No. 17-12653

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

Dr. Xiulu Ruan,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of Alabama, No. 1:15-cr-00088-CG-B-2 (Hon. Callie V.S. Granade)

SUPPLEMENTAL REPLY BRIEF OF APPELLANT ON REMAND

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1, counsel for Appellant certifies that the following persons and entities have an interest in the outcome of this case:

Armstrong, Gordon G. III – Counsel for Appellant

Bivins, Hon. Sonja F. – United States Magistrate Judge

Bodnar, Christopher J. – Assistant United States Attorney

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Couch, John Patrick – Co-Defendant

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Granade, Hon. Callie V.S. – United States District Court

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Ruan, Xiulu – Appellant

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United Health Group

* No public corporation owns any stock in these entities.

Dated: October 13, 2022

/s/ Lawrence S. Robbins
Lawrence S. Robbins

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PRELIMINARY STATEMENT

That "swooshing" noise you hear is the sound of the government sweeping all the difficult issues under the rug.

The district court's *mens rea* instruction was the polar opposite of the subjective standard adopted by the Supreme Court in this case. Rather than advise the jury that it could not convict Dr. Ruan unless he knew and intended to act without authorization, the district court invited the jury to convict Dr. Ruan even if all it found was that his prescriptions departed from the "usual course of professional medical practice." Tr. 6333. That fundamentally erroneous charge tainted *all* of the convictions in this case, not just the § 841 charges, as government maintains.

That instructional error is prejudicial as a matter of law under *McDonnell v. United States*, 579 U.S. 550 (2016), a case the government barely addresses. And even if a prejudice inquiry is warranted, the government does not and cannot carry its burden to show the instructional error harmless beyond a reasonable doubt. That is doubtless why the government helps itself to a more forgiving harmless error standard.[1]

[1] Dr. Ruan reiterates the request he made in his opening supplemental brief (at 1-2 n.1) that the Court order briefing on the implications of the government's concession before the Supreme Court that Alabama law, rather than a national standard, determines the bounds of professional practice.

ARGUMENT

I. THE DISTRICT COURT'S INSTRUCTION WAS FLATLY INCONSISTENT WITH THE *MENS REA* STANDARD ADOPTED BY THE SUPREME COURT.

The Supreme Court held that the government must "prov[e] that a defendant knew or intended that his or her conduct was unauthorized." *Ruan v. United States*, 142 S. Ct. 2370, 2382 (2022). The district court's *mens rea* instruction could not have departed further from that standard. Because the government seems unwilling to quote the court's instruction in full, here it is again:

> For a controlled substance to be lawfully dispensed by a prescription, the prescription must have been issued by a practitioner both within the usual course of professional practice and for a legitimate medical purpose. If the prescription was issued either, one, not for a legitimate medical purpose or, two, outside the usual course of professional practice, then the prescription was not lawfully issued.
>
> A controlled substance is prescribed by a physician in the usual course of a professional practice and, therefore, lawfully if the substance is prescribed by him in good faith as part of his medical treatment of a patient in accordance with the standard of medical practice generally recognized and accepted in the United States. The defendants in this case maintain at all times they acted in good faith and in accordance with standard of medical practice generally recognized and accepted in the United States in treating patients.
>
> *Thus* a medical doctor has violated section 841 when the government has proved beyond a reasonable doubt that the doctor's actions were either not for a legitimate medical purpose or were outside the usual course of professional medical practice.

Tr. 6333 (emphasis added).

1. It is scarcely surprising that the government is unwilling to defend these instructions on the merits. Although the second paragraph adverted to Dr. Ruan's good faith defense, the final, summarizing paragraph—headed by the word "Thus"—told the jury that it was free to convict defendant, regardless of his subjective beliefs, if he prescribed outside the "usual course of professional medical practice." That was the "bone" the district court was willing to "throw[]" to Drs. Ruan and Couch (Tr. 6107), and there was no meat on it. That is surely why the Solicitor General declined to defend (or even quote) the actual instructions in its Supreme Court briefing. Indeed, the Supreme Court flatly rejected as insufficient the Solicitor General's "objective honest effort" standard (which itself was more defense-friendly than the instruction given at Dr. Ruan's trial). *Ruan*, 142 S. Ct. at 2381.

2. The government claims (Br. 8-9) that the *mens rea* instruction, even if erroneous, tainted only the § 841 charges. Not so. First and most obviously, the CSA conspiracy charges, which expressly relied on the § 841 charges as their predicate, must be vacated. *See* Dkt. 269:20-22 (Second Superseding Indictment (Apr. 28, 2016)). True, the jury was told that, to be guilty of conspiracy, Dr. Ruan had to know "the unlawful purpose of the plan and willfully join[] in it," Gov. Br. 10; but that is cold comfort to the government's argument. In all but one instance, this instruction was given after the jury had already been told that the only thing the defendants had to know and intend was that they were *dispensing* controlled

substances, *see* Tr. 6330, 6334-35, 6343, 6346, 6348, 6350; the jury was not required to find subjective knowledge of a lack of authorization. The conspiracy instruction then incorporated that error by reference. Tr. 6331-35. And the district court compounded that error by telling the jury—immediately before the snippet cited by the government, Tr. 6335—that it could convict the defendants of conspiracy without regard to their subjective beliefs. *See* Ruan Br. 11 n.4; Tr. 6334-35.

