**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI**

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| UNITED STATES OF AMERICA | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 08-00026-04-CR-W-FJG |
| | ) | |
| CHRISTOPHER L. ELDER | ) | |
| | ) | |
| Defendant. | ) | |

DEFENDANT ELDER'S MOTION FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 29, OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL PURSUANT TO RULE 33

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Defendant Troy Solomon has filed a motion for judgment of acquittal and/or motion for new trial. See Docket # 365. Defendant Elder hereby joins in, adopts and reasserts those arguments and assignments of error in Solomon's motion as if fully set forth herein as his own. In addition, Defendant Elder offers the following additional argument and authority in support of the motion for judgment of acquittal.

**1. The evidence is insufficient as a matter of law as to the conspiracy count and the substantive counts of distribution because the government failed to prove an essential element of the offense; that is, that the drugs were dispensed other than for a legitimate medical purpose and not in the usual course of professional practice.**

The government relied on the testimony of Doctor Richard Morgan to prove the required element that the drugs dispensed were other than for a legitimate medical purpose and not in the usual course of professional practice. The evidence at trial was that Doctor Elder wrote numerous prescriptions while employed at Texas Wellness center that were filled in Missouri and shipped back to Texas. Doctor Elder did not dispute authoring the original scripts, testified they were real patients, and he saw each one and prescribed what he thought was a proper and legitimate course of treatment. He vigorously deputed that he had anything to do with approving refills and denied that the fax cover sheets with the scrawled initials were his. This was patently obvious to all when his initials on original scripts were laid side by side on screen for easy comparison. Whether he authorized the refills or not; however, does not cure the serious legal deficiency of the government's case as he was a prescribing physician and was charged with violating his duty as a doctor – not as a simple street drug dealer.

Doctor Morgan testified that he was a 55 year old MD and was employed by St. Joseph Pain Managements Associates in Kansas City. He grew up in Emporia, Kansas and received his medical degree from the University of Kansas (Tr. 3).[1] He

[1] Transcript references in this pleading refer to the testimony of Doctor Richard Morgan. Counsel ordered the transcript from the Court Reporter and that transcript is on file in the case. Pagination commenced with page one and runs through page 55.

did anesthesia residence at St. Luke's Hospital and then a fellowship in critical care and pain management in the Mayo Clinic, completing that in 1985 (id.). He has been in private practice at St. Joseph's Medical Center since 1985 in the field of pain management and "added qualifications in pain management awarded by the American Board of Medical Specialties as a subspecialty of anesthesia" (Tr. 4).

Doctor Morgan testified that there are different types of pain management clinics; some are interventional where only injections are provided; and, others specialize in rehabilitative medicine and pain management (Tr. 5). Doctor Morgan testified that every patient is different; some tolerate opioids while others respond to over the counter medications (Tr. 6-7).

The prosecution next inquired about what type of information should appear on a prescription (Tr. 7). After discussing name and address information he was asked if there was anything that struck him in particular about the Elder prescriptions. He responded:

> Well, all of the prescriptions in each batch of patients that I reviewed were identical or nearly identical providing the same medication at the same dose with the same number of tablets in combination with another medication, again, in the same number, the same dose. And that was true for nearly the entire lot or batch of prescriptions that I reviewed, all prescribed or filled on the same day.

(Tr. 10).

He then testified in his practice he would not do this and would be more apt to try different courses of treatment (Tr. 10-11). Next he talked about how he

prescribes opioids and that Elder's treatments were unusual (Tr. 11-12). The questioning then turned to the general requirement for doctors to keep patient records and he explained why that is necessary (Tr. 11-14). He then finished his direct examination by stating that he knows through his own research that promethazine with codeine is a drug that is often abused (Tr. 15).

During cross-examination counsel inquired about collateral matters for a while and then went directly to the four charged counts. This exchange took place:

> I'm going to be fair to you. I'm going to show you this other stuff too. But let's just isolate these four prescriptions that are the four charges in the indictment here. If that was a real, live patient and they went in to see Dr. Elder, he examined them and he wrote that prescription and gave it to them, he treated the four -- two out of the four the same, the other two were different, weren't they?
>
> A. In the instructions on how to take the medicine, that is correct, but the medicines that he prescribed were identical.
>
> Q. Well, those are recognized pain medications?
> A. One is a pain medication. The other one is an anxiolytic and sedative.
>
> Q. All right. But without having the full patient record and everything here to review today, you can't second guess what he did in those four cases, can you?
> A. No.
>
> Q. They appear to be regular on their face, nothing unusual or sinister or anything about them, is there?
> A. No.

