO THE PROCEEDINGS

The petitioner is Lilian Akwuba, the appellant-petitioner below. Respondent is the United States of America, the appellee-respondent below.

CORPORATE DISCLOSURE

The Petitioner, Lillian Akwuba, is an individual, so there are no disclosures to be made pursuant to Supreme Court Rule 29.6.

STATEMENT OF RELATED PROCEEDINGS

- *United States v. Akwuba*, No. 19-12230, 7 F.4th 1299 (11th Cir. Aug. 11, 2021);
- *United States v. Akwuba*, No. 2:17-CR-511WKW, 2022 WL 1620429 (M.D. Ala. May 23, 2022);
- *United States v. Akwuba*, No. 22-11917, 2023 WL 6460040 (11th Cir. Oct. 4, 2023).

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The Eleventh Circuit's decision reversing Ms. Akwuba's health care fraud conviction (Count 24), affirming all other convictions, and remanding for resentencing is available at 7 F.4th 122 (11th Cir. 2021), and attached as App. A. (*Akwuba I*). The United States District Court, Middle District of Alabama Memorandum Opinion and Order overruling Ms. Akwuba's presentence report objection prior to resentencing is unreported but available at 2022 WL 1620429 and attached as App. B. The Eleventh Circuit's decision affirming Ms. Akwuba's convictions after her resentencing is unreported but available at 2023 WL 6460040 and attached as App. C. (*Akwuba II*).

STATEMENT OF JURISDICTION

The Eleventh Circuit issued its final decision on October 4, 2023. App. C. On December 29, 2023, this Court granted Ms. Akwuba an extension of time to file for a writ of certiorari review to February 1, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND PROCEDURAL PROVISIONS

28 U.S.C. § 2111 provides: "On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

Rule 52(a), Fed. R. Crim. P. provides: "Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."

STATEMENT

This Petition arises from Ms. Akwuba's convictions for distribution of controlled substances and conspiracy to distribute controlled substances in violation of 21 U.S.C. §§ 841(a)(1) and 846 following her trial and appeal to the Eleventh Circuit. The question presented is whether harmless error can result where (1) the jury never heard the proper mens rea instruction in a § 841 prosecution involving a person authorized to prescribe controlled substances and (2) the authorized person presented evidence to contest that omitted element.

In *Ruan v. United States*, 597 U.S. 450, 468 (2022), this Court declined to answer the question of harmless error, instead remanding the case for the lower court to decide first whether there existed a jury instruction error and second whether any such error would be harmless. On remand, in *Ruan III*, the Eleventh Circuit held that the jury instructions did not comply with the mens rea required for a § 841 conviction and this error could not be harmless considering "both sides presented expert evidence about the appropriate standard of care." *United States v. Ruan* (*Ruan III*), 56 F.4th 1291, 1298 (11th Cir. 2023).

But in Ms. Akwuba's case, despite contested evidence on Ms. Akwuba's intent, the Eleventh Circuit held, rather generally, that the strength of the Government's case foreclosed any harm to Ms. Akwuba's substantial rights. App. C at 11. In full, the harmless error analysis in Ms. Akwuba's case provided:

> But this does not mean Akwuba obtains relief under plain error review. While she has shown the district court plainly erred, her attempt to prove her substantial rights were affected is deficient. There was more than enough evidence for the jury to find that Akwuba acted with the necessary *mens rea* in

> light of *Ruan*. At trial, the following evidence was introduced: Akwuba instructed staff to fabricate content in patient records to justify prescriptions; she forged doctors' names on prescriptions, with one doctor testifying approximately 22 prescriptions purporting to bear his name were forgeries; and Akwuba even admitted that prescriptions she issued while she lacked a collaborative agreement with a physician were unlawful. We are "satisfied beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." [*United States v.*] *Heaton*, 59 F.4th [1226,] 1242 [(11th Cir. 2023)]. Therefore, although there was plain error, that error did not affect Akwuba's substantial rights.

