TRULINCS 19519424 - VOLKMAN, PAUL H - Unit: TCP-A-A

FROM: 19519424
TO: Morris, Jane
SUBJECT: 2255 - 1
DATE: 07/12/2022 08:16:45 AM

Comes now Paul H. Volkman, Appellant (V), to pray this Court to grant leave to file a successive 2255 Motion to Vacate or Amend Judgment. The holding of the Supreme Court in Ruan-Khan v US, 20-1410 has materially and significantly altered the law pertaining to 21 USCS 841(a) indictments and convictions against physicians duly authorized to prescribe and dispense controlled substances to their patients. The Ruan Court held that, in order to find a physician guilty of felony violation of the Controlled Substances Act (CSA), and subject to the harsh penalties of 841(a), the Government was required to prove beyond a reasonable doubt that the Defendant had the mens rea of criminal intent to distribute controlled substances "without a legitimate medical purpose". (21 CFR 1306.04) In other words, that the physician had "utilized his prescription-writing powers to engage in illegal drug trafficking as conventionally understood, for the profits to be gained therefrom; in fact, that he had not acted as a doctor at all, but as a streetcorner drug dealer." (Moore, 423 US 122, 1975) The District Court in Ruan denied his request for a jury instruction that would have required the Government to prove that he subjectively knew that his prescriptions fell outside the scope of his prescribing authority. The District Court rejected this request and instead set forth a "more objective standard", instructing the jury that a doctor acts lawfully when he prescribes "in good faith as part of his medical treatment of a patient in accordance with the standard of medical practice generally recognized and accepted in the United States." The court further instructed the jury that a doctor violates Sec. 841(a) when "the doctor's actions either were not for a legitimate medical purpose, or were outside the usual course of professional practice." The Eleventh Circuit affirmed Ruan's convictions, holding that a doctor's "subjective belief that he is meeting a patient's medical needs by prescribing a controlled substance" is not a "complete defense" to a Sec. 841(a) prosecution. Rather, "whether a defendant acts in the usual course of his professional practice must be evaluated on an objective standard, not a subjective standard." The Government position was that, once a defendant meets his burden of production (that he is in fact authorized), he can be convicted by proving beyond a reasonable doubt that he did not even make an objectively reasonable attempt to ascertain and act within the bounds of professional medicine." The Government used such words as "good faith", "objectively", "reasonable", or "honest effort". "A physician can violate Sec. 841(a) when he makes no objectively reasonable attempt to conform his conduct to something that his fellow doctors would view as medical care." The Ruan Court rejected this position, asserting that "knowingly or intentionally" included in Sec. 841(a) required the proof of scienter, or criminal intent on the part of the doctor, and remanded the cases of Drs. Ruan and Khan for reevaluation in light of the new jury instruction standard.

The Ruan holding has a direct bearing on V's 841(a) convictions. In the jury instruction conference, V requested the following jury instruction, taken verbatim from the Court's holding in Moore(1975): "In order to find the defendant physician guilty of violating the CSA, you must determine that he has utilized his prescription-writing powers to engage in illegal drug trafficking as conventionally understood, for the profits to be gained therefrom; that he has not acted as a doctor at all, but as a streetcorner drug dealer." (TT: 22-9:11, p7228) Trial judge Beckwith rejected this instruction, stating "it was not an accurate statement of the law, that it would require the jury to determine the meaning of 'illegal drug trafficking as conventionally understood.'" J. Beckwith then admitted that "there has been no testimony of personal profit per se." (TT: 23-9:10, p7229) The standard jury instruction was given, identical to that now struck down by Ruan, since it made no mention of proof of criminal intent, beyond a reasonable doubt. In the 6th Circuit's response to V's challenge to his jury instruction, J. Donald gave a lengthy exposition of exactly why proof of criminal intent to violate 841(a) is not required for conviction of a physician. (797 F.3d 382) This justification has now been thoroughly discredited and overturned by Ruan-Khan.

Appellant is now before this Court for adjudication of his petition for compassionate release under the First Step Act, before Judge Matthew McFarland. Please refer at this point to Doc. 570, the Motion for Compassionate Release; Doc. 575, Supplemental Memorandum supporting 570; Doc. 576, Response in Opposition by USA to 570; and Doc. 578, Supplemental letter of Paul H. Volkman in Response to 576. In 576, Prosecutor Oakley clearly demonstrates the hyperbolic, overheated, inflammatory rhetoric he employed during his closing arguments at trial, revealing his "whatever it takes to convict" attitude. In the Government's response to a petition for compassionate release under the First Step Act, references to the underlying criminal case are irrelevant, in fact out of bounds, yet Oakley sought to relitigate the convictions, in lieu of any legitimate objection to V's petition. On p5: "He and his partners helped fuel the opioid crisis for his own financial gain." (J. Beckwith had stated that there had been NO testimony of personal profit per se.) The "deadly combinations of controlled substances" were the same combinations and doses prescribed by the Government's own expert, Dr. Severyn, as well as by V's expert Dr. Tennant. The "million doses of controlled substances " unaccounted for were in fact fully reconciled with the dispensary's prescription records. On p6: "Any medical expert who has reviewed his work found it outside the scope of legitimate medical practice." Oakley is of course referring to HIS hired "experts". Hal Blatman, MD was the medical expert presented by V, a Cincinnati pain management specialist and board member of the American Academy of Pain Management. Dr. Blatman testified that the medical charts of V demonstrated that he had fully complied with the requirements of the Ohio Intractable Pain

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In the 35 page 2007 indictment, V's pain patients were described as "customers travelling long distances to see V, despite claiming to be in severe pain." V was described as "dispensing large quantities of controlled substances to anyone who had the cash." But Oakley knew this was false; he had sent waves of undercover agents to the office of Tristate Health to purchase controlled substances; all were sent away empty-handed. In fact, the 35 page indictment failed to allege a single specific instance of "drugs for money", of controlled substances sold to an undercover agent or to an identified individual "for no legitimate medical purpose". The indictment was thus defective because it did not charge a critical element of every violation of the CSA. Three SCt cases held that "drugs for money, or some sort of commercial transaction" was a required element of all felony violations of the CSA (Lopez, 549 US at 49, 2006; Carachuri-Rosendo, 560 US 563, 2010; Moncrieffe, 133 SCt 1678, 2013), without which no conviction was possible. As mentioned, J. Beckwith admitted that there had been "no testimony of personal profit per se." Oakley desperately tried to show that V's office was a typical "pill mill" which sold large quantities of drugs for piles of cash, to anonymous crowds who came in from three states, without receiving any semblance of medical treatment. Unable to present any evidence of such, at closing Oakley and Wright spewed forth 90 minutes of blatant falsehoods to "inflame the passions of the jury", in violation of Berger v US, (79 L Ed 1314, 1935) as well as the Ohio State Rules of Professional Conduct. And he got his convictions. See Appendix A for 30 examples.

V was supported by the NIH Medical Scientist Training Program at the University of Chicago, earning a PhD in Pharmacology and Toxicology (1972), and MD (1974). He was board certified in Pediatrics, Emergency Medicine, and Pain Management, and fellowship trained in Clinical Pharmacology. V published 10 papers in peer-reviewed scientific journals between 1975 to 1983, and practiced pediatrics and family practice, and emergency medicine for thirty years. In 2004, his medical malpractice insurance became prohibitively expensive so he had to withdraw from emergency medicine. V attended two national conferences of the American Academy of Pain Management (AAPM), learning that an enormous cohort of some 100 million pain patients were terribly undertreated. The DEA's heavy-handed enforcement policy considered all pain patients to be drug addicts, and pain doctors as their drug dealers. Terrified doctors simply stopped prescribing controlled substances, driving millions into the arms of streetcorner drug dealers, creating a public health disaster; hundeds of youths and thousands of legitimate pain patients would fall victim every week to street pills adulterated with deadly fentanyl. The conferences evaluated the laws of various states which specified the details of medical pain management as required by the state legislatures and state medical boards. The various requirements were codified by the "Model Policy for the Use of Controlled Substances in Treatment of Severe Chronic Pain" of the Federation of State Medical Boards in 2000, and ENDORSED BY THE DEA. Both state law and the Model Policy stated that physicians practicing pain management in compliance with these standards would be 'safe-harbored' from prosecution for violating the CSA. Furthermore, Sec. 903 of the CSA, the "non-preemption" provision, stated that the Act did not overrule valid state law for the medical use of controlled substances, affirmed by the SCt in Gonzalez v Oregon, 546 US 243, 2006.

