No. 21-5261

IN THE SUPREME COURT OF THE UNITED STATES

SHAKEEL KAHN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The government's principal contention is that Petitioner's case, and the other similar *cert petitions* before this Court,[1] are not appropriate vehicles for this Court's review because no "meaningful" circuit split exists as to the *mens rea* applied to doctors charged under §841.[2] This contention is completely belied by the simple text of the caselaw.

In the instant case, the Tenth Circuit explicitly held:

> "Thus, the only relevant inquiry under that second prong is whether a defendant-practitioner objectively acted within that scope, *regardless of whether he believed he was doing so.*"

United States v. Kahn, 989 F.3d 806, 825 (10th Cir. 2021) (*quoting United States v. Schneider*, 704 F.3d 1287, 1303 (10th Cir. 2013) (Holmes, J., concurring)) (emphasis added). *See also*, *United States v. Tobin*, 676 F.3d 1264, 1283 (11th Cir. 2012); *United States v. Norris*, 780 F.2d 1207, 1209 (5th Cir. 1986). The defendant's intent or knowledge that he is acting outside the scope is irrelevant.

By contrast, the Seventh and Ninth Circuits have explicitly found that the government must prove that the defendant intended that the charged prescriptions were issued outside the scope of professional practice:

> "In other words, the evidence must show that the physician not only intentionally distributed drugs, but that he *intentionally* 'act[ed] as a pusher rather than a medical professional.'"

Kohli, 847 F.3d at 490 (emphasis added).

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[1] Three related pending petitions address the same question, albeit from different factual backgrounds. *Ruan v. United States*, No. 20-1410 (filed Apr. 5, 2021), *Couch v. United States*, No. 20-7934 (filed Apr. 5, 2021), and *Naum v. United States*, No. 20-1480 (filed Apr. 20, 2021). The government in its response to petitioner's brief referenced many of the arguments made in these petitions. See, e.g., Gov. Brief at 14.

[2] Gov. Brief at 14 ("Contrary to petitioner's assertion … the court of appeals' decision does not implicate a division among the courts of appeals regarding the *mens rea* required for a Section 841(a) conviction, or the standard governing good-faith instructions for Section 841(a) offenses, that would warrant this Court's review.")

> "[T]he government must prove … that the practitioner acted with intent to distribute the drugs and with *intent* to distribute them outside the course of professional practice.".

Feingold, 454 F.3d at 1008 (emphasis added). *United States v. Sabean,* 885 F.3d 27, 45 (1st Cir. 2018).

With all respect to the government, it is hard to imagine a clearer articulation of a circuit court split than one where some circuits hold that the defendant's mental state is irrelevant, and others require the government to prove a specific intent.

The government argues that, notwithstanding any circuit split regarding what intent the appellate courts say is required, the issue is not appropriate for this Court's review because there is not a meaningful circuit split regarding the good faith instructions themselves. *See, e.g.*, Gov. Brief at 10. The government's analysis is incorrect. However, even if it were correct, petitioner readily concedes that the courts of appeal are not always internally consistent in their approach to intent and the good faith instructions they approve. For example, in *Wexler*, 522 F.3d at 206 (2nd), the Second Circuit indicated that a mistake "however gross" is insufficient to prove guilt. However, that court also issued a good faith instruction which allowed for a doctor to be convicted if he failed to act in accordance with what he "*should have reasonably believed* to be proper medical practice." *Id*. *See, also*, *King*, 898 F.3d at 808, finding that the defendant's good faith instruction was erroneous because it was not "objective," the district court properly required the jury to find knowledge.

The government's response brief does not argue that an instruction, which defines good faith as "what a defendant 'should have reasonably believed' to be the usual course of professional practice" is consistent with the requirement that a defendant *intentionally* act outside of what she knows to be the usual course of professional practice.

