No. 20-1410

In The
Supreme Court of the United States

XIULU RUAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PHYSICIANS AGAINST ABUSE IN SUPPORT OF PETITIONER

SEBASTIAN OHANIAN, ESQ.

1 Alhambra Plaza, Suite 1225
Coral Gables, FL 33134
Tel: 786.369.5447
sebastian@ohanianlegal.com
Counsel for Amicus Curiae Physicians Against Abuse

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Physicians Against Abuse, ("PAA") was founded in 2019 in response to the astronomical number of convictions against physicians involving "scope of practice" charges that have sprung up in the past two decades. PAA is made up five Board Members and is a Florida Corporation in the process of gaining nonprofit status.

Physician Board Members of PAA are uniquely situated in identifying the root cause of criminal prosecutions against physicians because either they been themselves previously subjected to criminal prosecution and/or have had exposure to the criminal court system. Prior to founding the organization, the Board members conducted a review of 211 convictions against physicians over a ten-year span involving prescription and/or health care fraud. The inescapable conclusion from review of trial transcripts, including but not limited to opening and closing statements and testimony of expert witnesses, was that the prosecutions against physicians amounted to nothing short of 'blind leading the blind'- where one blind is the prosecutor and the other blind is the physician's own attorney.

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[1] Blanket consent was provided by counsel for Petitioner. In addition, PAA sought consent from both counsel for Petitioner and Respondent. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, or its members made a monetary contribution to its preparation or submission

In analyzing the root cause of the near 99% percent success rate of convictions against physicians, PAA concluded that what it all boiled down to was a prosecutor with a hunch hiring an expert using the deep pockets of the government, often not even in the same field as the accused physician, to criminalize behavior of the accused physician. While this may be acceptable in the context of medical malpractice litigation, it is not acceptable where the consequences are loss of freedom for the accused physician.

Relying on a three pronged approach, (1) the phrase, "not for a legitimate medical purpose", (2) hired government expert, and (3) ability to show substantial wealth for the accused physician, federal prosecutors have been successfully getting jury to return a guilty verdict in 9 out of 10 "scope of practice" cases all over the country.

This formula has made US the only country in the world mass incarcerating physicians. This is not because all the criminal doctors miraculously reside in the United States, but rather, because there is something significantly wrong in the manner federal prosecutors have been allowed to litigate these cases as if they are in the "Wild West". Prosecutors are able to easily appeal to the emotions of the jury all over the country where there is an ongoing opioid crisis such that it is estimated that at least 1 in every 4 individuals know of a person who has died of an overdose.

No other country criminalizes physician behavior like the federal prosecutors have done in the US. This is especially the case as these prosecutions are all based on a whim with an "expert" opinion rendered by a hired government expert and orchestrated by a new generation of overzealous and unchecked federal prosecutors pointing fingers at wealthy doctors as greedy drug pushers and fraudsters. Doctors are just a 'sitting duck' for these federal prosecutors who raid medical offices and unlike the career drug pusher on the streets who gets caught and charged with one or two counts, federal prosecutors pile up count after count because doctors are required to keep records and those records are used against them in these out of control prosecutions against physicians.

This case addresses an impermissible invasion of the federal government into state affairs where the practice of medicine is solely regulated by state medical boards. Without any consultation and without any referral from state medical boards where the standard of practice of medicine and the definition of what is legitimate medical purpose is created and regulated, federal prosecutors have been pursuing indictment after indictment by capitalizing on the opioid crisis. It is not the federal government that regulates the practice of medicine and thus no federal prosecutor should be permitted to argue in court that a physician criminally violated the standard of care unless and until a criminal referral is generated by the state medical board where the accused physician practices. Requiring prosecutors to first receive a criminal referral from the state regulatory agency prior to filing an indictment on scope of practice charges would eliminate the financial incentive by government hired experts who often tailor their testimony according to the hunch of federal prosecutors.