In 2004 V was 57 years old, too young to retire, with the tuition of two children in graduate and law school to fund. V needed a good position as a physician which did not require malpractice insurance coverage, and pain management promised a virtually endless supply of patients shunned by almost all doctors, patients who had a great need for a reliable doctor who was brave (or foolhardy) enough to prescribe the strong medications they required for their disabling, severe chronic pain. In 1998 the Ohio State legislature had passed the Ohio Intractable Pain Treatment Act (OIPTA), so V decided to take a position in Portsmouth, a small, southern Ohio town on the Ohio River. The clinic owner, Denise Huffman, did not require V to carry malpractice insurance, so V investigated Huffman, her personel, her practices, and the area, and decided to take the job, as long a Huffman agreed that he would be in absolute control over the medical conduct of the clinic. V determined that malpractice lawsuits were simply not a risk in that population and in that specialty, but the DEA was, as always. The situation seemed to be ideally suited to V's training, knowledge, and experience. V knew that he would have to be extraordinarily careful to prescribe only to patients with well documented pain problems not amenable to surgery or other modalities. V knew that pain medications were often stolen and resold on the street, so V instituted every procedure advised by the conferences and required by Ohio law to safeguard against diversion: pill counts, urine drug tests, no treatment before receipt of medical records, careful interviews and focussed physical examinations, no early refills. V required every patient to purchase a small safe from Walmart to be bolted to the floor, to protect medications from theft and diversion, and to invalidate the frequent, false claims of those who would state that their pills had been "stolen". V instituted in-office dosing of the prescribed pain medications; patients taking their full doses every day as prescribed would have no problems from the drowsiness and respiratory depression effects of opioids, which quickly diminished as tolerance developed, but those who only took some of their meds and sold the rest would be severely affected, possibly even passing out. V required patients to remain in the waiting room under observation of the nurses. No serious problems occurred, but almost one half of the "patients" disappeared when word about the in-office dosing became

known. Some of these individuals later claimed that they left because V was trying to kill them by overdosing them.

Within a month of starting work at Tristate in Portsmouth, V's patients reported to him that local pharmacies were refusing to fill his prescriptions for pain medication, or even for the blood pressure, asthma, and diabetes medications he prescribed. V learned that a Dr. Proctor had practiced in the area until the DEA shut him down and indicted him. Proctor really WAS a "pill-mill" doctor; people came from three states, paid $500 to have their names written on previously written narcotics prescriptions, to be filled at a pharmacy across the street which Proctor owned, then went back home to sell the pills. V learned that the DEA had threatened local pharmacists with jail if they filled V's prescriptions. Oakley and the DEA obvously assumed that, since V was another so-called "pain doctor" moving in to Portsmouth, supposedly to fill the void left by the jailed Proctor, V would of course practice in the same manner. V was outraged to be tarred with the same black brush as Proctor, although his practice was completely lawful and by the book. Instead of quitting when he had barely begun, he added a dispensary to the clinic, to stock and dispense his controlled substance prescriptions as well as other medications, only to his registered patients, an arrangement legal in Ohio. As noted above, the DEA sent at least ten undercover agents (as revealed in discovery materials) to V's office to make "controlled buys", all sent away empty-handed by the clinic's alert staff. Next, agents came in attempting to sign up as patients; they were given medical release forms to sign to send to their (nonexistent) doctors to obtain (nonexistent) medical records, and told they would be called back as soon as all records documenting their need for pain treatment had been received. The next wave came in with bogus medical records; they, too, were sent away and told they would be notified after complete records had been received from whoever had signed the (fake) medical records. The clinic was surveiled, which revealed 25 to 30 patients per day, whereas Proctor's pill mill serviced 500 customers daily. Tristate was searched in June, 2005, pursuant to a falsified affidavit based upon a wired clinic visit of patient James Russell. (The computer-enhanced transcript was submitted to J.Beckwith by Counsel Cross, requesting suppression of all materials confiscated; the motion was denied.) Medical charts and computers were taken away; Huffman's registered gun was noted in the locked medication safe, but not removed; the clinic was not closed. A few months later, Huffman began spending her days at area casinos, and missed payment of V's weekly retainer; at that point, V decided to leave employment at Tristate. At that point, V was advised by a Cincinnati attorney that, if he simply quit and went home, he would risk facing sanctions from the Ohio State Medical Board for abruptly abandonning his pain patients. V therefore decided to use his Portsmouth apartment as a temporary office until he could find more suitable space, hired four nurses and two security guards, bought fax machines, copiers, and other office equipment, installed four phone lines and continued to treat his patients, who all followed him from Tristate. (The owner of V's apartment, who also owned half of the town, found a suitable empty building that he promised to remodel to suit his needs, provided that V signed a long-term lease.) However, within weeks the famously corrupt Portsmouth Police raided V's new office, took all of the newly generated medical charts, and condemned his apartment building, an act that enraged his influential landlord.

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V was advised by the same Cincinnati attorney to move at least two counties away from corrupt Portsmouth, and to reopen. V followed her advice because he was unwilling to give up his livelihood, and desert the 500 or so patients who remained after he had weeded out (most) of the drug seekers and hopeful drug sellers. Furthermore, he knew that he had been practicing pain management according to every state and federal requirement, and considered himself a poster boy to demonstrate to other fearful doctors that it was actually possible to practice pain management. (Instead, it turned out that V was a poster boy to demonstrate that it was actually IMPOSSIBLE to practice pain management!) V opened a new, large office in Chillicothe, Ohio, fifty miles north of Portsmouth. V was encouraged and relieved when in January, 2006 the SCt ruled in Gonzalez v Oregon, 546 US 243 (2006), that the USAG (or his AUSAs) did not have the authority or expertise to criminalize entire areas of medical practice that he did not approve of, like physician-assisted suicide, or pain management, and affirmed that the CSA did not supersede and overrule valid state law for the medical use of controlled substances.

At that time, in late 2005, there was no laboratory test available which could determine how much oxycodone a patient actually took on a daily basis. Existing tests provided a yes or no answer, but did not enable a pain doctor to monitor compliance, i.e. whether a patient actually needed and took all of his pain medicine prescribed, or just some of it, selling the rest. This left a pain doctor vulnerable to DEA charges that he was in the business of supplying pain pills for the street. A urine specimen, taken at the hospital and sent to the Mayo Clinic lab, as V ordered to monitor his patients, provided a quantitative result for unchanged oxycodone, but that result did not determine the total ingested amount, because, as published in a 2005 paper by Daniel Shen and associates at the U. of Washington School of Pharmacy, oxycodone was metabolized by the liver into three major substances (noroxycodone, oxymorphone, and noroxymorphone), all three still exerting opioid effects. However, by analyzing oxycodone as well as the three metabolites in the same sample, an accurate determination of the total ingested oxycodone was possible, but no commercial lab provided the analysis required. V sent numerous emails to his clinical pharmacologist colleagues around the country, including to Dr. Shen, and finally found an analytical chemist at the U. of Utah, who told V he could easily perform the measurement of oxycodone and the three major metabolites on a urine sample. V then worked out a protocol to send urine samples from all of his patients to Utah. However, the project was delayed when V was informed that the Human Research Committee required him to become a member of the U. of Utah faculty before the program could begin; V initiated the process. He planned to immediately publish the results of this project in the prestigious and widely read New England Journal of Medicine, in order to disseminate his methods to all physicians in clinical practice. This would, in effect, allow and encourage all doctors to begin treating serious pain in their established patients with oxycodone, secure from DEA persecution, as they would be able to reliably monitor drug compliance to prevent diversion and resale on the street. While V was processing his application for U. of Utah staff privileges, and two weeks after the Gonzalez v Oregon decision, the DEA SWAT team, with helicopters hovering overhead, raided V's Chillicothe office and closed it down and revoked his DEA license. V spent $50,000 on attorney fees in an attempt to regain his license, but lost. Eighteen months later, in May 2007, V was indicted and dragged off to "pretrial detention", a few weeks after Nancy, V's wife of 34 years was diagnosed with a lethal brain tumor. V was released from a dirty, overcrowded Kentucky private jail five months later with an ankle bracelet, to care for his wife in her last few months, driving her to her doctor appointments and (useless) radiation treatments.

