

A close-up photograph of a person's hand holding a clear glass bottle. The bottle is tilted, and a large number of small, white, round pills have spilled out onto a dark, reflective surface. The background is dark and out of focus. A solid red vertical rectangle is located in the top right corner of the image.

Opioids: Criminal Actions

JUDGE SCOTT ROWLAND

OKLAHOMA COURT OF CRIMINAL APPEALS

The Polar Ends of Two Views

- ▶ Doctors Who Prescribe Narcotics and Dangerous Drugs Outside the Law Are No Different than Other Drug Offenders/Dealers
- ▶ The Above View is Myopic and Essentially Criminalizes What is At Most Medical Negligence

**As Usual.....The Truth
Lies In Between.....**

The Genesis of Prosecuting CDS Registrants

U.S. v. Moore, U.S. Supreme Court 1975

- ▶ Doctor charged with 40 counts of illegally distributing **methadone**
- ▶ Convicted: 14 Counts: 5-15 years c/c
- ▶ 8 Counts: 10-30 years c/c and c/s with above counts
- ▶ Federal Appeals Court-D.C. Circuit reversed, finding his status as a registrant made him immune from prosecution under standard drug distribution statutes.

U.S. v. Moore, U.S. Supreme Court 1975

- ▶ Defense: could only be prosecuted, if at all, under lesser crimes applicable only to registrants.
- ▶ Unanimous Court holds that defendant's actions were outside the scope of his authorization, and thus could be prosecuted under either criminal provision.
- ▶ Outside Usual Professional Practice and Without Legitimate Medical Need

Outside The Usual Course of Professional Practice

- ▶ Little or no physical examination
- ▶ Prescribed amount patient demanded/paid for
- ▶ Authorization was for detox treatment
- ▶ Did not dispense it at the clinic
- ▶ Took no steps to guard against diversion
- ▶ Charged by the number of pills prescribed

U.S. v. Moore, U.S. Supreme Court 1975

- ▶ “We. . .hold that registered physicians can be prosecuted under s 841 when their activities fall outside the usual course of professional practice.”
- ▶ Oklahoma Title 63 Section 2-401 is equivalent of federal 841 distribution offenses

Oklahoma Statutes

Title 63

Oklahoma Title 63 §2-401

- ▶ A. Except as authorized by the Uniform Controlled Dangerous Substances Act, it shall be unlawful for any person:
- ▶ 1. To distribute, dispense, transport with intent to distribute or dispense, possess with intent to manufacture, distribute, or dispense, a controlled dangerous substance or to solicit the use of or use the services of a person less than eighteen (18) years of age to cultivate, distribute or dispense a controlled dangerous substance;

Okla Uniform Jury Instruction 6-16

- ▶ **Dispensing** - Delivering a controlled dangerous substance to an ultimate user or human research subject by or pursuant to the lawful order of a practitioner.
- ▶ **Distribute** - "Distribute" means to deliver other than by administering or dispensing a controlled dangerous substance.

2-406

- ▶ A. It shall be unlawful for any registrant knowingly or intentionally:
 - ▶ 1. To distribute, other than by dispensing or as otherwise authorized by this act, a controlled dangerous substance classified in Schedules I or II, in the course of his legitimate business, except pursuant to an order form as required by Section 2-308 of this title;
 - ▶ 2. To use in the course of the manufacture or distribution of a controlled dangerous substance a registration number which is fictitious, revoked, suspended or issued to another person;

(Cont'd)

2-406

- ▶ 3. To acquire or obtain possession of a controlled dangerous substance by misrepresentation, fraud, forgery, deception or subterfuge;
- ▶ 4. To furnish false or fraudulent material information in, or omit any material information from, any application, report, or other document required to be kept or filed under this act, or any record required to be kept by this act; and

2-407

- ▶ A. No person shall obtain or attempt to obtain any preparation excepted from the provisions of the Uniform Controlled Dangerous Substances Act pursuant to Section 2-313 of this title in a manner inconsistent with the provisions of paragraph 1 of subsection B of Section 2-313 of this title, or a controlled dangerous substance or procure or attempt to procure the administration of a controlled dangerous substance:

(Cont'd)

2-407

- ▶ 1. By fraud, deceit, misrepresentation, or subterfuge;
- ▶ 2. By the forgery of, alteration of, adding any information to or changing any information on a prescription or of any written order;
- ▶ 3. By the concealment of a material fact; or
- ▶ 4. By the use of a false name or the giving of a false address.

