

NO.

25-5600 ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

IN RE: LONNIE W. HUBBARD,
PETITIONER.

FILED

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SUPREME COURT, U.S.

ON PETITION FOR WRIT OF HABEAS CORPUS TO
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT
OF KENTUCKY (CENTRAL DIVISION)

PETITION FOR WRIT OF HABEAS CORPUS

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

- I. Whether the jury instructions informed the jury, as a matter of law, of the "knowingly or intentionally" mens rea of the 21 U.S.C. § 841(a)(1) counts in the federal indictment, as interpreted by the Supreme Court in Ruan v. United States, 142 S. Ct. 2370 (2022), in order to convict Petitioner Hubbard.
- II. Whether the jury instructions informed the jury, as a matter of law, of the required subjective knowledge of the § 841 counts as it related to all of the other counts of the indictment, according to Ruan, in order to convict Hubbard (including criminal forfeiture).

LIST OF ALL PARTIES

1. Lonnie W. Hubbard, Petitioner, federal inmate held at FCI Memphis under Warden Harrison's custody.
2. The United States District Court for the Eastern District of Kentucky (Central Division) and the Honorable Judge Danny C. Reeves, Respondent.

LIST OF CASES DIRECTLY RELATED TO THIS CASE

1. United States District Court for the Eastern District of Kentucky.
2. United States of America, Plaintiff, v. Lonnie W. Hubbard, Defendant.
3. Crim. Action No. 5:15-cr-00104-DCR
4. Dates of Judgment: April 26, 2017, Oct. 1, 2020.

1. United States Court of Appeals for the Sixth Circuit
2. United States of America, Plaintiff-Appellee, v. Lonnie W. Hubbard, Defendant-Appellant.
3. No. 17-5853
4. Dates of Judgment: July 17, 2019, Nov. 19, 2019, Dec. 6, 2019, April 23, 2024.

1. United States District Court for the Eastern District of Kentucky
2. United States of America, Plaintiff/Respondent, v. Lonnie W. Hubbard, Defendant/Movant
3. Crim. Action No. 5:15-104-DCR and Civil Action No. 5:21-090-DCR
4. Dates of Judgment: April 15, 2021, Sept. 24, 2021, November 10, 2021.

1. United States Court of Appeals for the Sixth Circuit
2. Lonnie W. Hubbard, Petitioner-Appellant, v. United States of America, Respondent-Appellee.
3. No. 21-6114
4. Dates of Judgment: June 14, 2022, Aug. 1, 2022.

1. United States District Court for the Northern District of West Virginia
2. Lonnie W. Hubbard, Petitioner, v. S. Brown, Acting Warden, Respondent.
3. Civil Action No. 5:22-cv-196
4. Dates of Judgment: Oct. 19, 2022, Nov. 14, 2022, Dec. 28, 2022.

1. United States Court of Appeals for the Fourth Circuit
2. Lonnie W. Hubbard, Petitioner-Appellant, v. S. Brown, Acting Warden, Respondent.
3. No. 23-6023
4. Date of Judgment: July 25, 2023.

1. United States Tax Court (Washington D.C.)
2. Lonnie Wayne Hubbard, Petitioner, v. Commissioner of Internal Revenue, Respondent.
3. No. 4464-21
4. Date of Judgment: March 22, 2024.

1. United States Court of Appeals for the Sixth Circuit
2. Lonnie W. Hubbard, Petitioner-Appellant, v. United States of America, Respondent-Appellee.
3. No. 25-5005
4. Date of Judgment: Feb. 28, 2025.

1. United States Court of Appeals for the Sixth Circuit
2. Lonnie W. Hubbard, Petitioner-Appellant, v. Commissioner of Internal Revenue, Respondent-Appellee.
3. No. 24-1450
4. Date of Judgment: March 19, 2025

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1. United States Court of Appeals for the Sixth Circuit
2. In re: Lonnie W. Hubbard, Movant
3. No. 24-6108
4. Date of Judgment: April 7, 2025.

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RELIEF SOUGHT

Petitioner Hubbard prays that this Honorable Court will grant his petition for writ of habeas corpus as to Question I, and transfer his petition back to the United States District Court for the Eastern District of Kentucky, and to the Honorable Judge Danny C. Reeves directing and commanding the Respondent to have a hearing and determination of Hubbard's Question II. See In re Davis, 557 U.S. 952 (2009) (Where the Supreme Court acted on an original habeas corpus petition, transferring the petition to the district court for a "hearing and determination" of Petitioner's claim of actual innocence.).

Or in the alternative, Hubbard prays that this Court grant such other relief as may be appropriate to dispose of this matter as law and justice require.

CITATIONS OF OFFICIAL REPORTS OF
THE OPINIONS AND ORDERS BY COURTS
(CHRONOLOGICAL ORDER)

The decision of the United States District Court for the Eastern District of Kentucky, which denied Hubbard's motion for a new trial pursuant to Fed. R. Crim. P. 33, is reported at United States v. Hubbard, 2017 U.S. Dist. LEXIS 62982 (E.D. Ky. Apr. 26, 2017), and is set forth at pages 108-117 of the Appendix.

The original conviction of Hubbard was appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the conviction in all respects in an opinion reported at United States v. Hubbard, 843 Fed. App'x. 667 (6th Cir. 2019), and is set forth at pages 142-152 of the Appendix. Hubbard filed a petition for panel rehearing of the Sixth Circuit's opinion which the opinion is reported at 2019 U.S. App. LEXIS 34435 (6th Cir. 2019) and is set forth at page 153 of the Appendix. Hubbard filed a motion to recall the mandate of the Court's decision, which the decision of the Court of Appeals is reported at United States v. Hubbard, 2019 U.S. App. LEXIS 36444 (6th Cir. 2019), and is set forth at page 154 of the Appendix.

The decision of the United States District Court for the Eastern District of Kentucky, which denied Hubbard's 28 U.S.C. § 2255 motion is reported at United States v. Hubbard, 2021 U.S. Dist. LEXIS 217626 (E.D. Ky. Nov. 10, 2021), and is set forth at pages 118-132 of the Appendix. Hubbard appealed the district court's decision. The opinion of the United States Court of Appeals for the Sixth Circuit, where Hubbard sought a COA from a circuit judge to appeal his 2255 motion, was denied and is reported at Hubbard v. United States, 2022 U.S. App. LEXIS 16383 (6th Cir. 2022), and is set forth at pages 155-158 of the Appendix. Hubbard filed a petition for panel rehearing of the Court's decision which the opinion of the Court of Appeals is reported at Hubbard v. United States, 2022 U.S. App. LEXIS 21242 (6th Cir. 2022), and is set forth at page

159 of the Appendix.

The decision of the United States District Court for the Northern District of West Virginia, which denied Hubbard's 28 U.S.C. § 2241 petition asking for reversal of his convictions in light of Ruan, is reported at Hubbard v. Brown, 2022 U.S. Dist. LEXIS 232666 (N.D. W. Va. Dec. 28, 2022), and is set forth at pages 133-137 of the Appendix. Hubbard appealed the District Court's decision. The decision of the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's order denying Hubbard's 2241 petition is reported at Hubbard v. Brown, 2023 U.S. App. LEXIS 19501 (4th Cir. 2023), and is set forth at page 160 of the Appendix.

Hubbard filed a motion to recall the mandate of the United States Court of Appeals for the Sixth Circuit to reopen the appeal raising Ruan claims, which denied it at United States v. Hubbard, 2024 U.S. App. LEXIS 9855 (6th Cir. 2024), and is set forth at pages 161-62 of the Appendix.

Hubbard filed a Fed. R. Civ. P. 60(b)(6) motion to reopen his earlier habeas proceedings to the United States District Court for the Eastern District of Kentucky, which denied the motion and construed it as a second or successive 2255 motion and transferred it to the Sixth Circuit, which was not reported, but is set forth at pages 138-141 of the Appendix. Hubbard appealed the district court's decision. The opinion of the United States Court of Appeals for the Sixth Circuit, which denied authorization for the district court to consider a second or successive 2255 motion and Hubbard's request to transfer his Rule 60(b)(6) motion back to the District Court, is reported at In re Hubbard, 2025 U.S. App. LEXIS 8167 (6th Cir. 2025), and is set forth at pages 163-166 of the Appendix.

