

# Drugs on the Docket Podcast

## Season 1.5 Episode 2.5 – After *Ruan*: the implications of Supreme Court decisions and the prosecution of doctors

### TRANSCRIPT:

**Hannah Miller:** From the Drug Enforcement and Policy Center at The Ohio State University, this is Drugs on the Docket. Each episode will tell the story of how U.S. court decisions impact drug law and policy and continue to shape the War on Drugs. I'm your host, Hannah Miller.

While the United States Supreme Court offers the final word on important legal questions, its decisions ripple through the justice system, sometimes offering clarity but often times spurring additional legal debate surrounding ongoing or seemingly settled judicial matters.

In this episode of Drugs on the Docket, we're examining the legal implications of the Supreme Court case *Ruan v. United States* and how this decision is influencing the prosecution and appeal of similar cases in lower courts.

If you like what you hear in today's episode, visit [go.osu.edu/drugsonthedocket](http://go.osu.edu/drugsonthedocket) to follow the series.

While we're working hard to bring you more content, Doug and I thought it would be fun to provide some updates and additional commentary on topics we covered in season one of Drugs on the Docket. So, today we're talking through a fourth circuit United States Court of Appeals decision for *United States v. Kim*, one of many current attempts to appeal court decisions since the Supreme Court issued their ruling in the 2022 case, *Ruan v. United States*. So, Doug, if you could please provide a summary of *Ruan v. United States*, that would be great.

**Douglas Berman:** *Ruan* was the opportunity for the Supreme Court to examine an issue that's been coming up nationwide for awhile when Federal prosecutors have sought to use standard drug prohibition, basically the law that says you can't knowingly or intentionally distribute controlled substances, against doctors that often were described as running "pill mills" or being very loose with the way in which they would prescribe and distribute opioids as part of the broader opioid epidemic. Of course doctors have authority to distribute controlled substances, if they're doing it the right way, as actual doctors.

And what was uncertain in a lot of litigation before we got to the *Ruan* ruling by the Supreme Court was if a doctor is seeming to violate medical practice, giving out prescriptions without really functioning as a doctor, and it's obvious kind of objectively, that's often the language used, anybody looking at that would say oh that doesn't look like a doctor really being a doctor. Was that enough to turn that doctor into an illegal drug dealer? Or could the doctor say, well, no, I'm just sort of a new age doctor who thinks opioids helps with everything or that thinks more generally that we're too stringent in the way we hand out prescriptions and we ought to trust patients more or whatever the argument might be? If the doctor could claim, if the doctor would assert, I genuinely believe I was still functioning as a legitimate doctor, even though maybe the circumstances suggests I was very loose with my prescriptions, would that be a valid defense to prosecution under the drug dealing statute? And without getting into a lot of the technicalities, the Supreme Court said, yes, for our criminal laws it's not enough just that somebody actively we would say it doesn't look like you're functioning as a doctor, the government's going to have to prove, and prove beyond a reasonable doubt to a jury, if it gets to a jury trial, that the doctor knew or intentionally realized that they weren't actually functioning as a doctor and didn't believe they were functioning as a doctor, they really were functioning as just a standard issue drug dealer.

**Hannah Miller:** Around the time of recording our episode on *Ruan*, the Supreme Court had recently handed down its decision in favor of petitioners and our guests for that episode, Jenn and Kelly, they had filed an amicus brief in support of the petitioners and were understandably buzzing from the win. There were a lot of questions about how the outcome of that case might impact the investigation and prosecution of medical doctors authorized to prescribe controlled substances going forward. And so we're one year removed from that Supreme Court decision and we're

seeing how things are starting to play out retroactively. And my sense is it is not clean. It's a very messy process. So let's talk about *United States v. Kim* kind of from the top. What is this case about in relation to Ruan?