Recent Prosecutions for Unlawful Distribution of Opioids

***U.S. Chaney*, 921 F.3d 572 (6th Cir. 2019)**

- ▶ Co-Defendants husband and wife operated pain management clinic in Kentucky
- ▶ Indicted on various drug, money laundering, health care fraud counts
- ▶ 240 Count Indictment, whittled down to 40 for trial—25 day trial
- ▶ Convicted on some.
 - ▶ Him: 15 years Her: 6.5 years

***U.S. Chaney*, 921 F.3d 572 (6th Cir. 2019)**

► Elements of Distribution Counts:

1. That defendant distributed a controlled substance;
2. That he acted intentionally or knowingly; and
3. That defendant prescribed the drug **without a legitimate medical purpose and outside the course of professional practice.**

“Without a Legitimate Medical Purpose”

- ▶ On Appeal: Argued patients had underlying conditions justifying the opioids, thus was medical purpose
- ▶ Court rejects this: language means doctor-patient relationship so that doctor's purpose is the key, not the patient's underlying medical condition

The Court stated:

“Accepting the Chaneys’ premise, no physician could be held criminally liable for distributing opioid prescriptions to users who incidentally carried some legitimate need for painkillers, regardless of where, why, or how those prescriptions were issued. Suppose, for example, that a physician began dispensing prescriptions for powerful narcotics to strangers on a street corner, without asking for their medical history or performing a medical examination of any kind.”

(Cont’d)



(Cont'd)

“Under the Chaney’s proposed construction of the law, the Government could not prosecute this physician for dispensing painkillers “without a legitimate medical purpose” absent some expert testimony that proved each stranger did not have a legitimate need for the pills.”

***U.S. v. Roland*, 737 F. App'x 484, 488 (Unpublished, 11th Cir. 2018)**

- ▶ Atlanta-area physician convicted on conspiracy and seven distribution counts in 12 day trial in 2017.
- ▶ 130 months federal prison
- ▶ Oct. 2013-April 2014 worked at 4 area clinics, 3 of them owned by co-defendant Licata

U.S. v. Roland

Licata planned to open a second clinic, but first needed to hire a prescribing physician, so he placed an ad on Craigslist. No doctor responded to Licata's ad, but Licata did receive a message from someone whom Licata described as a "headhunter for pill mills." The headhunter offered to find Licata a doctor who had experience working at pill mills. Licata declined because the Craigslist headhunter's referral fee of \$15,000 was too expensive and decided to find a doctor on his own.

U.S. v. Roland

In May 2013, Licata found a suitable replacement and started a new clinic titled "Express Health Center." But five to six months later, Licata's replacement doctor quit after he became concerned that the clinic was under investigation for operating as a pill mill.

Hoping to keep Express Health open, Licata again contacted the Craigslist headhunter and began paying the \$15,000 fee in installments. In exchange, the headhunter agreed to send Licata a doctor who was willing to work at a pill mill.

U.S. v. Roland

The headhunter subsequently sent Licata two more doctors, but neither one lasted very long. One doctor worked for Licata for less than two weeks, while the other doctor quit working for Licata after just one day. Both doctors expressed unease about working at a pill mill.

U.S. v. Roland

Without a doctor and facing the prospect of having to close Express Health, Licata contacted his Craigslist headhunter again, urging him to send Licata a suitable replacement. Licata's headhunter complied, sending Dr. Roland, whom the headhunter "highly recommended." In October 2013, Dr. Roland began working at Express Health. After Licata hired Roland, Express Health began to earn a profit, seeing a regular flow of customers.

