

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MICHAEL J. GIVEN,

Defendant.

Case No.: 3:21cr63/MCR

Pensacola, Florida
July 22nd, 2022
8:11 a.m.

RULE 29 MOTION

EXCERPT TRANSCRIPT OF **JURY TRIAL** PROCEEDINGS
BEFORE THE HONORABLE M. CASEY RODGERS
UNITED STATES DISTRICT JUDGE, and a jury
(Pages 1-18)

APPEARANCES:

FOR THE GOVERNMENT:

Jason R. Coody
Acting United States Attorney
By: **ALICIA H. FORBES**
Assistant U.S. Attorney
alicia.forbes@usdoj.gov

J. RYAN LOVE
Assistant U.S. Attorney
Ryan.Love@usdoj.gov
21 East Garden Street, Suite 400
Pensacola, Florida 32502

Donna L. Boland, RPR, FCRR
United States Court Reporter
*1 N Palafox Street * Pensacola, Florida 32502*
Donna_Boland@flnd.uscourts.gov

FOR THE DEFENDANT:

Beggs & Lane
By: **DAVID LEE MCGEE**
dln@beggslane.com

MATTHEW PAUL MASSEY
mpm@beggslane.com
501 Commendencia Street
Pensacola, Florida 32501

1

PROCEEDINGS

08:11:20 2 **MR. MASSEY:** Yes, Your Honor. Good morning. May it
08:11:22 3 please the Court.

08:11:22 4 I printed off some case law just that I'll be
08:11:26 5 referencing or relying. May I hand a copy to Madam Clerk?

08:11:31 6 **THE COURT:** Yes.

08:11:32 7 **MR. MASSEY:** I'm handing a copy to government counsel
08:11:34 8 as well.

08:11:39 9 Your Honor, just for the record, the cases that I've
08:11:41 10 handed up are *United States vs. Joseph*, which is 709 F.3d 1082;
08:11:48 11 *United States vs. Rosen*, 582 F.2d 1032; *United States vs.*
08:11:59 12 *Abovyan*, which is 988 F.3d 1288; and then *Ruan vs. United*
08:12:05 13 *States*, 142 S. Ct. 2370.

08:12:13 14 Your Honor, this is an extremely unusual case that the
08:12:17 15 government has decided to bring. They have chosen to base
08:12:20 16 their entire prosecution based on one thing and that's an
08:12:24 17 allegation of a violation of a DEA civil regulation. That's
08:12:27 18 what's in the indictment, that's what the expert has testified
08:12:30 19 about, and now that the government has closed its case in
08:12:33 20 chief, they've confirmed that the only thing that they're
08:12:38 21 alleging is a violation of 1306.05 of the Code of Federal
08:12:42 22 Regulations. That's it. There are no other allegations of
08:12:45 23 wrongdoing.

08:12:46 24 They've even conceded -- and this is, again, highly
08:12:50 25 unusual -- they've conceded that every single prescription was

08:12:53 1 for a legitimate medical purpose. That is such a critical
08:12:57 2 component of this case because there's nothing, there's
08:13:00 3 literally no evidence that would be sufficient to sustain a
08:13:03 4 conviction under the Controlled Substances Act.

08:13:06 5 This would have been true before *Ruan* under the old
08:13:09 6 objective standard. It's especially true now that the
08:13:13 7 government has to prove that Dr. Given subjectively intended to
08:13:18 8 act and I'll say "except as authorized" which is how *Ruan*
08:13:21 9 phrased the language.

08:13:22 10 Your Honor, the government is truly testing the
08:13:25 11 Court's role in keeping the civil realm separate from the
08:13:29 12 criminal realm.

08:13:30 13 What do I mean by that?

08:13:32 14 The civil realm has its own body of administrative
08:13:36 15 proceedings -- sanctions, fines, having doctors lose their
08:13:42 16 license, things of that element. That's all serious, that's
08:13:45 17 all something that actually happens. We've even heard about
08:13:48 18 how the Department of Health has an active role in these
08:13:52 19 investigations and can sanction people. But that's not what
08:13:54 20 we're here for. We're here for a Controlled Substances Act
08:13:59 21 allegation.

