Is This a Federal Traffic Ticket?

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AAPS published my article, "Third Circuit Gives New Meaning to Term 'Criminal Justice System.'"[1] In it, I reiterated what had befallen me in the federal criminal legal system after two appeals for a new trial, a Supreme Court petition for writ of certiorari that was not granted, and numerous rounds of civil testimony. This painted the picture of my case as of spring 2008.

We collected ourselves. We filed a 2255 motion on Apr 27, 2009. After the prosecutor's response followed by our final response, we were granted an evidentiary hearing, scheduled for Sep 18. In late August I was approved for an unsupervised furlough to travel to and from Pittsburgh on the day of the hearing. The prosecution trumped my furlough by ordering a writ that became effective Sep 1. I was transported in chains to the Allegheny County Jail. Because I am a convicted felon, I was placed in the maximum security pod. I would not be returned to the federal prison camp until Oct 6, 2009.

Surprises abounded at the evidentiary hearing. My original lawyers had fought a case without having obtained an expert medical witness. Thus the government's expert medical witness was unopposed. The primary purpose of our 2255 was to add my expert medical witness's opinions and testimony to the record. He was unflappable, and his opinions were thoroughly referenced. The government's expert medical witness offered no references; moreover, his testimony seriously conflicted with the criteria for prescribing found in the *Physician's Desk Reference* (*PDR*).

We presented our case first. My civil attorney, a former ICU nurse who became a lawyer and had 20 years of courtroom experience, testified that it is impossible to defend malpractice cases without an expert to define the "standard of care." She elaborated on how easy it is to obtain an expert. She discussed several effective ways to engage a competent expert.

We followed my civil lawyer's testimony with that of our expert medical witness. He completely contradicted the government's expert. He unequivocally testified that my medical treatment was appropriate and proper at all times.

The prosecution followed, presenting my one remaining initial criminal lawyer. The other one had died this year. My former criminal lawyer squirmed in the witness stand before he finally admitted he had not contacted a medical expert witness until the day the prosecution had rested in my case. We had a document that had been faxed to our office to verify this.[2] The prosecution called no other witness.

We presented the office notes of Alan Barnett, M.D., an internist who had treated one of the witnesses who testified for the prosecution at my trial, during the same timeframe that I had, with the same medication—OxyContin 20mg every 12 hours. He had also prescribed Xanax as I did, but Dr. Barnett wrote for larger quantities. Just as I had done, he treated this patient without obtaining her previous medical records. However, I had numerous orthopedic consultations for this patient before I undertook prescribing OxyContin, while he had no consultations in his records.[3]

We included in our 2255 response an affidavit from another internist.[4] He had reviewed the extensive hospital records for one of the witnesses. These records destroyed the veracity of three of the government's witnesses. They force the conclusion that these witnesses conspired to generate coordinated perjury.[5] This affidavit was so solid that the prosecution ignored it.

We were pleased with the evidentiary hearing. We knew that we had finally removed, or at the very least neutralized the only remaining testimony that supported my conviction—that of the government's expert medical witness.

Judge Gary Lancaster handed down his ruling on the evening of Nov 24, 2009. It stated: "[P]etitioner traded controlled substances for sexual favors from these patients. Whether these patients had a medical need for the controlled substances is, therefore, not dispositive."[6]

Because our 2255 motion when coupled with our exhibits and testimony was so strong, Judge Lancaster was left with little justification for not ordering a new trial. I believe this is the reason he returned to the sex-for-drugs issue.

We had hoped that the first appellate three-judge ruling had put this issue to rest. The appellate decision had repeatedly stated: "Sexual contact with patients was not an element of the convicted offense." They went on to clarify: "The crime for which Rottschaefer was convicted was not trading drugs for sex. Rather, he was convicted of unlawfully distributing controlled substances outside the course of professional practice."[7] [The sex-for-drugs charge was totally based on perjured testimony, as previously documented.[1]]

We must remember that the second appellate decision did not doubt that the patients had also perjured themselves about whether they had medical reasons for medications, or not. The second appellate panel upheld my conviction on the preponderance of evidence, i.e. the testimony of the government's expert medical witness.[8]

Judge Lancaster now maintains that prescribing controlled substances for legitimate medical reasons is within the domain of the

Controlled Substances act (CSA). The CSA is a law crafted by Congress empowering the Food and Drug Administration (FDA) to empower the Drug Enforcement Administration (FDA) to regulate the day-to-day prescribing of potentially addicting substances. All other issues regulating day-to-day medical practice fall under the auspices of the states. We are licensed state by state, not federally. This ruling appears to have transferred day-to-day medical practice regulation to the control of the federal government, something prohibited by *Gonzales v. Oregon*.[9] It could expand the scope of the CSA to include an infinite number of possible crimes.

Finally, Judge Lancaster attempted to block our ability to appeal his decision. We nonetheless placed a motion before the Third Circuit Appellate requesting their permission to appeal, but it was denied.

My trek through the federal criminal legal system has left me confused and disillusioned. Almost 6 years post trial, I still do not have a clear understanding of the basis of my conviction. I do feel that the process favors the prosecution, and that truth and justice may truly be unobtainable. I continue to battle for vindication even though my prospects are becoming more limited with each new twist in my convoluted case.

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 can or should be attributed directly to the author or used against him.

REFERENCES

1. Rottschaefer BL. Third Circuit gives new meaning to term "criminal justice system." *J Am Phys Surg* 2008;13:56-57.
2. Exhibit: dated faxes to John Ceraso, Esq, and Erv Grain, Esq, *U.S. v. Bernard Rottschaefer, M.D.* Civil Act No 05-2025 (Criminal No 03-162).
3. Exhibit: Dr. Barnett. *U.S. v. Bernard Rottschaefer, M.D.* Civil Act No 05-2025 (Criminal No 03-162).
4. Affidavit of Paul A. Reilly, M.D. *U.S. v. Bernard Rottschaefer, M.D.* Civil Act No 05-2025 (Criminal No 03-162)
5. As contradicting court testimony Diane Wisniewski, Corey Rose Schlemmer and Rosemary Vogel. Transcript. *U.S. v. Bernard Rottschaefer, M.D.* 3rd Circuit 03-162 (2004).
6. Decision. *U.S. v. Bernard Rottschaefer, M.D.* Civil Act No 09-507 (Criminal No 03-162), opinion rendered Nov 24, 2009.
7. Decision *U.S. v. Bernard Rottschaefer, M.D.* Nos 04-4015, 05-1229, 178 Fed. Appx. 145 (3d Cir. Apr. 27, 2006).
8. *U.S. v. Bernard Rottschaefer, M.D.* Nos 07-1142 and 07-1673, 264 Fed. Appx. 234 (3rd Cir. Feb. 13, 2008).
9. *Gonzales v. Oregon* 546 US 243, 126 S. Ct. 904 (2006).