JURISDICTION STATEMENT

This Court has jurisdiction to issue the requested petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241(a) and Supreme Court Rule 20.4(a).

CONTROLLING PROVISIONS, STATUTES, AND REGULATIONS

Fifth Amendment to the United States Constitution provides: No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of 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.

Sixth Amendment to the United States Constitution provides: 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 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.

Eighth Amendment to the United States Constitution provides: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Section 2 of Title 18 of the United States Code provides: (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal. (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 982(a)(1) of Title 18 of the United States Code provides: The court, in imposing sentence on a person convicted of an offense in violation of section

CONTROLLING PROVISIONS (CONT.)

1956, 1957, or 1960 of this title [18 USCS § 1956, 1957, or 1960], shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property.

Section 1956(h) of Title 18 of the United States Code provides: Any person who conspires to commit any offense defined in this section or section 1957 [18 USCS § 1957] shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Section 802 of Title 21 of the United States Code provides: (21) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research; (34) The term "list I chemical" means a chemical specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this title and is important to the manufacture of the controlled substances, and such terms includes (until otherwise specified by regulation of the Attorney General, as considered appropriate by the Attorney General or upon petition to the Attorney General by any person) the following: (K) Pseudoephedrine, its salts, optical isomers, and salts of optical isomers.

Section 841(a)(1) of Title 21 of the United States Code provides: Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

CONTROLLING PROVISIONS (CONT.)

Section 841(c)(2) of Title 21 of the United States Code provides: Any person who knowingly or intentionally--possesses or distributes a listed chemical knowing, or having a reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title;

Section 846 of Title 21 of the United States Code provides: Any 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.

Section 856(a)(1) of Title 21 of the United States Code provides: Except as authorized by this title, it shall be unlawful to--knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance.

**Section 1957 of Title 18 of the United States Code is too lengthy to verbatim quote here and is provided in the Appendix pages 182-83.

**Section 853 of Title 21 of the United States Code is too lengthy to verbatim quote here and is provided in the Appendix on pages 184-190.

Section 1306.04(a) of Title 21 of the Code of Federal Regulations 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. 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 Controlled

CONTROLLING PROVISIONS (CONT.)

Substance Act (21 U.S.C. § 829) and person knowingly filling such a purported prescription, as well as the person issuing it, shall be subject to the penalties provided for violations of the provisions of law relating to controlled substances.

STATEMENT OF THE CASE AND GOVERNING FACTS

A. Indictment, Trial and Conviction

Hubbard, an erstwhile pharmacist and pharmacy owner, was indicted in Dec. of 2015 in a 38-count indictment. After two superseding indictments, which raised the counts to 73, he was charged with one count of conspiracy to distribute pseudoephedrine and oxycodone in violation of 21 U.S.C. § 846; thirteen counts of distribution of a listed chemical in violation of 21 U.S.C. § 841(c)(2) and 18 U.S.C. § 2; forty-five counts of distribution of controlled substances in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2; one count of maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1); one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h); twelve counts of engaging in unlawful monetary transactions in violation of 18 U.S.C. §§ 1957 and 2; and criminal forfeiture allegations of listed property pursuant to 21 U.S.C. § 853 and 18 U.S.C. § 982(a)(1). Case No. 5:15-cr-00104, Honorable Judge Danny C. Reeves, United States District Court of the Eastern District of Kentucky (Central Division). (A. 1-25).

Hubbard pleaded not guilty and proceeded to a jury trial. On February 16, 2017, he was convicted on all counts of the superseding indictment, except Counts 7 & 47, which were dismissed by government motion. The district court added eight sentencing enhancements (including relevant conduct). (A. 149-50). The court sentenced Hubbard to 360 months' incarceration with three years of supervised release and forfeiture of listed property. (A. 98-107).

B. Post-conviction Remedies-Motion for a new trial, direct appeal and 2255 motion

Soon after trial and his conviction, Hubbard filed a motion for a new trial under Fed. R. Crim. P. 33 arguing, inter alia, that the § 841 counts were not supported by sufficient evidence. However, on April 26, 2017, the district

court denied the motion under the manifest weight of the evidence standard. (A. 108-117).

On direct appeal to the Sixth Circuit, Hubbard's counsel filed a motion to withdraw pursuant to Anders v. California, 386 U.S. 738 (1967), and Sixth Circuit rule 12(c)(4)(C), notifying the court of a lack of good faith issues to appeal. The Sixth Circuit entered an order granting counsel's motion to withdraw, but appointed new counsel to allow the filing of supplemental briefs. After new counsel was appointed, he too filed a motion to withdraw pursuant to Anders, stating he had nothing to add to original counsel's brief. The Sixth Circuit independently reviewed the record and the briefs of counsel and Hubbard, and granted counsel's motion to withdraw. The Court found no grounds for appeal could be sustained. (A. 142-152). Hubbard had argued that there was insufficient evidence to convict on all counts, but the Court found that he filed a "specific Rule 29 motion;" and therefore he forfeited review of all counts except 49 through 59. (A. 147).

Hubbard filed a petition for panel rehearing claiming the Court overlooked a precedential case that he cited on direct appeal that clarified what a specific Rule 29 motion was, but the Sixth Circuit denied the petition on November 19, 2019. (A. 153).

Hubbard filed a motion to recall the mandate because his second appellate counsel did not consult him or provide an Anders brief supporting his arguments, but instead wrote him a letter telling him to argue said errors himself. The Sixth Circuit denied the motion on December 6, 2019. (A. 154).

Hubbard filed a petition for a writ of certiorari to the Supreme Court on the Sixth Circuit's decision asking this question: Whether the Court of Appeals erred by holding a jury could rationally conclude that defendant pharmacist abdicated his duty under 21 U.S.C. § 841 & 21 C.F.R. § 1306.04(a), despite

pharmacist's argument that there were legitimate medical purposes for the controlled substance prescriptions he filled because trial witnesses testified that they had real injuries and medical issues requiring medications before he filled their prescriptions. The Supreme Court denied the petition on March 30, 2020. (A. 167).

On March 29, 2021, Hubbard filed a 28 U.S.C. § 2255 motion with the district court arguing four instances of ineffective assistance of trial counsel. The second claim stated: Trial counsel failed to advise Petitioner on the legal concepts and implications of aiding and abetting, pinkerton liability, and deliberate ignorance and furthered the fallacies that Petitioner could not have aided and abetted and that 21 C.F.R. § 1306.04(a) was two essential elements, instead of one. The district court denied the motion without an evidentiary hearing or a certificate of appealability (COA). (A. 118-132).

Since there were no appeals allowed for § 2255 motions without a COA, Hubbard asked a circuit judge of the Sixth Circuit for a COA, but the application was denied on June 14, 2022. (A. 155).

Hubbard filed a petition for a panel rehearing of that denial, arguing his second claim warranted a COA and an evidentiary hearing because his declaration and his trial counsel's affidavit were conflicting statements that should be evaluated in an evidentiary hearing, but the Sixth Circuit denied the petition on August 1, 2022. (A. 159).

C. Other Remedies-2241 petition, Recall of the Mandate and Rule 60(b)(6) motion

On June 26, 2022, the Supreme Court decided Ruan v. United States, 142 S. Ct. 2370 (2022), which held that 21 U.S.C. § 841's knowingly or intentionally mens rea applied to the "except as authorized" clause. This meant that in a § 841 prosecution in which the defendant met his burden of production under 21 U.S.C.

§ 885, the government had to prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. Ruan, 142 S. Ct. at 2375.

On August 15, 2022, Hubbard filed a 28 U.S.C. § 2241 petition with the district court of the place of his confinement, which was the United States District Court for the Northern District of West Virginia, Civil No. 5:22-cv-00196, arguing his § 841 convictions are no longer illegal because of the recent Supreme Court case in Ruan. The district court denied the petition on December 28, 2022. (A. 133-137).

Hubbard appealed the district court's denial of his 2241 petition to the United States Court of Appeals for the Fourth Circuit. On July 28, 2023, the Fourth Circuit affirmed the district court's decision because of the recent Supreme Court decision in Jones v. Hendrix, 599 U.S. 465 (2023). (A. 160).