U.S. v. Roland

- ▶ 10-20 patients per day
- ▶ \$300 for Georgia residents, \$400 for out of state patients cash only
- ▶ Dr. Roland paid end of each day \$1300 per day
- ▶ Relied on “patient sponsors” to recruit others

U.S. v. Roland

- ▶ Patients typically rode several in same car
- ▶ Fights, drug dealing, etc. in parking lot and security guard was hired
- ▶ Exams often 30 to 50 seconds long; patient complaint often resulted in increased pill amounts prescribed

U.S. v. Roland

- ▶ “Upon entering the clinics, Licata’s patients paid for their appointments. The patients then filled out intake paperwork asking them about the pain they were suffering and what treatment they sought for that pain. Licata’s clinics also required the patients to provide urine samples for drug testing, MRI scans of their injuries, and pharmaceutical reports listing their current pain medication. During the trial, Licata and other witnesses admitted that many MRI scans were forged and that the urine samples were rarely tested and typically discarded. Even if the urine samples were tested, Dr. Roland would not look at the reports to assess whether his patients were abusing drugs.”

U.S. v. Elliott, et al., 876 F.3d 855, (6th Cir. 2017)

- ▶ “From 2008 to 2014, the Pain Center of Broward (“PCB”) in Ft. Lauderdale, Florida, was the place to go to find cheap pain pill prescriptions. Indeed, the banner hanging in the waiting room advertised exactly that: “Pain Center of Broward, lowest cost prescriptions.” At just \$300 for an initial appointment, \$200 for a repeat visit, and with discounts for loyal customers, a patient could leave the PCB with a monthly prescription for 180 30-milligram and 90 15-milligram pills of oxycodone. By way of context, another doctor might prescribe a new patient two 5-milligram pills *858 per day. Business at the PCB boomed. At its height, 60 to 65 patients a day arrived at the PCB. They would overcrowd the waiting room and spill over into the parking lots, creating a mass so substantial that the clinic's staff feared that the crowds would attract the suspicion of federal agents.”

U.S. v. Elliott, *et al.*, 876 F.3d 855, (6th Cir. 2017)

- ▶ Physician, P.A., and Security Guard all charged conjointly and in conspiracy
- ▶ Evidence was sufficient to show outside the scope and no legitimate medical purpose even without an expert witness
 - ▶ Thousands of patients from Ohio, Georgia, Mass., but mostly Kentucky
 - ▶ 2008-2014 generated 10 million dollars profit

U.S. v. Elliott, et al., 876 F.3d 855, (6th Cir. 2017)

- ▶ Claim of insufficient evidence to show outside of scope and lack of legit medical purpose because government called no expert witness
 - ▶ “Here, the evidence required no expert interpretation to prove that Frial-Carrasco's actions were not within the realm of legitimate medicine. The government showed that Frial-Carrasco prescribed opioids in doses generally not found outside patients with traumatic injuries or in end-of-life care, that she thought the PCB possessed the “red flags” of a pill mill, and that she continued working there regardless. (Cont’d)

U.S. v. Elliott, *et al.*, 876 F.3d 855, (6th Cir. 2017)

- ▶ The jury also heard about the extremely short time Frial-Carrasco spent with patients and her knowledge of the distances they traveled to obtain prescriptions at the clinic. Dr. Golovac's expert testimony offered additional evidence to distinguish Frial-Carrasco's actions from those of an ordinary doctor, and thus prove her participation in the conspiracy."

***United States v. Volkman*, 797 F.3d 377, 382
[6th Cir. 2015]**

- ▶ University of Chicago M.D. and PhD in Pharmacology
- ▶ Board Certified Emergency Medicine
- ▶ Diplomat, American Academy of Pain Management
- ▶ Multiple lawsuits and other financial woes = no malpractice insurance and no job in 2003
- ▶ Accepted job at pain management clinic for \$5,000 per week; 18-20 patients per day; cash only

***United States v. Volkman*, 797 F.3d 377, 382 (6th Cir. 2015)**

- ▶ Local pharmacies quit honoring his prescriptions due to high dosages so he opens a dispensary in his clinic.
- ▶ “Drug addicts, drug peddlers, or individuals otherwise not complaining of pain would come to see him as his “patients.” Very little was done in terms of taking medical histories or conducting physical examinations. Volkman would regularly prescribe a drug cocktail consisting of opiates (such as oxycodone and hydrocodone) as well as sedatives (diazepam, alprazolam, and carisoprodol; more commonly referred to as Valium, Xanax, and Soma). He had a tendency of first resorting to narcotics, disregarding first lines of treatment for pain management such as non-steroidal anti-inflammatory drugs (NSAIDs).”

