No. ____

IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA,
Respondent,

v.

RONALD P. HARGRAVE,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
FROM THE FOURTH CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, South Carolina 29204
(803) 445-1333
elizabeth@franklinbestlaw.com

Counsel for Ronald P. Hargrave

Questions Presented

Can a physician be convicted of a violation of 21 U.S.C. §841, post-*Ruan*, when that physician's conduct in prescribing the controlled substance was both subjectively and objectively reasonable as evidenced by the fact that the recipient of the prescription had been prescribed that very same controlled substance by other physicians both before and after her encounter with this physician?

Is the Fourth Circuit improperly applying its harmless error standard in assessing *Ruan* error?

Parties to the Proceedings

All parties appear in the caption of the case on the cover page.

Related Proceedings

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

Table of Contents

Index to Appendix

Table of Authorities

Cases:

Federal Statutes:

In the

Supreme Court of the United States

Petition for Writ of Certiorari

Petitioner respectfully prays that a writ of certiorari to review the judgment below.

Opinion Below

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

The opinion of the court of appeals is unreported and is reprinted in the Appendix ("App.") beginning at page 1a. *United States v. Hargrave*, 2024 WL 2953131 (filed June 12, 2024). The judgment of the court of appeals is reprinted at 7a. The order denying Petitioner's timely petition for rehearing en banc is reprinted at 8a.

Jurisdiction

The Fourth Circuit entered judgment on June 12, 2024. The court of appeals denied rehearing en banc on September 24, 2024. This Court has jurisdiction under 28 U.S.C. §1254.

Statutory Provisions Involved

21 U.S.C. §841(a)(1) states, in pertinent part:

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

Preliminary Statement

Petitioner, previously a licensed physician who practiced at an emergency healthcare clinic, Doctor's Care, in Moncks Corner, South Carolina, is convicted of having violated 21 U.S.C. §841 of the CSA for a patient for whom the following is true:

- [The patient] had, at the time she was treated by Petitioner during normal business hours, been previously treated for post-traumatic stress disorder, attention deficit activity disorder, panic attacks, and treatment for chronic pain.
- On her medical form at the Doctor's Care on March 10, 2017, she indicated she had a sore throat. JA 340.
- She had muscular skeletal complaints. JA 341.
- She provided Petitioner with her CVS pharmacy prescription history. JA 344.
- She attended the physical with her aunt and the two of them met with Petitioner for 30 minutes during regular business hours. JA 290, 223.
- Petitioner gave her a strep test and she was prescribed a Z-pack to address her medical condition. JA 342.
- [The patient] testified she was disabled and did not work due to a cheerleading injury. JA 331.
- She testified she had been receiving oxycodone for the past 10 years on a regular basis. JA 336.

- At the time of her testimony, she was taking the very same medications for which Petitioner has been convicted of providing her. JA 271, 328-330, 336

- On her medical chart, and after her examination, Petitioner noted she suffered from depression, needed assistance controlling her asthma, and coping with her PTSD. JA 213.

- On the prescription that he provided to her, he filled her medications, noted it was a "one-time prescription only" and then referred her to Dr. Jeffrey Buncher, a pain management specialist. JA 213.

- A government witness testified that the patient had a legitimate need for the prescriptions she was provided. JA 163-180.

- Petitioner's expert witness also testified she had legitimate need for the medications Petitioner prescribed to her. Tr. 87, 92.

- On a prior occasion, the two of them engaged in sexual activity at the Doctor's Care facility, after which Petitioner was promptly fired upon its discovery. JA 290.

None of the facts recited above were contested at trial. The patient had a long history of being prescribed the same medications that Petitioner prescribed to her after she presented at the Doctor's Care complaining of legitimate medical issues.[1] While Petitioner assuredly had an inappropriate relationship with Petitioner at that facility, that fact was irrelevant to the issue of whether the government proved,

