

No. _____

In the
Supreme Court of the United States

PARVEZ ANJUM QURESHI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

George McCall Secrest, Jr.

Counsel of Record

BENNETT & SECREST, PLLC

1545 Heights Boulevard, Suite 800

Houston, TX 77008

(713) 757-0679

mac@bennettandsecrestlaw.com

February 17, 2025

Counsel for Petitioner

SUPREME COURT PRESS

◆ (888) 958-5705 ◆

BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Where the district court misinforms and erroneously instructs the jury as to the *mens rea* requirement for Title 21 U.S.C. § 841(a), in violation of *Ruan v. United States*, and thereby commits reversible error as to the substantive § 841(a) counts of conviction, can a conviction for conspiracy to unlawfully distribute or dispense controlled substances, in violation of Title 21 U.S.C. § 846, tried in the same proceedings, be affirmed notwithstanding the fact that the conspiracy jury instructions tracked verbatim the district court's erroneous misstatement of law as to the *mens rea* requirement for § 841(a) (the underlying substantive offense and sole object of the conspiracy), rendering both instructions "inextricably intertwined", and resulting in a jury charge that failed to require the jury to find, and the Government to prove, beyond a reasonable doubt the requisite culpable mental state?

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit
No. 22-20328

United States of America, *Plaintiff-Appellee*, v.
Parvez Anjum Qureshi, *Defendant-Appellant*.

Final Opinion: November 20, 2024

U.S. District Court, S.D. Texas, Houston Division
No. 4:17-CR-00389

United States of America v. Parvez Anjum Qureshi,
Defendant.

Verdict: October 15, 2021

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PROCEEDINGS.....	ii
TABLE OF AUTHORITIES	vi
PETITION FOR A WRIT OF CERTIORARI.....	1
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE.....	4
A. Course of proceedings below	4
B. Appellate Proceedings.....	5
C. The Jury Instructions Misstated the <i>Mens Rea</i> Requirement.....	6
REASONS FOR GRANTING THE PETITION.....	10
I. The Fifth Circuit’s Opinion Eviscerated the Constitutional Imperative That the Jury Be Accurately Instructed as to Each Constituent Element of an Offense to Ensure That Its Verdict Comports with Due Process and the Right to Trial by Jury... ..	10
A. The <i>Mens Rea</i> Requirement Imposed by <i>Ruan</i>	10
B. The Fifth Circuit Misapplied the Principles of <i>Ruan</i> to the Conspiracy Jury Instructions Herein.....	13
(i) Conspiracy’s “Agreement” Requirement.....	15

TABLE OF CONTENTS – Continued

	Page
(ii) Knowledge of the Unlawful Purpose of the Conspiracy.....	16
(iii) The Purported Distinctness of the Conspiracy Jury Charge from the Erroneous Substantive Counts Jury Instructions.	18
C. The Erroneous Jury Instructions Violated Due Process, the Right to Trial by Jury, and Denied Dr. Qureshi a Fair Trial.	22
D. The Erroneous <i>Mens Rea</i> Jury Instructions in Violation of <i>Ruan</i> Were Not Harmless Beyond a Reasonable Doubt.....	25
II. There Is a Conflict Among the Circuit Courts of Appeal as to Whether Jury Charge Error as to Substantive Offenses Render Conspiracy and Other Related Counts of Conviction in the Same Proceedings Infirm.	29
A. The Fifth and Eleventh Circuits' Holdings Are in Conflict with the Decisions of Other Circuit Courts of Appeals.....	29
B. Criminal Conspiracy's Requirement That Two Separate "Intents" Be Proven as Applied to the Facts Herein.....	33
CONCLUSION.....	36

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS**OPINIONS AND JUDGMENTS**

Opinion, U.S. Court of Appeals for the Fifth Circuit (November 20, 2024).....	1a
Judgment, U.S. Court of Appeals for the Fifth Circuit (November 20, 2024).....	26a
Verdict of the Jury, U.S. District Court Southern District of Texas, Houston Division (October 15, 2021)	28a

OTHER DOCUMENTS

Jury Instructions (October 15, 2021)	34a
Superseding Indictment (July 18, 2019)	52a

TABLE OF AUTHORITIES

	Page
CASES	
<i>Carter v. Kentucky</i> , 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981)	23
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	25
<i>Connecticut v. Johnson</i> , 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983)	28
<i>Elonis v. United States</i> , 575 U.S. 723 (2015)	8, 11
<i>Gonzales v. Oregon</i> , 126 S.Ct. 904 (2006)	13
<i>Greer v. Miller</i> , 483 U.S. 756 (1987)	24
<i>Griffith v. Kentucky</i> , 479 U.S. 314 (1987)	5
<i>Ingram v. United States</i> , 360 U.S. 672, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959)	35
<i>Milanovich v. United States</i> , 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961)	19
<i>Moody v. United States</i> , 377 F.2d 175 (5th Cir. 1967)	24
<i>Neder v. United States</i> , 527 U.S. 1 (1999)	23, 25, 26, 28

TABLE OF AUTHORITIES – Continued

	Page
<i>Ratzlaf v. United States</i> , 114 S.Ct. 655 (1994)	31
<i>Rehaif v. United States</i> , 139 S.Ct. 2191 (2019)	11, 12, 13
<i>Rogers v. United States</i> , 422 U.S. 35 (1975)	8
<i>Ruan v. United States</i> , 142 S.Ct. 2370 (2022)	i, 5, 7, 8, 10-13, 15-23,
 25, 28-30, 33, 36
<i>Staples v. United States</i> , 511 U.S. 600 (1994)	11, 12, 13
<i>Stromberg v. California</i> , 283 U.S. 359, 51 S.Ct. 32, 75 L.Ed. 1117 (1931)	31
<i>Sullivan v. Louisiana</i> , 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)	29, 30
<i>Taylor v. Kentucky</i> , 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)	24
<i>United States v. Alghazouli</i> , 517 F.3d 1179 (9th Cir. 2008), <i>cert. denied.</i> 129 S.Ct. 237 (2008)	36
<i>United States v. Alston</i> , 77 F.3d 713 (3d Cir. 1996).....	34
<i>United States v. Anchrum</i> , 590 F.3d 795 (9th Cir. 2009), <i>cert. denied.</i> 130 S.Ct. 3435 (2010)	25

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Baker,</i> 63 F.3d. 1478 (9th Cir. 1995), <i>cert. denied.</i> 516 U.S. 1097 (1996)	34
<i>United States v. Clark,</i> 475 F.2d 240 (2d Cir. 1973).....	23
<i>United States v. Collazo,</i> 984 F.3d 1308 (9th Cir. 2021) (En banc), <i>cert. denied.</i> 143 S.Ct. 323 (2022)	35
<i>United States v. Dadi,</i> 235 F.3d 945 (5th Cir. 2000), <i>cert. denied.</i> 121 S.Ct. 2230 (2001)	35
<i>United States v. Fairley,</i> 880 F.3d 198 (5th Cir. 2018), <i>cert. denied.</i> 139 S.Ct. 321 (2018)	19, 20, 21
<i>United States v. Feola,</i> 420 U.S. 671 (1975)	35
<i>United States v. Forbes,</i> 64 F.3d 928 (4th Cir. 1995)	25
<i>United States v. Gaudin,</i> 515 U.S. 506 (1995)	23
<i>United States v. Houston,</i> 792 F.3d 663 (6th Cir. 2015), <i>cert. denied.</i> 138 S.Ct. 286 (2017)	28
<i>United States v. Kahn,</i> 58 F.4th 1308 (10th Cir. 2023).....	28, 30
<i>United States v. Kim,</i> 65 F.3d 123 (9th Cir. 1995)	31, 32, 33, 34

