

No. 17-____

In the
Supreme Court of the United States,

LUCILLE FRIAL-CARRASCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a person be prosecuted for conspiring to unlawfully dispense or distribute drugs in a state other than the state where the conspiracy was formed and all acts in furtherance of its object were completed, or does such a prosecution violate the person's constitutional right to be tried in the venue where the crime occurred, pursuant to U.S. Constitution, Article III, § 2, cl. 3, and the Sixth Amendment?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lucille M. Frial-Carrasco respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit (App. 1 – 19) is *United States v. Elliott*, 876 F.3d 855, 857 (6th Cir. 2017). This Opinion includes three cases which were consolidated in the district court; the relevant Opinion regarding Lucille M. Frial-Carrasco is designated as 2016-6676.

The Opinion of the United States District Court for the Eastern District of Kentucky at London, *United States v. Solomon*, was issued October 31, 2016. The Opinion is unpublished but is reported at 2016 U.S. Dist. LEXIS 150787 (E.D. Ky., Oct. 31, 2016). Judgment was entered on November 16, 2016. (App. 20 – 60). Petitioner's Motion for Change of Venue and Memorandum in Support (App. 64 – 68) was filed on September 9, 2015. The district court's Order denying Petitioner's Motion (App. 61 – 63) was entered on October 13, 2015; the Order is not reported.

BASIS FOR JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The Court's Opinion was entered on October 31, 2016, and Petitioner's Notice of Appeal to the Sixth Circuit was filed on November 16, 2016. The Sixth Circuit had appellate jurisdiction over the Petitioner's appeal because the district court's opinion was a

final decision within the meaning of 28 U.S.C. § 1291. The United States Court of Appeals for the Sixth Circuit entered its Opinion on November 30, 2017.

This Court has jurisdiction to consider this appeal under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment of the U.S. Constitution, in relevant part, provides:

“[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . 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.”

21 U.S.C.S. § 846 provides: “[a]ny person who attempts or conspires to commit any offense defined in this title 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.”

INTRODUCTION

Here, the Government alleged that employees of a Florida pain clinic, the Pain Center of Broward (“PCB”), were part of a conspiracy to distribute oxycodone in the Eastern District of Kentucky in violation of 21 U.S.C. § 846. These employees were prosecuted in the Eastern District of Kentucky. Based upon the Government’s evidence, though, PCB’s conspiracy was formed, and all acts in furtherance of it were completed, entirely within the Southern District of Florida. The sole nexus of the Florida defendants to Eastern Kentucky was that Kentucky drug trafficking organizations sent Kentucky patients to PCB to obtain oxycodone prescriptions, who then brought the oxycodone back for redistribution in Eastern Kentucky. There was no evidence presented that these patients or drug trafficking organizations conspired with the Florida defendants. In fact, the evidence was completely to the contrary: the Kentucky drug traffickers had to lie to the Florida defendants to obtain prescriptions.

The transactions between PCB employees and Kentucky patients created the equivalent of a buyer-seller relationship in a traditional drug transaction. The Sixth Circuit has recognized that a buyer-seller relationship alone is insufficient to tie a buyer and seller to the same conspiracy, because mere sales do not prove the existence of the agreement that must exist for there to be a conspiracy. *United States v. Deitz*, 577 F.3d 672, 680 (6th Cir. 2009) (quoting *United States v. Cole*, 59 Fed. App’x 696, 699 (6th Cir. 2003)). Because the Florida defendants were not part of any conspiracy to distribute oxycodone in Kentucky, and because the Kentucky

patients' independent conspiracy to redistribute oxycodone in Kentucky was the sole link to the Eastern District of Kentucky, venue was improper there for the Florida defendants. While the evidence presented at trial may have demonstrated that the PCB employees conspired together, such a conspiracy was formed, and all acts in furtherance of it were completed, entirely within the Southern District of Florida.