(Tr. 32-33)

Doctor Morgan continued to point out that the use of opioids by Doctor Elder was "unusual". This exchange then took place:

> Q In your earlier testimony I -- or your testimony earlier when he started questioning you, I think you said there's been a move to opioids because there is a feeling in your profession that it is just a better medication?
> A Well --
>
> Q Overall?
> A I think that's a complicated answer.
>
> Q Okay. Let me help you a little bit. Isn't it a fact there have been documented problems with some of these, and there's a term -- maybe you can help me -- to describe these nonopioid medications that cause stomach bleeding and symptoms like that?
> A That's true.
>
> Q And there's been a lot of deaths from actually that kind of treatment?
> A There's no medication free of side effects, and there are complications with each medication.
>
> Q Some statistics I looked at, and maybe you've seen this and know, that there were as many deaths from stomach bleeding from medication as there were AIDS last year?
> A I can't tell you the exact number, but I know there have been a number of deaths contributed to medication-related gastrointestinal bleeding.

(Tr. 37-38).

After additional questioning about a variety of issues dealing with treatment of the poor and the differences in urban core practice and suburban practice covered by insurance Doctor Morgan testified as to how he would approach a poor patient who could not afford MRIs, CAT scans, and other sophisticated diagnostic regimens:

> I may personally want to get that exam done, but I have to find somebody who's willing to do that exam for free or no cost. What happens is they're often -- patients who don't get those exams, and they --
>
> Q. You rely on the symptoms and signs and your best judgment as a physician and your good faith and belief in -- that most humans are pretty decent and you go ahead and prescribe the medicine, don't you?
> A If it -- if I believe they need medicine, that's what I would do.
>
> Q. Okay. Because you're in the art of healing and helping, aren't you?
> A. Yes.

(Tr. 49-50)

Mr. Bohling's redirect was short and consists of 3 pages (Tr. 50-53) The prosecution once again merely asked Dr. Morgan if Dr. Elder's methods were "unusual" and elicited an affirmative response. As pointed out by Mr. Solomon in his motion, there is not one single place in the record where Doctor Morgan was asked in his professional opinion, based on a reasonable degree of medical certainty, whether what Doctor Elder did as a physician violated the national standard of care for physicians. The record is devoid of any such evidence.

The distribution instructions given in this case listed two essential elements. Instruction Number 32 for Count Three is typical of the repetitive instructions given as to the substantive counts:

> ***One,*** on or about October 19, 2004, the defendant intentionally distributed or dispensed a controlled substance, either hydrocodone or alprazolam; and
>
> ***Two***, at the time of the distribution or dispensing, the defendant knew that he was distributing or dispensing a controlled substance, either hydrocodone or alprazolam, other than for a legitimate medical purpose and not in the usual course of professional practice.

The relevant definitions for the substantive counts were set out in Instruction Number 42 and stated:

> You are instructed that the term "distribute," as used in these instructions, means to deliver or to transfer possession or control of something from one person to another. The term "distribute" includes the sale of something by one person to another. Moreover, the term "distribute" includes the actual transfer, constructive transfer, or attempted transfer of a controlled substance.
>
> With respect to the terms "constructive transfer," as used in these instructions, you are instructed that a person who does not actually transfer a thing but who has both the power and the intention at a given time to cause the transfer of a thing, either directly or through another person or persons, has constructively transferred it.
>
> The term "dispense" means to deliver a controlled substance to an ultimate user by, or pursuant to a lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for delivery.

> The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.
>
> The term "practitioner" means a physician or pharmacy licensed or registered to distribute or dispense a controlled substance in the usual course of professional practice.

