

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 11-2145

UNITED STATES OF AMERICA,

Appellee,

- vs -

TROY SOLOMON

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

APPELLANT'S REPLY BRIEF

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CONTEXT AND PURPOSE OF THIS REPLY BRIEF

At trial, the Government's theory was that the hydrocodone, alprazolam, and promethazine sent from The Pharmacy Shoppe in Belton, Missouri to Ascensia Nutritional Pharmacy in Houston were not for actual patients, but for illegal distribution on the streets of Houston. The Government tried to prove this by relying on Dr. Richard Morgan, a local Kansas City physician who was asked to examine several of the many thousands of prescriptions the prosecution entered into evidence. But Dr. Morgan testified instead that he could *not* say whether these prescriptions were inappropriate unless he also could read the patients' charts. The Government's case agent, Judi Watterson, had testified that she tried to retrieve several patients' charts from South Texas Wellness Center unsuccessfully. But she later admitted that when she also subpoenaed charts from the other medical facility she investigated, Westfield Medical Clinic, she mistakenly sent Westfield a demand for charts belonging to STWC patients, instead. Later, the corrected list of names yielded the patients' charts she sought from Westfield. Beyond this attempt, Watterson and the Government did not undertake any other investigation into

whether the patients' names and identities on these prescriptions were fictitious. While four prescriptions out of all those submitted into evidence were found to have been written for names of deceased individuals, no one testified that the patients on the thousands of other prescriptions did not exist. Instead, embarrassingly for the Government, one of its main witnesses, Pharmacist Quan Pham, testified that she decided to investigate this issue herself, so she called three patients, all of whom confirmed their identities and the receipt of their medications.

As Appellant's opening brief pointed out, the Government offered no evidence at trial that these thousands of prescriptions were phony. The Government's case agents did not investigate whether the patients on these prescriptions existed. And most importantly, the Government's expert, Dr. Richard Morgan, did not testify that these prescriptions, themselves, were improperly written or in violation of the National Standard of Care set out in 21 U.S.C. 841, which is an indispensable element to sustain a conviction for illegal distribution of Schedule III, IV or V substances.

In its Response Brief, the Government has now boldly asserted without citation to the Record that *all* of the prescriptions were phony, and

that there was evidence that the hydrocodone, alprazolam, and promethazine was diverted to the streets of Houston instead of to the patients on the prescriptions. (See Government's Issue I: "Whether sufficient evidence supported the conclusion that the drugs were dispensed for other than a legitimate medical purpose . . . where the prescriptions written were entirely fraudulent ones not based on any doctor-patient relationship. . . ") This is simply not true.

In this Reply Brief, Appellant's counsel will identify the Government's misstatements, and provide the contradictory record citations:

DISSECTING THE GOVERNMENT'S STATEMENT OF FACTS

The Government's Statement of Facts spanned pages 6 through 64 of its brief. It was organized into twelve sections, A through L. But key to this appeal is whether, in those 59 pages, there are citations to places in the trial transcript where it was proven that "the prescriptions written were entirely fraudulent ones not based on any doctor-patient relationship" or

that the prescriptions submitted to the jury were written in violation of the National Standard of Care set out in 21 U.S.C. 841.

Section A, pp. 6-8 (Cindy Martin and Troy Solomon):

The Government's Statement of Facts opened with a section detailing that Appellant Troy Solomon knew Cynthia Martin and had an affair with her. There is nothing in this section discussing fraudulent or fictitious patient identities, or improperly written prescriptions.

Section B, pp. 9-10 (Organization of STWC & Ascnesia):

This section discussed the organizations of SWTC and Ascensia. There is no reference to fraudulent or fictitious patient identities, or improperly written prescriptions.

Section C, pp. 11-13 (STWC hires Elder; Solomon meets Rostie):

This section discussed Appellant Dr. Elder working at STWC, and that Cindy Martin connected Appellant Solomon with Lynn Rostie, owner of The Medicine Shoppe in Belton. There is no discussion of fraudulent or fictitious patient identities, or improperly written prescriptions.

