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PREVIEW; *State v. Christensen: Can Practitioners, in the Face of the Opioid Epidemic, be Convicted for Distribution of Dangerous Drugs Under Montana Law?*

Holly C. Suek*

The Montana Supreme Court is scheduled to hear oral argument in this matter on Friday, April 3, 2020, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, Helena, Montana. The oral arguments are closed to the public but will be available via live stream on the Court's website.¹ Assistant Attorney General C. Mark Fowler is likely to appear for the Appellee and Joshua S. Van De Wetering is likely to appear for the Appellant.

I. INTRODUCTION

The threshold issue of this case is one of statutory interpretation and applying the law to the case of a physician; the necessary approach for respecting and adhering to the separation of powers of the judicial and legislative branches. This case presents the issue of whether a “practitioner,” here, a licensed physician, may be convicted of criminal distribution of dangerous drugs under Montana law for his prescribing practices.² The Montana Supreme Court's interpretation of the Montana criminal distribution statute,³ as applied to physicians, will have important implications in the future for application in the courts, including possibly calling for the Legislature to pass new legislation. In conjunction, this case also presents the issue of whether the district court fully and fairly instructed the jury on drug distribution under Montana law when the court modeled the instructions after the Ninth Circuit due to the lack of precedent at the state level.⁴

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¹ <http://stream.vision.net/MT-JUD/>

² See Appellant's Opening Brief at 2, *State v. Christensen* (Mont. July 17, 2019) (No. DA18-0268); Appellee's Response Brief at 1, *State v. Christensen* (Mont. Jan. 21, 2020) (No. DA 18-0268).

³ MONT. CODE ANN. § 45–9–101 (2019).

⁴ Appellant's Opening Brief, *supra* note 1, at 3; Appellee's Response Brief, *supra* note 1, at 1.

Although this preview focuses on the above-mentioned issues, there are a handful of other issues being raised on appeal, including: whether Montana's criminal endangerment statute⁵ is unconstitutionally vague as applied to physicians prescribing controlled substances; whether the district court erred when the court admitted character evidence without holding a 404(b) evidentiary hearing; whether the court erred in refusing the defense to put on character witnesses in order to present a complete defense; and whether the State presented enough evidence to convict Christensen, the appellant-practitioner.⁶

II. FACTUAL AND PROCEDURAL BACKGROUND

2011 marked the beginning of Chris Arthur Christensen's work as a physician in Florence Montana, where he operated as a general practice, with some focus placed on services for pain management through prescribing controlled substances.⁷ In 2014 local, state, and federal authorities conducted a search of Christensen's clinic and home pursuant to search warrants, and obtained 4,718 patient files.⁸ These files revealed Christensen's prescribing practices, including his review of prior medical records, extent of examinations of his patients before prescribing, monitoring of patients and where his patients geographically were from.⁹

On August 19, 2015, the State charged Christensen with 396 drug related crimes including charges of criminal distribution of dangerous drugs, criminal possession of dangerous drugs, criminal endangerment, and negligent homicide.¹⁰ The charges were amended in October 2017, to 11 counts of criminal distribution, nine counts of criminal endangerment, and two counts of negligent homicide.¹¹

⁵ MONT. CODE. ANN. § 45-9-102 (2019).

⁶ Appellant's Opening Brief, *supra* note 1, at 3; Appellee's Response Brief, *supra* note 1, at 1.

⁷ Appellant's Opening Brief, *supra* note 1, at 3; Appellee's Response Brief, *supra* note 1, at 2.

⁸ Appellee's Response Brief, *supra* note 1, at 2-3.

⁹ *Id.* at 3.

¹⁰ Appellant's Opening Brief, *supra* note 1, at 3.

¹¹ *Id.* at 4.