Instruction number 43 dealt with the physician status element of the substantive offenses and with respect to Elder as the principal provided:

> The Federal Controlled Substances Act makes it a crime for any "person" to knowingly or intentionally distribute or dispense controlled substances other than for a legitimate medical purpose and in the usual course of professional practice.
>
> The term "person," as used in this statute, has the same meaning as the ordinary meaning of that term and does not just include licensed medical professionals, such as physicians or pharmacists, but also unlicensed persons who may violate this statute.
>
> The Federal Controlled Substances Act is not violated if a person distributes or dispenses controlled substances pursuant to a lawful prescription issued for a legitimate medical purposes by an individual practitioner acting in the usual course of his or her professional practice. However, an order purporting to be a prescription that is issued without a legitimate medical purpose and issued outside the usual course of professional practice is not a prescription within the meaning of the Federal Controlled Substances Act. "Usual course of professional practice" means that the practitioner acted in accordance with a standard of medical practice generally recognized and accepted in the United States. In issuing prescriptions, practitioners are not free to disregard prevailing standards of treatment.
>
> Thus, under federal law, any person who issues a prescription for a controlled substance without a legitimate medical purpose and outside the usual course of professional practice is guilty of illegally dispensing a controlled substance and shall be subject to

> the penalties provided for violations of the Controlled Substances Act. Similarly, under federal law, any person who knowingly fills a prescription for a controlled substance without a legitimate medical purpose and outside the usual course of professional practice is guilty of illegally distributing a controlled substance and shall be subject to the penalties provided for violations of the Controlled Substances Act.
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> * * *

Instruction No. 44a was a good faith instruction given as to Defendant Solomon based on a request by Solomon's attorney. That instruction provided:

> Defendant Troy R. Solomon as an owner/investor of a pharmacy may not be convicted when he distributes or dispenses controlled substances in good faith for a legitimate medical purpose and in the usual course of a professional practice.
>
> When you consider the good faith defense, you should consider only whether the defendant believed he was acting in conformance with the law. The test is whether the defendant's own thought process was one of good faith. That subjective thought process provides an absolute defense, even if you find that the defendant's subjective beliefs were unreasonable or wrong.
>
> When you consider the good faith defense, it is the defendant's belief that is important. It is the sincerity of his belief that determines if he acted in good faith.
>
> If the defendant's belief's unreasonable, you may consider that in determining his sincerity of belief, but an unreasonable belief sincerely held is good faith.
>
> Again, the burden is upon the government to prove, beyond a reasonable doubt that the defendant did not act in good faith.

As noted, there was simply no evidence provided by Doctor Morgan or any other witnesses to support a finding of guilt based on these instructions. Morgan never was asked nor did he volunteer any testimony that Elder "disregarded prevailing standards" or that the procedure he followed constituted a standard of medical practice that was neither "recognized and accepted in the United States" or that he "disregarded prevailing standards of treatments." There is simply no evidence in the case to support such jury findings.

As noted above, with respect to Solomon, the jury was told he could not be convicted if he acted in good faith. Doctor Elder received no such instruction. By failing to include such an instruction for him, the jury likely concluded that with respect to the doctor no such defense was available – it was only available to the pharmacist. Consequently, not only was he substantially prejudiced by the failure to receive such an instruction – the error was compounded by the creation of a negative inference that he was not entitled to one by its very absence. This left the jury with the impression that he could be convicted with a lower standard of mens rea and caused them to hone in on facts in the case to render a finding of guilt without focusing on the key issues of Morgan's testimony and how it established or failed to establish that proof required by the instructions discussed above.

In summary, the evidence was insufficient to sustain a finding of guilty as to these charges and the problem was compounded for the jury when trying to sort out

proof as to Elder because of the confusing instruction on good faith that Solomon received.

**2. The Court erred when it failed to properly instruct the jury as to the issue of good faith as it related to Doctor Elder's defense that asserted that Elder was prescribing for real patients and that he believed his treatment methods and regimes were legitimate.**

In ***United States v. Hurwitz***, 459 F.3d 463 (2006) the Fourth Circuit reversed a far more egregious case where there was a failure to adequately instruct on the crucial issue of good faith in physician prosecutions such as this. ***Hurwitz*** makes it clear that the court must instruct on good faith and to the extent that this court did not do so for Elder, it is plain error of such a magnitude as to justify a new trial on due process grounds, particularly in light of the fact that Solomon received such an instruction. The appellate court noted in ***Hurwitz***:

> While the government's evidence was powerful and strongly indicative of a doctor acting outside the bounds of accepted medical practice, we cannot say that no reasonable juror could have concluded that Hurwitz's conduct fell within an objectively-defined good-faith standard. Hurwitz presented expert testimony showing that it was proper to use opioids when treating addicts who suffered from pain. Hurwitz's experts testified that his high-dose opioid