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Martinez</i> , 496 F.2d 664 (5th Cir. 1974), <i>cert. denied.</i> 95 S.Ct. 627 (1974)	36
<i>United States v. Palazzolo</i> , 71 F.3d 1233 (6th Cir. 1995)	30, 31
<i>United States v. Peterson</i> , 244 F.3d 385 (5th Cir. 2001), <i>cert. denied.</i> 122 S.Ct. 142 (2001)	35
<i>United States v. Ruan (Ruan II)</i> , 56 F.4th 1291 (11th Cir. 2023), <i>cert. denied</i> , 144 S.Ct. 377 (2023)	16, 17
<i>United States v. Rubio</i> , 834 F.2d. 442 (5th Cir. 1987)	24
<i>United States v. Serawop</i> , 410 F.3d 656 (10th Cir. 2005)	28
<i>United States v. Smithers</i> , 92 F.4th 237 (4th Cir. 2024).....	29
<i>United States v. Stanford</i> , 823 F.3d 814 (5th Cir. 2016), <i>cert. denied.</i> 137 S.Ct. 453 (2016)	24
<i>United States v. U.S. Gypsum Co.</i> , 438 U.S. 422 (1978)	12, 34
<i>United States v. Williams</i> , 836 F.3d 1 (D.C. Cir. 2016)	23
<i>United States v. Young</i> , 464 F.2d 160 (5th Cir. 1972)	23, 25

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V.....	2
U.S. Const. amend. VI	2

STATUTES

18 U.S.C. § 2.....	4
18 U.S.C. § 371.....	20
21 U.S.C. § 641.....	19, 20
21 U.S.C. § 829.....	3
21 U.S.C. § 841.... 4, 5, 6, 10, 11, 12, 13, 17, 18, 26, 29	
21 U.S.C. § 841(a) i, 3, 5, 6, 9, 16, 25, 31, 34, 35	
21 U.S.C. § 841(a)(1)	6, 9, 12, 21, 25, 29, 30
21 U.S.C. § 846..... i, 3, 4, 5, 6, 8, 14, 15, 18, 28, 30, 35	
21 U.S.C. § 856.....	29
28 U.S.C. § 1254(1)	1

JUDICIAL RULES

Fed. R. Crim. P. 30(d)	21
Fed. R. Crim. P. 52.....	25

REGULATIONS

21 C.F.R. § 1306.04	3
21 C.F.R. § 1306.04(a).....	12, 15

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

2A Charles Alan Wright, FEDERAL PRACTICE AND PROCEDURE (3d ed.1999)	24
K. O'Malley, J. Grenig, & W. Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 31.02	35
W. LaFave & A. Scott, CRIMINAL LAW (1972)	34



PETITION FOR A WRIT OF CERTIORARI

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



OPINIONS BELOW

The opinion of the Fifth Circuit appears at App.1a-25a, and is published. 121 F.4th 1095 (5th Cir. 2024).



JURISDICTION

The Fifth Circuit entered judgment on November 20, 2024. App.26a-27a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment by a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

21 U.S.C. § 841(a)

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

- (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
- (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

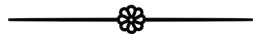
21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 C.F.R. § 1306.04**Purpose of Issue of Prescription**

- (a) A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. The responsibility for the proper prescribing and dispensing of controlled substances is upon the prescribing practitioner, but a corresponding responsibility rests with the pharmacist who fills the prescription. An order purporting to be a prescription issued not in the usual course of professional treatment or in legitimate and authorized research is not a prescription within the meaning and intent of section 309 of the Act (21 U.S.C. 829)

and the person knowingly filing such a purported prescription, as well as the person issuing it, shall be subject to the penalties for violations of the provisions for law relating to controlled substances.



STATEMENT OF THE CASE

A. Course of proceedings below

In November 2020, Dr. Parvez Anjum Qureshi was originally tried on the multi-count superseding indictment herein which alleged a conspiracy to unlawfully distribute and dispense controlled substances, proscribed by Title 21 U.S.C. § 846, four (4) substantive counts of unlawfully distributing and dispensing controlled substances, and aiding and abetting, proscribed respectively, by Title 21 U.S.C. § 841, and Title 18 U.S.C. § 2. ROA.29-37; App.52a-61a. The jury was unable to reach a unanimous verdict in that proceeding and a mistrial was declared. ROA.16. Retrial commenced on October 12, 2021 and concluded on October 18, 2021, with verdicts of “guilty” as to all counts. ROA.445-447; App.28a-33a. The district court sentenced Dr. Qureshi to sixty (60) months confinement as to each count, to run concurrently, and assessed a fine of \$50,000.00. ROA.465-471.

B. Appellate Proceedings

On appeal to the Fifth Circuit, Qureshi argued that the trial court's jury instructions as to all counts of conviction were infirm in light of this Court's opinion in *Ruan v. United States*, 142 S.Ct. 2370 (2022).¹ In its opinion dated November 20, 2024, the Fifth Circuit reversed all substantive counts of conviction (Counts 2 through 5), but affirmed the conspiracy charge (Count 1), and remanded the case for a new trial and resentencing. *Qureshi*, 121 F.4th at 1107-1108; App.24a-25a.

The Fifth Circuit found that the district court erred in overruling Qureshi's objections to the jury instructions pertaining to the culpable mental state requirements of § 841(a) (substantive counts), and that the error was not harmless. However, it concluded that the § 846 conspiracy instructions were not erroneous, notwithstanding the fact that the sole object of the alleged conspiracy was the unlawful distribution or dispensing of a controlled substance, and within the conspiracy instructions themselves, the trial court tracked verbatim its erroneous instructions pertaining to the *mens rea* requirement of § 841. 121 F.4th 1095, 1102 (5th Cir. 2024); App.12a.

¹ *Ruan* was decided while Dr. Qureshi's direct appeal was pending and not yet final, therefore, is fully applicable to him. *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987).

C. The Jury Instructions Misstated the *Mens Rea* Requirement

The District Court's instructions to the jury with respect to the constituent elements of Title 21 U.S.C. § 841(a)(1), as alleged in counts two through five of the superseding indictment (and the sole object offense of the title 21 U.S.C. § 846 conspiracy), and the constituent elements of title 21 U.S.C. § 846, as alleged in Count One, were legally infirm by misstating the *mens rea* requirement for § 841.²

At the conclusion of trial, and over the timely objection³ of defense counsel, the District Court instructed the jury, in pertinent part, as follows:

Title 21, United States Code, Section 841(a)(1) makes it a crime for any person to knowingly and intentionally distribute or dispense a controlled substance not for a legitimate medical purpose or not in the usual course of professional practice.⁴

² The culpable mental state requirements for both 841 and 846 were erroneously alleged in the superseding indictment as well. App.56a, 59a.

