No. _____

In the
Supreme Court of the United States

HAROLD PERSAUD,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Reasonable Jurists Could Debate the Denial of Petitioner's Motion to Vacate and Set Aside his Judgment of Conviction where the District Court's Review of Such Petition Did Not Address the Merits of Petitioner's Ineffective Assistance of Counsel Claims and Mistakenly Referenced the Arguments of a Different 2255 Petitioner in its Memorandum Opinion.

2. Whether a Certificate of Appealability Should Issue on Petitioner's Ineffective Assistance of Counsel Claim Where Defense Counsel Failed to Object or Otherwise Challenge the Admission of Improper Expert Testimony and Lay Opinion Testimony in violation Criminal Rule 16 and Evidence Rules 701, 702, 703, and 704, and Where the District Court Failed in its "Gatekeeper" Obligations Under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) and Evidence Rule 702.

STATEMENT REQUIRED BY RULE 14.1

Pursuant to Supreme Court Rule 14.1, Petitioner states that all parties to the proceedings in the Court whose Judgment is sought to be reviewed are listed in the caption above

STATEMENT OF RELATED PROCEEDINGS

- *USA v. Harold Persaud,* No. 1:14-cr-0276 (N.D. Ohio) (Judgment of Conviction issued January 5, 2016; Memorandum Opinion and Order Denying Petitioner's Motion to Vacate and Denying a Certificate of Appealability issued November 19, 2018, and Judgment Order Denying Petitioner's Motion to Vacate and Certifying that an Appeal Could Not be Taken in Good Faith issued on November 27, 2018).
- *USA v. Harold Persaud*, No. 2016-cr-03105 (6th Cir.) (Opinion and Judgment filed June 13, 2017; mandate issued July 26, 2017).
- *USA v. Harold Persaud*, No. 2016-cr-03427 (6th Cir.) (Consolidated with No. 2016-cr-03105 on May 13, 2016) (Opinion and Judgment filed June 13, 2017; mandate issued July 26, 2017).
- *USA v. Harold Persaud*, No. 2016-cr-03578 (6th Cir.) (Consolidated with Nos. 2016-cr-03105 and 2016-cr-03427) on June 6, 2016) (Opinion and Judgment filed June 13, 2017; mandate issued July 26, 2017).

- *Harold Persaud v. USA,* No. 1:18cv013131 (N.D. Ohio) (civil case opened upon Petitioner's filing his Motion to Vacate and Set aside Judgment of Conviction) (clerk refers to Criminal Case No.1:14-cr-276 for all further entries on June 11, 2018).

- There are no additional proceedings in any court that are directly related to this case.

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Petitioner Harold Persaud respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit and all other adverse decisions in his case.

OPINIONS BELOW

The United States District Court for the Northern District of Ohio issued its Memorandum Opinion denying Petitioner's Motion to Vacate under Title 28 United States Code Section 2255 and further denying Petitioner a Certificate of Appealability on November 19, 2018. The United States District Court for the Northern District of Ohio issued a Judgment Order denying Petitioner's Motion to Vacate under Title 28 United States Code Section 2255 and further denying Petitioner a Certificate of Appealability on November 27, 2018.

The United States Court of Appeals for the Sixth Circuit issued an Order denying Petitioner's Motion for Certificate of Appealability on March 28, 2019. The United States Court of Appeals for the Sixth Circuit issued a subsequent Order relative to Petitioner's Request for Rehearing and adhered to its original decision on May 21, 2019. Finally, the United States Court of Appeals for the Sixth Circuit issued an Order denying Petitioner's Request for an *En Banc* Hearing on June 6, 2019. Copies of the United States District Court's Decision and the Decisions of the United States Court of Appeals for the Sixth Circuit are attached hereto.

