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WHITE-COLLAR CRIME

'Mens Rea' on Appeal

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Mental state is usually the key issue in a white-collar criminal case. Whether framed as a question of knowledge, intent, willfulness, lack of good faith, or a variation thereof, the government must be prepared to prove a defendant's guilty state of mind, or mens rea, beyond a reasonable doubt.

The defense's challenge is to point to evidence and logic that casts doubt on the government's proof of mens rea. When a white-collar case goes to trial, naturally the jury instruction on the requisite state of mind is of particular importance. If that instruction is wrong, and the "harmless error" standard controls, how should that standard be applied? Is it applied differently because the instruction goes to mens rea?

Those were the basic questions addressed in the Second Circuit's recent decision in *United States v. Parasmo*, 176 F.4th 220 (2d Cir. 2026). The defendant, a medical doctor, was convicted of unlawfully distributing opioids under 21 U.S.C. §841, which prohibits knowingly and intentionally distributing controlled substances "[e]xcept as authorized."

Courtesy photos

Elkan Abramowitz, left, and Jonathan Sack.

The Supreme Court in *Ruan v. United States,* 597 U.S. 450 (2022), held that the government bears the burden of disproving a defendant's claim of "authoriz[ation]," and further that the issue of authorization turns on a defendant's subjective mental state.

Many courts, including the Second Circuit, had previously defined the issue in terms of the objective reasonableness of the defendant's claimed authorization. *See* E. Abramowitz & J. Sack, "'Ruan v. United States' Reinforces Importance of *Mens Rea* in Federal Criminal Law," N.Y.L.J. (Nov. 1, 2022). Dr. Parasmo was tried and convicted under a pre-*Ruan* instruction.

In this article, we analyze the Second Circuit's decision, which affirmed Parasmo's conviction despite acknowledging error in the district court's pre-*Ruan* jury instruction. Next, we examine a dissenting opinion, which questioned the majority's application of the harmless error standard. Finally, we consider the limits of harmless error review when a jury has been instructed to decide *mens rea* under an erroneous legal standard.

Background

Frank Parasmo, a medical doctor licensed to prescribe opioids, wrote prescriptions for large quantities of oxycodone and hydrocodone for at least 20 patients in 2014 and 2015. Many of the patients displayed red flags indicating that they should not have been prescribed either medication.

The markers of misuse of the medications included signs of addiction, positive tests for narcotics and negative tests for the prescribed drugs. Parasmo continued to prescribe opioids to such patients even after receiving written warnings from insurers, pharmacies, and the New York State Medical Society that he was overprescribing.

A grand jury in the Eastern District of New York returned a 35-count indictment for distributing oxycodone and hydrocodone without authorization, in violation of 21 U.S.C. §841. Section 841 makes it a federal crime, "*[e]xcept as authorized* [,]... for any person knowingly or intentionally... to manufacture, distribute, or dispense... a controlled substance" (emphasis added).

The defendant argued at trial that he had acted in "good faith," and the district court instructed the jury that to "determine whether the defendant acted in good faith" it should consider whether "the defendant acted in accordance with what he reasonably *believed to be the standard of medical practice generally recognized and accepted in the state of New York*" (emphasis added).

The defense sought a good faith instruction, denied by the district court, which considered Parasmo's "good intentions" and considered whether he had acted in "the honest exercise of professional judgment as to a patient's needs." Parasmo was convicted at trial on 32 of the 35 counts of unlawful drug distribution.

While Parasmo's post-trial motions were pending, the Supreme Court decided *Ruan*, which considered the "state of mind that the [g]overnment must prove to convict... doctors of violating [section 841 (a)(1)]." The Supreme Court adopted a "subjective" standard, meaning that when a defendant produces evidence that he is "authorized to dispense controlled substances," the burden shifts to the government to "prove beyond a reasonable doubt that the defendant knew that... []*he was acting in an unauthorized manner.*" (emphasis added). Parasmo filed a supplemental motion for acquittal or a new trial, in light of Ruan which the district court denied.

Majority Opinion

On appeal, Parasmo argued that his conviction should be set aside because the district court's erroneous instruction was so prejudicial that it could not be found to be harmless error. An error in jury instructions is harmless when "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Ng Lap Seng*, 934 F.3d 110, 129 (2d Cir. 2019). On May 19, 2026, the Second Circuit affirmed the conviction, with Judge Sullivan writing for the majority, along

with Judge Kearse, and Judge Robinson writing in dissent.

The court first determined that the district court's jury instruction was erroneous under Ruan, but that the error was mitigated by the continued relevance of objective indicia of mental state, regardless of the specific mens rea instruction given to the jury, and because the instruction "hinted" at subjective intent.