This entire complicated and convoluted case boiled down to the issue of whether or not V's conduct in prescribing and dispensing controlled substances to his patients constituted the legitimate practice of medical pain management, protected and sanctioned by the OIPTA and the Model Policy, and thus immune from federal prosecution according to the non-preemption clause (Sec. 903) of the CSA, as affirmed by Gonzalez v Oregon, ibid. If this critical issue was established, by a preponderance of evidence, then the prosecution of V would be prohibited by the legal doctrine of entrapment by estoppel. Entrapment by estoppel is an affirmative defense to criminal charges, which "applies when an official tells a defendant that certain conduct is legal, and the defendant believes that official to his detriment. In order to prove the defense of entrapment by estoppel, a defendant must show that: 1) a government agent announced that the charged conduct was legal; 2) the defendant relied upon the agent's announcement; 3) the defendant's reliance was reasonable; 4) given the defendant's reliance, prosecution would be unfair." (US v Roberts, 2011 US District Lexis 12849, 11/7/11 (6D), quoting US v Triana, 468 F .3d 308, 316 (6th Cir. 2006); US v Levin, 973 F.2d 463 (6th Cir. 1991), quoting Raley v Ohio, 360 US 423, L Ed. 2D 1244 (1959). Levin quotes US v Smith, 940 F. 2d 710 (1st Cir., 1990): "The court concludes that the statute in question has been rendered ambiguous by numerous opinion letters issued by the government...which appear to sanction the practice challenged by the indictment. Accordingly, the Court holds that the government cannot as a matter of law establish criminal intent beyond a reasonable doubt.")

In the instant case, V relied upon: 1) Sec. 903 of the CSA, which states that the Act does not supersede valid state law for the

legitimate medical use of controlled substances; 2) The OIPTA (ORC 119.032, Ch. 4121-01to 06), which provides detailed and specific requirements and guidelines for the use of controlled substances in the treatment of severe, chronic pain patients; 3) "The Model Policy for the Use of Controlled Substances in the Treatment of Severe, Chronic Pain", published in 2000 by the Federation of State Medical Boards and ENDORSED BY THE DEA, which included the statement that "physicians who adhered to the minimum standards of the Model Policy would be 'safe-harbored' from prosecution for violating the CSA; 4) the holdings of the SCt in Gonzalez v Oregon, ibid., which affirmed that the CSA's non-preemption clause, Sec. 903, made it clear that Congress had no intent to supersede valid state law for the medical use of controlled substances, and no intent to remove the authority to regulate the practice of medicine from the fifty state medical boards. The Gonzalez Court held that the USAG did not have the authority or expertise to declare entire areas of the practice of medicine sanctioned by valid state law to be illegal just because he disapproved of them. The criminal indictment in this case did not allege that V had violated controlling Ohio law, the OIPTA, or the Model Policy. In the only other case to date which involved a physician's alleged misuse of controlled substances in the state of Ohio, US v Martinez, 588 F.3d 301 (Jun 16, 2009), the jury heard evidence that Martinez had violated Ohio law and the requirements of the Ohio State Medical Board. V's indictment failed to allege that V had "utilized his prescription-writing powers to engage in illicit drug dealing and trafficking as conventionally understood." At trial, V's nurses Santos-Mauntel, Ames, and Scott, each testified that the OIPTA was posted in every interview room of his Chillicothe office, and carefully followed in every detail. V's pain management expert, Hal Blatman, MD, board member of the AAPM, testified that V's medical charts demonstrated that he had followed the Ohio law at all times, and that all of V's prescriptions for controlled substances had been issued for a legitimate medical purpose, the control of pain and associated symptoms. The Ohio State Medical Board was aware of his pain management practices since the DEA's June 5, 2005 search of Tristate, which OSMB attended. However, the Board took no action against V's medical license until forced to do so by the DEA's revocation of his Controlled Substances Certificate following an in-house civil-law proceeding presided over by a DEA employee. The indictment alleged, in the words intoned by "expert" Kennedy some 26 times during court testimony, that V had no doctor/patient relationships, performed no physical examinations, and had, in effect, been a drug dealer to his drug-addicted "customers". However, the indictment had repeatedly characterized V's "customers" as "travelling long distances to see V", despite "claiming to be in severe pain." Thus, the government had admitted that all of V's actions were under the ambit of the OIPTA, since all of the "customers" were in fact pain patients. Furthermore, the OIPTA made it clear that all severe pain patients who required treatment with opiates would become dependant upon their medicine, but carefully distinguished opiate dependence from opiate addiction (in individuals without medical necessity for opiates who abused them for the euphoric effect, or "high".) V asserted in his original 2255 and in this successive 2255, that all of his actions charged in the indictment, and for which he was convicted, were legal, in fact required by controlling law, the OIPTA and the Model Policy, and that his medical charts, his patients who testified, and medical experts Drs. Blatman and Tennant substantiated by a preponderance of evidence that V had complied with all relevant law regarding medical pain management in Ohio. The Government's testimony never established any specific instances of violation of the OIPTA or the Model Policy. Thus, the doctrine of entrapment by estoppel supports a claim of actual innocence of all charges, and that the CSA failed to provide subject matter jurisdiction to the Government for indictment, conviction, and imprisonment of V.

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The holding of the SCt in Washington v Glucksberg, 521 US 702, 780 (1997) established that the relief of severe pain constituted an Eighth Amendment Right, even for terminally ill patients in hospice facilities, even if the administration of the strong medications required hastened death, provided that the patient and his family were advised of, and consented to the possibility. In fact, the Court referred to the Ohio law, which shielded hospice physicians from liability for patient deaths, possibly related to pain medication. (4731-21-06, a chapter of the OIPTA; 2133.11(A)(6); 2133.12(E)(1))

Forrest Tennant, MD, largely established the medical specialty of medical pain management in the 80s. He successfully defended the physician who had prescribed pain medication for billionaire Howard Hughes, burned over 90% of his body in a crash of one of his experimental airplanes. He successfully defended the doctor who prescribed (some) of the medications taken by Elvis Presley. Dr. Tennant published a peer-reviewed paper in 2005: "Serum Opiate Levels in Chronic Pain Patients", which established that opiate levels in alert, well-functioning pain patients were far higher than the supposedly lethal levels published in Basselt, the Government manual used to label deaths as overdoses. Dr. Tennant testified at trial that he had employed the same combinations of medications and similar doses to treat his severe, chronic pain patients (not surprising since V had carefully studied and modeled his practices on those of Dr. Tennant). Dr. Tennant testified that most of his pain patients were severely chronically ill and frail, and that many died from their chronic conditions while under his care. He testified that his role, and the role of pain doctors in general, was to provide comfort care to terminal patients. Hospice doctors should not get charged with murder when their patients expire, as Glucksberg made clear.

As noted above, Dr. Blatman affirmed that V's practice of medical pain management fully complied with all the requirements of federal and Ohio State law. Nationally respected pathologist and toxicologist Harry Bonnell, MD, testified that, according to the postmortem toxicology results of V's patients, after reference to the in vivo serum opioid levels determined and published by Dr. Tennant, NO patient's death could be attributed to pain medications prescribed by V. However, as Glucksberg and the OIPTA and Model Policy made clear, even if a terminally ill patient had expired as a result of legally dispensed pain medication, dispensed for a "legitimate medical purpose", V would bear NO legal liability! Dr. Bonnell further testified that two of the deaths (Brigner and Hieneman) for which V received life sentences, clearly resulted from severe, four-vessel coronary artery disease (CAD), perhaps surprising in two individuals in their 30s. However, severe, chronic pain produces large increases in the stress hormone, cortisol, which greatly accelerates CAD. Dr. Bonnell attributed the death of Ratcliff, not autopsied, to the street methadone he was taking, but never acknowledged to V, also the conclusion of Government witness Policastro. The fourth decedent, Kristi Ross, was not autopsied either, as the coroner quickly brought her body to his own funeral home for embalming and funeral services. As noted, her toxicology results did not substantiate overdose, and Dr. Bonnell testified that her cause of death was undetermined. At trial, the Government "experts" attributed Ross's death to the increase of her oxycodone dose two days before she died. But coroner at the scene Pat Hutchens testified to finding the prescription in Ross's purse, UNFILLED!

