

19-1163
No. _____

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

BERNARD L. ROTTSCHAEFER, M.D.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On March 3rd, 2006, the Court of Appeals for the 3rd District ruled that sex-for-drugs played no part in Dr. Rottschaefer's convictions and that Dr. Rottschaefer was convicted of "unlawfully distributing controlled substances outside the course of professional practice." Subsequently, in November 2009, the US District Court for the Western District of Pennsylvania ruled that "The fact that the petitioner was exchanging sex-for-drugs was central to the government's case against him... In short the jury believed that petitioner traded controlled substances for sexual favors from these patients. Whether these patients may arguably have a medical use for the controlled substances is, therefore, not depository." On January 3, 2020 the Court of Appeals denied Dr. Rottschaefer's appeal, by citing that he "failed to present a substantial question."

The questions presented are as follows:

1. May the District Court overrule the previous unanimous Court of Appeals decision in the same case?
2. Does such a reversal constitute a "substantial question"?
3. What crime, if any, has Dr. Rottschaefer committed?

PARTIES TO THE PROCEEDING

Bernard L. Rottschaefer, M.D.

Petitioner

and

United States of America

Respondent

RELATED PROCEEDINGS

Bernard L. Rottschaefer, M.D. v. USA US Court of Appeals for the 3rd Circuit No. 19-2655 & 2:03-Cr. 162
filed July 25, 2019, rejected January 3, 2020.

Bernard L. Rottschaefer, M.D. v. USA US District Court for the Western District of Pennsylvania. Petition For a Writ of *Coram Nobis* 03-162 filed November 2017, denied July, 2019.

USA v. Bernard Rottschaefer Court of Appeals for the 3rd Circuit 04-4015 and 05-1229 argued March 3, 2006 and filed April 27, 2006.

Bernard Rottschaefer v. USA US District Court of the Western District of Pennsylvania Civ. Act. No. 09-507, Crim Act. 03-162 November 24, 2009.

USA v. Bernard Rottschaefer, M.D. US Court of Appeals for the 3rd Circuit Nos. 07-1142 & 07-1673 submitted February 12, 2008 affirmed February 13, 2008.

RELATED PROCEEDINGS – Continued

USA v. Bernard Rottschafer, M.D. US District Court for the Western District of Pennsylvania Motion Under 28 U.S.C. to Vacate and Set Aside Sentence by a Person in Federal Custody Civ. Act. 05-2025 April 27, 2009.

USA v. Bernard Rottschafer, M.D. US Court of Appeals for the 3rd Circuit, Appellant's Petition for a Panel Rehearing and Petition for Rehearing *En Banc* Nos. 07-1142 & 07-1673 filed February 25, 2008.

USA v. Bernard L. Rottschafer in the US District Court for the Western District of Pennsylvania Cr. No. 03-162 December 26, 2006.

USA v. Bernard Rottschafer US Court of Appeals for the 3rd Circuit C.A. 09-4530 March 11, 2010.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit filed on January 3, 2020 is unpublished and is reproduced in the Appendix at App. pp. 1-4. The opinion and judgement of the United States District Court for the Western District of Pennsylvania filed July 11, 2019 is unpublished and is reproduced in the Appendix at App. pp. 5-16.

JURISDICTION

The Court of Appeals had jurisdiction over petitioner's appeal of the District Court's final judgment under 28 U.S.C. § 1291. The judgment of the Court of Appeals was entered January 3, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL AND/OR
STATUTORY PROVISIONS INVOLVED**

26 Stat. 826 (The Judiciary Act of 1891) created the "United States Circuit Courts of Appeals". This Act gave the Courts of Appeal jurisdiction over most appeals from the lower District Courts thus placing the Courts of Appeal directly above the District Courts.

STATEMENT OF THE CASE

Bernard L. Rottschaefer, M.D., comes before this honorable court *pro se* requesting correction of a fundamental error that challenges the very **Order of Law** which if not corrected undermines the entire established structure of the Criminal Justice System, namely the hierarchy of the federal courts. This fundamental error is the subsequent 2009 reversal by the US District Court for the Western District of Pennsylvania of the previous 2006 unanimous US Court of Appeals for the 3rd Circuit in Bernard L. Rottschaefer, M.D.'s case leaving the stated criteria for Dr. Rottschaefer's convictions in complete opposition – the lower District Court overruling the previous Court of Appeals conviction criteria in Dr. Rottschaefer's case.