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***United States v. Volkman*, 797 F.3d 377, 382
[6th Cir. 2015]**

- ▶ Convicted four counts unlawful distribution leading to death, seven counts unlawful distribution, conspiracy, one count of maintaining a drug involved premises, and one count of possessing a firearm in furtherance of a drug trafficking offense
- ▶ 4 life terms concurrent with 240 years

***United States v. Volkman*, 797 F.3d 377, 382 [6th Cir. 2015]**

- ▶ “When a doctor first enters the practice of medicine, he or she swears to abide by a prime directive of the profession: “First, do no harm.” Paul Volkman breached this sacrosanct tenet when he prescribed narcotics to addicts and individuals with physical, mental, and psychological frailties. A federal jury looked at Volkman's actions and found him guilty of breaking several laws, chief among them the law prohibiting the unlawful distribution of controlled substances.”

***U.S. v. McKay*, [10th Cir. 2013]**

- ▶ Doctor indicted on 84 counts, including two relating to causing the death of a patient by wrongful prescribing
 - ▶ Pain management doctor—saw 80 to 100 patients per day spending 2 to 5 minutes per patient
 - ▶ Expert witness reviewed charts and testified that defendant was prescribing outside of legitimate medical practice.

***U.S. v. McKay*, [10th Cir. 2013]**

- ▶ 10th Circuit rejected claim that Government's evidence was merely Dr. Hare's subjective opinion
 - ▶ "Defendant further argues the Government is unable to point to any specific evidence that shows Defendant stepped out of his role as a physician and into that of a criminal drug dealer. But the above trial testimony reveals the Government did present evidence as to each patient named in the non-death counts. Dr. Hare stated that Defendant prescribed to each patient without a legitimate medical purpose."

***U.S. v. Lovern*, [10th Cir. 2009]**

- ▶ 45 year veteran pharmacist, and the pharmacy's computer technician, convicted of conspiracy to dispense drugs in violation of Controlled Substances Act.
 - ▶ Government uses expert witnesses, some doctors some not
 - ▶ 10th Circuit expressly rejects notion that only physicians may be expert witnesses on proper prescribing

***U.S. v. Lovern*, [10th Cir. 2009]**

- ▶ “Mr. Lovern complains that neither of the two pharmacists who testified, Ms. Rice and Ms. Ihrig, nor the DEA investigator, Ms. O'Malley, is a physician. From this, we gather that Mr. Lovern believes only doctors can testify about usual practices in the profession. But he provides no legal support for this notion, and in the case of pharmacists, the regulations implementing the CSA tend to refute his hypothesis. Those regulations expressly place a duty on pharmacists not to knowingly fill prescriptions issued outside the usual course of medical practice. ”

State Prosecutions for Murder or Manslaughter

***People v. Tseng*, 241 Cal. Rptr. 3d 194, 196**

[Cal. Ct. App. 2018]

- ▶ Physician convicted of three counts of Second Degree Murder, Nineteen Counts Unlawful Prescribing, One count Obtaining CDS by Fraud
- ▶ 2007, Dr. Tseng, D.O.,--internal medicine joined clinic in Rowland Heights, a general medical practice operated by her husband. When Tseng first joined the clinic, the patients came from the local Hispanic and Asian communities, the wait time for each patient was 15 to 30 minutes and 90 percent of the patients paid for treatment through their insurance.