The trial focused on 11 of Christensen’s patients; nine were present and testified, and two are deceased.¹² Christensen wrote prescriptions for the 11 patients, with many of the prescriptions being for opiates, which are Schedule II controlled substances (dangerous drugs).¹³ After a four week trial, ending November 20, 2017, the jury convicted Christensen on all counts and the district court later sentenced him to 20 years in Montana State Prison, with ten years suspended.¹⁴ Christensen now appeals the decision of the Montana Twenty-First Judicial District Court, Ravalli County, and his sentence was stayed pending the outcome of this appeal.¹⁵

III. SUMMARY OF ARGUMENTS

A. Appellant’s Argument

Appellant argues Christensen cannot be prosecuted under Montana’s criminal distribution of dangerous drugs statute for two reasons: (1) the statute provides an exemption for practitioners acting in the course of a professional practice, which Appellant contends Christensen was doing; and (2) the distribution statute does not apply to the action of prescribing, because the definitions of “distribution,” “sell,” “barter,” “exchange,” or “give away” do not equate to, or encompass prescribe.¹⁶ Appellant does not argue that physicians can never be prosecuted, just not for prescribing.¹⁷ Additionally, if a practitioner engages in *distribution* actions of dangerous drugs outside of their professional practice, they may be criminally liable.¹⁸

Appellant asserts Montana’s criminal distribution of dangerous drugs statute differs from the applicable federal law under the Controlled Substances Act (“CSA”).¹⁹ To the same end, Appellant argues the district court erred when it modeled jury

¹² Appellee’s Response Brief, *supra* note 1, at 3.

¹³ *See generally* Appellant’s Opening Brief, *supra* note 1, at 9–15; MONT. CODE ANN. § 50–32–202 (2019); *Id.* § 50–32–224.

¹⁴ Appellant’s Opening Brief, *supra* note 1, at 4.

¹⁵ Appellee’s Response Brief, *supra* note 1, at 2.

¹⁶ Appellant’s Opening Brief, *supra* note 1, at 19–22.

¹⁷ Appellant’s Reply Brief at 2, *State v. Christensen* (Mont. March 13, 2020) (No. DA18-0268).

¹⁸ *Id.*

¹⁹ 21 U.S.C. § 841 (2018).

instructions from *United States v. Feingold*,²⁰ a Ninth Circuit case applying federal law.²¹ Additionally, even if modeling its jury instructions after the Ninth Circuit's was proper, the district court did not "fully" instruct the jury because the court did not give an instruction on heightened *mens rea*—intent—as required by the Ninth Circuit.²² Rather, the Appellant argues the district court only instructed on the lesser standard, "knowingly."²³

B. Appellee's Argument

The State argues the distribution statute applies to physicians—and to Christensen in particular—because Christensen was not acting in the course of a professional practice when he prescribed dangerous drugs, "freely and liberally . . . at the victims' choices and whims."²⁴

Addressing jury instruction concerns, the State asserts the jury instructions applying to criminal distribution were full and fair, regardless of whether every *Feingold* principle was instructed on within one instruction, or if the applicable law of the case at issue is covered when the instructions are read together as a whole.²⁵ The State argues the jury was instructed to convict Christensen under criminal liability—which requires heightened *mens rea*—and not under the lesser civil malpractice showing.²⁶ The State refers to Jury Instruction No. 24,²⁷ which directed the jury on the "good faith" defense, "that it must find that if the prescribing practitioner had a legitimate medical purpose, as defined not only by the 'practitioner's sincere intent towards his patient' but also by the practitioner's 'honest effort to prescribe for a patient's condition in accordance with the standard of medical practice,'" then the practitioner is exempt from conviction.²⁸

²⁰ 454 F.3d 1001 (9th Cir. 2006).

²¹ Appellant's Opening Brief, *supra* note 1, at 17.

²² *Id.* at 40.

²³ Appellant's Reply Brief, *supra* note 16, at 8.

²⁴ Appellee's Response Brief, *supra* note 1, at 8, 39.

²⁵ *Id.* at 17.

²⁶ *Id.* at 14–16.

²⁷ *See Id.* at 14.

²⁸ *Id.* at 15.

IV. ANALYSIS

A. *Applicability of Mont. Code Ann. § 45–9–101 to Practitioner Prescribing*

The Montana Supreme Court’s decision will likely turn on a threshold inquiry of whether the criminal distribution of dangerous drugs statute contemplates the act of “prescribing.” If the Court decides prescribing is within the scope of the statute, the next inquiry will likely be whether *all* practitioners are exempt from the statute, or instead, only those practitioners “acting in the course of a professional practice.” The parties disagree on the interpretation of the statute.

