

No. _____

In The
Supreme Court of the United States

MASOUD BAMDAD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should a habeas proceedings court adjudicate all claims of a habeas petitioner before making its final judgment and closing the case, or otherwise such judgment is invalid and does not end the action pursuant to Fed.R.Civ.P. 54(b)?
2. Does a defective indictment result in a court losing its jurisdiction over a criminal defendant?
3. Whether due process demands government agents follow their own agency policy and procedures during their investigation stage.
4. Where there is no evidence of interstate commerce violations in a case of a physician who was charged and convicted of distribution of controlled substances, while he was practicing legitimate pain management based on his licensing agency guidelines, do federal authorities have jurisdiction over such a case?

LIST OF PARTIES

All parties to the proceeding are identified in the caption of the case.

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In The
Supreme Court of the United States

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PETITION FOR WRIT OF CERTIORARI

Petitioner Masoud Bamdad respectfully prays that a writ of certiorari be issued to review the judgment below.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit appears in *Appendix A* to this Petition. The Order denying the rehearing and *en banc* hearing is also attached as part of *Appendix D*. As far as the Petitioner is aware, the two opinions are unpublished. The District Court's order is attached as *Appendix B*.

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JURISDICTION

On August 3, 2017, a two-judge panel of the Ninth Circuit Court of Appeals entered its opinion. *Appendix A*. Petitioner Bamdad filed a Petition for Panel Rehearing, or alternatively, for *En Banc* Rehearing. This Petition was denied on September 22, 2017 by another two-judge panel. *Appendix D*.

This Court has jurisdiction under 28 U.S.C. §1254(1).

**STATUTES, ORDINANCES
AND REGULATIONS INVOLVED**

“Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . .” 21 U.S.C. §841(a)(1).

“A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.” 21 C.F.R. §1306.04.

“The term ‘practitioner’ means a Physician . . . or Other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices . . . to distribute, dispense, . . . , administer, or use . . . a controlled substance in the course of professional practice. . . .” 21 U.S.C. §802(21).

“When an action presents more than one claim for relief – whether a claim, counterclaim, cross claim. . . . Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims . . . does not end the action as to any of the claims. . . .” Federal Rule of Civil Procedure 54(b).

“DEA policy prohibits Diversion Investigators from any kind of undercover and surveillance activities

in the cases of registered practitioners.” Chapter 64; Subchapter 6411.2 of the DEA procedures; *Appendix E*.

INTRODUCTION

This Case is a clear example of where the lower courts departed from the acceptable usual course of judicial proceedings. Therefore, this Court’s exercise of its supervisory power under Supreme Court Rule 10(a) is required in aid of its appellate jurisdiction. Petitioner seeks to correct this manifest injustice of conflicting application of controlling law.

This Case was originally submitted for filing in this Court in December 2017 with attached opinion/order of the Ninth Circuit Court of Appeals (appeal and rehearing opinions). On January 2, 2018, the Clerk of this Court sent a letter to Petitioner Masoud Bamdad that he needed to send the judgment of the district court as well.

On February 26, 2018, Petitioner Bamdad submitted the requested district court’s judgment (attached as *Appendix B*). On April 30, 2018, Bamdad, while waiting to receive this Court’s docket number, received a letter from the Clerk’s office that because he had previously submitted other petitions for issuance of writ of certiorari in forma pauperis, the Court decided that it would not accept any more petitions under in forma pauperis status. He also needed to file his petitions under Rule 38(a) in compliance with Rule 33.1.

After some communications with the Clerk's office, on August 1, 2018, Bamdad was able to talk to Mr. Jacob C. Traverse on telephone. Mr. Traverse agreed to give Bamdad another 60 days from the above date to resubmit his petition under the above said rules through a printing company based on this Court's Order.

In this instant Petition, Bamdad combined his original petition with its supplement, which was submitted on February 26, 2018, in order to provide the Court the requested judgment of the district court.

STATEMENT OF THE CASE

Petitioner Masoud Bamdad, M.D. (hereinafter "Bamdad") is a 64-year-old U.S. Citizen, and former practicing physician and surgeon from the Los Angeles area. Bamdad has been incarcerated by federal authorities for about 10 years against the rule of law, Constitution and its civil rights guarantees. Based on the precedents, the district court of the Central District of California, which convicted and sentenced him, does not have jurisdiction over the subject matter nor petitioner. Bamdad has remained in a federal prison, as a result of ineffectiveness of his trial and appellate lawyers, who did not raise or object to the Government's case in a timely manner.