[1] Petitioner was convicted of three counts related to this same patient. Count One alleged that on March 10, 2017, Petitioner did knowingly, intentionally, and unlawfully distribute oxycodone, a Schedule II controlled substance in violation of 21 U.S.C. §841(a)(1) and (b)(1)(C); Count Two alleged that on that same date, he unlawfully distributed dextroamphetamine, a Schedule II controlled substance; and Count Three alleged that on that same date, he unlawfully distributed alprazolam and clonazepam, both Schedule IV controlled substances, in violation of 21 U.S.C. §841(a)(1) and (b)(1)(E)(2). She received 30 mg x 90 pills for 2700 mg of oxycodone; 3 mg X 30 pills for 30 doses of Alprazolam; 60 doses of Clonazepam; and 30mg x 60 for 1800 mg of dextroamphetamine.

consistent with this Court's recent decision in *Ruan v. United States*, 142 S. Ct. 2370 (2022), Petitioner knowingly or intentionally issued prescriptions outside the bounds of professional practice when he conducted a standard medical examination during office hours three days later, prescribed medications that were appropriate to the conditions, and then referred her to a pain management specialist. At trial, the government failed to prove to the jury Petitioner subjectively believed the prescription he wrote for the patient was as "payment" for sexual services rendered three days earlier, and that the prescriptions were not for legitimate medical conditions. If the jury had been charged that "the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner," and that this was a subjective inquiry, the jury would have -- at a minimum-- hung. *United States v. Kim*, 71 F. 4th 155, 160 (4th Cir.), *cert denied*, 144 S. Ct. 436 (2023). Instead, having conceded the jury instructions in the case were improper and having reversed his convictions on some counts, the Fourth Circuit held Petitioner could not show he was harmed with respect to this patient because his actions were "beyond the pale." 6a. As to the sexual relations, that is true. But as to his convictions for violating §841(a)(1) as to this patient, it is most assuredly not.

The erroneous, pre-*Ruan*, instructions the Court charged the jury, state, in relevant part:

> For you to find the defendant guilty of the charges in Counts 1 through 7, the Government must prove the following three essential elements beyond a reasonable doubt: The Government has to first prove that the defendant distributed the controlled substance alleged in the

> Indictment; second, that the defendant knew the substance distributed was a controlled substance under the time of the distribution; and third, that the defendant distributed the controlled substance outside the usual course of professional practice and without a legitimate medical purpose.…
>
> A physician's own methods do not themselves establish what constitutes professional practice. In determining whether defendant's conduct was within the bounds of professional practice, you should subject—subject to the instructions I give you concerning the credibility of experts and other witnesses, consider the testimony you have heard regarding or heard relating to what has been characterized during the trial as the norms of professional practice. You should also consider the extent to which, if any at all, any violations of professional norms you find that have been committed by the defendant interfered with his treatment of his patients and contributed to an excessive distribution of controlled substance.

JA 822-824.

The district court also instructed the jury regarding "good faith"— "If a doctor distributes a drug in good faith in medically treating a patient, then the doctor has distributed that drug for a legitimate medical purpose in the usual course of professional practice; that is, he has distributed the drug lawfully.

> Good faith in this context means good intentions and the honest exercise of professional judgment as to the patient's needs. It means that the defendant acted in accordance with what he reasonably believed to be proper medical practice. If you find that the defendant acted in good faith in distributing the drugs charged in the indictment, then you must find that the defendant is not guilty."

JA 822-23.

The court of appeals properly held these jury instructions were improper and that "the instructional error undermines [its] confidence in the outcome of the trial" as to the other convictions in this case. App. 5a (quoting *United States v. Duldulao*, 87 F. 4th 1239, 1261 (11th Cir. 2023). The court's decision not to grant the same relief

as to this patient, however, lacks logical consistency. The government's argument, which the court of appeals appears to have adopted, was that Petitioner's prescribing these medications was not legitimate because he had sex with the patient for money three days earlier but, while that conduct may have been unethical, and subjected him to termination from Doctor's Care as violative of its policies, it was not a federal crime.

The patient presented at Doctor's Care on March 10, 2017, as someone who had extensive and well-documented legitimate medical needs, had received these medications in the past, and it was within Petitioner's discretion to prescribe them for her on this occasion. He gave her a single prescription for a 30-day supply of oxycodone and noted that it would be last he would prescribe to her. He referred her to a pain management specialist. These actions are not consistent with being a "drug-pusher." *See United States v. Moore*, 423 U.S. 122, 138 (1975) (noting that prosecution under §841 is for the "significantly greater offense of acting as a drug pusher"). Petitioner prescribed the patient with reasonable prescriptions for the other medications which she had received before, and for the same medical conditions she complained of when she met with Petitioner and earlier doctors.