³ With respect to both the conspiracy and substantive counts, the Fifth Circuit acknowledged that defense counsel timely objected to the district court's instructions as "to the lack of any *mens rea* [as] to the act of distributing a drug for legitimate medical purpose or in the usual course of professional practice." *Qureshi*, 121 F.4th at 1099; ROA.363; App.6a.

⁴ As will be seen *infra*, the underlined language was repeated *verbatim* in the Court's § 846 instructions. ROA.436; App.44a. As to the first element of conspiracy—the agreement requirement—the Court instructed the jury it had to find “[t]hat two or more persons, directly or indirectly, reached an agreement to unlawfully distribute or dispense a controlled substance not for a legit-

For you to find the Defendant guilty of this crime, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:

First: That the defendant distributed or dispensed a controlled substance;

Second: That the defendant did so knowingly and intentionally; and

Third: That the defendant did so other than for a legitimate medical purpose or in the usual course of professional practice.

. . .

A controlled substance is prescribed by a physician for a legitimate medical purpose or in the usual course of professional practice and, therefore, lawfully if the substance is prescribed in good faith. A physician must act in a manner that is in accordance with the standard of care set forth in the medical community or must have a good faith basis for a deviation from that standard of care. Good faith in this context means an honest effort to prescribe for a patient's condition in accordance with standards of medical practice generally recognized or accepted in the

imate medical purpose or not in the usual course of professional practice.” ROA.436; App.44a. Nowhere in the Court’s conspiracy instructions, including the “agreement” element, did it apply the requisite culpable mental state to the essential element and gravamen of the object offense—“not for a legitimate medical purpose or not in the usual course of professional practice”, as required by *Ruan*. ROA.436-37; App.44a-46a.

United States.⁵ In considering whether a physician prescribed a controlled substance for a legitimate medical purpose or in the usual course of a professional practice, you should consider all of the physician's actions and the circumstances surrounding them.

ROA.438-39. (Emphasis added); App.46a-47a.

As to Count One, the § 846 conspiracy charge, the District Court instructed the jury, in pertinent part, as follows:

Title 21, United States Code, Section 846 makes it a crime for anyone to conspire with someone else to commit a violation of certain controlled substances laws of the United States. In this case, the defendant is charged

⁵ This Court rejected the government's argument that the statute's explicit "knowingly or intentionally" *mens rea* standard could be replaced by implicitly relying on an "objectively reasonable good-faith effort" or 'objective honest-effort standard.' *Ruan*, 142 S.Ct. at 2381. The Court reasoned that although the statute explicitly set out a *mens rea* requirement "[i]t nowhere uses words such as 'good faith,' 'objectively,' 'reasonable,' or 'honest effort.'" *Id.* And, maybe more important, "the Government's standard would turn a defendant's criminal liability on the mental state of a hypothetical 'reasonable' doctor, not on the mental state of the defendant himself or herself." *Id.* (Emphasis added.) Predicating criminal liability on what a "reasonable person" or "reasonable doctor" might do, as opposed to what the defendant knew and intended to do, "reduces culpability on the all important element of the crime to negligence." *Id.*, quoting, *Elonis v. United States*, 575 U.S. 723, 732 (2015). Historically, the Court "has been reluctant to infer that a negligence standard was intended in criminal statutes.' *Id.*, quoting *Rogers v. United States*, 422 U.S. 35, 47 (1975) (Marshall, J. concurring)). We believe the same of the Government's proposed standard here." *Id.* (emphasis added.)

with conspiring to commit a violation of Title 21, United States Code, Section 841(a)(1), which makes it a crime for any person to knowingly or intentionally distribute or dispense a controlled substance not for a legitimate medical purpose or not in the course of professional practice.⁶

A “conspiracy” is an agreement between two or more persons to join together to accomplish some unlawful purpose. It is a kind of “partnership in crime” in which each member becomes the agent of every other member.

For you to find the defendant guilty of this crime, you must be convinced that the government has proven each of the following beyond a reasonable doubt:

First: That two or more persons, directly or indirectly, reached an agreement to unlawfully distribute or dispense a controlled substance not for a legitimate medical purpose or not in the usual course of professional practice;

Second: That the defendant knew of the unlawful purpose of the agreement;

Third: That the defendant joined in the agreement willfully; that is with the intent to further its unlawful purpose.

⁶ Not only does the bolded language above constitute a palpably incorrect statement of law as to what constitutes a violation of § 841(a), that particular penal provision is the only underlying or “object” offense alleged in the conspiracy charge (Count One) of the indictment. App.56a.

[. . .]

If a defendant understands the unlawful nature of a plan or scheme and knowingly and intentionally joins in that plan or scheme on one occasion, that is sufficient to convict him for conspiracy. . . .

121 F.4th at 1100; App.44a-46a.



REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit’s Opinion Eviscerated the Constitutional Imperative That the Jury Be Accurately Instructed as to Each Constituent Element of an Offense to Ensure That Its Verdict Comports with Due Process and the Right to Trial by Jury.

A. The *Mens Rea* Requirement Imposed by *Ruan*.

In *Ruan v. United States*, 142 S.Ct. 2370 (2022), the question before the Court concerned “the state of mind that the Government must prove to convict” doctors for violating 21 U.S.C. § 841:

To prove that a doctor’s dispensation of drugs via prescription falls within the statute’s prohibition and outside the authorization exception, is it sufficient for the Government to prove that the prescription was in fact not authorized, or must the Government prove that the doctor knew or intended that the prescription was unauthorized?

Id. at 2375. (Emphasis in original.) With respect to Section 841, which makes it unlawful, “[e]xcept as authorized[,] . . . for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance”, “§ 841’s ‘knowingly or intentionally’ *mens rea* applies to the “except as authorized” clause. *Id.* (Emphasis added):

[t]his means that once a defendant meets the burden of producing evidence that his or her conduct was ‘authorized,’⁷ the Government must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.

Id. (Emphasis added.) Or, stated another way, “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. (Emphasis added.)

The Court’s decision flowed naturally from the universal proposition that “[w]ith few exceptions, ‘wrongdoing must be conscious to be criminal.’” *Elonis v. United States*, 575 U.S. 723, 734 (2015). *Ruan*, 142 S.Ct. at 2376. In interpreting statutes, not only is there a “longstanding presumption” that Congress “intends to require a defendant to possess a culpable mental state”, *Rehaif v. United States*, 139 S.Ct. 2191, 2195 (2019), this is the case even if the particular statute in question is silent as to a *mens rea* element. *Ruan*, 142 S.Ct. at 2377. The *mens rea* that is read into statutes is usually “knowledge or intent.” *Id.*, citing, *Staples v.*

⁷ The record amply demonstrates that Dr. Qureshi carried his burden in this regard and is not in dispute. ROA.2621-22; *Qureshi*, 121 F.4th at 1097-1098; App.2a-3a.

United States, 511 U.S. 600, 619 (1994), and *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 444-446 (1978). When the statute in question is not silent as to *mens rea*, but rather, includes a *mens rea* requirement, “the presumption applies with equal or greater force’ to the scope of that provision.” *Ruan*, 142 S.Ct. at 2377. The culpable mental state of “knowingly”, for example, “modifies not only the words directly following it, but also other statutory terms that ‘separate wrongful from innocent acts.’” *Id.*, quoting, *Rehaif*, 139 S.Ct. at 2197. (Emphasis added.)