The Sixth Circuit erroneously held that the Eastern District of Kentucky was a proper venue to try the Florida defendants regardless of whether they conspired with Kentucky patients to redistribute the oxycodone in Kentucky. Such a ruling is at odds with this Court's directive that the *locus delicti* of a crime is to be determined by the nature of the crime alleged and the nature of the act or acts constituting it. *United States v. Cabrales*, 524 U.S. 1, 6 (1998) (citing *United States v. Anderson*, 328 U.S. 699, 703 (1946)). Here, the *locus delicti* of the crimes was in Florida, and the prosecution was proper only in Florida – not Kentucky. The Court should therefore grant the writ petition.

STATEMENT OF THE CASE

A. The Pain Center of Broward Conspiracy

The Government tried five former employees of PCB for conspiring amongst themselves and with others to distribute oxycodone in the Eastern District of Kentucky in violation of 21 U.S.C. § 846. (R. 279, Fourth Superseding Indictment, Page ID# 1181-85). Petitioner, Dr. Lucille Frial-Carrasco ("Dr. Frial-Carrasco"), was one of them. PCB was located in Fort Lauderdale, Florida. Prior to trial, Dr. Frial-

Carrasco filed a Motion for Change of Venue, arguing that under the Sixth Amendment, Rule 18 of the Federal Rules of Criminal Procedure, and Article III, Section 2, Clause 3 of the Constitution, venue was improper in the Eastern District of Kentucky, and that the case should be transferred to Southern District of Florida. (R. 476, Motion for Change of Venue, PgID# 2237-41). None of the named defendants were Kentucky residents, nor did they write any prescriptions or treat any patients in Kentucky. *Id.* The district court denied Dr. Frial-Carrasco's motion. (R. 527, Order, PgID# 2420-22). Although the court acknowledged that there were no allegations that the defendants ever entered Kentucky, it found that there was "ample evidence" that the defendants conspired with residents of the Eastern District of Kentucky and that multiple acts in furtherance of the alleged conspiracy took place in the Eastern District of Kentucky. *Id.*

Joel Shumrak ("Shumrak"), the owner of PCB and kingpin of the "pill mill" conspiracy, pleaded guilty before trial to conspiring to distribute oxycodone and money laundering in connection with the PCB operation. (R. 849, Transcript, PageID# 4026). The Government established the existence of a conspiracy at PCB through Shumrak's testimony and the testimony of other former employees, including Dr. Irving Karten, Shirley Casimir, and Delma Arnold.

Dr. Irving Karten worked at PCB for about a year and a half, from late 2009 through March of 2011. (R. 861, Transcript, PageID# 5735, 5758-59). While he worked there, Dr. Karten knew that Shumrak had allowed some patients he had previously discharged from the clinic to return. (R. 861, Transcript, PageID# 5741).

Shumrak wanted Dr. Karten to prescribe the patients as much medication as they “felt they needed or wanted,” and Dr. Karten obliged. (R. 861, Transcript, PageID# 5744). Dr. Karten ultimately pleaded guilty to distributing oxycodone outside the usual course of professional practice and for no legitimate medical purpose, “in the context of a conspiracy.” (R. 861, Transcript, PageID# 5748). He understood a conspiracy to mean that everyone at PCB “knew what the other person was doing [i.e., overprescribing] and no one said or did anything about it.” (R. 861, Transcript, PageID# 5749).

Shirley Casimir, a front office worker at PCB, testified that the front office staff knew that patients were coming down from Kentucky in groups because these employees would book the patient appointments, and would see the patients come together and pay together upon arrival. (R. 860, Transcript, PageID# 5459-60). Shumrak knew about this, too. But the physicians and physician assistants would not have known, because the waiting room was out of sight from the exam rooms where they worked. (R. 860, Transcript, PageID# 5460; 5504); (R. 849, Transcript, PageID# 4074-75). Delma Arnold, another former front office worker, testified that she and another front office worker, Tiffany Reddick, accepted bribes from patients to falsify urine screens, but the two of them kept this fact concealed from the physicians, including Dr. Frial-Carrasco. (R. 860, Transcript, PageID# 5555-56).