United States v. Akwuba, No. 22-11917, 2023 WL 6460040, at *5 (11th Cir. Oct. 4, 2023) (*Akwuba II*); App. C. at 11.

The Eleventh Circuit's harmless error analysis, however, failed to consider the totality of the evidence admitted at trial, which included evidence that Ms. Akwuba acted within an appropriate standard of care. In other words, she contested the very mens rea element of knowing and intentional unauthorized conduct required for the Government to convict under § 841, which the jury couldn't have properly considered due to the lacking jury instructions.

Moreso, the above-quoted harmless error analysis from Ms. Akwuba's case does not comply with the standard set forth by *Neder v. United States*, 527 U.S. 1, 17 (1999), applicable here. In *Neder*, this Court stated: "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id*. This is a more stringent harmless error test compared to the general test of "whether he guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993).

In Ms. Akwuba's case, the Eleventh Circuit's failure to address conflicting evidence on standard of care, focusing only on the strength of Government's case, suggests that it applied the more general harmless error opposed to the specific test set forth in *Neder*. Was this a correct application? As numerous lower courts are now grabbling with lacking jury instructions and resulting verdicts rendered pre-*Ruan*, questions of harmless error left open by *Ruan* must now be addressed to encourage consistency in harmless error analysis.

Therefore, to address the application of harmless error post-*Ruan* in cases involving evidence of proper standard of care, this Court should grant Ms. Akwuba's petition for a writ of certiorari and answer the question presented.

A. Factual Background

Ms. Akwuba was charged with drug distribution, healthcare fraud, and money laundering for her work as a nurse practitioner at the Family Practice medical office and distribution of controlled substances at her medical office, Mercy Family. (Doc. 295 at 7-20, 27-38). She was charged with the following relating to Family Practice: (1) conspiracy to distribute controlled substances, in violation of 21 U.S.C. § 846 (Count 1); (2) distribution of controlled substances, in violation of 21 U.S.C. § 841 (Counts 2-7, 9-11); (3) conspiracy to commit healthcare fraud, in violation of 18 U.S.C. § 1349 (Count 13); (4) healthcare fraud, in violation of 18 U.S.C. § 1347 (Counts 15-18, 22-25); (5) conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count 38); and (6) money laundering, in violation of 18 U.S.C. § 1957 (Counts 39-42). (*Id*. at 7-20, 27-30). During her time at Mercy Family, Ms. Akwuba

was charged with distribution of a controlled substance, in violation of 21 U.S.C. § 841 (Counts 44-48, 50-53). (*Id.* at 30-38).

The Eleventh Circuit in *Akuba I*, provided the following factual background:

> Ms. Akwuba was convicted of issuing and conspiring to issue prescriptions for controlled substances improperly, conspiring to commit health care fraud, and committing health care fraud through her practice as a nurse practitioner (NP).
>
> Alabama law provides that an NP can prescribe controlled substances if the NP obtains a Qualified Alabama Controlled Substance Certificate (QACSC) from the Alabama Board of Medical Examiners (ABME). To obtain a QACSC, the ABME requires NPs to have a collaborative agreement with a physician. During the timeframe relevant to this case, Ms. Akwuba worked with four different collaborative physicians: Dr. Sanchez, Dr. Jose Chung, Dr. John MacLennon, and Dr. Viplove Senadhi. Dr. Sanchez was Ms. Akwuba's collaborative physician during her employment at his medical practice, Family Practice. Doctors Chung, MacLennon, and Senadhi were Ms. Akwuba's collaborative physicians at her own primary care practice, Mercy Family. Dr. Sanchez pled guilty and was one of the primary witnesses in the government's case-in-chief. Doctors MacLennon and Senadhi also testified as government witnesses. Dr. Chung was not called as a witness by either party.
>
> Most of the counts Ms. Akwuba faced pertain to the time she spent working under Dr. Sanchez at Family Practice. Ms. Akwuba left Family Practice in March 2016, and one month later she formed her own medical practice, Mercy Family. Some of the patients Ms. Akwuba saw at Family Practice followed her to Mercy Family. Additional drug distribution counts relate to prescriptions she issued at Mercy Family. The drug distribution and health care fraud counts were tied to specific patients, the records of whom were presented at trial and formed the basis of the expert testimony.
>
> The government presented expert testimony from three doctors at trial: Dr. Gary Kaufman, Dr. Robert Odell, and Dr. Gene Kennedy. Each doctor reviewed files for specific patients—including each patient's Prescription Drug Monitoring Program (PDMP) report—and testified to their conclusions based on those patient files. Based on the documentation made available to them, the experts concluded that the prescriptions were not issued for legitimate medical purposes. The doctors repeatedly testified that there was nothing in the available records to support diagnoses that would require controlled substances.