> therapy was a medically appropriate way to treat intractable pain and that the quantities of opioids he prescribed were appropriate.[2]
>
> * * *
>
> In addition, the testimony of Hurwitz and his staff indicated that he ran a legitimate medical practice, requiring patients to submit medical records and questionnaires before visits, conferring with other physicians outside of his practice about proper procedures, and relying on information from professional conferences when determining proper treatment practices. Thus, the record reveals a sufficient evidentiary basis for a good-faith instruction.
>
> Hurwitz did not dispute the bulk of the government's factual evidence-that is, he did not argue that he did not prescribe the narcotics that were the basis for the charges against him. Instead, Hurwitz argued that the manner in which he used narcotics to treat chronic and debilitating pain was a medically proper approach to a difficult medical issue. By concluding that good faith was not applicable to the § 841 charges and affirmatively instructing the jury that good faith was not relevant to those charges, the district court effectively deprived the jury of the opportunity to consider Hurwitz's defense. Thus, while we recognize that the government's evidence was strong, we simply cannot conclude that the district court's error in removing good faith from the jury's consideration was harmless.[3]

The court concluded:

> To summarize, we conclude that good faith is relevant to § 841 charges against a registered physician and that the district court erred by incorrectly instructing the jury that Hurwitz's good faith was relevant only to the healthcare fraud charges. This error in

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[2] Doctor Elder who is double board certified provided nearly identical testimony in his own defense.

[3] The relatively short period of time that the Elder jury deliberated strongly suggests that they saw this case as one of street drug distribution. Had they been properly instructed as to the nature of Elder's defense the outcome might have been significantly different.

> the court's instructions to the jury cannot be considered harmless, and a new trial is therefore required. On remand, the district court shall include a good-faith instruction (if requested by Hurwitz and if supported by the evidence presented at re-trial), but that instruction must reflect an objective rather than subjective standard for measuring Hurwitz's good faith.

Defendant Elder did not individually request a specific instruction which appears to be necessary in a case such as this based on the ***Hurwitz*** decision. Mr. Solomon's attorney did indeed request a good faith instruction which was ultimately given and quoted above in argument one. That instruction request by Solomon, under the facts of this case, was sufficient to trigger a requirement and preserve for appeal this instruction error now raised by Elder based on the ***Hurwitz*** analysis which holds that once the issue is injected into the case, the failure of a defendant to tender a properly drafted instruction, and presumably the failure of a co-defendant then to fail to seek one at all, does not absolve the court from the duty to fashion a proper one.

Obviously, if the instruction given was appropriate for Solomon in his role of aiding and abetting Doctor Elder, which it was based on case law cited to the Court by Solomon, then it would be equally applicable to Elder and should have been given as to Elder. Therefore, Elder has preserved this error for appeal based on Solomon's request which was granted.

Assuming, *arguendo*, Elder should have submitted his own requested identical instruction, the failure of the court *sua sponte* to instruct on his behalf with respect to

this critical issue amounted to plain error under the 5th Amendment due process clause requiring reversal. Rule 52(b), Federal Rules of Criminal Procedure provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Plain error is defined in ***United States v. Cotton***, 535 U.S. 625 (2002):

> ". . . [B]efore an appellate court can correct an error not raised at trial, there must be (1) `error,' (2) that is `plain,' and (3) that `affect[s] substantial rights.'" ***Johnson v. United States***, 520 U.S. 461, 466-467 (1997) (quoting ***Olano, supra***, at 732). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."

The burden is on the defendant to prove plain error. ***United States v. Pirani*** 406 F.3d 543, 550 (8th Cir. 2005) (***en banc***).

Individual errors at trial should not be considered in a vacuum. Here the instruction error becomes even more critical to a fair trial in view of the government's failure to properly factually frame the issue through Doctor Morgan's testimony (See Argument One, ***supra***) and the negative inference that Elder was not entitled to such an instruction based on the fact that Solomon received one and Elder did not. As in ***Hurwitz***, the good faith dispensing of medications be Elder and his evidence that he was a board certified pain management physician properly treating patients and properly prescribing medications for them involved the heart of the

defense case. The court will recall that Morgan actually testified consistent with this defense on more than one occasion. As suggested, above, this court should therefore consider this point as not waived and proceed to do the harmless error analysis required by ***Hurwitz***.