After the direct appeal, Bamdad started to study the law and facts of his case, he understood the injustice in which he had become entrapped. He filed a

timely §2255 motion for habeas relief in the year 2012. The district judge, Judge Wu, misinterpreted the constitutional law under the Fourth, Fifth, and Sixth Amendments, then plainly refused to adjudicate some of Bamdad's other claims in his motion. These claims have resulted in habeas relief in similar cases. The Ninth Circuit was also reluctant to issue a Certificate of Appealability ("COA"), in order to rectify Bamdad's meritorious claims. It has become a silent observer of the district court's actions and inactions. There are at least four claims of relief on §2255 proceedings, which as of today remain unaddressed and untouched by the courts.

Bamdad's original §2255 motion for habeas relief was dismissed by the district court, approximately a year after its filing in June 2013. Bamdad tried to obtain a COA from the district court or the Ninth Circuit without success. This Court also declined to issue a writ of certiorari. In the following year Bamdad moved to recuse his trial judge and filed simultaneously a motion under Fed.R.Civ.P. 60(b), to reopen his §2255 motion, and at least obtain adjudication on his unaddressed claims, with no success. The Ninth Circuit and this Court again declined to review his claims.

In July 2016, Bamdad filed another motion under Rule 54(b) of Federal Rules of Civil Procedure. There, Bamdad claimed that because the district court never adjudicated some of his claims in his §2255 motion, the final judgment in habeas proceedings is not complete, and therefore, it should be void under Rule 60(b)(4), and the district court should reconsider its judgment with addressing the unadjudicated claims. The district

court ordered the Government to respond to Bamdad's claims. The Government sidestepped the claims, and only claimed that those claims are old, and the district court should dismiss Bamdad's Rule 54(b) motion. The district court, without addressing the unadjudicated claims, incorrectly claimed that it had already adjudicated those claims in its original ruling. Bamdad filed a motion under Rule 59(e) for reconsideration, and requested that the district court show him where those claims were adjudicated. The district court was not able to pin point with specificity where and when it addressed those claims. Had it addressed them based on the rule of law, Bamdad would have been released from custody a long time ago.

The Ninth Circuit again declined to issue a COA and hear Bamdad's meritorious claims. This Petition for issuance of a writ of certiorari by this Court is the next step.

Three out of four unadjudicated claims in Bamdad's original §2255 motion are constitutional violation claims, and the fourth one is a jurisdictional claim as a result of his indictment's defect as they will be asserted and briefly explained later.

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SUMMARY OF BAMDAD'S CRIMINAL CONVICTION

Bamdad was practicing general family medicine and pain management in the San Fernando Valley of California. His private medical practice was investigated from September 2007 through mid January 2008

by three agents of the Drug Enforcement Administration ("DEA"). The four-month, eight visit investigation was supervised by two agents of the DEA Diversion Unit.

The agents feigned being patients in pain and in need of painkillers. They presented credible and verifiable medical complaints; stated, in understandable manners, physical symptoms that are commonly recognized by medical practitioners as cardinal signs of credible complaints of medically treatable pain. All physician treatment responses were wholly consistent with current "good clinical practices" if not "best clinical practices" and the patient charts so reflect this level of care. During their consultation and conversation with Bamdad, they secretly recorded him both in audio and video. The agents did not reveal their true identity and obtain Bamdad's consent for their clandestine fishing expedition, nor did they have the required judicial warrants for waiver of the Fourth and Fifth Amendments, and also eavesdropping and interception under 18 U.S.C. §§2510-20. Therefore, their activities and investigation were unconstitutional to begin with.

Bamdad later discovered that the agents also violated their own agency policy and procedures. Chapter 64 of the DEA procedures defines the DEA Diversion Unit responsibilities and the extent of their investigation. See *Appendix E*. Subchapters 6411.1 and 6411.2 prohibit agents from any kind of undercover and surveillance activities during the investigation of practice of any registered practitioner such as Bamdad. During the investigation of Bamdad's practice, the DEA

agents placed Bamdad's practice on constant surveillance and monitoring. They also invasively surveilled his home and his family, without having any kind of warrants. Thus, all agents' activities were unconstitutional in violation of Bamdad's rights under the Fourth and Fifth Amendments.