In all cases in which scientific, medical, or technical issues are central to the outcome, both sides bring in experts to explain the arcane details to the jury. However, the SCt in Daubert v Merrill Dow (509 US 579, 1993) held that both sides are entitled to thoroughly vet and cross-examine opposing experts pretrial, to keep prejudicial, damaging, "junk science" from the ears of the jury. The Court held that cross-examination of the Government experts at trial did not cure the prejudice. Accordingly, the Court mandated the pretrial "Daubert" hearing to allow the defense to challenge the credentials and proposed testimony of the Government experts. In this case, J. Beckwith scheduled the required "Daubert" hearing, but as soon as she took her seat on the bench, she announced that she would not allow any cross-examination by defense counsel. Prosecutor Oakley then added: "The defendant's counsel can cross-examine at trial. He doesn't get two bites at the apple!" (Material misstatement of controlling law in effort to defraud the Court) Counsel Cross was at least allowed to point out that, from perusal of the resumes, none of the three "experts" had any credentials or experience in pathology or toxicology required to render cause of death opinions. J. Beckwith, in response, reluctantly ruled that she would not allow such testimony by the Government "experts". At trial, J. Beckwith allowed all three to opine at great length about COD despite her Daubert ruling to the contrary (without objection by Cross). J. Beckwith's refusal to allow cross-examination by V's counsel deprived him of his bedrock constitutional right of confrontation. From that point on, there was no possibility that V would receive a fair trial. The District Judge's role at the Daubert was to act as "gate-keeper", to provide specific and detailed explanations as to why certain testimony would be allowed or barred. J.Beckwith did no such thing, and simply ruled that all three were "eminently qualified" to testify. In US v Smitless, 212 F.3d 306, 310 (6th Cir. 1999), this Circuit remanded a matter for failure to allow voir dire of a proposed Government expert. The Court stated that: "The District Court had merely held a brief sidebar on the issue of qualifying the witness as an expert, without a voir dire of the witness." According to this circuit, this was not enough to satisfy Daubert. Here, V was not even afforded an opportunity at a "sidebar". The District Court clearly failed to follow SCt as well as circuit precedent.

Furthermore, J. Donald and the Panel simply declined to address this circuit's controlling precedent regarding the assessment of the qualifications of the Government's "experts'" credentials and proposed testimony. In this case, the critical issue was the balance of contesting expert testimony, as to whether V's medical practice was legal under Ohio law and the Model Policy, or in violation of the CSA. The failure of the District Court to allow cross-examination, and the failure of the Panel to even address this issue decided the case against V.

Of the three Government "experts", only Steven Severyn, MD had legitimate credentials to allow him to opine regarding V's practice of pain management, as he was the director of Ohio State University's pain clinic, BUT NOT TO OPINE AS TO COD! Severyn was provided a list of 4000 prescriptions written by V for his pain patients. Severyn testified that, merely by examining the list, he could determine that "none of the prescriptions for controlled substances had been written for a legitimate medical purpose." Counsel Crouse asked on cross if he had reviewed the medical charts for these patients. Severyn replied that he did not need to do so, to make his assessment. Crouse then showed him a list of pain medication prescriptions (obtained from a Columbus, Ohio pharmacy near OSU). Severyn quickly opined that the prescriptions were "highly suspicious and questionable." Crouse then showed Severyn and the jury that these prescriptions were in fact written by Severyn himself. Severyn then quickly asserted that HIS medical charts would substantiate the legitimacy and medical purpose of HIS prescriptions. Crouse then pointed out the blatant hypocrisy of Severyn's testimony, that he didn't need to examine V's charts to decide that ALL of V's prescriptions were illegitimate! It is difficult to believe that a single juror was swayed towards conviction of V by Severyn's preposterous testimony, which should have, and would have been excluded, had J. Beckwith allowed the vigorous cross-examination required by Daubert, and fulfilled her "gate-keeper" role. However, the Panel would indeed give credence to the testimony, for the purpose of finding "sufficient evidence" for sustaining V's convictions.

Lowell Douglas Kennedy MD was a defrocked, former Kentucky pain doctor, who had lost his medical license in connection with his defense of a doctor who worked for him, found to have been stealing morphine and injecting himself with it. Kennedy had lost his practice, his wife, and his house, and then filed an insurance claim for disability, asserting that he was no longer able to practice medicine. All of this apparently qualified him as an expert for the DEA. Kennedy's only apparent source of income, as noted on court records, was fees for his testimony against other doctors. In trial after trial, including V's prior DEA license hearing, Kennedy had reliably and obediently delivered the testimony required of him by his boss and paymaster, the DEA, always in vague and sweeping generalities. J. Beckwith refused to allow any questions about Kennedy's history at trial. Oakley asked Kennedy twenty-six times leading questions such as: "Was there a legitimate medical purpose for V's prescription of [ ] for [ ]?" Kennedy's answer, twenty-six times, was "No." Kennedy was asked by Oakley about the COD of each of thirteen decedents charged in the indictment (despite J. Beckwith's ruling that such testimony would not be allowed since Kennedy had no credentials in pathology or toxicology). "Was the death of [ ] caused by the medications prescribed by V?" "Yes." The Panel brushed aside V's challenge to the fairness and legality of allowing Kennedy to provide dozens of conclusory legal answers to Oakley's leading questions. Kennedy repeatedly intoned that V's medical charts did not record any physical examination, as assertion immediately contraverted on cross-examination as Kennedy was shown the charts with physical examinations. (See Appendix) Again, it is hard to believe that Kennedy's dull, droning, vague, conclusory testimony convinced any member of the jury, but the Panel considered his testimony "in the light most favorable to the Government" and called the "evidence" sufficient to sustain the convictions.

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SUBJECT: 2255 - 5
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Gary Policastro, MD was the third "expert", a young ER doctor lured into court by the promise of a big payday, likely double his yearly hospital salary. Policastro had no credentials in pathology or toxicology, but had taken a brief course to allow him to answer poisoning and overdose calls to the ER. Policastro admitted that he had never treated a severe, chronic pain patient, and that he had never prescribed any of the medications utilized by V and other pain doctors, including Severyn, to treat chronic pain patients. Policastro thus revealed that he had no knowledge about the doses, effects, and side-effects of these medications, routinely prescribed in combinations to treat the typical symptom complex of severe pain, muscle cramps, sleep disorder, anxiety, and depression. Policastro would proceed to testify that treatment of the deceased patients with the medication combinations was clearly the COD of each and every one. Policastro was asked on cross-examination how he could make that claim despite postmortem toxicology results (in the 4 or 5 patients where they had been obtained) inconsistent with overdose, and absent ANY toxicology results in the rest of the patients. Policastro answered that the combination of medications was lethal, and that the postmortem toxicology results were unimportant. As noted previously, this "lethal Portsmouth cocktail" was utilized for decades by Dr. Tennant, and even by Dr. Severyn! That thirteen of V's chronically ill, severe pain patients died in three and a half years was hardly surprising, and certainly not evidence of criminal intent or legal culpability. It is doubtful that any "rational juror" was convinced by Policastro's incoherent assertions, supposedly foreclosed by J. Beckwith's answer to Cross that NONE of the three Government "experts" were qualified to present COD testimony; but these were of course utilized by the Panel to claim "sufficient evidence" to sustain the convictions.

In Oakley's closing arguments he asserted that "someone told him that V was not interested to hear about, or to find out about, the death of any of his patients. Oakley presented no witness of this third-hand hearsay. In fact, whenever V learned of a patient death, he immediately contacted the local hospital to request the medical records; his requests were routinely denied, because he was not a member of the staff. This fact was acknowledged by Portsmouth physician Dr. Wayne Wheeler; on cross -examination he admitted that the local hospital would not release medical records to a doctor not on staff. Oakley recounted another slanderous allegation that when the mother of deceased Steven Heineman came to Tristate Clinic, V refused to talk to her and slammed the door in her face. In fact, V never met Paula Eastley; she had seen John Huffman outside the clinic and thought Denise's husband was V. When Mrs. Heineman was asked in court to point to V, she pointed to a bailiff.