In enacting Section 841(a)(1), Congress explicitly included the culpable mental states of “knowingly and intentionally”. But to what conduct does the culpable mental states apply? It is not the “fact of the dispensation” itself which renders the conduct wrongful; rather, “[i]n § 841 prosecutions, . . . it is the fact that the doctor issued an unauthorized prescription that renders his or her conduct wrongful . . . In other words, authorization plays a ‘crucial’ role in separating innocent conduct —and, in the case of doctors, socially beneficial conduct —from wrongful conduct.” *Ruan*, 142 S.Ct. at 2377. “Applying § 841’s “knowingly or intentionally” *mens rea* to the authorization clause thus ‘helps advance the purpose of scienter, for it helps to separate wrongful from innocent acts.’” *Id.*, citing, *Rehaif*, 139 S.Ct. at 2197.⁸

The Court found the regulatory language in 21 C.F.R. § 1306.04(a), which defines an “authorized”

⁸ In pertinent part, 21 C.F.R. § 1306.04(a) provides: “A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice. . . .”

prescription, to be of little help or assistance in illuminating the *mens rea* requirement for § 841 because it is “ambiguous,” and “written in ‘generalit[ies], susceptible to more precise definition and open to varying constructions.’” *Ruan*, 142 S.Ct. at 2377, quoting, *Gonzales v. Oregon*, 126 S.Ct. 904 (2006). Therefore, “[a] strong scienter requirement helps to diminish the risks of ‘overdeterrence,’ *i.e.*, punishing acceptable and beneficial conduct that lies close to, but on the permissible side of, the criminal line.” *Ruan*, 142 S.Ct. at 2378. In addition, because § 841 imposes severe penalties upon those found to have violated its provisions, this fact counsels in favor of a “a strong scienter requirement” and “ ‘suggest[s] that . . . the usual presumption that a defendant must know the facts that make his conduct illegal should apply.’” *Id.*, quoting, *Staples*, 511 U.S. at 618-619. Without knowledge of those facts, a “defendant may well lack the intent needed to make his behavior wrongful . . .” *Ruan*, 142 S.Ct. at 2379, quoting, *Rehaif*, 139 S.Ct. at 2197 (Emphasis added.)

B. The Fifth Circuit Misapplied the Principles of *Ruan* to the Conspiracy Jury Instructions Herein.

The Fifth Circuit held that the convictions for the substantive distribution counts were legally infirm in light of this Court’s holding in *Ruan v. United States*. *Qureshi*, 121 F.4th at 1101-1102; App.11a and further concluded, based on the record evidence, that the jury charge error was not harmless. *Id.*, at 1107; App.18a-24a. But as to the conspiracy charge alleged in Count One, the court concluded that the jury instructions did not run afoul of *Ruan*, and that any impact by the substantive charge’s error “on the conspiracy convic-

tion was harmless.” *Id.* at 1102, 1105; App.12a, 18a. According to the Fifth Circuit,

“[c]onspiracy” in the § 846 context takes the term’s common-law definition, which means that “the defendant must intend to agree and must intend that a substantive offense be committed by some member of the conspiracy.”⁹ The conspiracy charge in this case satisfies these requirements.

To see why the conspiracy instruction was not erroneous of its own accord, it is helpful to parse it carefully. To convict, the jury needed to find that Qureshi agreed to distribute a controlled substance without authorization. Convicting Qureshi required the jury to find, in the words of the conspiracy instruction, that Qureshi “reached an agreement to unlawfully distribute or dispense a controlled substance not for a legitimate medical purpose or not in the usual course of professional practice.” The “not for a legitimate medical purpose or not in the usual course of professional practice” language mirrors the regulatory standard for authorized prescriptions by medical practitioners. Therefore, by convicting, the jury found that Qureshi agreed to distrib-

⁹ As will be demonstrated *infra*, this fleeting reference to the requirement that the government must prove two separate culpable mental states when prosecuting a criminal conspiracy is the only mention made of that fact by the Fifth Circuit. The court cited no authorities, much less offered any analysis, of this essential legal precept in its opinion.

ute a controlled substance without authorization.

Id. at 1102; App.12a-13a. (Emphasis added.)

(i) Conspiracy’s “Agreement” Requirement.

But surely the Fifth Circuit’s rationale in this regard misses the mark. As to the first element of conspiracy, § 846’s agreement requirement, the “unlawful purpose” referenced in the jury instructions was “to unlawfully distribute or dispense a controlled substance not for a legitimate medical purpose or not in the usual course of professional practice.” *Qureshi*, 121 F.4th at 1101; App.44a. (Emphasis added.) What made the alleged agreement to distribute “unlawful” was for Dr. Qureshi to have “knowingly or intentionally acted in an unauthorized manner” and the government proving that he “knew or intended that his. . . . conduct was unauthorized”, *Ruan*, 142 S.Ct. at 2375, 2382, as opposed to the government merely proving (and the jury finding) that he “knowingly and intentionally distribu[d] or dispense[d] a controlled substance not for a legitimate medical purpose or not in the ususal course of professional practice”, as the district court erroneously instructed the jury in both the substantive distribution and conspiracy to distribute jury instructions. *Qureshi*, 121 F.4th at 1100; App.44a, 46a.

While the bolded language of the conspiracy jury instruction above may “mirror[] the regulatory standard for authorized prescriptions by medical practitioners”, *Qureshi*, 121 F.4th at 1102, that fact is of little moment because its inclusion in the district court’s instructions failed to inform the jury of *Ruan’s critical mens rea* requirement. Not mentioned by the Fifth Circuit was this Court’s specific admonition that § 1306.04(a)’s

regulatory language defining an “authorized” prescription, is “ambiguous,” and “written in generalit[ies], susceptible to more precise definition and open to varying constructions”, and, therefore, cannot supplant or replace § 841(a)’s “strong scienter requirement”. *Ruan*, 142 S.Ct. at 2378.

(ii) Knowledge of the Unlawful Purpose of the Conspiracy.

The Fifth Circuit next reasoned, as to the second element of conspiracy, that in order to convict

[t]he jury also needed to find that Qureshi “knew of the unlawful purpose of the agreement.” That agreement is the one referred to in the first element: an agreement to distribute controlled substances “not for a legitimate medical purpose or not in the usual course of professional practice” (i.e., without authorization). In sum, by convicting, the jury concluded that Qureshi ‘knew of the unlawful purpose of the agreement’—that he knew the agreement was to distribute controlled substances without authorization. Accordingly, Qureshi’s conspiracy conviction satisfies § 841(a)’s requirement that the Government prove “the defendant knowingly or intentionally acted in an unlawful manner.”

Qureshi, 121 F.4th at 1102-1103; App.13a-14a.

In support of this circuitous reasoning, the Fifth Circuit cited, *United States v. Ruan (Ruan II)*, 56 F.4th 1291, 1299 (11th Cir. 2023), *cert. denied*, 144 S.Ct. 377 (2023), wherein the Eleventh Circuit held:

“[f]or a defendant to know that the aim of their agreement was illegal in this context means that they would need to know both that (1) they were dispensing a controlled substance and (2) that they were doing so in an unauthorized manner.” Thus, “if the jury concluded that the defendant did not know either of these things, then they could not conclude the defendant knew the illegal object of the conspiracy and could not vote to convict.”