On July 26, 2023, knowing he would lose his Fourth Circuit appeal because of Jones v. Hendrix, Hubbard wrote a letter to AUSA Ron L. Walker Jr., the prosecutor who indicted and helped convict him, asking him to "submit a motion to dismiss the second superseding indictment pursuant to Federal Rule[] of Criminal Procedure 48(a) because of the facts and the Supreme Court gloss of Ruan." (A. 169-173). After two months of not receiving a reply, Hubbard, on October 7, 2023, sent the AUSA a reminder letter and a proposed show cause motion that he was prepared to send to the district court if he did not receive a response. (A. 174-179). On October 20, 2023, AUSA Ron L. Walker Jr., responded to Hubbard in a letter declining the request to dismiss the indictment. The AUSA stated, "[a]dmittingly, neither the indictment nor the jury instructions contained the now required mens rea language as set forth in []Ruan, 142 S. Ct. 2370 (2022). However, recent Sixth Circuit decisions have ruled that dismissal is not required for cases tried before Ruan where a

deliberate ignorance instruction was also given." (A. 180).

In February 2024, Hubbard filed a motion to recall the mandate & reopen the direct appeal with the Sixth Circuit arguing five questions of law concerning the mens rea of 21 U.S.C. § 841 and related other counts in the indictment in light of the gloss of the Supreme Court's decision in Ruan. On April 23, 2024, the Sixth Circuit denied the motion stating an intervening change in law did not warrant a new direct appeal when it appeared to circumvent the AEDPA's gatekeeping role in second or successive § 2255 petitions. (A. 154).

Hubbard filed a petition for a writ of certiorari with the Supreme Court on that Sixth Circuit decision asking this question: Whether the Sixth Circuit abused its discretion when it denied Hubbard's motion to recall the mandate, post-Ruan, when it held that: (1) changes in statutory interpretation are not the type of unforeseen contingency which warrants recall of the mandate, and (2) since Hubbard had already filed a § 2255 motion to vacate and could not file a second or successive § 2255 motion, then that did not warrant a recall of the mandate either. The Supreme Court denied the petition on October 15, 2024. (A. 168).

Hubbard filed a Fed. R. Civ. P. 60(b)(6) motion with the district court asking leave to reopen his habeas proceedings due to the injustice to himself, the risk that denial of relief will produce injustice in other pharmacists' cases, and the risk of undermining the public confidence of the judicial process. On December 10, 2024, the district court denied the motion and transferred it to the Sixth Circuit, pursuant to 28 U.S.C. § 2244, to be approved as a claim for a second or successive § 2255 motion. (A. 138-141). Hubbard requested that the Sixth Circuit transfer the Rule 60(b)(6) motion back to the district court to be decided on the merits. The Sixth Circuit, however, denied Hubbard's request to transfer the motion back to the district

court and held that he raised new grounds for relief and his motion was a second or successive application. The Sixth Circuit then went on to deny the application as a second or successive motion request. (A. 163-166). Hubbard afterward attempted to file a petition for panel rehearing on that decision, but the Sixth Circuit's clerk refused the petition citing Sixth Circuit caselaw and 28 U.S.C. § 2244(b)(3). (A. 181).

Hubbard cannot file another 28 U.S.C. § 2241 petition with the local district court because of Jones v. Hendrix. He cannot file another second or successive 2255 motion because of 28 U.S.C. § 2255(h). Ruan is not a new rule of constitutional law that was made retroactive by the Supreme Court to cases on collateral review. Hubbard lacks newly discovered evidence.

SUPREME COURT RULE 20.4(a) REQUIREMENTS

A. Compliance with Requirements of 28 U.S.C. §§ 2241, 2242

As per Sup. Ct. R. 20.4(a), a petition seeking a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular regarding § 2242, a statement of the "reasons for not making application to the district court of the district in which the applicant is held."

1. 28 U.S.C. § 2241

28 U.S.C. § 2241 lists five circumstances under which a federal court may grant a writ of habeas corpus. Hubbard qualifies for these three:

- a. He is in custody under or by color of the authority of the United States;
- b. He is in custody for an act done ... in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States.
- c. He is in custody in violation of the Constitution or laws of the United States.

Specifically, Hubbard is a federal inmate incarcerated at FCI Memphis with a 30 year sentence. See Appendix ("A.") page 101. He was convicted by a jury of the United States District Court for the Eastern District of Kentucky (Central Division), Crim. No. 5:15-cr-00104-DCR. (A. 98-107). Currently, Warden Harrison has federal custody over him. He was convicted by a jury on February 16, 2017, where he has been incarcerated since.

2. 28 U.S.C. § 2242

Reasons for not making application to the district court of the district in which the applicant is held:

- a. Hubbard has already filed a 28 U.S.C. § 2241 petition to a district court of the district in which he was held in 2022, after Ruan v. United States, 142 S. Ct. 2370 (2022), was decided. On August 15, 2022, he filed a 2241 petition with the United States District Court for the Northern District of West Virginia,

his district of confinement, but it was denied on Dec. 28, 2022. (A. 133-137). Hubbard appealed the district court's denial of his petition to the Fourth Circuit Court of Appeals, but was denied on July 28, 2023, because of the recent Supreme Court's decision in Jones v. Hendrix, 599 U.S. 465 (2023), which held that 28 U.S.C. § 2255(e)'s savings clause did not permit a federal prisoner asserting an intervening change in statutory interpretation an avenue to circumvent AEDPA's restrictions on second or successive § 2255 motions by filing habeas petitions under 28 U.S.C. § 2241. (A. 160).

b. Hubbard, therefore cannot file another 28 U.S.C. § 2241 petition to the district court of the place of his current confinement (FCI Memphis), the United States District Court for the Western District of Tennessee, because that petition would be a duplicable and frivolous petition. Hubbard is not allowed to file another 2241 petition to circumvent the AEDPA's restrictions challenging his convictions based on an intervening change in statutory interpretation because of Jones v. Hendrix. See also 28 U.S.C. § 2255(h).

B. Exceptional Circumstances

Hubbard asserts that there are exceptional circumstances that warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. The exceptional circumstance warranting utilization of this Court's Rule 20.4(a), 28 U.S.C. § 2241(b), and the Court's original habeas jurisdiction is the fact that there is a substantial risk of leaving a legally and statutorily innocent pharmacist in prison. He is serving a 30 year sentence, after being unconstitutionally convicted for conduct that was not criminal by an uninformed jury who otherwise could not have found the required mens rea of Ruan to convict. This violates, the Fifth, Sixth and Eighth Amendments of the U.S. Constitution under the due

process clause, the right to a fair trial, and assuming incarcerating an innocent person is "cruel and unusual punishment."

The Supreme Court's decision in Ruan v. United States, 142 S. Ct. 2370 (2022), casted grave doubt on Hubbard's 21 U.S.C. § 841(a)(1)'s convictions because the district court's jury instructions were incorrect as to how they informed the jury of the mens rea element required to convict. Moreover, the improper jury instructions at Hubbard's trial infected the entire trial resulting in convictions for other similarly related counts that depended on the mens rea of § 841(a)(1) & (c)(2), which violated due process. See Estelle v. McGuire, 502 U.S. 62 (1991). The due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358 (1970).

Unfortunately for Hubbard, Ruan was decided after his direct appeal and § 2255 motion were decided. (A. 142-152, 118-132). Hubbard did file a 28 U.S.C. § 2241 petition with the district court of the place of his confinement, but was denied. (A. 133-137). He appealed, but was denied because of Jones v. Hendrix, 599 U.S. 465 (2023). (A. 160). The Jones v. Hendrix ruling forecloses forever Hubbard's avenue for relief of his Ruan claims because it bars federal petitioners from using 2255(e)'s savings clause for habeas relief due to AEDPA's restriction of filing second or successive 2255 motions through 2241 petitions. Unfortunately, Ruan is not a new rule of constitutional law made retroactive on collateral review by the Supreme Court and Hubbard lacks newly discovered evidence. See § 2255(h). However, Hubbard notes that the Jones v. Hendrix's 6-3 decision was not unanimous. In dissent, Justice Sotomayor and Justice Kagan lamented, "A prisoner who is actually innocent, imprisoned for conduct that Congress did not criminalize, is forever barred by 28 U.S.C.