08:13:59 22 The government has charged something that is, at
08:14:03 23 worst, a civil infraction in the criminal world, and that's
08:14:06 24 just improper.

08:14:07 25 Some background, Your Honor, for these cases, and I'll

08:14:10 1 be brief because these are really, I would submit to the Court,
08:14:12 2 the four just lead cases that control on these issues.

08:14:16 3 I guess first, the government cannot contest that a
08:14:19 4 violation of a civil regulation in and of itself is a felony
08:14:23 5 crime. That's clear law. I'm not going to go through any case
08:14:26 6 law on that.

08:14:26 7 What I will go through, Your Honor, is just a couple
08:14:31 8 of these cases because I think they're indicative of what these
08:14:35 9 I'll say pill mill cases or CSA, Controlled Substances Act
08:14:40 10 cases are all about. The first one in the pack I handed up is
08:14:42 11 *U.S. vs. Joseph*, Eleventh Circuit decision which Your Honor is
08:14:45 12 aware of.

08:14:45 13 The Court says that they agree with the defendants
08:14:49 14 that a violation of § 1306.05, which is what we're looking at
08:14:54 15 here, does not constitute a per se violation of § 841.

08:15:00 16 Importantly, the Court then goes on to list all of the
08:15:03 17 many, many facts in that case that supported the conviction.

08:15:08 18 Your Honor, that language that I'm looking at was at
08:15:11 19 pincite 1102 of the decision. But if you go to pincite 1089 of
08:15:19 20 the decision, which is found on page 8 of Your Honor's
08:15:23 21 printout, the government goes through those facts. Let's look
08:15:24 22 at a few of those facts.

08:15:26 23 In that case, which is very much unlike here, the
08:15:28 24 prosecution presented evidence that the defendant's clinic
08:15:31 25 would see as many as 100 patients a day, the defendant required

08:15:37 1 the patients pay in cash, they didn't accept any insurance.
08:15:40 2 Inside the clinic patients were rude and hysterical, people
08:15:44 3 would be vomiting in the bathrooms, patients would be offering
08:15:47 4 the receptionist bribes to see the doctor, people would be
08:15:50 5 camping outside in tents, sleeping in cars, urinating in
08:15:54 6 public.

08:15:55 7 There was evidence presented during that trial, Your
08:15:56 8 Honor, that many of the defendants' former patients were actual
08:16:00 9 addicts, that they were showing this drug-seeking addictive
08:16:08 10 behavior.

08:16:08 11 **THE COURT:** I don't mean to interrupt or short circuit
08:16:10 12 your argument, but just so you know, and maybe you don't, I've
08:16:14 13 provided over probably at least five of these trials since 2004
08:16:20 14 probably, all the way from Panama City to here. I'm very
08:16:24 15 familiar with the facts of the pill mill cases and how
08:16:27 16 different they are from this case.

08:16:29 17 **MR. MASSEY:** That substantially speeds up my argument
08:16:32 18 then. Then I would just ask Your Honor to just again take
08:16:36 19 notice of *United States vs. Joseph*. I included the *Rosen*
08:16:40 20 decision, Your Honor.

08:16:40 21 The pertinence of that decision is because the Fifth
08:16:44 22 Circuit in that decision gave a great list of the factors that
08:16:49 23 support a conviction for a CSA violation.

08:16:53 24 And then finally, the *Abovyan* case, as well as *Ruan*
08:16:58 25 case, which Your Honor is aware of.

08:16:59 1 Your Honor, this entire trial, the parties have just
08:17:03 2 been going back and forth about civil regulations, that's it.
08:17:06 3 There has been nothing else in this case, nothing else to take
08:17:09 4 this outside of the realm of a civil matter and here into a
08:17:13 5 criminal context.

08:17:14 6 Let's talk about that. What are some things that the
08:17:17 7 government would have had to have shown? Under the *Rosen*
08:17:21 8 factors let's just list a couple:

08:17:22 9 An inordinately large quantity of controlled
08:17:26 10 substances. We don't have that.