**Douglas Berman:** Kim is one example of a number of cases, really these prosecutions have been going on for the better part of a decade and more, where the doctor's practices were very suspect looking. And what was going on, you may recall that Ruan and his co-defendants in that case in much of other cases, defendants who have gone to trial, been convicted, and then sentenced, are often facing decades in prison. I believe Ruan got over 20 years. And so lots of doctors who get subject to prosecution will say, and often will be advised by their defense attorneys, hey, you should plead guilty and admit that you were illegally distributing opioids, controlled substances. If we go to trial and the government prevails, and again here's where the Ruan decision was so significant, before Ruan in many jurisdictions it would be enough for a lawyer to say to his client, look, you even if you think you were acting as a legitimate doctor, it looks really bad. All the government's going to have to show, the jury is going to be told, as long as from an objective standard it looks like you're violating standard medical practice, they can convict you even if they think you're being honest in saying you thought you were functioning as a proper doctor. This objective standard, this judging your practice by how other doctors operate, that was the standard in most circuits prior to the Ruan decision saying, no, no, no, you actually have to have this more particularized showing that the doctor realized, knew, in some sense intended not to function as a doctor, just to function as a drug dealer. and so there were lots of people, Mr. Kim being among them, who, upon getting subject to prosecution, were likely convinced by their lawyer, I'm going to get a much better outcome if I admit, okay, I realized I was doing poorly, I was giving these drugs away too readily and so I'll plead guilty to drug dealing but I'll seek a lower sentence.

**Hannah Miller:** As you're saying, unlike the petitioners in Ruan, Kim was not originally tried by a jury. He entered a plea deal.

**Douglas Berman:** Correct. And I guess that's maybe worth emphasizing in these contexts is, in every setting, drug prosecutions, all sorts of other prosecutions, in federal court, in state court, the vast majority of convictions are secured through pleas, in part because the vast majority of indictments don't include some uncertainty or at least significant uncertainty around either the law or the facts. And so, realistically, most prosecutors are used to a world in which I bring an indictment, the facts I've investigated are pretty clear, the underlying criminality statute is pretty clear. And so it's just often a debate over, okay, when will you plead guilty and what will the sentence be? In the federal system for example, roughly speaking, about 96 percent of cases that lead to a sentencing are the product of a plea deal rather than going to trial. However, when there is uncertainty, particularly significant uncertainty about the law or about the applicable facts, and these drug dealing doctor cases have the potential for that, some will go to trial. It's also very well known though, and this is part of why so many cases plead guilty, if you go to trial and lose you're going to face a longer sentence. Partially because you haven't accepted responsibility, partially because the facts often come out in sort of fuller detail in front of the judge in negative ways.

And so that's part of the back story, not just of the Ruan case, which is the cases that get to the Supreme Court or disproportionately the cases that go to trial and often lead to longer sentences and get the extra layers of appeal, but also that once those cases play out and defendants and prosecutors see the severity of the sentences, that heightens the interest to plead guilty, even if there is some uncertainty, even if there might be an argument that could be made. Oh, I don't think this law is being interpreted the right way. Or, it's too broad or shouldn't apply to me. Defense attorneys will say, again doing their job well, look, I'm prepared to go to trial and try to make the best argument, but until this law is interpreted in a way more favorable to you, you should know I think you're going to lose and if you lose you're going to get maybe, you know, an extra decade. What the Kim case represents, what a number of other cases that are still sort of percolating since Ruan is, well, what if a defendant plead guilty based on the old law? What if they agreed to try to cut their losses when the law was such that if it just looked bad that was likely to be enough to get them convicted.

**Hannah Miller:** How is an appeal structured when someone has taken a plea deal compared to an appeal where the defendant was tried by a jury and found guilty and then had their sentencing hearing?

**Douglas Berman:** After a plea, the defendant needs to show on direct appeal, or in some other way, that either their plea was not knowing and voluntary, or there was some fundamental legal error sort of baked into the terms of the plea. And the problem here, for the Dr. Kims of the world and others who took pleas under the old standard is oftentimes they were admitting as part of their plea, yes I realized this wasn't standard professional practice. Oftentimes, before Ruan had come along, the language that would be used in these plea agreements would kind of