§ 2255(h) from raising that claim, merely because he previously sought post conviction relief. It does not matter that an intervening decision of this Court confirms his innocence. By challenging his convictions once before, he forfeited his freedom." 599 U.S., at 492-93. Also in dissent, Justice Jackson opined, "[W]e should honor Congress's clear interest in preserving a prisoner's ability to have one meaningful opportunity to have all of his claims presented to a court." Id. 531. She continued with the opinion "closes off all avenues for certain defendants to secure meaningful consideration of their innocence claims" and "creates an opening for Congress to step in and fix the problem." Id. 532.

Well, Congress has not fixed the problem and Hubbard is left languishing in prison for crimes that he is legally and statutorily innocent of, which makes his incarceration and criminal forfeiture unconstitutional. Constitutional errors violate fundamental fairness. Truly, these are exceptional circumstances that warrant the exercise of the Court's discretionary powers to grant the petition for writ of habeas corpus.

C. Unavailability of Relief in Other Courts

No other court can grant the relief sought by this petition because Hubbard has exhausted every court remedy known and has been denied. Hubbard cannot file another 2241 petition with the district court of the place of his confinement. Hubbard cannot file a second or successive 2255 motion.

D. Unavailability of Any Other Form of Relief

No other form of relief will be sufficient to reverse Hubbard's convictions and criminal forfeiture. The Supreme Court's decision in Ruan is not a new rule of constitutional law and has not been made retroactive to cases on collateral review, which is required to file a second or successive 2255 motion. Hubbard is barred by the AEDPA's gatekeeping restrictions.

REASONS FOR GRANTING THE PETITION

The Supreme Court is statutorily authorized to grant this habeas corpus petition under 28 U.S.C. § 2241 for exceptional circumstances that Hubbard has enumerated. The petition should be GRANTED for the following reasons:

1. Hubbard asserts that the Supreme Court's decision in Ruan v. United States, 142 S. Ct. 2370 (2022), invalidates his 21 U.S.C. § 841(a)(1) convictions from his 2017 federal conviction at trial. Not only was the mens rea missing from the § 841(a)(1) counts of the superseding indictment, but the district court's § 841 jury instructions failed to comport to Ruan's holding that the prosecution must prove beyond a reasonable doubt that the defendant "knowingly or intentionally" acted as unauthorized, or intended to do so. Id. Moreover, the district court's deliberate ignorance jury instruction failed to comport to the Sixth Circuit's holding in United States v. Anderson, 67 F.4th 755 (6th Cir. 2023). There, the Sixth Circuit in Anderson held that a district court properly declined to give a proposed good faith jury instruction for an unlawful distribution charge under § 841(a)(1) because a deliberate ignorance jury instruction substantially covered the requested instruction. The Anderson Court held that a district court's deliberate ignorance jury instruction comported to the Supreme Court's direction in Ruan "by referring continuously to the 'knowledge of the defendant,' 'his deliberate ignorance,' and if he 'knew' that the prescriptions were dispensed illegitimately." 2023 U.S. App. LEXIS *20-21. Hubbard asserts the district court's deliberate ignorance jury instruction did not comport to Anderson, and thus to Ruan, because the jury instruction did not refer to Hubbard's subjective knowledge or "if he knew the prescriptions were dispensed illegitimately." Anderson, 2023 U.S. App. LEXIS at *21.
2. Hubbard asserts that the United States Court of Appeals for the Sixth

Circuit has decided in Anderson an important question of law relating to whether a deliberate ignorance jury instruction comports to the Supreme Court's direction in Ruan, that has not been, but should be, settled by this Court. It has already set precedent in that circuit and has affected numerous doctors' direct appeals who argued jury instruction error on the § 841(a)(1)'s counts of their conviction. Hubbard asserts, as well as some circuit judges (White and Cole), that Anderson is in direct contravention to the Supreme Court's direction in Ruan because the prosecution must prove beyond a reasonable doubt that the defendant "knowingly acted in an unauthorized manner." Ruan, 142 S. Ct. at 2376. Here is a list of collecting cases after Anderson's holding of defendants' being negatively affected: United States v. Stanton, 103 F.4th 1204, 1213 (6th Cir. 2024); United States v. Sakkal, 2023 U.S. App. LEXIS 13489 (6th Cir. 2023); United States v. Bauer, 2023 U.S. App. LEXIS 25199 (6th Cir. 2023); United States v. Hoffstetter, 80 F.4th 725 (6th Cir. 2023); United States v. Suetholz, 2024 U.S. App. LEXIS 23369 (6th Cir. 2024); United States v. Campbell, 2025 U.S. App. LEXIS 7849 (6th Cir. 2025). (collecting cases).

3. Hubbard has already filed a direct appeal and a 28 U.S.C. § 2255 motion contesting his convictions. However, Ruan was decided after these post-conviction remedies. Hubbard did file a 2241 petition with the district court of the place of his confinement, but that petition was denied. A. 133-137. He appealed that decision to the Fourth Circuit, but that appeal was denied, A. 160, because of the Supreme Court's decision in Jones v. Hendrix, 599 U.S. 465 (2023), which foreclosed relief by 2241 petition federal prisoners who wish to assert a change in statutory interpretation exonerates him, but cannot because of the AEDPA's restrictions on second or successive filings under § 2255. Importantly, the Supreme Court in hearing this writ of habeas corpus is not bound or limited by the AEDPA's restrictions and could grant the writ.

See Felker v. Turpin, 518 U.S. 651, 660 (1996) ("[W]e conclude that Title I of the "Antiterrorism and Effective Death Penalty] Act [of 1996] has not repealed our authority to entertain original habeas petitions." The Supreme Court is the only court that can overturn Hubbard's convictions under § 841(a)(1) and other related criminal convictions and criminal forfeiture. There is no other avenue or form of relief. Hubbard is languishing in prison with a 30 year prison sentence. Hubbard's continued incarceration violates the U.S. Constitution's Fifth, Sixth and Eighth amendments.

4. Hubbard is legally and statutorily innocent of the § 841(a)(1) counts of conviction. He asserts that the jury, as a matter of law, could not have found the necessary mens rea or scienter element of § 841 to convict him of the other related criminal charges of the federal indictment because the Ruan mens rea applied to conspiracy to distribute controlled substances, aiding and abetting, maintaining a drug premises, conspiracy to commit money laundering, money laundering and criminal forfeiture, also.

ARGUMENT

I. WHETHER THE JURY INSTRUCTIONS INFORMED THE JURY, AS A MATTER OF LAW, OF THE "KNOWINGLY OR INTENTIONALLY" MENS REA OF THE 21 U.S.C. § 841(a)(1) COUNTS IN THE FEDERAL INDICTMENT, AS INTERPRETED BY THE SUPREME COURT IN RUAN V. UNITED STATES, 142 S. CT. 2370 (2022), IN ORDER TO CONVICT PETITIONER HUBBARD.

A. The second superseding indictment failed to mention the mens rea element of the 21 U.S.C. § 841(a)(1) counts 15 through 59.

The second superseding indictment failed to mention the "knowingly or intentionally" mens rea on the 21 U.S.C. § 841(a)(1) counts, Counts 15 through 59. (A. 5-11). Moreover, the verdict forms also failed to list the mens rea. (A. 29-37). The Supreme Court in Ruan v. United States, 142 S. Ct. 2370 (2022), held that § 841's knowingly or intentionally mens rea applied to the "except as authorized" clause. This means that in a § 841 prosecution in which a defendant met his burden of producing evidence that his conduct was "authorized," the government had to prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner. Ruan, 142 S. Ct. at 2376. This mens rea is called "subjective knowledge" and was notably absent from the indictment and verdict forms. Certainly as a pharmacist who was practicing out of his pharmacy, Hubbard was "authorized" to dispense controlled substance prescriptions. See 21 U.S.C. § 802(21) "practitioner". Therefore, as a matter of law, in order for the jury to have convicted Hubbard under 21 U.S.C. § 841(a)(1), the jury would have had to have been entirely instructed of the requisite mens rea by the district court's jury instructions. (A. 42-97). Additionally, the jury instructions would have had to comport to the Supreme Court's decision in Ruan to prove that Hubbard "knowingly acted in an unauthorized manner." Ruan, 142 S. Ct. at 2376.

