APPENDIX A

NOT FOR PUBLICATION

FILED

SEP 14 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL MINAS, Defendant-Appellant.	No. 16-30209 D.C. No. 1:14-cr-00109-EJL-1 MEMORANDUM*

Appeal from the United States District Court
for the District of Idaho
Edward J. Lodge, District Judge, Presiding

Argued and Submitted August 29, 2017
Seattle, Washington

Before: McKEOWN and GOULD, Circuit Judges, and ROTHSTEIN,** District Judge.

Michael Minas, a physician, appeals his conviction on 80 counts of distribution of a controlled substance. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Barbara Jacobs Rothstein, United States District Judge for the Western District of Washington, sitting by designation.

Physicians are subject to criminal prosecution under 21 U.S.C. § 841 when their actions fall outside the usual course of professional practice and are conducted with no legitimate medical purpose. *United States v. Feingold*, 454 F.3d 1001, 1003 (9th Cir. 2006) (citing *United States v. Moore*, 423 U.S. 122, 124 (1975)); *see also* 21 C.F.R. § 1306.04(a). The indictment tracked the language of § 841 and properly alleged that Minas acted outside the usual course of professional practice and with no legitimate medical purpose.

The district court properly denied Minas's motion for a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978). Minas failed to show that the search warrant affiant intentionally or recklessly made false statements or omitted information in the affidavit.

Minas objected to the district court's admitting expert testimony related to morphine equivalent dose ("MED"), the Idaho Board of Medicine's Model Policy on the use of opioid analgesics, and Idaho's opioid epidemic. Where a defendant objects before the trial court, we review evidentiary rulings for abuse of discretion. *United States v. Hankey*, 203 F.3d 1160, 1166-67 (9th Cir. 2000). Where a defendant fails to make a Rule 403 objection before the trial court, we review for plain error. *United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990). MED is a standard tool used to calculate the overall strength of opioid narcotics. The Model Policy is nationally and locally recognized as reflecting the relevant,

usual course of professional practice. Testimony revealed that Idaho adopted the Model Policy in part because of concerns over Idaho's opioid epidemic. Accordingly, this expert testimony was not only helpful to the jury, but was necessary to assess whether Minas's actions were criminal; and, therefore, the district court properly admitted the testimony. *See Feingold*, 454 F.3d at 1007; *United States v. Boettjer*, 569 F.2d 1078, 1082 (9th Cir. 1978).

The government having presented ample evidence of Minas's guilt through the testimony of twenty-two witnesses, the district court did not err in concluding that sufficient evidence supported the conviction. *See Feingold*, 454 F.3d at 1004-06, 1012-13; *see also United States v. Varma*, 691 F.2d 460, 464 n.2 (10th Cir. 1982) (collecting cases). Nor did it err in denying Minas's proposed jury instruction that defined the "practice of medicine" in Idaho. The instruction would have been confusing, and the instructions given fairly and adequately covered the proper finding of intent. *See Feingold*, 454 F.3d at 1008.

AFFIRMED.

APPENDIX B

COA No. 16-30209

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	U.S. DISTRICT COURT NO. 1:14-CR-00109-EJL
Plaintiff/Appellee,	)	UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO
v.	)	
MICHAEL MINAS,	)	
Defendant/Appellant.	)	

APPELLANT'S PETITION FOR REHEARING EN BANC (RULE 35, FRAP) AND BY THE PANEL (RULE 40, FRAP)

Appeal from the District Court for the District of Idaho
Honorable Edward J. Lodge, District Judge, presiding.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

COMES NOW the Appellant, Dr. Michael Minas ("Dr. Minas"), by and through his counsel of record, C. Tom Arkoosh of Arkoosh Law Offices, and hereby respectfully submits this *Petition for Rehearing.*

RULE 35 STATEMENT

This proceeding involves a question of exceptional current importance as stated in the issue herein, i.e., how to properly distinguish between the practice of medicine and opioid drug trafficking such that prescribing physicians can prospectively understand a fairly propagated standard in a time of heightened scrutiny.

I.
INTRODUCTION

In 2013, the Federation of State Medical Boards adopted a "Model Policy on the Use of Opioid Analgesics in the Treatment of Chronic Pain" ("Guidelines"). ER00680-00716. The Idaho Board of Medicine subsequently adopted these Guidelines. ER00674-00685.

The government charged Dr. Minas with 146 counts of opioid trafficking occurring in 2013 and 2014. ER00625. The search warrant affidavit in this case, the indictment, and the evidence given over objection by the government's experts at trial all equated failure to follow the Guidelines with practicing without a legitimate medical purpose. ER00627, 00628, 00297: 19-21; 00309: 23 – 00310: 4.

Further, the government's experts also opined that prescribing an amount of opioids over 100 mg per day of Morphine Equivalent Doses ("MEDs") was without a legitimate medical purpose, even though the government experts described this threshold as "arbitrary." ER00293: 18-20.

Even in face of these incorrect contentions, the Court declined to give Dr. Minas his proffered instruction that the practice of medicine as defined by the Idaho statute consisted of examination, diagnosis, and treatment. ER00417, 00063: 24 – 00064: 25. This one instruction would have corrected the deliberate misimpression that only by following the Guidelines and prescribing less than 100 MEDs could a doctor be engaged in the legitimate practice of medicine.