Instead, the government argues that the good faith instructions approved of even in those circuits requiring knowledge and intent are not materially different from the instruction issued in Dr. Kahn's case. Again, the government's analysis is belied by the language of the cases. For example, the government argues that the instruction given in petitioner's case is substantially similar to the instruction issued in *United States v. Kohli*, 847 F.3d 483 (7th Cir.). Gov. Brief at 15 n3. The government identifies the following language from the instruction issued in *Kohli*: "The Defendant may not be convicted if he merely made an honest effort to treat his patients in compliance with an accepted standard of medical practice." *Id*. The government argues that this language is substantially similar to the instruction in Dr. Kahn's case: "The good faith defense requires the jury to determine whether Defendant Shakeel Kahn acted in an honest effort to prescribe for patients' medical conditions in accordance with generally recognized and accepted standards of practice." The government omits the following sentence of the instruction issued in *Kohli*, "Good faith in this context means good intentions and the honest exercise of good professional judgment as to the patient's medical needs." *Kohli,* 847 F.3d at 489 (7th). In *Kohli*, a defendant who was acting in his best professional judgement to meet a patient's medical needs was acting in good faith. That language is explicitly not allowed in other circuits. *See*, *Godofsky*, 943 F.3d at 1017; *United States v. Voorhies*, 663 F.2d 30, 34 (6th Cir. 1981).

The government argues that *United States* v. *Sabean*, 885 F.3d 27 (1st Cir. 2018) stands only for the proposition that violating the standard of care is not sufficient to sustain a conviction under Section 841. Gov. Brief at 19-20. To the contrary, the central holding of *Sabean* clearly requires that the government prove intent:

> "So it is here: although a physician's failure to adhere to an applicable standard of care cannot, by itself, form the basis for a conviction under Section 841(a), such a failure is undeniably relevant to that determination… After all, the further that a defendant strays from accepted legal duties, the more likely that a factfinder will *find him to be in knowing*

> *disregard of those duties*… With such a predicate in place, a jury supportably may conclude "that the government has carried its burden of proving knowledge."

Sabean, 885 F.3d at 45 (quotation omitted) (emphasis added). The defendant's argument in *Sabean* was that, by referencing the civil standard of care, the instructions, which otherwise required actual knowledge, risked conviction based on negligence. *Id.* The First Circuit held that the instructions in that case, taken as a whole, did not improperly conflate the civil and criminal standards. *Id*. Indeed, the instructions in that case (1) required knowledge and (2) repeatedly informed the jury that negligence or even recklessness was not sufficient. Id. *at* 49 ("However, I caution you that this is not a civil case involving medical negligence for which a person may recover monetary damages. Here we're talking about whether the evidence establishes beyond a reasonable doubt that the physician—that violated his obligation under federal law to prescribe a controlled substance for a legitimate medical purpose in the course of professional practice."); *Id.* ("However, it's important to bear in mind, again, that mere negligence, recklessness or mistake in failing to learn a fact is not enough. There must be a deliberate effort to remain ignorant of the fact.").

The government also maintains that the Ninth Circuit's holding in *Feingold* would not necessarily compel a finding of abuse of discretion based either on the "reasonable belief" instruction issued in this case, nor the strict liability instruction issued in *Ruan*. *See Ruan v. United States,* Br. in Opp. at 21-22 (Nos. 20-1410 & 20-7934). The government argues that "although the *Feingold* opinion additionally noted the defendant's 'state of mind' …. And even 'commended the district court for requiring the jury to determine the defendant's state of mind … the Ninth Circuit did not hold that a district court would abuse its discretion by declining to give an instruction like the one proffered by petitioners in this case." The government does not

articulate how the issuance of a "reasonable belief" or strict liability instruction could be, in any way, consistent with the central holding of *Feingold* requiring specific intent.

The government argues that a circuit split has not been perfected because petitioner cannot identify a case where a court of appeals found issuance of the instruction in this case to be an abuse of discretion. That, however, flips the question on its head. The Court of Appeals in this case did find that an instruction, which would have been accepted in the Ninth or the Seventh Circuits, was an erroneous statement of law. A robust good faith defense instruction requiring specific intent to act outside the usual course of professional practice is available in the Ninth and Seventh Circuits and prohibited in Tenth Circuit and others. Even a reasonable belief instruction is prohibited in the Eleventh Circuit.