Months before the trial, clinic owner Denise Huffman accepted a plea deal, to avoid the life sentences she too was charged with. Counsel Cross and Crouse attended Huffman's plea colloquy and reported the proceedings to V, who requested the transcript as Jencks Act materials (18 USCS Sec. 3500), as prior testimony under oath of a co-defendant, to be used for impeachment purpose, but was denied receipt. At the start of the colloquy, J. Beckwith informed Huffman that she (Beckwith) would read the entire 35 page indictment sentence by sentence, then pause so that Huffman could affirm its truth, on the record. J. Beckwith began the recitations, but several times Huffman said: "No, that didn't happen." "No, the doctor didn't do that." The judge became infuriated and told Huffman: "You had better have a conference in the back room with your attorney, and when you come out, you had better be ready to answer "Yes" to everything I read to you, or else I will revoke your bond and put in jail from now until the trial is over, and probably long after that!" After a brief huddle, Huffman, white and shaking, agreed to answer "Yes" to everything in the indictment. Huffman's plea deal, for 152 months, was blatantly and illegally coerced. (Waley v Johnston, 316 US 101, 1942) She received a 5K 1.1 credit for her "cooperation" in the prosecution of V, but at trial Huffman testified that V had never received any money from patients, or from selling drugs or prescriptions, only his weekly paycheck that was set and unchanged by the number of patients seen or the number of prescriptions written or dispensed. Prior to the trial, J. Beckwith had ruled in response to Cross, that she would not provide the indictment (given more credibility by Huffman's coerced vouching) to the jury to use during deliberation. As the jury was filing out to begin deliberation, the judge handed a juror the indictment. Virtually none of the indictment's slanderous allegations and overheated rhetoric had been substantiated by courtroom testimony, but the many disgusting, fabricated claims may well have swayed the jury to convict. Subsequently, the appeals court would quote from the Huffman-bolstered indictment to assert that there was sufficient evidence to sustain the sentence imposed on Huffman. The Panel would again use the Huffman-bolstered indictment to assert that there was sufficient evidence to deny V's appeal. In 2014, the SCt issued a GVR order (135 SCt 13, 2014), remanding the case to the 6th Circuit "in light of the holdings of Burrage" (134 SCt 881, 2014), that enhanced sentences for 841(b)(1)(c) could only be imposed if the Government had proven "but-for", "stand-alone" causation of death by the controlled substance charged in the case. The three Government "experts" had, without factual basis and contradicted by Dr. Bonnell, characterized the patient deaths as "multidrug overdose deaths". But Justices Thomas and Alito, who certainly would not have known that the indictment had been bolstered by J. Beckwith's coercion of Huffman, in an opinion issued with the GVR order quoted Huffman's coerced admissions to emphasize that the GVR order was not to be interpreted as an acquittal. The 6th Circuit then reissued the same opinion without changing a word, after asserting that "but-for" really meant "contributory", turning the Burrage holding

on its head.

During the trial, Oakley put fourteen former patients on the stand (seven of whom had been dismissed by V for failing drug tests (see Appx B). Each and every one testified almost identically that they had lied to V about the severity of their pain, in order to induce him to increase their doses, so that they could obtain more pills to sell on the street. Each one admitted on cross-examination that they considered V their trusted physician. Then former patient Barry Houser (now deceased) testified in identical manner, but on cross, Houser (who had apprised V of all of this prior to the trial and as a result J. Beckwith had allowed Cross to obtain the sealed grand jury record of his testimony) asserted that Oakley (pointing to him) had coerced him to lie at the grand jury and at trial, threatening him with jail if he did not tell the story demanded by Oakley. (See Appendix) This shocking testimony strongly suggested that all fourteen patients had been similarly coerced, and that the massive suborned perjury had rendered the indictment fatally defective!

Oakley presented former V Chillicothe nurse Heather Goodlander, a self-acknowledged drug addict, who claimed that V had prescribed her 180 pain pills for a toothache, which had led to her addiction and to her losing her LPN license. Oakley did not produce the prescription, despite his having provided to Severyn 4000 others written on V's DEA license. Goodlander did not recall at what pharmacy she had obtained the pills. Goodlander also claimed that she called V's attention to a patient who had an irregular heart rhythm. Oakley asked Goodlander what V did about it. "Nothing!" What happened to the patient? "He died!" That evening, V called the dead patient, who answered the phone. Cross then sent an investigator to the patient's house, and had him sign an affidavit identifying himself. J. Beckwith would not allow the investigator to testify and present the signed statement, calling it hearsay. Oakley presented former V Chillicothe nurse Penny Draves, who also admitted to being a drug addict. She admitted to lying to V nurse Elizabeth Santos-Mauntel when she was interviewed about her pain symptoms and was accepted as a pain patient. Draves had produced medical records documenting a chronic painful hip problem. She never told V about her drug addiction. In his closing, Oakley engaged in "impermissible vouching" (Donelly v DeChristoforo, 416 US 637, 1974) for the stories of Goodlander (Doc. 504, p.8779), and Draves (p.8806), as well as for two other drug addicts, Colley (p.8782) and Wallace (p.8793), despite the judge's warning to the jury that testimony of drug addicts was inherently unreliable.

After the Government rested, V presented two patients, a married couple Tammy and David Powell. Both were treated with high doses of oxycodone for severe, chronic pain. David had worked for the railroad for twenty-six years, but had been on disability for five years because of severe neck and back pain from carrying a fifty pound switch box all day. On V's pain medications, David returned to work. When V was closed down by the DEA, Mr. Powell was forced back onto disability. One day Tammy was involved in a car accident in which she was ejected from her car and rendered unconscious. She had landed on top of a poisonous snake, and as a result lost half of the muscles of her leg, suffering terrible chronic pain. On high doses of oxycodone, Mrs. Powell was able to drive an hour to physical therapy, then work an eight hour shift at a call center, then drive an hour back home. When V was shut down, Tammy went back on disability. Neither of them was able to find another pain doctor who would prescribe to them the doses they needed.

V presented his Chillicothe nurses, Elizabeth Santos-Mauntel, LPN, Rene Ames, RN, and her sister, head nurse Sally Scott, RN. All three testified that V was the fairest, most conscientious doctor they had ever met, who showed genuine concern for the welfare of his patients, as well as that of his staff. V gave them the job of carefully interviewing new and returning patients, reviewing medical records, examining patients, then presenting their findings to V, who would then see the patient. The visit usually required at least an hour. It took eight to ten hours to see twenty-five to thirty patients each office day. Both a male and a female security guard were required to personally observe collection of urine drug screens, which were then evaluated by the nurses and recorded on the charts. All of these duties and tasks were required by the

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FROM: 19519424
TO: Morris, Jane
SUBJECT: 2255 - 6
DATE: 07/12/2022 08:17:18 AM

OIPTA, copies of which were posted in every interview room. All three nurses obviously took great pride in the work they had done with V. All three were obviously outraged and furious at Oakley as he tried repeatedly to get them to admit to observing V selling prescriptions or pills.

V then presented his three experts, Drs. Blatman, Tennant, and Bonnell. Their testimony has been discussed above. Dr. Blatman's testimony provided the preponderance of evidence needed to establish the affirmative defense that V's pain management practice fully complied with controlling Ohio law, the OIPTA, as well as the Model Policy for the Treatment of Severe Pain published by the Federation of State Medical Boards, which contained the statement that "physicians who had adhered to the minimum standards of the Model Policy would be 'safe-harbored' from prosecution for violation of the CSA." Dr. Blatman testified that all of V's patients received appropriate physical exams, as noted on their medical charts, and that all of V's controlled substance prescriptions were absolutely legal, issued for the legitimate medical purpose of the control of severe pain. Dr. Blatman flatly contradicted the slanderous, unsupported assertions of Severyn and Kennedy that V "had no doctor/patient relationships, had never examined his patients, and was nothing but a drug dealer." The prosecutor presented no rebuttal witness to contest Dr. Blatman's testimony, which was confirmed by Dr. Tennant. J. Beckwith was then required to instruct the jury that, since V had presented an affirmative defense by a preponderance of evidence, the Government was then required to disprove the defense beyond a reasonable doubt, or else the defense would stand. The judge did not issue such a jury instruction (without objection by defense counsel).

Dr. Tennant's testimony affirmed that of Dr. Blatman, that the combination of medictions employed by V was routinely prescribed, and was quite safe when taken as directed. Dr. Tennant's acknowledgment that severe chronic pain patients were frail and ofter terminally ill, and that many died while under his care, gave the proper context and meaning to the deaths of thirteen of V's patients, as did the SCt in Glucksberg: severe pain MUST be treated, even if the strong medications required hastened death!

Dr. Bonnell's testimony that the postmortem toxicology results in fact proved that NONE of the deaths had resulted from overdose of medications prescribed by V flatly contradicted the junk science (i.e. false) assertions of "multidrug overdose deaths" by all three Government "experts", none of whom were qualified to present COD testimony, as noted several times already.

