

Third Circuit Gives New Meaning to Term “Criminal Justice System”

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Eight years ago, I was peacefully practicing medicine, doing my best to serve the needs of my patients, believing myself to be in compliance with all laws and ethical standards. Since then, I have been learning first hand about the operations of our criminal justice system.

Arrested

On Dec 12, 2001, I was overwhelmed by the intimidating sight of 40 agents of the U.S. government invading my office, two with revolvers in their hands.

They were executing a search warrant obtained for alleged fraud based on affidavits from two perjurers. Although I knew I was not committing fraud, or any other crime, I could not prove at that time that the affidavits were perjured.

But when no fraud could be found, Assistant U.S. Attorney (AUSA) Mary Houghton, assistant to prosecutor Mary Beth Buchanan, changed the pretext for their investigation to “sex for drugs.”

The entire nightmare was devastating to me. However, I continued to practice as before, and my patients continued to seek my care, maintaining their faith in me, a trust for which I will forever be thankful. My lawyers attempted to determine what Houghton and Buchanan thought was criminal in my medical practice. I asked for and received help from AAPS, the Pennsylvania Medical Society, and the University of Pittsburgh, where my teaching appointment was renewed even after my conviction.

Slowly, over the next 18 months, mining my files, the government selectively entrapped four more witnesses against me. A total of five desperate patients were confronted with a choice: they could face lengthy prison terms, or they could lie about me and thereby obtain leniency for themselves. One witness even called me at breakfast, while my wife was listening, and apologized for having to make a deal; then she asked if she could return as a patient when everything was over! This cell phone call was mentioned in Amy Vivio’s statement in the trial testimony.¹

Indicted, Tried, Convicted, and Sued

I was indicted on Jun 3, 2003. I went to trial in February 2004. My case contains profoundly disturbing documentation of corruption at every step of the way. Before and during my trial my legal team was denied access to complete copies of my medical records for these five witnesses/patients, despite repeated attempts and demands. The medical records I myself had recorded were “protected” by the Health Insurance Portability and Accountability Act (HIPAA), while I was thereby made vulnerable.

The so-called Privacy Rule of HIPAA does not protect patients’ privacy from the government. It does, however, prevent

physicians from obtaining exculpatory material, and predatory federal prosecutors are taking full advantage of this. My life and freedom were on the line, but not that of the witnesses. During my trial we heard with dismay perjury upon perjury, all the while knowing that records that would exonerate me existed, but that we were powerless to obtain them. It was apparent that the prosecuting attorneys knew full well that they were repeatedly suborning perjury.¹

I was convicted of 153 of 208 counts of unlawful distribution of a controlled substance, for prescribing low-dose alprazolam (0.25 to 0.5 mg, 30-40 pills per month) to patients with panic attacks and anxiety diagnosed by psychiatrists, as well as OxyContin at doses no larger than 20 mg every 12 hours and Duragesic 50 mcg patches to patients who told me they had pain. These dosages were well within ordinary ranges.

At the time of my conviction, I was, and remain, unable to understand why a physician treating patients for pain, anxiety, and panic attacks would be convicted of a crime. Now, with the convoluted and conflicting appellate rulings from the U.S. Court of Appeals for the Third Circuit, the stated reason for my conviction is even more absurd.^{2,3}

Within a month after my trial, I was sued by all five material witnesses, and one non-material witness, all using the same lawyer. But this opened the floodgates for us to be able to obtain the “HIPAA-protected” records. Meanwhile, although local lawyers launched a media campaign, urging my patients to sue me, none of my patients responded to their solicitations.

Perjury Proved

Six months after my conviction, in November 2004, my attorneys received hundreds of pages of letters, complete with postmarked envelopes, handwritten by Jennifer Riggle-Cook,⁴ one of the five material witnesses, which she had written to her imprisoned boyfriend, detailing how she was going to perjure herself at my upcoming trial, and how the Drug Enforcement Administration (DEA) and AUSA Mary Houghton were aiding and abetting her in that endeavor. Those letters, saved by the later-jilted boyfriend, became the crux of my first motion for a new trial. Riggle-Cook’s letters document the shameless involvement of the prosecution in a *Giglio* violation, as detailed below, so flagrant that it should chill the blood of every American.

Meanwhile, at the almost 24 hours of depositions in the civil cases, all five material witnesses totally recanted the testimony they had produced at my criminal trial. The civil discovery material clearly stated that each of these witnesses suffered from conditions for which I had appropriately prescribed medications, although I was prosecuted for allegedly prescribing drugs for other than a legitimate medical purpose in the usual course of a medical practice. Moreover, they admitted that the treatments were effective.

One of the witnesses, when asked during her civil deposition why there was such a difference between her civil depositions and her criminal trial testimony, stated under oath that she had lied at my trial. The basis for my second motion for a new trial was the fact that the witnesses all had now testified under oath that they had the medical conditions for which I had prescribed appropriate medications to them. We also argued that there were two clear and obvious *Giglio* violations.² The government violates *Giglio* when it fails to disclose government concessions to a witness, or solicits, or allows to go uncorrected, a witness's false testimony about benefits the witness will receive from the government for testifying.