Dr. Frial-Carrasco did not begin working at PCB until July 5, 2011. (R. 849, Transcript, PageID# 4167). She worked at PCB after Dr. Karten had left. Shumrak never told Dr. Frial-Carrasco what to prescribe to patients, which stands in stark

contrast to his instructions to Dr. Karten. (R. 849, Transcript, PageID# 4061). Shumrak never had a verbal or written agreement with Dr. Frial-Carrasco to prescribe medications to patients who did not need them, although it was his opinion that “she knew the business.” (R. 849, Transcript, PageID# 4061-62). Dr. Frial-Carrasco acknowledged that PCB had several “red flags” before she joined the clinic, but she tried to prevent any illegitimate practices from happening while she worked there. (R. 849, Transcript, PageID# 4418). She only became aware of the red flags after a long period of time, but it was out of her control to prevent them. *Id.*

Shumrak designated Dr. Frial-Carrasco as PCB’s medical director in October of 2012. Others who worked with her at PCB testified that she provided legitimate medical treatment. Shumrak testified that Dr. Frial-Carrasco “wanted [PCB] to run correctly.” (R. 849, Transcript, PageID# 4040-41). He believed that Dr. Frial-Carrasco spent too much time with the patients, and he criticized her for doing so. (R. 849, Transcript, PageID #4065). In addition, DEA Agent Thanh Churchin testified that the confidential informant working at PCB, Shirley Casimir, had informed him that Dr. Frial-Carrasco treated patients “by the book.” (R. 860, Transcript, PageID# 5422). Ms. Casimir likewise testified that she had overheard Dr. Frial-Carrasco voice her concerns about the clinic to Shumrak while she was medical director, but Shumrak was in charge of decisions at the clinic and he ignored those concerns. (R. 860, Transcript, PageID# 5500-5501).

Despite Dr. Frial-Carrasco’s Motion in Limine to prevent the Government from presenting a “parade of convicts” to testify as to the source of their oxycodone

(R. 630, Motion, PageID# 2760-2765), the district court allowed the government to call ten Kentucky patients as witnesses. (R. 643, Minute Entry Order, PageID# 2847-2850). All ten of these patients had either been convicted or pleaded guilty to trafficking in oxycodone, and all ten had been treated at PCB at some point. However, not a single one testified that they had a verbal or written agreement with anybody at PCB to distribute oxycodone in the Eastern District of Kentucky.¹ All ten testified that they had represented to the physicians and physician assistants during their visits to PCB that they were in pain. Some of them were telling the truth about that, and some were lying. None of them told the defendants that they were selling the medicines they were prescribed. Some of them even faked their urine tests to induce the physicians to issue the oxycodone prescriptions. They all signed forms at PCB, sworn under penalty of perjury, that they would not divert their drugs for a non-medical use.

Because there was no express agreement between Dr. Frial-Carrasco or any of the other defendants on trial to join and further the object of the PCB conspiracy, the Government necessarily relied upon a supposed implicit agreement. The Government attempted to prove this agreement through the opinion testimony of an expert witness, Dr. Stanley Golovac. (R. 862, Transcript, Page ID# 5851-5923). However, because Dr. Golovac's expert report did not detail the acts or omissions of

¹ For the Court's reference, the testimony of each patient can be found in the record at the following pages: **Bendrea Wilson** (R. 859, Transcript, PageID# 5306-5341); **Laura Keith** (R. 859, Transcript, PageID# 5342-5357); **Damon Helton** (R. 860, Transcript, PageID# 5564-5589); **Malla McCown** (R. 860, Transcript, PageID# 5589-5617); **Suzanne Fox** (R. 860, Transcript, PageID# 5624-5642); **Larry Wayne Smith** (R. 860, Transcript, PageID# 5644-5671); **Lawrence Edward Smith** (R. 860, Transcript, PageID# 5672-5722); **Angela Smith** (R. 861, Transcript, PageID# 5776-5810); **Ruth Beckner** (R. 861, Transcript, PageID# 5811-5844); **Jay Young** (R. 849, Transcript, PageID# 4099-4149).

