

IN THE SUPREME COURT OF THE UNITED STATES

---

PAUL H. VOLKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

DONALD B. VERRILLI, JR.  
Solicitor General  
Counsel of Record

LESLIE R. CALDWELL  
Assistant Attorney General

JOHN P. TADDEI  
Attorney

Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217

---

---

## QUESTIONS PRESENTED

1. Whether the district court's instructions adequately advised the jury of the elements required to commit the offense of illegally dispensing a controlled substance, in violation of 21 U.S.C. 841(a)(1).

2. Whether the district court complied with this Court's decision in Burrage v. United States, 134 S. Ct. 881 (2014), by issuing an instruction that a "death result[s]" from trafficking in a controlled substance within the meaning of 21 U.S.C. 841(b)(1)(C) if "the death would not have occurred" had the victim not ingested the controlled substance.

IN THE SUPREME COURT OF THE UNITED STATES

---

No. 13-8827

PAUL H. VOLKMAN, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 736 F.3d 1013.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 2013. A petition for rehearing was denied on January 23, 2014 (Pet. App. A17). The petition for a writ of certiorari was filed on February 19, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted of one count of conspiracy to unlawfully distribute a controlled substance, in violation of 21 U.S.C. 841(a)(1) and 846; eight counts of unlawful distribution of a controlled substance, in violation of 21 U.S.C. 841(a)(1); four counts of unlawful distribution of a controlled substance leading to death, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); four counts of maintaining drug-involved premises, in violation of 21 U.S.C. 856(a)(1); and one count of possession of a firearm in furtherance of a drug-trafficking offense, in violation of 18 U.S.C. 924(c)(1) and (2). Judgment 1-2. Petitioner was sentenced to four consecutive terms of life imprisonment for the counts of unlawful distribution resulting in death, to concurrent terms of 120 and 240 months of imprisonment for most of the remaining counts, and to a further consecutive term of 60 months of imprisonment for the firearm-possession count, all to be followed by three years of supervised release. Id. at 3-4. The court of appeals affirmed. Pet. App. A1-A16.

1. Petitioner was a self-described "pain management physician" with an M.D. and a Ph.D. in pharmacology. Pet. App. A2. After several lawsuits, he was left with no job and no malpractice insurance. Ibid. In spring 2003, he began working as a

doctor at Tri-State Health Care, a small clinic in Portsmouth, Ohio, that specialized in distributing pain medication. Ibid.; Gov't C.A. Br. 5-6. Six months into his tenure there, pharmacies began refusing to fill the clinic's prescriptions due to concerns over improper dosing and inadequate patient screening. Pet. App. A2; Gov't C.A. Br. 6. As an alternative, petitioner convinced the clinic's owners to obtain a license to operate a dispensary. Pet. App. A2; Gov't C.A. Br. 7, 44. During a follow-up inspection, the Ohio Board of Pharmacy observed several problems with the new dispensary, including sloppy record-keeping and a lack of physician oversight of the distribution process. Pet. App. A2.

The clinic also purchased and distributed an inordinately large amount of pain medication. Pet. App. A2-A3. Between July 2003 and September 2005, petitioner purchased more than 20 times as much oxycodone as any other medical practitioner in Ohio. Ibid.; Gov't C.A. Br. 9-10. The clinic's high level of activity was largely attributable to petitioner's unorthodox medical practice. Pet. App. A3. He glossed over patients' medical histories and failed to conduct adequate physical examinations. Ibid.; Gov't C.A. Br. 10, 43. Instead of following the common practice of initially treating pain with less potent drugs, he immediately prescribed strong pharmaceutical cocktails consisting of opiates, including oxycodone and hydrocodone, and seda-

tives, such as Valium, Xanax, and Soma. Pet. App. A3. Petitioner often provided minimal explanation of how those multiple controlled substances might interact with one another or their potential adverse effects. Gov't C.A. Br. 10, 43-44. Many of petitioner's "patients" were drug addicts or individuals with criminal convictions for dealing drugs. Pet. App. A3; Gov't C.A. Br. 10-11, 44. Some did not even complain of pain. Pet. App. A3; Gov't C.A. Br. 11, 44.

When federal agents searched the clinic in June 2005, they found urine specimens in cups on the floor, pills scattered about, and patient files stored in random locations, including inside a kitchen stove. Pet. App. A3; Gov't C.A. Br. 11-12. Investigators also noted that the facility lacked equipment to read X-rays and MRI results. Pet. App. A3; Gov't C.A. Br. 12. Petitioner was fired three months after the investigation, but soon opened his own "pain clinic" in another location. Pet. App. A3; Gov't C.A. Br. 12.