> In response, Ms. Akwuba asserted an "incomplete records" defense. Through her own testimony and the cross-examination of government witnesses, she and her counsel raised issues regarding the patient files relied on by the expert witnesses. As Ms. Akwuba explained to the court, "part of our defense is that these records we're relying on are incomplete. And these incomplete records thus form the basis of the experts' opinions." Ms. Akwuba testified that she kept additional handwritten paper records—triage sheets or "T-sheets"—which contained her patient visit notes; if these notes were examined in addition to the electronic records, she argued, the expert witnesses could have—and should have—reached a different conclusion regarding the legitimacy of the prescriptions in question.

United States v. Akwuba, 7 F.4th 1299 (11th Cir. 2021) (footnotes omitted) (*Akwuba I*); App. A at 2-4.

B. Procedural Background

Ms. Akwuba proceeded to trial in October 2018. Immediately prior to the start of trial, the district court dismissed Counts 8, 14, 19, 20, 21, 26, 27, 49, and 52 of the fourth superseding indictment on the Government's motion. (Doc. 408). The government later dismissed counts 16, 18, 23, and 25 during trial. (Doc. 555 at 3). After trial, Ms. Akwuba was convicted on all the remaining drug-distribution and healthcare fraud counts but acquitted of money laundering. (Doc. 420). At sentencing, Ms. Akwuba was sentenced to 10 years' imprisonment. (Doc. 511).

Ms. Akwuba appealed, and the Eleventh Circuit affirmed all convictions but one (Count 24) and remanded the case for resentencing considering the vacated conviction. *Akwuba I*, 7 F.4th 1299. App. A. Ms. Akwuba was resentenced on May 18, 2022, and May 23, 2022, to 10 years' imprisonment with the district court and readopting the restitution order previously entered. (Doc. 645, 647, 630).

Ms. Akwuba again appealed her convictions and sentences arguing two issues involving this Court's decision in *Ruan*, which was decided on June 27, 2022. She first argued that the Eleventh Circuit should revisit its holding that the Government presented sufficient evidence to convict her of several offenses considering *Ruan*. She also argued that like the appellants in *Ruan*, the jury received erroneous instructions regarding the applicable mens rea necessary to convict her of the distribution offenses.

Akwuba II declined to revisit the sufficiency of the evidence argument holding that this Court's *Ruan* decision did not implicate any sufficiency of the evidence claim; therefore, the analysis from *Akwuba I* governed under the law of the case doctrine. App. C. at 7. But on the second issue, regarding the jury instructions, *Akwuba II* acknowledged that the trial court "blended jury instructions pre- and post-*Ruan*, thereby rending them deficient on the whole." App. C. at 10. Despite this plain error after *Ruan*, the Eleventh Circuit turned to the strength of the Government's case against Ms. Akwuba and held the jury instruction error to be harmless. App. C. at 11.

REASONS FOR GRANTING THE PETITION

Guidance is necessary from this Court to address the proper harmless error test to apply to cases post-*Ruan*.