The instructions issued in the various courts of appeal might all use the words "good faith." However, they do not define good faith to mean the same thing. As this Court has recognized, issuing a good faith instruction that requires a lesser *mens rea* than that required by the statute is in error. *Cheek v. United States*, 498 U.S. 192 (1991).

The government also argues that petitioner's case is not suitable for review because use of the word "attempt" in the jury instructions issued in petitioner's case prevented conviction based on the defendant's failure to abide by the standard of care. The government notes language from the appellate court below that: "the jury could not convict [petitioner] for merely failing to apply the appropriate standard of care; it could only convict [petitioner] if it found, beyond a reasonable doubt, that [he] failed to even attempt or make some honest effort to apply the appropriate standard of care." Gov. Brief at 18-19 (quoting Pet. App. A34).

The government seems to be suggesting that the usual course of professional practice and the "standard of care" have the same meaning. This is contrary to the holding of other Courts that

even *intentional* failure to abide by the civil duty of care is not sufficient to sustain a conviction under §841. *Feingold*, 454 F.3d at 1010 ("even intentional malpractice" not sufficient for conviction).[3] In *Sabean* the degree to which a defendant violates the duty of care is evidence and relevant to whether he acts outside the scope of professional practice. However, violation of the former does not render one guilty of the latter. *Sabean*, 885 F.3d 45.

Perhaps more importantly, the government, like the Tenth Circuit, misunderstands where Dr. Kahn argues the intent should attach. Dr. Kahn argued that the government must prove that he intentionally issued prescriptions outside of what he *knew* to be the usual course of professional practice. The instructions issued in Dr. Khan's case read, in part: "Good faith connotes an attempt to act in accordance with *what a reasonable physician should believe* to be proper medical practice." The instruction issued by the district court did not allow for a good faith defense based on an unreasonably mistaken view as to what the usual course of professional practice required. If petitioner had an accurate understanding of what prescriptions were in the usual course of professional practice and some mistake caused him to issue a prescription outside of that practice, then the instructions issued serve as a possible defense. If, however, petitioner was wrong about what the usual course of professional practice required in the first place, then he has no defense under these instructions, whether he was attempting to act for his patients' medical needs or not.

Let us say that it is objectively outside the scope of professional practice to issue an opioid prescription to a person currently using marijuana. One doctor testifies that, despite conducting all the recommended tests, he did not know his patient was using marijuana and

[3] As pointed out in petitioner's original petition, no court of appeals has clearly delineated the distinction between the usual course of professional practice and failure to adhere to the civil duty of care. Nor do jury instructions necessarily articulate that distinction.

therefore issued the prescription. A second doctor testifies that he was aware that his patient was using marijuana, but believed that it was okay to issue the prescription anyway, because he believed that other doctors would issue prescriptions under similar circumstances, and marijuana has no negative interactions with the prescription issued. The former doctor was attempting to comply with the objectively recognized standard of medical practice; the latter was not. Nor, however, was the latter doctor intentionally acting outside the scope of professional medical practice. Rather, that doctor was simply wrong about what the scope of professional medical practice allowed. The use of "attempt" in the jury instructions issued in Dr. Khan's case might provide a defense to the former doctor. However, the second doctor's guilt would be determined, not by his subjective intent to act in good faith, but the reasonableness of the (mistaken) view that prescribing to people currently using marijuana was within the scope of professional practice.

The government suggests that petitioner is arguing for a "freewheeling subjective approach" under which doctors may issue prescriptions that they view as medically acceptable even knowing that they are alone in that view. Gov. Brief at 13. That is a straw man argument and not Petitioner's position. The petitioner is arguing that there is a split as to whether the government must prove that a doctor issued a charged prescription outside of what he knew to be the usual course of professional practice. That split needs to be resolved by this Court so it is no longer possible for a defendant in one circuit to have a complete defense based on holding an unreasonably mistaken view about what constitutes the usual course of professional practice and an identical defendant in another circuit to have no defense at all.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the Court will grant his Petition for Certiorari.

Respectfully Submitted,

October 12, 2021
DATE

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