Between June 2003 and November 2005, 12 of petitioner's patients died. Pet. App. A3; Gov't C.A. Br. 13. Four of those deaths led to petitioner's convictions for unlawful distribution of a controlled substance resulting in death. Pet. App. A10-A14; Gov't C.A. Br. 49-67. Kristi Ross died the day after petitioner doubled the daily dosage for her oxycodone prescription and prescribed additional sedatives. Pet. App. A11; Gov't

C.A. Br. 13, 50-55. Steve Hieneman died the day after petitioner gave him a prescription to take 180 milligrams (mgs) of oxycodone per day, combined with prescriptions for Valium and Xanax. Pet. App. A11-A12; Gov't C.A. Br. 14, 55-59. Bryan Brigner died two days after petitioner increased his daily oxycodone dosage eight-fold and prescribed additional opiates and sedatives. Pet. App. A12-A13; Gov't C.A. Br. 14, 60-64. And Earnest Ratcliff died the day after he filled petitioner's prescription for 240 doses of 30 mgs of oxycodone per day, plus additional opiates and sedatives. Pet. App. A13-A14; Gov't C.A. Br. 14, 65-67.

2. Petitioner was charged with one count of conspiracy to illegally dispense controlled substances, in violation of 21 U.S.C. 841(a)(1) and 846; with multiple counts of illegally dispensing controlled substances, including distributions that resulted in death, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(C); and with other drug-related crimes. Pet. App. A3; see p. 2, supra.

At trial, several medical experts evaluated petitioner's methods and testified that he prescribed and dispensed controlled substances without a legitimate medical purpose outside the usual course of professional practice. Pet. App. A7-A9; Gov't C.A. Br. 33. Other physicians testified that the deaths of Ross, Hieneman, Brigner, and Ratcliff were consistent with

ingesting the drugs that petitioner had prescribed them. Pet. App. A10-A14; Gov't C.A. Br. 49-67.

In his proposed jury instructions addressing violations of 21 U.S.C. 841, petitioner requested that the district court instruct the jury that, "in order to find the defendant guilty, you must find that he used his prescription-writing power as a means to engage in the illicit drug-dealing and trafficking as conventionally understood." Pet. App. A4. He asked that the language be included after the last sentence of the instruction discussing the standard of care. Gov't C.A. Br. 19. That portion of the instruction read:

This case is not about whether the defendant acted negligently or whether he committed malpractice. Rather, in order for you to find the defendant guilty, you must find that the government has proved to you beyond a reasonable doubt that the defendant's action was not for a legitimate medical purpose in the usual course of professional practice.

Ibid. The district court declined to give petitioner's proposed instruction, explaining that it would confuse the jury. Ibid.

In addition to the instruction quoted above, the district court's jury instructions further explained the contours of illegal distribution of a controlled substance when a registered physician is the defendant. Pet. App. A5-A7. It noted that "[c]arelessness or negligence or foolishness" is insufficient to sustain a conviction and that the jury "must be convinced beyond a reasonable doubt that the defendant was aware of a high proba-



bility that the controlled substances were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose." Id. at A6.

Specifically connecting the definitions of those phrases with the case, the court further stated as follows:

A physician's own individual treatment methods do not, by themselves, establish what constitutes a "usual course of professional practice." In making medical judgments concerning the appropriate treatment for an individual, however, physicians have discretion to choose among a wide range of available options.

It's the theory of the defense that [petitioner] \* \* \* treated his patients in good faith. If a physician dispenses a drug in good faith in the course of medically treating a patient, then the doctor has dispensed the drug for a legitimate medical purpose in the usual course of accepted medical practice. That is, he has dispensed the drug lawfully.

"Good faith" in this context means good intentions and an honest exercise of professional judgment as to a patient's medical needs. It means that the defendant acted in accordance with what he reasonably believed to be proper medical practice.

In considering whether the defendant acted with a legitimate medical purpose in the course of usual professional practice, you should consider all of the defendant's actions and the circumstances surrounding them.

Pet. App. A6 (emphasis omitted).

For purposes of the counts alleging illegal distribution resulting in death, the court issued the following instruction:

In order to establish that a death resulted from defendant's conduct, the government need not prove that the death was foreseeable to the defendant, but the government must prove beyond a reasonable doubt

that the death would not have occurred had the mixture and substance containing a detectable amount of oxycodone, a Schedule II controlled substance dispensed by the defendant, not be[en] ingested by the individual.

Jury Charge 30-31.