B. The district court's jury instructions failed to comport with the mens rea of Ruan in instructing the jury on finding the petitioner's subjective knowledge in order to convict under 21 U.S.C. § 841(a)(1).

1. The district court's § 841(a)(1) jury instruction

The district court's § 841(a)(1) jury instruction instructed the jury that there were two elements they had to find in order to convict Hubbard. (A. 72-73). The district court began by distinguishing between § 841's two elements. It instructed that, for a guilty verdict, the jury had to find, first, that petitioner had "knowingly or intentionally distributed the controlled substance, outside the scope of professional practice and not for a legitimate medical purpose" and, second, that petitioner "knew at the time of the distribution that the substance was a controlled substance." Hubbard is not contesting the second jury element. However, the district court's jury instruction assigned the mens rea only to the "distributed the controlled substance" part of the instruction and not the remaining part of the first jury element. The Supreme Court's Ruan opinion teaches that a defendant must also "knowingly or intentionally" dispense said controlled substance outside the scope of professional practice and not for a legitimate medical purpose. Ruan, 142 S. Ct. at 2375. Without such clarification, this jury instruction does not comport to Ruan's high mens rea. Moreover, the AUSA who prosecuted Hubbard's jury trial conceded these errors to the indictment and § 841(a)(1) jury instruction in his response letter to Hubbard. (A. 180).

The § 841 jury instruction did not comport to Ruan, and could not have alerted the jury to consider the subjective knowledge of Hubbard, as a matter of law.

2. The district court's deliberate ignorance jury instruction

a. a deliberate ignorance jury instruction alone cannot comport to the high mens rea of Ruan.

The district court also gave the jury a deliberate ignorance jury instruction to "prov[e] a defendant's knowledge." (A. 57). The deliberate ignorance jury instruction instructed the jury that Hubbard could be found

guilty if the jury believed he was deliberately ignorant and that carelessness, negligence or foolishness on his part were not the same as knowledge and not enough to convict. This instruction comes close to, but falls short of Ruan's required mens rea. This instruction tells the jury that it can "explain something about proving a defendant's knowledge" if they find that "the defendant deliberately ignored a high probability that others were using and/or distributing pseudoephedrine or oxycodone without a legitimate medical purpose." (A. 57). However, the instruction does not inform the jury that to return a guilty verdict that they must find that Hubbard knowingly or intentionally distributed illegal controlled substances. Indeed, the knowledge component in Ruan does not depend on perceiving or ignoring probabilities. The Supreme Court in Ruan taught that defendant must have subjective knowledge and that a "hypothetical reasonable" pharmacist's mindset would not convict. Ruan, 142 S. Ct. at 2381. Hubbard either understood and intended to dispense illegal controlled substances, or he did not. See United States v. Anderson, 67 F.4th 755 (6th Cir. 2023)(White, J. concurring in part and dissenting in part), where in dissent, Circuit Judge White stated "the [deliberate ignorance] instruction does not further clarify that both elements require the 'knowledge or intent' mens rea. Telling the jury that carelessness, negligence, or foolishness is insufficient is not tantamount to instructing what mental state is required." Id. at LEXIS *38. See also United States v. Hofstetter, 80 F.4th 725 (6th Cir. 2023)(Cole, J., concurring), where Circuit Judge Cole stated the "specifics of the instant case cast further doubt on Anderson's holding." Id. at 2023 U.S. App. LEXIS *13. Further, he agreed with circuit judge White's dissent in Anderson and stated "a deliberate [ignorance] instruction does not inform the jury that both elements of the § 841 offense--distribution and outside the course of

professional conduct--must be done with knowledge or intent." "Per Ruan, 'the [g]overnment must prove beyond a reasonable doubt that the defendant knowingly or intentionally acted in an unauthorized manner.'" Id. at 2023 App. LEXIS *18. But cf United States v. Smithers, 92 F.4th 237 (4th Cir. 2024)(where Ruan makes clear that Smithers' jury instructions misstated the law, the Fourth Circuit vacated his convictions and remanded to the district court for a new trial.) There, the government argued that the willful blindness jury instruction "squarely directed at proof beyond a reasonable doubt that Smithers knew (by way of deliberately avoiding his patients' obvious drug abuse) that his prescriptions were not for a legitimate medical purpose or were beyond the bounds of the medical practice." Id. at 2024 U.S. App. LEXIS *24. However, the Fourth Circuit held that argument would only work if there was another instruction "explaining the meaning of 'without a legitimate medical purpose or beyond the bounds of medical practice'" which "required a finding that Smithers knowingly acted outside the course of professional practice." Id. at LEXIS *25. The Fourth Circuit reasoned, that had it required that finding, "the willful-blindness instruction would have instructed the jury that they could find the requisite mens rea." Id. Importantly, the Fourth Circuit's conclusion was that Instruction 20 did not require any knowledge to begin with, so instructing the jury that they could find knowledge from willful blindness was not relevant to them. Id.

Similarly, Hubbard's indictment did not alert the jury to the mens rea in the 21 U.S.C. § 841(a)(1) counts. The point is: if the district court instructed the jury that they could prove knowledge "if they were convinced that the defendant deliberately ignored a high probability that others were using and/or distributing ... oxycodone without a legitimate medical purpose," then that was not relevant to the jury because the indictment did not require

knowledge on these counts and the other jury instructions did not alert the jury of the required Ruan mens rea. Also, like the Smithers case, the district court's jury instructions did not explain the meanings of "not for a legitimate medical purpose" and "outside the usual course of professional practice."

The Supreme Court was silent on whether a deliberate ignorance jury instruction could comport to explaining the mens rea of Ruan to the jury. Hubbard asserts that a deliberate ignorance jury instruction alone cannot comport to the high mens rea of Ruan, especially when it was not even mentioned in the indictment. Therefore, the jury could not have found the requisite mens rea of Ruan to convict Hubbard on Counts 15 through 59, as a matter of law.

b. even if the Supreme Court finds that a deliberate ignorance jury instruction alone can comport to the mens rea of Ruan, then Hubbard asserts that the district court's jury instruction still failed to comport to Anderson and thus Ruan's high mens rea.

The Sixth Circuit in Anderson held that a district court's deliberate ignorance jury instruction comported to the Supreme Court's direction in Ruan "by referring continuously to the 'knowledge of the defendant,' his 'deliberate ignorance,' and if he 'knew' that the prescriptions were dispensed illegitimately." Id. at 2023 U.S. App. LEXIS *20-21. The Anderson Court held that "[s]uch terms go beyond an objective view of the 'usual course of professional practice' and instead direct the jury's attention to Anderson's subjective mindset in issuing the prescriptions." Id. at LEXIS *21. Moreover, the Court held the instructions "substantially cover the concept of knowledge through the description of deliberate ignorance and the juxtaposition of 'knowledge' with '[c]arelessness, negligence, or foolishness.'" Id. at LEXIS *21-22.

Hubbard asserts that the district court's deliberate ignorance jury

instruction did not comport to Anderson or Ruan. True, the district court's jury instruction used words like "[c]arelessness, negligence, [and] foolishness" and stated that it "is not the same as knowledge, and not enough to convict." (A. 57). True also, the jury instructions referred "continuously to the knowledge of the defendant" and to his "deliberate ignorance." (A. 57). However, this is where the similarities end. Hubbard asserts that the jury instruction did not refer to his subjective knowledge or "if he knew the prescriptions were dispensed illegitimately." Anderson, at LEXIS *21.

The pertinent reading of the jury instruction instructs the jury that if they were "convinced the defendant deliberately ignored a high probability that others were using and/or distributing pseudoephedrine or oxycodone without a legitimate medical purpose, then they may find that the defendant knew that others were using and/or distributing these substances without a legitimate medical purpose." (A.57). Hubbard obviously dispensed oxycodone by prescription from medical doctors to his pharmacy customers; But this is "objective knowledge." The scienter element was absent on whether Hubbard knowingly dispensed illegal oxycodone prescriptions. That was where the jury instruction failed to alert the jury to Ruan's required mens rea. The jury was not informed to be on the lookout for Hubbard's subjective knowledge or if he "knew the prescriptions were dispensed illegitimately." Anderson, at *21. Therefore, the deliberate ignorance jury instruction did not comport to Anderson or Ruan. The jury could not have found the requisite mens rea of 21 U.S.C. § 841(a)(1) to convict, as a matter of law.