The remaining convictions must be vacated too. The anti-kickback conspiracy charges, for example, turned on Dr. Ruan's purpose for issuing the challenged prescriptions; by mis-defining Dr. Ruan's good-faith defense, the district court invited the jury to convict on an erroneous basis. So too for the other fraud conspiracies, which the government concedes to be related to the propriety of prescribing (Br. 9). Those charges, too, turned on whether Dr. Ruan issued prescriptions in good faith, and thus likewise were irreparably tainted by the erroneous good-faith instruction. *See* Dkt. 269:37-38 (Second Superseding Indictment). And the racketeering charge expressly relied on the § 841 and wire and mail fraud charges as predicates, and thus suffered from the same errors. *See id.* at 19-20.

The government does not mention, much less distinguish, *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012). As in that case, this Court should consider the substantive CSA counts and the other charges "together" "because the manner

and means in which the fraudulent scheme was carried out directly related" to whether Dr. Ruan's prescribing was "legitimate and within the usual course of professional practice." *Id.* at 1227.

II. THE INSTRUCTIONAL ERROR WAS NOT HARMLESS.

1. As the Supreme Court explained in *McDonnell*, when an incorrect instruction may have led a jury to convict a defendant "for conduct that is not unlawful," the error cannot be harmless. *McDonnell v. United States*, 579 U.S. 550, 579-80 (2016). This is precisely what happened here. Because Dr. Ruan's jury was incorrectly instructed that § 841(a)'s *mens rea* element applied only to the act of *dispensing*, and not *authorization*, Dr. Ruan may have been convicted for conduct that the Supreme Court has now held not to be unlawful.

The government simply ignores this point. Rather than address *McDonnell*'s legal holding, the government's only reference to *McDonnell* is a passing attempt to distinguish the case on its facts. Gov. Br. 19. The significance of *McDonnell*, however, does not turn on facts. To the contrary, the import of *McDonnell* is that this Court need not parse the trial record where, as here, an instruction authorized the jury to convict for lawful conduct. This is dispositive, and the government offers no counter.

2. Even if a search for prejudice were warranted, the government misconceives its harmless error burden. The government does not dispute that an

incorrect *mens rea* instruction is constitutional error, and correctly cites to *Neder v. United States*, 527 U.S. 1 (1999), as authority for the harmless error inquiry. Gov. Br. 15. But the government misstates the standard. Under *Neder* and *Chapman v. California*, 386 U.S. 18 (1967), when a jury instruction contains an error of constitutional magnitude, the government must prove that the error was "harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24; *see also Neder*, 527 U.S. at 16. The question is not whether a reasonable jury could have convicted on the evidence offered at trial, but whether *any* reasonable jury *would have* convicted on the trial evidence. *See Neder,* 527 U.S. at 16 (constitutional error was harmless where "no jury could reasonably find" that the disputed element was not met). If a reasonable jury could have acquitted, the error cannot be harmless.

The government does not (and cannot) come close to making this showing. The trial was suffused with evidence of malpractice, with numerous government witnesses testifying to the "standard of care" for doctors. *See* Ruan Br. 15-17 (collecting examples). This evidence—reinforced by the district court's erroneous *mens rea* instruction—invited the jury to convict based on simple malpractice (or less). As the Supreme Court has now made abundantly clear, that is not the standard for criminal liability under § 841(a). *See Ruan*, 142 S. Ct. 2370.

Rather than grapple with the prejudicial impact of the jury instructions, the government notes that there was at least *some* evidence that transcended simple

malpractice. But as the government fails to dispute, that proof was hotly contested. *See* Ruan Br. 16-18. The government also omits to mention any of the trial evidence *supporting* Dr. Ruan, including testimony from medical experts and former PPSA employees, some of whom were government witnesses, about Dr. Ruan's long history of dedicated, effective medical practice. Where "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding," the reviewing court "should not find the error harmless." *Neder*, 527 U.S. at 19.

Moreover, because it believed that good faith was a defense only if Dr. Ruan's conduct otherwise fit within objective professional norms, the district court precluded Dr. Ruan from introducing independent evidence of his good faith. *See* Ruan Br. 18 n.6. Over Dr. Ruan's objection, the district court excluded "good patient" testimony and videos of undercover agents who sought and failed to obtain opioids in improper circumstances from Dr. Ruan. *See United States v. Ruan*, 966 F.3d 1101, 1153 (11th Cir. 2020). This evidence was, to say the least, plainly relevant to Dr. Ruan's good-faith defense, and makes the government's harmless error burden even greater. Yet the government has nothing to say about it.

There is, in short, no substance to the government's harmless error argument. In contending otherwise, the government appropriates to itself a decision that belongs in the first instance to a properly instructed jury.

CONCLUSION

This Court should vacate all of Dr. Ruan's remaining convictions and vacate his sentence.

Dated: October 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the page limitation set by the Eleventh Circuit Court of Appeals in its August 8, 2022, order on supplemental briefing in this case, because it is not longer than 10 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. (32)(a)(5) and type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in Times New Roman 14-point font, a proportionally spaced typeface, using Microsoft Office 365.

Dated: October 13, 2022

/s/ Lawrence S. Robbins
Lawrence S. Robbins

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2022, this brief was filed and served on all parties by CM/ECF.

/s/ Lawrence S. Robbins
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