Judge Sullivan noted that the *Ruan* decision did not "bar all consideration of objective criteria" and found that the government could still appropriately refer to "objective criteria," such as "'legitimate medical purpose' and 'usual course' of 'professional practice'" as circumstantial evidence of a defendant's subjective intent.

Sullivan also explained that although the instruction "incorrectly suggested that good faith, in and of itself, required that Parasmo was (objectively) 'acting reasonably,'" the instruction "hinted at the correct subjective standard of intent" by referring to "good faith" as involving the "honest exercise of best professional judgment as to a patient's needs."

The court next analyzed whether the error was harmless, asking whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Ng Lap Seng,* 934 F.3d at 129.

To determine whether a jury would have reached the same conclusion if properly instructed, Judge Sullivan reviewed the trial evidence in detail, including the treatment history of specific patients and the red flags that, in the majority's view, Parasmo had been faced with but not heeded. He concluded that a rational jury would have found Parasmo guilty beyond a reasonable doubt if it had been instructed correctly.

Dissent

Judge Robinson agreed with the majority that the instruction was erroneous, but she did not agree with the majority's approach to the harmless error analysis or its conclusion that the error was harmless. She began her dissent by quoting one of the country's founders, John Adams, who wrote that juries are the "'heart and lungs' of liberty" in the criminal justice system.

She emphasized that when an element of an offense is contested, appellate courts "should be extremely wary of treating the failure to require the jury to make a finding as to that element as a harmless error, lest we usurp the jury's role." Judge Robinson wrote that, while the evidence was sufficient to establish guilt, that was very different from concluding that that the jury "would" have reached that conclusion beyond a reasonable doubt if they had been correctly instructed.

In contrast to the majority, Robinson pointed to "ample evidence" from which the jury could have found that the government had not carried its burden to prove that Parasmo had acted with a culpable intent.

She pointed to Parasmo's "copious and detailed notes" of his patients' symptoms and what he prescribed and the absence of "hallmarks of a pill mill," such as no "prescriptions without examination, fake patients, cash payments, lines of people waiting to get into the mill, and cash kickbacks from a pharmacy," as evidence that he did not knowingly or intentionally act without authorization. Like the majority, Robinson discussed individual patient histories but reached a different conclusion.

In Robinson's view, the majority gave insufficient weight to the broader context of Parasmo's prescriptions, including that the patients all had histories of chronic pain and that Parasmo faced

not only certain red flags of misuse but also real patients suffering from pain. This evidence taken as a whole, in Judge Robinson's view, undermined a finding of harmless error since it supported a rational jury finding that Parasmo subjectively believed he was prescribing opioids for the legitimate purpose of treating his patients' pain.

Robinson disagreed with the majority's contention that her view of the record was "highly selective," countering that the harmless error analysis requires the court to focus on evidence that may support a defendant's defense under correct instructions.

Robinson also noted the government's repeated emphasis in summation on an objective standard and explicit (and erroneous) assertion that Parasmo's belief had to be "reasonable" and "*not subjective*." She expressed concern that the erroneous instruction in combination with the government summation generated a substantial risk that the jury had been misled.

Judge Robinson found support in other Second Circuit cases. In *United States v. Pabisz*, 936 F.2d 80 (2d Cir. 1991), as in Parasmo's trial, the instruction erroneously focused on the objective reasonableness of the defendant's beliefs, an error exacerbated by the government's summation. In *United States v. Tureseo*, 566 F.3d 77 (2d Cir. 2009), the Second Circuit found at least some trial testimony suggesting that the defendant did not have the knowledge required for an aggravated identity theft conviction. In both cases the Second Circuit found the errors not to be harmless.

The majority in *Parasmo*, in contrast, distinguished both cases, noting that unlike the defendant in *Pabisz, Parasmo* did not testify at trial and "introduce any direct evidence of his subjective beliefs," and the evidence in *Tureseo* was thin versus the "overwhelming[]" evidence at Parasmo's trial.

Robinson also relied on the Tenth Circuit's decision in *United States v. Kahn,* 58 F.4th 1308 (10th Cir. 2023) and the Eleventh Circuit's decision in *United States v. Duldulao,* 87 F.4th 1239 (11th Cir. 2023), both of which vacated convictions because flawed state of mind instructions went "directly to the heart of the trial."

Because the erroneous jury instruction in *Parasmo* ultimately took the "central contested factual issue" in the case away from the jury, Judge Robinson found the error also "undermined the fundamental fairness of [Parasmo's] trial" as in *Kahn* and *Duldulao.*

Conclusion

The analysis conducted by the Second Circuit majority, which parsed the trial record, contrasts with the approach taken by other appellate courts. In *Kahn*, the Tenth Circuit declined to "wade through the evidence" at all, concluding that when the defendant's intent "was the centerpiece of his defense," an instructional error on that element could not be harmless.

The court emphasized that "to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee."

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