WHY THE COURT SHOULD GRANT THE WRIT

I. The Fourth Circuit is Misapplying *Ruan*'s Burden of Proof in Adjudicating post-*Ruan* cases

The Court should grant the writ because the Fourth Circuit is improperly applying this Court's recent opinion in *Ruan*. Before more cases come before this Court, the Court should signal to the Fourth Circuit that it meant what it said in the

opinion—that the Government has the burden of proving beyond a reasonable doubt that a in a §841 prosecution under which a defendant meets his burden of production, the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. *Ruan,* 597 U.S. at 468. Instead of requiring the Government to meet this burden, the Fourth Circuit instead has substituted its own standard which appears to be that it will uphold a conviction if the conduct is sufficiently offensive.[2]

For the Fourth Circuit's decision to be correct, the jury would have had to conclude that Petitioner did not *really* believe the patient had a sore throat on March 10, 2017, or a history of PTSD, or a long-standing cheerleading injury that left her disabled, but prescribed these substances because he had sexual relations with her *anyway*. Petitioner would have had to *believe* she was lying about having any condition that required medical attention on that date. There is no evidence to support this far-fetched conclusion. *Ruan*, 597 U.S. at 467 ("And for purposes of a

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[2] This analysis also conflicts with another panel decision addressing *Ruan* error in *United States v. Smithers*, 92 F.4th 237 (4th Cir. 2004): There the Court declared that to determine whether jury-instruction errors were harmless, the Court asks whether the "record contains evidence that could rationally lead to a contrary finding with respect to that omitted element." *U.S. v. Brown*, 202 F.3d 691, 701 (2000) (quoting *Neder, supra)*. If "there is any evidence upon which a jury could have reached a contrary finding, the error is not harmless… because…we cannot determine beyond a reasonable doubt that the 'jury verdict would have been the same absent the error.'" *Id*. The Court then undertook to assess the additional evidence that was presented below—that Smithers offered evidence as to the medical records, their complaints, and the incidents that led to their pain. The Court found "[t]he defense provided evidence that could rationally have led to a contrary finding on each of the unlawful-distribution counts." *Smithers*, 92 F. 4th at 251.

criminal conviction under §841, this requires proving that a defendant knew or intended that his or her conduct was unauthorized.")

II. The Fourth Circuit's Harmless Error Analysis Violates *Neder v. United States*, 527 U.S. 1 (1999).

The Fourth Circuit, in its opinion denying Petitioner relief on three counts, cherry-picked facts to support its opinion while disregarding a trove of evidence tending to prove Petitioner subjectively believed he was providing prescription medications in the usual course of medical treatment. In holding the error here harmless, the Fourth Circuit completely ignored that Petitioner offered a defense to his mental state, the core issue in his case and in *Ruan*. For example, the government's own witness testified to the legitimate medical need for the medications prescribed to the patient. JA 164. Then, Petitioner's own expert witness also testified to those legitimate needs. JA 623, 628. Focusing solely on the sexual component of Petitioner's conduct while overlooking the multiple bases upon which a properly instructed jury could have found in Petitioner's favor, the Fourth Circuit has rendered *Neder* a dead letter. *See United States v. Kahn*, 58 F.4th 1308 (10th Cir. 2023) ("This is not a case in which the element of the crime that was impacted by the invalid jury instruction was "uncontested and supported by overwhelming evidence," and where "the defendant 'did not contest the element… at trial, and did not 'suggest he would introduce any evidence bearing upon the issue… if so allowed." (*United States v. Ellis*, 868 F.3d 1155, 1172 (10th Cir. 2017) (quoting *Neder*, 527 U.S. at 15, 17)). This Court should not allow a circuit court of appeals to simply disregard a recent opinion because it believes the facts of the case *surrounding* the dispensing of

the controlled substance (but not the dispensing of the controlled substance itself) to be particularly egregious. *See also United States v. Qureshi*, 121 F.4th 1095 (5th Cir. 2024) (finding government did not carry its burden to prove beyond a reasonable doubt that the jury verdict would have been the same without the error where the defendant put forth evidence of defendant's knowledge at trial).