JURISDICTION

The Sixth Circuit Court of Appeals entered an Order denying Petitioner's Motion for Certificate of Appealability on March 28, 2019. The Sixth Circuit issued an Order as to Petitioner's Request for Rehearing and adhered to its original decision on May 21, 2019. The Sixth Circuit entered an Order denying Petitioner's Request for an *En Banc* Hearing on June 6, 2019. Jurisdiction of this Honorable Court is invoked *inter alia*., under the provisions of 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL PROVISIONS

Involved herein are the Fifth and Sixth Amendments to the United States Constitution:

Amendment V

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

INTRODUCTION

This case presents important questions about a criminal defendant's rights to due process and the effective assistance of counsel under the Fifth and Sixth Amendments. Petitioner contends that he was denied due process and effective assistance of counsel because the District Court and his own defense counsel

failed in their respective roles as "gatekeeper" and "advocates" when they allowed the Government to lead a procession of eight physician witnesses before the jury (only two of which had been identified before trial as "experts" as required under Fed. Crim. R. 16). Each of these witnesses was permitted to give "expert testimony" absent any objection, challenge, or proper qualification under Daubert and the Federal Rules of Evidence.[1] In denying Petitioner's Motion to Vacate, the District Court stated that all such witnesses would have been allowed to testify based upon their "qualifications" and that objecting to such witnesses' testimony would have been a waste of time and resources. Petitioner submits that the application of Daubert and the Rules of Evidence in each and every criminal case is never a waste of time and the mere fact that a witness has professional credentials does not render his or her testimony admissible or proper.

Almost as if the District Court and defense counsel were star-struck, afraid, or too polite to question the credentials of the Government's physician witnesses, all such witnesses gave expert testimony criticizing

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[1] Recognizing that Petitioner has maintained distinct challenges, to wit: 1) the Government's "experts" were not properly "qualified" as "experts", and, 2) the Government's lay witnesses were either permitted to give "expert testimony" and/or were allowed to give improper "lay opinion" testimony, Petitioner will address these over-lapping grievances together referencing such improper testimony as "expert testimony", since the cumulative effect was that untested, and improper "expert testimony" was admitted at trial without challenge or objection, in violation of Daubert, Evidence Rules 701, 702, 703, and 704, and the Fifth and Sixth Amendments to the United States Constitution.

Petitioner, his medical practices, his subjective judgments, and even his motivations. These witnesses were blindly accepted as "qualified" simply because they were educated, medical doctors. In failing to object or conduct a *voir dire*, defense counsel and the District Court helped the Government's bombard the jury with "expert testimony" condemning Petitioner. The Government's unfettered and unvetted use of "expert" testimony resulted in a constitutionally unsound/void verdict. Defense counsel did nothing to stop, or even slow, the blitz of complicated expert and improper opinion testimony and were thus constitutionally deficient.

More than one third (37%) of the Government's case consisted of improper "expert testimony" testimony from witnesses who were not vetted under Evidence Rule 702, and/or from "medical doctors" presented as "lay" witnesses who then gave opinion testimony in violation of Evidence Rule 701. Counsel's failures deprived Petitioner of due process and a fair trial, causing him clear and actual prejudice. The District Court likewise failed in its "gatekeeper" role under Daubert and Evid.R. 702, further denying Petitioner due process.

Petitioner's criminal trial would surely have ended in a different result absent a full one-third of the Government's case consisting of technical, specialized, and scientific opinions from learned physician witnesses who were permitted to testify *inter alia.*, that: a) Petitioner's methods and analysis were wrong, b) Petitioner was not a competent cardiologist, c) Petitioner was a liar, and, d) Petitioner committed

fraud. These damning opinions were presented in violation of FRE 104, 402, 403, 701, 702, 703, Daubert, and Criminal Rule 16. Reasonable jurists could at least debate whether these constitutional violations were so extraordinary as to have caused the outcome of his trial. The jury was overwhelmed and had no choice but to find Petitioner guilty.

A defendant's constitutional rights have been denied when he receives ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). "An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Id. at 685. To establish ineffective assistance of counsel under the Strickland standard, a defendant must make two showings. First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. Second, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," Id. at 694.

At Petitioner's trial, there was insurmountable prejudice due to the scientific complexity of the charges against Petitioner in relation to the alleged falsity of his subjective medical interpretations, analysis, and judgments. The Government presented its case and its alleged "proof" of Petitioner's "false statements" through its multiple "expert" and "lay" physician witnesses. In failing to object and challenge the admissibility of such witnesses' testimony under FRE

701, FRE 702, defense counsel did nothing to ensure that the trial was fair. Defense counsel's representation of Petitioner was therefore objectively, and constitutionally, unreasonable. There can be no confidence in the outcome of Petitioner's trial.