3. The district court's aiding and abetting jury instruction

The district court's aiding and abetting instruction instructed the jury that "Counts 43, 44, 45, 46 and 48 allege Defendant Hubbard was aided and

abetted by another in distributing oxycodone. The instruction that I have just given you regarding aiding and abetting concerning Counts 2 through 14 (excluding Count 7) apply to these counts (Counts 43, 44, 45, 46 and 48) as well." (A. 75). However, the district court's jury instruction was designed specifically for distribution of pseudoephedrine counts of the indictment, Counts 2 through 14, and aiding and abetting. (A. 74-75). The district court informed the jury that they could also use this instruction for the aiding and abetting the distribution of oxycodone, Counts 43, 44, 45, 46 and 48 as well. This was erroneous. Hubbard asserts that Ruan applied to the aiding and abetting jury instruction. See United States v. Naum, 2025 U.S. App. LEXIS 8598 (4th Cir. Apr. 11, 2025) at LEXIS *10-11, where the Fourth Circuit applied Ruan to the aiding and abetting jury instruction and charge. Therefore, the jury instructions must alert the jury that Hubbard knew the prescriptions his employees dispensed were illegal before they dispensed them. There was no aiding and abetting jury instruction specifically for the oxycodone counts of the indictment. Thus, the aiding and abetting jury instruction failed to alert the jury of the required subjective mens rea of Hubbard according to Ruan. The jury could not have convicted Hubbard on Counts 43, 44, 45, 46 and 48 of aiding and abetting the distribution of oxycodone, as a matter of law, because the jury instruction requires scienter of the aider and abettor with the knowledge and intent of the principal expressed in two related concepts: (1) that the defendant consciously shared the principal's knowledge, and (2) that the defendant shared the principal's criminal intent. United States v. Blood, 435 F.3d 612, 623 (6th Cir. 2006).

II. WHETHER THE JURY INSTRUCTIONS INFORMED THE JURY, AS A MATTER OF LAW, OF THE REQUIRED SUBJECTIVE KNOWLEDGE OF THE § 841 COUNTS AS IT RELATED TO ALL OF THE OTHER COUNTS OF THE INDICTMENT, ACCORDING TO RUAN, IN ORDER TO CONVICT HUBBARD (INCLUDING CRIMINAL FORFEITURE).

A. Standard of Review

A habeas petitioner bears a heavy burden when seeking habeas relief on the basis of allegedly improper jury instructions. Henderson v. Kibbe, 431 U.S. 145 (1977). An allegedly improper jury instruction warrants habeas relief only if the instruction so infected the entire trial that the resulting conviction violates due process. Estelle v. McGuire, 502 U.S. 62 (1991). The due process clause protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. See In re Winship, 397 U.S. 358 (1970). A failure to instruct the jury on an essential element as complex as the mens rea issue in this case created an impermissible risk that the jury had not made a finding that the Constitution requires.

B. Conspiracy to distribute oxycodone and pseudoephedrine in violation of 21 U.S.C. § 846, Count 1

The indictment in Count 1 charged that Hubbard "did conspire with others to knowingly and intentionally distribute and dispense, outside the scope of professional practice and not for a legitimate medical purpose," oxycodone in violation of 21 U.S.C. § 841(a)(1) and "to knowingly and intentionally distribute ... pseudoephedrine, which may be used to manufacture a controlled substance ... knowing or having reasonable cause to believe, that such chemical ... will be used to manufacture a controlled substance" in violation of 21 U.S.C. § 841(c)(2), all in violation of 21 U.S.C. § 846. (A. 4).

Hubbard asserts that Ruan applied not only to § 841 counts of the indictment, but to also the conspiracy to distribute oxycodone and

pseudoephedrine count of the indictment. See United States v. Naum, 2025 U.S. App. LEXIS *11, where the Fourth Circuit applied Ruan to Dr. Naum's conspiracy jury instructions. The Fourth Circuit held that the conspiracy jury instructions were incorrect according to Ruan because they did not clarify whether he knowingly authorized a nurse to write Suboxone prescriptions. Hubbard asserts the district court's conspiracy jury instructions failed to alert the jury of the required mens rea of Ruan. See also United States v. Campbell, 135 F.4th 376 (6th Cir. 2025), where the Sixth Circuit applied Ruan to a conspiracy to distribute charge and jury instruction finding "the government cannot prove a § 846 violation unless it proves that the conspirators in the agreement knew they were" acting as unauthorized. 2025 U.S. App. LEXIS *5-6.

The district court's conspiracy to distribute controlled substances jury instruction stated:

"For you to find the defendant guilty of the conspiracy charge, the government must prove each and every one of the following elements beyond a reasonable doubt:
"First, that two or more persons conspired, or agreed, to commit the crime of knowingly and intentionally distributing one or both of the following:
"(i) oxycodone, a controlled substance, outside the scope of professional practice and not for a legitimate medical purpose; and/or
"(ii) pseudoephedrine while knowing, intending, or having reasonable cause to believe that the pseudoephedrine will be used to manufacture a controlled substance or a listed chemical; and
"Second, that the defendant knowingly and voluntarily joined the conspiracy." (A. 60-61).

As a matter of law, the jury could not have found these elements to convict Hubbard of conspiracy to distribute illegal oxycodone in light of Ruan. The instruction's first element instructed the jury that it had to find "that two or more persons conspired" to knowingly distribute oxycodone outside the scope of professional practice and not for a legitimate medical purpose. But the instructions did not clarify that Hubbard must have knowingly dispensed illegal oxycodone that was not authorized, or that he knowingly distributed

illegal oxycodone. Naum, 2025 U.S. App. at LEXIS *11. The district court's other conspiracy jury instructions do not correct or clarify the required mens rea either. (A. 66, 67, 68, 70-71).

It appears at first glance that the jury could have found Hubbard guilty of knowingly distributing illegal pseudoephedrine knowing that it would be manufactured into methamphetamine because the mens rea comes before and after the word "pseudoephedrine." (A. 60). But Hubbard asserts that Ruan also applied to 21 U.S.C. § 841(c)(2)'s distribution of a listed chemical. This means that Hubbard must have subjective knowledge, or something close to it, that the pseudoephedrine his pharmacy employees sold would be manufactured into methamphetamine. He will explain more about this argument infra, Heading C, but spoiler alert, the jury could not have found Hubbard aided and abetted the distribution of illegal sales of pseudoephedrine to manufacture meth.

Further, as a matter of law, the jury could not have found the instruction's second element that Hubbard "knowingly and voluntarily joined the conspiracy," (A. 60), because, if he did not knowingly distribute illegal oxycodone and pseudoephedrine to customers in his pharmacy, then he could not have "knowingly" joined a conspiracy to do the object of which was to knowingly dispense illegal oxycodone and pseudoephedrine. This count's conviction was especially onerous to Hubbard because the district court enhanced his sentence 4-levels under U.S.S.G. § 3Bl.1(a) for being an organizer and leader of a conspiracy of five or more people. (A. 150). Moreover, the district court held Hubbard responsible for over 90,000 kg of marijuana equivalency for the drug quantity under U.S.S.G. § 2D1.1 resulting in a base offense level of 38, pursuant to U.S.S.G. § 2D1.1(c)(1), for the oxycodone. (A. 150).

C. Aiding and abetting the distribution of pseudoephedrine in violation of 21 U.S.C. § 841(c)(2) and 18 U.S.C. § 2, Counts 2 through 14.

The indictment in Counts 2 through 14 charged that Hubbard "aided and abetted by others, did distribute a listed chemical, namely, pseudoephedrine, ... knowing or having reasonable cause to believe, that such listed chemical will be used to manufacture a controlled substance, namely Methamphetamine," all in violation of 21 U.S.C. § 841(c)(2) and 18 U.S.C. § 2. (A. 4-5).