In 2006, the United States Court of Appeals for the 3rd Circuit three judge panel unanimously ruled in Dr. Rottschaefer's first appeal that **sex-for-drugs** played no part in Dr. Rottschaefer's conviction firmly emphasizing this by restating it three times. **"The crime for which Rottschaefer was convicted was not, as he claims, trading drugs for sex. Rather, he was convicted of unlawfully distributing controlled substances outside the course of professional practice."¹ "sexual contact with patients was not an element of the convicted offense"² "it (jury) acquitted him of several counts despite**

¹ USA v. Bernard Rottschaefer Court of Appeals for the 3rd Circuit 04-4015 and 05-1229 argued March 3rd, 2006 and filed April 27, 2006 Page 8, Lines 7-9.

² Ibid. Page 10, Lines 1-2.

testimony of sexual favors, and convicted him of others with respect to which there was no evidence of sexual contact.”³ Three years later in 2009 the United States District Court for the Western District of Pennsylvania ruled on Dr. Rottschaefer’s 2255 motion that **sex-for-drugs** was indeed the basis for Dr. Rottschaefer’s convictions. **“The fact that the petitioner was exchanging sex for drugs was central to the government’s case against him . . . In short the jury believed that petitioner traded controlled substances for sexual favors from these patients. Whether these patients may arguably have a medical use for the controlled substances is, therefore, not depository.”⁴**

Additionally, the United States District Court for the Western District of Pennsylvania (subsequently referred to as District Court) in Dr. Rottschaefer’s 2255 ruling denied Dr. Rottschaefer a Certificate of Appealability. Dr. Rottschaefer immediately appealed the denial of the Certificate of Appealability to the United States Court of Appeals for the 3rd Circuit (subsequently referred to as the Court of Appeals) firmly emphasizing the opposing court rulings concerning **sex-for-drugs** between the Court of Appeals and the District Court in Dr. Rottschaefer’s case. The Court of

³ Ibid. Page 10, Lines 3-5.

⁴ Bernard Rottschaefer v. USA 2:03-cr-00162 3rd District Civ, Act. No 09-507, Cr. Act No 03-162 November 25, 2009 Page 11, Lines 7-10.

Appeals summarily dismissed Dr. Rottschaefer's motion for a Certificate of Appealability without comment.

Dr. Rottschaefer diligently filed a Coram Nobis in November of 2017. Dr. Rottschaefer's *pro se* Coram Nobis emphasized the overruling of the unanimous three judge higher Court of Appeals determination that **sex-for-drugs** was not the basis for Dr. Rottschaefer's convictions by the lower District Court which subsequently ruled that **sex-for-drugs** was indeed the basis for Dr. Rottschaefer's convictions. The District Court denied Dr. Rottschaefer's Writ of Coram Nobis in June of 2019. Dr. Rottschaefer filed an appeal with the Court of Appeals based primarily upon the lower District Court ruling that **sex-for-drugs** constituted the basis for Dr. Rottschaefer's convictions which ignored the years earlier Court of Appeals unanimous ruling that **sex-for-drugs** did not constitute the basis for Dr. Rottschaefer's convictions.⁵

⁵ At Dr. Rottschaefer's 2255 Habeas Corpus motion, the United States District Court for the Western District of Pennsylvania could no longer maintain that Dr. Rottschaefer was distributing controlled medications outside the scope of professional legitimate medical practice. All five of the major convicting witnesses had civilly sued Dr. Rottschaefer after his trial and lost without receiving one single penny. During depositions lasting one to three full days for the witnesses, the witnesses completely reversed themselves and testified in deposition that they indeed suffered from the very medical conditions that Dr. Rottschaefer diagnosed them with and that the medications Dr. Rottschaefer prescribed were effective with each and every office visit. Furthermore, third party hospital records unavailable at trial to Dr. Rottschaefer were introduced at the 2255 motion which made

The Court of Appeals in its summary denial stated: “*We may take summary action if an appeal fails to present a substantial question.*” This in effect was the second time that the Court of Appeals ignored the fact that the lower District Court had overruled the earlier Court of Appeals ruling in Dr. Rottschaefer’s case. Dr. Rottschaefer firmly believes that when a lower court overrules a previous higher court ruling in the same case and circuit that this indeed constitutes a **substantial question**.