08:17:27 11 Large numbers of prescriptions were issued. No, we
08:17:30 12 don't have that.

08:17:31 13 No physical exam was given. No. These are all
08:17:35 14 established patients. These are all patients going in and
08:17:38 15 having a full physical examination from a PA.

08:17:41 16 Another factor, the physician issued prescriptions to
08:17:43 17 a patient known to be delivering the drugs to others. No.
08:17:50 18 They've actually never even spoken to a single patient.

08:17:52 19 And there was no logical relationship between the
08:17:56 20 drugs prescribed in treatment of the conditions allegedly
08:17:59 21 existing.

08:18:01 22 Again, Your Honor this is highly unusual, they're
08:18:03 23 conceding that every single prescription was for a legitimate
08:18:07 24 medical purpose.

08:18:08 25 So what does that mean? It means -- and I'm going to

08:18:11 1 try to articulate this I guess on behalf of the government.
08:18:14 2 They're trying to say that, even though this was good medicine,
08:18:18 3 that everything was for a legitimate medical purpose, somehow
08:18:21 4 Dr. Given still subjectively abandoned the practice of medicine
08:18:26 5 and turned into a pill mill case or a common drug dealer. And
08:18:31 6 we just don't have that here, Your Honor.

08:18:33 7 Now, I would imagine the government is going to
08:18:37 8 respond and say, well, Judge, it's in the disjunctive, you can
08:18:41 9 prove either or.

08:18:43 10 All those elements bleed into each other, Your Honor.

08:18:47 11 **THE COURT:** I made that finding at the outset of the
08:18:49 12 trial that they do prove in the disjunctive, and I cited a
08:18:54 13 couple of cases that support that. So I think that's where we
08:18:57 14 are.

08:18:57 15 **MR. MASSEY:** Absolutely. And we understand that, Your
08:19:00 16 Honor. All those *Rosen* factors, Your Honor, I would submit to
08:19:04 17 you that all these decisions, they're looking at the *Rosen*
08:19:08 18 factors in both contexts. They're certainly looking at them in
08:19:11 19 the scope of whether a physician's conduct was within the
08:19:15 20 practice of medicine.

08:19:16 21 **THE COURT:** Well, actually, I think those factors go
08:19:19 22 more to -- if we're talking about the disjunctive, I think that
08:19:23 23 they relate more to the usual course of practice than I do
08:19:25 24 legitimate medical purpose. So I'm agreeing with you, I guess
08:19:29 25 is --

08:19:30 1 **MR. MASSEY:** Understood, Your Honor. And this -- and
08:19:33 2 I'll try to wrap up here. This case truly seems to be the
08:19:37 3 first of its kind. I'll represent we've searched high and low
08:19:41 4 since the beginning of this case to try to find anything where
08:19:43 5 the government has elected to proceed on such scant evidence.
08:19:47 6 We just haven't found that.

08:19:51 7 We believe this is probably going to be the first
08:19:53 8 trial of this kind to apply *Ruan* after the Supreme Court's
08:19:57 9 decision.

08:19:59 10 The government -- if this matter goes to the jury and
08:20:03 11 if the jury convicts Dr. Given, the only thing they will have
08:20:09 12 convicted him on is under the mistaken belief that a DEA civil
08:20:14 13 regulation -- that a violation of that civil regulation is
08:20:17 14 sufficient to support a conviction under the CSA. That is not
08:20:21 15 the law. That cannot be the law. That's why we have the civil
08:20:24 16 realm and we have the criminal realm.

08:20:27 17 Your Honor, we recognize that on a Rule 29 motion the
08:20:32 18 Court must view the evidence in the light most favorable to the
08:20:36 19 government, but that standard presupposes that the government
08:20:39 20 has evidence. They do not have that evidence here. They must
08:20:44 21 show that Dr. Given abandoned the practice of medicine. Where
08:20:50 22 that's lacking, Your Honor, the Rule 29 should be granted.
08:20:54 23 Thank you, Your Honor.