Qureshi, 121 F.4th at 1103; App.14a.¹⁰

But this assumes far too much. How could a jury lawfully conclude that a defendant “knew of the unlawful purpose of the agreement”—in this case dispensing a controlled substance “in an unauthorized manner”—when it was erroneously instructed in the first place (in the substantive distribution counts jury charge), as to the legal standard required to make such a finding? Just as it had failed to do with respect to the substantive counts jury instructions, nowhere in the conspiracy jury instructions, including the “agreement” element, did the district court apply the requisite culpable mental state that “separates wrongfulness from innocence”¹¹

¹⁰ Ruan’s case is starkly different from that of Dr. Qureshi. Ruan and his co-defendant, Dr. John Patrick Couch, were charged with seven (7) separate conspiracies in violation of three (3) separate statutes—three drug conspiracies, three fraud conspiracies, and a conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (“RICO”), in addition to multiple § 841 substantive distribution counts, and money laundering charges. *United States v. Ruan*, USCA 11 Case: 17-12653, [Doc. 269, 22-27, 3-22, 27-28, 31-35, 38-40, 40-42.]

¹¹ *Ruan*, 142 S.Ct. at 2377.

to the gravamen of the object offense—the “except as authorized” clause—namely, “not for a legitimate medical purpose or not in the usual course of professional practice”, as required by *Ruan*. *Id.* at 2382.

(iii) The Purported Distinctness of the Conspiracy Jury Charge from the Erroneous Substantive Counts Jury Instructions.

The Fifth Circuit was “not persuaded that the conspiracy conviction is erroneous just because the substantive charge is erroneous.”¹² *Qureshi*, 11 F.4th at 1103; App.14a-15a. According to the court,

[a]lthough we have previously ‘reversed a conspiracy conviction based on an erroneous instruction in a separate but related substantive count, we have declined to reverse a conspiracy count that was sufficiently “distinct” from a related and erroneous substantive instruction. This case falls into the latter category. We recently affirmed a conviction under a jury charge that separately referred to the correct elements despite an error in a related substantive instruction because the conspiracy instruction was sufficiently distinct. This case falls into the latter category.

¹² Dr. Qureshi is not arguing that his “conspiracy conviction is erroneous just because the substantive charge is erroneous.” *Qureshi*, 121 F.4th at 1103. As will be explained *infra*, the conspiracy conviction is invalid (and not harmless) precisely because the totality of the district court’s erroneous instructions as to the *mens rea* component of § 841 was repeated verbatim in the § 846 conspiracy jury instructions.

Id. (Emphasis added.)

The “recently affirmed” conviction referenced by the Fifth Circuit as a case involving a conspiracy charge that “was sufficiently ‘distinct’ from a related and erroneous substantive instruction” was *United States v. Fairley*, 880 F.3d 198, 212 n.17 (5th Cir. 2018), *cert. denied*. 139 S.Ct. 321 (2018); its application to the present case, however, is particularly problematic on both procedural and substantive grounds. Fairley’s claim that the conspiracy charge presented reversible error was dispatched, in large part, due to the fact that no objection was lodged at trial to the trial court’s instruction, therefore, relegating appellate review to that of plain error. *Fairley*, 880 F.3d. at 212-213. In addition, the court concluded that the jury charge as to “count one (conspiracy) was distinct from the substantive counts and the errors regarding counts two and three. . . .”) *Id.*

Fairley’s substantive counts charged a violation of 21 U.S.C. § 641 which proscribes, in two separate paragraphs, both “stealing from the United States” and “knowingly receiving stolen United States property.” *Fairley*, 890 F.3d at 204, *citing, Milanovich v. United States*, 365 U.S. 551, 554, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961). Although § 641 in two separate paragraphs, “describe two distinct criminal acts, with distinct elements”, Fairley’s “indictment, jury instructions, and verdict form, all, in different ways, combined the first and second paragraphs of § 641 into a single purported offense.” *Fairley*, 880 F.3d at 205-206. Specifically with respect to the jury charge as to the substantive § 641 counts, the Fifth Circuit concluded that “in mixing the elements of ‘stealing’ and ‘receiving’, the

district court had failed to adequately charge as to either.” *Fairley*, 880 F.3d at 209.

As to the § 371 conspiracy instruction, however, the Fifth Circuit held that the district court accurately charged the jury as to the elements of the underlying or object offense of the conspiracy—§ 641—and asserted that Fairley “points to no actual error in how [the conspiracy jury charge] was presented . . .” *Fairley*, 880 F.3d at 212. Based on the indictment, jury instructions, and argument of the prosecutor,¹³ the court

¹³ The Fifth Circuit, likewise, in the present case relied on defense counsel’s final argument as constituting an accurate statement describing the conspiracy’s *mens rea* requirement to the jury which, according to the court, “underscores the distinctiveness of the conspiracy count from the substantive counts.” *Qureshi*, 121 F.4th at 1104; App.16a-17a. With all respect, that proposition is belied both by the facts and the law. Defense counsel herein merely addressed the third element of conspiracy (“Willfully”) as set forth in the district court’s instructions (“that the defendant joined in the agreement ‘willfully’; that is to say, with the intent to further its unlawful purpose”) and argued:

[The conspiracy count] requires that you have to join that agreement to commit an unlawful act willfully. That means that you did it with the intent to further its unlawful purpose. In other words, Dr. Qureshi would have to join Rubeena Ayesha and say, ‘Hey, let’s distribute some drugs illegally’. That has to be his mind set, and that has to be the Government’s proof. *Id.*

Defense counsel was not permitted by the district court’s instructions to argue that the government had to prove beyond a reasonable doubt that Dr. Qureshi “knowingly or intentionally acted in an unauthorized manner”, or “knew or intended that his . . . conduct was unauthorized.” *Ruan*, 142 S.Ct. at 2375, 2382. In any event, as will be demonstrated, *infra*, argument of counsel is no substitute for a trial court’s solemn duty to provide legally accurate instructions to the jury.

determined that “[t]hese repeated instructions made clear to the jury that count one—unlike counts two and three—charged Fairley with conspiring to steal, rather than receive government money” and “[g]iven this separation, and the high threshold of plain error review, Fairley’s conviction on count one stands.” *Id.*

Fairley is inapposite to the present case. Not only did Dr. Qureshi timely object to the *mens rea* instruction error that infected both the substantive and conspiracy drug counts, and preserved the issue for appellate review,¹⁴ the substantive counts’ *Ruan* error, in fact, was not “sufficiently ‘distinct’” from the error in the conspiracy count instructions, and unlike *Fairley*, did not “accurately charge[] the jury as to the elements of the underlying or object offense of the conspiracy.” *Fairley*, 880 F.3d at 212. Quite to the contrary, the district court’s misstatement of law as to the *mens rea* requirement in the substantive counts instructions (and sole object of the conspiracy) herein was repeated verbatim and incorporated into the conspiracy count instructions,¹⁵ rendering them “inextricably intertwined”, and resulting in a jury charge that did not “refer[] to the correct elements.” *Qureshi*, 121 F.4th at 1103.