The jury convicted Dr. Minas of 80 of the 146 counts of drug trafficking opioids charged in the *Indictment* after being allowed to hear that the distinction between whether Dr. Minas practiced medicine or whether he trafficked opioids was only whether he followed the Guidelines and prescribed under 100 MEDs per day.

II.
ISSUE

This issue is represented as both important and overlooked by the *Memorandum Decision* of the panel:

Whether the dual elements defining drug trafficking of opioids by a prescribing physician, i.e., prescribing opioids outside the usual course of practice

and for no legitimate medical reason, adequately distinguishes drug trafficking from the professional practice of medicine when the District Court allows the government to limit in its evidence what is the legitimate practice of medicine to only following the Guidelines and prescribing no more than 100 MEDs without further informing the jury of the true definition of the practice of medicine.

III.
FACTS

In this case, the evidence was uncontroverted that Dr. Michael Minas prescribed only for the relief of pain, or thought he was prescribing for the relief of pain. ER 00201:12-14; 00202:12-14, 24-25; 00203:4-5; 00204:16-22; 00205:9-14; 00206:4-7; 00211:25-00212:4; 00213:23-00214:3; 00215:16-20; 00216:5-7, 17-19; 00217:7-8, 19-22; 00218:8-21; 00219:5-8; 00220:16-18; 00221:9-16; 00222:8-13, 20-23; 00223:11-17; 00224:13-15; 00225:2-13; 00230:10-12; 00231:21-24; 00232:4-7; 00233:9-10, 14-15, 22-23; 00234:1; 00235:11-14; 00236:13-16; 00237:2-14; 00238:16-00239:2; 00240:9-15; 00241:22-00242:7; 00243:2-6; 00244:9-14; 00245:22-00246:2; 00247:22-00248:6; 00249:23-00250:6; 00250:20-21; 00251:8-10; 00252:3-6; 00253:10-19; 00259:16-22; 00260:23-25; 00261:20-23. Further, the record is uncontroverted that prescribing opioids for the relief of pain is a legitimate medical purpose. ER00170:22-00171:2; 00171:10-15; 00291:16-18; 00297:10-18. The government's experts asserted that practitioners used opioids to reduce pain. ER 00183:22-25; 00184:16-21; 00297:10-15.

The government's experts, however, testified that notwithstanding this evidence, Dr. Minas' prescriptions had no legitimate medical purpose because Dr. Minas made the prescriptions without following the cautionary steps found in the Guidelines and because the amount of the prescriptions exceeded somebody's recommendation of 100 MEDs per day. In summary, the government's experts testified they could discern that no medical purpose existed for Dr. Minas' prescriptions because of how he assessed and inter-related with his patients and because of how much he prescribed. From this evidence, the jury concluded that even though Dr. Minas engaged in the legitimate medical purpose of treating pain, he intentionally prescribed without any legitimate medical purpose. They arrived at this conclusion because they were given government evidence that notwithstanding that Dr. Minas was treating pain, his means and amounts prescribed would not be sanctioned by a legitimate practitioner because he failed to follow best practices.

IV.
DISCUSSION

The decision in this case puts the Circuit at the crux of whether the Ninth Circuit instructs the Department of Justice upon what constitutes criminal drug trafficking or whether the Department of Justice will instruct this Circuit.

U.S. v. Moore, 423 U.S. 122 (1975) and *U.S. v. Feingold,* 454 F.3d 1001 (9th Cir. 2006) make clear that the definition of drug trafficking opioids by a physician

licensed to prescribe Schedule II medications is whether the physician engages in the professional practice of medicine, or merely traffics drugs. This search has been further refined to query whether the doctor intentionally distributed opioids outside his professional practice and whether the physician intentionally prescribed opioids with no legitimate medical purpose.

It is respectfully submitted that the current test to ferret out drug trafficking by doctors, i.e., prescribing outside of the usual course of professional practice and without a legitimate medical purpose, can include non-criminal activity. This is especially so when the Court allows the government to define the legitimate practice of medicine as only following the Guidelines and prescribing under 100 MEDs per day without further informing the jury that the legitimate practice of medicine is more broadly defined by statute to mean examination, diagnosis, and treatment. For instance, many times the negligent or experimental practice of medicine would have no legitimate medical purpose in the eyes of more traditional practitioners whom the government pays to testify against their fellows. These more traditional practitioners may follow different means or prescribe lesser amounts of pain medications than a defendant. When measured this way, "no legitimate medical purpose" simply means the bad practice of medicine by a defendant. The phrase "without legitimate medical purpose," without more, paints with too broad a brush by its focus on the legitimate and illegitimate without defining what is medical and what is not medical.

To counter the ambiguity of the phrase "no legitimate medical purpose" caused by the testimony of the government's experts describing their view Dr. Minas' prescriptions were too large and poorly controlled to ever be legitimate, Dr. Minas requested a jury instruction advising the jury of the elements of what constitutes the practice of medicine in Idaho. In essence, Idaho defines the practice of medicine as examination, diagnosis, and treatment of a condition. This definition encompasses all practice of medicine regardless of whether an observer perceives the means of practice, or even its purpose, to be legitimate or illegitimate. Thus, if the instruction had been given, when the government experts acknowledged that the treatment of pain was a legitimate medical purpose, but that Dr. Minas had no legitimate medical purpose because of the amount of medicine prescribed and means of treatment of pain, the jury would have been informed by the Court of what Idaho law describes as a legitimate medical purpose by describing what doctors do that makes them doctors. Idaho Code § 54-1803. The jury would have been adequately informed to judge whether the government expert confused the practice of medicine done negligently or poorly with drug trafficking.