Under the general principles of statutory interpretation, the Montana Supreme Court will not, “insert that which the legislature omitted, nor [will it] omit that which the legislature has inserted.”²⁹ Appellee argues the statute is clear and the only inquiry necessary is whether Christensen was acting in the course of a professional practice when he prescribed dangerous drugs to his patients.³⁰

Even if the Montana Legislature “borrowed heavily” from the CSA for guidance in drafting controlled substance statutes—as argued by the State—differences between the CSA and Montana’s criminal distribution statute exist.³¹ Importantly, the CSA does not limit the prohibited acts solely to acts under the umbrella of “distribute,” as the Montana criminal distribution statute does.³²

In contrast to the Montana criminal distribution statute, the CSA makes it unlawful, “for any person knowingly or intentionally (1) to manufacture, *distribute*, or *dispense* . . . a controlled substance.”³³ The word “dispense” is not incorporated in the Montana criminal distribution statute. Furthermore, the words “distribute” and “dispense” are defined as separate from one another

²⁹ Appellant’s Opening Brief, *supra* note 1, at 21 (*quoting* MONT. CODE ANN. § 1–2–101 (2019)).

³⁰ Appellee’s Response Brief, *supra* at 8.

³¹ *See Id.* at 8–9 (*citing* State ex rel. Lance v. Dist. Court, 542 P.2d 1211 (1975); State v. Pirello, 282 P.3d 662 (2012)).

³² *See* 21 U.S.C. § 841 (2018); MONT. CODE ANN. § 45–9–101 (2019).

³³ 21 U.S.C. § 841(a) (*emphasis added*).

in the Montana statutory scheme.³⁴ The “dispense” definition encapsulates prescribing, whereas “distribute” does not.³⁵

Since instructional legislative history on the statute is nonexistent, the Court may agree with the Appellant and decide the act of prescribing is not contemplated in the Montana distribution statute. In that case, Christensen (or any practitioner) may not be convicted for his actions of prescribing under the statute’s current language. Thus, under this interpretation the Court will dismiss Christensen’s 11 convictions for distribution of dangerous drugs for his actions of prescribing. The implications of this interpretation require legislative action, as the Court is unable to insert “prescribe” into the statute. If the Montana legislature intends to criminalize actions by physicians for prescribing for non-legitimate purposes, the legislature may do so by passing new legislation for prescribing or dispensing, as other states have recently done.³⁶

Alternatively, should the Court agree with the State, such a decision would seem to necessarily imply the act of prescribing falls within the definition of one or more of the following: “distribution,” “sell,” “barter,” “exchange,” or “give away,” as laid out in the Montana criminal distribution statute. If so, the Court also must determine whether Christensen’s prescribing efforts were within the course of his professional practice. Although the phrase “within the course of professional practice” in the Montana distribution statute is not defined, it was modeled after the CSA. Thus, the Court might look to both state and federal law for guidance.³⁷ Additional guidance may be gleaned from 21 C.F.R. § 1306.04, providing that

³⁴ See MONT. CODE ANN. § 45-9-101(a); *Id.* § 50-32-101(10) “‘Dispense’ means to deliver a dangerous drug. . .by or pursuant to the lawful order of a practitioner, including *prescribing*, administering. . .” (emphasis added); *Id.* § 50-32-101(12) “‘Distribute’ means to deliver *other than* by administering or dispensing a dangerous drug” (emphasis added).

³⁵ *Id.*

³⁶ Appellant’s Opening Brief, *supra* note 1, at 30-31; *see Id.* at 23-24.

³⁷ Appellant’s Opening Brief, *supra* note 1, at 26; e.g. *U.S. v. Moore*, 423 U.S. 122, 123-124 (1975) (The issue presented was whether a person who are registered under the CSA can be prosecuted under 21 U.S.C. § 841 for *dispensing* or *distributing* controlled substances. Additionally, the Court said, “the scheme of the CSA, viewed against the background of the legislative history, reveals an intent to limit a registered physician’s *dispensing* authority to the course of his ‘professional practice.’”).

a practitioner shall be subject to penalties relating to controlled substances if the prescriptions were written and issued without a legitimate medical purpose.³⁸

B. Criminal Distribution & the Practitioner Exception Jury Instructions

Beyond the threshold issue of statutory applicability, the Court's decision of whether the district court fully and fairly instructed the jury on each element of the crimes presented will hinge on the determined appropriate *mens rea*. Despite the Montana criminal distribution statute not mentioning "good faith," was the district court required to instruct on such; if so, did they?