The jury found petitioner guilty of, inter alia, numerous counts of illegally dispensing controlled substances, including distributions resulting in death, in violation of 21 U.S.C. 841. Pet. App. A3.

3. Petitioner pressed multiple contentions on appeal, all of which were rejected by the court of appeals. Pet. App. A1-A16.

a. As relevant here, petitioner contended that the district court had erred by denying his proposed jury instruction. Pet. App. A3-A4. The court of appeals rejected that claim, holding that the district court's instructions "amply and accurately conveyed the meaning of 'legitimate medical purpose' to the jury -- the ultimate purpose of [petitioner's] proposed instruction." Id. at A7. It further noted that "[t]he district court's instructions appropriately defined the contours of the offense without unduly cabining the jury's ability to consider a broad swath of evidence in determining whether [petitioner's] conduct had no legitimate medical purpose." Ibid. The court of appeals concluded that the district court's instructions were "not only adequate, but an example of model instructions for cases such as this one." Id. at A5.

The court of appeals recognized that petitioner's proposed instruction was "copied verbatim" from this Court's decision in Gonzales v. Oregon, 546 U.S. 243 (2006). Pet. App. A4. It explained, however, that "[c]ontext is critical, and in the present context of federal criminal law, Gonzales provides \* \* \* little guidance." Ibid. Relying in part on decisions from three other courts of appeals, the court of appeals noted that "Gonzales was decided in the setting of administrative law, not criminal law" and it "dealt only with the question of the Attorney General's ability to define 'legitimate medical purpose' in light of state medical standards." Ibid. (citing United States v. Lovern, 590 F.3d 1095, 1100 (10th Cir. 2009); see ibid. (quoting similar observations from United States v. Kanner, 603 F.3d 530, 535 (8th Cir. 2010), and United States v. Armstrong, 550 F.3d 382, 397 (5th Cir. 2008), cert. denied, 558 U.S. 829 (2009)). As a result, the court found that Gonzales "did not impose new requirements to prove a violation of the [Controlled Substances Act (CSA)]" and that petitioner's "proposed instruction would have needlessly narrowed the scope of the jury's inquiry." Id. at A5.

The court of appeals also agreed with the district court that petitioner's proposed instruction was "nebulous[]" and likely to confuse the jury. Pet. App. A5. It noted that insofar as petitioner's "goal was to conjure up the unsavory specter

of 'street' drug dealing -- complete with imagery of shady characters conducting quick, suspicious handoffs -- then his instruction was not an accurate statement of the law, for 'street' drug dealing is not necessary to prove a violation of the CSA." Ibid.

The court of appeals' conclusion was "reinforced" by its determination that the district court had "substantially covered what [petitioner] sought to convey" by describing what constituted a "legitimate medical purpose" in the "usual course of professional practice," as well as by connecting those terms to petitioner's defense that he had "treated his patients in good faith." Pet. App. A5-A6.

Accordingly, the court of appeals held that "the district court properly rejected [petitioner's] proposed instruction." Pet. App. A7.

b. As also relevant here, the court of appeals further rejected petitioner's contention that the evidence was insufficient to establish that the oxycodone that he prescribed had resulted in the deaths of four victims. Pet. App. A10-A14. Discussing the facts and testimony, id. at A11-A14, the court held that, with respect to each of the four victims, "there was sufficient evidence for a jury to conclude that (1) [petitioner] issued a prescription; (2) that had no legitimate medical purpose; (3) which resulted in death," id. at A11.

## ARGUMENT

1. Petitioner principally contends (Pet. 11-17) that the court of appeals erred by declining to instruct the jury that a conviction under 21 U.S.C. 841(a)(1) requires a physician to act as a drug pusher. He contends (Pet. 11) that the decision below conflicts with this Court's decision in United States v. Moore, 423 U.S. 122 (1975), and with dictum in Gonzales v. Oregon, 546 U.S. 243 (2006). No such conflict exists, and further review is unwarranted.

a. In Moore, the Court held that licensed physicians, registered under the CSA, can be subject to criminal liability under 21 U.S.C. 841 "when their activities fall outside the usual course of professional practice." 423 U.S. at 124. The Court reasoned that, under the statutory predecessor to the CSA, physicians "who departed from the usual course of medical practice" had been subject to the same penalties as "street pushers," and that "the scheme of the [CSA], viewed against the background of the legislative history, reveals an intent to limit a registered physician's dispensing authority to the course of his 'professional practice.'" Id. at 139-140. Applying that standard, the Court concluded that "[t]he evidence presented at trial was sufficient for the jury to find that respondent's conduct exceeded the bounds of 'professional practice.'" Id. at 142 (footnote omitted). Although the Court did

not specifically decide what jury instructions would be appropriate, it implicitly endorsed the jury instructions given, which stated that a physician could be found guilty of violating Section 841 if he dispensed controlled substances "other than in good faith \* \* \* in the usual course of a professional practice and in accordance with a standard of medical practice generally recognized and accepted in the United States." Id. at 139.