As a general proposition, if the defense of good faith has been interposed the defendant is entitled to an instruction directly on the issue provided there is sufficient evidence to support the theory and such an instruction is requested. ***United States v. Hopkins***, 744 F.2d 716 (10th Cir. 1984) (***en banc***). This ***en banc*** decision reversed a panel decision at 716 F.2d 739 (10th Cir. 1982). In the panel opinion the Court went into great detail about the facts of the case and argued that the totality of the evidence and the general instructions on intent and the elements of offense all taken together adequately protected the defendant's rights, argument ultimately rejected by the ***en banc*** court.

In ***Needer v. United States***, 527 U.S. 1 (1999), a federal income tax prosecution, the Supreme Court held that the harmless-error rule of ***Chapman v. California***, 386 U.S. 18 (1967), applies to a jury instruction that omits an element of an offense (materiality). Omitting an element is also sometimes analogized to improperly instructing the jury on the element. See ***Johnson v. United States***, 520 U.S. 461 (1997). It would appear that failure to instruct on "good faith" should also be subject to "harmless error" analysis.

***Hurwitz*** is clear and convincing authority that the failure to properly and fully instruct on the issue of dispensing other than for a legitimate medical purpose and not in the usual course of professional practice with a corresponding good faith defense instruction when requested or warranted in these doctor distribution cases is fundamental error. After considering facts that were far more damaging in Doctor Hurwitz's trial that went well beyond anything Doctor Elder was alleged to have done, including a partial concession of the core issue by Doctor Hurwitz, the court in ***Hurwitz*** concluded that a jury might have acquitted if properly instructed.

Elder submits that such omissions and errors in a physician distribution case go well beyond the failure to instruct on something as innocuous as materiality. See ***Needer, supra***. While ***Hurwitz*** holds that this issue is subject to harmless error analysis, defendant submits that it is error of such magnitude in this case, when contrasted with the ***Hurwitz*** facts, that under the totality of the circumstances, this court should have little difficulty in finding their was fundamental constitutional error in this case that was not harmless that requires reversal.

This court should grant both Defendants a new trial based on the failure to properly instruct.

**3. The financial evidence and testimony about large illegal cash profits made by Doctor Okose and the other conspirators charged in the case offered to**

**prove the money laundering counts against Solomon were prejudicial to Doctor Elder and deprived him of a fair trial.**

Defendant filed motions requesting a severance in this case and argued in those motions that the slop over evidence of money laundering would substantially harm him and deprive him of a fair trial and that there was improper joinder based on ***United States v. Bledsoe,*** 674 F.2d 647 (8th Cir. 1982) and ***United States v. Wadena***, 152 F.3d 831 (8th Cir. 1998) (See Federal Rules of Criminal Procedure 8 and 14). Although this evidence was admitted only as to Solomon, it was obviously considered by the jury in deciding Elder's case. The prejudice from such testimony was anticipated and addressed in the Doctor's early argument for severance:

> [T]here is real prejudice from subjecting him to a lengthy trial in which a substantial portion of the evidence focuses on the more sinister crime of money laundering. The charge itself implies lying and deception and serious devious acts designed to convert ill gotten gain into a more legitimate form so that the perpetrators can put the illegal funds into the normal and legal stream of commerce. Doctor Elder is charged with abusing his power as a physician to write prescriptions that he knew or should have known were excessive. The indictment alleges no connection between this alleged offense committed by he and the other four and their separate crime of money laundering for which he had no knowledge and did not participate in. The prejudice resulting from a joint trial will be substantial.

Again, the shortness of the jury deliberation time suggests this is exactly what happened. The defendants were not given individual consideration. Indeed, the jury was apparently reluctant from the start to honor their oath as evidenced by their

request for an index to the exhibits. Shortly after being provided the index they returned a guilty verdict, the clear implication being that they considered both defendants together instead of separately, failed to look at any exhibits in any detail, and accepted the government's closing argument that Elder made massive illegal profits from the conspiracy even though there was no evidence to support such a conclusion.

In a separate trial the focus would have been strictly on whether Doctor Elder saw patients, provided proper treatment and believed what he was doing was medically acceptable. In a separate trial the outcome would likely have been different. Consequently, he should be granted a new trial and have his case severed from that of his co-defendant.

WHEREFORE, defendant moves the Court to enter a judgment of acquittal as to all counts or alternatively grant him a new trial.

/s/
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CERTIFICATE OF SERVICE

I certify that a copy of this pleading has been caused to be served on the Assistant United States Attorney for Western District of Missouri and other ECF listed counsel through use of the Electronic Court Document Filing System on Tuesday, August 17, 2010.

/s/
JOHN R. OSGOOD