Both the District Court and the Circuit panel commented that a jury instruction defining the practice of medicine would have confused the jury in light of the evidence. This is a correct conclusion. A jury instruction educating a jury that a physician who examined, diagnosed, and treated in conjunction with the

uncontradicted evidence that Dr. Minas was treating diagnosed pain, and such treatment is a legitimate medical purpose, would have confounded the jury regarding how the government's experts could conclude Dr. Minas abandoned the practice of medicine to traffic drugs. Such an instruction would have refocused the jury on the real decision they had to make, i.e., whether Dr. Minas practiced medicine or trafficked drugs, rather than the decision of whether Dr. Minas violated certain arbitrary best-practice guidelines.

Sometimes using only the elements of "outside the usual course of practice" and "for no legitimate medical purpose" are too granular to accurately capture the distinction between the practice of medicine and drug trafficking. Sometimes practitioners can breach both standards and still be practicing medicine rather than trafficking drugs. This possible confusion is especially so when the government's experts limit legitimate medical purpose to only following certain best-practice guidelines as was done in this case. Simply telling the jury the definition of what is the practice of medicine, which lays at the heart of the issue, allows the jury to make a legitimate judgment for itself.

Ironically, if the Court had given Dr. Minas' *Daubert* motion more credence, the Court could have concluded that the legitimate practice of medicine was not solely limited to practicing in accord with the Guidelines and prescribing under a suggested MED amount. The Court would have concluded these are arbitrary

guidelines, not scientific guidelines.

The convictions frame and spotlight a more picante irony: Because the Court allowed the measure of conviction to be the arbitrary Guidelines, the jury convicted Dr. Minas for failure to follow guidelines promulgated the same year, or the year prior, to the alleged conduct, and, in some instances, for conduct occurring before the adoption of the Guidelines in April 2013. Only by accepting the arbitrary Guidelines as the criminal standard, which it is not, can the denial of Dr. Minas' Rule 29 motion be justified. ER00008-14.

The definitional struggle in *Moore* was to isolate when a doctor engaged in the "professional practice" of medicine. If the professional practice of medicine becomes limited only to instances when a physician follows best practices instead of being defined by the activities of examination, diagnosis and treatment, many activities that meet the definition of the practice of medicine will be criminal if the government finds a conservative physician willing to testify that prescribing outside these guidelines has no legitimate medical purpose AND the Court declines to tell the jury what is the professional practice of medicine.

The time now ripens to eradicate the canard that following arbitrary best practices equates to the only definition of the practice of medicine. The Department of Justice recently initiated a special prosecution task force sending agents and special prosecutors throughout the nation. See **Attachment 1** attached hereto. This

crusade focuses upon "which physicians are writing opioid prescriptions at a rate that far exceeds their peers." By its description, this program focuses upon the criminality of prescribing "too much," just as occurred in the instant case, without seeming regard for whether the prescribing physician was or was not actually practicing medicine. If this Circuit allows prosecutions for failure to follow best practices, without also assuring that the jury is instructed upon what is and what is not the practice of medicine versus drug trafficking, the Department of Justice has paved an uninterrupted path for physicians intending to be engaged in the professional practice of medicine straight to the prison doorway.

All through these proceedings, from the search warrant, indictment, evidentiary rulings, and through the instructions, the assumption obtained that failure to follow best practices constituted drug trafficking. These missteps could well have been put back on the true course by granting any of Dr. Minas' motions, most of which have been brought to this Court of Appeals for review. Instead, Dr. Minas received no motion hearings, and the Court denied all motions in chambers.

V.
CONCLUSION

Respectfully, this requests the panel to rehear or this Court to initiate an *en banc* panel to hear the question of whether the practice of medicine can be defined only by reference to best practices, or, as stated in *Feingold*, whether the practice of

medicine, even practice constituting intentional malpractice, is not drug trafficking, so long as the physician does not abandon the professional practice of medicine. And this remains true whether or not the doctor follows best practices.

RESPECTFULLY SUBMITTED this 20th day of September, 2017.

ARKOOSH LAW OFFICES

/s/C. Tom Arkoosh
C. Tom Arkoosh
Attorneys for Michael Minas

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1 because this brief contains 2,017 words, excluding the parts of the brief exempted by Rules 32(a)(7)(B)(iii) and 32(f) of the Federal Rules of Appellate Procedure and Circuit Rule 32-1(c).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2013 version of Microsoft Word in 14 point Times New Roman.

DATED this 21st day of September, 2017.

ARKOOSH LAW OFFICES

/s/ C. Tom Arkoosh
C. Tom Arkoosh
Attorney for Michael Minas

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I electronically filed the foregoing *Appellant's Petition for Rehearing En Banc and by the Panel* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on the 21st day of September, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ C. Tom Arkoosh
C. Tom Arkoosh

ATTACHMENT 1

[redacted]

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, August 2, 2017

Attorney General Sessions Announces Opioid Fraud and Abuse Detection Unit

Attorney General Jeff Sessions today announced the formation of the Opioid Fraud and Abuse Detection Unit, a new Department of Justice pilot program to utilize data to help combat the devastating opioid crisis that is ravaging families and communities across America.