lay on the cusp of, did you know that this was not not being a regular doctor? And in part because the government realized their case is that much stronger if and when they got the defendant to fully admit as part of the plea deal that they knew they weren't functioning as doctors, there would be people who would plea on terms that they might, in hindsight say, oh, I wouldn't have clad if I knew what the law is now. But a court will say, sorry, there's not the basis for us to think this plea is problematic because, even under the new law with Ruan requiring this higher standard of proof, the facts you admitted to as part of the plea essentially say you knew you weren't being a legitimate doctor because you were doing all this other stuff. Right? And that's itself part of another piece of where courts are, you might say, hyper-concerned that whenever there's a new Supreme Court ruling, whenever there's a new anything ruling that seems to tweak the law, everybody with a conviction, everybody with the long sentence from the old law, runs to court and says, hey, redo my case. And so courts are often inclined, hey, if I think this is still a pretty good conviction and the person pled guilty, I'm not going to bend over backward to undo things. Again, and here's the important point to keep in mind, especially in a case where if everybody knew what the new law was, he probably still would get convicted. Right? That's again the core issue in the post-Ruan world. Nothing about Ruan says you can't convict a doctor for running a pill mill, it just says the doctor needs to realize it's a pill mill rather than a legitimate medical practice. And the government believes, I think with generally good authority, we only go after the real pill mill guys anyway.

One of the worries of the old law was not just that you would maybe be wrongfully convicting some doctors involved in legitimate medical practice, but it led lots of legitimate doctors to be very concerned about the opioid prescribing. Am I going to get in trouble if I just deviate a little bit from standard medical practice? Ruan now guarantees that doctors should feel comfortable. As long as I'm functioning as a doctor, I'm not going to get in trouble under these sets of circumstances. However, it doesn't comfort the folks who are like, I can make a lot of money just by giving out opiate prescriptions to anybody who comes in with a big check. And that's who the government has always believed they focus on anyway. Right? So this is really where the rubber hits the road and why the government is eager to uphold all these convictions. They think they've only gone after the people who know they're bad guys and they think they've already screened the cases to make sure no legitimate doctors are even at risk of getting in trouble under this. Of course doctors will often tell a different story. But when there's a plea, whenever this conviction has taken place a while ago, there's going to be a strong institutional interest to say, okay, maybe we didn't get the law exactly right when this was being processed because the Supreme Court hadn't spoken yet, but now that the Supreme Court has spoken it's not obvious that what we did before was so unjust that we need to reconsider it.

**Hannah Miller:** An aspect of Kim's appeal was he did not speak on his own behalf because he felt that the judge had already made it very clear that they were going to sentence him very severely. So he was looking at an upward variance. In the decision, they say, you should have known that whatever the judge said wasn't set in stone, that that wasn't going to be the actual sentence. But is that the fault of Kim's defense attorneys to not let him know?

**Douglas Berman:** These doctor cases are great examples of the dueling tensions that surround both advice from defense attorneys to their clients about whether or not to plead guilty, but then also kind of how to build a file in mitigation. And I think doctors, not unreasonably, would think, oh if I go and tell my story about why I thought this was legitimate medical practice. And I'm not thinking about Dr. Kim's case in particular. But you can think of some other doctors who might say things like, look, I realized I was giving opioid prescriptions to people who weren't legitimate patients, but I knew in my community they'd go get heroin, they'd go get fentanyl on the street, I felt like I was doing harm reduction, or some other sort of story of, yeah, technically I'm not following the rules, but I think I was doing more good than harm. That's something that may appeal to a doctor a lot, that's something that may not appeal to a judge at all, especially a judge who's now taking a guilty plea and is likely to be wanting to credit a certain kind of remorse, a certain kind of statement of, I knew I was a terrible guy, not let me tell you a story about why I'm not as terrible as this conviction suggests.

And so often defense attorneys tell their clients, look, just stay quiet at sentencing. We've kind of worked our way through a mitigating argument as part of the sentencing proceeding, we've oftentimes filed a brief ahead of time saying here are all the good things about this guy, look at all the stuff they've done in the past, etc. etc. And that often leads defendants to feel like, oh, I'm being told in a system I don't fully understand just to keep my mouth shut. And then if things don't work out, you know, the sentence is more severe than they hoped for or they have this sort of remorse of, God, did my defense attorney really understand my case well and understand how convincing I could be? And I think, you know, doctors and lawyers don't always get along for lots of reasons, and one of those stories is the doctor feels like, I can give an account of why I thought this was a valid medical practice, even as the defense attorney

might be worried if he talks too much at sentencing the whole claim might get blown up because it might lead the judge to think he didn't even voluntarily agree and that he committed a crime.