any individual defendant that purportedly fell below the applicable standards of a legitimate pain management practice, the district court ruled that Dr. Golovac could testify only as to whether an individual patient received treatment at PCB that fell below the applicable standard. (R. 731, Minute Entry Order, PgID# 3513-14). At trial, he failed to offer specific testimony that Dr. Frial-Carrasco's prescriptions were written outside the course of professional practice and for no legitimate medical purpose. 21 C.F.R. 1306.04.

The Government had cherry-picked 27 patient files (out of more than 10,000 it had seized from PCB) for Dr. Golovac to review. (R. 862, Transcript, PgID# 5893). Dr. Golovac formed his opinion concerning the medical practices at PCB based on these 27 files, though he admitted at trial that the number of patient files was not statistically significant. (R. 862, Transcript, PgID# 5896). *See also* Government's Exhibit 4. The vast majority of these patients had not been treated by Dr. Frial-Carrasco.

After an eight-day trial spread out over the course of three weeks, Dr. Frial-Carrasco was convicted of conspiring to distribute oxycodone outside the usual course of professional practice and for no legitimate medical purpose. At the conclusion of the Government's case in chief, Dr. Frial Carrasco moved for a judgment of acquittal (R. 849, Transcript, PageID# 4151) and renewed that motion at the close of trial. (R. 853, Renewed Motion for Judgment of Acquittal, PageID # 4972-4989). The district court denied those Motions. (R. 879, Memorandum Opinion

and Order, Page ID# 6379-6391). She was sentenced to 120 months' imprisonment. (R. 942, Judgment, PgID# 6864-70).

B. The Sixth Circuit's Opinion

Dr. Frial-Carrasco appealed her conviction to the Sixth Circuit Court of Appeals, on the grounds that, even if the Government had presented sufficient evidence at trial that a conspiracy existed at PCB, all acts in furtherance of the same occurred exclusively in Florida. Relying upon the Seventh Circuit's buyer-seller rule, which the Sixth Circuit itself had adopted, *see United States v. Deitz*, 577 F.3d 672, 680-81 (6th Cir. 2009), that "[a] drug purchaser does not enter into a conspiracy with his supplier simply by reselling the drugs to his own customers," *United States v. Johnson*, 592 F.3d 749, 754 (7th Cir. 2010) (internal citations omitted), Dr. Frial-Carrasco argued that the alleged PCB conspiracy was a separate conspiracy from that of the Kentucky drug traffickers. Because the Government failed to link the conspiracies, no acts in furtherance of the alleged PCB conspiracy occurred in Kentucky. Construing the evidence in the light most favorable to the Government, the Government's evidence suggested that the object of the PCB conspiracy was to attract patients to pay a nominal fee for a doctor's appointment in which they were likely to receive an opioid prescription. That conspiracy, and all acts in furtherance thereof, took place entirely in the Southern District of Florida. The PCB conspiracy did not rely upon the Kentucky patients redistributing oxycodone, because the PCB conspiracy achieved its object once a patient paid the fee for an appointment, which was a prerequisite to seeing a physician and

receiving a prescription. If each of the Kentucky patients had consumed their medicine instead of selling it, the PCB conspiracy would have been no less successful.