Since this Court decided *Ruan*, lower courts have addressed jury instruction error and harmless error in § 841 prosecutions where the jury never heard the proper mens rea requirement. The Eleventh Circuit has done so in at least two cases in addition to Ms. Akwuba's case. *United States v. Ruan*, 56 F.4th 1291, 1298 (11th Cir. Jan. 5,

2023) (*Ruan III*) (error not harmless); *United States v. Heaton*, 59 F.4th 1226, 1242 (11th Cir. 2023) (error harmless). Other jurisdictions have addressed harmless error analysis in this realm as well. *United States v. Pierre*, 88 F. 4th 574 (5th Cir. 2023) (error harmless); *United States v. Kahn*, 58 F.4th 1308, 1317-21 (10th Cir. 2023) (error not harmless); *United States v. Orusa*, No. 3:18-CR-00342, 2023 WL 5125086, at *10-11 (M.D. Tenn. Aug. 10, 2023) (error not harmless).

Because the result of harmless error analysis turns on the circumstances of each case, inconsistency in results is of no concern to this Court. However, the lower courts do not appear to be consistently or intentionally employing the more stringent harmless error test from *Neder*, which Ms. Akwuba contends is applicable to cases like hers involving *Ruan* jury instruction error. In fact, at present, the lower courts have generally applied harmless error analysis without specific adherence to this Court's instruction: "where a reviewing court concludes beyond a reasonable doubt that the omitted element was **uncontested and supported by overwhelming evidence**, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Neder*, 527 U.S. at 17 (emphasis added). The lack of specificity and uniformity concerning the governing harmless error standard in post-*Ruan* cases requires review by this Court.

A. Stringent harmless error language from *Neder* must apply to cases involving *Ruan* jury instruction error.

In *Ruan*, this Court held that there is a knowing and intentional mens rea element applicable to § 841 charges against healthcare providers. 597 U.S. at 454. Specifically, this Court explained: "We hold that the statute's "knowingly or intentionally" *mens*

rea applies to authorization. After a defendant produces evidence that he or she was authorized to dispense controlled substances, 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." *Id.*

But this Court did not address the substance of the jury instruction given in *Ruan* nor whether error, if any, could be considered harmless. *Id.* at 467. Instead, this Court remanded these questions to the Court of Appeals for determination in the first instance. *Id.* Thus, this Court's decision in *Ruan* did not address the substance of the harmless error test that should apply to *Ruan*-based jury instruction errors.

At first blush, this would not appear to pose a problem since this Court has already specifically addressed harmless error in the context of missing offense elements in jury instructions. *Neder*, 527 U.S. at 17. In *Neder*, a tax fraud case, this Court agreed that the District Court failed to properly "submit the issue of materiality to the jury . . .". *Id.* at 4. It then went on to hold that harmless error as analyzed by *Chapman v. California*, 386 U.S. 18 (1967), applies to jury instruction error even when that error involves an omitted element of the charged offense.

As to the *Chapman* treatment of harmless error, this Court focused on state and federal rules allowing for harmless error when there appeared to be no violation of "substantial rights." *See* 386 U.S. at 23-24. This Court further explained, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

Turning back to *Neder*, this Court applied the harmless error holding from *Chapman* to the scenario where the jury was never instructed on a material element of the offense. 527 U.S. at 17. In doing so, *Neder* recognized that these types of jury instruction errors pose a particular problem due to the impact to the trial framework itself: "The error at issue here—a jury instruction that omits an element of the offense—differs markedly from the constitutional violations we have found to defy harmless-error review." *Id.* at 8. But the omission of an element during the jury charging will not always result in reversal—harmless error may apply. *Id.* at 15. However, in applying harmless error to the jury instruction omission in *Neder*, this Court used particular and stringent language. *Id.* at 17. In determining that the error at hand was in fact harmless, this Court stated: "where a reviewing court concludes beyond a reasonable doubt that the **omitted element was uncontested and supported by overwhelming evidence**, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless. *Id.* at 17 (emphasis added.) And when the defense in *Neder* was not related to the omitted materiality element, the error "'did not contribute to the verdict obtained.'" *Id.* (quoting *Chapman,* 386 U.S. at 24).