SUMMARY OF ARGUMENT

Dr. Xiulu Ruan was convicted of overprescribing controlled substances outside the usual course of medical practice and was sentenced to more than 20 years in federal prison. Only the most prolific drug traffickers get these kind of sentences, and when they do, Rule 35 reductions will typically result in shortening their sentences. Both the conviction and the sentence is offensive to due process and basic tenets of a civilized society because both the conviction and the sentence is based on the whimsical notion of a prosecutor's unfettered discretion and a paid expert opinion.

In Dr. Ruan's case, as is the case in all scope of practice prosecutions, there is never a criminal referral by the regulatory state agency such as a state medical board. State medical boards regulate the practice of medicine as a neutral body and without a financial incentive. However, most importantly, the state medical boards are charged with the task of setting the standard of care and what is legitimate and what is not legitimate medical purpose. The fact that prosecutors have been able to bypass these state regulatory agencies in bringing about these "scope of practice" prosecutions speak volumes to unhinged prosecutorial overreach in our criminal justice system and impermissible intrusion of federal government into state affairs.

The practice of medicine is regulated by State Medical Boards in each state. In the United States, there is no federal regulation of the practice of medicine. "The power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine, and punishing those who attempt to engage therein in defiance of such statutory

provisions, is not open to question." *Reetz v. People of State of Michigan*, 188 U.S. 505, 505, 23 S. Ct. 390, 391, 47 L. Ed. 563 (1903).

While prescription of controlled substances is regulated through the issuance of registration numbers by a federal agency known as the Drug Enforcement Administration, ("DEA"), the manner and the propriety of dispensing controlled substances, i.e. the pain killers, are regulated by each state medical board. State medical boards can penalize a physician by a number of disciplinary actions including but not limited to revocation of a medical license. But in addition, and for eons, state medical boards have been deemed as the appropriate peer review body to deem when a physician's conduct is outside the scope of acceptable practice and therefore dangerous to society. In fact, litigation in this area has almost uniformly sided with state medical boards not just as the authoritative body on establishing standard of care and scope of practice but also as the authoritative body to deem when a licensee steps outside the established scope of practice. *Rathle v. Grote*, 584 F. Supp. 1128 (M.D. Ala. 1984*); see also Steinbach v. Metzger*, 63 F.2d 74, 76 (3d Cir. 1933) citing to *Powell v. Pennsylvania*, 127 U. S. 678, 683 (1888), holding that "a state may thus regulate the practice of medicine, using this word, in its most general sense, can no longer be questioned."

With federal prosecutors stepping into this arena to create criminal liability against physicians by relying on differences of opinion of hired experts, the United States has now become the only country in the world mass incarcerating physicians. However, mass incarcerating physicians is not because we are housing most of the

criminal doctors in the world, but rather because there is something fundamentally wrong with federal prosecutors stepping in as the 'super' experts to determine what is and what is not "outside the scope of professional practice" for a physician.

ARGUMENT

I. "WAR OF EXPERTS" CANNOT BE THE BASIS OF CRIMINAL LIABILITY IN "SCOPE OF PRACTICE" PROSECUTIONS

In an attempt to place the opioid crisis on the shoulders of physicians, federal prosecutors have been capitalizing on differences of opinion by paid experts in order to argue that criminal behavior exists. How many times do two judges have differences in opinion in rendering decisions that affect millions of lives? How many times do two prosecutors have differences of an opinion as to what is criminal behavior and what is not? But when prosecutors or judges have differences of an opinion, their behavior is not criminalized. But an accused physician's behavior is criminalized instantly by the mere opinion of one prosecutor and the government hired expert.

If the government's expert is more believable, more charismatic and more court room savvy, then no matter the facts, the accused physician becomes convicted especially with the playing field that is not leveled as prosecutors point fingers at the physician's lifelong hard earned wealth as having been acquired fraudulently. Everyone, including the jury and the judge, falls for this drama. In nearly every one of these cases, prosecutors

argue that rich doctors writing prescriptions for controlled substances with patients who are paying cash cannot possibly be for a legitimate medical purpose. And in nearly every one of these cases, first the jury and then the judge fall for it.