STATEMENT OF THE CASE

The criminal case against Petitioner Harold Persaud was based on claims that he performed unnecessary medical tests and procedures; falsified medical records; performed certain medical tests improperly; utilized inappropriate cardiac testing; falsified certain test results; and up-coded the services he provided patients, for monetary gain. The Government's criminal claims followed a negative peer review and civil investigation opened by the hospitals at which Petitioner had enjoyed privileges.[2]

Notwithstanding the overall subjectivity of the practice of medicine, and the need for an individual's treating physician to use his or her skill and experience in making necessary judgments regarding that individual's treatment, the Government decided that Petitioner should be criminally prosecuted based upon the subjective interpretations, analysis, and judgments he made within the course of his private medical practice. The Government claimed Petitioner's interpretations and alleged misreading of the levels of stenosis (arterial blockage) found in his patients constituted materially false statements. Despite the

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[2] It is noted that physicians involved in the negative peer review and civil investigation of Petitioner testified as Government witnesses at trial.

irregularity and ever-changing standards of medical analysis the Government considered Petitioner's subjective medical statements and opinions as criminally false, rather than possible proof of mistakes, negligence, or malpractice.

Imposing criminality upon a physician's subjective judgments and stretching to somehow quantify what is an "acceptable" level of "inter-observer variability" confounds the Government's burden to prove the elements of the crimes charged in violation of due process. The case against Petitioner included scientifically-sophisticated testimony concerning complicated medical concepts and modalities from many physician witnesses, who testified about cardiac care, medical testing standards, and "medically necessary" versus "non-medically necessary" procedures absent any adherence to the Federal Rules of Evidence. Each of the Government's physician witnesses was permitted to give expert testimony against Petitioner absent any objection by defense counsel and/or *voir dire* and analysis of their testimony by the District Court.

Petitioner was likely not the most popular cardiologist practicing at St. John's Westshore Hospital, Southwest General Hospital, or Fairview Hospital. He could fairly be described as "all-business". He was proactive and aggressive in the treatment of his cardiac patients and was known to be purposeful during his patients' testing and examinations. Petitioner cared deeply about his patients and did not hold back letting them know when he thought their eating habits or life-style choices were the cause of

their health problems. Petitioner could be critical and was often blunt in communicating with his patients, staff, and other doctors. He prided himself on efficiency and did not approve of chit-chat, wasting time, or taking short-cuts. Petitioner was self-assured about his own skills, training, and experience. Petitioner may have abided by more traditional cardiac treatment methods than some of his more junior colleagues, but that did not stop him from telling young doctors when he thought their opinions were wrong or when he believed his years of experience trumped their newer, less-tested methods and procedures, which to him, at times, seemed dictated by insurance companies. Frankness, lack of diplomacy, and being old-fashioned, however, are not crimes. Petitioner's straightforwardness ultimately led to his downfall, because when the wave of criticism from his peers rose against him, other colleagues, co-workers, and former employees (who may have been on the receiving end of his directness) failed to speak up for him.

REASONS FOR GRANTING THE PETITION

This case presents questions of exceptional importance regarding the ineffectiveness of Petitioner's trial and appellate counsel under; the abandonment of the requirements of FRE 104, 701, 702, 703, and 704; the elimination of the necessary process and analysis by which proposed "expert" witness testimony is tested under Daubert; and, the propriety of granting a Certificate of Appealability. Petitioner submits that a Certificate of Appealability should have issued relative to the issues raised in his Motion to Vacate because reasonable jurists could have resolved Petitioner's

Motion differently considering the overwhelming circumstances, the lack of adherence to the Rules of Evidence, the lack of engagement by defense counsel during trial through objections, and the lack of oversight from the District Court.

In Slack v. McDaniel, 529 U.S. 473 (2000), this Honorable Court held that § 2253 codified the standard previously set in Barefoot v. Estelle, 463 U.S. 880 (1983). This Honorable Court reasoned that for claims denied on the merits, a habeas petitioner "must make a substantial showing of the denial of a constitutional right, a demonstration that, under Barefoot, includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'" *Id.* at 483-84 (*quoting* Barefoot, 463 U.S. at 893, n.4).