Further, Bamdad never violated any state or federal statute to be prosecuted by the federal authorities. His office, his patients, and his license to practice medicine, were Californian. He was not accused of insurance or mail fraud; and during his practice, he did not make even one out of state phone call regarding his practice. In fact, interstate phone lines of his office were disabled as a cost control measure due to prior employee abuse of long distance dialing of personal calls. It is still a big puzzle how his alleged crime, the practice of medicine, became a federal offense. Moreover, his indictment does not state the manner and fashion of interstate commerce violation by Bamdad, a must for any federal indictment. See *Appendix C*. Additionally, the forfeiture count (Count 26) of his indictment is defective. It lacks the required specificity and particularity. His indictment also charged him with a nonexistent crime, after *Burrage v. United States*, 134 S.Ct. 881 (2014), a substantive retroactive law. Counts 1-19 of the indictment charged Bamdad with provision (b)(1)(C) of 21 U.S.C. §841. For the above three reasons, Bamdad's federal indictment is invalid, and any subsequent conviction based upon such indictment is unconstitutional. This is a jurisdictional issue, which has never been adjudicated by any federal district court, the Ninth Circuit, or this Court.

Bamdad's trial later hinged on the selected prejudicial excerpts of the unconstitutionally recorded audio and video tapes, testimonies of the DEA agents, as well as presentation of prejudicial evidence of one overdosed patient, Count 19, which Bamdad was not the "but-for" cause of his death, based on this Court's decision in *Burrage*, supra. A patient who took all of his one month supply of medicine in less than one day, and in addition received additional licit and illicit substances provided to him by others. The Coroner concluded his cause of death a "polymedication" overdose.

Bamdad was convicted on 13 counts of his 25 count indictment. Each count for writing one prescription for a legitimate quantity of medication for a legitimate time span, as his indictment illustrates as well. The total quantity of prescribing/distributing Oxycodone, Bamdad was convicted by the jury on all 13 counts of conviction was 51.5 grams. Out of this amount, 38 grams pertained to the DEA agents' eight visits to his office, who basically entrapped Bamdad with their unlawful and unconstitutional activities as discussed above. The jury did not unanimously convict Bamdad on the death count (Count 19), but were hung. The Government later dismissed that count after swaying the grand and trial juries' emotions, therefore, no longer needing that count to obtain a conviction.

On a conviction for prescribing 51.5 grams of Oxycodone to his patients, Bamdad received 25 years (300 months) imprisonment, \$1,000,000.00 criminal fine, and forfeiture of his small medical/dental office, which he was sharing with his wife, a dentist. This office was

not asserted in his indictment. It was, and is still owned by, an innocent California LLC and family trust. The prosecutors later placed Bamdad's wife under duress, forcing her to borrow about \$250,000.00, which was paid to the Government, in order to save *her* own practice from a government auction. As the honorable justices of this Court can see, Bamdad's investigation, conviction, and sentence are the fruits of numerous constitutional rights and due process violations. His sentence is astronomical and draconian, in relation to the amount of the medication for which he was convicted. The advisory sentencing guidelines suggests between 63-78 months incarceration for distribution of 51.5 grams Oxycodone. Yet the trial judge, by suggestion of the prosecutors, based Bamdad's sentence on prescribing 4,818 grams of Oxycodone. This was never asserted in his indictment, nor was he convicted by a jury for this amount. In fact, Bamdad's sentence sets a record in the Ninth Circuit for a doctor convicted of distribution of controlled substances. This was *Olando's* plain error under *Apprendi* and its progeny such as *Allegre*.

The following physicians in California and the Ninth Circuit, who have been convicted and sentenced for similar conduct. Astonishingly, some of these doctors have been prosecuted by state authorities, and some by the federal Government. The disparity between federal and state sentences is also unbelievable and should shock the Court.