My legal team and I have been faced with eight lawsuits from seven of the witnesses against me. Civil suits against me by six of the civil plaintiffs have been found in my favor. No settlements were made. We expect to prevail against the seventh plaintiff as well. So, how can I be, for the same behavior, innocent in civil suits and guilty in a criminal trial? The standard for liability in civil courts—a preponderance of evidence—is much lower than the oft-cited “beyond a reasonable doubt” standard for criminal conviction. This paradoxical outcome signifies serious dysfunction in the criminal justice system.

Perjury Suborned and Protected

The appellate court held that evidence of perjury by Jennifer Riggle-Cook did not matter. Despite the role it had played at my trial, the sex-for-drugs issue was not an element of the conviction—or so ruled the Court in its denial of my first motion for a new trial.³ I had really been convicted, the Court then said, for prescribing medications without a legitimate medical reason. This deletion of sex as a reason for conviction was held to demote Riggle-Cook's perjured testimony on that allegation to an impeaching matter only, not warranting a new trial. But in denying my second motion for a new trial, the same Court reversed its own reasoning, apparently a legal contortion to avoid admitting to corruption in the court system. Now that the civil cases had established a legitimate purpose for the prescriptions, the Court reverted back to the sex-for-drugs accusation as the reason for my conviction.²

The documentation in my case shows in minute detail that all the government witnesses committed extensive perjury, and conspiracy to commit perjury, and that the government attorneys knew it. Perjury, however, is apparently not a reason to reverse a conviction, as long as the defense had an opportunity to impeach the witnesses at trial—even though the evidence that would have enabled the defense to do so convincingly could not possibly have been obtained until later.

We will continue to fight, exhausting the avenues that are legally available to us. We will eventually file a 2255 motion, a modern descendant of the common law petition for writ of habeas corpus. We expect that to be denied at the district court level and again, most likely, at the appellate level. At each and every step, the Department of Justice, if past experience is a guide, can be expected to contradict itself, ignore perjury, and condone other prosecutorial misconduct, including alteration of medical records. AUSA Mary Houghton will, in all likelihood, continue to request that Jennifer Riggle-Cook's probation not be revoked. Riggle-Cook faced up to 20 years in prison for her sales of OxyContin, but received only 6 years probation for her crimes. Meanwhile, she has had several subsequent arrests for significant crimes that would normally lead to revocation of her probation, were it not for her relationship with AUSA Mary Houghton. When this type of activity is not cut off and

punished, none of us are safe from arbitrary, life-destroying government power.

When the Third Circuit Court denied my second motion for a new trial, it ignored the U.S. Supreme Court decision in *Gonzales vs. Oregon*,⁶ which found that the Department of Justice could not overrule state laws determining the appropriate use of medications that were not themselves prohibited, as well as established Third Circuit case law. Its unpublished ruling allows my conviction to remain intact despite its knowledge that material government witnesses committed perjury on the very element on which my conviction was based, according to the Court's own previous ruling.

My case is not the first or only example of unjust prosecution. In 1943, three black American soldiers were tried on capital charges and maliciously deprived of their Constitutional rights by one predatory government prosecutor, Leon Jaworski, who went on to achieve fame. Jaworski produced career-boosting convictions by withholding information from the defense teams. He died in 1982, without ever making any attempt to atone for the great injustice caused by his nefarious conduct.

Mike Nifong tried similar tactics in attacking the Duke University lacrosse team. The prosecution was derailed, however, when the defendants had the resources to hire an unexpectedly high-powered legal defense, and managed to expose the prosecutorial misconduct.

Eliot Spitzer, now ex-governor of New York, was brought down by revelations of his sordid adultery with prostitutes, not because of his abusive prosecutions. It is very unlikely that he will be prosecuted for anything.

Conclusions

With the denial of my second appeal, I was struck by the revelation that the United States has a criminal legal system. I am nothing but a statistic in the prosecutor's record of “wins.”

I sound this warning to every physician who takes care of the sick and the needy; to every physician who ever prescribes controlled substances, no matter how much good faith you exercise in doing it; to every physician in the United States: You could be next. If a prosecutor wants to use you for career-climbing, he or she can do it with impunity. There are no effective checks on prosecutors' power to destroy you, even if they use unlawful means.

Bernard L. Rottschaefer, M.D., an internist, is serving a 5-year prison sentence.

Disclaimer: The author is in prison and was prevented from reviewing and approving this published article. Because his original version underwent the customary *Journal* process of copy editing, nothing specific herein should be used against the author.

REFERENCES

- ¹ Trial Transcript. *United States v. Rottschaefer*. 3rd Circuit 03-162 (2004). Trial testimony of Jennifer Riggle-Cook, Amy Vivio, Corey Schlemmer, Molly Leskovic, Sue Leskovic, Rosemary Vogel, and Diane Wisniewski.
- ² *United States v. Rottschaefer*, Nos. 07-1142 & 07-1673.
- ³ *United States v. Rottschaefer*, Nos. 04-4015 & 05-1229 Fed. Appx. 145 (3rd Cir. 2006).
- ⁴ Appendix to *United States v. Rottschaefer* Nos. 04-4015 and 05-1229 Fed App 145 3rd Cir. 2006.
- ⁵ Written response of AUSA Mary Houghton to the second motion for a new trial *United States v. Rottschaefer* Nos. 07-1142 & 07-1673.
- ⁶ *Gonzales v. Oregon*, 546 US 243, 126 S. Ct. 904 (2006).
- ⁷ Hamann J. When justice became a casualty of war. *American History*, 2008;43(Apr):23-24.