Speaking at the Columbus Police Academy today, Attorney General Sessions said that the new Opioid Fraud and Abuse Detection Unit will focus specifically on opioid-related health care fraud using data to identify and prosecute individuals that are contributing to this prescription opioid epidemic.

Additionally, as part of the program, the Department will fund twelve experienced Assistant United States Attorneys for a three year term to focus solely on investigating and prosecuting health care fraud related to prescription opioids, including pill mill schemes and pharmacies that unlawfully divert or dispense prescription opioids for illegitimate purposes.

The following districts have been selected to participate in the program:

1. Middle District of Florida,
2. Eastern District of Michigan,
3. Northern District of Alabama,
4. Eastern District of Tennessee,
5. District of Nevada,
6. Eastern District of Kentucky,
7. District of Maryland,
8. Western District of Pennsylvania,
9. Southern District of Ohio,
10. Eastern District of California,
11. Middle District of North Carolina, and
12. Southern District of West Virginia.

In his speech, the Attorney General discussed the new program:

"First, I am announcing a new data analytics program – the Opioid Fraud and Abuse Detection Unit. I have created this unit to focus specifically on opioid-related health care fraud using data to identify and prosecute individuals that are contributing to this opioid epidemic. This sort of data analytics team can tell us important information about prescription opioids—like which physicians are writing opioid prescriptions at a rate that far exceeds their peers; how many of a doctor's patients died within 60 days of an opioid prescription; the average age of the patients receiving these prescriptions; pharmacies that are dispensing disproportionately large amounts of opioids; and regional hot spots for opioid issues.

"With this data in hand, I am also assigning 12 experienced prosecutors to focus solely on investigating and prosecuting opioid-related health care fraud cases in a dozen locations around the country where we know enforcement will make a difference in turning the tide on this epidemic. These prosecutors, working with FBI, DEA, HHS, as well as our state and

local partners, will help us target and prosecute these doctors, pharmacies, and medical providers who are furthering this epidemic to line their pockets. These prosecutors will be based in several states across the country, including Kentucky, West Virginia, Tennessee, and right here in Southern Ohio.

"With these new resources, we will be better positioned to identify, prosecute, and convict some of the individuals contributing to these tens of thousands of deaths a year. The Department is determined to attack this opioid epidemic, and I believe these resources will make a difference."

Full remarks as prepared for delivery are provided below:

Thank you Benjamin (Glassman) for that introduction, and more importantly, thank you for your 12 years of hard work at the Department to keep this community safe. And, of course, thank you to your Attorney General Mike Dewine. I know they care about these issues deeply. And Senator Portman, who couldn't be with us today, but I know firsthand he has been a passionate and steadfast leader in the Senate about tackling the opioid problem for years.

I wanted to be here with you all today because Ohio is at the center of this drug crisis that is gripping our entire nation. This crisis affects all of us, but it is especially taking its toll on this community.

On average, one person in Columbus dies of a drug overdose every day.

And that pace is only accelerating. According to a survey of Ohio's coroners, more than 4,000 Ohioans died of a drug overdose last year. And in Columbus, the coroner has already seen a 66 percent jump this year from the same time last year.

These aren't just numbers. These are moms and dads. These are sisters, brothers, and grandchildren. These are neighbors and co-workers. These are friends. These are Americans.

Just last week, a two-year-old girl in Dayton was hospitalized for a suspected opioid overdose—two years old.

In 2015, more than 52,000 Americans lost their lives to drug overdoses. And the numbers we have for 2016 show another increase—a big increase. Based on preliminary data, nearly 60,000 Americans lost their lives to drug overdoses last year. That will be the highest drug death toll and the fastest increase in that death toll in American history. This is not a sustainable trend nor an acceptable America.

This crisis is being driven primarily by opioids—prescription drugs, heroin, and synthetic drugs like fentanyl.

According to the New England Journal of Medicine, we're seeing more availability, higher purity, and lower price. They're lacing heroin and cocaine with fentanyl—a drug 30 to 50 times more powerful than heroin. As a result, the drugs on the street are now more powerful, more addictive, and more dangerous than ever. And they're not just dangerous for users: even being accidently exposed to just a few grains of fentanyl can kill a police officer or paramedic.

Sadly, this was almost the case just a couple months ago in East Liverpool, Ohio when Officer Chris Green brushed off a few grains of white powder from his shirt an hour after a traffic stop and fell to the floor. Luckily, he was in his squad room and they got to him immediately. As his police chief said, "if he would have been alone, he would have been dead." Or imagine if he'd gone straight home that day to give his kids a hug? These are terrifying thoughts for our law enforcement.

To confront a crisis on this scale, we must take a comprehensive approach to the problem. There are three components: prevention, enforcement, and treatment.

Treatment is important. In some cases, treatment can help break the cycle of addiction and crime and help people get their lives back together.

But treatment alone is not enough. Treatment often comes too late. By the time many people receive treatment, they, their families, and communities have already suffered so much. The struggle to overcome addiction can be a long

process – and it can fail. And not only can it fail, it very often fails.

In recent years, some of the government officials in this country have sent mixed messages about the harmfulness of drugs. We must not capitulate intellectually or morally to drug use. We must create a culture that is hostile to drug abuse. We know this can work. It has worked in the past for drugs, but also for cigarettes and seatbelts. A campaign was mounted, it took time, and it was effective. We need to send such a clear message now.