The Eleventh Circuit Court of Appeals has fallen the hardest for this drama as it has written the necessary element of *mens rea* out of existence in considering charges involving prescription fraud. *21 U.S.C. § 841(a)(1).*

II. FEDERAL PROSECUTORS SHOULD BE REQUIRED TO HAVE A CRIMINAL REFERRAL FROM STATE MEDICAL BOARDS PRIOR TO INITIATING PROSECUTION FOR CHARGES RELATING TO "SCOPE OF PRACTICE"

Prosecutors should have the discretion to bring criminal prosecution against any individual irrespective of the profession of the individual. However, when the prosecution involves professional behavior that is regulated by a state agency, prosecutors should not have unfettered discretion without first receiving a criminal referral from a state medical board. This is because it is a state agency, not a federal agency, which regulates the practice of medicine. Only a state agency charged with the regulation of the practice of medicine can be qualified to deem what is dangerous and illegitimate for the profession it regulates—not a federal prosecutor who hires an expert to play out his hunch before the jury. Federal prosecutors deciding what is and is not "outside scope of

practice" is nothing other than prosecutorial overreach and exploitation of the practice of medicine. *See United States v. Am. Med. Ass'n,* 110 F.2d 703 (D.C. Cir. 1940) holding that "The practice of medicine in the District of Columbia is subject to licensing and regulation and may not lawfully be subjected to commercialization or exploitation."

A collective consent and referral from the state's medical board must be a prerequisite to each and every criminal prosecution against a physician who is accused of practicing medicine outside the scope of professional practice. A federal prosecutor going out and hiring an expert to render an opinion that is tailored to his or her hunch is not fair process. But if the prosecutor has the green light of a state medical board that operates without financial incentives, then these criminal prosecutions against physicians will not offend due process as they do now.

It is not clear how the federal prosecutors lost their way, but it is certainly clear that they did so because they have, for so long, had unfettered discretion that has been repeatedly condoned by the courts. We are where we are today because it is not feasible to maintain integrity when there is such lack of accountability with very little to no redress for bringing these prosecutions for personal agenda. Lawyers are judged by other lawyers in state regulated agencies known as State Bars. Doctors should also be judged by a body of their own peers in state regulated agencies known as state Medical Boards.

III. DECISION IN *RUAN* SHOULD HAVE FULL RETROACTIVE EFFECT

For the past decade or more, physicians' freedom has been hanging on the unfettered discretion of prosecutors and the opinion of their hired experts. In this endeavor, the prosecutors have scored big wins making United States the only country in the world that has the highest number of physicians behind bars. As of to date, we have physicians in federal prisons who are sentenced to 327 years, (US v. Mukerjee 4:04-cr-50044 in Eastern District of Michigan), life (US v. Henson 6:16-cr-10018 in District Court of Kansas), life (US v. Webb 3:08-cr-00136 in Northern District of Florida), life (US v. Volkman 1:07-cr-00060 Southern District of Ohio), and countless more serving 20 years plus for prescribing controlled substances that a government hired expert believed was outside the scope of professional practice. Even the most prolific drug traffickers with known criminal enterprises that expand over several continents and in existence for decades do not get these stiff penalties. Actual trafficker of hard drugs serve less time (and leave prison with more money) than doctors who have spent their lives helping the sick.

Full retroactive effect should be considered by the Court due to the fact that criminal prosecutions initiated by federal prosecutors against physicians regarding charges involving scope of practice all are rooted in prosecutorial overreach violating fundamental rights of the accused to a fair trial. See *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987), holding that failure to apply newly declared constitutional rule to criminal cases pending on direct review would violate basic norms of constitutional adjudication.

Going forward, all criminal prosecutions involving scope of practice charges should be required to have a criminal referral by the regulating state medical board which has no financial incentive to deem whether there has been behavior that is outside the scope of professional practice.

CONCLUSION

Federal prosecutions based on federal experts determining what is "outside the scope of professional practice" offends comity and should be eliminated. The only logical manner in which this can be done is by requiring a criminal referral to be made by state medical boards before federal prosecutors can initiate prosecution against physicians for charges relating to the practice of medicine.

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Respectfully submitted,

/s/ Sebastian Ohanian

Sebastian Ohanian, Esq.
Counsel for Amicus Curiae
Physicians Against Abuse