In cases with *Ruan*-based error, it would follow that the above-described harmless error test from *Neder* requires both that the omitted mens rea element be uncontested and that there be overwhelming evidence of knowing and intentional unauthorized behavior. But, as the Tenth Circuit has specifically indicated, there appears to be uncertainty whether this more stringent harmless error language from *Neder* applies

to *Ruan* errors. *See Kahn*, 58 F.4th at 1317-20 (analyzing *Ruan* error under *Neder* and a more generalized application of harmless error). Other jurisdictions, including the Eleventh Circuit and Fifth Circuit have not specifically grappled with the applicable formulation of harmless error in this context, but have not referred to the specific language from *Neder* that Ms. Akwuba contends must apply. *See Pierre*, 88 F.4th 574; *Heaton*, 59 F.4th 1226; ***Ruan III***, 56 F.4th 1291.

B. In addressing post-*Ruan* jury instruction error, the lower courts are not clearly or consistently applying stringent and applicable harmless error language from *Neder*.

The Tenth Circuit's decision in *Khan* specifically demonstrates uncertainty in the application of harmless error to *Ruan* jury instruction error. *Kahn*, 58 F.4th at 1317-20. In *Kahn*, the Tenth Circuit first determined that the given jury instructions violated *Ruan* as they "improperly interjected a good faith exception." *Id.* at 1317. The Court then went on to apply two differing forms of harmless error analysis concluding under either application, the error was not harmless. *Id.* at 1317-20.

In reversing, the Court first indicated an apparent unresolved question on harmless error analysis concerning whether to apply language from *Neder* that requires the Government prove "'beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.'" *Id.* at 1318 (quoting *Neder*, 527 U.S. at 11). Specifically, the Tenth Circuit explained:

> In the context of jury instructions that omit—rather than misstate—an element, we have sometimes invoked a passage of *Neder* that imposes additional requirements. Under that test, the government must prove "beyond a reasonable doubt that the omitted element was uncontested and supported

> by overwhelming evidence, such that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 11, standard for direct review under *Neder*," *United States v. Schneider*, 665 F. App'x 668, 672 (10th Cir. 2016), and we may continue to avoid doing so here. Under either iteration of the test for harmless error, the government has not shown beyond a reasonable doubt that the instructional error was harmless.

Kahn, 58 F.4th at 1318. (cleaned up). *Kahn* further explained its occasional use of the more stringent harmless error language from *Neder* this way:

> "Defendants contend the applicable standard for determining harmless error when, as here, the jury was not instructed on an element of the offense is whether the 'reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error.' *Neder*, 527 U.S. at 17, 119 S.Ct. 1827. In reviewing such instructional error for harmlessness on direct appeal from a conviction, we have sometimes invoked this standard verbatim. We have on other occasions invoked another passage from *Neder* that does not refer to whether the omitted element was uncontested or supported by overwhelming evidence, but simply asks more generally 'whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." [*United States v.*] *Schneider*, 665 F. App'x [668,] 672 [(10th Cir. 2016)] (internal citations omitted).

Kahn, 58 F.4th at 1318 n.5.

The Tenth Circuit, applying first the more specific and stringent language on harmless error from *Neder*, concluded that because the thrust of Dr. Kahn's defense at trial related to his intent—the improperly instructed element—a properly instructed jury must decide his guilt. *Id.* at 1319. Under this view, the analysis on harmless error focused on the fact that the intent element was not uncontested opposed to the overall strength of the Government's case. *Id.*

But the Tenth Circuit also applied the more general harmless error test, which asks whether "'the guilty verdict actually rendered in *this* trial was surely

unattributable to the [alleged] error.'" *Id.* at 1320 (quoting *United States v. Mullikin*, 758 F.3d 1209, 2111 (10th Cir. 2014) (quoting *Sullivan*, 508 U.S. at 279)). Under this formulation, the Court also found the *Ruan* jury instruction error could not be harmless indicating that "'to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee.'" *Id.* at 1320 (quoting *Sullivan*, 508 U.S. at 279).