In Oakley's closing, he attempted to portray V as a callous monster for his treatment of patient Paul Crum, who was a patient with terminal cancer, heart disease, and severe lung disease. Two weeks before his final visit to V, Mr. Crum was admitted to a hospital and intubated for severe respiratory distress, a certain indicator of his impending death. Mr. Crum improved enough to make it home. When he came to V two weeks before Christmas, he looked terrible and his lungs were congested. V explained to Mr. Crum that if he continued his pain medications for severe pain, he might well die from them. Mr. Crum told V that he would take the risk; he desperately wanted to give his ten year old son his Christmas present, and did not want to be bedridden with severe pain on that day. V carefully wrote an informed consent, explaining that Mr. Crum knew that in his condition the pain medictions he needed could cause his death, but had chosen to continue taking them. All of V's nurses, V, and Mr. Crum signed and witnessed the informed consent. Mr. Crum gave his son a fine new bike on Christmas morning. Mr. Crum died the next day. Oakley called the informed consent a "death waiver"; "V knew his medications were dangerous but he prescribed them anyway, and he killed Mr. Crum. What about the doctor's Hippocratic Oath to do no harm?" (Doc. 504, p.8810) This reprehensible, vicious, out of context libel was endorsed and utilized by 6th Circuit Panel Judge Donald to introduce her opinion denying V's appeal of his convictions and sentences. Oakley, in his zeal to win any way that he could, turned a heartrending, precious, loving episode into pure feces. V had done everything for Mr. Crum according to Ohio law (4731-21-06; 2133.11(A)(6); 2133.12(E)(1)), according to Glucksberg (521 US 702, 780, 1997), according to V's obligations to his dying patient, and according to Christian decency.

After the trial, V was shocked and devastated as the eighteen guilty verdicts were read, one after another, including the four "resulting in death". The bailiff put handcuffs on him, and led him away to a holding cell, thence to a county jail. Six months later Counsel Cross came to the jail to give V a copy of the Presentencing Report (PSR), and her response to it. The PSR was simply a word for word copy of the indictment, of which virtually nothing had been proven, adding in the judgments of conviction. Cross's response was weak and superficial, "praying the Court to mercifully impose 'only' a twenty-five year sentence (on a 65 year old, first time, nonviolent offender)". After reading that, V demanded that Cross withdraw as counsel, and chose to represent himself at the upcoming sentencing hearing. There, V requested a continuance to allow him to secure

experts and present testimony and evidence, and presented multiple objections to the PSR. He requested trial transcripts (to which he had a legal right: Evitts v Lucey, 83 L. Ed. 2d 821 (1985); Entsminger v Iowa, 386 US 748, 750-51 (1967))), but J. Beckwith denied every request, and then stated: "You were at the trial; why do you need transcripts?" Behind V, the courtroom was filled to capacity with screaming, angry relatives of the deceased patients, some shouting "Give him the needle!" (One reason why J. Beckwith would not consider granting a continuance to the sentencing hearing!) A scene reminiscent of Paris in 1793, as Louis XVI was led to the guillotine!

V timely filed a 2255 motion after the SCt remand to the 6th Circuit, and after the appeals court reissued their prior opinion. The 2255 motion raised nine issues of constitutional import. V was not provided the Government's (Oakley's) response to the 2255 before J. Beckwith issued her ruling: "The Court agrees with the Government's argument. Therefore, the 2255 motion is DENIED." The rules governing 2255 motions required that V must have the opportunity to respond to the Government. The rules governing 2255 motions also require the district judge to respond in writing to all issues raised. All the rules were simply disregarded. V then petitioned the 6th Circuit for a COA, but this was refused in a brief opinion that simply asserted that the evidence at trial was more than sufficient to support all the convictions. None of the issues V raised were actually dealt with. V then filed a petition for certiorari with the SCt, but that was denied in 2018. (17-8614)

The legal landscape of this case has been materially changed by the Ruan-Khan SCt holdings, now requiring proof of criminal intent in order to convict a physician of violating the CSA. J. Beckwith's refusal of V's requested jury instruction taken from Moore, ibid., which would have required proof of scienter, makes it obvious that V's jury instruction proffered by the judge allowed his jury to convict absent the now required proof of mens rea to illegally distribute controlled substances.

V fully expected to testify in his defense, an opportunity he had been eagerly awaiting and preparing for, for over five years. However, Cross and Crouse browbeat V for hours, Cross saying that she could tell by the jurors body language that they were on his side; he could ruin everything if Oakley succeeded in provoking him to an angry response. Reluctantly, V agreed not to testify, one of his worst decisions. Had he told his story as related herein, it is quite likely that, even with the incorrect jury instruction, V could have convinced at least one, and possibly twelve, jurors that he had at all times acted as a conscientious, caring physician, and not as a streetcorner drug dealer. This conclusion was certainly presented by V's medical charts, his nurses, his patients, and his experts, but it would have been far more effective coming from his lips.

Nevertheless, the holdings of Ruan and Khan should invalidate V's CSA convictions. In addition, since the affirmative defense provided by Dr. Blatman's testimony was not rebutted, it was therefore established that V's pain management practice was in full compliance with the OIPTA and the Model Policy, and therefore not under the ambit of the CSA at all. Lastly, J. Beckwith's statement that "there has been no testimony of personal profit per se" provides yet another reason why every count of conviction must fall. The SCt has held in three cases (Lopez, 2006; Carachuri-Rosendo, 2011; Moncrieffe, 2013) that "absent proof of 'drugs for money, or some sort of commercial transaction, no felony conviction for violation of the CSA is possible.'" That includes all of the counts of conviction, including the 924(c), "use of a firearm in furtherance of a drug trafficking offense", if there was no "drug trafficking offense." In fact, the 35 page indictment failed to allege a single specific instance in which V sold controlled substances or controlled substance prescriptions for "money, or some sort of commercial transaction", consistent with J.Beckwith's statement that there has been no testimony presented of personal profit per se. The testimony of co-defendants Alice and Denise Huffman substantiated that V's weekly salary did not depend upon how many patients he treated, or how many prescriptions he issued, or any other shadowy or illicit activity in the back rooms of the clinic. These three SCt holdings identified "drugs for money" as an ELEMENT of every felony violation of the CSA. Therefore, the very indictment, already fatally tainted by Oakley's subornation of perjury to obtain it from the grand jury, failed to charge V with the central element of the CSA, and is yet another reason why all the counts of conviction must be dismissed.

TRULINCS 19519424 - VOLKMAN, PAUL H - Unit: TCP-A-A

FROM: 19519424
TO: Morris, Jane
SUBJECT: 2255 - 7
DATE: 07/12/2022 08:17:23 AM

The 6th Circuit panel ruling on V's direct appeal simply brushed aside every constitutional and procedural issue raised by V, asserting time after time that, "considering the testimony in the light most favorable to the Government, there was sufficient evidence for a "rational juror" to sustain every count of conviction. There was, indeed, evidence that V had ordered, prescribed, and dispensed controlled substances, which he was authorized to do pursuant to his DEA Controlled Substances Certificate. There was evidence that thirteen former patients had died while under his care, but the testimony of V expert pathologist/toxicologist Harry Bonnell, MD, asserted that NO patient had died from an overdose of medications prescribed by V. Of the four patients for which the jury found V guilty of 841(b)(1)(c), "illegal distribution of controlled substances resulting in death", Brigner and Heineman had clearly died from severe, four-vessel coronary artery disease, according to Dr. Bonnell. Ratcliff and Ross had not been autopsied, so the COD was not determinable, according to Dr. Bonnell. V had been treating Ross for severe pain, as well as severe hypertension, a response to severe pain. There was, however, NO proof of V's mens rea to "knowingly and willfully" dispense controlled substances without a legitimate medical purpose, resulting in death. V received four consecutive life sentences for the deaths of the four, longer than the sentences of Terry Nichols, the accomplice of Timothy McVea; longer than Unabomber Ted Kaczynski; longer than 9/11 terrorist Zacharias Moussaui. There was NO evidence of "drugs for money", according to J. Beckwith, the essential element of every felony violation of the CSA, according to Lopez (2006, ibid.); Carachuri-Rosendo (2011, ibid.); Moncrieffe (2013, ibid.). Since "drugs for money" is an element of every count of conviction of V, how could the Panel conclude that a "rational juror" could find sufficient evidence to convict? And since there was NO testimony presented to refute the affirmative defense presented by Dr. Blatman beyond a reasonable doubt, the defense must stand.