Federal prosecuted doctors for instance are: (1) Dr. Kummerle (Case No. 10-cr-0417-DMG), interestingly,

at the same courthouse with the same prosecutors, received only two months pre-trial detention and probation, after he pled guilty of distribution of controlled substances, in a case with more serious charges than Bamdad; (2) Dr. Healy (No. 09-cr-0163-MMR, C.D.Cal.) (four years imprisonment and \$150,000.00 fine); (3) Dr. Bassam Yassine (No. 07-cr-778-PSG, C.D. Cal.) (37 months imprisonment and \$6,500.00 fine); (4) Dr. Odegaard (No. 06-cr-0178-DAE, D. Haw.) (convicted at jury trial) (five years imprisonment and \$12,500.00 fine); (5) Dr. Davis (No. 00-cr-1132-MMM, C.D. Cal.) 40 months imprisonment, reversed on direct appeal); (6) Dr. Braun (convicted on 3/5/2007, C.D. Cal.) (70 months imprisonment and \$17,500.00 fine); (7) Dr. Kaplan, 895 F.2d 618 (9th Cir. 1990) (D. Nev.) (five years unsupervised probation); and (8) Dr. Vu Le (C.D. Cal.) (convicted on 11/17/2009) (57 months incarceration and \$1,500.00 assessment fee).

In comparison with federal convictions and sentences at the same time for similar conduct the other doctors in state courts received: (1) Dr. Paul Maynard (convicted on Feb. 15, 2007, and received seven months incarceration); (2) Nicholas Sasson (Salina, California, convicted on 10/18/2004, received five years probation and \$1,000.00 fine); (3) Peter Ahles (convicted on 10/05/2006, received six months home detention and three years probation); (4) Peter Dietrich (Sacramento, California, convicted on 11/19/2009, received 60 days suspended sentence in jail, four years probation, 600 hours community service, and \$800.00 restitution fine); (5) Joan Keteschbach (Elk Grove, California, one

day jail, three years probation, 120 hours community service, and \$18,204.11 restitution fee); and more recently, Dr. Carlos Estandian from the Los Angeles area was convicted on 13 counts by a jury, the same number of counts of conviction as Bamdad. He was also convicted by the jury for the overdose death of one of his patients in contrast with Bamdad, who was not found guilty of any overdose deaths. Dr. Estandian received five years imprisonment, and only ended up serving two and a half years in a state prison.

Bamdad's sentence is not even close to any of the above doctors who were charged and accused of the same alleged crime, practicing pain management.

The Ninth Circuit affirmed Bamdad's conviction and sentence on direct appeal, because his ineffective and incompetent paid appellate lawyer failed to raise any of the above-mentioned claims. Subsequently, Bamdad filed a *pro se* motion for habeas relief under §2255. The district court, by misconstruing the Fourth, Fifth, and Sixth Amendments, denied any relief, and in addition, left some of Bamdad's important claims of relief unaddressed. Of the four claims, three of them are constitutional and one is jurisdictional. Such claims resulted in relief of other similar cases during habeas proceedings. As a matter of fact, as of today no federal court has chosen to adjudicate Bamdad's claim of relief. The aforementioned claims are:

- 1. The Jurisdictional Claim of the defects of Bamdad's indictment regarding its lack of the manner of**

violation of interstate commerce by him, and also its defect in the forfeiture Count. It does not have the required particularity and specificity. Additionally, the indictment charged Bamdad with a nonexistent crime after *Burrage's* decision by this Court, a substantive retroactive law;

2. The Constitutional Claim of pre-trial breakdown of communication between Bamdad and his trial lawyer. Fifty days before the trial, Bamdad notified the trial court and requested a hearing and the possibility of a court-appointed counsel. *Appendix F*. The trial court ignored Bamdad's request. This is a serious Sixth Amendment rights violation, and in other similar cases resulted in habeas relief;
3. The Constitutional Due Process Claim of the violation of the DEA procedures by its agents during the investigation of Bamdad's medical practice, though in addition to that the agents violated Bamdad's rights under the Fourth and Fifth Amendments, which was misinterpreted by the district court, but the issue of violating their own policy has never been adjudicated by the district court or any other court. This claim also resulted in habeas relief in other similar cases; and