While the Tenth Circuit identified two different formulations of harmless error analysis and recognized that *Neder* suggests a more stringent test when the jury instruction omits a required element, the actual analysis the Tenth Circuit applied under each reiteration is remarkably similar. And to be clear, the Tenth Circuit appears to have applied both formulations due to some amount of inconsistency in past cases decided within the circuit. *See Kahn*, 58 F.4th at 1318 n.5.

Other jurisdictions deciding issues of harmless error following *Ruan* jury instruction error have not grabbled with the stringent language from *Neder*. Instead, these cases appear, on balance, to apply a more generalized harmless error test that focuses on the strength of the Government's case.

Take, for example, *Ruan III*, where, on remand from this Court, the Eleventh Circuit found an error in the jury instruction given, but decided such an error could not be harmless. *Ruan III*, 56 F.4th at 1296-97, 1298. As for the harmless error test it employed, the Court briefly stated: "Where the error is the omission of an element of the crime we will reverse unless it can be shown the error was harmless beyond a

reasonable doubt." *Id.* at 1296-97 (citing *Neder*, 527 U.S. at 15-16). And while *Ruan III* cited to *Neder* for its harmless error standard, it never references the language from *Neder* that "the omitted element was uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17. For both Dr. Ruan and the companion case involving Dr. Couch, the harmless error analysis pointed to competing standard of care evidence noting that "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." *Ruan III*, 56 F.4th at 1298.

In addition to Ms. Akwuba's case, the Eleventh Circuit has addressed *Ruan* error without mention of the more stringent language from *Neder* that would call for focus on both the strength of the evidence and whether the defendant contested the omitted element at trial. In *Heaton*, 59 F.4th at 1242, the Court stated the harmless error test as "'Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?'" (quoting *Neder*, 527 U.S. at 18).

Other jurisdictions have also failed to specifically address the language from *Neder* that would require the omitted element be uncontested and the evidence be overwhelming. In *Pierre*, 88 F.4th at 581, the Fifth Circuit focused solely on the strength of the Government's case. It cited the applicable harmless error test this way:

> We need not decide whether Pierre has shown clear and obvious error in the jury instructions, however, because he has not shown that any such error affected his substantial rights. *See, e.g., United States v. Dixon*, 273 F.3d 636, 640 (5th Cir. 2001). This is because there was "overwhelming evidence" that Pierre understood the illegitimacy of his actions. *Ibid.*; *see also United States v. Little*, No. 21-11225, 2023 WL 7294199, at *14–*15 (5th Cir. Nov. 3, 2023)

(finding *Ruan*-error did not affect defendant's substantial rights); *United States v. Heaton*, 59 F.4th 1226, 1242 (11th Cir. 2023) (finding *Ruan*-error harmless).

Id. at 581. In *Orusa*, the Middle District of Tennessee held that although the evidence of wrongdoing was overwhelming, it could not hold the *Ruan* error harmless due to the way the indictment linked each § 841 count to a specifically identified patient. __ F.Supp.3rd __, 2023 WL 5125089 *11. That Court merely stated the harmless error test applied without citing any governing principles. *Id.* at *10.

Thus, clear language from *Neder* specifically addresses harmless errors in the context of jury instructions that omit an element of the offense. This stringent language requires "the omitted element [be] uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17. But despite this Court's mandate, only the Tenth Circuit has grabbled with application of the exacting standard on harmless error from *Neder*. Other courts appear to apply a generalized harmless error test. This conflict requires resolution by this Court.

C. The Eleventh Circuit got the harmless error analysis wrong in this case.

As indicated, the Eleventh Circuit has not applied the more stringent language from *Neder* to cases involving *Ruan* instruction error. *See Heaton*, 59 F. 4th at 1242. This rings true in Ms. Akwuba's case as well.