¹⁴ *Qureshi*, 121 F.4th at 1099; App.6a. See Fed. R. Crim. Proc. 30(d).

¹⁵ . . . [t]he defendant is charged with conspiracy to commit a violation of . . . Section 841(a)(1), which makes it a crime for any person to knowingly or intentionally distribute or dispense a controlled substance not for a legitimate medical purpose or not in the course of professional practice.

Qureshi, 121 F.4th at 1103; App.44a.

The Fifth Circuit ultimately concluded that:

[b]oth the substantive and the conspiracy instructions correctly identified what Qureshi needed to know to be convicted: that he lacked authorization to distribute controlled substances. So, although the substantive charge erroneously omitted the *mens rea* element, the conspiracy charge directed the jury to convict only if they concluded Qureshi ‘knew of the unlawful purpose of the agreement.’¹⁶ The jury charge was not infected by the substantive charge’s error, and any impact on the conspiracy charge was harmless.

Qureshi, 121 F.4th at 1105; App.18a.

C. The Erroneous Jury Instructions Violated Due Process, the Right to Trial by Jury, and Denied Dr. Qureshi a Fair Trial.

In the case *sub judice*, the district court’s charge failed to provide the jury with an accurate instruction as to the very conduct element which formed the gravamen of the instant offenses as mandated by

¹⁶ Direct[ing] the jury to convict only if they concluded Dr. Qureshi knew of the unlawful purpose of the agreement”, addresses only the second element of the conspiracy count instructions and provides no guidance, whatsoever, to the *mens rea* standard applicable to the first and distinct element of conspiracy—the agreement requirement—which mandates that the government prove that Dr. Qureshi reached an agreement to “knowingly or intentionally act[] in an unauthorized manner”, and that he “knew or intended that his . . . conduct was unauthorized.”

Ruan, 142 S.Ct. at 2382, 2385.

Ruan. “The Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged.” *United States v. Gaudin*, 515 U.S. 506, 522-523 (1995). “[M]isdescriptions and omissions” of elements “preclude[] the jury from making a finding on the actual element of the offense.” *Neder v. United States*, 527 U.S. 1, 10 (1999). “Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.” *Carter v. Kentucky*, 450 U.S. 288, 302, 101 S.Ct. 1112, 1120, 67 L.Ed.2d 241 (1981). And,

[i]f justice is to be done in accordance with the rule of law, it is of paramount importance that the court’s instructions be clear, accurate, complete and comprehensible, particularly with respect to the essential elements of the alleged crime that must be proved by the government beyond a reasonable doubt.

United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973) (Emphasis added.)

This is especially the case when the omitted or misstated element involves the culpable mental state of the criminal statute alleged in the indictment. *United States v. Young*, 464 F.2d 160, 164 (5th Cir. 1972) (“The failure to instruct properly on the issue of intention effectively deprived Young of his right ‘to have presented instructions relating to a theory of defense for which there is any foundation in the evidence.’”); and *United States v. Williams*, 836 F.3d 1, 20 (D.C. Cir. 2016) (Kavanaugh, J., concurring) (“In criminal cases where a *mens rea* related jury instruction issue may have made a difference to the conviction and sentence, it is critically important to ensure that the jury had a correct

understanding of the relevant law.”) “It is grave error to submit a case to a jury without accurately defining the offense and its elements”; 2A Charles Alan Wright, FEDERAL PRACTICE AND PROCEDURE § 497.1, at 472-73. (3d ed.1999).

Despite the fact that the jury was provided an erroneous instruction by the district court as to the *mens rea* requirement of the object of the conspiracy, the Fifth Circuit concluded that “defense counsel’s accurate statement of the *mens rea* requirement in his closing argument in this case underscores the distinctness of the conspiracy count from the substantive counts.” *Qureshi*, 121 F.4th at 1104; App.16a-17a. But this is asking too much. Beyond the fact that defense counsel was not permitted by the district court’s instructions to argue that the government had to prove that Dr. Qureshi “knowingly or intentionally acted in an unauthorized manner”, it is axiomatic that “[t]he burden of giving proper instructions is on the Judge . . . And it is his words, *not the lawyers[.]* which ‘carry an authority bordering on the irrefutable.’” *United States v. Rubio*, 834 F.2d. 442, 447 (5th Cir. 1987) (emphasis added), quoting *Moody v. United States*, 377 F.2d 175, 179 (5th Cir. 1967). This Court has held that “arguments of counsel cannot substitute for instructions by the court.” *Taylor v. Kentucky*, 436 U.S. 478, 488-89, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978).

It is ordinarily presumed that the jury followed the district court’s instructions. *Greer v. Miller*, 483 U.S. 756, 766, n.8 (1987), and “[c]onversely, absent an appropriate instruction, [appellate courts] cannot presume that the jurors applied the correct standard of proof.” *United States v. Stanford*, 823 F.3d 814, 834 (5th Cir. 2016), *cert. denied*. 137 S.Ct. 453 (2016). It is

likewise reasonable to assume that since the sole underlying felony alleged in the conspiracy accusation as its object was Section 841(a), the jury was guided by what the district court erroneously instructed with respect to that offense (as well as what the district court specifically stated in its conspiracy instructions—section 841(a)(1) “makes it a crime for any person to knowingly or intentionally distribute or dispense a controlled substance not for a legitimate purpose or not in the course of professional practice”), App.44a, 46a.

D. The Erroneous *Mens Rea* Jury Instructions in Violation of *Ruan* Were Not Harmless Beyond a Reasonable Doubt.

The erroneous jury instructions herein cannot be deemed harmless under Fed. R. Crim. P. 52. “A jury instruction that erroneously misstates or omits an element of the offense is a non-structural constitutional error subject to harmless error review.” *United States v. Anchrum*, 590 F.3d 795, 799-800 (9th Cir. 2009), *cert. denied*. 130 S.Ct. 3435 (2010). But such error will rarely be harmless, *United States v. Forbes*, 64 F.3d 928, 934-35 (4th Cir. 1995), especially when the omitted or misstated element involves the culpable mental state of the criminal statute alleged in the indictment. *United States v. Young*, 464 F.2d at 164.

The burden of proving “harmless error” is on the Government and it must appear “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Chapman v. California*, 386 U.S. 18, 24 (1967); and *Neder v. United States*, 527 U.S. at 18 (1999). In *Neder v. United States*, 119 S.Ct. at 15-16, this Court held that the failure to include an element in the instructions (in that case, “materiality”)

could be determined to be harmless beyond a reasonable doubt where the element was otherwise “supported by uncontroverted evidence”:

In a case such as this one, where a defendant did not, and apparently could not, bring forth facts contesting the omitted element, answering the question whether the jury verdict would have been the same absent the error does not fundamentally undermine the purpose of the jury trial guarantee. Of course, safeguarding the jury guarantee will often require that a reviewing court conduct a thorough examination of the record. If, at the end of that examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless.

(Emphasis added.)