4. **The Constitutional Claim of an unreasonable and unsubstantiated one million (\$1,000,000.00) dollar criminal fine, which was found by the judge not the jury, and is in conflict with this Court's decision in *Southern Union Co. v. United States*. Though this constitutional claim has not resulted in complete habeas relief. Yet it could waive Bamdad's unlawful criminal fine.**

REASONS FOR GRANTING THE PETITION

- A. **The Ninth Circuit and District Court of the Central District of California are reluctant to fulfill their duties.**

For at least the past five years, Bamdad has been trying to raise his unadjudicated claims, particularly the above asserted four claims in his habeas proceedings under different provisions of the Federal Rules of Civil and Criminal Procedures such as Rules 59(e), 60(b), and more recently under Rule 54(b). The district court wrongly claims that it has already adjudicated them; the Ninth Circuit has applied wrong standards for issuing a COA, thus sidestepping Bamdad's claims of relief.

The four aforementioned claims mirror clear-cut claims of relief in similar cases. The district court does not ask itself if it properly, based on the rule of law, adjudicated Bamdad's claims, then what is the reason

that Bamdad has yet to receive habeas relief? Bamdad appropriately raised the above claims, among the other claims in his §2255 motion under ineffectiveness of his trial and appellate lawyers, and raised them in a timely manner. The trial court either wrongfully claimed that they were procedurally defaulted, or erroneously claims they were addressed, contrary to the facts.

The Ninth Circuit incorrectly claims that Bamdad's claims are not qualified as constitutional violations. Without going into detail of his claims, it decided then on their merits. This is an erroneous standard for issuance of a COA, as this Court recognized in *Buck v. Davis*, 580 U.S. ___, 197 L.Ed.2d 1 (2017). Bamdad plainly raised his claims under the Sixth Amendment rights, and ineffectiveness of both of his lawyers during the trial and direct appeal proceedings. Yet, for unknown reasons, the Ninth Circuit does not recognize Bamdad's claims as a substantial showing of a violation of Bamdad's constitutional rights. The Ninth Circuit sidesteps [the COA] process and first decided the merits of the appeal, and then, justifying its denial of a COA based on its adjudication of the actual merits, it in essence decided the appeal without jurisdiction, and considering its own precedents. See *Miller-El v. Cockrell*, 537 U.S. 322, 336-337 (2003), while at COA stage, the only question should be whether the applicant has shown that "jurists of reason could disagree with the district courts resolution of the constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to

proceed further.” *Id.* at 327. The Ninth Circuit stretches credulity to characterize Bamdad’s ineffective assistance of counsel claims as run-of-the-mill. Bamdad clearly illustrated that a procedural ruling barring relief in his case itself is debatable among jurists of reason, where the district court falsely admits that it ruled on unadjudicated claims of relief in Bamdad’s original §2255 motion, and the Ninth Circuit relies on this admission. See *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4 (1983)).

Bamdad, as a criminal defendant and a U.S. citizen, deserves to be heard on all of his claims of relief in his §2255 motion. The lower courts refuse to execute their obligations; therefore, this Court’s intervention is required to issue a writ of certiorari and rectify Bamdad’s unadjudicated claims of relief. As mentioned before, one of the unaddressed claims is a jurisdictional issue and based on that claim, the federal district court never had jurisdiction over Bamdad in the first place. The Ninth Circuit persistently sidesteps that claim, and has kept stating that Bamdad has not demonstrated substantial showing of his constitutional rights violation(s) without mentioning anything about the jurisdictional issue.

B. This Case asks an important question about when a Physician should be prosecuted by the federal authorities.

This Court has never addressed this question: under what circumstances may a medical doctor be charged federally? All federal statutes related to the accusation and conviction of Bamdad, are based upon the notion of an interstate commerce violation. The Government must demonstrate that a defendant either somehow impacts interstate commerce by crossing a state line during the commission of a crime, or the instruments of his/her crime, passed across state borders with intention of committing an offense, in order for a crime to become a federal offense. Federal prosecutors have a tendency to overreach and charge medical doctors under the federal statutes ignoring the fact that these statutes were enacted mainly for illegal manufacturers, distributors, and high rank drug dealers. They were not intended for a doctor with a small practice limited to one state. The exceptions being those involved in sales or insurance and financial crimes. This Court's intervention is required to draw a line and terminate the federal prosecutorial abuses in these types of cases through overreaching under the guise of a nexus of interstate commerce.