And so all of those factors often influence both how defense attorneys and defendants act at sentencing and then moreover what happens afterwards, whether they want to challenge things. And especially when then a Supreme Court case comes along like Ruan, that gives a defendant a new opportunity to kind of raise new questions, they're going to raise every question. Oh, and I also didn't get a chance to talk at sentencing, oh and my defense attorney didn't do this, and they didn't think about that, what about this. And that's another challenge that can come up on appeal is, do you throw everything at the Appellate Court and hope something sticks? Or do you pick one particularly strong issue or another? And in the Kim case, and in other cases, there's a very strong tendency for appellate courts to say, the fact that you made a strategic choice not to talk or that your lawyer advised you not to talk, and you say that now was a bad bit of advice, sorry, you got to live with that because we can't fly spec everything when you've made these strategic choices uh in the past. And again I think for defendants who are professionals, for cases in which there's an elaborate story that can be told that may not fit nicely onto the law, we're always going to have opportunities for defendants in retrospect to say I was misjudged in a sense, both with a conviction perhaps or at sentencing. But in some respects, that's not unusual. Lots of defendants in lots of settings will assert that because sentencing is so much of a of a judgment call, uh you know rather than as cut and dry as maybe the original conviction, although again the Ruan case is a prime example of where even the facts and factors that play into whether the person can be convicted at all can be subject to dispute.

**Hannah Miller:** So it doesn't seem like United States v. Kim is a good litmus test for how Ruan could be successfully retroactively applied. Seems like the decision of this case leaves room for similar cases that were tried pre-Ruan to successfully appeal. So can you talk us through what you're seeing out there?

**Douglas Berman:** So my sense is there have always been dozens, in some periods hundreds, of prosecutions of doctors ongoing that the Ruan ruling necessarily sent shock waves through. In those parts of the country where this lesser standard, namely you just have to show objectively that this didn't comply with standard medical practice, those cases all had to sort of accommodate this and depending on where the case was in the legal process, that accommodation could take a lot of different forms. It also depended on how strong the evidence was. Right? That, you know, every case had slightly different variations of how much opioid prescriptions taking place, how many examples they had of bad prescribing going on, how kinky other activities were at the medical clinic or wherever else this was going on. And so what Ruan did was give defendants an opportunity to make a new kind of argument. Sometimes that argument's being made to a prosecutor. Hey, drop these charges. These charges are going to be hard to prove now under this new harder legal standard to a jury. My sense is that happened in a handful of cases. Other situations, now the jury instructions have to be clear if the case was ongoing, I've seen some reports of some acquittals in cases where maybe it wouldn't have been an acquittal given the the pre-Ruan standard.

A lot of the appeals have involved maybe vacating accounts that was based on the wrong jury instruction. But the Ruan case itself is an interesting example. Dr. Ruan was not just convicted of drug dealing, he was also convicted, among other things, of conspiracy and all sorts of falsification of health care records to get more reimbursement for Medicare and all sorts of other practices. The appeals court said, we don't reverse any of those convictions. Nothing's changed with the law of the other suspect stuff you were doing in your practice, Dr. Ruan. And so that's another component of when you've got these suspect doctors being prosecuted, it's often they're being prosecuted for more than just the illegal drug dealing and those other convictions, sometimes money laundering, all sorts of other activities as well, can still be upheld because Ruan didn't change the legal standards for those sets of convictions. And that can lead to maybe a resentencing but a resentencing that you know will almost go down similar to what happened when the drug conviction was still in place.

And so this is, in some respects, what keeps prosecutors and defense attorneys up at night. Unwinding the echoes of a significant Supreme Court decision is very elaborate and will vary defendant to defendant, courtroom to courtroom, case setting to case setting. And one of the things that I guess will be interesting to watch is if anybody, a couple years from now, does a full accounting of where Ruan left us because I sense that it's making a difference but it's a very complicated story of who's getting benefited, who's being impacted, and how prosecutorial practices may be changing.

**Hannah Miller:** Drugs on the Docket is a production of the Moritz College of Law Drug Enforcement and Policy Center. This episode is produced by me, Hannah Miller, and Holly Griffin. Doug Berman is our editorial adviser. The music is composed by Joe DeWitt.