The Department of Justice has been working diligently to improve our prevention efforts. We are doing that through raising awareness, through drug take-back programs, and through DEA's 360 Strategy program – Dayton was recently announced as a 2017 pilot city.

Prevention is what we at the Department do every day—because enforcement is prevention. Enforcing our laws helps keep drugs out of our country, decrease their availability, drive up their price, and reduce their purity and addictiveness.

DEA tells us that 80 percent of heroin addiction starts with prescription drug addiction. We must stop the abuse of prescription drugs.

Earlier this month, the Department announced the largest health care fraud takedown in American history. DOJ coordinated the efforts of more than 1,000 state and federal law enforcement agents to arrest more than 400 defendants. More than 50 of these defendants were doctors and have been charged with opioid-related crimes, which means this was also the largest opioid-related fraud takedown in American history.

And, just a week after we made that announcement, we announced the seizure and take down of AlphaBay— the largest dark net marketplace takedown in history. This site hosted some 220,000 drug sale listings and was responsible for countless synthetic opioid overdoses, including the tragic death of a 13 year old in Utah.

These efforts build on the good work that U.S. Attorney Glassman and the Department have accomplished here. In late January, a doctor from New Albany, Ohio pled guilty to maintaining a clinic as a front for drug trafficking. He forfeited more than $29 million in seized assets from illegal drug trafficking.

A few months later, in April, a doctor from Portsmouth, Ohio, pled guilty to conspiring to distribute a controlled substance through a pain clinic. For six years, the clinic saw more than 20 patients a day, who each paid at least $200 in cash. At one point the defendant even opened her own dispensary at the clinic, so she could fill her own prescriptions for desperate patients.

These cases are beginning to roll in from all over the country.

On behalf of the Department, I want to say thank you to U.S. Attorney Glassman and everyone who worked on these cases. You have made this Department proud—and more importantly, you have made the people of Ohio safer.

And we can and must do more. Which is why today, we are announcing a new effort to target our federal resources against this epidemic. If you are a doctor illegally prescribing opioids for profit or a pharmacist letting these pills walk out the door and onto our streets based on prescriptions you know were obtained under false pretenses, we are coming after you. We will reverse these devastating trends with every tool we have.

First, I am announcing a new data analytics program – the Opioid Fraud and Abuse Detection Unit. I have created this unit to focus specifically on opioid-related health care fraud using data to identify and prosecute individuals that are contributing to this opioid epidemic. This sort of data analytics team can tell us important information about prescription opioids—like which physicians are writing opioid prescriptions at a rate that far exceeds their peers; how many of a doctor's patients died within 60 days of an opioid prescription; the average age of the patients receiving these prescriptions; pharmacies that are dispensing disproportionately large amounts of opioids; and regional hot spots for opioid issues.

With this data in hand, I am also assigning 12 experienced prosecutors to focus solely on investigating and prosecuting opioid-related health care fraud cases in a dozen locations around the country where we know enforcement will make a difference in turning the tide on this epidemic. These prosecutors, working with FBI, DEA, HHS, as well as our state and local partners, will help us target and prosecute these doctors, pharmacies, and medical providers who are furthering

this epidemic to line their pockets. These prosecutors will be based in several states across the country, including Kentucky, West Virginia, Tennessee, and right here in Southern Ohio.

With these new resources, we will be better positioned to identify, prosecute, and convict some of the individuals contributing to these tens of thousands of deaths a year. The Department is determined to attack this opioid epidemic, and I believe these resources will make a difference.

And I issue a plea to all physicians, dentists, pharmacists: slow down. First do no harm.

These efforts will make all of us safer—and not just from the threat of drug addiction. They also help us reduce violence in our communities.

Drug trafficking is an inherently violent business. If you want to collect a drug debt, you can't file a lawsuit in court. You collect it by the barrel of a gun.

By putting traffickers behind bars and reducing the supply of dangerous drugs, we will prevent much of the violence that is associated with drug dealing.

We also have to recognize that most of the heroin, cocaine, methamphetamine, and fentanyl in this country got here across our Southern border. Under President Trump's strong leadership, the federal government is finally getting serious about securing our borders. Illegal entries are down 50 percent already and the wall has not even gone up.

We have also seen steep decreases in drug prices on the street. But the price we have paid as a country has only gone up. If you ask the economists, they'll tell you that prescription opioid addiction costs our economy some $78 billion a year and other illicit drugs cost us another $193 billion a year. Remember, many of these drugs are paid for by private insurance, Medicaid, Medicare, and the VA. But what is even more devastating is the price we have paid in broken relationships, broken lives, and death rates the likes of which we have never seen before.

In the face of the worst drug crisis in our history, we need to use every lawful tool we have. But I'm convinced this is a winnable war. We will be calling on America's great physicians and health care workers to take special care with addictive drugs. And in order to win, we are committing more Department of Justice resources to combat this epidemic, as well as continue to work to strengthen our partnerships with you—law enforcement on the front lines.

Let me ask you to do a simple thing: after every arrest for illegal possession of an illegal prescription, make every effort to get the arrestee to tell you where he or she got the drugs. We did that in Mobile and it led us to the two biggest sources in town. We need to hammer these illegal suppliers. You are ultimately the most effective resources that we as a country have in this effort. You have a tough job, but it's a job worth doing.

But you can also know this: you have our thanks and this Department of Justice will always have your back. Thank you.