As asserted earlier, Hubbard asserts that Ruan applied to all of § 841--including § 841(c)(2)--because the Supreme Court held "§ 841's knowingly or intentionally mens rea applied to the 'except as authorized' clause." Ruan, 142 S. Ct. at 2371. Additionally, Hubbard asserts that Ruan applied to the district court's aiding and abetting jury instruction(s) as argued supra in Question I. See Naum, 2025 U.S. App. LEXIS 8598 (4th Cir. 2025), at LEXIS *10-11. Hubbard was charged with being an aider and abettor, he personally did not sell any pseudoephedrine in the counts of the indictment. Hubbard asserts that the Ruan mens rea applied to his pharmacy employees by proxy because he was "authorized" and they were board certified pharmacy technicians registered to work behind a pharmacy counter at the time of his offenses. See 21 U.S.C. § 802(21). Each pharmacy employee was registered by the state of Kentucky and were thus "authorized" to legally sell pseudoephedrine in the pharmacy Hubbard owned.

The district court's aiding and abetting jury instruction (21 U.S.C. § 841(c)(2) and 18 U.S.C. § 2) instructed the jury that in order to convict Hubbard of distributing pseudoephedrine knowing or having reasonable cause to believe that it would be manufactured into methamphetamine, that they must find three essential elements:

"First, that the crime of distributing pseudoephedrine, knowing or having reasonable cause to believe that such listed chemical would be used to manufacture a controlled substance ... was committed.

"Second, that the defendant helped to commit or encouraged someone to commit the crime.

"And third, that the defendant intended to help commit or encourage the crime." (A. 74).

As a matter of law, the jury could not have found the first and third elements to convict Hubbard. The first element stated that first the crime of illegally distributing pseudoephedrine was committed. But the subjective mens rea of the pharmacy employees to commit the crime was not explained to the jury. The jury was not instructed that the pharmacy employees must have knowingly "acted in an unauthorized manner." Ruan, 142 S. Ct. at 2376. Moreover, the jury was instructed that Hubbard could be found guilty if he was deliberately ignorant of his employees distribution of pseudoephedrine.

The district court's deliberate ignorance jury instruction stated the jury may prove a defendant's knowledge. It stated: "If you are convinced that the defendant deliberately ignored a high probability that others were using and/or distributing pseudoephedrine or oxycodone without a legitimate medical purpose, then you may find that the defendant knew others were using and/or distributing these substances without a legitimate medical purpose." (A. 57). But as discussed supra, it is not enough that Hubbard ignored a high probability that his pharmacy employees were dispensing pseudoephedrine. Either Hubbard knew his pharmacy employees were dispensing illegal pseudoephedrine or he did not. Additionally, and assuming the jury read the jury instruction to mean illegal distribution of pseudoephedrine, Hubbard cannot be deliberately ignorant (that his pharmacy employees were knowingly distributing illegal pseudoephedrine that would be used to manufacture meth) and at the same time share the specific intent necessary to help commit or encourage the crime in the third element of the aiding and abetting jury

instruction. See United States v. Chen, 913 F.2d 183, 190 (5th Cir. 1990) (Where the trial court instructed the jury that knowledge for a § 856(a)(1) charge could be inferred from deliberate ignorance. Id. at 187. The Fifth Circuit disagreed and concluded that a deliberate ignorance instruction could not be used under a plain reading of § 856(a)(1) because "[o]ne cannot be deliberately ignorant (in order to convict for the knowledge element) and still have the purpose of engaging in illegal drug activities." Id. at 190). In terms of connecting the aider and abettor with the principal, "[t]he government must prove that the aider/abettor had the same mental state as that necessary to convict a principal of the offense." Blood, 435 F.3d at 623. Therefore, caselaw teaches that Hubbard must share his specific intent with his employees in order to encourage the crime, where "intent" must also be subject to Ruan's scienter mens rea holding.

The jury was not instructed that Hubbard's subjective knowledge extended to his specific "intent" to help the employees to commit the crime of illegally distributing pseudoephedrine knowing or have reasonable cause to believe that it would be manufactured into methamphetamine. As a matter of law, Ruan requires knowledge of acting unauthorized, both by the defendant pharmacist and his employees. Therefore, in order to convict Hubbard, the district court had to instruct the jury that Hubbard must have knowingly aided and abetted the illegal sale of pseudoephedrine by his employees and that they must have had knowledge or something close to it, that the sale would end up manufacturing methamphetamine. See United States v. Trung Huu Truong, 425 F.3d 1282, 1289-90 (10th Cir. 2005) ("Presumably because of large-scale legitimate use of pseudoephedrine ... and a concern about not imposing unreasonable duties or risk liability on the pharmacies ... Congress limited the reach of 21 U.S.C. § [841(c)(2)] to sellers with actual knowledge.").

As a matter of law, the jury could not have found aiding and abetting the illegal distribution of pseudoephedrine to manufacture methamphetamine. The jury could not have found the subjective knowledge of Hubbard or that he shared the same criminal intent of his pharmacy employees. The jury could not have found that Hubbard subjectively intended to commit the crime or encouraged it. Lastly, Hubbard could not be deliberately ignorant of his pharmacy employees knowingly distributing illegal pseudoephedrine to be manufactured into meth and still share the same mental state of the employee to help or encourage said crime.

D. Maintaining a drug-involved premises in violation of 21 U.S.C. § 856(a)(1), Count 60

21 U.S.C. § 856(a)(1) provides that "except as authorized," it shall be unlawful to knowingly open or maintain a place "for the purpose of manufacturing, distributing, or using any controlled substance." 21 U.S.C. § 856(a)(1).

The indictment in Count 60 charged that Hubbard "did knowingly and intentionally open and maintain and manage ... a place, namely RX DISCOUNT OF BERA ... for the purpose of distributing and dispensing, outside the scope of professional practice and not for a legitimate medical purpose ... oxycodone and pseudoephedrine, a listed chemical, in violation of 21 U.S.C. § 841(a)(1) and (f)(1), all in violation of 21 U.S.C. § 856(a)(1)." (A. 11).

Hubbard asserts Ruan applied to 21 U.S.C. § 856(a)(1)'s "except as authorized clause." Indeed, on remand from the Supreme Court in case No. 3:15-cr-00027, Hofstetter v. United States, 142 S. Ct. 351 (U.S., Oct. 17, 2022), the Sixth Circuit applied Ruan to defendants' 21 U.S.C. § 856(a)(1) charges and jury instructions. See United States v. Hofstetter, 2023 U.S. App. LEXIS 22755 (6th Cir. 2023) (Cole, J., concurring). "Thus, under Ruan, the district court must have instructed the jury that knowledge of illegal distribution is an element of offenses under § 856(a)." Id. at LEXIS *6.

As a matter of law, the jury could not have found the Ruan mens rea to convict Hubbard because the jury was not informed that his subjective knowledge was an element of the offense. As a matter of law, the jury could not have found pseudoephedrine, a listed chemical, was illegally distributed as the purpose of opening and maintaining the premises because pseudoephedrine is not a controlled substance and therefore does not violate the § 856(a)(1) statute.

The district court's Opening and Maintaining Drug-Involved Premises jury instruction instructed the jury that there were two elements:

"First, the defendant opened and maintained a place, Rx Discount of Berea ... for the purpose of distributing oxycodone, a controlled substance, outside the scope of professional practice and not for a legitimate medical purpose, or pseudoephedrine, a listed chemical, knowing, intending, or having reasonable cause to believe that it would be used to manufacture a controlled substance; and "Second, the defendant knew that the place would be used for such a purpose." (A. 76).

As a matter of law, Hubbard asserts that the jury instruction given by the district court was erroneous because the jury was not instructed that Hubbard must have subjective knowledge of illegal distribution of oxycodone. Hofstetter, 2023 U.S. App. at LEXIS *6. Instead, the jury instruction stated that Hubbard could be convicted if they found that he maintained the premises for "distributing oxycodone [] outside the scope of professional practice and not for a legitimate medical purpose," and "knew that the place would be used for such a purpose." (A. 76). The district court's jury instruction allows the jury to convict Hubbard of the offense of § 856(a)(1), if he objectively dispensed oxycodone outside the scope of professional practice and not for a legitimate medical purpose without regard to whether he "knowingly acted in an unauthorized manner." Ruan, 142 S. Ct. at 2376. The Sixth Circuit in Hofstetter affirmed defendants' convictions under § 856(a)(1) because "the jury instructions, taken as a whole, made clear that the jury had to find the

defendants knowingly opened the clinics for the purpose of illegally distributing Schedule II controlled substances." Id. at LEXIS *7.