08:20:54 24 **THE COURT:** All right. Thank you.

08:20:55 25 Ms. Forbes?

08:20:57 1 **MS. FORBES:** Your Honor, the government's burden is
08:21:11 2 actually not that we have to show that the defendant entirely
08:21:15 3 abandoned the practice of medicine. It's, for each of the
08:21:18 4 charges or count, that each prescription was issued outside the
08:21:22 5 usual course of medical practice, professional practice or --

08:21:24 6 **THE COURT:** But isn't that what that means? Isn't
08:21:26 7 that what the cases say is that that's essentially -- in order
08:21:30 8 for you, the government, to convict a physician who is an
08:21:34 9 authorized registrant and has that license to prescribe
08:21:37 10 controlled substances, in order for you to convict him, you
08:21:40 11 have to essentially -- I think *Moore* even says that you have to
08:21:43 12 prove that he's a drug pusher, that he acted outside of his
08:21:47 13 authorization, which means abandoning his authorized medical
08:21:52 14 license.

08:21:53 15 **MS. FORBES:** As to the particular prescriptions
08:21:56 16 charged. We don't have to prove he was a pill mill, his entire
08:22:00 17 practice was illegitimate.

08:22:02 18 **THE COURT:** Well, you have -- well, that's usually
08:22:06 19 what's done. I don't know if you have to do that, but I can
08:22:09 20 tell you in the cases I've had, in the trials I've had -- and
08:22:12 21 again, I've had many -- *Freddie Williams, Merrill, Boullier,*
08:22:18 22 *Caroni, DiLeo,* those were all my trials, and that's what all
08:22:22 23 the evidence was, I mean, the practices were just that, they
08:22:27 24 were pill mills. And the factors that the cases talk about
08:22:30 25 were all present in those cases. They're not present here.

08:22:34 1 **MS. FORBES:** Your Honor, I would submit that there are
08:22:37 2 some factors that are present but --

08:22:38 3 **THE COURT:** Well, I want to hear from you about what
08:22:40 4 those are. Because all I have seen that even just touches on
08:22:46 5 those factors is that you have one patient who had marijuana in
08:22:51 6 a drug screen and you have one patient who didn't have the drug
08:22:55 7 that he was taking in his drug screen.

08:22:57 8 What else?

08:22:58 9 **MS. FORBES:** Your Honor, there were actually multiple
08:23:01 10 patients that had negative urine drug screens and were
08:23:04 11 continued to be prescribed.

08:23:06 12 **THE COURT:** That are charged in the indictment?

08:23:08 13 **MS. FORBES:** Yes, Your Honor.

08:23:09 14 **THE COURT:** And then where is the evidence -- I didn't
08:23:11 15 hear it from your expert -- that that means automatically you
08:23:14 16 have to terminate that patient from the practice when that
08:23:17 17 happens?

08:23:19 18 **MS. FORBES:** The evidence was that it requires -- it's
08:23:23 19 not an automatic termination. But first of all, if you're
08:23:26 20 going to sign a -- I believe he testified if you're going to
08:23:29 21 sign a controlled substance agreement -- I mean, the defendant
08:23:32 22 said he was going to do that -- based on the controlled
08:23:35 23 substance agreements that he signed.

08:23:36 24 But what is agreed upon is that the doctor needs to
08:23:40 25 have that conversation with the patient and then it needs to be

08:23:45 1 documented as to why there is continued -- why it's legitimate
08:23:50 2 to continue prescribing if there's no documentation in the
08:23:53 3 files because Dr. Given wasn't there.

08:23:54 4 **THE COURT:** Is that in a regulation somewhere or is
08:23:57 5 that just in the expert's testimony?

08:23:59 6 **MS. FORBES:** That was in his testimony. And I would
08:24:03 7 -- again, we're talking predefense, but I would note Dr. Hoch
08:24:07 8 said the same thing is that it should be --

08:24:09 9 **THE COURT:** Well, I'm not considering the defense case
08:24:11 10 at all for this motion.