***People v. Tseng*, 241 Cal. Rptr. 3d 194, 196 [Cal. Ct. App. 2018]**

- By 2008, the practice and the clientele of the clinic had changed. Most of Tseng's patients were now white males in their 20's and 30's who came from outside Los Angeles County seeking pain and anxiety management medications. By 2010, the clinic had developed a reputation as a place where patients could easily obtain prescriptions for controlled substances, including opioids, sedatives, muscle relaxants, and drugs used to treat drug addiction. In addition, fees had doubled, and nearly all patients paid in cash.³ The clinic's income increased from \$600 a day in cash to \$2,000 to \$3,000 per day.⁴

***People v. Tseng*, 241 Cal. Rptr. 3d 194, 196
[Cal. Ct. App. 2018]**

- ▶ According to one visitor, the clinic looked “like a parole office” with “drug dealing.” The wait time for Tseng’s patients also increased to about six hours with 20-30 patients inside the waiting room or outside the clinic at any one time. Some patients appeared to be under the influence of drugs or suffering from drug withdrawals, and one patient overdosed in the waiting room. When G.R., the clinic’s receptionist, expressed concern about the number of patients waiting and the level of anxiety and agitation they expressed in the waiting room, Tseng told her that they were “druggies” and could wait.

***People v. Tseng*, 241 Cal. Rptr. 3d 194, 196
[Cal. Ct. App. 2018]**

- ▶ 10-15 minute first exam; 5 minutes thereafter
- ▶ See multiple unrelated patients in same exam room
- ▶ cursory or no exam; wrote for nonspecific patient complaints with little or no inquiry
- ▶ oxycodone, oxymorphone, fentanyl, and hydrocodone, such as promethazine, benzodiazepine, muscle relaxants such as carisoprodol

***People v. Tseng*, 241 Cal. Rptr. 3d 194, 196
[Cal. Ct. App. 2018]**

- ▶ At trial, the prosecution presented evidence that from September 2007 to December 2009, nine of Tseng's patients—ranging from 21 to 34 years of age—died shortly after filling the prescriptions Tseng wrote them for controlled substances.

***People v. Tseng*, 241 Cal. Rptr. 3d 194, 196 [Cal. Ct. App. 2018]**

- ▶ "There is substantial evidence of Tseng's subjective awareness of the risk of death her prescribing practices posed to the three charged murder victims. Concerning Nguyen, the evidence showed that from his initial visit, Tseng knew that Nguyen was drug-seeking and that he was taking high doses of opioids prescribed by other doctors. Nonetheless, she failed to corroborate his complaints of pain and anxiety, contact his other doctors, or do the kind of physical examination required to determine whether a legitimate medical reason existed for prescribing the drugs he requested."

***People v. Stiller*, 242 Mich. App. 38, 47, 617
N.W.2d 697, 701–02 (2000)**

- ▶ "...by prescribing huge quantities of medicine unrelated to any rational medical treatment and that had a possibility of interacting with other drugs he prescribed, defendant should have known that an overdose **702 was likely to occur, and he therefore exhibited a wanton and willful disregard of the likelihood that the natural tendency of his behavior was to cause death or great bodily harm."

Elements of Homicide Offenses

- ▶ First Degree Murder: Requires malice/intent to take a human life.
- ▶ However: Oklahoma/Some other States enumerate it among offenses to support a felony murder conviction
- ▶ Thus, death in course of commission of this crime is first degree murder

Elements of Homicide Offenses: 21

O.S. §701.7(b)

- ▶ B. A person also commits the crime of murder in the first degree, regardless of malice, when that person or any other person takes the life of a human being during, or if the death of a human being results from, the commission or attempted commission of murder of another person, shooting or discharge of a firearm or crossbow with intent to kill, intentional discharge of a firearm or other deadly weapon into any dwelling or building as provided in Section 1289.17A of this title, forcible rape, robbery with a dangerous weapon, kidnapping, escape from lawful custody, eluding an officer, first degree burglary, first degree arson, unlawful distributing or dispensing of controlled dangerous substances or synthetic controlled substances, trafficking in illegal drugs, or manufacturing or attempting to manufacture a controlled dangerous substance

Elements of Homicide Offenses

- ▶ Murder in Second Degree
- ▶ Felony Murder non-enumerated felony
- ▶ “Depraved Heart” murder-where conduct is imminently dangerous, shows depravity of heart, without regard for human life.

Elements of Homicide Offenses

- ▶ Manslaughter Offenses:
- ▶ First Degree—Misdemeanor Manslaughter: death, though unintentional, results from commission of some misdemeanor
- ▶ Second Degree: Defendant's culpable negligence caused the victim's death

Conclusion