The constitutional claims and evidentiary issues raised in Petitioner's Motion to Vacate could have been resolved differently by reasonable jurists who could debate whether he was denied due process and effective assistance of counsel, and, whether Petitioner would have been convicted if his defense counsel had not sat silent while the Government presented scientific expert testimony from a multitude of unchallenged, untested witnesses and/or if the District Court had abided its duties as "gatekeeper" under Daubert. Clearly, reasonable jurists could debate whether abrogation of the principles set forth in Daubert and FRE 104, 701, 702, 703, and 704 during a criminal trial might be

considered the denial of Petitioner's constitutional rights.

In Daubert, this Honorable Court detailed the district courts' duties as "gatekeepers" in connection with making inquiry to determine whether a particular witness is qualified to give expert scientific testimony under Evidence Rule 702 and Evidence Rule 104. Specifically, this Court held that the trial court had very specific obligations regarding the analysis of proposed expert scientific testimony, to wit:

> Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate.
>
> Ordinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. "Scientific methodology today is based on generating hypotheses and testing them to see if

> they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry." Green 645. *See also* C. Hempel, Philosophy of Natural Science 49 (1966) ("[T]he statements constituting a scientific explanation must be capable of empirical test"); K. Popper, Conjectures and Refutations: The Growth of Scientific Knowledge 37 (5th ed. 1989) ("[T]he criterion of the scientific status of a theory is its falsifiability, or refutability, or testability") (emphasis deleted).
>
> Another pertinent consideration is whether the theory or technique has been subjected to peer review and publication.
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> * * *

Daubert, Id. at 592-593.

At Petitioner's trial, the Government's physician witnesses testified regarding the American College of Cardiology, the American Heart Association, and pertinent medical, billing, and professional guidelines, and further testified relative to practical field expectations, and *acceptable* medical standards for a variety of cardiac tests and procedures. These physician witnesses *educated* the jury without any limitations regarding the Government's theory of the case; the Government's view of the medical tests and procedures at issue; and why the Government believed Petitioner's subjective medical judgments were "criminal". These witnesses indoctrinated the jury as to what "medical necessity" was; which medical practices were proper; what scientific principles were

to be relied upon; and, what "dangers" existed when a physician misread test results, overperformed, failed to perform, or otherwise practiced below or contrary to the medical standards declared "correct" by the Government. Petitioner's rights to due process and a fair trial were abrogated with the admission of all of the testimony noted above absent objection from defense counsel or inquiry by the Court under FRE 702 and Daubert.

There was no effort during trial to determine whether the physician witnesses and their intended expert testimony regarding Petitioner's subjective medical analysis, opinions, and diagnosis, were appropriate and admissible, and/or whether such would assist the jury. Likewise, there was no assessment of the reasoning or methodology undertaken by the Government's witnesses who gave *expert testimony*. There was no inquiry or demonstration that the witnesses' expert testimony was *based on sufficient facts*, *the product of reliable principles and methods*; and/or that such witnesses *reliably applied such principles and methods to the facts of the case.* Defense Counsel failed to provide effective assistance to Petitioner when they raised no challenge or objection to such testimony. Similarly, the District Court failed in its role as "gatekeeper" to ensure that proper inquiry was made under Daubert.

Although the only information presented during trial regarding the Government's physician witnesses themselves was testimony related to each witness' background, education, licenses, experience, etc., the District Court's Opinion denying Petitioner's §2255

Motion discloses that the Government's "expert witnesses" would have been allowed to testify because the District Court fully believed such witnesses were "qualified". The District Court's misapplication of the law; over-estimation of the Government's physician witnesses' abilities; failure to apply the Federal Rules of Evidence and the law in Daubert; and, its misunderstanding of its role as "gatekeeper" is illustrated in the following excerpts from the Memorandum Opinion and Order denying Petitioner's § 2255 Motion:

> There is no question, based on the evidence presented at trial that the witnesses who had been identified as experts were sufficiently qualified to opine on the matters addressed by each at trial.
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> At trial, the Government presented evidence of each expert's qualifications, and with or without objection, the Court would have permitted the testimony of each expert based on the information provided. [Petitioner] has offered no evidence or suggestion of any identifiable deficiency that would have prevented any of these experts from being qualified to offer testimony in this case.
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> Further, the qualifications of the expert witnesses were known to the defense prior to trial, so defense counsel was likely aware that any challenge to the admissibility of the expert's testimony would have been fruitless.