Section D, pp. 13-33 (Prescriptions and cash sent to Missouri):

There was no dispute at trial that Appellant Solomon was faxing Ascensia's prescriptions to The Medicine Shoppe for filling, and that payments for these medicines were being mailed. Virtually all of the patients visiting Elder and the other physicians mentioned during trial had no insurance, so they were cash customers. (See testimony of Government witness Diane Hearn, owner of Westfield Medical Clinic, Trial Tran. 648-651, 669-673) As regards fraudulent or fictitious patient identities or improperly written prescriptions, the Government allows that The Medicine Shoppe's Lynn Rostie had a conversation with Dr. Elder in which he confirmed the legitimacy of all prescriptions Solomon was sending to Rostie. (Government Brief, pp. 17-18) As the Government's chart shows (p. 18, Govt. Ex. 1116), Dr. Elder wrote 544 prescriptions in 9 weeks.

The Government next detailed prescriptions for patients Allen (wrong address); Hollis (deceased); Perez (deceased); Cooks (purse stolen, but after prescription written); Perry (listed as neighbor on street of Solomon's rental property, though Agent Watterson found no evidence

Perry lived there); McKelvey (deceased); Danage (deceased). (Government Brief, pp. 19-20, 25, 31)

However, other than these anomalies, there was no evidence or testimony submitted at trial (and referenced in this section of the Government's brief) that supports the Government's contention in Issue I (and throughout the brief) that "the prescriptions written were entirely fraudulent ones not based on any doctor-patient relationship."

Section E, pp. 34-37 (Medicine Shoppe shipments to Houston):

This section discussed The Medicine Shoppe's shipments of medicines back to Houston. Here, the Government also mentioned that its lead investigator, Judi Watterson, had indeed served a demand on Pleshette Johnson-Wiggins for 110 SWTC patient files from STWC, but her clinic could not locate those. But then the Government tried to spin the fact that Watterson mistakenly served the same list on Westfield Medical Clinic as some sort of intentional investigative ploy. The reality was that Watterson had to re-send a second list of corrected names to Westfield for its patient files, and then those files were, in fact, provided to Watterson.

(Government brief, p. 37; compare Trial Tran. 656-58, names on Govt. Ex. 1196 against Ex. 1198, and then also Trial Tran. 730-31)

Again, there was no evidence or testimony in this section of the Government's brief that supports its contention in Issue I that "the prescriptions written were entirely fraudulent ones not based on any doctor-patient relationship."

Section F, pp. 38-39 (Elder and SWTC, and Solomon):

This section spoke of the friendship between Appellants Solomon and Elder. But there is nothing about fictitious patient identities or fraudulent prescriptions.

Section G, pp. 39-50 (Ascensia Nutritional Pharmacy):

This section discussed the volume of prescriptions that were filled at Ascensia. As mentioned earlier, Government witness Quan Pham even called several patients who all confirmed receipt of the medicines listed on prescriptions Pham had filled. (Trial Tran. 571-73, 583, 589-93). Lillian Zapata, another Ascensia employee also testified, claiming she had an affair with Solomon and was present when Solomon purportedly met a man on a street in Houston to give him a briefcase, after which Zapata

claimed Solomon remarked, "I bet you didn't know you were traveling with three million dollars." (Trial Tran. 856)

But yet again, there is nothing in this section discussing fraudulent or fictitious patient identities, or improperly written prescriptions. And while the Government has tried to spin Zapata's claim into evidence of street level drug distribution, there was not a single witness who testified at trial that any substance ever made its way into the hands of anyone other than the intended patient for whom the prescription was written. Not one Houston police officer came to trial, nor was a single pill bottle ever discovered in the hands of someone other than the patients. No law enforcement officer or federal agent came to tell this jury that any of the medicines at issue in this case were *ever found anywhere*, let alone anywhere they should *not* have been.

Section H, pp. 50-55 (Elder working at Westfield):

This section does not discuss fraudulent or fictitious patient identities, or improperly written prescriptions. The Government did point out that some prescriptions apparently were being filled by patients at

more than one pharmacy, but there was no evidence that Appellants Elder or Solomon were involved.

Section I, pp. 55-56 (May, 2006 search warrants):

This section was unremarkable.