Topic(s):
Drug Trafficking

Component(s):
Office of the Attorney General

Press Release Number:
17-861

Updated August 2, 2017

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 24 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. MICHAEL MINAS, Defendant-Appellant.	No. 16-30209 D.C. No. 1:14-cr-00109-EJL-1 District of Idaho, Boise ORDER

Before: McKEOWN and GOULD, Circuit Judges, and ROTHSTEIN,* District Judge.

Appellant's Petition for Rehearing is DENIED.

The full court has been advised of the Petition for Rehearing En Banc and no judge of the court has requested a vote on the Petition for Rehearing En Banc.

Fed. R. App. P. 35. Appellant's Petition for Rehearing En Banc is also DENIED.

* The Honorable Barbara Jacobs Rothstein, United States District Judge for the Western District of Washington, sitting by designation.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

NOV 01 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

MICHAEL MINAS,

Defendant - Appellant.

No. 16-30209

D.C. No. 1:14-cr-00109-EJL-1
U.S. District Court for Idaho, Boise

MANDATE

The judgment of this Court, entered September 14, 2017, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Craig Westbrooke
Deputy Clerk
Ninth Circuit Rule 27-7

APPENDIX E

INSTRUCTION NO. ____

The practice of medicine in Idaho consists of an evaluation, diagnosis and treatment of and/or prescription for a physical condition. Idaho Code § 54-1803.

APPENDIX F

ALL COUNSEL: Thank you, Your Honor.

MR. MALONEY: I think we might be ready on the instructions.

THE COURT: I'm not.

MR. MALONEY: Fair enough.

(Recess taken from 11:10 a.m. to 11:25 a.m.)

THE COURT: It is my understanding, Counsel, that you have had an opportunity to review the Court's proposed instructions as well as the verdict form.

Does the Government have any objection to the Court's proposed instructions?

MS. WARD: No, Your Honor, the Government does not have any objection.

THE COURT: Any objection to the Court's failure to give a submitted instruction?

MS. WARD: Not that the Government submitted, Your Honor, no.

THE COURT: Any objection to the proposed verdict form?

MS. WARD: No, Your Honor.

THE COURT: Mr. Arkoosh, you have had an opportunity to review the Court's proposed instructions?

MR. ARKOOSH: I have, Your Honor. We have no objection to the proposed instructions. We do object to the absence of our proposed instruction. The practice of medicine

in Idaho is defined by Idaho Code 54-1803. It is our feeling that if one of the issues in the case is the legitimate practice of medicine -- or legitimate medical purpose, we believe that the jury should be told what the practice of medicine is. And I think you have heard the argument before, Your Honor.

We have no objection to the verdict form.

THE COURT: Thank you.

In response to your objection, the Court has had an opportunity to review the requested Idaho statute as well as the relevant case law. The Court finds the inclusion of the Idaho licensing definition of the practice of medicine in a jury instruction would be confusing and possibly misleading if given in a criminal case.

Under *Feingold*, the Government must prove the Defendant intentionally distributed controlled substances outside the usual course of professional conduct and without a legitimate medical purpose. The Idaho statute does not define in quote "the usual course of professional conduct, end quote, nor does it define, quote, "legitimate medical purpose."

Instead, the medical experts have testified as to the applicable usual course of professional conduct in the community for the treatment of pain and prescription of controlled substances for a legitimate medical purpose. These are the standards to be considered by the jury in this case.

This is consistent with the holding in Gonzales vs. Oregon,

APPENDIX G

Idaho Statutes

TITLE 54
PROFESSIONS, VOCATIONS, AND BUSINESSES
CHAPTER 18
PHYSICIANS AND SURGEONS

54-1803. DEFINITIONS. (1) The "practice of medicine" means:

(a) To investigate, diagnose, treat, correct or prescribe for any human disease, ailment, injury, infirmity, deformity or other condition, physical or mental, by any means or instrumentality;

(b) To apply principles or techniques of medical science in the prevention of any of the conditions listed in paragraph (a) of this subsection; or

(c) To offer, undertake, attempt to do or hold oneself out as able to do any of the acts described in paragraphs (a) and (b) of this subsection.

(2) The word "board" means the state board of medicine.

(3) The term "physician" means any person who holds a license to practice medicine and surgery, osteopathic medicine and surgery, or osteopathic medicine, provided further, that others authorized by law to practice any of the healing arts shall not be considered physicians for the purposes of this chapter.

(4) "Alternate supervising physician" means a physician who is registered with the board as set forth in board rule and who is responsible for supervising a physician assistant or graduate physician assistant in the temporary absence of the supervising physician.

(5) "Supervising physician" means a physician who is registered with the board as set forth in board rule and who is responsible for the direction and supervision of the activities of and patient services provided by a physician assistant or graduate physician assistant.

(6) A "license to practice medicine and surgery" means a license issued by the board to a person who has graduated from an acceptable school of medicine and who has fulfilled the licensing requirements of this chapter.

(7) A "license to practice osteopathic medicine and surgery" means a license issued by the board to a person who either graduated from an acceptable osteopathic school of medicine subsequent to January 1, 1963, or who has been licensed by endorsement of a license issued by another state where a composite examining board exists and where physicians licensed to practice medicine and surgery and osteopathic physicians take the same examination and hold equal licenses, and who has fulfilled the licensing requirements of this chapter.