* * *

(Memorandum Opinion and Order, ECF #228, Page ID #6992)

The Sixth Circuit's Order denying Petitioner's Certificate of Appealability also assumes that a witnesses' professional qualifications alone will satisfy the requirements of the Federal Rules of Evidence relative to determining whether particular expert testimony will be admissible. Considering only a witness' qualifications, but failing to analyze the nature, basis, reliability, and probative value of such witness' testimony and/or failing to determine whether such testimony will assist the trier of fact, are patent violations of the Federal Rules of Evidence and the law as defined in Daubert.

Notably, in Petitioner's direct appeal, a panel of the Sixth Circuit observed Petitioner's counsel's wholesale failure to challenge the Government's "experts" under Daubert noting that Petitioner (who had raised only sufficiency of evidence grounds on appeal) was "…not arguing that the admission of the testimony of the government's expert witnesses violated Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993), 125 L. Ed. 2d 469 (1993), which establishes standards for the admissibility of expert-witness testimony in federal court." United States v. Persaud, 886 F.3d 371 (2017), FN 11.

In reviewing Petitioner's application for a Certificate of Appealability, however, the Sixth Circuit now seems to ignore the admission at trial of the very same avalanche of unvetted, untested, expert

testimony (as the result of defense counsel's and the District Court's failures) which resulted in an obviously prejudicial outcome to Petitioner. Clearly, a Certificate of Appealability is warranted in the instant case. Indeed, Petitioner prays that a substantive review of his Motion to Vacate and the constitutional violations he has suffered will ultimately afford him a reversal and a new trial.

Petitioner's counsel were obligated to request that appropriate inquiry and review be made pursuant to the Federal Rules of Evidence and Daubert, before the Governments' witnesses could be permitted to give *expert testimony*. Mere cross-examination is not a substitute and defense counsel's complete failure to challenge the Government's submission of untested *expert testimony* regarding complex, scientific matters related to the alleged "falsity" of Petitioner's subjective medical decisions was constitutionally deficient. Since there were no objections, no *voir dire*, and no other inquiry into the reasoning and methodology underlying the *expert testimony* of the Government's witnesses, there is no way to now determine whether any such reasoning and methodology (if it existed) was appropriate and whether the *expert testimony* was competent and/or admissible. Denying a Certificate of Appealability slams the door on Petitioner's right to challenge the admissibility of the Government's purported expert evidence.

The District Court's Memorandum Opinion denying Petitioner's Motion to Vacate sidesteps Strickland completely. Without addressing defense counsel's failure to challenge a single witness' **capacity** to give

relevant, admissible, *expert opinion testimony*. in accord with Evid. R. 701, 702, or 703, the District Court's Opinion gave only cursory consideration to the issues raised by Petitioner and concluded, without providing any legal analysis, that all the physician witnesses, "…were clearly qualified to be experts based on their education and experience." (ECF #228, Page ID #6994).[3]

Further, in disregarding Daubert and the process by which a trial court, as gatekeeper, conducts *voir dire* of a potential witness, the District Court noted, "[t]here was no need for [Petitioner's] counsel to waste resources and time, and risk being seen as unduly argumentative or incompetent by the jury, by objecting to the admission of clearly admissible testimony." (ECF #228, Page ID #6993). Instead of examining the "relevance", "admissibility", and "fit" of these witnesses' testimony relative to the charges against Petitioner, and absent objection from the defense, the District Court permitted each physician witness to give *expert testimony* during trial regarding Petitioner's actions, medical decisions, and motives, regardless of whether they practiced in the field of cardiology. The resulting prejudice to Petitioner was overwhelming and the jury had no option but to adopt the testimony and

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[3] Petitioner's Motion to Vacate and Set Aside Judgment of Conviction and Sentence Pursuant to 28 United States Code Section 2255 includes a detailed recitation of the actual improper expert opinion testimony given by each of the Government's physician witnesses, as well as it's "medical coding expert" and also provides further analysis relative to the alternative presentation of improper "lay" opinion testimony absent challenge or objection by defense counsel.

conclusions of such witnesses and convict him! The District Court's Opinion unreasonably added to Petitioner's injuries when it determined he was not entitled to a COA. The Sixth Circuit erroneously agreed.