Section J, pp. 56-60 (Elder's and Solomon's statements):

When the Government executed its search warrants in May, 2006, Appellant Solomon spoke to agents. At other times, so too did Appellant Dr. Elder. However, neither were questioned about fraudulent or fictitious patient identities, or street level drug distribution.

Section K, pp. 60-61 (Elder's handwriting exemplars):

This section is unremarkable. The issue is not whether prescriptions were written or filled, but whether instead all of the medicines went to fraudulent or fictitious patients, as the Government contended in Issue I.

Section L, pp. 61-64 (Dr. Morgan's testimony):

Dr. Morgan testified that he could *not* say whether the prescriptions shown to him by the prosecution were inappropriate or below the National Standard of Care. He stated that he could not do so unless he could read the patients' charts. He was provided with none, not even the ones

received from Westfield. And while Dr. Morgan offered that some of the prescriptions seemed unusual (Government brief p. 63), he never testified to any opinions within a reasonable degree of medical certainty.

Dr. Morgan's testimony was the highlight of the Government's case, but it was woefully inadequate and inconsequential. He never addressed the issue of fraudulent or fictitious patient identities. He was only given prescriptions, not any patient files. Accordingly, he conceded that he could not say that any of the prescriptions he saw were written improperly. He agreed on cross-examination that "without having the full patient record and everything here to review today, you can't second guess what [Dr. Elder] did in those four cases." The prescriptions shown to Morgan appeared regular and there is "nothing unusual or sinister about them." (Trial Tran. 963-67)

THE GOVERNMENT'S ARGUMENTS

Issue I (Sufficiency of evidence - illegal drug diversion):

There is an old adage often passed down from older lawyers to younger lawyers: "Just sayin' it's so, doesn't make it so!" And such is the

case with the Government's brief. On page 65 (and 67), the Government wrote, "The evidence showed beyond question that *every single one of the prescriptions* sent to The Medicine Shoppe in Belton, Missouri, by the Houston-based conspirators were fraudulent, in that they were either written based on stolen identity information without any examination or relationship with a real patient, or they were duplicates of real prescriptions the patient had already filled at a Houston-area pharmacy." (Emphasis added)

On page 69, the Government wrote "The totality of the evidence in the record established that *all of the prescriptions* written in Texas and filled at The Medicine Shoppe in Belton, Missouri, whether written by Dr. Elder, dr. Okose, or Dr. Botto, were fictitious, in that they were written without the patient's knowledge or consent, and they were not based upon any doctor-patient relationship." (Emphasis added)

Given that Agent Watterson only tried to subpoena 110 of Dr. Elder's patient files from SWTC, and given that there was no evidence she ever tried to locate or interview all of the patients whose name appeared on the thousands of prescriptions entered into evidence at this trial, the

Government's claim that "all prescriptions were fraudulent" is an unproven grandiose contention of disturbing proportions. All that the Government showed was that four patients' identities were stolen after they died, and a fifth patient had her identity stolen - according to her recollection - a few weeks *before* her purse was stolen. Yet there was no evidence that Appellants Elder or Solomon were involved, much less aware. The Government *could have tried to show* that the deceased patients had visited Dr. Elder when they were alive, such that he ought to have known of a fraud when someone else came to him for care using the decedents' identities, but alas, the Government offered no such investigation or evidence.

And where does the Government provide justification for its claim on page 69 that all prescriptions, including those of Drs. Okose and Botto, were fictitious? Neither of those two doctors were indicted or testified at trial, and not a single one of their patient files were offered. Agent Watterson never testified that she ever tried to subpoena an Okose or Botto patient file, or tried to ever interview an Okose or Botto patient. Indeed, the testimony at trial was that Dr. Okose ran a high-patient-volume

medical practice for the poor in Houston, treating between 50 and 400 patients per day. (See testimony of Okose employee Robert Klemen, Trial Tran. 873-75)

Similarly, there was evidence that as many as 90 prescriptions filled by The Medicine Shoppe were initially filled at C&G Pharmacy in Houston. (Government Brief, pp. 53-55) However, the Government provided no evidence whatsoever to indicate that either Appellants Solomon or Elder knew these patients already had their prescriptions filled at C&G before seeking the same medicines at Ascensia. Another 84 prescriptions found at C&G were also located at Ascensia, but were not filled twice. Of course, Agent Watterson did not interview any of these 174 patients, despite having their names and addresses. Nor did she testify that she *tried* to locate these patients, but they do not exist.