Conclusion

This Court should grant the petition for writ of certiorari and summarily reverse the court of appeals' affirmance of Counts 1-3.

Respectfully submitted,

Elizabeth Franklin-Best
Elizabeth Franklin-Best, P.C.
3710 Landmark Drive, Suite 113
Columbia, South Carolina 29204
(803) 445-1333
elizabeth@franklinbestlaw.com

Counsel for Ronald P. Hargrave

December 19, 2024.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4711

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONALD P. HARGRAVE,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Charleston. Bruce H. Hendricks, District Judge. (2:18-cr-00425-BHH-1)

Submitted: April 4, 2024 Decided: June 12, 2024

Before WYNN, HARRIS, and QUATTLEBAUM, Circuit Judges.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

ON BRIEF: Elizabeth A. Franklin-Best, ELIZABETH FRANKLIN-BEST, P.C., Columbia, South Carolina, for Appellant. Adair F. Boroughs, United States Attorney, Winston D. Holliday, Jr., Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

A jury convicted Ronald P. Hargrave, a former physician, of seven counts of unlawfully distributing a controlled substance, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). On appeal, Hargrave challenges the district court's jury instructions, the sufficiency of the evidence, and the exclusion of one of his proposed witness' testimony. We affirm Hargrave's convictions on Counts 1 through 3, vacate his convictions on Counts 4 through 7, and remand for further proceedings.

Hargrave relies on the Supreme Court's decision in *Ruan v. United States*, 597 U.S. 450 (2022), to argue that the district court's jury instructions were erroneous because they applied an objective, rather than subjective, standard to the requirement that Hargrave's actions were outside the scope of a professional medical practice. The Government argues that Hargrave invited any error by proposing some of the language in the jury's instructions. Alternatively, the Government contends that plain-error review applies. We disagree with the Government on invited error but agree on plain error.

Under the invited error doctrine, "a court can not be asked by counsel to take a step in a case and later be convicted of error, because it has complied with such request." *United States v. Herrera*, 23 F.3d 74, 75 (4th Cir. 1994) (internal quotation marks omitted). We have applied the doctrine in the context of jury instructions. *Id.* at 76. However, Hargrave's "requested instructions 'relied on settled law that changed while the case was on appeal.'" *United States v. Kumar*, No. 20-4478, 2024 WL 1134035, at *2 (4th Cir. Mar. 15, 2024) (quoting *United States v. Duldulao*, 87 F.4th 1239, 1255 (11th Cir. 2023)). Thus,

we will consider Hargrave's challenge on the merits, employing plain-error review. *See Duldulao*, 87 F.4th at 1257.

To succeed on plain-error review, Hargrave "has the burden to show that: (1) there was error; (2) the error was plain; and (3) the error affected his substantial rights." *United States v. Cowden*, 882 F.3d 464, 475 (4th Cir. 2018). If Hargrave makes this showing, "we may exercise our discretion to correct the error only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (cleaned up). The Government does not dispute the first two prongs of plain-error review are satisfied, and in light of *Ruan* and our subsequent decision in *United States v. Smithers*, 92 F.4th 237 (4th Cir. 2024), we agree they are. *See United States v. Ramirez-Castillo*, 748 F.3d 205, 215 (4th Cir. 2014) (recognizing error is plain when it is "clear or obvious at the time of appellate consideration" (cleaned up)); *see also Duldulao*, 87 F.4th at 1258 ("[A] district court errs by instructing a jury to apply an objective standard to the usual course of professional practice requirement, or failing to convey that a subjective analysis is required." (cleaned up)).

To establish the error affected his substantial rights, Hargrave has the "burden of showing that the error actually affected the outcome of the proceedings." *United States v. Nicolaou*, 180 F.3d 565, 570 (4th Cir. 1999) (internal quotation marks omitted). In other words, Hargrave must "show that the proper instruction, on the same evidence, would have resulted in acquittal, or at the very least a hung jury." *Id.*

It is illegal to distribute or dispense a controlled substance "[e]xcept as authorized" by law. 21 U.S.C. § 841(a)(1). In *Ruan*, the Supreme Court held that § 841's "knowingly

or intentionally" mens rea applies to the "[e]xcept as authorized" clause of the statute. 597 U.S. at 454, 468. Thus, when a defendant shows that he is authorized to issue prescriptions for controlled substances, "the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner." *Id.* This is a subjective, rather than objective, inquiry. *United States v. Kim*, 71 F.4th 155, 160, 164 (4th Cir.), *cert. denied*, 144 S. Ct. 436 (2023). The Government cannot meet its burden by proving that the physician lacked objective good faith in issuing the prescriptions. *Ruan*, 597 U.S. at 465.