As the court of appeals correctly concluded, the jury instructions in this case were consistent with Moore and adequately described the conduct required for conviction. Pet. App. A4-A7. Viewed as a whole, those instructions required the jury to find that petitioner knowingly and intentionally prescribed or dispensed controlled substances for nonmedical reasons. Thus, the district court instructed the jury that it "must be convinced beyond a reasonable doubt that the defendant was aware of a high probability that the controlled substances were distributed or dispensed outside the course of professional practice and not for a legitimate medical purpose." Id. at A6. The district court then explained that a physician acts "lawfully" if he "dispenses a drug in good faith in the course of medically treating a patient." Ibid. Those and other aspects of the instructions, which the district court tailored to the facts of this case, were a "model of clarity and comprehensiveness in

defining the unlawful-distribution offense for a case involving a so-called 'pill mill' doctor." Id. at A7.

b. This Court's subsequent decision in Gonzales does not indicate otherwise. In Gonzales, an interpretive rule issued by the Attorney General "prohibit[ed] doctors from prescribing regulated drugs for use in physician-assisted suicide, notwithstanding a state law permitting the procedure." 546 U.S. at 248-249. The Court struck down the interpretive rule, holding that "the CSA's prescription requirement does not authorize the Attorney General to bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct." Id. at 274-275. In reaching its decision, the Court observed that "[t]he statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood." Id. at 269-270.

Noting the Court's reference to "illicit drug dealing and trafficking as conventionally understood," petitioner contends (Pet. 11-12) that Gonzales effectively adopted that language as a new standard for violations of the CSA. Every court of appeals to address that contention has correctly rejected it. Pet. App. A4-A5; United States v. Kanner, 603 F.3d 530, 535 (8th Cir. 2010); United States v. Lovern, 590 F.3d 1095, 1100 (10th

Cir. 2009); see United States v. Armstrong, 550 F.3d 382, 397 (5th Cir. 2008) (noting that "knowingly distributing prescriptions outside the course of professional practice is a sufficient condition to convict a defendant under the criminal statutes relating to controlled substances"), cert. denied, 558 U.S. 829 (2009), overruled on other grounds by United States v. Balleza, 613 F.3d 432, 433 n.1 (5th Cir.), cert. denied, 131 S. Ct. 680 (2010).<sup>1</sup>

As the decision below explained, Gonzales "provides [courts] with little guidance \* \* \* in the setting of a criminal prosecution" and "did not impose new requirements to prove a violation of the CSA." Pet. App. A4-A5; see also Lovern, 590 F.3d at 1100 (noting Gonzales is limited to situations in which the government seeks "to unilaterally define which

---

<sup>1</sup> The court of appeals' decisions that petitioner invokes (Pet. 12-13) in support of his "drug pusher" formulation are not to the contrary, because they used the same formulations that were contained in the jury instructions in this case. See United States v. Wexler, 522 F.3d 194, 205-206 (2d Cir. 2008) (requiring government to prove that defendant "caused the drugs to be dispensed other than for a legitimate medical purpose, other than in good faith, and not in the usual course of medical practice"); United States v. Feingold, 454 F.3d 1001, 1008 (9th Cir.) (holding that jury instructions including the "legitimate medical purpose" and "course of professional practice" standards, as well as good-faith instruction, correctly "require[d] the jury to find that [the defendant] intentionally acted outside the usual course of professional practice"), cert. denied, 549 U.S. 1067 (2006); United States v. Tran Trong Cuong, 18 F.3d 1132, 1137 (4th Cir. 1994) (citing Moore standard); United States v. Vamos, 797 F.2d 1146, 1151 (2d Cir. 1986) (same), cert. denied, 479 U.S. 1036 (1987).



practices fall outside the scope of professional practice") (citation, internal quotation marks, and alteration omitted). Gonzales does not redefine the standards in a criminal proceeding in which the government's theory of the case is that a particular defendant's actions were outside the scope of professional practice. Kanner, 603 F.3d at 532-535; Lovern, 590 F.3d at 1099-1100.