On page 65, the Government even so boldly claimed, "There was evidence of his (Solomon's) actual street distribution of drugs." As regards the proposition that *any* of these medicines made their way onto the streets of Houston, the prosecution at oral argument will be unable to name even one law enforcement officer who testified to this. The Government ought

to be forced to admit that it did not produce even one single pill or bottle that was ever recovered by Houston police which was traceable to The Medicine Shoppe or anyone else involved in this case.

In the end, all that has been offered is a conclusory claim – without any evidentiary support – that “*every single one of the prescriptions* sent to The Medicine Shoppe in Belton, Missouri, by the Houston-based conspirators were fraudulent” Were this indeed the Government’s theory at trial, however, then there would have been no need for the Government to include – much less conclude its case with – Dr. Morgan’s testimony. After all, if none of these patients existed, what would Dr. Morgan have to add? In the end, he could add nothing because the Government did not show him the patient files from Westfield Medical, nor was there any attempt to acquire patient files from Drs. Okose or Botto.

In the end, this Court ought to see through the smoke and mirrors. At trial, the Government failed to produce any patients or patient files to confirm its theory that Solomon and Elder were running a diversion scheme using fraudulent prescriptions. So, the Government enlisted the services of first-time expert witness Dr. Morgan who they hoped would

testify that Dr. Elder's prescriptions were improperly written, and inadequate when measured by the National Standard of Care in 21 U.S.C. 841. But this strategy failed miserably when Dr. Morgan, himself, pointed out that more evidence was needed, in the form of patient files and patient interviews, none of which the Government had tried to amass. (Trial Tran. 963-67) As such, now on appeal, the Government is trying to argue that Dr. Morgan was an unessential witness. (Government Brief, p. 69: "The jury was entitled to render their verdicts based upon all of the evidence in the record, not solely the testimony of Dr. Morgan, the Government's medical expert.") The Government even went so far as to insinuate that Dr. Morgan wasn't needed because none of the prescriptions were real. (See Government's Brief, p. 72) But the prosecution cannot overlook the fact that it used Dr. Morgan at trial, and he pointed out the obvious holes in their case. Dr. Morgan was essential, just as the National Standard of Care is an indispensable element in a prosecution for illegally distributing Schedule III, IV and/or V substances. United States v. Smith, 537 F.3d at 657, quoting United States v. Katz, 455 F.3d 1023, 1028 (8th Cir. 2006); see also,

United States v. Moore, 96 S.Ct. 335, 423 U.S. 122, 46 L.Ed.2d 333 (1975); see also ROA 176-177, Jury Instruction 43.

Before closing this section, one final argument must be made. The Government in its brief on pages 2, 69, 70 and 71 relied on the case of United States v. Armstrong, 550 F.3d 382 (5th Cir. 2008), standing for the proposition that expert testimony is not needed where the prosecution proves no patients actually existed. But Armstrong also stands for the principle that professionals like nurses and pharmacists cannot be convicted for counts of “dispensing” Schedule III, IV or V controlled substances without a finding of guilt against a physician for those same counts. Id. at 394-95. In the case at bar, Appellant Solomon was charged in counts 11 and 12 alone with Lynn Rostie, but with no physician at all. (ROA 39, 51-52) For this reason alone, those two counts ought to be reversed.

And, for all these reasons explained in this section, Appellant Solomon’s convictions for counts 1 and 3 through 12 ought to be reversed because of insufficient evidence.

Issue II (Money Laundering):

As with the preceding issue, the Government in its brief made sweeping, generalized statements which were not supported by investigation or evidence: “The evidence in this case was absolutely definitive that not a single patient received either the SWTC or the ANP-filled Okose prescriptions ostensibly written in the patient’s name.” (Government’s Brief, pp. 85-86) The Government even misquoted witness testimony in hopes of bolstering its case for this Court, ascribing to Appellant Solomon a statement, “That’s what three million dollars looks like.” (Government’s Brief, p. 86) The quote actually was “I bet you didn’t know you were traveling with three million dollars.” (Trial Tran. p. 856) Of course, if Solomon was illegally distributing controlled substances, he would be *receiving* money, not giving it away.