This is such a case where the error is not harmless. Dr. Qureshi both contested the erroneously submitted culpable mental state element and “presented sufficient evidence to support a contrary finding.” *Neder*, 119 S.Ct. 15-16. As the Fifth Circuit concluded with respect to the substantive § 841 counts of conviction,

[c]onsidering all the evidence, the Government has not carried its burden to prove “beyond a reasonable doubt that the jury verdict would have been the same absent the error.” As the preceding summary of the parties “evidence”

reflects, Qureshi's knowledge was contested at trial. In their closing arguments, both Qureshi and the Government highlighted the evidence of what Qureshi knew. Given that assessing the weight of this evidence involves making determinations of witnesses' credibility—and especially the credibility of Qureshi—we cannot say that the Government has shown "the error was harmless beyond a reasonable doubt."

Furthermore, as discussed, Counts 2 through 5 asked the jury whether Qureshi distributed controlled substances without authorization on four specific occasions when Qureshi was out of the country in March 2015. A properly instructed jury could have considered Qureshi's testimony that he believed he was authorized to pre-sign the prescriptions at issue not credible. Or, it could have credited Qureshi's testimony. Determinations of the credibility of witnesses like this are "solely within the province of the jury." Under these circumstances, "a rational jury could find the Government failed to prove the omitted element."

Qureshi, 121 F.4th at 1107; App.23a-24a.

The Fifth Circuit's analysis of harmless error as to the substantive counts of conviction applies equally to the conspiracy count herein. Determinations of credibility and the defendant's culpable mental state must be left to the jury:

[a]ppellate judges are better equipped to assess materiality than to evaluate states of mind based on a cold record. The defendant in Neder

“did not, and apparently could not, bring forth facts contesting the omitted element”, *id.* at 19, 119 S.Ct. 1827—something that is not true in this case where the defendant has plenty to work with in contesting the mental-state determination.

United States v. Houston, 792 F.3d 663, 669 (6th Cir. 2015), *cert. denied*. 138 S.Ct. 286 (2017). (Emphasis added.) In *United States v. Kahn*, 58 F.4th 1308, 1321 (10th Cir. 2023), in finding that the *Ruan* error therein was not harmless beyond a reasonable doubt, the court held that it “should not assume the responsibility of making a finding on a contested issue of fact”, citing, *Connecticut v. Johnson*, 460 U.S. 73, 85-86, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983) (“If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant.”) *See also, United States v. Serawop*, 410 F.3d 656, 669-70 (10th Cir. 2005) (“[I]n this case, the only issue actually in dispute is the very subject of the instructions’ error [culpable mental state]. Because the jury here was not properly charged on this basic issue, the conviction cannot stand . . . The risks of misunderstanding are simply too significant to overlook in this case.”)

In the present case, because the jury was erroneously instructed as to the culpable mental state requirement applicable to a § 846 charge, it “did not make the required mens rea finding, and 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.” *United States v. Kahn*, 58 F.4th at 1320, quoting,

Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993).

II. There Is a Conflict Among the Circuit Courts of Appeal as to Whether Jury Charge Error as to Substantive Offenses Render Conspiracy and Other Related Counts of Conviction in the Same Proceedings Infirm.

A. The Fifth and Eleventh Circuits' Holdings Are in Conflict with the Decisions of Other Circuit Courts of Appeals.

Other circuit courts have reached diametrically opposed conclusions in determining whether a legally defective substantive jury instruction has “infected” a conspiracy jury charge¹⁷ in the same criminal pro-

¹⁷ A district court’s misstatement of the law in its charge to the jury as to the elements of a substantive offense may well prejudice a defendant as to other counts of conviction in the same criminal proceedings even when those counts do not allege criminal conspiracy. For example, in *United States v. Smithers*, 92 F.4th 237 (4th Cir. 2024), the court found *Ruan* error as to the § 841(a)(1) counts of conviction, and, in addition, concluded that such error fatally infected the 21 U.S.C. § 856 count (maintaining a place for the purpose of unlawful distribution), as well. Even assuming the § 856 jury instruction constituted a correct statement of the law, the court held that the conviction could not stand because “jury instructions are not evaluated in ‘isolated segments,’ but instead analyzed ‘as a whole.’” *Id.* at 250. The court found “it impossible to believe” that the jury interpreted the § 841 counts as requiring an objective mens rea but interpreted Count 2 (§ 856) as requiring a subjective mens rea. *Id.* As the court reasoned,

The most obvious explanation, rooted in the understanding that juries read instructions as a whole, is that once the jury convicted Smithers on the unlawful-distribution counts, a conviction on the maintaining-a-place count was inevitable. *Id.*

ceedings. In *United States v. Kahn*, 58 F.4th, at 1320, the sister case to *Ruan v. United States*, *supra*, on remand from this Court, the Tenth Circuit concluded that the § 841(a)(1) instructions were infirm:

Based on the jury instructions, as they were written and presented to the jury, the jury was not required to find that Dr. Kahn intended to or knowingly did act not “as authorized.” The jury did not make the required *mens rea* finding, and “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”.

Sullivan v. Louisiana, 508 U.S. 275, 279 (1993).

The Tenth Circuit further held that with respect to the § 846 conspiracy charge and other substantive counts, “the instructions pertaining to those charges are likewise predicated in part, on one or more of the erroneous § 841(a)(1) instructions. Accordingly, we conclude that Dr. Kahn’s convictions as to each count must be vacated.” *Kahn*, 58 F.4th, at 1322. (Emphasis added.)

Similarly, in *United States v. Palazzolo*, 71 F.3d 1233, 1238 (6th Cir. 1995), the district court’s erroneous instructions with respect to the culpable mental state requirement of the object offense of the conspiracy (illegal structuring) poisoned the conspiracy count as well:

Because that charge was submitted under an instruction that permitted the jury to convict without requiring the government to prove all the elements of the offense, it

would be a violation of the defendant's due process rights to permit such a verdict to stand.

Palazzolo's conspiracy charge alleged three separate object offenses—money laundering, illegal structuring of transactions to avoid bank reporting requirements for large cash transactions, and causing a co-defendant's business to file a required IRS Form 8300. *Id.* at 1234. The district court's "legally incorrect" instruction pertained to the culpable mental state requirements for "illegal structuring", in violation of *Ratzlaf v. United States*, 114 S.Ct. 655 (1994). Palazzolo's conspiracy conviction was reversed because "the jury had no way of determining that the instruction misstated the law in defining the elements of one of the offenses the defendants were charged with conspiracy to commit." *Palazzolo*, 71 F.3d at 1238.¹⁸ (Emphasis added.)

In *United States v. Kim*, 65 F.3d 123, 126 (9th Cir. 1995), the Court held that the *mens rea* requirement for a substantive violation of engaging in illegal structuring set forth in *Ratzlaf v. United States*, 114 S.Ct. 855, 862 (1994) was equally applicable to the separate charge of conspiring to engage in illegal structuring. Furthermore, the reference within the conspiracy instruction to the "erroneous definition of the substan-

¹⁸ In reliance on *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 32, 75 L.Ed. 1117 (1931), and its progeny, the Sixth Circuit held that "it is impossible to be certain that the jury's general guilty verdict under Count 1 (conspiracy) was not based solely on the admittedly erroneous instruction related to the structuring offense." *Id.* at 1235.