Over the past 40 years, this, Court has only ruled two times on the issue of prescription of licit controlled substances by physicians: (1) In *United States v. Moore*, 423 U.S. 122 (1975), which held "[T]he scheme of the Controlled Substance Act ("CSA") viewed against the background of the legislative history reveals an intent

to limit a registered physician's dispensing authority to the course of his 'professional practice.'" *Id.* at 140. Dr. Moore in some cases was handing his patients up to 200 pills of Methadone per day. For that reason, this Court recognized him as a drug-pusher. Yet the Court was careful to emphasize that the defendant in that case had so wantonly ignored the basic protocols of the medical profession that "he acted as a large-scale 'pusher' – not a physician." The Court further described §841(a) as prohibiting "the significantly greater offense of acting as a drug 'pusher.'" *Id.* at 138. These statements suggest that the *Moore* Court based its decision not merely on the fact that the doctor had committed inadvertent or even intentional malpractice, rather, on the fact that his actions completely betrayed any semblance of legitimate medical treatment.

This interpretation of *Moore* was reinforced thirty years later in the dicta of; (2) *Gonzales v. Oregon*, 546 U.S. 243 (2006). In explaining that the CSA's prescription requirement did not authorize the United States Attorney General to bar dispensation/prescription of controlled substances for assisted suicide in the face of a state medical regime permitting such conduct, this Court explained:

"The Controlled Substance Act (CSA), 21 U.S.C. §801 et seq., and case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood.

Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally.”

Gonzales, 546 U.S. at 269-70.

Other than the guidance given in *Moore*, and limited explanation in *Gonzales*, there has been no one right way to convey the governing standards of “legitimate medical purpose” and “in the usual course of . . . professional practice,” in cases like this Petitioner, who was practicing pain management based on the Medical Board of California Guidelines for controlling pain with opioid based medications. Petitioner never overprescribed any medication to any of his patients even the undercover DEA agents, as his indictment reveals. See *Appendix C*.

The Ninth Circuit in *United States v. Feingold*, 454 F.3d 1001, 1011 (9th Cir. 2006), in a case of a homeopathic doctor in Arizona, who wasn’t authorize to prescribe controlled substances, yet he was prescribing Oxycodone, and for unknown reasons, the local pharmacist was filling his prescriptions, held “that it is appropriate in [§841 cases] for the jury to consider the practitioner’s behavior against the benchmark of acceptable and accepted medical practice.” Noting that a breach of the medical standard of care, without more, is not dispositive in a §841 case against a physician. Dr. *Feingold* ended up serving a 12 year sentence, while he was writing scripts which he was not authorized to write, passing them out like candy even to his house painter. That sentence is less than half of this

Petitioner's sentence without fine or forfeiture. Bamdad was authorized to write all of the prescriptions at issue, which he wrote, and as stated before, all his prescriptions were for a legitimate quantity of medication for a legitimate time span. Petitioner, as a physician who had accepted the responsibility for the care of a number of chronic care pain management cases, had a legal and moral obligation to trust his patients in a manner appropriate and proportional to their pain control needs, whether such needs were actual, or as in the case of the DEA actors, cunningly and convincingly feigned.

The other Circuits have held that the Government can present evidence of the standard of medical care to prove that a doctor is acting without a legitimate medical purpose or outside of the course of usual practice. *See, e.g., United States v. Wexler*, 522 F.3d 194, 204 (2d Cir. 2008) ("While failure to comply with the standard of care applicable to a medical specialty does not alone provide a basis for concluding that a physician's activities fall outside the usual course of professional practice, it surely is relevant to that determination."); *United States v. Chube*, 538 F.3d 693, 698 (7th Cir. 2008) ("[I]t is impossible sensibly to discuss the question whether a physician was acting outside the usual course of professional practice and without a legitimate medical purpose without mentioning the usual standard of care."); *United States v. McIver*, 470 F.3d 550, 561 (4th Cir. 2006) (upholding expert testimony regarding standard of care and noting "it is the extent and severity of departures from the professional norms

that underpin a jury's finding of criminal violations."); *Feingold*, 454 F.3d at 1011 ("Knowing how doctors generally ought to act is essential for a jury to determine whether a practitioner has acted not as a doctor, or even as a bad doctor, but as a 'pusher' whose conduct is without a legitimate medical justification.").