In this case, the Eleventh Circuit first found plain error because "[t]he jury instructions given in Akwuba's case blend jury instructions pre- and post-*Ruan*, thereby rendering them deficient on the whole." App. C. at 10. But in declining relief,

the Eleventh Circuit concluded the plain error to be harmless. App. C. at 11. The full analysis on this point is as follows:

> But this does not mean Akwuba obtains relief under plain error review. While she has shown the district court plainly erred, her attempt to prove her substantial rights were affected is deficient. There was more than enough evidence for the jury to find that Akwuba acted with the necessary *mens rea* in light of *Ruan*. At trial, the following evidence was introduced: Akwuba instructed staff to fabricate content in patient records to justify prescriptions; she forged doctors' names on prescriptions, with one doctor testifying approximately 22 prescriptions purporting to bear his name were forgeries; and Akwuba even admitted that prescriptions she issued while she lacked a collaborative agreement with a physician were unlawful. We are "satisfied beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Heaton*, 59 F.4th at 1242. Therefore, although there was plain error, that error did not affect Akwuba's substantial rights.

App. C. at 11.

Certainly, the Eleventh Circuit did not engage with this Court's ruling from *Neder* that harmless error in this context requires that: "a reviewing court conclude[] beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence, such that the jury verdict would have been the same absent the error . . . ." *Neder*, 527 U.S. at 17. Instead, from the analysis cited above, the Court simply decided the Government presented strong evidence of guilt. When the jury, however, never heard the proper instruction on a contested element of the offense, *Neder*, requires reversal. The Eleventh Circuit simply ignored Ms. Akwuba's defense that focused on intent. That Court got the harmless error analysis wrong.

Had the Eleventh Circuit applied the proper harmless error test from *Neder*, it would have considered not just the Government's case, but also Ms. Akwuba presented evidence contesting any knowing and intentional unauthorized action.

This evidence included testimony that during her time as a Nurse Practitioner authorized to prescribe controlled substances, Ms. Akwuba was thorough in her practices. (Doc. 549 at 80.) And that she often provided appropriate care using drug screens and appropriate protocols if patients failed a drug test before issuing certain prescriptions. (Doc. 551 at 182, 233, 249; Doc. 552 at 31, 52, 189-90; Doc. 553 at 23-24, 27-28, 32-33, 37, 67, 69-71; Doc. 554 at 160; Doc. 555 at 34.) It also included evidence indicating patients were prescribed non-scheduled medications alongside controlled substances and that Ms. Akwuba treated non-pain management. (Doc. 552 at 26, 41, 55; Doc. 553 at 40-41, 155; Doc. 554 at 154, 257-58, 267-68.) Records also indicated that Ms. Akwuba discussed drug dependency. (Doc. 553 at 70, 73.)

Ms. Akwuba also contested the Government's expert witnesses' opinions on standard of care based on review of patient records by asserting an incomplete record defense. (Doc. 549 at 266.) That is, that the testifying experts relied on incomplete medical records in forming their opinions. Specifically, numerous witnesses testified that the medical records presented were not complete as they were missing Ms. Akwuba's handwritten patient notes. (Doc. 549 at 73-74, 76-77; Doc. 550 at 141, 143-44, 199; Doc. 554 at 109-11, 127.) Other evidence indicated significant discrepancies in the electronic patient records. (Doc. 551 at 134-35, 138; Doc. 553 at 45; Doc. 555 at 48, 80.) Ms. Akwuba, herself, testified to inaccuracies in the electronic medical records. (Doc. 556 at 164-65, 169.)

In sum, Ms. Akwuba testified in her defense, the defense contested the intent element, and contested the Government's standard of care testimony based on its

incomplete records defense. Thus, Ms. Akwuba contested the knowing and intentional mens rea element. The very element that the jury was never properly instructed to consider. Under *Neder*, because the omitted element was not uncontested in Ms. Akwuba's case, there can be no harmless error.

CONCLUSION

For these reasons, this Court should grant Ms. Akwuba's petition for a writ of certiorari.

Respectfully submitted,

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