08:24:14 11 **MS. FORBES:** And, Your Honor, in terms of the
08:24:15 12 uniqueness of this case, this may be the first of its -- first
08:24:19 13 of these kind of facts in front of Your Honor, but the *United*
08:24:22 14 *States v. Joseph* case in terms of the particular counts --
08:24:29 15 particular substantive Controlled Substances Act counts was
08:24:34 16 very similar to this case, as well as I would note that in
08:24:37 17 February in the Northern District of Alabama there was a very
08:24:42 18 similar case that was tried, *U.S. vs. Mark Murphy et al.* So
08:24:45 19 this is not --

08:24:45 20 **THE COURT:** Is that on appeal? Is there an Eleventh
08:24:47 21 Circuit decision?

08:24:48 22 **MS. FORBES:** There is not yet because the trial was
08:24:51 23 just in February.

08:24:54 24 **THE COURT:** So talk to me about the legitimate medical
08:25:00 25 purpose. Because I have not heard any evidence -- I have to

08:25:02 1 agree with the defense -- unless I just missed it, that these
08:25:07 2 patients weren't given these prescriptions for legitimate
08:25:10 3 medical purposes.

08:25:10 4 **MS. FORBES:** And, Your Honor, yes, I would disagree
08:25:12 5 that we conceded that.

08:25:15 6 **THE COURT:** Well, I don't agree you conceded it, but
08:25:19 7 you still have to have evidence of it.

08:25:21 8 **MS. FORBES:** Yes, Your Honor. And the one thing I do
08:25:24 9 agree with Mr. Massey is when he says that the factors in terms
08:25:30 10 of the usual course of medical practice and legitimate medical
08:25:32 11 purpose for the prescription, there is some overlap.

08:25:37 12 And what Dr. Rauck said is that, if the physician
08:25:41 13 isn't there to determine a legitimate medical purpose, if that
08:25:45 14 prescription -- if that prescription gets presigned, no
08:25:49 15 physician made a determination as to a legitimate medical
08:25:53 16 purpose.

08:25:53 17 **THE COURT:** But that's not the same as saying it
08:25:55 18 wasn't for a legitimate medical purpose. So that's not the
08:25:59 19 same --

08:26:00 20 **MS. FORBES:** It can't have been for a legitimate
08:26:02 21 medical purpose.

08:26:02 22 **THE COURT:** You said Dr. Rauck.

08:26:06 23 **MS. FORBES:** I'm sorry. Dr. Hoch.

08:26:08 24 **THE COURT:** I'll have to go back and look at his
08:26:11 25 testimony. And I don't know that that's actually the law

08:26:13 1 either but --

08:26:15 2 **MS. FORBES:** Well, I wouldn't say it's a legal -- I
08:26:17 3 would say it's a factual question for the jury to consider.

08:26:21 4 **THE COURT:** I don't know if I agree with that, but
08:26:23 5 I'll give it some thought.

08:26:25 6 **MS. FORBES:** And, Your Honor, with respect to the
08:26:31 7 defense argument that this case is merely predicated on a
08:26:36 8 violation of an administrative regulation, it isn't. It's
08:26:42 9 about the fact that the physician was not there to evaluate the
08:26:46 10 patient, determine the legitimate medical need, and then on
08:26:51 11 that date sign and issue the prescription in compliance with
08:26:54 12 federal and state law.

08:26:55 13 And the *United States vs. Joseph* case, the Eleventh
08:27:01 14 Circuit found that that was not only sufficient for a Rule 29
08:27:04 15 motion when viewing evidence in the light most favorable to the
08:27:07 16 government, but it was sufficient to support conviction.

08:27:10 17 The Eleventh Circuit said, "The jury was entitled to
08:27:12 18 infer based on Green, who is the physician, presigning and
08:27:15 19 predating of the prescriptions, and Mack, the physician's
08:27:20 20 assistant, delivery of those prescriptions to Green's patients
08:27:23 21 that they violated the act. The record establishes that Green
08:27:26 22 and Mack, the physician and the physician's assistant,
08:27:28 23 delivered Schedule II prescriptions to a patient who were never
08:27:32 24 examined by a physician. Mack met with those patients but even
08:27:36 25 she performed no physical examinations or cursory physical

08:27:39 1 examinations."