Of course, in the case *sub judice*, there was only ONE object of the conspiracy—§ 841(a)—and the instructions for it were legally incorrect.

tive offense embodied in the substantive offense instructions” constituted error:

While the court’s instructions regarding the elements of the conspiracy offense were generally unobjectionable, they necessarily refer to the erroneous definition of the substantive offense embodied in the substantive offense instructions, which failed to mention a requirement of proof that the defendants knew that structuring a transaction was illegal. The jury therefore erroneously based its determination of guilt solely on whether the transactions were arranged to avoid reporting, not whether the defendant was actually aware such avoidance was illegal. This failure to properly instruct the jury of the knowledge requirement in the underlying offense resulted in an error in the conspiracy instruction.

Kim, 65 F.3d at 126.¹⁹ (Emphasis added.)

¹⁹ The Fifth Circuit found *Kim* to be distinguishable:

We read *Kim* as basing its holding on that (sic) fact that the substantive instruction misidentified what the defendant needed to know to be convicted . . . The jury’s finding that the defendant knew of the unlawful purpose of the conspiracy did not implicate the defendant’s knowledge that the transaction was illegal. It only meant that the defendant knew the agreement was to prevent a bank from reporting a qualifying transaction.

Qureshi, 121 F.4th at 1104; App.17a-18a.

The Fifth Circuit’s parsing of the *Kim* opinion constitutes a “distinction without a difference.” In the instant case, just as in *Kim*, “[t]he jury’s finding that the defendant knew of the unlawful purpose of the conspiracy did not implicate [Dr. Qureshi’s]

B. Criminal Conspiracy's Requirement That Two Separate "Intents" Be Proven as Applied to the Facts Herein.

The conspiracy jury instructions herein with respect to the third element of conspiracy required the government to prove "[t]hat the defendant joined in the agreement willfully; that is with the intent to further its unlawful purpose." *Qureshi*, 121 F.4th 1100; App.45a. But that does not save the day for the government. The district court's reference was to the culpable mental state for the conspiracy—not the separate and distinct culpable mental state required for commission of the underlying substantive offense and object of the conspiracy. This very point was made by the Ninth Circuit in *Kim v. United States*:

The use of "willfully" in the conspiracy instruction refers to the joining in the agreement, not the *mens rea* of the substantive offense. Moreover, the reference to knowledge of the unlawful purpose of the conspiracy does not instruct the jury to explicitly find knowledge of the illegality of structuring.²⁰

knowledge that the transaction was illegal", in light of the fact that the district court failed to require the Government to prove beyond a reasonable doubt that he "knew or intended that his . . . conduct was unauthorized", as was required by *Ruan* as to the underlying felony. What squarely is on point is *Kim's holding* that an otherwise unobjectionable conspiracy jury instruction presents reversible error when it refers to, or, as in this case, literally incorporates verbatim an erroneous definition of the *mens rea* requirement of the underlying substantive offense and sole object of the conspiracy. *Kim*, 65 F.3d at 126.

²⁰ "The illegality of structuring" was the object of the conspiracy.

Kim, 65 F.3d at 126. (Emphasis added.)

Because of the erroneous conspiracy instructions herein, the Government was not required to prove, nor was the jury called upon to determine, that the defendant had the requisite intent necessary for a conviction of the underlying (§ 841(a)) offense. ‘It is well settled that to convict a defendant of conspiracy . . . the government must prove whatever level of *mens rea* is required for conviction of the underlying substantive offense.’ *United States v. Alston*, 77 F.3d 713, 718 (3d Cir. 1996); and *United States v. Baker*, 63 F.3d. 1478, 1493 (9th Cir. 1995), *cert. denied*. 516 U.S. 1097 (1996) (stating that “[e]stablishing a defendant’s guilt of conspiracy to commit a substantive crime requires proof of the mens rea essential for conviction of the substantive offense itself.” (Emphasis added.) As for the culpable mental state of “willfully”, the jury was informed that, by its very terms, it was applicable only to the “agreement” element; this, therefore, did not remedy the charge’s mischaracterization of the underlying object offense’s separate *mens rea* requirement. It was still incumbent upon the district court to correctly instruct as to the culpable mental state requirement of the conspiracy’s object—the unlawful distribution or dispensing of controlled substances.

“In conspiracy cases, two different types of intent are generally required—the basic intent to agree, which is necessary to establish the existence of the conspiracy, and the more traditional intent to effectuate the object of the conspiracy. See W. LaFave & A. Scott, CRIMINAL LAW 464-465 (1972).” *United States v. U.S. Gypsum Co.*, 438 U.S. at 444 (1978.) (Emphasis added.) “Conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal

intent necessary for the substantive offense itself.” *Ingram v. United States*, 360 U.S. 672, 677-78, 79 S.Ct. 1314, 1319, 3 L.Ed.2d 1503 (1959); and *United States v. Feola*, 420 U.S. 671, 686 (1975). That is,

in order to convict a defendant of (a § 846) conspiracy, the government must prove beyond a reasonable doubt that (1) the defendant agreed with another person that some member of the conspiracy would commit the relevant underlying offense (here § 841 (a)), and that (2) the defendant had the requisite intent necessary for a conviction of the underlying offense.

United States v. Collazo, 984 F.3d 1308, 1320 (9th Cir. 2021) (En banc), *cert. denied.* 143 S.Ct. 323 (2022) (Emphasis added). *See also, United States v. Peterson*, 244 F.3d 385, 389-90 (5th Cir. 2001), *cert. denied.* 122 S.Ct. 142 (2001), quoting, *United States v. Dadi*, 235 F.3d 945, 950 (5th Cir. 2000), *cert. denied.* 121 S.Ct. 2230 (2001) (stating that for purposes of criminal conspiracy “[t]he government must prove the same degree of criminal intent as is necessary for proof of the underlying substantive offense.”) “[A] defendant must ‘intend to agree and must intend that the substantive offense be committed.’” K. O’Malley, J. Grenig, & W. Lee, FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL § 31.02, at 220.

In the case *sub judice*, it is indisputable that the jury’s verdict under the conspiracy count was based on the erroneous § 841(a) instruction which was the only object of the conspiracy, and was repeated verbatim in the court’s conspiracy instructions. It was essential that the district court accurately “instruct the jury on the elements of the substantive crimes constituting

the objects of the charged conspiracy.” *United States v. Martinez*, 496 F.2d 664, 669 (5th Cir. 1974), *cert. denied*. 95 S.Ct. 627 (1974); and *United States v. Alghazouli*, 517 F.3d 1179, 1189 (9th Cir. 2008), *cert. denied*. 129 S.Ct. 237 (2008) (“It is also well established that a trial court errs in a conspiracy case if it fails to instruct the jury on an element of the crime that is the object of the conspiracy. That is, if a jury is asked to determine whether a defendant conspired to commit an offense, the jury needs to know the elements of that offense.”)



CONCLUSION

For the foregoing reasons, the Fifth Circuit’s opinion in this case as applied to Count One—the conspiracy count—conflicts with *Ruan v. United States* and presents reversible error. In addition, the Fifth Circuit’s analysis and conclusions conflicts with that of other Circuit Courts of Appeal. The petition for writ of certiorari should be granted.

Respectfully submitted,

George McCall Secrest, Jr.

Counsel of Record

BENNETT & SECREST, PLLC

1545 Heights Boulevard, Suite 800

Houston, TX 77008

(713) 757-0679

mac@bennettandsecrestlaw.com

Counsel for Petitioner

February 17, 2025