How, then, did this jury arrive at eighteen guilty felony verdicts, sustained by the Panel?
1) The 35 page indictment was filled, start to finish, with shocking, cringe-worthy, infuriating allegations, based upon hearsay, or based upon nothing at all, except Oakley's need to paint a grim picture of a "pill-mill" clinic operated by a callous, greedy, fake doctor, out to make as much money as possible, as quickly as possible (perhaps a quite accurate description of jailed Dr. Proctor!). Virtually nothing in the indictment was substantiated by trial testimony; pretrial J. Beckwith had granted a motion of counsel Cross that the indictment should not be proffered to the jury to use during deliberation, but then the judge did just that. During Huffman's plea colloquy, J.Beckwith had coerced Huffman, on pain of immediate jailing, to affirm every detail of every page of the indictment. In a case such as this one, in which the jury might well have been confused and uncertain about how to weigh the diametrically opposite testimony of the medical experts, the crude, unsupported, inflammatory allegations in the indictment could well have been the deciding factor. The Huffman-bolstered indictment next reared its head in the sentencing phase, as the PSR was simply a word-for-word incorporation of the unproven accusations of the indictment. Huffman appealed her 152 month sentence, apparently far longer than she expected. The Panel then quoted, ironically, Huffman's own coerced admissions to sustain her sentence. In ruling upon V's appeal, the Panel again quoted the contents of the bolstered indictment to sustain the convictions and sentences imposed by J.Beckwith. And when the SCt issued a GVR order, Justices Thomas and Alito referred to the indictment (unaware that it had been bolstered by the coercion of Huffman) to assert that the GVR order "in no way was to be considered an acquittal."
2) The failure of J. Beckwith to allow V to challenge the Government experts at the required Daubert hearing allowed three egregiously unqualified experts to present preposterous, literally unbelievable testimony at trial. None of the three should have been allowed to take the stand at the trial. The SCt in Daubert recognized the gravely prejudicial effect of allowing Government experts to present sophisticated lies larded with strange, unfamiliar words in long, unintelligible phrases. It is quite difficult to believe that Severyn, Kennedy, and Policastro convinced any jurors, but the Government needed to present "experts", and this undistinguished trio played the roles. V presented three highly respected and reputable experts who confirmed that his practice was absolutely legitimate, legal, appropriate, and compassionate, but it is possible that the utterly contrasting descriptions of V's practice cancelled each other out in the minds of the jury. It is clear, however, that the testimony of the three "experts",immediately exposed as false on cross-examination, allowed the Panel to completely disregard the testimony of V's experts, and to decree that there was sufficient evidence for the mythical "rational juror" to convict. This case presents a grim illustration of the wisdom of the Daubert Court, and the miscarriage of justice which can occur when scientifical mumbo jumbo is allowed front and center.
3) The closing arguments of the Government are the last words the jury hears before they begin deliberation, which is why inappropriate, misleading, even blatantly false and inflammatory assertions from the prosecutor can sway the outcome, and undermine the country's confidence in America's system of justice, as held in the famous old case of Berger v US, ibid. Prosecutors Oakley and Wright did their level best to "inflame the passions of the jury", and they got their convictions, without a single objection from V's timid, court-appointed counsel. In Hodge v Hurley, 426 F.3d 368, 385 (6th Cir. 2004), the Court held that "failure of defense counsel to object to any aspect of the prosecutor's egregiously improper closing argument was

objectively unreasonable", and established ineffective assistance of counsel. In Appendix A, thirty shocking examples in the 90 minutes of the Government's closing are presented.

V asserts that these three sources of grave and unfair prejudice are accountable for his conviction, and certainly provide a a wealth of grounds for reversal. However, the most important reasons to grant a new trial, and ultimate judgment of actual innocence are:

1) The SCt's Ruan determination that the government must prove the mens rea of criminal intent to violate the CSA by the illegal distribution of controlled substances without a legitimate medical purpose in order to secure a conviction, which was not done in this case.

2) "Drugs for money", an element of every felony violation of the CSA was not charged in the indictment, and no evidence of "drugs for money" was ever presented. Therefore, no conviction of any of the charged counts of violation of the CSA is possible.

3) Failure to allow cross-examination of the Government experts at the Daubert hearing resulted in devastating prejudice to V as a result of the "junk science" testimony of the egregiously unqualified Government "experts", and requires, de minimis, remand and a new trial.

4) The testimony of Drs. Blatman and Tennant established by a preponderance of evidence that V followed all provisions of controlling state and federal law, and was therefore immune to federal prosecution for violation of the CSA, and has thus been victimized by the legal doctrine of entrapment by estoppel. The Government actually lacked subject-matter jurisdiction, and the entire case must be dismissed, along with issuance of a certificate of "actual innocence".

5) The coercion of co-defendant Huffman to bolster the entire, unproven, unsupported indictment, which was then provided to the jury to consult during deliberation likely influenced the jury to convict, in the absence of any real evidence of wrongdoing by V, and certainly influenced the sentences imposed by J. Beckwith, and upheld by the Panel.

Further, Appellant saith not.

Paul H. Volkman, MD, PhD

TRULINCS 19519424 - VOLKMAN, PAUL H - Unit: TCP-A-A

FROM: 19519424
TO: Morris, Jane
SUBJECT: 2255 Appendix
DATE: 07/12/2022 08:17:27 AM

V's court-appointed CJA counsel Cross and Crouse failed to object to prosecutors Oakley and Wright's vicious, inflammatory, false assertions during their closing statement, which was "objectively unreasonable " conduct for a defense counsel, and which established "cause and prejudice" against V, invalidating the entire criminal proceedings. Examples of egregious prosecutor misconduct during their closing statements follow. (Day 26, Doc. 504) Wright:

#8777, line 13: "distribute controlled substances without any legitimate medical purpose" (improper legal conclusion which invaded the jury's province to decide)
#8777, line 20: "decision to give drugs to anyone who walked in the door with enough cash to see the doctor." NO testimony of this allegation was presented; in fact Wright KNEW this was false, as government discovery contained reports that four undercover DEA agents sent to Tristate to buy controlled substances had been sent away empty-handed.
#8778, line 7: "all they had to do, besides pay cash, was to swear they weren't law enforcement." (a blatant falsehood, contradicted by the testimony of every former patient, and all the medical charts introduced as exhibits)
#8778, line 23: "decision not to practice medicine" (improper legal conclusion govt has no authority or expertise to make)
#8779, lines 9-13: (improper vouching for knowingly false testimony of self-acknowledged drug addict Goodlander, who lied about the alleged prescription for 180 hydrocodone pills for a toothache, then lied about patient Doug Kiser dying.)
#8782, lines 7-9: (improper vouching for false testimony of self-admitted drug addict Danny Colley)
#8782, lines 19-25: Misquoted Forrest Tennant, MD, as stating that chronic pain patients "understand they are not going to live very long", then asserted that the medications prescribed by V are dangerous, without quoting Dr. Tennant's testimoony that the combinations prescribed by V are the same ones he prescribed safely and effectively. A blatant mischaracterization of Dr. Tennant's testimony to mislead the jury about V's legitimate practice of pain management in accordance with the OIPTA, and recognized experts in the field.
#8783, line 4 ff: (Improper vouching for coerced, false testimony of pharmacists) During DEA administrative hearing, Agent Kresnak testified he had sent agents to every pharmacist in the Portsmouth area to tell them they would lose their licenses and go to jail if they filled V's prescriptions. Kresnak's agent, Nicole Bornstein-Bowie testified that she had composed the affidavits purporting to be the personal statements of the pharmacists, who were aware of the consequences if they did not sign the affidavits, and if they did not later testify as directed by Oakley at trial.
#8784, lines 2-15: (Improper vouching for coerced, false testimony of pharmacist Rick Griffith: "I don't know why you are complaining, because you are making a lot of money.") Rank, false hearsay, presented without noting that V had filed a serious complaint against Griffith with the WVA Board of Pharmacy, which resulted in his censure and fine.
#8787, line 16: "If a patient died, the file went to V's office." NO testimony to that effect presented.
#8790, lines 16-19: "Did the defendant reach out to the emergency room and say: 'If I have one of my patients come in, you let me know?' Other pain management doctors had done that. V didn't." A completely fabricated, bald-faced lie.
#8791, lines 20-25: Quotes Dr. Wheeler about the duty of a physician to ask for emergency room records, without quoting Wheeler's testimony on cross-exam that the hospital would not release records to a doctor not on staff.
#8793, lines 6-8: "a double dose of oxycodone from 90 to 180 and died the next day." Ignores, and hopes the jury will not remember, the testimony of coroner Pat Hutchens (R270, Day 10) that the new prescription for 180 mg. oxycodone was found in Kristi Ross's purse UNFILLED. Wright's statement was deliberate misstatement to mislead the jury, which convicted V in Ross's death.
#8793, line 19: (Improper vouching for the testimony of incarcerated drug addict Lisa Wallace)
#8794, line 2: Mentions Barry Houser, without mentioning Houser's testimony that he had been coerced to lie to the Grand Jury by Oakley. Stated Mrs. Houser was "hooked on Xanax", conflating dependency with addiction, despite clear and specific distinctions made between the two conditions in the OIPTA.
#8795, lines 4-13: Paula Eastley, mother of deceased former patient Steven Hieneman, never actually saw or spoke to V. In court, when asked to identify V then sitting at the defendant's table, pointed to one of the marshals.
#8796, lines15-16: "he refused to give information, at least initially, to the coroner who wanted to find out what happened." Wright ignores that HIPAA prohibited V from giving out patient information to an unidentified person over the phone; V required the coroner to come to his office and present his identification, after which V provided the medical records of Dwight Parsons.
#8797, line 25: "It was clear that Mr. Hieneman was an addict." V's medical expert Dr. Blatman testified that V's medical chart for Hieneman stated that he suffered from reflex sympathetic dystrophy, or "clenched fist syndrome", which caused him excruciating pain, and thus in absolute agony without his pain meds. Wright was prohibited from offering this legal/medical conclusion to the jury.
#8799, lines 18-21: "He describes a so-called program where he says that half of the patients were summarily dismissed when it was found out that they were selling their pills, and he claims to have a half-time job. There's no evidence in the record that