(8) A "license to practice osteopathic medicine" means a license issued by the state board of medicine to a person who graduated from an acceptable osteopathic school of medicine and who prior to January 1, 1963, has fulfilled the licensing requirements of this chapter.

(9) The word "person," the word "he" and the word "his" mean a natural person.

(10) An "acceptable school of medicine" means any school of medicine or school of osteopathic medicine that meets the standards or requirements of a national medical school accrediting organization acceptable to the board.

(11) The word "extern" means a bona fide student enrolled in an acceptable school of medicine who has not received his degree.

(12) The word "intern" or "resident" means any person who has completed a course of study at an acceptable school of medicine and who is enrolled in a postgraduate medical training program.

(13) The term "physician assistant" means any person who is a graduate of an acceptable training program and who is qualified by specialized education, training, experience and personal character and who has been licensed by the board to render patient services under the direction of a supervising and alternate supervising physician. Nothing in this chapter shall be construed to authorize physician assistants to perform those specific functions and duties specifically delegated by law to those persons licensed as pharmacists under chapter 17, title 54, Idaho Code, as dentists or dental hygienists under chapter 9, title 54, Idaho Code, or as optometrists under chapter 15, title 54, Idaho Code.

(14) "Graduate physician assistant" means a person who is a graduate of an approved program for the education and training of physician assistants and who meets all of the requirements in this chapter for licensure, but who:

(a) Has not yet taken and passed the certification examination and who has been authorized by the board to render patient services under the direction of a supervising physician for a period of six (6) months; or

(b) Has passed the certification examination but who has not yet obtained a college baccalaureate degree and who has been authorized by the board to render patient services under the direction of a supervising physician for a period of not more than five (5) years.

History:

[54-1803, added 1977, ch. 199, sec. 4, p. 537; am. 1998, ch. 177, sec. 1, p. 659.; am. 2010, ch. 89, sec. 1, p. 170.]

How current is this law?

Search the Idaho Statutes and Constitution

APPENDIX H

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We have no objection to the verdict form.

THE COURT: Thank you.

In response to your objection, the Court has had an opportunity to review the requested Idaho statute as well as the relevant case law. The Court finds the inclusion of the Idaho licensing definition of the practice of medicine in a jury instruction would be confusing and possibly misleading if given in a criminal case.

Under *Feingold*, the Government must prove the Defendant intentionally distributed controlled substances outside the usual course of professional conduct and without a legitimate medical purpose. The Idaho statute does not define in quote "the usual course of professional conduct, end quote, nor does it define, quote, "legitimate medical purpose."

Instead, the medical experts have testified as to the applicable usual course of professional conduct in the community for the treatment of pain and prescription of controlled substances for a legitimate medical purpose. These are the standards to be considered by the jury in this case.

This is consistent with the holding in Gonzales vs. Oregon,

546 U.S. 243, 2006.

Objection noted and denied.

MR. ARKOOSH: Thank you, Your Honor.

THE COURT: And I you indicated you do not have any objection to the Court's verdict form as well?

MR. ARKOOSH: We do not.

THE COURT: Counsel, I want to bring to your attention that in the instructions -- we get down to Instruction No. 34, and you note there are a number of charts that are included there. I think the direction probably from the Ninth Circuit as well as other courts is that the Court technically is to read every one of those lines.

What I am suggesting and asking, I guess, is if counsel have any objection to the Court just bringing those to the attention of the jury without reading every line.

MR. ARKOOSH: We would not only stipulate, we would ask to be saved from that, Your Honor. Thank you.

MS. WARD: We have an all-around agreement then, Your Honor. The Government would also stipulate to that.

THE COURT: I think it just causes the jury to turn off. It is just so repetitious that they just don't listen after a period of time, and I think it is counterproductive.

But I am going to just ask, in the exercise of caution, Doctor, if you also consent as well.

THE DEFENDANT: I do.

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL MINAS, Defendant.	)	Case No. 1:14-cr-00109-EJL **ORDER**

Pending before the Court in the above-entitled matter are Defendant Michael Minas' Motion for Post-Verdict Judgment of Acquittal (Dkt. 219), Motion Re: Juror Interviews (Dkt. 248), and Motion for Leave to File Excess Pages (Dkt. 263). Having fully reviewed the record, the Court finds that the facts and legal arguments are adequately presented in the briefs and record. Accordingly, in the interest of avoiding further delay, and because the Court conclusively finds that the decisional process would not be significantly aided by oral argument, the Court will decide this matter without oral argument.

Factual Background

Following a jury trial in this matter, Minas was found guilty of 80 counts of distributing a controlled substance in violation of 21 U.S.C. § 841. Minas was found not guilty on 59 counts and the Government dismissed Counts 46-52 prior to the jury

deliberating. The jury deliberated for five days. The Court previously denied Defendant's Motion for Acquittal during the trial and he has now renewed his motion post-judgment.

Defendant claims the jury verdict is not supported by the evidence and the jury determined the Defendant was guilty based on a malpractice standard, not the criminal standard set forth in the Jury Instructions. The Government maintains the jury had sufficient evidence to convict the Defendant on the criminal standard and the motion should be denied.

Motion for Post-Verdict Judgment of Acquittal

Pursuant to Rule 29, a motion for acquittal is reviewed for sufficiency of the evidence and the court views the evidence in a light most favorable to the Government to determine if the evidence submitted would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) (quoting *United States v. Stoddard*, 150 F.3d 1140, 1144 (9th Cir. 1998)).