08:27:39 2 **THE COURT:** That's not the evidence here, but okay.

08:27:41 3 **MS. FORBES:** But the evidence is still that the
08:27:43 4 physician never --

08:27:45 5 **THE COURT:** Well, I know, but they went on to cite or
08:27:47 6 note that the PA performed only a cursory examination or no
08:27:53 7 examination, and that's just not the case here. We heard from
08:27:56 8 two physician's assistants who were actually performing these
08:27:58 9 examinations and they were very thorough.

08:28:00 10 **MS. FORBES:** Well, I would submit that Mr. Kidwell
08:28:03 11 said, *My examination was watching them walk into the room.*

08:28:06 12 **THE COURT:** I don't agree with that. He said that was
08:28:08 13 a way that he could assess if there were neurological deficits,
08:28:13 14 but he also said he did full exams.

08:28:15 15 **MS. FORBES:** And it says that, "Although Mack, the
08:28:17 16 physician's assistant, delivered the prescription based on her
08:28:20 17 judgment that the patients had a legitimate medical need for
08:28:23 18 the Schedule II substances, she lacked authority to make that
08:28:27 19 medical conclusion."

08:28:28 20 And under *United States v. Rosen*, that's what the
08:28:31 21 *Joseph* court quoted -- "A physician's delivery of a
08:28:34 22 prescription without conducting any physical examination of the
08:28:36 23 patient provides strong evidence to support conviction under
08:28:40 24 the act."

08:28:40 25 **THE COURT:** All right. Anything else?

08:28:47 1 **MS. FORBES:** I would also just note also from the
08:28:49 2 *Joseph* case, although this, too, has long been Eleventh Circuit
08:28:53 3 law, that expert medical testimony is not necessary to sustain
08:28:57 4 a conviction under the act because a jury may find that a
08:28:59 5 doctor violated the Controlled Substances Act from evidence
08:29:03 6 received from lay witnesses surrounding the facts and
08:29:06 7 circumstances of the prescriptions, and that's at pincite 1100
08:29:10 8 of the *Joseph* case.

08:29:11 9 **THE COURT:** That evidence is, again, lay witnesses, is
08:29:15 10 very different than what we've heard in this case. I didn't
08:29:19 11 hear from one patient. You didn't interview one patient.
08:29:23 12 There's no evidence that any patient was harmed, that there was
08:29:26 13 overdose, I mean, nothing, nothing along those lines.

08:29:31 14 I'm not going to rule on the motion. I'm going to
08:29:34 15 take it under advisement. And if the jury convicts, then I'll
08:29:38 16 have an opportunity to go back through the record, review
08:29:41 17 testimony, and look at the law more closely, now that I've
08:29:44 18 heard the evidence, and decide whether the verdict should
08:29:48 19 stand. But I'm going to send it to the jury.

08:29:50 20 I am going to -- on the verdict form I am going to
08:29:52 21 have the jury identify legitimate medical purpose and/or
08:29:58 22 outside the usual course of practice. Because you do prove,
08:30:02 23 I've agreed with you, in the disjunctive, and I'm going to want
08:30:06 24 to know, if they do convict him, for what purpose, what part of
08:30:10 25 that standard did they convict him on, either/or. They'll be

08:30:15

1

told they can do both or either/or.

08:30:18

2

So the motion is under advisement and the case will go

08:30:22

3

to the jury.

4

(Rule 29 Motion concluded at 8:30 a.m.)

5

6

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. Any redaction of personal data identifiers pursuant to the Judicial Conference Policy on Privacy are noted within the transcript.

7

8

9

***s/Donna L. Boland
Donna L. Boland, RPR, FCRR
Official Court Reporter***

***8-30-2022
Date***

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