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he did that." A blatant lie. Seven of the patients brought in by the Government had been dismissed: Tolliver (R451, p3) came to V for pain management. Failed UDS, DISMISSED; Margaret Maynard (R451, p18): referred by kidney doctor to pain clinic, convicted of selling pills, p21, DISMISSED; Archie Maynard (R451, p18) severe back pain. Failed UDS DISMISSED; Dorothy Vanatter (R477, p150) back and neck pain. Failed UDS DISMISSED; Walter Vanatter (R477, p175) diabetes, foot and leg problems, severe hypertension. Failed UDS DISMISSED; Danny Colley (R303, p62) claimed severe pain, lied to V to get meds, failed to take UDS DISMISSED; Stoney Carver (R454, p44) severe back pain, failed to take UDS DISMISSED.
#8800, lines 3-10: testimony was, in fact, exactly the opposite. Wright's assertions came from Huffman's coerced admissions at her guilty plea colloquy, used against V in violation of Ohio Code of Professional Regulations.
#8800, line 22: "He drops addicts, doesn't try to get them any help, and he used levels to determine to determine compliance." Wright, required to be "learned in law", must be aware that a separate certification is required by the Narcotic Addict Treatment Act, which V did not have, and did not want. Wright here criticizes V for NOT treating addicts, after claiming that ALL of V's patients were "drug-addicted customers".
#8803, lines 4-12: (Improper vouching of self-acknowledged drug addict Danny Colley)
#8804, lines 8-10: "And you heard the officer testify that there was a conversation about street value, where the Defendant talked about street value." Rank hearsay, improperly vouched, allowed in error by Beckwith.
#8806, lines 2-23: (Improper vouching of self-acknowledged drug addicts Heather Goodlander and Penny Draves)
#8806, line 24 ff: Amazing assertion by Wright regarding what V was supposedly concerned about, absent any testimony by V or any other witnesses to that effect.
#8807, lines 9-10: "a prescription for oxycodone 30s, 10 per day, became a prescription for oxycodone 15s, 30 times a day." A blatant, knowingly false assertion, not documented by any such prescription, where there was testimony of the permissible substitution of 20 oxycodone 15s for 10 oxycodone 30s.
#8808, lines 3-4: "foamy fluid on his mouth, one of the telltale signs of an overdose." The testimony of the only forensic pathologist expert to testify, Harry Bonnell, MD, was that "foamy fluid on the mouth was seen at any and every death which was characterized in its final agonal moments as having a component of respiratory distress, and was certainly NOT a telltale sign of an overdose death."
#8809, lines 13-19: (Improper vouching of blatantly false, fantastic testimony of self-acknowledged drug addict Draves, which had been directly and completely contradicted by V nurses Sally Scott and Elizabeth Santos-Mauntel)
#8810, lines 1-14: re Paul Crum, terminally ill patient with cancer, heart disease, black lung disease. Wright characterizes V's careful and detailed informed consent for Mr. Crum to continue his pain medication, even though in his grave condition, the medications could hasten his demise, as "DEATH WAIVER". V's practice was absolutely legal and required under OIPTA, by the Model Policy for the Use of Controlled Substances in the Treatment of Severe Chronic Pain, and by the SCt in Glucksberg.
#8812, line 12: "no physical exams", but on #8798, Wright references physical examinations in the charts of patients Staten, Carver, Hieneman, Parsons, and Gillespie. "Expert" Kennedy repeatedly asserted that there were no physical exams, but was immediatedly impeached on every patient by chart entries which documented physical examinations.
#8813, lines 7-8: "anyone with enough cash to see the doctor" (repeats the same blatant lie as #8777, line 13, in case any juror missed the lie the first time around)

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FROM: 19519424
TO: Morris, Jane
SUBJECT: 2255 Appendix - 2
DATE: 07/12/2022 08:17:32 AM

Oakley
#8876, lines 6-8: "has been about profit" Oakley disregards the determination of J. Beckwith during the jury instruction conference that "there has been no testimony about personal profit per se."
#8878, lines 7-12: re Reeder "and it killed him!" Oakley's witness had testified that Reeder had died a cardiac death, not from any drug ingestion or overdose. Another outright, inflammatory falsehood!
#8888, lines 13-15: "That's for another doctor I'm not going to coordinate with, if in fact they have one. I'm just going to give them stuff that will kill them." And he knows that. He clearly knows that because he has Paul Crum sign that he know this can kill him." Oakley makes the same vicious mischaracterizations of V's informed consent statement that Wright did.
#8889, lines 22-24: "he didn't. He was above calling." Oakley here refers to testimony of Dr. Langman from the Mayo Clinic Laboratory, whom V stated, in the interview conducted during the Tristate search, that he had consulted with numerous times. Langman stated that she did not recall speaking with V, but that hundreds of doctors called her every month. Her testimony did not in any manner substantiate Oakley's assertions.
#8890, lines 15-17: "The hospital wouldn't do an ultrasound of her under V's order." Meant to be a killing accusation against V's practice of medicine. However, Alice Huffman testified (R266, R477) that after the Portsmouth hospital (Southern Ohio Medical Center) had refused to treat her on V's order, V had called a hospital in Cincinnati, to which she was admitted for eclampsia, saving the lives of her eight-month gestation twins, and possibly hers as well. V never sent his patients to SOMC, regarding it as a disgracefully incompetent facility run by bad doctors.
#8891, line 17: "What he was doing was not legitimate." Oakley is not allowed to make this legal conclusion, improperly invading the province of the jury.
#8893, line 16: "The SOB Mark Reeder overdosed." Rank hearsay, Oakley improperly vouched the false testimony of a self-acknowledged drug addict.
#8893, line 22: "to make a profit" Again ignoring Beckwith's determination that "there has been no testimony of personal profit per se." Repeated at the end of his outrageous closing argument, to reinforce the verdict he desired the jury to reach.

Careful reading of this list of outlandish, outrageous lies by the AUSAs Wright and Oakley supports the conclusion that V was in fact convicted by the jury by the Satanic combination of this devastating, frankly evil closing performance, along with the indictment, filled with unproven, scurrilous allegations for 35 pages, bolstered as truth by Huffman's coerced admissions. The jury was clearly not going to carefully study 1000 pages of court testimony gathered in 9 weeks; the memorable closing statements and the indictment gave them an easy path (the "wide gate") to 18 convictions.