The substantive jury instruction was approved by the parties. Consistent with *United States v. Feingold*, 454 F.3d 1001 (9th Cir. 2006), in order for the jury to convict, the jury was required to find beyond a reasonable doubt each of the following elements for each count:

> First, on or about the dates set forth in the chart below, the defendant Michael Minas knowingly and intentionally distributed the specific controlled substance and quantity of the controlled substance set forth on the chart for each count;
>
> Second, for each count, the defendant knew that the distribution of the controlled substance was outside the usual course of professional practice and without a legitimate medical purpose; and
>
> Third, for each count, the defendant acted with intent to distribute the controlled substance and with intent to distribute the controlled substance outside the usual course of professional practice and without a legitimate medical purpose.

Jury Instruction 34 (in part), Dkt. 217.

Defendant argues the record does not support that a reasonable jury could find the prescriptions were outside the usual professional practice and for no legitimate medical purposes when witnesses testified the prescriptions were to treat pain and it was undisputed that oxycodone is prescribed as pain medication. The Court respectfully disagrees.

While it is possible to cite portions of the record wherein witnesses agreed they were in pain or that the use of opioid prescriptions is within the professional practice and for a legitimate medical purpose when prescribed to treat pain, there was also sufficient evidence presented that the prescriptions identified in the Second Superseding Indictment were intentionally issued by Minas were not within the usual course of professional practice and were not for a legitimate medical purpose. The Court must consider *all* the evidence submitted at trial and view such evidence in a light most favorable to the

Government in determining whether there was sufficient evidence for a the jury to have returned the verdicts of guilty

The jury did not convict Minas for the prescriptions he issued for the undercover officers or for the felons who testified they were also distributing oxycodone. The jury did not convict Minas of the first prescription he wrote for each of the other patients, but did convict Minas for the prescriptions he refilled after the first visit for these patients. This is not an inconsistent verdict. The evidence certainly could lead rational jurors to conclude that Minas acted within the usual course of professional practice and for a legitimate medical purpose for the *first* office visit for these patients when he intentionally distributed controlled substances. The jury observed the differences in how Minas dealt with the undercover agents on their first office visit as compared to follow up visits. Additionally, the patients testified as to Minas' conduct over the course of the time he was treating them.

The Court finds there was sufficient evidence presented that a reasonable jury could conclude that Minas intentionally failed to act within the usual course of professional practice *and* without a legitimate medical purpose when he intentionally renewed and/or increased the prescriptions without inquiry or consideration of further medical testing, review of prescription histories, discussion of the pain contract, failed to keep medical records, trusting all excuses given by a patient, increasing the dosages so far beyond the standard that an expert determined he was lucky his patients were still alive.

Minas argues this is just malpractice and does not rise to criminal liability. The Court disagrees. There was a battle of experts in this case. The record supports a reasonable jury could find the Government experts more credible than the defense experts when they testified there would be "no legitimate medical purpose" for prescribing the this type and quantity of pain medication to the identified patients that the jury returned guilty verdicts on.

This expert testimony combined with the testimony of the patients who had noted addiction problems in their medical files or medical conditions that did not support the prescribed dosages supports a lack of legitimate medical purpose to for the prescriptions. Minas admitted in his interview by investigators (that was played for the jury) that he knew 40 to 50% of his patients were drug seeking patients that did not present a legitimate medical need for prescriptions for controlled substances.

When this expert testimony is combined with the factual testimony regarding Minas' change in his medical practice, his conduct during the office visits, there is sufficient evidence for a reasonable jury to find the Government proved beyond a reasonable doubt all elements for the criminal standard for illegal drug distribution by Minas in this case.

The Court is mindful that there was also evidence presented that the prescriptions were within the usual course of professional practice and for a legitimate medical purpose. But it was up to the jury to consider all the evidence and to weigh the credibility of the witnesses. The record is clear there was "sufficient evidence" presented for a jury

to find the Defendant guilty beyond a reasonable doubt on the 80 counts of conviction and that the jury did not apply a malpractice standard, but the criminal standard set forth in the jury instructions. For these reasons, the motion for acquittal must be denied.

Motion for Juror Interviews

Defendant previously filed a motion regarding alleged improper influence on a juror. The Court conducted an inquiry and concluded that any improper influence on the identified juror occurred *after* jury deliberations had concluded. The Court finds there is no need for further inquiry of the other jurors to confirm what the Court has already determined occurred regarding the improper influence allegations. Moreover, the Ninth Circuit discourages post-verdict interviews of jurors. *Traver v. Meshriy*, 627 F.2d 934, 941 (9th Cir. 1980). In this case it appears, the Defendant is merely seeking to inquire about confidential jury deliberations and this is not proper. The request to conduct further have contact with and interview the jurors in this matter is denied.

Motion for Leave to File Excess Pages

Defendant seeks leave to file overlength briefing regarding sentencing in this matter. For good cause shown, this motion is granted and the excess pages shall be considered by the Court.

Order

IT IS ORDERED:

1. Defendant Michael Minas' Motion for Post-Verdict Judgment of Acquittal (Dkt. 219) is **DENIED.**

2. Defendant's Motion Re: Juror Interviews (Dkt. 248) is **DENIED.**

3. Defendant's Motion for Leave to File Excess Pages (Dkt. 263) is **GRANTED**.

DATED: **September 8, 2016**

Honorable Edward J. Lodge
U. S. District Judge