The *mens rea* requirement is connected to the practitioner exception language of the statute—acting inside the course of a professional practice. Christensen puts significant weight on the need to provide a jury instruction on intent (for acting outside of the course of a professional business).³⁹ "Good faith" and "intent" in this instance go hand-in-hand. The Ninth Circuit, whom the district court relied upon, required instructions on "good faith" to ensure if a jury rendered a conviction, they did so after contemplating the heightened *mens rea* requirement and not just the lesser requirement for malpractice standard.⁴⁰ The parties disagree as to whether the district court gave (an) instruction(s) for "intent" or "good faith."⁴¹

The Court will determine if the jury instructions on criminal distribution were fully and fairly given, regardless of whether the word "intent" was used. It would be improper for the Court to judge

³⁸ *Feingold*, 454 F.3d at 1003–04; "Thus, a physician remains criminally liable when he ceases to distribute or dispense controlled substances as a medical professional, and acts instead as a 'pusher'" *Id.* (internal citations omitted).

³⁹ Appellant's Opening Brief, *supra* note 1, at 43–45.

⁴⁰ *Id.* at 41–43; "A controlled substance is distributed by a practitioner in the usual course of his professional practice if the substance is distributed by him in good faith in medically treating a patient. Good faith is not merely a practitioner's sincere intention towards the people who come to see him, but, rather, it involves his sincerity in attempting to conduct himself in accordance with a standard of medical practice generally recognized and accepted in the country." *Id.* at 42–43.

⁴¹ *Id.* at 44; Appellee's Response Brief, *supra* note 1, at 14–15.

a jury instruction in isolation. Rather, the Court should determine if the instructions, as a whole, state the applicable law of the case.⁴²

Although district courts are given broad discretion when instructing the jury, the Court may find the district court did not fully and fairly instruct the jury on criminal distribution of dangerous drugs if the Court determines the given instructions, “prejudicially affect the defendant’s substantial rights.”⁴³ The implication of that finding is reversible error.⁴⁴ However, the Court cannot find the instructions prejudicial if read in their entirety, the set of jury instruction state the applicable law of the case and crimes at hand.⁴⁵

Alternatively, the Court may determine that any “imprecision” of the jury instructions was harmless and uphold the convictions for distribution. Any imprecision would be evident in the word choice of the instructions; thus, the Court will look to whether the words used instructed the jury to consider Christensen’s mental state, and if “purposely and knowingly” is sufficient for heightened *mens rea*.⁴⁶

V. CONCLUSION

The Court will likely dismiss Christensen’s convictions under the criminal distribution of dangerous drugs statute because his actions of prescribing controlled substances is not within the bounds of the definition of “distribution.” Additionally, for future similarly situated practitioners engaged in the act of prescribing, they would not be susceptible to conviction under the statute as written. Although case law and legislative history is sparse or nonexistent on the matter, the Court’s decision will likely be justified by adherence to the strict rules of statutory interpretation and by applying the plain meaning of the words used in the statute.

Alternatively, if the Court does not dismiss Christensen’s criminal distribution convictions based on statutory interpretation,

⁴² See *Tarlton v. Kaufman*, 199 P.3d 263, 267 (2008).

⁴³ *State v. Williams*, 358 P.3d 127, 129 (2015) (internal citations omitted).

⁴⁴ *Id.*

⁴⁵ Appellee’s Response Brief, *supra* note 1, at 18.

⁴⁶ The State argues the words “purposely and knowingly” were used in order to “wed” the relied upon federal jury instructions to the Montana law. *Id.* at 16.

the convictions will likely stand because the jury was fully and fairly instructed on the law of the case, although these types of instructions go beyond existing Montana law.

Lastly, Christensen's other convictions—negligent homicide and criminal endangerment—are outside the purview of this preview.