As a matter of law, the jury could not have found pseudoephedrine, a listed chemical, was illegally distributed as the purpose of opening or maintaining the premises because pseudoephedrine was not a controlled substance required to convict under the § 856 statute. See 21 U.S.C. § 802(34)(K). Moreover, the indictment did not allege that Hubbard was "manufacturing" pseudoephedrine into methamphetamine, a controlled substance, at the premises or that others were doing such. (A. 11). Further, the jury could not have found Hubbard aided and abetted the illegal distribution of pseudoephedrine. Alternatively, the jury could not have found that Hubbard was deliberately ignorant of the illegal distribution of pseudoephedrine, but still shared the subjective knowledge and specific intent to encourage or help others to commit said crime.

E. Conspiracy to commit money laundering and money laundering with or without aiding and abetting in violation of 18 U.S.C. §§ 1956(h), 1957 and 2, Counts 61 through 73.

1. 1956(h)

The indictment in Count 61 charged Hubbard and another with knowing that the property involved financial transactions of some form of unlawful activity and he, did conspire to conduct such financial transactions which involved proceeds of specified unlawful activity through distribution of unlawful controlled substances and pseudoephedrine with the intent to promote the carrying on of such specified unlawful activity in violation of 18 U.S.C. § 1956(a)(1)(A)(i) and (a)(1)(B)(i), all in violation of 18 U.S.C. § 1956(h). (A. 11-12).

The conspiracy to commit money laundering jury instruction stated that there were two elements that the jury had to find beyond a reasonable doubt

to convict:

"First two or more persons conspired, or agreed, to violate the money laundering statute.

"Second, the defendant knowingly and voluntarily joined the conspiracy.

"A violation of the money-laundering statute would consist of the following elements:

"First, the defendant conducted or attempted to conduct a financial transaction.

"Second, the financial transaction involved property that represented the proceeds of unlawful distribution of [controlled substances], and/or pseudoephedrine.

"Third, the defendant knew that property involved in the financial transaction represented the proceeds of some form of unlawful activity.

"Fourth, the defendant conducted these transactions either:

"(i) intending to promote the carrying on of the unlawful distribution of [controlled substances], and/or pseudoephedrine; or

"(ii) knowing that the transaction was designed in whole or in part to conceal ... the nature ... or control of the proceeds of the unlawful distributions of [controlled substances], and/or pseudoephedrine."

(A. 63).

Hubbard asserts Ruan applies to his 18 U.S.C. §§ 1956(h) & 1957 convictions because in order to convict, the government must prove the scienter mens rea element of "knowingly acting as unauthorized" or he must knowingly distribute illegal oxycodone and pseudoephedrine to convict. Hubbard asserts that Ruan applied to conspiracy to commit money laundering, Count 61, for the reasons explained supra. Thus, under Ruan, the district court jury instructions must have instructed the jury that knowledge of illegal distribution is an element of offense under 18 U.S.C. §§ 1956(h), 1957 and 2.

As a matter of law, the jury could not have found the first element of conspiracy to violate the money laundering statute because the Ruan mens rea element was wholly absent. The jury instruction used words like "unlawful distribution" and "unlawful activity," but it did not alert the jury that said unlawful distribution was knowingly dispensing illegal oxycodone and pseudoephedrine. As mentioned supra, the aiding and abetting of the pharmacy employees illegal distribution of pseudoephedrine could not have been found by a jury because the aiding and abetting element of subjective knowledge

could not be inferred by the deliberate ignorance jury instruction because Hubbard must also have had specific "intent" to encourage or help said crime. Either Hubbard knew his pharmacy employees were distributing illegal pseudoephedrine or he did not. There were, therefore, no knowingly unlawful distributions, proceeds, or unlawful activity and no "violat[ion] [of] the money laundering statute." (A. 63). Further, the jury could not have found Hubbard conducted financial transactions either "intending" to promote the carrying on of unlawful distribution or "knowing" the transaction was designed to conceal or hide the nature or control of unlawful distribution of controlled substances or pseudoephedrine because Hubbard must have also "knowingly acted in an unauthorized manner." Ruan, 142 S. Ct. at 2376.

2. 1957 & 2

The indictment in Counts 62 through 73 alleged Hubbard (or aided and abetted by another), did knowingly engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity which is distribution of unlawful controlled substances and pseudoephedrine of specific instances of Counts 62 through 73 all in violation of 18 U.S.C. §§ 1957 & 2. (A. 12-21).

The Transactions in Criminally-Derived Property jury instruction stated that there were five elements needed to convict Hubbard:

"First, the defendant knowingly engaged [and/or] attempted to engage in a monetary transaction.
"Second, the monetary transaction was in property derived from specified unlawful activity.
"Third, the property had a value greater than \$10,000.
"Fourth, the defendant knew that the transaction was in criminally derived property.
"Fifth, the monetary transaction took place within the United States." (A. 78).

Hubbard asserts, as a matter of law, that the jury could not have found the first, second and fourth elements. As a matter of law, the jury could

not have found specified unlawful activity or that he knowingly engaged in such, or that he knew the transactions were in criminally derived property.

On Counts 63 and 65 through 72, Hubbard was charged with aiding and abetting another to commit money laundering under 18 U.S.C. § 2. The Aiding and Abetting jury instruction (18 U.S.C. § 1957 and 18 U.S.C. § 2), instructed the jury that there were three elements that a jury must find in order to convict:

"First, the crime of engaging ... in a monetary transaction involving property from unlawful activity ... was committed.

"Second, the defendant helped to commit the crime or encourage someone else to commit the crime.

"And third, the defendant intended to help commit or encourage the crime." (A. 80).

As a matter of law, the jury could not have found someone aided and abetted Hubbard because the first and third elements could not have been found. The jury could not have found he aided and abetted the illegal monetary transactions because he must share the same criminal intent as the aider and abettor, which according to Ruan, 142 S. Ct. at 2376, is subjective knowledge or "knowingly acting in an unauthorized manner." Hubbard and another must have intent to aid one another and have culpable knowledge or scienter, knowing the transactions were in criminally derived property. And again, the jury could not have found specified unlawful activity or "proceeds obtained from a criminal offense." (A. 80-81).

**F. Forfeiture of listed property pursuant to 21 U.S.C. § 853
& 18 U.S.C. § 982(a)(1)**

The indictment alleged that Hubbard in "committing the felony offenses alleged in Counts 1-60 of this second superseding Indictment ... used and intended to use the below-described property to commit and facilitate the commission of the said controlled substances violations, and the below-described property constitutes proceeds obtained directly and indirectly as a

result of the commission of the aforesaid violations of 21 U.S.C. § 841(a)(1)," of listed property. (A. 21-24).

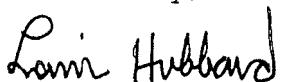
However, as a matter of law, the jury could not have found there were commissions of controlled substance violations under 21 U.S.C. § 841(a)(1) and therefore could not have found that property constituted proceeds obtained either directly or indirectly as a result of its commission. As a matter of law, the jury could not have found that Hubbard "intended to use" the below described property to commit and facilitate the commission of said controlled substances violations. As a matter of law, the jury could not have found that Hubbard committed the § 841 counts of the indictment which the government alleged were a nexus to the commission of controlled substances violations in the indictment, 1-60.

CONCLUSION

Petitioner Hubbard prays that this Honorable Court grant his petition for a writ of habeas corpus as to Question I, and transfer his petition back to the United States District Court for the Eastern District of Kentucky and to the Honorable Judge Danny C. Reeves directing and ordering Respondent to have a hearing and determination of Hubbard's Question II.

Or in the alternative, Hubbard prays that this Court grant such other relief as may be appropriate to dispose of this matter as law and justice require.

Sincerely,



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Date: 7-6-2025