On Counts 1 through 3, we do not believe the instructional error affected Hargrave's substantial rights. These counts related to his conduct with C.K., who testified that Hargrave wrote her prescriptions for controlled substances and gave her cash in exchange for sex. While Hargrave attacked C.K.'s credibility, two employees testified that they observed the beginning of Hargrave's encounter with C.K., confirming C.K.'s account. In the face of substantial evidence of this quid-pro-quo relationship with C.K., Hargrave cannot satisfy his burden to show that the jury would have acquitted him, or at least hung, if it had been properly instructed. *See Nicolaou*, 180 F.3d at 570.

As for counts 4 through 7, which corresponded with prescriptions Hargrave issued J.L., D.W., and M.F., those three individuals did not testify at trial. The Government introduced an expert who testified that these prescriptions were not justified by Hargrave's written notes, but Hargrave called his own expert to testify that they were. While C.K. testified that J.L. was a drug dealer and referred her to Hargrave, she was unsure if J.L. called Hargrave on her behalf or if he simply provided Hargrave's contact information, and

there was no other evidence linking them to a conspiracy. And although a pharmacist testified that she observed some questionable behavior between Hargrave and M.F. that signified there may have been a sexual relationship between the two, Hargrave only treated C.K. one time, three days after their sexual encounter, while Hargrave had an extended physician-patient relationship with M.F., and he ordered an MRI that confirmed M.F. had a nerve condition that caused pain.

Thus, on this record, we believe that a properly instructed jury could have at least hung, *Nicolaou*, 180 F.3d at 570, and the "instructional error undermines our confidence in the outcome of the trial," *Duldulao*, 87 F.4th at 1261 (cleaned up). Accordingly, we believe it prudent to exercise our discretion to correct the plain error and vacate Hargrave's convictions on Counts 4 through 7. In light of our decision to vacate, we need not address Hargrave's sufficiency challenge to those counts. *See Smithers*, 92 F.4th at 240. And for the reasons stated above, we reject Hargrave's sufficiency challenge on Counts 1 through 3.

Finally, Hargrave challenges the district court's decision to exclude the testimony of a pharmacist. We review the district court's decision for abuse of discretion.[*] *See United States v. Parker*, 262 F.3d 415, 420 (4th Cir. 2001). "An error [in an evidentiary

[*] In his brief, Hargrave conceded that this argument is reviewed for plain error. However, "parties cannot waive the proper standard of review by failing to argue it or by consenting to an incorrect standard." *United States v. Venable*, 943 F.3d 187, 192 (4th Cir. 2019) (internal quotation marks omitted). The district court excluded the testimony upon motion of the Government, and Hargrave argued for allowing the witness to testify. Thus, Hargrave preserved his argument below.

ruling] is harmless if it's highly probable that it did not affect the judgment." *United States v. Caldwell*, 7 F.4th 191, 204 (4th Cir. 2021) (cleaned up). We conclude that any error was harmless. Hargrave presented testimony from a physician who opined that his prescriptions were written for legitimate purposes. Moreover, Hargrave's conduct with C.K. was so beyond the pale that the pharmacist's proposed testimony that others have received similar prescriptions would not have swayed the jury.

Accordingly, we affirm Hargrave's convictions on Counts 1 through 3, vacate his remaining convictions, and remand for further proceedings. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED

FILED: June 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4711
(2:18-cr-00425-BHH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RONALD P. HARGRAVE

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed in part and vacated in part. This case is remanded to the district court for further proceedings consistent with the court's decision.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

FILED: September 24, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4711
(2:18-cr-00425-BHH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RONALD P. HARGRAVE

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wynn, Judge Harris, and Judge Quattlebaum.

For the Court

/s/ Nwamaka Anowi, Clerk