Counsel are aware that courts are forced to contend with a tremendous volume of cases and time-constraints, and respectfully submit that the District Court below was unable to give the issues raised in Petitioner's § 2255 Motion the in-depth analysis required. The District Court's Opinion denying Petitioner's Motion and denying the COA, references a different § 2255 Petitioner and mistakenly states, "[t]his Court . . . having thoroughly reviewed the arguments, both procedural and factual in support of Mr. Viola's motion to vacate, determines that there is no substantial showing of the denial of a constitutional right, and there is no reasonable basis upon which to debate the Court's procedural rulings." (*See,* Memorandum Opinion and Order, ECF # 228, Page ID #6997 (emphasis added). Clearly, the District Court failed to adequately review and consider the constitutional deficiencies of Petitioner's counsel and abridged its review and analysis of Petitioner's Motion to Vacate's merit-based issues.

The Government's presentation of expert testimony from a parade of physician witnesses[4] was an unfair,

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[4] The Government purposely elicited technical, scientific "opinion" testimony from each of its physician witnesses regarding the alleged "falsity" of Petitioner's medical practices, without complying with Criminal Rule 16 and without substantiating that such witnesses were *qualified* and/or that their methodology and

inappropriate effort to infer the alleged falsity of Petitioner's *subjective* medical interpretations without actual, reliable, scientific proof. In so doing, the Government violated Crim. R. 16 and failed to meet its burden to prove the elements of the crimes charged in violation of due process. The District Court and defense counsel permitted the Government to inundate the jury with untested "expert testimony" attacking Petitioner's medical practices and judgments, in violation of the rules regarding relevancy, probative value, prejudice, and "fit". The jury had no choice but to find him guilty.

Criminalizing doctors' subjective practices and instituting prosecutions based upon the testimony of "experts" whose qualifications are untested and whose personally biased opinions are given without regard to the Rules of Evidence and Daubert turns science upside down and puts the trier of fact in an impossible position. *See*, "A Second Opinion Becomes a Guilty Verdict", Clark and George, Wall Street Journal, December 27, 2018, which discusses in detail the recent trend in Health Care Fraud prosecutions' criminalization of subjective medical practices.

The Government's physician witnesses gave scientific testimony and "second" opinions of what they observed in medical records, but that did not establish that Persaud's real-time hands-on medical judgments

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proposed testimony was appropriate under FRE 702. The bulk of the Government's entire case was comprised of "opinion" testimony regarding the alleged *medical practice failures* of Petitioner. Indeed, if such failures existed, they should have been the subject of civil malpractice litigation, not criminal prosecution.

were criminally "false statements" within the context of the Health Care Fraud and False Statement charges. The Government's expert/coding/insurance "evidence" included speculative analysis based upon: a) a *non-random sample*; b) non-verifiable computations; c) admittedly overstated "intended loss" figures; d) unreasonable conclusions (by a non-physician regarding "appropriate" treatment); e) flawed extrapolation and analysis; f) insupportable assumptions regarding payment protocol; g) results not based on measurable evidence subject to accepted scientific and mathematical principles; and, h) results which could not be replicated.

The effect of presenting cumulative "expert" and/or "lay opinion" testimony from so many "experts" literally forced the jury to conclude that, if so many *educated, qualified, scientific professionals* say Petitioner's *interpretations* and billing practices were wrong, they had to be *"false"* as the Government claimed.

The Federal Rules of Evidence and the law under Daubert were violated in the instant case. Reasonable jurists could debate whether Petitioner's counsel were constitutionally defective. Reasonable jurists could also debate whether the District Court failed in its "gatekeeper" role.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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