Along these lines, the Government tries to gain traction for its argument by pointing out that Solomon mailed cash to Missouri: “No legitimate business would ever have paid for its product in this manner, as mailing cash does not create a proper record of the business transaction and exposes the purchasing business to risks of loss at every stage of the

transaction.” (Government’s Brief, pp. 89-90) Once again, there was absolutely no testimony at trial to support these argumentative generalizations. Moreover, the hypocrisy of such a statement should not be lost on the reader. For the very government that makes currency continually, in litigation, denounces its use by the citizenry. However, the reality of this nation and its health care crisis is that millions are uninsured, and pay for their medical services and prescription drugs with cash. (See testimony of Government witness Diane Hearn, owner of Westfield Medical Clinic, Trial Tran. 648-651, 669-673; see also testimony of Dr. Morgan, Trial Tran. pp. 950-52)

The bottom line is that the facts are insufficient to support Appellant Solomon’s drug diversion convictions, so therefore his money laundering conviction, which rests upon the illegality of the alleged diversion scheme, is similarly infirm.

Issue III (Forfeiture determination):

Once again, that old adage is appropriate: “Just sayin’ it’s so, doesn’t make it so!” On page 66 of its brief, the Government misinformed this Court, trying to persuade it to rule that Appellant Solomon has waived his

objection to forfeiture by not properly preserving the issue for appeal. The Government has argued that “Neither defendant requested a hearing.” And, on page 95, the Government wrote, “At Solomon’s sentencing, Solomon’s counsel objected to the imposition of the forfeiture money judgment but at no time did Solomon request that live testimony be presented in support of the affidavit.”

However, the Record on Appeal is crystal-clear that Appellant Solomon indeed asked the District Court for an evidentiary hearing in support of his objection to the Government’s \$991,114.00 forfeiture claim:

WHEREFORE, pursuant to Fed. R. Crim. P. 32.2, Mr. Solomon objects to the Government’s Motion for Forfeiture, moves the Court to deny the Government’s request for a preliminary order of forfeiture and requests a hearing on the merits or any other relief to which he may be entitled Mr. Solomon.

(District Court Document 386, last page, 11/8/10)

The District Court declined to hold a hearing, and instead simply issued two forfeiture orders after Solomon's sentencing. (District Court Documents 444 & 448, 5/16/11 and 5/19/11)

Accordingly, there is no procedural default, and this issue ought to be addressed by this Court on the merits.

As for the merits of the issue, again Government counsel makes an unsupported argument. On page 99 of its Brief, he said, "The \$991,114 came from the United States currency mailed by Solomon using UPS to co-conspirator Martin, and as such those funds were the subject of the money laundering counts as to which Solomon has been convicted." But there was no testimony at trial about Martin having received a calculated total of \$991,114.00, nor was there even testimony that this was the amount The Medicine Shoppe received. Instead, the only single mention of \$991,114.00 at trial was when Lynn Rostie acknowledged on cross-examination that she consented to a \$991,114.00 forfeiture judgment in her plea agreement. (Tran. 306-07)

The only other testimony concerning dollar amounts was provided by financial analyst Lori Nelson, who said that: (a) Cindy Martin's cash

deposits between October, 2004 and October, 2005 were \$71,666.80; and, (b) Rostie Enterprises' total deposits between August, 2004 and October, 2005 were \$2,943,653.37. (Tran. 886, 888-890; Govt. Ex's 1143, 1145) No figures attributable to Lynn Rostie's dealings with Troy Solomon were broken out by prosecutors. See, i.e., Tran. 138 discussing role of Medicine Shoppe tech Patty Webb, who filled only prescriptions for local customers from the Belton area.