The reversal of the preceding 2006 Court of Appeals unanimous ruling that **sex-for-drugs** played no part in Dr. Rottschaefer’s convictions by the District Court in 2009 denied Dr. Rottschaefer justice. Dr. Rottschaefer brought this reversal by the lower District Court of the previous ruling on **sex-for-drugs** to the attention of the Court of Appeals on two occasions – the first being the request for a Certificate of Appealability in 2010 and the second being the appeal to the Court of Appeals of the District Court’s denial of Dr. Rottschaefer Coram Nobis in 2019. Furthermore, the Court of Appeals refusal to address or correct a contradicting lower court ruling essentially implies that

three additional prosecution witnesses perjurers. Additionally, Dr. Rottschaefer introduced the sworn statements of an expert medical witness for the first time which countered the prosecution’s expert medical witness. Dr. Rottschaefer’s Coram Nobis added hundreds of pages of irrefutable medical records and legal documents far beyond what had been included at Dr. Rottschaefer’s 2255 hearing which impugned the government’s arguments and witnesses.

there is no need for any United States Court of Appeals.

The summary dismissal by the Court of Appeals citing there was not a **substantial question** left Dr. Rottschaefer in an untenable position. In 2006, Dr. Rottschaefer argued that **sex-for-drugs** was indeed the basis for his convictions. Dr. Rottschaefer presented strong arguments that negated **sex-for-drugs** and therefore he should be granted a new trial. The Court of Appeals negated **sex-for-drugs** as being part of Dr. Rottschaefer's conviction thereby denying Dr. Rottschaefer's motion for a new trial. The Court of Appeals stated that Dr. Rottschaefer was convicted of "unlawfully distributing controlled substances outside the course of professional practice". With Dr. Rottschaefer's 2009 2255 Motion, Dr. Rottschaefer was finally able to thoroughly counter the Court of Appeals ruling that Dr. Rottschaefer had distributed controlled substances outside the course of professional practice so well that the District Court reverted back to **sex-for-drugs** as the basis for Dr. Rottschaefer's conviction while noting: "whether these patients may arguably have a medical use for the controlled substances is, therefore, not dispositive." This leaves Dr. Rottschaefer in the untenable position of heads the prosecution wins and tails Dr. Rottschaefer loses.

ARGUMENT

The subsequent reversal by the District Court of the previous Court of Appeals ruling in Dr. Rottschaefer's case destroys the established hierarchy of the federal court system and as such constitutes a **substantial question**. Stated conversely, how does the reversal of the previous Court of Appeals ruling in the same case by the District Court not disrupt the order of Law? Similarly, how does such a reversal by the District Court of the previous Court of Appeals ruling not constitute a **substantial question**? Likewise, when the courts themselves cannot agree upon the convicting criteria in the same case, how can such a confounded verdict be justified and remain viable?

There is no case in the federal criminal justice system where a lower court has been allowed to overrule a previous higher court decision in the same case other than the case of Dr. Rottschaefer. However, there are cases where contradictory confusing criteria for conviction have vacated criminal convictions – the case of Naveed Siddiqi (Siddiqi v. United States, 98 F.3d 1427 (2d Cir. 1996)⁶ being one.

⁶ Siddiqi's ruling states: "The government has, throughout this prosecution, adopted shifting theories of guilt. This inconsistency of position impeded Siddiqi's defense at trial and has severely hampered judicial consideration of this matter. At this final stage, in order to rebut a claim of ineffective assistance, the government now embraces a theory that is legally insufficient. A miscarriage of justice having occurred, we vacate the conviction".

CONCLUSION

Dr. Rottschafer requests this esteemed honorable court to restore the **Order of Law**. In addition, following the principle of Siddiqi where conflicting criteria for conviction has vacated verdicts and granted new trials, Dr. Rottschafer requests the same.

Respectfully submitted,

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