Notwithstanding the fact that the Sixth Circuit had itself previously adopted the buyer-seller rule, it, like the District Court, relied almost exclusively upon its prior case of *United States v. Turner*, 936 F.2d 221 (6th Cir. 1991) and affirmed Dr. Frial-Carrasco's conviction, brushing aside Dr. Frial-Carrasco's argument that the buyer-seller rule deprived the Eastern District of Kentucky of venue to try the Florida defendants.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Ruling Creates an Inter-Circuit Split

For the Eastern District of Kentucky to have been a proper venue under constitutional standards, the Government had to prove either that the alleged conspiracy was formulated there or that an act in furtherance of the conspiracy occurred there. *See* U.S. CONST. ART. III, § 2, CL. 3 *and* U.S. CONST. AMEND. VI.; *Corral v. United States*, 562 Fed. App'x 399, 404 (6th Cir. 2014). (R. at 757; Jury Instructions PgID # 3660). Here, the Government's theory was that the Kentucky patients were co-conspirators with the Florida physicians who prescribed medication, and that venue was therefore proper in the Eastern District of Kentucky. But it produced no evidence in support of that theory at trial.

The Sixth Circuit's ruling that the buyer-seller rule from *United States v. Johnson*, 592 F.3d 749, 754 (7th Cir. 2010) is inapplicable to the facts at bar merely

because “*Johnson* is simply not a venue case” wholly misses the mark. *Johnson* stands for the proposition that a drug purchaser does not enter into a conspiracy with his supplier simply by reselling the drugs to his own customers. 592 F.3d at 754. **If there is no conspiracy with the purchaser, there can be no venue in the locale where the purchaser redistributes the drugs.** The Sixth Circuit ignored this key point, and the Seventh Circuit’s *Johnson* decision.

II. To Suggest that the Effects of a Criminal Act, Standing Alone, Rather than the Location of the Acts Themselves, Controls Proper Venue Cannot be Reconciled with Constitutional Mandates or This Court’s Precedent

This Court has long-recognized the special value that the Nation’s founders placed upon proper venue in criminal proceedings:

Proper venue in criminal proceedings was a matter of concern to the Nation’s founders. Their complaints against the King of Great Britain, listed in the Declaration of Independence, included his transportation of colonists “beyond Seas to be tried.” The Constitution twice safeguards the defendant’s venue right: Article III, § 2, cl. 3 instructs that “Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed”; the Sixth Amendment calls for trial “by an impartial jury of the State and district wherein the crime shall have been committed.” *United States v. Cabrales*, 524 U.S. 1, 6 (1998).

Accordingly, the *locus delicti* for venue purposes must be determined from the nature of the crime alleged and the location of the act or acts constituting it. *Id.* (citing *United States v. Anderson*, 328 U.S. 699, 703 (1946)).

Here, the nature of the acts of conspiring to unlawfully prescribe oxycodone outside the usual course of professional practice and for no legitimate medical

purpose occurred entirely in the Southern District of Florida. The object of the conspiracy was accomplished when the patients paid for their office visit and received a prescription for oxycodone. There was no conspiracy with anyone from Kentucky, no agreement in Kentucky, and no act in furtherance of the PCB conspiracy in Kentucky. Accordingly, the Eastern District of Kentucky was not a proper venue for this case.

III. The Question Presented Raises Constitutional Issues of Great Significance

The Sixth Circuit's opinion eviscerates the Sixth Amendment's venue protections. It is absurd to suggest that whether the Florida defendants were part of the same conspiracy as the Kentucky patients is irrelevant. Dr. Frial-Carrasco was accused of conspiring to distribute drugs in Eastern Kentucky, but neither she nor any of the Florida defendants ever appeared in Kentucky, made any agreement in Kentucky, or took any actions in furtherance of the conspiracy in Kentucky. It was, therefore, wholly improper to try them in the Eastern District of Kentucky.

If this type of prosecution is permitted, it sets the precedent for a very slippery slope. Essentially, it would mean that a person who conspires to distribute a drug in Florida and sells only within the state of Florida could nevertheless be prosecuted in Maine, Alaska, or Hawai'i if one of the drug buyers transported the drug to those faraway states without the conspirator's knowledge. Such an outcome would render the Sixth Amendment's venue protections to a farce, and cannot be allowed.

CONCLUSION

For the reasons stated herein, Dr. Frial-Carrasco respectfully requests that the Court issue a writ of certiorari.

Respectfully submitted,

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