Astonishingly, all the above cases were adjudicated after this Court decided *Gonzales*, 546 U.S. 243, and at 257-258, concluding that the terminologies of "legitimate medical purpose" and "in the usual course of . . . professional practice," are ambiguous, and they need another day for discussion. Bamdad believes his case brings that day for this Court to explain these two terms, and terminate the Circuit Courts' confusion on these matters, relieving some physicians such as Bamdad, who was practicing legitimate pain management, and is being ensnared by the federal prosecutors' agendas, and those who have no medical training, or understanding its practice. All the accusations against Bamdad revolved around issues of medical science, professional judgment, and evolving standards of medical practice.

During the past two decades, there has been a revolution in the scientific and medical understanding of pain and its proper treatment.

As a matter of fact, by the 2000s, the nation so was demanding of pain treatment, such that Congress declared a "Decade of Pain Control and Research." See Pub. L. No. 106-386 (Oct. 28, 2000) (designating the calendar decade beginning January 1, 2001, as the

Decade of Pain Control and Research). Physicians thus came to appreciate that, more than merely an unpleasant side effect of injury or disease that should be endured, pain is a significant cause of other morbidity. See Amer. Acad. of Family Physicians, *Pain Management and Opiate Abuse: A Public Health Concern* (Aug. 2, 2012).

The issue of the proper clinical standard of care for prescription cases such as Petitioner's, is thus an important issue for this Court to revisit after a forty year hiatus. Previously, this Court had indicated that the standard must be so far outside of the norm of professional practice that the physician has become akin to a drug pusher. But, what is the "norm" and what test or tests exist in the jurisprudence to assure fair, just and equitable application of the CSA on a case-by-case basis? Yet, courts are routinely refusing instructions containing such language, allowing the Government to secure convictions based only on evidence amounting to medical negligence. When this occurs, it has a chilling effect on the dwindling number of legitimately practicing physicians who are willing to treat chronic pain patients. Cris Barrish, *Crackdown on Painkiller Epidemic Hurts Legitimate Patients*, USA Today, Feb. 27, 2012. Doctors become concerned about the media coverage of prescription drug abuse and the tough enforcement actions undertaken against treating physicians. *Id.* Also, when doctors are stripped of their licenses or worse, there are collateral consequences to legitimate patients, who then have a difficult time obtaining proper treatment. *Id.* Of course or perhaps,

there are always some patients who lie in order to obtain narcotics or abuse drugs, even if they have a legitimate medical condition. And this issue sometimes becomes a puzzle for even seasoned physicians, who are dealing with legitimate pain issues, because pain is subjective. Often times a doctor has only his patients' word on whether they are in pain, and the level and frequency of that pain. This is all in the context of compassionate care of a patient; not a quasi grand jury examination of the patient in a physician's office.

See also "When Treating Pain Brings a Criminal Indictment," by Criminal Defense and Civil-Liberties Litigator Harvey Silvergate, the Wall Street Journal, June 13-14, 2015. The author asserted that "the line between legitimate and illegitimate prescription – as drawn by the Drug Enforcement Administration (DEA) and the Justice Department – is far from clear. This puts physicians in great legal jeopardy, and too often leaves their patients to suffer needless agony." It also invites invidious, selective and vindictive prosecutions such as Petitioner's Case.

This Court's intervention and advice is necessary to help stem the tide of opioid hysteria intentionally directed against legitimate pain management practice. It would benefit not only this Petitioner and the very harsh consequences he and his family have suffered, but pain management practitioners who sometimes do not have any other tool in the armamentarium except narcotics. Nationwide, patients are suffering from chronic pain with no appropriate treatment. Petitioner Bamdad therefore respectfully requests this Court to

grant certiorari in his case to determine a nationwide standard of care in prescription drug cases such as his. This is outrageous, cruel and immoral.

CONCLUSION

Accordingly, Petitioner Bamdad respectfully prays that this Court will grant certiorari to review the decisions of the Ninth Circuit in his case.

Respectfully submitted under penalty of perjury on this 1st day of October, 2018.

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