In October, 2010, the Government urged the District Court that the \$991,114.00 figure was a "reasonable measure of the conspiracy's value." (ROA 191) Yet, Indictment page 10, Count 2(f) alleges that the \$991,114.00 figure represents "gross sales ... which includes proceeds of the illegal sales of hydrocodone, alprazolam, and promethazine with codeine." (ROA 48)

The Government's proposition that \$991,114.00 represents a fair value for forfeiture purposes is thus nothing more than a supposition. Evidence that it was mathematically or empirically based was not provided to the Court, and Appellant Solomon had no opportunity to refute this arbitrary figure, though he asked for a hearing in writing.

Because Appellant's trial counsel *did* request an evidentiary hearing on this issue, and because the Government on appeal is unable to show the Court how the \$991,114.00 was mathematically derived from trial testimony, a remand for a forfeiture hearing is in order. See United States v. Huber, 404 F.3d 1047, 1056-62 (8th Cir. 2005)(forfeiture amount determined using dollar amounts received and used by defendant, not gross proceeds figure of the larger scheme; remand for reduction of forfeiture), *affirmed after remand*, United States v. Huber, 462 F.3d 945, 953 (8th Cir. 2006).

CONCLUSION

The Government has argued to this Court that Appellant Solomon was involved in an illegal diversion scheme in which "every single one" of the prescriptions were fraudulent, in which there were no actual patients, and which generated at least \$3 million from proven street level drug sales. Obviously the District Court knew full well that the Government had not proven this. At sentencing, Appellant Solomon's guideline range was "base offense level 22, 41-51 months." The Government sought upward adjustments based on three claims: 4 levels for "leader and organizer"; 2

levels for “obstruction of justice” because of “improper contact with Government witnesses,” and “perjury.” The District Court bought none of it, saying “Quite frankly, I see something that’s a little bit troubling to me. I think when, not just in this case but in other cases, when a defendant goes to trial and testifies and gets convicted and they want a perjury charge filed against the defendant, and I think the evidence at the trial was believed by the defendant but if – believed by the jury doesn’t make the defendant a liar. Could be. I don’t see it in this case.” The District Court sentenced Appellant Solomon to 24 months, a significant variance from the aforementioned guideline range. (See PSR paragraph 50; see also Transcript Volume VIII, Sentencing, pp. 4-6, 9-10, 51-52)

The prosecutors in this case initially cross-appealed this sentence, but the Department of Justice intervened and instructed them to dismiss. The bottom line is that everyone except the Government’s brief writer has been able to recognize the enormous evidentiary gaps in the Government’s case: There was no evidence or testimony sought from any of the patients on these prescriptions, and there was not a single pill or bottle ever recovered from the streets, from someone other than the person for whom the

prescription was written. And most importantly, not even the Government's own expert was able to opine, within a reasonable degree of medical certainty, that the prescriptions being filled in this case were written by Dr. Elder and others in violation of the National Standard of Care. That is an indispensable element needed in order to sustain a conviction for illegal drug diversion under 21 U.S.C. 841.

In light of the foregoing arguments and authorities, Appellant Troy Solomon respectfully requests that this Court reverse his convictions and the \$991,114.00 forfeiture order.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2011, the foregoing was electronically filed with the Clerk of the Eighth Circuit Court of Appeals, using the ECF system. A paper copy will be served on participants in this case via U.S. Mail, postage pre-paid, within 5 days of the Court's notice that this brief has been reviewed and accepted for filing: Counsel for the Government, Attorneys Curt Bohling and Rudy Rhodes, 400 East 9th Street, Kansas City, Missouri 64106; Counsel for co-defendant Elder, Mr. Dennis Owens, 1111 Main Street, 7th Floor, Kansas City, Missouri 64105.

/s/ Jonathan Laurans
Jonathan Laurans

CERTIFICATE OF COMPLIANCE

I hereby certify that the above and foregoing complies with all page limitations and type-volume restrictions set by Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains 4,291 words of monospaced type. This brief was typed on a computer utilizing Microsoft Word 7.0, but the format has been saved to allow for viewing and/or modification on a computer utilizing Microsoft Word 5.0. Furthermore, the electronically filed version of this brief has been checked for viruses by the undersigned. There were no privacy redactions needed to counsel's knowledge.

/s/ Jonathan Laurans
Jonathan Laurans