In this case, the government did not attempt, as it had in Gonzales, "to unilaterally define which practices fall outside the scope of professional practice; rather, it intended to leave that question where it has been for over 30 years -- with the jury." Lovern, 590 F.3d at 1000 (citation, quotation marks, and brackets omitted). Therefore, the court of appeals correctly reasoned that "Gonzales has no application here," Kanner, 603 F.3d at 535, and the district court's decision to deny petitioner's requested instruction was proper. Further review of the jury instruction is accordingly unwarranted.

2. In the alternative, petitioner contends (Pet. 18-23) that this case should be remanded to the court of appeals for further proceedings in light of Burrage v. United States, 134 S. Ct. 881 (2014). But such a remand would serve no purpose, because the jury instructions were consistent with Burrage and petitioner has not established that the evidence was insufficient to support the jury's verdict.

a. Burrage construed 21 U.S.C. 841(b)(1)(C), which subjects a defendant who distributes a Schedule I or Schedule II drug to enhanced penalties if "death or serious bodily injury results from the use of" the drug he distributes. 134 S. Ct. at 885. The defendant in Burrage had distributed heroin to a victim, who used the heroin along with oxycodone and other drugs obtained elsewhere and died of a "mixed drug" overdose. Id. at 885. The Court concluded that the district court's instructions in that case, which required the jury to find only that the heroin was a "contributing cause" of the victim's death, were erroneous because they did not require but-for causation. Id. at 886, 892. The Court held that, because the statute requires that death or injury "results from" the drug in question, "at least where use of the drug distributed by the defendant is not an independently sufficient cause of the victim's death or serious bodily injury, a defendant cannot be liable \* \* \* unless such use is a but-for cause of the death or injury." Id. at 891-892.

b. Here, as petitioner concedes (Pet. 21), the district court correctly "gave the jury a 'but-for' causation instruction."<sup>2</sup> Thus, petitioner does not suggest that Burrage has

---

<sup>2</sup> The district court instructed the jury that "[i]n order to establish that a death resulted from defendant's conduct \* \* \* the government must prove beyond a reasonable doubt that the death would not have occurred had the mixture and substance containing a detectable amount of oxycodone, a Schedule II

revealed any infirmity in the jury instructions. Instead, he contends (Pet. 21) that the evidence was not sufficient to support a conviction under the offense "as stated in the district court's jury instruction." That contention lacks merit.

Petitioner's sufficiency-of-the-evidence argument requires him to establish that no rational trier of fact could find that petitioner's prescriptions were a but-for cause of the deaths of the four victims. See Jackson v. Virginia, 443 U.S. 307, 319 (1979). Although petitioner suggests that the parties proceeded in the court of appeals without "the clarification of Burrage," Pet. 19, there was no dispute that the evidence needed to support but-for causation. Thus, the government contended that "there was sufficient evidence for any rational jury to find beyond a reasonable doubt that the deaths of these four 'patients' would not have occurred had they not ingested the oxycodone [petitioner] prescribed." Gov't C.A. Br. 50 (emphasis added). On the basis of its own detailed review of the record, the court of appeals correctly rejected petitioner's contrary contention that the evidence was insufficient. Pet. App. A11-A14.

c. Petitioner suggests that the court of appeals' analysis was flawed because it repeatedly referred to evidence about

---

controlled substance dispensed by defendant, not be[en] ingested by the individual." Jury Charge 30-31.

a "combination[]" of oxycodone and other drugs or about the "cumulative effect[s]" of multiple drugs including oxycodone. Pet. 22 (emphases omitted); see Pet. App. A11, A13, A14. But that suggestion rests on an apparent misunderstanding of what constitutes "but-for" causation. Petitioner seems to believe that oxycodone must have been the sole cause of each death. While that would indeed suffice, Burrage itself explained that but-for causation also exists when the drug in question "combines with other factors to produce the result." 134 S. Ct. at 888 (emphasis added). Thus, in the Court's example: "if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived." Ibid.

Under that test, the evidence here was sufficient to establish that oxycodone was a but-for cause of the death of each of the four victims, even if it would have been fatal only in combination with other drugs or diseases. See Pet. App. A11-A14; Gov't C.A. Br. 49-67. Indeed, petitioner does not even suggest that other drugs or diseases would have been sufficient to result in the death of any of the victims in the absence of the oxycodone that petitioner had prescribed. Accordingly, Burrage does not warrant further review -- even by the court of appeals -- of petitioner's sufficiency-of-the-evidence argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
Solicitor General

LESLIE R. CALDWELL  
Assistant Attorney General

JOHN P. TADDEI  
Attorney

JULY 2014